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Unit 1: The Nature of Property

The Properties of “Property”

Legal vs daily usage of the term property

Daily usage such as car, house, objects, etc. Legal usage makes it easier to think of property as a network/system of relationships. Relationships between individuals with respect to things. Ex. Susan has a Porsche, she has a legal liberty to drive it but not without a license. She has a claim that no one can use it without her permission but has duties and liabilities to pay damages if it rolls into her neighbor’s fence. These rights, liberties, and duties are the basic “stuff” of ownership. Relationships are dynamic, can alter existing relationship or create new ones (by selling or lending).

Property as a right

- A right against the world:
  - Like saying “Keep off X unless you have my permission. Signed private citizen. Enforced by State.”
- Implications of property as a right
  - Has to be defined and recognized by community, enforceable
  - Can be limited rather than absolute (dynamic, changes)
  - Has to be based in some justification
  - Source: government, society, natural right.

The bundle of right metaphor

- The right to exclude (Merrill)
  - Identify property owner not with asset itself but with various rights attached to asset
    - Possession (use or non-use), management and control
    - Income and control
    - Transfer inter vivos and on death
    - Protection under law
    - 2 additional features: liability to seize (liability to execution) and prohibitions on harmful use
  - Shows how unhelpful a term like property or ownership is because very different to own a car to a condo to a patent
  - Rights can be unbundled by the owner. Owning a house but leasing to someone else. Right of possession passed onto tenant temporarily.
  - Why would you unbundle? Optimize use of resources
  - Largest bundle of rights for land is called estate & fee simple
  - Three intellectual approaches:
    - Single Variable Essentialism: Right to exclude is the fundamental characteristic of property. If you don’t have right to exclude, you don’t have property. Right to exclude is necessary and sufficient.
    - Multi-Variable Essentialism: Property is set of attributes and right to exclude is essential but not the only one (includes: possess, use, manage, income of the thing, security, transmissibility, liability).
    - Nominalism/realism: No defining feature of property, property is what the law says it is. Right to exclude is not necessary and not sufficient.

Social and Historical Context of Property:

Changes from society to society. Responds to social, economic, and technological conditions. Feudal England’s conditions were vastly different from those of 16th century England (mercantilism). Aboriginal ideas of property differed greatly from that of the Europeans.

Private Property: Certain exclusive rights to a resource. Has property rights.

Public Property: Owned by the State. State can put a fence around property and say it’s off limits and in that sense it’s “private”. But State owns property in trust of people, so has duty of fairness and transparency.

Common Property: Also called communal/shares property. All members of a particular community own and control and manage the resource together. Looks private from outside, from inside many rules govern members of community.

Open-Access Property: Cannot exclude anyone. Such as an idea, no one can own it, the idea of “star crossed lovers” or air, or themes in writing.

The Case for Private Property

- Private Property promotes: human happiness, human flourishing, freedom, enhances material wealth, it is just and legitimate, all arguments together

The Economic Case for Private Property

- Incentives: measures gains and losses by willingness to pay instead of happiness
  - Can’t measure Jane’s gain in happiness, but can measure Jane’s willingness to pay for benefit for law.
  - Can’t measure her gain in pain but can measure willingness to pay to avoid cost of law
• If I want a product, I value product more than I value my money, so I give money for product. Seller values money more than product so he takes money and gives product. World is better off. Not all contracts make world better place (contract to have someone killed).

• Principles governing property will create efficiency and wealth maximization if have:
  o Protection of exclusivity – allows for incentives and expectations
  o Allow transferability – must facilitate exchange and reduce transaction costs so that property will gravitate to those that value it most
  o Property should be universal – should protect broad range of items and allow for multiple players

• The “State of Nature” (Hobbes)
  o Why do we need government? Need it because otherwise we would live in a society where only the strong survive and that is no place for industry. Government’s purpose is to protect property rights against war, brutes, exc so people can invest/create/work

• The importance of property rights to the market economy
  o De Soto: Economies that have strong regimes of property rights and governments that protect those right, prosper. Groups that do not have strong property rights, don’t prosper.
    ▪ Said to give squatters formal title so they could use land to get them loans for businesses and prosper. However, sometimes defaulted on loans, had land taken away, no formal or informal ownership anymore.
  o Adam Smith: Argues for capitalist system based on private property and trade. Everything that is of value to someone is made private property. If you make/find something useful, it will be yours. If anyone can make better use of it then you can agree to trade any mutually acceptable terms of trade.
    ▪ Legal system that puts resources into efficient use needs two things: private property and rule of contract.
    ▪ Private property encourages investment and labor thus trade
  o Richard Posner: Everything should be private property. Can sell babies if parents can’t support and someone else wants one

• Conservation and the “tragedy of the Commons” (Hardin)
  o Lord is owner of all parts of estates including common pastures. Farmers would plow everyone’s land together, rotate crops, no straight system of ownership.
  o **Hardin: Common property is not sustainable and needs to be converted to private property. Every villager has incentive to put cows on pasture but none have incentive to improve pasture because benefits would be reaped by all and not in your economic interest. Race to get it while it’s good ex picking berries before they’re ripe then common pasture is depleted and collapses. Better if every villager gets a section and manages it. Experts call it problem of externality (affects someone without financial adjustment)
    ▪ Prof has ugly yard, negative externality for his neighbor. Neighbor has beautiful yard, positive externality for prof.
    ▪ Steel producers make steel and profit but release emissions harmful to others.
    ▪ Cares about overpopulation.
    ▪ Solutions for externality: develop rules for pasture (limit on cows, when you can harvest things). You need to be able to enforce this rule, a sanction (social exclusion).
    ▪ Resources in common management managed less well than those in private ownership.
  o Prisoner’s dilemma: Two people caught for crime. If no one snitches they both get medium sentence. If one snitches on the other, the one who snitched gets minimal time while other gets maximum. If both snitch, both get maximum. Therefore both snitch when both should stay quiet. Individual rationality leads to group stupidity.
  o How to solve externality?
    ▪ Expensive so must find solution that costs least
    ▪ In common example, everyone has incentive to deplete supply as fast as possible because no compensation required.
    ▪ One solution – contract between all involved. Cost would include negotiation and enforcement of contract. Possible if small common where everyone knows each other.
    ▪ Can make business to manage land. Costs of this are overhead, salaries for management, cost of policies/regulations and meetings. If cost was sufficiently low, it would be good. This is solution lots of the time. Or government can nationalize.
    ▪ Sometimes no solution, every one can have problems

• Tragedy of the Anticommons: Economic development can be inhibited by too much private property. Fracturing private property into small bits can wind up paralyzing resource use (tragedy of anticommons). It’s when too many people have a right of exclusion with no person holding effective control. What happens is transactional gridlock, making efficient use thwarted and goods under-utilized.

• Emergence of private property rights (Demsetz)
Move from open access to private property when costs are justified by benefits of establishing private property.

Before fur trade, anyone could hunt freely in forest. Hunting, like every activity, generates costs and benefits. If Native kills beaver, he gets benefit of animal but everyone shares cost of the loss of that animal. Before Europeans, the hunt for beavers was only for personal use, for clothes and food, so externality was not very high. After Europeans, competition for beaver pelts increased so hunting increased. Loss of beaver was very real. Natives divided hunting territory into private zones where each group was responsible for costs and benefits of that zone. In contrast, plains Indians continued to hunt bison and longhorn in group and never established such systems of private property. The reason is that not only because bison were not in as much demand as beavers, but also bison roam while beavers stay in place and cannot stop bison from roaming cheaply. The cost of establishing a system of private property in bison was too expansive to make it possible. It might have been more efficient to do so, but too expensive. Some things are worth privatizing, some things aren't.

Locke’s labour theory; Kant and personhood theories (Lewis)

Hegel: Personhood theory. We become attached to certain things, tangible or intangible to such a degree that they become extension of ourselves. Property allows us to realize ourselves and project ourselves to world. People buried with their objects because they’re part of who they are.

Locke: Labor theory. Religious, God gave two orders: go forth and multiply and till (work the land). Labor of his body and work of his hands are property. You combine your property (in your body/person) with one held in common (the whole Earth) and thus make it your own. No one but the laborer has right once joined, State has purpose to protect it.

- Two provisions: (1) law of the village binds peasant to use his land to grow corn that village needs, everyone is a custodian and cannot let things spoil, (2) Appropriation by labor is legitimized where there is enough and as good left in common for others. But doesn’t say what happens when there’s NOT enough.

Peggy Radin: Attachment to things we associate with our character or events in our lives (family albums, diaries, heirlooms, all connected with memory and continuity of self through memory). Distinguishes between fungible property (money, exchange value only) and personal property (indicates personhood) ex ring in store worth $1k (fungible), but once couple married, ring takes on new meaning. Important to people in a way that market value does not represent. Ex. Office vs house your family has lived in for 5 generations.

Bentham (utilitarianism) and legal positivism/realism

- Property is born with law and dies with law.
- Legal protection of property is essential to protecting our happiness
- Bentham: Proposed to aggregate how many people are made happy or unhappy, and decide that way. Property may increase utility.
  - Problems: No accurate measure of utility. How do you aggregate one person’s happiness with another one’s pain? How to justify one individual’s happiness in favor of another.
- Posner: Value is that and only to the extent that it puts resources to their best uses. That’s why we have property rights, no other reason.

Novel (unprecedented Claims)

Considerations

- Property in what? Property as a dynamic concept
- Allocating by whom? Legislatures, courts, and markets
- Allocating to whom? Occupancy and first possession, just deserts and the economic efficiency
- Depends on whether law will recognize and enforce entitlements
- Property is not a static concept as is apparent when disputes over new forms of property erupt
- Two approaches in deciding a novel claim:
  - Attributes Approach: asks for new property right based upon another item which has already been recognized as property
    - Does it “look” like property? Must search for a “family resemblance”
    - Weak – it retains property law but requires us to have a coherent idea of what property is
  - Functional Approach – social ends that property is meant to advance
    - Focus on policy factors in play
    - Focuses on the social ends that the institution of property is supposed to advance (ex public)

Three Cases: Associated Press v International News Service (property in the news)

Facts: Time of WW1, heavy competition, newspaper is only way to get news. According to AP, INS is pirating AP’s news in three ways (writing them as their own, AP filed for injunction):

1. Bribing AP employees to tell them AP news before publication
2. Inducing AP employee to violate by-laws and permit INS to get news before publication
3. Copying news from bulletin boards and early editions of AP’s paper

Issue: Is there property in the news?
Decision: Injunction upheld.
Reason: Court held that news is quasi-property due to commercial realities of its’ production. AP’s labor is valuable commodity and INS is benefitting from it for free ("trying to reap where it has not sown") Locke’s labor theory.

• News is socially valuable, want people to be informed, and commercially valuable
• There is no copyright in news, so AP cannot base claims on that law
  o Every copyright requires registration, so impractical for news
  o Copyright only protects the particular expression of the idea, not the idea itself
• Principle used to prevent INS from copying is that you should not reap where you have not sown. **Clear expression of John Locke’s theory of property**
• Problems with labour theory:
  o Suppose there is a legal principle established that one must not reap where they have no sown then INS would never be able to use news, how is it possible to prevent INS from ever using news stories though?
  o News not like wheat
    ▪ Cannot exclude people from news, cost of excluding people from wheat is relatively low, cost of excluding people from news is extremely high
    ▪ Cannot share wheat with everyone, can share news with everyone, as it does not go away when it is used, as news is read no one is impaired from reading it again. Difference between tangible goods and information
  ▪ Cannot limit access to a historic event
  o Maybe analogy of labour not so successful
• If not reap/sow argument, what else drives Pitney's decision?
  o News becomes merchandise when labor and expense put into gathering it
• Economic efficiency
  o If AP could not guarantee its news collection, it would have no incentive to do this good duty
  o If AP were not guaranteed its rights, then the consequences of that would be no news from war, which is bad for public. This is why AP should have its rights protected, not for AP to make a profit
  o Crux of economic argument, needs protection of rights or have no incentive to gather news
• Why can INS only publish copied news after a few hours, and not fresh news?
  o Fresh news has more worth then old news, but more to it then that
  o INS v. AP shows though we have to consider making news, we have to consider consumption of news. Pitney wants to encourage consumption of news, so wants to create a balance between incentive between producer of news and society's interest in consuming news
  o Want AP to have competitors to prevent it becoming a monopoly, which is economically bad to society
    ▪ No quality control if only AP provides news
  o Pitney wants to recognize property in news for a certain time. Free riders guilty of misappropriation.

Ratio:
• Pitney says news is common property because everyone has right to use it, but news is quasi-property between competitors. Quasi: has aspects of
  o Pitney was making use of an actual property law, not a quasi property law, because he was giving exclusive rights to AP for news, for a period of time during the day.
  o The right is good against the world, but in this case the world is fellow competitors, not the public.
• Both approaches to novel claims
  o Functional approach - advancing social end of news
  o Attributes – looks like property

Holmes J. (dissenting):
• Agrees the news is commercially valuable, values gives rise to legal rights
  o Holmes says something is valuable to the extent that it is protected by law
• Questions distinction between public and competitor
• Says much progress is made by copying, see this in art, literature, science, etc.
• Says that INS can copy AP, as long as it credits AP as source of news. AP’s rights limited to proper attribution, so deserve a credit by INS

Brandeis J. (dissenting):
• Says we are recognizing a new form of property. It is not quasi-property, but new type of property
• When saw need to protect trade secrets, we came up with appropriate legislation
• When copyrights became necessary, the constitution gave legislators right to create new legislation
• Says Pitney created new property law, is there enough evidence to do so?
  o Who says INS stealing will kill AP? Do parasites kill their host?
How long do we need to recognize exclusive rights in order to give that commercial right?

The judges are not in a situation to decide these things for the people, if it is a society issue legislators should worry about it.

Well, a lot of property laws have been created in the first place by judge decisions (common law).

Victoria Park Raceway v Taylor (property in spectacles)

Facts: VP has horse races, DF has land next to races and placed elevated platform on his land so he can see signs, winners, exc. He then comments and describes races over the phone which are broadcast on radio. PL was this to stop as it takes away business from park. Filed for injunction.

Decision: Appeal dismissed. No wrong doing.

Reasons: Anyone can look over neighbor’s property and describe what they see. No breach of contract or defamatory statements so no fault. A spectacle cannot be owned. No copyright or nuisance. PL failed to establish a violation of any legally protected interest. Law cannot be used to erect a fence where the PL has failed to do the same. If you want to exclude, put up a physical barrier. No property in a spectacle.

- Didn’t follow AP v INS because it’s not binding, just persuasive.

Dixon J. (concurring opinion):

- Not actionable in nuisance
  - Defendant deprived the plaintiff of the exclusivity of his premises and therefore his profits, but that’s not actionable under common law. The fact that you cause someone to lose profits in itself is not actionable
  - Intangible value is only recognized when the incorporeal right falls within a recognized category to which legal protection applies
  - These majority views are very conservative, do not want to make new property laws
  - No precedent for this situation
  - However, by denying this, you deny any novel claim
  - Latham and Dixon say you must go to parliament and they must legislate these laws, not make novel claims

Rich J. (dissenting):

- Racing is reasonable, profitable activity, one that we should protect
- Defendant's unusual conduct is nuisance

Moore v Regents of the University of California (property in the human body)

Facts: Moore has hairy cell leukemia and is undergoing treatment at UCLA. He had blood, bone marrow aspirate and other bodily substances removed. Doctor recommends removal of spleen, asking Moore to come back various times, parts of it are then taken for research but Moore was never informed. DRs created a cell line worth $3 billion from Moore and patented it and made money. Moore wants his money because it’s his spleen. More sues. Statement of claim tries to establish 2 causes of action:

1. Breach of fiduciary duty/lack of informed consent
   - His doctor has a duty to act in his best interest
   - Doctor performed operation on Moore without his informed consent
     - If Moore knew DR was removing spleen to make something in his lab and patent it, he may have acted differently
2. Conversion
   - Conversion is a tort. A cause of action was available to a PL that was able to say that the DF found his property and refused to return it.

Issue: Did Moore retain ownership interest in excised cells and matter such that he can prosecute DFs for conversion?

Decision: No

Reasons:

Panelli J’s analysis:

- 2 reasons why Moore loses on conversion:
  - Law of conversion as it stands (p 64)
    - Law of conversion requires you have either possession or a propriety interest. Because Moore never intended to hold onto spleen, he must show that he owns spleen. But Moore can't because California law limits what Moore can do with spleen and gives careful instruction on what can do with excised cells.
      - No case law on point
      - Cali law abridges patients’ rights in excised cells
      - Patented cell line and derivatives cannot be Moore’s
    - In terms of law as it stands, Moore loses
  - Should the court expand the doctrine of conversion?
    - Policy considerations weigh against it
Problems demand a legislative solution
• Patients are already adequately protected (breach of fiduciary duty/lack of informed consent)
  • Settled out of court so not sure what happened.

Reasons:
• Will bring medical research to a halt as everyone will want claim in their own tissue
• Will also cause strict liability for researchers who didn’t even know they were using tissue that was under conversion
• Litigation Lottery: Make sure that tissue was removed with all forms signed, follow cells back to spleen.

Dissent:
• Just because rights abridged does not mean no property – it is a broad bundle – he at least had the rights to do with his material what DF did

Contrasting INS v AP with Moore
• Both are economic concerns
• In INS Pitney is concerned with consequences of not recognizing enough property. In Moore, Panelli is concerned with consequences of recognizing too much property.
  • Pitney is concerned about leaving information in the commons, the tragedy of the commons
  • Panelli is concerned with excluding too much information from the commons, the tragedy of the anti-commons

Anti-commons and assembly problems
• Every procedure requires use of genes and patented processes, which means if you need consent of everyone who contributed in past, can be major obstacle to research
• Problem in pharmaceutical research
• Contrast with tragedy of commons: everyone has right to graze, no one cares about anyone else, and eventually land will be destroyed. Solution is to gather everyone and work things out to reduce externalities. Really about transaction costs.
• In anti-commons also need cooperation and can assemble what you need to prevent anti-commons problem. However, that is the cost of transaction
• The commons or anti-commons are not the problem in other words. The problem is cost of trading property rights. The cost of aggregating or disaggregating property rights

Numerus clausus principle
• Recognition of a limited number and carefully regulated kinds of interests. Why?
  • Reduce information costs – if range of rights is restricted, it is easier to determine what interests encumber a given parcel
  • Helps to reduce anti-common problems – recognition of too many kinds of rights prevents efficient exchange by causing hold-outs
  • Inhibits ability of court to delist previously recognized rights

Unit 2: Property in Perspective

The Sources of Canadian Property Law
• Common law distinguishes between real property and personal property
  • Distinction is historical rather than principle
    ▪ Could bring action to recover possession of land but not other types of property
    ▪ If you wanted to recover possession of a cow you could go to court and get a judgment to return that property or the DF could pay to satisfy you
    ▪ With land, sheriff would come and compel DF to give you your property back

The Doctrine of Tenure
Origins, nature, and function
William the Conqueror took all land. Under his society there was a hierarchy that all people fell into: Warrior, Priests, Famers (and other service providers).
• Everyone given land in hold of the King in exchange for loyal service (concept of tenure)
• Most tenets in chief were warriors and continued to hold land as tenants-in-chief. They had to come fully equipped with a quota of knights.
• Upkeep of knights is expensive. So they took their own tenets. They were tenants-in-chief and had their own tenets.
  • If you owed king knights, you could have tenets who owed you knights and then they would go to king. These tenants of tenants-in-chief were known as Mesne Lords
• Eventually there was a level of tenants who had no one to take as tenants (bottom of hierarchy), called tenants-in-demesne
• Land so important because there was no economy or politics, so continued existence depended on land, so king ensured that to have land must have allegiance to king

• Eventually the services provided by tenants (tenurial services) become standardized

Tenurial Forms (especially free and common socage)
• Knight service: scutage
  o If you owed four knights to king, you paid a certain amount instead of sending knights, as army became a mercenary army
  o Eventually Parliament decided how much you paid for knight service, looks like taxes

• Religious services: frankalmoin
  o Prayed for souls of people, praying for battle, caring for parish etc

• Personal Service: serjeantry
  o Ceremonial service that person guarantees in exchange for land such as hold banner of Lord while marching, dress lord, etc.
  o Sometimes was more symbolic of feudal relationship between tenant and the lord
  o Grand – tenants in chief perform ceremonial services
  o Petty

• Socage: Free and common. Really an economic tenure service.
  o Began as duty to provide certain agricultural duties (grow wheat, etc.)
  o Over time, that also changed to payment of money
  o Tenant in demesne, who has no tenants of his own, is not actually plowing field. Serfs worked the fields for him. He just managed this and money
  o Cannot be dispossessed of land by superior, or can go to court

• Unfree Tenure: Serfs
  o If disputes among them they had no recourse to courts
  o Lords creatures, had to settle things in front of lord
  o If grievance was with lord, they had to no option but to leave the manor, which was not very practical

• The tenurial relationship is personal
• Every estate must be "seised" (identify the person who must give periodic service to the King). Transferred when two people go to land and pass handful of dirt to new owner in front of witnesses.
• When something has been seised, there must be a person who is identified as the one responsible for the performance of obligations that are attached to the land.
  o If the king wants to collect what's due, he looks to who is seised of the land, regardless of any transactions that have occurred.
• King concerned with revenue. Money flowed from land up, through feudal mesne lords.

Incidents of Tenure
• They were infrequent. They were all sorts of liabilities that are performed infrequently and included a variety of occasions in which the lord would claim regain possession of the land or the profit of the land

• Homage: Ceremony that is very symbolic.
  o Most humble service a tenant can make to his lord. Symbolic gesture.
  o Saying that tenant becomes kings man (very personal)
  o Tenant owes feudal superior a great personal duty or obligation.
  o A tenant can be released of his tenancy if lord agrees to it and lord can take other tenant for same land

• Escheat: If tenant died and left no heir recognized by law, the property would revert to the lord
• Forefeiture: If tenure found guilty of treason against lord or of committing a felony, then the lord had the right to terminate the tenancy and reclaim the land
• Aids: King has certain financial needs, so king levies aids (taxes) on all his tenants. Limiting for ransom of Lord, knightig of first son, marriage of one's daughter
• Relief: If tenant dies, lord has right to give land to someone else. If father is very loyal but son is not, lord can have someone else take the land. Because the relationship was personal, there was no right of inheritance. However, it became tradition that the first born son could fee the land by paying a relief tax (like heirloom tax)
• Wardship and marriage: The right of the lord to manage for his own profit land if a tenant died and left a minor heir (man below 21, or woman before 15) until they come of age. In the meanwhile, the lord would hold the land get all the profit until they come of age. Lord had right to arrange marriage of heir of tenant. Lord could sell right to marry heir. Could not compel anyone to marry someone they didn't like, but there would be GREAT CONSEQUENCES to not do so

Fall of Feudal Tenure; Statute Quia Emptores; Tenures Abolition Act
• Society moved from status to contract. In medieval times you were born into a class and that was that. But gradually society moved from status to contract. By interacting with others you could accumulate wealth and establish yourself with others, so law had to reflect this change.
• Tenurial services (knight service, agricultural service) proved impractical and were replaced by monetary payment.
• Because terms were fixed, the lord fell victim to inflation, they had tremendous land holdings but collect little money from them.
• Had power to levy taxes but where heavily restricted over time.
• Eventually king agreed to follow restrictions too.
• In 1660 the Tenure Act converted all tenure services, except franklomoin, to socage (for free tenures). Everyone holds by socage. As for unfree socage, they became known as copyholders.
• Further subinfeudation is prohibited.
• A tenant could no longer take tenants of his own, but did not cancel existing tenancies. If you want to have a new tenant, you must substitute a new one for an old one.
• Lord's consent for substitution not required.
• Substitution was when lord gave permission for tenant to sell land to someone else, needed lord's permission to do so, lord needed to agree that replacement was suitable. If decided he wasn't, lord said no, you can't sell.
• Now land could be bought and sold freely in the market.
• This happened because the tenants found that periodic services could be exacted from them but the services were meaningless.
• Value of incident based on value of their holding so they shielded themselves by taking tenant of their own.
• Suppose a tenant conveys the property, takes as tenant someone else, for the rose of midsummer. For socage, the tenant must give one rose on midsummer every year. Now lord has tenant who must pay one rose, so if lord should impose a wardship, or an aid, he got a rose. Lords were denied the most lucrative incidents of tenancy through subinfeudation. It was worst for the Lord if tenant should take church. If you took as a tenant church it was worse because it never commits treason, has no heirs or marriages to arrange, so lord got nothing. So lords had immense land holding and were going bankrupt.
• Went to king said NO more new tenants. If someone wants to sell, let them sell.
• Over time, through forfeiture and through escheat, all the middle men disappear and pyramid collapses. By the end, there are only Tenants of the king, no more pyramid.
• Under common law system of property, no one owns land. You may own books and cars, but you are a tenant of the Crown, you hold of the king. What we refer to as a sale of property means that the tenancy has ended and the Crown takes a new tenant instead. The various Doctrines of property law that emerged over the years were a result of the lords effort to collect money and the tenants efforts to engage in tax evasion.

Remnants of Tenure in Modern Canadian Property Law:
• In Canada, the Crown is the only absolute owner – we are tenants in free and common socage.
  o It is fee simple – no fixed term; can hold forever.
  o Socage – pay taxes.
• Unclaimed Personal Property and Vested Property Act, S.A. 2007, c. U-1.5, s. 15:
  o Property vests in the Crown in right of Alberta. .
  ▪ (d) in the case of personal property, if it was owned by an intestate (no will) who died while resident in Alberta, in accordance with Part 3 of this Act.
  ▪ (e) in the case of land in Alberta, if it was owned by an intestate, in accordance with Part 3 of this Act, Land is not owned absolutely but held of the Crown.
• This is like escheat.

The Reception of English (property) law in Canada:
• Settlers brought the law with them as long as applicable:
  o Most English law was received.
  o Most departure concerns water and Nfld.
• Quebec under rules of conquest – keep same.
• Aboriginals – sui generis – hold rights until taken away by legitimate state action (no free and common socage – they hold title).
• Reception is convenient, creates continuity, predictability.
Classification of Property

Categories (Chambers)

1. Movables (chattels, can move, get worn and destroyed)/immovables (land, stays put and is indestructible)
   a. English law did not maintain this Roman distinction
2. Real (refers to land)/personal (refers to things that are not land)
   a. Difference between 1 and 2 is procedure.
3. Legal/equitable
4. Tangible/intangible
5. Choses in possession/choses in action

**Classification of Property**

![Real Property - Personal Property Diagram]

**Real property - Land**
- Corporeal – Possessory
  - Fee simple
  - Prehold estates (life tenancy in particular)
- Incorporeal – Non-possessory:
  - Certain rights in land but not right to possession:
    - Easement - right to drive cattle over your land, do not have possession of your land but have interest in it

**Personal property – Things that are not land**
- Chattels Personal
  - Choses in Possession – Things in Possession – Tangibles
    - Cars, paintings, boats, furniture
  - Choses in Action – Things in action – Intangibles:
    - Stocks, bonds, writs to bring actions, IOUs
- Chattels Real
  - Leases

**Legal and Equitable Classification of Property**
- Equity arose when king gave lord or chancellor power to make equitable decisions
  - Court of Equity - This court recognized your right even if not seized of an estate.
- Situation where someone has legal right and someone else has equitable right to same piece of land

**Influence of Writs (Maitland)**
- Writs that enable you to recover possession were known are real writs (where term “real property” comes from)
- Not anyone can use this writ. Only a tenant-in-chief (someone who holds directly from King)

**State Power Over Property**

**Royal prerogative**
- King used to have royal prerogative over property (could do whatever he wanted with other’s property)
- Under Magna Carta, he took to respect the citizenry
- King/Queen gives royal assent to the enactment of laws and legislative power over private property in BNA Act.

**Federal and Provincial Jurisdiction Over Property (Constitution Act/BNA Act, 1867)**
- Division of powers between Canada and the provinces
• Feds = exclusive jurisdiction over ports and harbors, lands reserved for Aboriginals
• Provinces = property and civil rights in the province
• Shared = environment

Constitutional, Quasi-Constitutional and Other Protection of Property (Ziff)

Constitutional Protection of Property
• Availability of Constitutional protection means that government cannot use legislative authority to deprive people of their property (like in the States)
• In Canada there is **NO Constitutional or Charter protection against a physical taking or expropriation**
• Majority can further public good by taking property, this is the legal situation in Canada
• Canadian Charter does not protect private property but it does protect overlapping interests, such as protection from search and seizure.
• When there is a takings charge in Canada, courts scrutinize underlying legislation and decide if taking was pursuant to legislative authority or whether it was done ultra vires. If Act was pursuant to legislative authority court then asks whether the private owner can point to statutory source of compensation

The Canadian Bill of Rights
• Section 1: It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination...(a) the right of the individual to life, liberty, security of the person and **enjoyment of property, and the right not to be deprived thereof except by due process of law**
  o Therefore rights CAN be violated without compensation if there is a due process of law
  o Not a constitutional document
  o Clear language in a legislation can override the Bill of Rights
    • Notwithstanding section 1 of the Canadian Bill of Rights...
• This applies only at the Federal level (procedural right)
  o There is an Alberta Bill of Rights, identical to the Canadian one

Alberta's Personal Property Bill of Rights
• If there is a taking, it requires compensation. If there is no compensation, then there cannot be a taking
• This bill can be overwritten by a legislation
  o Notwithstanding the Alberta Personal Property Bill of Rights...
• This Bill of Rights imposes a political limitation, not a substantive one
  o It forces the government to admit they are taking someone’s property and paying no compensation (subtext: let’s see you survive the next election)
• No more implied compensation because there is a Bill saying compensation is ALWAYS required. It must be explicitly stated that a taking will not provide compensation in order for the taking to be legal
• This and the Canadian Bill of Rights do not prevent takings, however, and provide minimal protection

Statutory and Common Law Right to Compensation

Physical taking or expropriation:
• All levels of government need land to carry out their objectives
  o To get land, government can buy land from owner at a mutually agreeable price
  o But if person refuses to sell land, the government may choose to exercise expropriation power
• **Expropriation Act of Alberta:**
  o s. 3: When an authorizing Act permits or authorizes an expropriation of land, the expropriating authority may, unless the authorizing Act expressly otherwise provides, acquire any estate required by the expropriating authority in the land and may acquire any lesser interest by way of profit, easement, right, privilege or benefit in, over or derived from the land.
• Why have this?
  o For public good (prevents individual from interfering with public good)
  o Crown owns the land
  o Hold out problem
• Should you be compensated for the taking?
  o Economic disincentive: no one would invest if land can just be taken
  o Equity/fairness: no one person should bear the legislative burden for everyone else
  o Let society pay for compensation if society benefits from expropriation
  o Promotes investment by providing insurance to owners that will be compensated (1110 of NAFTA)
  o Forcing government to compensate makes government buy land if it is worth more in the hands of the public - Forces government to assess value of project prudently
Statutory Compensation Rule

Sisters of Charity of Rockingham

- No general right in common law that you can get compensation for land
- Compensation must be found in statute
- Owner of land entitled to compensation only if they can point to a statutory right of compensation. Claim cannot be found on general principles but rather on statutes. Must show legislature’s intent to grant compensation.

Expropriation (compulsory acquisition)

Expropriation Act, s 3
Municipal Government Act, s 14(2)
Contrast with Mines and Minerals Act, s 15.1 (“pore space”)
- Has been and will be vested in Crown
- Not to be a taking, no compensation

Implied right to Compensation

- All claims to compensation are statutory. No common law right.
- Intention to compensate can be inferred. Doesn’t have to explicit.
- If legislation wanted to give you nothing, they would have stated so. So if silent, infer right of compensation.
- If state authorizes partial compensation, it is evidence that legislature only intended to give partial legislation.

AG v De Keyser Royal Hotel

- Army takes hotel and uses it by necessity. When hotel is given back it does not look the same, owners want compensation.
- The House of Lords said a statute is not to be construed as to take away the property of a subject without compensation.
- Parliament can override this ordinary principle if it sees fit to do so, but they will not disregard it without plain expression of such purpose
- When a statute authorizes expropriation, it is assumed that a right for compensation is built into the statute UNLESS the statute explicitly states that there is no compensation

Manitoba Fisheries Ltd v The Queen

- Crown decides to leave all export of fish to government. Owner of company in MB is stuck, they’ve been legislated out of business.
- Provision in enabling act states that fed government can enter into agreement with province to pay for facilities that are now obsolete. That sum is $1,400.
- Owner of business wants to be compensated more as government has appropriated all of his clientele.
- Richie J: Goodwill associated with Manitoba Fisheries is a proprietary interest and effect of statute was to deprive company of that goodwill. Not only did it deprive, it acquired that goodwill. Took property from Manitoba and gave it to Crown corporation and didn’t authorize compensation therefore we’re going to read in a right to compensation based on rule from De Keyser.
- Kaplinsky likes result but thinks it’s wrongly decided. If case was properly argued before SCC, result would be different, not better but different.

British Columbia v Tanner

- Tanner acquires minerals under surface in BC. All he has to do it take them out. But government has a better idea. They think the area is beautiful and increasingly restricts activities in park. After 5 years of trying to negotiate for a mining right, ministry writes to Tanner and says park has been reclassified as one of the most protected parks and he will never get a permit to mine for minerals in that area. Tanner says they’re expropriated his minerals so he needs compensation. BC says no, minerals are still his, he just can’t mine them.
- Case came before court but it’s tricky. Government didn’t take over operations (like in Manitoba) but they obstructed it.
- Majority considers taking of value for Tanner and acquisition of public amenity constitutes a taking. OR maybe regulation is a right for Crown to reclaim mineral rights given away earlier.
- Wilson J: Government took right to use/extract mineral. Acquisition by the Crown. Not clear from decision what taking is. Decision unsatisfying. But say it is a taking and they pay Tanner for value of minerals (Keysers rule).

Regulatory Takings and De Facto Expropriation

- Should governments have the power to expropriate private property?
- Should owners have a right to compensation?
Policy Considerations:

- **Equity**
  - Burden of project spread just like benefits, some people better off and some worse off, but owner also not to be made better off,
  - Want benefits to be given to public, owner did nothing to deserve that surplus
  - Does it take into account personhood values?
  - Market value, value for improvements, value for moving expenses
  - Special value → Market value → Market value plus

- **Efficiency**
  - Investment by the owner in the land. Do things to make sure he’s not worse off but does not enjoy benefit unjustly
  - Concern: Accounting by government. Must be aware of all costs, one cost is cost to the owner. Property worth $100. Depends what property is worth to owner and developer.
  - Developer has to put money where mouth is, government doesn’t. It can just say so.

Compensation

- Pulls governmental actions to light of day.
- Less than market value unfair to owner. Above market value unfair to public.

1. Expropriation Act, 2(1), 3, 42(1): right to compensation for land taken
2. Surface Rights Act 15(1), 23: Operator can go to Surface Rights Board and they can grant a right of entry and then board determines compensation to owner. Statute provides compensation explicitly.
3. Hydro and Electric Energy Act, s 37: You will get no compensation if hydro or electric extends over your airspace (Didow).

Examples:

- Government takes your pore space: No taking. Noncompensable.
- SRB grants operator a right-of-way over your land: Yes taking. Yes compensation.
- Electric co intrudes into your airspace Didow style: Yes taking. Noncompensable
- If government takes land with house. House is owned by someone, rented by someone else. → Taking interest in thing. Taking 2 rights away (leasehold from renter, aversion from registered owner) so must compensate both. If neighbor happened to have right of way over land, they will compensate her as well.

Regulatory Takings in the US

- Interpretation of 5th Amendment

**Pennsylvania Coal Co v Mahon**

- Kohler Act – companies cannot mine in some areas and where can, must compensate
- PCC does not need the surface. Conveys surface to homeowners
- Mining causes subsidence: PCC mines and surface can collapse
- The arrangement between the homeowners and PCC was that homeowners take house subject to risk. If house collapses it is the homeowner’s problem, PCC does not need to pay compensation for this. PCC usually did though
- Kohler Act - Now required to leave certain pillars of coal so as to not cause subsidence
- PCC argues that this is a taking of PCC property and that either value was taken from them or some interest was taken from them (a mining interest)
- If government had taken the coal under the surface, that would be a physical taking. Government did not take any coal from PCC
  - But property is a right to the thing, not the thing itself.
- Holmes J could have decided that the Act took the support estate from PCC and gave it to the homeowners. This is a taking, and requires compensation.
- Also nuisance is private not public (no public safety justification, notice prior to mining would be sufficient).
- Instead, Holmes J created a new rule: this is a regulation gone too far
  - If a regulation goes too far it will be considered a taking and will require compensation
  - Holmes J. has a test to distinguish between regulation and regulation gone too far
    - The test is the judge will recognize regulation gone too far when he sees it
    - Decided that loss to PCC for not being able to mine is great
- In DISSENT, Brandeis J. says value is relative.
  - Value of coal that you have to leave behind is not a large percent of what you totally dig out. Not a great diminution. Regulation intended to prevent a nuisance and therefore not a taking. Does not require compensation due to protection of public.
• So two factors exist in a regulatory taking:
  o The extent of diminution (Holmes says great)
  o Protection of public from nuisance activities (Holmes says no)
• Holmes J. rejects nuisance
  o Can claim nuisance at common law, but homeowners cannot complain about nuisance because they
    consented to no compensation. The Kohler Act does not let homeowners claim under nuisance, they
    signed away their claim to nuisance by agreeing to no compensation if subsidence occurs
• As a result of this case, law is unclear which is a disadvantage. But the advantage is that it recognizes right of a
  plaintiff for compensation when regulation goes too far
• Case law after PCC, *Penn Central Transportation Co v New York City* distilled three criteria for a regulated
  taking:
  1. Extent of diminution
  2. Whether the regulation interfered with investment backed expectation
     a. If land worth $500,000 is bought because of certain development expectations but government
        changes the buyer’s right through regulation to that property and property now only worth
        $100,000, there was interference with investment backed expectation
  3. The nature of the state action
     a. Whether it involves physical invasion or merely the adjustment of burdens of economic life to
        promote public good
• Per se takings:
  o Physical invasion (Loretta)
    i. Cable company putting boxes on all buildings. Loretta says my property and must pay to
       do so. SCC agrees.
  o Denial of all economically viable uses (Lucas)
    ii. You’ll be compensated. No need to engage in ad hoc analysis.

*Lucas v South Carolina*

• Act said man could not develop beach front land into homes on beach front property he owned because of
  environmental purposes
  o Court says a taking
• “While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking” –
  when is too far?
  1. When there is a physical invasion of property – no matter how small the intrusion and important the public
     purpose = compensation
     a. Supreme Court: if going to deny an owner the right to exclude, compensation is owed
  2. The economic impact of the measure – where regulation denies all economically beneficial use of land
     o Plaintiff bought beachfront lots that he wanted to develop but California government prevented this, as the
        area was environmentally sensitive
     o Land is economically valueless to plaintiff, he cannot develop it
     o Supreme Court required compensation
     o Government asked how they are supposed to protect the beach. Supreme Court said if the government
        objective is so important they should prove it and pay Lucas for the land
• Scalia:
  o Deprivation of all economic beneficial use, from perspective of property owner, is deprivation of property
    itself.
  o When all economically beneficial use is restricted, hard to assume legislature is “adjusting” benefits and
    burdens
  o Regulations that restrict all economically beneficial uses of land may be a way to press land to public
    service (Lucas’ land deprived of all economically beneficial uses)
  o No way to distinguish regulation that “prevents a harmful use” and confers benefits on nearby property
  o Contrary to South Carolina’s assertion, title is not held subject to limitation that the state may regulate
    away all the property’s economically beneficial use

*The Canadian Approach*

*Mariner Real Estate v Nova Scotia*

• Nova Scotia passed *Beaches Act*, regulating use of public and private beaches. Any structure (path, trail, road,
  building, anything not indigenous to beach is not allowed unless authorized from Minister). Family applied to build
  single family home on beach but denied due to sensitive nature of land and consequences of what would happen
  with dune system. Respondents sought fact that land was de facto expropriated, trial judge agreed and were
  entitled to compensation.
• MRE cause of action: they bought beach front property and wanted to develop it
Told they cannot do anything at all. MRE said that the economic loss they suffered constitutes a taking.

In Canada, the right to compensation must be found in a statute. The only claim they had was by finding a statute that shows they had right to compensation, so based claim on *Nova Scotia Expropriation Act*

Court says it is a taking if:
- There is a confiscation of all reasonable private uses of the land in question
- Court is aware that line between regulating property and taking property is blurry
- Use a 2 step ancillary test to determine if expropriation:
  - Is it direct expropriation? → is the state forcibly acquiring an interest and becoming the owner?
  - Is it de facto expropriation? → Is this considered “acquisition” (is the State taking a degree of indirect interest such that it has in effect an interest equal to ownership?) → Is it a stringent regulation of use of property? Note that mere loss of economic value on its own is not adequate for an action to constitute expropriation.

In order to claim compensation based on regulatory taking, there must be a denial of all reasonable private uses. Uses ancillary test of sufficient severity: Whether regulation removes all rights associated with the property holder

Was Mariner real estate deprived of all its uses? No:
- Not excluded from property
- Could still exclude others
- Could camp on it
- The only thing they could not do is build anything of value

They were wiped out economically but were still the nominal holders of the property and could exercise some power and usage

Cromwell requires us to examine not every potential use of the land but those that are reasonable given the land’s situation and the extensive land use regulation which is the norm in Canada
- You can’t buy a lot in a residential area and build a sky-scraper, and then when told that’s not allowed expect compensation
  - You can’t buy land in Canada without regulations. You cannot expect compensation given that there is extensive land use regulation in Canada

Canadian takings law is not like American takings law:
- Even if there is an extensive and compelling reason for compensation, it is not up to judges to enforce compensation but up to legislatures

A further difference is that in Canada expropriations are based on expropriation statues:
- Expropriation takes place when the government takes an estate or some interest in the land.
- There must be some expropriation of an interest in order to have compensation
  - Land only regulated – not enough that MRE lost right to build and public gained/benefited by it (enhanced value to government or public is not a taking)
  - The regulation must be severe enough “to remove virtually all of the rights associated with the property holder’s interest”
    - Must point to an interest that the government acquires

The extent of the bundle must be assessed “not only in relation to the land’s potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it is actually being put

Only lost value of use
- In Lucas, lost *all economic value*
- Here only a *decline* in value – could still theoretically use for other things than building houses - no taking
- Defacto expropriation requires that owner be stripped of all *reasonable private uses of land*
- In determining loss of economic value, they asked if it constituted the loss of land *within the meaning of the Act*
- Can argue that when the government prohibited Mariner Real Estate from building, it acquired without consent a restrictive covenant, which is an interest. For that reason, it’s been argued that the courts did not look hard enough to see if an interest was in fact appropriated by the government

Mariner may have had a good claim to compensation, but that is not the law

Kaplinsky: First, acquisition test is not supported by precedent. Second, thinks Cromwell gets it in reverse, not because compensation isn’t payable because in this country regulation is norm but because government owes no duty to compensate since regulation has become so restrictive. If government knew it would have to compensate, it would think twice about regulation. Kap says yes there’s restrictive regulation but that’s because there’s no regulation.

**Canadian Pacific Railway Company v Vancouver**
- Situation repeated from Mariner
- Crown granted CPR “Arbatus Corridor” – line fell in disuse – discontinued operations there – willing to sell for
development – City designates it public greenway – confined CPR to noneconomic uses – compensation? (CPR argues legislation intended it)
  o CPR has a decommissioned rail line and wants to develop it and is told they can’t

Test for de facto taking:
  o An acquisition of a beneficial interest in the property or flowing from it
  o Removal of all reasonable uses of the property

Neither met:
  o City has no beneficial interest:
    ▪ City has only gained assurance that it will be developed to its vision
  o Has not removed reasonable use
    ▪ Must assess: highest use – nature of land – range of reasonable uses

Does not prevent CPR using as railway or prevent track maintenance
Practical result is citizens of Vancouver benefited from a recreational trail at expense of CPR
May or may not be a good thing, but point of view is that there was taking of property, but court does not recognize right to compensation

Protection from takings
  • Vancouver Charter, s. 569
    o (1) Where a zoning by-law is or has been passed any property thereby affected shall be deemed as against the city not to have been taken or injuriously affected by reason of such zoning and no compensation shall be payable by the city or any inspector or official thereof
  • City Charter says: property effected by a bylaw “not a taking”
  • Expropriation Act applies only to “ takings” – so no help

NAFTA, Article 1110: Expropriation and Compensation
1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
   a. for a public purpose;
   b. on a non-discriminatory basis;
   c. in accordance with due process of law and Article 1105(1); and
   d. on payment of compensation in accordance with paragraphs 2 through 6.
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation")...

These read like the Constitution of the States, where it says no property shall be taken without compensation
  o These have quasi-constitutional status – cannot be bypassed through unilateral Canadian action
  o Foreign investors have protection similar to US Constitution

Annex B.13
a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;

b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
   a. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
   b. the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and
   c. the character of the measure or series of measures;

b) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

An indirect expropriation is protected like a direct expropriation

Sounds like ad hoc analysis:
  o Extent of diminution – economic impact
  o Whether the regulation interfered with investment backed expectation
  o The nature of the state action – charter of the measure

Canada is giving more protection to foreign investors than Canadians
  o Why not apply this to Canadians if it is deemed important enough to give to foreign investors
Metaclad

Property, Class, and Poverty (Waldron)

Two ways to address distributive concerns:
1. Tax system: everyone contributes based on ability to pay
2. Through legal rules themselves: favors people of lower income

Waldron – “Homelessness and the Issue of Freedom”

- Homeless are excluded from all private property because have none
- Only “allowed” to be in collective areas – street etc
- These areas are becoming more and more regulated
- “A person who is not free to be in any place is not free to do anything”
- They have freedom only to the extent that our society is communist
- We should be concerned about their freedom as much as their physical needs
- We tolerate having homeless in our economic system so we should tolerate them acting as free agents doing what they need to survive in public spaces.

Victoria v Adams

- City of Victoria made a bylaw that prevented anyone from setting up any over night shelter in the park
- The purpose of the city’s bylaw was to deny homeless people protection from the elements at night to drive them from the park, and ultimately the park would be reserved for recreational use by the general public
- Several individuals as well as NGO’s appeal the courts to quash the bylaw
  - Infringed section 7 of the Charter: the right to liberty and security of a person
  - Not saved by section 1 of the Charter
- Court accepted evidence that at the time the bylaw was passed the number of homeless in Victoria exceeded the capacity of shelters
  - That meant that some homeless were forced to seek shelter outside
- On that basis, the court held that the bylaw was in fact unconstitutional and the appeal came from that decision
  - The court framed the debate as an inevitable need of the homeless to perform life sustaining acts in public and responsibility of the government to maintain parks
- Not common property but public property
- City could have avoided this issue by saying you could erect shelter at night but must take down in morning
- City argued that the trial judge effectively required city to provide additional shelter beds, therefore they argue that court was enforcing a positive obligation on the city, which is inconsistent with Charter jurisprudence.
  - The charter is said to protect certain liberties and prevent state from acting certain ways, but does not guarantee economic and social rights
- No Constitutional right to housing in this country or minimum wages or sufficient means of living
- CA rejected this argument
  - CA said only duty of city was to refrain from preventing the use of over night temporary shelter

Is this a property right?

- City also argued that what was being asserted was a property right, and there are no property rights protected by the Charter
- CA said: The right asserted by the respondents and recognized by the trial judge is the right to provide oneself with rudimentary shelter on a temporary basis in areas where the City acknowledges that people can, and must, sleep.
  - This is not a property right, but a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter, a prohibition found to impose significant and potentially severe health risks on one of the City’s most vulnerable and marginalized populations.
- Homeless are not claiming the right to exclude, which means they are not trying to exclude people so they are not claiming a property right
  - They are claiming right of equal use, the right to NOT be excluded
    - This is not claiming an absolute right because this is not a property right
- City over regulated. It was not necessary to prevent over night shelters in all public parks at all times in order to protect its parks. CA said its possible to limit overnight shelters to certain times at certain parks which are not considered shelters
- There was a rational nexus between the prohibition of over night shelters and the legitimate purpose of protecting over parks, but the prohibition goes further then necessary and is not minimally impairing and the benefits of protecting parks do NOT outweigh the deleterious health risks homeless people face when faced with no shelter overnight. OAKES TEST.
- Without the Charter could the city still have excluded the homeless?
  - Park is public, so can’t homeless use it?
  - If it was MY lawn, I could stop people from doing so. Why can’t a park do the same?
• City owns park in trust for people
  o In this regard, then city cannot exclude the homeless from it
• City has an absolute right to park but the only reason it cannot exercise its rights is because of something external, the Charter
• If the rights of homeless were included in the property rights of the park, then no need for the Charter as there is an internal right
• Why would city make this law then, knowing it will be struck down?
  o Politics. Local councilors give in to political pressures coming from the typical voters. Council can say yes I'm going to do this and when courts interfere can blame it on unelected courts. Judicial activism?

Unit 3: The Boundaries of Property

Introduction: The Essence of Boundaries

• Can't do whatever you want on your property just because it's in your boundaries. Especially if it interferes with your neighbors enjoyment of theirs.

Nuisance and Trespass

Fontainebleau Hotel Corp v Forty-Five Twenty-Five Inc

• Fontainebleau and Eden Roc are two hotels next to each other on the beach. Font wishes to add 14 stories to it's hotel but it would block the sun after 2pm on Eden's beach, swimming pools, and sunbathing areas. Eden wanted an injunction because the addition would ruin their customers' experience. Addition being built on north side rather than south due to malice. Temporary injunction granted, Font appealed. Appeal allowed since no legal right to air and sunlight.
  • The maxim sic utere tuo ut alienum non laedas means only that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance.
  • Why does Eden Roc not succeed? No legal right to air or sunlight recognized in common law. Possible to recognize right to air or light in only very specific circumstances. For example, you have a shop with a big window and enjoy light through that window for years and years you have rights to it through ancient lights.
  • Most important proposition that Fontainebleau stands for is that common law doesn't protect you against harm per se. It protects you from injury to your legal rights. Just because you suffer a loss, doesn't mean common law will offer a remedy. You must show cause of action. In this case they're not recognized because of precedents.
  • Case also shows the problem that Demsetz articulates. What owner of what Fontainebleau does on his property has effect on other property (externality) and the law gives us the default position. It tells us what kind of external effect is going to be permitted or prohibited. We don't find out until court makes pronouncement. Boundary paradigm says within these four boundaries I can do whatever I want. Costs are aligned with benefits. Torts of nuisance balances rights of adjoining owners, uses standards instead of rules ex what is reasonable?

Dwyer v Staunton

• Tort of nuisance protects against use of enjoyment. Trespass protects against possession.
• Trespass rule is much more straight forward than nuisance rule. If I have property and right to use property, I have the right to kick out anyone off that property. You cannot come in without my permission. Limited in some situations such as emergencies (police, fire) or necessity (child/animal locked in) or agreement with company (gas/water meter checking person). English law recognizes rambling rights that allow public access as long as they don't damage property. Business owner cannot discriminate against religion, race, gender, exc.
• Sues for trespass ($500 for damages to special quality crops, $20 for damages to gate/fence, and an injunction). Snowy road, bulldozer made a path on farmer's land. Next day DF and 4/5 other cars take the path and are stopped by DF. Tells them not to do it again. On their way back they try to take different way and can't so take PL field. PL goes out and argues, DF drives through barbed wire fence. Judge found DF was in his rights to do so. Judge said the crop was winter-killed (barley to wheat in spring) therefore no crop damage. If there were crops, damage was more likely caused by bulldozer not DF. DF had to go through gate, PL should have allowed, no damages for gate.
• “My understanding of the law is that a traveller who is lawfully using a public road has the right to go upon private land at places where the public way is impassable”. Latin maxim: public welfare is highest importance. Using precedent. You have right to use private property to pass if public is impassable but you must not cause unnecessary damage. If you cause damage, you may be liable for damages.
• What if you cause necessary damage? In this case, PL has locked gate. Judges say what damage? It’s trivial and it’s the PL’s fault as he wouldn’t open gate.
• What if PL wasn’t there? Who pays for gate? If you have to trespass you’re not liable for necessary damage.

**Land: Airspace and Subsurface Rights**

*Cujus Est Solum Ejus Est Usque Ad Coelum Et Ad Inferos*

- Whoever owns the soil, holds title all the way to the heavens and down to the depths of the earth
  - Courts have resisted applying this maxim literally – it’s only a starting point
  - Anything you’re using as a matter of fact is yours, and anything you could potentially use. So whatever you build and projects into airspace is yours.

**Above the Surface (Airspace)**

- Can exist separately from surface rights. Eg a condo
  - Condo and apartment owners possess a slice of stratosphere
- Property rights limited to strike a balance between the realistic needs of owners and those of the public:
  - **Owner entitled to airspace up to a reasonable height if that space can be reasonably used or occupied**
- Actions:
  - Airspace rights are treated as possessory
  - Permanent invasion = trespass (there is direct interference with possession) – **actual damage need not be shown** (this is the commonly accepted one)
  - Usufructuary invasion = nuisance (interferes with mere right of use) – can claim only after the fact – **must be proven there has been an unreasonable interference with the enjoyment of the property**

**Didow v Alberta Power**

- Have a farm and the power company wants to run a power line along side a road that has common boundary with that farm
- The cross arm are going to intrude 6 feet into the airspace over Didow’s farm
- The Latin Maxim: An owner of land owns everything down to hell and up to the sky
- Seeks action in trespass – declaration/property rule rather than liability/property rule
- Balancing approach above is mentioned – right to enjoy the use of airspace limited beyond the height necessary for reasonable use – above this it is public domain
- Two kinds of intrusions covered in the case law to
  - Permanent structural projections into the air space above another’s land
    - More likely a trespass
  - Transient invasion into the air space above another’s land at a height not likely to interfere with the land owner
- Owner of land has limited right in the air space over his property; it is limited by what he can possess or occupy
  - What he can most definitely occupy is the surface of his property
  - Cannot occupy airspace above property to infinity, maxim does not apply
- Remedy is either for trespass or nuisance. Haddad J.A. decided it should be actionable by nuisance
- Trespass and nuisance are two causes of actions, two different torts that protect proprietary interests that are different.
  - Trespass protects a direct physical interference (either intentional or negligently) with land
  - Nuisance protects the use and enjoyment of land

**Remedies sought in this case**

- PL is seeking a declaration that the cross-arms amount to a trespass:
  - Judge allows appeal and grants declaratory relief
  - Court declared AB power required to obtain consent or obtain right of entry from surface rights board (just in AB)
    - Surface Rights Board allows access to power company while stipulating compensation they must pay Didow

**Hydro and Electric Energy Act**

- Act amended after Didow case, remedies Didow
- Section 37: a power line may project over property without owners consent
  - No remedy or damages available

**Law and Economics approach to boundaries - Coase Applied to Didow:**

- Allocative efficiency stressed – does not matter who property given to, just that one person given exclusive control
  - Facilitates exchange – lessens transaction costs and promotes economic efficiency
  - Whoever values it most will get it in the end and this result is independent of initial allocation
  - It is only when property rights not clearly assigned that dispute arises
  - It is likely that APC values it more than Didow – will bargain
Assign rights assuming 0 transaction costs

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<thead>
<tr>
<th>Property Rule</th>
<th>Liability Rule</th>
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<tbody>
<tr>
<td>Didow</td>
<td>1</td>
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<tr>
<td>Alberta Power</td>
<td>3</td>
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1. AB Power may not enter without Didow's permission
2. AB Power may simply enter airspace but must pay damages. Property was transferred to Didow, but his consent was not required, the value was decided by someone else (court).
3. AB Power may enter without Didow's permission (can place its utility poles over his land, with no relief). But if he values airspace more then they do, he must buy Power co. out.
   a. Didow must acquire permission to remove intrusion.
4. Didow may remove the intrusion, but must compensate AB Power
   a. Didow given an injunction to remove poles, but you must compensate them

- Property vs liability: Courts are huge transaction costs, if market solution will be cheaper than go property rule.
  - If you think two parties are unlikely to negotiate well or will be very costly, go with liability rule.
  - If think courts are slow and get compensation wrong, go with property rule so it is up to parties to decide
  - In Didow if he was given a property rule, he could hold out and demanded 2 million dollars for the airspace rights to place the power lines. But then the power line would never be built and he is extorting AB Power. So AB Power could go to Surface Rights Board who gives them permission to build while stipulating compensation to Didow (liability rule)
  - Hydro and Electric Energy Act, section 37 is a property rule in favour of AB Power, why would the Legislature choose this?
    o Final allocation will be determined by comparative wants
    o Prevents hold outs
  - Two questions:
    o What is fair? Not fair to Didow, they do not pay compensation
    o What is efficient? Yes. Things that are efficient however, are not always fair

Below the Surface

- Authorities and cases are conflicted so no set rule

Edwards v Sims

- Edwards found a cave on his property. Named cave Great Onyx Cave.
- The authorities in charge of developing Mammoth Cave as a natural park decided to expropriate Edwards land
- Jury fixed value of Great Onyx cave in 1926 at just under $400 000
- While this was going on, Mr. Lee decided he is also entitled to some of that money, as he suspects portions of the Great Onyx Cave are under his land.
- Majority decided that rights in cave should be allocated according to Latin Maxim, to bowels of the Earth (like a mine)
- Allowed surveyors to go under Edwards land to see how much lies under each person's property
- Majority says that the Latin Maxim is clear and easy to apply, Lee gets compensation as well
- Epstein argues that majority got it right, despite the strength of labour and possession theory, efficiency demands that Lee receives compensation as well, as the owner of the surface above the cave
- If only Edwards had ownership of the entire cave there would be 2 problems:
  o Subsurface operations of Edwards could impose an external cost on Lee
  - Therefore all owners of the surface property should have property in the subsurface.
  o If ownership of the surface and subsurface is split, a bargaining problem may be created
    - Owner of surface would be required to purchase the subsurface
- Logan J Dissent:
  o Lee had NO access to the cave, only access was on Edwards land
    - Edwards controlled the access to it and the value of the cave doesn't come from the land in the cave, but by having access into the cave
  o Edwards made it possible to get into cave, he worked for it
    - Labour theory, you labour you should be rewarded (labour and dessert)
    - Therefore only Edwards should have compensation

Commentator on Edwards: All the legal system will do is tell us who to negotiate with if we want subsurface rights. Whether the cave is going to be used for tourist attraction, storage, or growing mushrooms, depends on one thing: who’s willing to pay the most (Ronald Coase). As long as negotiating is not to costly, there will be an efficient use of resources. We don’t need the government to tell us how apples should be used, or how metal should be used. IF you think of
airspace rights as a factor of production, they are used most efficiently if bargaining is used. When party’s cannot bargain, initial legal rule is of significant importance.

Consider Didow again: It’s possible that (1) Didow values the air rights at $15k (less than cost of having to get new sprinkler system, move barn exc) and Alberta Power values the air rights at $10k; or (2) Didow values the air rights at $15k and Alberta Power values them at $40k. Policymakers are not in a position to determine which is true.

Two scenarios:
1. **Airspace belongs to Didow**: AB Power moves the power line and end of that. **Airspace belongs to AB Power**: Didow can buy rights, between $10k and $15k. Depends on negotiation, how shrewd they are.
2. **Airspace belongs to Didow**: AB Power going to try to buy it. Negotiate, threaten, bluff, but in the end we can expect a deal between $15k and $40k.

**Airspace belongs to AB Power**: Didow will change operations because can’t afford to pay what AB Power would demand.

**The use of airspace is determined by the parties’ valuations, regardless of legal rule – assuming bargaining is not too costly.**

**Mines and Minerals (Barton excerpt, notes)**

Generally: Martha owns Blackacre. Does Martha own mines and minerals? Depends on what was granted to Martha.

**Mineral Estates, Alberta Style**
- All mineral estates originate in a grant from the Crown
- Crown grant includes mines and minerals by default except gold, silver, and any mineral reserved expressly for Crown

**Public Lands Act**, s 35(1)
“...all mines and minerals and the right to work them are, by implication and without the necessity for any express words of exception, excepted from every disposition and notification made under this Act.”

**Mines and Minerals Act**, s 10
"It is hereby declared that no grant from the Crown, whether relating to land, minerals in the land or otherwise, has operated or will operate as a conveyance of gold and silver unless gold and silver are expressly named and conveyed in the grant"
- Doesn’t change common law, just codified it
- Title of mineral rights: fed Crown 10%, prov Crown 81%, private hands 9%
- Historical Pattern of grants: Dominion (later from province of AB) ➔ HBC & CPR & settlers ➔ CPR reserves everything

**Law of Property Act**, s 7(1)
"... every instrument transferring land operates as an absolute transfer of all right and title that the transferor has in the land at the time of its execution, unless a contrary intention is expressed in the transfer or conveyance."

**Rights of the Surface Owner**
- CPR’s original grant from Crown included all mines and minerals
- Granted some land to settlers, reserving for itself “coal, petroleum, and valuable stone”
- Natural gas is discovered under land. Who owns gas?
  - Gas company ➔ is a petroleum type product (structure identical)
  - Settler ➔ Unless something is expressly stated that it doesn’t
  - Borys v CPR: Although there is little chemical distinction between petroleum and gas, vernacular prevails.
    In situ, petroleum is liquid, and gas is gas. Surface owner owns gas.

**Mines and Minerals Act**, s. 1(p): “minerals”
Means all naturally occurring minerals, and without restricting the generality of the foregoing includes (1) gold, silver, uranium, platinum, exc exc but does not include
- a. sand and gravel that belong to the owner of the surface of land under section 58 of the Law of Property Act
- b. clay and marl that belong to the owner of the surface of land under section 57 of the Law of Property Act, or
- c. peat on the surface of land and peat obtained by stripping of the over burden, excavating from the surface or otherwise recovered by surface operations

**What if grant is ambiguous and legislation is unhelpful?** Court will interpret grant

**Access to Mineral Estates**

**Right of Entry**

**Surface Rights Act**, s. 12
- **Can operator access surface? A to M:** “… all mines and minerals under the lands described in the schedule, including hydrocarbons, and the right to work them, and for this purpose the right to enter … in consideration of $340,000”
  - She didn’t pay a specific amount for entry, she’s not allowed to enter
• A to M: “… all mines and minerals under the lands described in the schedule, including hydrocarbons, and the right to work them, in consideration of $340,000, and for this purpose the right to enter … in consideration of $0.02”
  o She paid for right to enter.
• Right to entry by order of the board

**Lateral Boundaries**
- Province divided by green and white land. Green is public. White is settled area (42%), 75% of which is in private hands. Grey is national parks, reserves, exc.
- **Fee Simple**: As close as common law will allow ownership of land
- **Joint Tenants**: If one passes away, other becomes sole owner through survivorship
- **Tenancy in Common**: If one passes away, he passes on ownership of land to anyone he wants.

**Dominion Land Survey System**
- Developed grid system in western provinces.
- Homesteading program in Alberta for purpose of settling the west to prevent Americans from taking over.
- Begins just west of Winnipeg. Has Prime/Principal meridian. Meridians then used to lay out townships.
- Township = 36 sections = 6 x 6 miles
- A quarter section (160 acres) = standard homestead
- Settlement Plan: some area in Edmonton is divided by that because it was here prior to Dominion Land Survey
- This system completely disregards topography. Science raping the land.
- North/South converge close to poles so more townships close to USA and less the more north you go.

**Boundary disputes:**
1. Correct location of boundaries → Adverse possession → Innocent mistake improvement
2. Encroachment/trespass
3. Maintenance of fences and trees

**Legal Description and the Torrens System**
- Will show you all interests that exist in respect to that property
- At the end of document is guarantee by government of Alberta that everything is clear and correct. If something turns up later on, hidden interest exc, government will compensate you.

**Land Bounded by Water**
- Common law presumption (tidal/non-tidal)
  o Boundary of land that is adjacent to a non-tidal river extends to the middle of that river (ad medium filum aquae)
  o Tidal body of water, ownership extends only to the ordinary or mean high water mark. Below that line, Crown holds title. Strip between high and low marks, the foreshore, belongs to state (unless granted away).
  o Tidal rivers are treated as navigable and hence reserved for general access
  o Some provinces use the idea of navigability. If a body of water is navigable (even if non-tidal) it belongs to Crown (so they can build docks & other structures)
AB: title to beds and shores of all permanent and naturally occurring natural bodies of water is vested in the Crown unless expressly conveyed away

- **Public Lands Act, s 3**
  - (1)… the title to the bed and shores of (a) all permanent and naturally occurring bodies of water, and (b) all naturally occurring river, streams, watercourses and lakes, is vested in the Crown in right of Alberta
  - (2) Subsection (1) does not operate (a) to affect a grant … that specifically conveys by express description a bed or shore referred to in subsections (1) … (b) to affect rights determined by a court before June 18, 1931

- **Surveys Act, s 17:** the bed and shore of a body of water shall be the land covered so long by water as to wrest it from vegetation or as to mark a distinct character on the vegetation where it extends into the water or on the soil itself

- **Riparian Rights:** Under AB law there is a general right for a riparian owner to divert water for household purposes (human consumption, sanitation, fire prevention, watering animals, gardens, lawns, and trees). No permit is needed for all these rights. This right has priority over rights granted under the legislation. Max of 1250 cubic meters per year. But for extraordinary uses (crop irrigation, manufacturing exc) need authorization under statutory scheme, as long as quality and quantity are not disturbed.

- **Other issues: accretion/avulsion**

- **Accretion:** at common law, a riparian (adjacent to water) landowner is entitled to extension of land through accretion and vice versa. Accretion must be a natural event and only meant to take place when change in water boundary is permanent. Must be **gradual** and **imperceptible.** Doesn’t have to be through water and wind, can be through non-natural such as building of a dam nearby (as long as it’s not landowner who brought about change)
  - The legal effect of accretion in Alberta depends on the grant
  - For example: “All that portion of section 16 in township 21, range 17, west of the 4th meridian, which is not covered by the waters of Beaver Lake”
  - There are riparian rights (right to use water you’re next to)
  - Water in Alberta was appropriated by crown to ensure everyone has access to irrigation system. Under Alberta law, everyone has right to trespass over others’ land to access bodies of water

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<th>Transformation of Chattels</th>
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**Fixtures**

**Definition, Context, and Rationale**

- Distinction between things that are land and things that aren’t land.
- Was the chattel transformed? Is it a fixture?

**Fixtures Tests:** whether or not chattel has been transformed into fixture is matter of intention. If it was intended to be part of land then it’s not personal property anymore.

- **Degree of annexation (attached to property or resting on own weight)**
  - If it’s attached, even by a screw, then presumption it’s meant to be permanent. If it’s resting on own weight then not permanent
- **Purpose of annexation (why is it attached or not attached)**
  - If it’s attached to land to make land more useful = fixture
  - Attached to help good work better as a good = not fixture
  - Objective Test: Purpose cannot be determined in a contract prior to but rather about objective of what all can see
- **Unattached fixtures:** house keys, tools associated with fixtures, dwellings resting on ground, ornaments that are integral to the architectural design of the property

**Examples**

- **Appliances:** Not always fixtures. If appliances are matching and are built into property or seem to be for betterment of property. Although appliances generally resting on their own weight and would cause much damage to move.
- **Factory machinery:** may be attached to enhance factory (fixture) or may be attached for proper functioning of machinery (chattel)
- **Mobile home on cinderblocks:** Can it be moved without causing damage to mobile home or to property? It looks like it is resting on cinderblocks and can be easily moved by flatbed truck. No stairs or deck allowing easy access to doorway.
- **China cabinet:** may be a fixture but everything inside isn’t fixture. Stating that any degree of annexation can be considered fixture could include if the cabinet is screwed into the wall. But could also be argued that it’s screwed in to make the good a better good.
- **Sign for Hotel:** Fixture. Depends what says on the sign. Stating address = fixture. Stating Dr. Kaplinsky = chattel cause it would go with him.

**Doctrinal Elements**
La Salle Recreations

- Carpet repossession dispute. Vendor owns title to carpet until purchase price is paid in full. Building is under mortgage.
- Issue is whether carpet became fixture? Installed in new way that makes removing it very easy so it’s not a fixture. But why is it fixed?
- Determined to be fixture as it was to make more effective use of building not more effective use of goods as goods.
- Should have registered security interest in land titles office to give the world notice saying “this is our property”. But lawyer didn’t tell vendor that, he told vendor to do it in company registry system which isn’t the same. Security is effective only when registered. Must register in land titles office.

“Tenants Fixtures”

- When a tenant attaches items to leased property they can become part of the land under principles outlined above
- Attachments by a tenant are to be looked at the same as those by freeholders
- Possibility that tenant might lose property through application of law of fixtures would, logically, inhibit improvement by leaseholders. Accordingly, it is well established that tenant’s fixtures are subject to special rules for detachment. Generally, a tenant may reclaim fixtures, that is, restore them to their chattel status.
- Right of restoration subject to four considerations:
  1. Items must fall within a set of protected fixtures
     - Includes items attached for purposes of trade, ornamentation, domestic convenience
     - Agricultural fixtures are not covered under trade, except those used for market gardening
  2. Removal may be precluded if it will cause very serious damage to property
     a. Incidental damage caused by proper removal must be remedied by tenant
  3. Implied right of detachment may be abridged by contract
     a. Such a waiver should be strictly constructed against the landlord
  4. There must be timely removal
     a. Not clear what timeliness is. Requirement is met if tenant acts before expiration of lease.
     b. When term ends because of forfeiture of tenant, a strict approach suggests tenant loses the right of removal because of the forfeiture. However, has been held that right to remove continues for reasonable period after

Security Interests

- Chattel sold subject to security interest (vendor can repossess if payments not made). That chattel becomes affixed to land that has a charge/mortgage, who gets priority over it? Under common law, when it becomes affixed to land, it falls under land security. Security holder of chattel loses their right of repossession and is left with an action on the debt against the purchaser.
- But can register that interest in land registry system and then the chattel vendor will be protected
- Modern day legislation balances interests more so. Security interest in a chattel will normally enjoy priority over subsequent land mortgage if that (chattel) security interest is taken before the item becomes a fixture

Effect of Contract and Right to Remove Fixtures

Diamond Neon

- Whether metal pole fastened to a block of concrete embedded in the soil, large (14 feet by 12 feet) sign hanging from pole, and large (2.5 feet by 21 feet) sign attached firmly to a shack were fixtures. DF acquired title through purchase of land and thus did not convert them when sold off. Appeal dismissed. Dissenting judge would allow appeal.
- DN makes signs for a living. Then supplies a sign to Uptown Motors (called lease of property stating signs are property of DN at all times). Uptown decides to leave and assigns by agreement all the rights in the sign to Dueck. WCP owns land and lease is assigned from Uptown to Dueck. Dueck leaves after lease. Signs on property. WCP says they’re going to sell land to TDR. TDR decides they don’t need signs so they sell to NH. DN says they want signs back.
- Are these signs a fixture? Were attached to ground, meant to improve use of land for business, they’re a fixture.
- Contract between DN and Uptown and even Dueck agrees that they’re property of DN. Court says there is an agreement but it is no good because person who took it over had no knowledge of the agreement when they took over. So when they bought the land, they bought fixtures and all and thus can sell.
- Dissent: Even though signs are attached, they’re not fixtures.
  o Subsequent sales of signs shows they’re not a fixture
  o Sign is capable of giving notice if contains right message/text. Signs did speak and confirmed by subsequent sale.
- When did DN lose right to recover signs? Fixture attached to premise by tenant. Tenant has right (unless it was abridged in lease agreement) to remove the fixture and restore it back to personality at the expiration of lease term or a reasonable time afterwards. DN has agreement with Dueck and under that they should be able to
exercise Dueck’s right as a tenant. As soon as Dueck’s lease was up (or reasonable time after), DN lost rights to sign.

Conversion

Interest of realty may be deemed to be one of personalty or vice versa even if no exchange or physical change has taken place. Idea that “equity regards as done that which ought to be done”. When there is an obligation to covert realty into personally, a court of equity will regard this as having been accomplished from the moment the obligation came into force.

- When a trustee is required to see land and hold proceeds on trust, the trust property will be treated as personalty even before sale takes place.
- Doctrine contemplates that a future exchange will occur, as through a sale, and not physical alteration of the item. However, it is conceivable that an obligation to affix a chattel, or detach a fixture, could trigger the doctrine.

Mistaken Improvements (Law of Property Act, s 69)

Elements
1. When a person at any time has made lasting improvements on land under the belief that the land was the person’s own, the person or the person’s assigns
   a) are entitled to a lien on the land to the extent of the amount by which the value of the land is enhanced by the improvements, or
   b) are entitled to or may be required to retain the land if the Court is of the opinion or requires that this should be done having regard to what is just under all circumstances of the case.
2. The person entitled or required to retain the land shall pay any compensation that the Court may direct.
3. No right to the access and use of light or any other easement, right in gross or profit a prendre shall be acquired by a person by prescription, and no such right is deemed to have ever been so acquired.

Remedies
- Lean is a device for you to enforce your right ex builder, mechanic can have leans
- Build a house on someone else’s land, believing it to be yours, court can say okay that land is now yours. Court can require you to become owner of land. That person shall pay compensation court will direct

Limitations Act
3(1) Subject to subsections (1.1) and (1.2) and section 11, if a claimant does not seek a remedial order within
   a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
      (i) that the injury for which the claimant seeks a remedial order had occurred,
      (ii) that the injury was attributable to conduct of the defendant, and
      (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
   or
   b. 10 years after the claim arose,
   whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

(4) The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 69 of the Law of Property Act.

Confusion, Intermixture, Alteration

Confusion (commingling, intermixture, admixture): when fungible (able to replace or be replaced by another identical item; mutually interchangeable) items are inseparably combined.
- Remedy: parties are entitled to their relative portions when goods mixed are of similar quality. When they’re not of similar quality, the respective monetary values of the liquids should determine the ratio of entitlement, not the respective percentage of the mixture

General considerations:
- Severability
- Dominant chattel or share
- Conduct
  o Innocent? Negligent? Wrongful?

Confusion:
- Authorized
  o rights determined by contract
- Innocent
  o Owners in common
    ▪ Proportional share
    ▪ 50/50 if contribution unknown
- Wrongful
  o Old rule (wrongdoer loses everything)
Alteration (specificatio): alteration of an item, produced by A transforming a chattel owned by B into some new item

- Degree of change is not well articulated in jurisprudence. Some say depends whether a new species of goods has been created (such as corn into liquor, marble into statue). Others based on reversibility of the effect of the work or continued identity of altered chattel.
- Remedies similar to accession
- *Jones v De Marchant*: guy gets beaver pelts made into coat for mistress. But some pelts belonged to wife. Pelts sewn together (alteration).

**Glencore**

Oil dispute. Many companies had oil in Metro’s tank, but oil was not separated according to tenant but all comingled. Ownership of oil was in dispute. New product is owned in common, quantities should reflect quantity and quality of oil put in. Any doubts about quality or value should be resolved against wrongdoer. Innocent party entitled to recover damages from wrongdoer in respect to any loss which was suffered as a result of wrongful use of oil.

**Accession**

When one type of personality becomes affixed to another. Rights in accessory are subsumed in principal chattel. Applying to tangible, physical goods. Can apply to intangibles as well (like IP).

- Principle chattel usually that with greatest market value
- Such as A’s paint being applied to B’s car.
- B breaches A’s copyright, printing thousands of pirated copies of A’s work. B’s ink and paper are inextricably combined with A’s copyrighted prose
- If PL seeks only damages (through trespass, conversion, or detinue) then problem of allocating title is not an issue
- However, dispute over who gets res (the thing), courts may:
  - Allow wrongdoer to keep goods, but pay damages
  - Confer new item on the fully innocent party
  - Allow innocent part to have goods if a payment is made to wrongful improver as a form of compensation for the added value
- Two questions:
  - Was the DF (affixer) the owner of principle chattel?
  - If so, was that person acting innocently, negligently, or intentionally?

**McKeown v Cavalier Yachts**

Ownership of yacht, PL owned laminated hull which was to be made into boat in exchange for another trade-in yacht and $2,000. Cavalier who had to do work sold to another company, Spartek. Spartek said they had not been paid for their work (as PL paid DF) so they wanted to keep the boat. Principal chattel is yacht not hull. Hull worth $1,777, improvements worth $24,409, improver innocent?

**Issues:**

- Has accession occurred? Yes.
  - 4 tests:
    - **Injurious Removal Test**: can the items be removed without serious physical injury to the principal chattel? Judge Young, can you conveniently remove it?
    - **Separate Existence Test**: Does the accessory retain a separate existence after being fused to principal chattel? Has the separate identity of the acceded chattel been lost (as when plank is added to ship)?
    - **Destruction of Utility Test**: Would removal of the combined item(s) destroy the utility of the principle chattel (such as by taking tires off a truck)?
    - **Fixtures Test**: Looking at the degree and purpose of annexation, has an accession occurred?
- Which is principal chattel?
  - Rights in accessory are extinguished. Hull worth less than $2k, improvements worth 11 times mores. Sequence of events modified the hull. Hull is property of McKeown.
- What is proper remedy?
  - Specific return or damages. If market value went down, you won’t want it back cause it’s worth less. However sometimes you just want your stuff back. Court of equity can compel someone to do something, why? Religious court. Held jurisdiction over people and whether conduct affected the right thing to do.
Chancellor “I’m telling you what the right thing to do is, and if you don’t you’ll burn in hell” Not what the law is but what conscience tells you to do. But Chancellor has discretion whether to give it back to you or not. Judge Young, says yacht has sufficient individuality to fall into class of special or unique chattel. Improvement to hull were accessories.

- Is the improver entitled to payment?
  - **Unjust enrichment.**
    - There needs to be a deprivation to PL, some loss of expenditure.
    - Corresponding enrichment for DF
    - No reason in eyes of the law for the DF to keep the enrichment
  - Has there been unjust enrichment?
    - Spartek said they “mistakenly” improved because they didn’t know no more payment was to be received. Court says no, at the least you were negligent. Someone should have known.
    - At least the innocent improver is entitled to a separation if possible and if not then value of the improvements.
    - How did court arrive at $4,409? Potentially some money was paid under table to avoid sales tax but no good way to understand why that amount was ordered.

**Identifying the “principal” chattel**

**A Different Approach**

**Gidney v Shank**

Gidney purchases dilapidated canoe for $100. Spends 100 hours and $800 in materials to improve it. Now it’s worth $1,900. Police knock on door and say canoe was stolen and he never lost property in it. Case decided on principles of unjust enrichment.

What’s one glaring thing about decision? Doctrine of accession. Nothing. Court completely ignores question of property rights

**Decision:** Give it to Feurestein

**Reason:**
- Thief never had title so could not pass on to next owner. Gidney had possession of canoe but not title.
- Gidney could claim property rights by improvement saying it’s accession
  - Doctrine of accession never mentioned in case
    - Gidney never took title of canoe from thief but may have taken title by accession. Property of canoe was subsumed in improvements.
  - Court assumes canoe belongs to Feurestein even in it’s improved state
  - Question whether Gidney can recover under doctrine of unjust enrichment

**Doctrine of Unjust Enrichment**
- Also called law of restitution
- Making canoe useful on water was an incontrovertible enrichment to F
- Taking of canoe was detriment to PL
- But since no relation between G and F and F had no knowledge that PL was doing this, there WAS a juristic reason for F to keep enrichment
- F never consented to any improvements and never any communication, unfair to make him pay for improvements he never consented to

**Unit 4: Possession**

**Significance of Possession in the Eyes of the Law**

**2 Elements of Possession**

**Factum/Corpus:** Physical possession

**Animus Possidendi:** Intent to possess the thing
- Possession of land or personal property may give rise to proprietary interest, know in common law as possessionary title
- **Pearson v Post:** Alberta Wildlife Act “For purpose of this Act a person has a thing in his possession when a person has a thing in his possession” Useless.
- **Popov v Hayashi:** possession can start even before complete dominion and control, such efforts must be significant and reasonably calculated to account for unequivocal dominion and control at some point in near future

**Tubantia**

Salvager’s case – find gold, second teams comes and tries to get gold
- First team can’t make claim as owners are they aren’t owners
- Must say it is in their possession and no one can interfere with possession
• To have possession need:
  o Intention to possess gold (animus possessendi)
  o Physical control (factum)

• Did first team of salvagers have physical control?
  o Court said they had as much physical control as possible under circumstances which is what’s required by court, “true owner” would not act different than PL

• Does first team have an intention to posses? Court said they intended to control and exhibited physical control

Bailment
• Right to possession given to someone for limited time. The bailor transfers temporarily personal goods to the bailee. Ex. Lending someone a book, rental company rents a car, leave your watch in a repair shop. All bailment situations.
  • Right to possession of bailee is only temporary

Factors Relevant to Possession
• Degree of Physical Control
• Knowledge of Existence and Nature

Possession, Constructive Possession, Custody
Constructive Possession: Situation where an individual has actual control over chattels or real property without actually having physical control of the same assets. A person with constructive possession stands in the same legal position as a person with actual possession.

• Ex: If your car is in your driveway, you have physical possession of the car. But any person with the key has constructive possession, as they can take physical possession at any time without further consent.

Immediate and Postponed Rights to Possession

Basic Concepts Applied

Wild Animals
• When animals nest on my land there is constructive possession – they are mine until they can fly or run away and I hold the exclusive right to hunt or capture them and land owner has exclusive rights to hunt and capture animals on his land. Title is lost if animal escapes.
  • Exception for wild animals that wander but come back (animus revertendi) periodically to the same place (as they’re seen as being partly tamed to master)

Pierson v Post
• Pierson chasing fox
• Post, the saucy intruder, sees fox and in view of Pierson shoots fox & takes it
• Issue: Does a person obtain possession of a wild animal by chasing it?
• Majority rejected claims of first pursual:
  o Says wild animal becomes possession of person who kills it or at least deprives it of natural freedom by mortally wounding or trapping it
  o Only those acts that bring the wild animal under that certain control that give risk to possession, and possession can give risk to title
  o This is how one acquires title to wild animal, reduce it to possession first by killing it, maiming it, or trapping it

• Possession here requires a clear act that makes it patent for the world to see the pursuer has “an unequivocal intention of appropriating the animal to individual use”
  • Good rule is eyes of majority because first in time rule is clear and easy to apply. Reduce conflict after wild animal is killed. But it reduces a certain kind of conflict that might arise subsequent to the killing, not conflict that rises prior to killing

Dissent:
• Most appropriate way to resolve this kind of dispute would be to leave it up to the hunters, the relevant group who should make that decision.
  o He would favor the first pursuer over the interloper
  o Fox is pest and it is good to hunt them
  o Wants to give rights at earlier moment
• Majority/dissent clash b/w labour rewards and value of act of saying “mine”. Saucy intruder hasn’t shared in honors of labor (reaping what he has not sewn)
• Economic analysis supports dissent. But efficacy also requires clear rule and rule suggested by majority is clearer. Owners that fail to clearly identify their claim create uncertainty which leads to litigation which wastes resources.
• In P v P, possession is a sign that comes too late into the game. Yes, the rule that says you should take fox into your possession and only then will we recognize your effort, that rule does not forget multiple pursuers from wasting their effort, as only one hunter will get the prize
• Occasionally more is required: seal cases – must bring on board to complete possession
• **Pursuit** (getting up to go hunt)→ **Hot pursuit** (see fox and chase) Livingston – better claim against any other hunter to come along at that point → “an animal bringing the animal under certain control” (would take a miracle to save this fox, shot or maimed) Majority → possession → title

**Newfoundland Sealing Cases**

*Clift v Kane*: Piles of seal carcasses on ice. Ship comes with team to take them but ice breaks away and becomes dangerous so they stay. Second crew comes and sees they’re marked but no one took them so they do. Court says on ice field seal is as difficult to catch when dead as when it’s alive. Ruled for PL.

**Fugitive Baseball**

*Popov v Hayashi*

- Would expect Pierson v Post to apply
- Reduce baseball to possession, prove animus and control under circumstances
- Not enough that you are about to catch the fox, unless you demonstrate or prove that you got it
- Popov had baseball in his glove, or so he thought. He was jumped by a mob of people for it. Falls to floor and ball is not in his glove. If it were in his glove, he would not have given up control. When mob jumped hi, he was just about to secure the ball
- Hayashi did not jump Popov, he has ball in his glove at the end
- If you apply P v P, result would be Popov gets nothing, even though he spent effort to get it → He did not end up with it, Hayashi did, so Hayashi’s ball
- Why did McCarthy J not give Hayashi the ball?
  - Violence of crowd made Popov lose it
  - McCarthy does not want to make this acceptable conduct
  - Although Popov did not have possession, he had a pre-possessory interest
- How much is pre-possessory right worth? In this case, half.
- So why does Hayashi get other half? Justice for both parties
- To establish pre-possessory interest: (qualified right to possession)
  1. Take significant but not complete action to possess
  2. Efforts must be interrupted by the unlawful acts of others
- If you prove you took significant effort to gain possession, and act was interrupted unlawfully, this gives rise to a qualified right to possession, which can have action in conversion
- In judge’s opinion, Hayashi did everything required to claim possession. Normally would be awarded everything but ball was already encumbered by Popov’s pre-possessory interest so half
- Equitable division? Why 50/50 and not 75/25? We just don’t know
- Odd decision b/c if we do recognize his pre-possessory interest and his effort was interrupted that is one thing, but we don’t know if uninterrupted he would have completed the catch
  - Rule of evidence. Unless you prove case as PL over 50%, you haven’t really made your case
  - Even if we do recognize pre-possessory interest maybe McCarthy should have dismissed Popov’s case as he didn’t prove that he would have made the catch even without a crowd

**Law of Finders**

- **Rank of interests**: true owner, person with prior interest at time of finding, occupier has better title than finder, finder, the world

**Actions:**
- Detinue: where DF wrongfully refuses request for return
- Trespass to chattel: can get damages
- Conversion

**Chattels Found on Real Property**

- Finder asserts title under possession
- Property owner under constructive possession – doesn’t matter if aware or not

**Why should finder be entitled to possession?**

- Undermining title would encourage a free-for-all for his good
- Subsequent dealing by him would be jeopardized
- No incentive to find things and return to socially productive uses

**Possession as Evidence of Title**

*Armory v Delamirie*

Chimney sweep boy finds jewel in chimney. Takes it to jeweler and jeweler takes stone out and gives back without, boy takes to court. The finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the owner and consequently maintain trover.
Nature of Possessory Title

Right of Finders
- See above
- Only get full rights if abandoned
- Limited rights if trespassing (wrongdoing – Baird/no criminality – Bird)

Rights of Occupier
- Occupier will prevail if embedded in land
- Have constructive possession

General Principles and Rational

Parker v British Airways
- Parker waiting in BA’s lounge at Heathrow, finds ring, no one claims it so he does
- If it isn’t a fixture how can you claim it? You’re not true owner so what’s the basis of your claim? Occupier’s right
- Should it go to finder or owner of land?
- Chattel is not embedded in property (does not pass fixtures test)
  - If it was embedded it would belong to BA
- Goes to Parker:
  - Could say BA had no animus possidendi and lacked physical control
  - When not attached or embedded, an occupier must have an intention to exercise control over premises and possess everything in it
  - No evidence BA searched regularly for or demanded lost objects
  - If had been found by employee he would have been in custody – BA would possess
  - Mention that if trespassing, landowner is preferred even if show no manifest intent to control
  - Refers to Bridges v Hawkesworth

Bridges v Hawkesworth
- Money on floor of shop
- Finder wins:
  - Shopkeeper had no animus
  - No intent to control shopping area
  - Lack of actual control

Trachuk v Olinek
Facts: Olinek and 4 other DFs found $75k on a property while doing work on it. Trachuk claims interest as property owner. Olinek as finders.
Issue: Who has right to money?
- Marathon (owns land in question), Amoco (energy operator who has access to surface and surface road), Trachuk (lease of surface, access to surface around well for grazing), Signalta/Sulperto/Voyager (right of way easements granted by Marathon to build, maintain, and operate piles leading out of oil and gas well), Olinek (contractor), Crown, “true” owner
- Today if you find something, Crown asserts rights to treasure trove
- Historical Resources Act, s 32(1): property in all archaeological resources and paleontological resources within Alberta is vested in the Crown
Decision: Trachuk built a fence around area where money was. T did not have right to occupy land. T therefore did not have sufficient possession of or manifest intent over the land where money was found. Olinek’s interest had priority against all the world except true owner.
Reason:
- Although occupier’s have a better title, Trachuk loses (Olinek wins)
  - Lease did not grant occupancy – tenants are given exclusive possession but clause ruled this out
  - Did not have physical possession
  - Rarely went in fence and never had right or intent to exclude
  - He built fence under Amoco’s instruction, not to keep others out

Keron v Cashman
Facts: Boys walking home by railroad. Youngest finds old stocking tied up at both ends with something inside. Boy uses it as plaything passing hand to hand. Stocking bursts open with $775 in it. Boy begin to split it but adults come so they run away. Boy’s father takes money to police. No one claims.
Issue: Who’s money?
Decision: Shared.
Reason: Because boys agreed to split money before they were interrupted.
- Let’s say they didn’t. Boy who found it does not have the mental element that there’s cash in the stocking because stockings do not normally contain cash. If it was a wallet, there would be mental element. When mental element comes together, they all had factual control.
• Have to have physical and subjective mental element manifest at same time to have possession

Relevance of Wrong Doing
Ex turpii principle
• Cannot found an action on a wrong doing
• Should not get title when find something in the course of wrong doing

Bird v Fort Frances
• Boy trespassing, finds money under billiard hole, police take away & refuse to give back despite no true owner coming forward and no claim from landowner
• Ex turpii? Claim money even though trespassing?
  o Yes, title good against world except true owner. Better than municipal claim

Baird v British Columbia
• Baird checks into hotel in Van and asks reception to deposit something into safe, $16k cash. He’s acting suspicious, hotel notifies police. Next morning, police from TO ask for Baird to be apprehended for robbing armored car. Arrested, admits money is stolen. He’s never prosecuted (snitches on his friends, played minor role)
• Court says OK – ex turpii denies him money. Why? How to reconcile with Bird?
  o Bird did not have degree of criminality or immorality to support it
  o Baird clearly criminal and immoral so applies
  o Where is the line?

Finder’s Duties
• Must actively seek out true owner
• Must take good care of chattel

Abandonment
• Opposite of possessory title. Process where you relinquish your rights by relinquishing physical control with intention of abandoning the thing:
  o Intention to abandon
  o Sufficient act of divestment: passage of time, nature of transaction, conduct, nature and value of object
  o If one misplaces an item, and all efforts to locate it are fruitless, merely giving up the search in despair is not abandonment
  o Garbage: arguable because it’s out for disposal but other view is they’re relinquished conditionally, not absolutely, because the household is not indifferent to what will happen next. They want the collection service to take it away.

Adverse Possession
Definition
• Allows a squatter to assert rights which are good not only against the rest of the world, but also against true title owner (defence to action to recover possession by title holder)
  o If the squatter fulfills requirements of AP, then the title of the owner is extinguished, or at least the right of true owner to bring an action to recover possession of land is barred
• Squatter must demonstrate fundamentals of possession, factum (physical control), and animus (intent to control)
• Must maintain possession in a precise way (CL) for precise time (10 years – Limitations Act) - even before period over, have rights against everyone but owner
• Can found an action in trespass against another squatter and this right can be transferred
  o If owner gives or sells land during limitation period the clock starts again
  o Torrens system will know of all registered claims against land – AP not registered
• Even before the possessory claim matures, we have an inchoate possessory title in the squatter. Illustrated in Australian Case Perry v Clissol:
  o Gov’t sent notice for expropriation to seize piece of land and reserve it for school site
  o Clissol fenced property, paid taxes, rented it out to tenants, and a year later died
  o When gov’t wanted to take the land, his heirs made a demand for compensation
  o Gov’t looked and found Clissol was not owner, but a squatter
  o Found a nice parcel of land, fenced it in, paid taxes, and made money off it
  o Now he wants compensation. Should he be entitled?
• Does he have possession of land? If he does, then his possessory rights are good against the world except the paper owner who is out there somewhere
• His rights based on possession are superior to those of the gov’t
  o Whether’s Clissol’s claim matured against paper owner are not important, because he has better possession than gov’t
  o So yes, he gets compensation
Does not matter than his claims are incomplete and he did not have possession for required time to have title against owner, had possession over gov’t

**Justifications of Recognizing Adverse Possession**

1. Problem of lost evidence: after 10 years can’t be expected to have the evidence to support your case
2. Quieting Title: we want buyers to be reasonably certain of what they’re buying. Can’t ask them to look after the complete history of the land. Want to say: you bought the land, it seems good, it is good. Place the onus on the paper owner to protect their rights.
3. Want to discourage paper owner from sleeping on their rights
4. Reliance interest not only of squatter who improved land thinking they had land (or not) but maybe squatter’s tenants. Want to protect those rights.

**Basic Elements**

- **Length of possession** – 10 years
- **Quality of possession**
  - Open and notorious: squatter acts as the true owner and occupation is of nature that should put the true owner on watch. Not concealing the possession as that is not acting like true owner would
  - Peaceful: Cannot establish squatter’s rights by violence or force
  - Adverse: Cannot be on property with permission of true owner and then claim possessory title, because then the possession is by permission of true owner
    - Not adverse if ever acknowledge the rights of the true owner
  - Actual: True owner has actual physical possession on what he uses and constructive possession of what he doesn’t
    - Squatter has possession only on what he claims (what he fences in)
    - Only exception: mistake of color of title. Enter into possession under erroneous grant that gives wrong description of grant. It says you own 600 acres but you own 20. Constructive possession will suffice.
  - Exclusive: Must work to keep true owner and others out. Act as if they have absolute control. If you squat on someone’s land and there’s a cherry tree, even though the true owners never quite take possession of land, they come and pick cherries. They act as owners. That’s enough to defeat a squatter’s claim.
    - Trivial acts of dominion by true owner will defeat this
  - Continuous: Cannot be interrupted even for 1 day
    - You find a cottage that isn’t winterized. Use it in summer, but leave for winter. Could argue it’s not interrupted because acting like titleholder. You’re making use of property that title holder would be expected to make

- All requirements of AP must be met for 10 years, and if one of those elements is not met for even a day during those 10 years, then claim of AP fails
- Squatter A can sell to Squatter B and time continues (clock does not restart). Passing of baton need not be consensual, B can displace A, or B enters on A’s departure.
- Common law test
- In a claim all elements of the test must be proven → then apply Limitations Acts
- On test – even if you say “has not met the common law requirements” go on to say “but if he did, here is how limitations act would apply”

**Test of Inconsistent Use**

- Law in ONTARIO only
- Subjective requirement focusing on animus of the squatter with respect to excluding the owner or acting in a manner inconsistent with title owner’s plans for the land
- England retreated from this test, not going to inquire into squatter’s state of mind, only ask if squatter intended to possess land
- In Alberta, common law rules for AP are put through Limitations Act
- Clock will not run against title holder unless squatter’s possession is discovered by title holder or it is objectively discoverable
  - Cabin built in woods so it is not seen aerially, but maybe when walking by foot in forest. Court said no as it was not open and notorious

**Keefer v Arillota**

- On north of driveway are appellants who own a grocery store. On south side, there is a house occupied by respondents, Keefer’s. Land is 8 feet wide and 105 feet long that is contested.
  - Stone driveway that leads to a grassy area then a garage
  - Steps that go upstairs to an apartment above the store
- Tenant there does not use driveway to park their car, just to cross to reach apt
- Keefer’s have easement for purpose of getting in and out of property, using driveway
• Keefer's have title to house on south and right of way over driveway which is a non-possessory interest (incorporeal, does not give them right to possession)
  o Seem that they abuse this right, build garage in back of property
  o Sometimes they turn parts of the driveway into ice rink
  o A point in time, where for 4 years a junk car parked on driveway
  o This is more than in and out, it is abuse of non-possessory right

Issue: Did they establish AP of the driveway, by using in the manner they did?

Reason:
• Operate a grocery store only open in summer, spend winters in Florida
• Don't need driveway other than for deliveries
• When tenants move in/out, Keefer's clear the driveway allowing the tenant to move van onto the driveway
• Under **Inconsistent Use Test**:
  o Do not get possessory title unless using land in a way that is inconsistent with the uses that the true owner intents to make of it
  o Use made by Keefer’s was not inconsistent with use by storeowners as they didn’t intend to use it
• Did not meet common law requirements: Was not exclusive
• Denning: everything they did was under implied license
  “A possessory title cannot be acquired against true owner by depriving him of uses of his property that he never intended or desired to make use of it”
  o Relevant to animus – must be shown that there was an **intention to exclude owner from using in way they want**
  o Not only that you need to have peaceful, open and notorious possession, etc. You now need to demonstrate 4 things.
    ▪ Need to know you’re not true owner
    ▪ Need to know who true owner is
    ▪ Have to know what uses or plans the true owners has for the property
    ▪ You must act in manner that is inconsistent with true owner’s plans
• Hostile to squatter, so if person for example said “I had no plans for this land”, then the squatter cannot use the land inconsistently with the owner, as owner had NO plans
  o Must now know that land belongs to another, who owner is, what plans are, and find way to get in way of plans
• The Keefer’s got the garage because use of garage was exclusive
• Rest of driveway was used by both

**Teis v Anacaster (Town)**
• Teis family cultivated land that they believed was theirs. Ancaster also thought it was T’s.
• Laskin J regarded by Teis family and municipality as having made mutual mistake
  o Both parties believed that Teis’ had paper title, even though it was municipality
• Under test from Keefer, Teis’ could not claim title to that area through **Inconsistent Use** as they could not claim that they were laboring in an area they knew was not theirs, they labored thinking it was theirs
  o How can you use land inconsistently to the true owner, when you think YOU are the true owner
• Laskin J says that is not right, and manages to establish and recognize a claim of AP by the Teis family (Laskin is skeptical from beginning about Inconsistent Use test)
• **Inconsistent Use** test focuses on paper title owner, not on intention of squatter
• Possession does not require to know who owner is, at common law if you had exclusive possession you had rights against the world
• Laskin says if we import test of inconsistent use, every time you are an innocent squatter believing land is yours you lose because you can’t prove actions inconsistent with true owner
  o Again, cannot use land inconsistently to true owner if you think that YOU are
  o Leaves AP only for willful trespassers who try to establish claims in other people’s land (perverse)
• **Laskin J says inconsistent use test cannot be applied to cases of MUTUAL MISTAKE of title**
  o In other words, in cases of mutual mistakes, the court may reasonably infer that the claimants intended to exclude all others including paper title holder
    ▪ If you THINK you’re the owner, court will assume you want to exclude everyone else from any plans they had
  o Would negate mutual mistake, but would permit knowing and willing trespass. Intentional wrong-doer rewarded. Mistaken person penalized.
• T successful in acquiring adverse possession. A was granted right of way to use land

**Adverse Possession and Land Registration**
**Personal Property/Chattels**
1. **Limitations Act**
• Section 1: defines claim, injury, remedial order
• Section 2: When does Act apply?
  o Burden and procedure (actually have to plead act in statement of DF)
  o Never provincial park
• Section 3(1): Limitation period
  o 2 years from time of actual or constructive discovery (for chattels/personalty)
    ▪ When PL knew or ought to have known
  o 10 years after the claim arose (only for land s. 3(4))
    ▪ Only period applicable to adverse possession of lands is s 3(4)
• Section 3(3)(f): when does the claim arise?
  o As soon as title owner is disposessed the clock starts runnin
• Section 3(6): what does adverse possession mean?
  o A round about way to bring back the pervious provision of the Act, which was included in this version. It means that after 10 years, your title is extinguished. Cannot bring an action, cannot regain land peacefully (by original owner)
• Section 3(7): acknowledgement – if person in AP of real property has given to the true owner of the real property an acknowledgement in writing of the true owner's title to the real property prior to the 10 year expiry limitation, he loses his AP claim
  o In common law, any (writing or oral) acknowledgement will defeat an AP claim
  o Now in Alberta, if you acknowledge an owner's claim orally, not sure what will happen. Must be in writing.
  o 3 versions:
    ▪ Common law acknowledgment
    ▪ Alberta acknowledgment in writing
    ▪ Alberta acknowledgement orally
• Section 4(1): concealment – is it relevant
  o Generally, for ANY claim, the operation of 3(1)(b) is suspended for any time that the defendant fraudulently conceals the AP claim, the clock is suspended for that time
  o If you conceal the fact that you are acting as the owner, the clock stops running. Any time your presence on the property is concealed, the clock is stopped. NOT restarted.
  o The problem: according to common law if you claim of AP is not open and notorious, the clock restarts so in Common law if not open and notorious the clock restarts but in statute it is suspended
• Chattels different than land
  o Moveable and easier to hide
  o Unlikely to be registered
  o Principle of memo dat: you can’t give what you don’t have

Effect of Land Titles Act
• Tacking: When squatter A sells property to squatter B. What did squatter A have? Possessory title. So sold possessory title to squatter B. B can sell to squatter C.
• At the end of 10 years, last squatter wins. Even if they were only there for 20 mins.
• If multiple squatters claiming at once, they all fail cause no exclusivity.
• Title holder also sold land in that time. New title brings it up in Torrens system and think he can rely on land titles system in good faith and take exactly what it says he buys. Squatters claim is not reflected in registry. Whenever land is sold by title holder it restarts the squatter’s clock since they took free and clear possession.
• If purchaser knows they’re doing it to prevent squatter, it’s not in good faith.
• Squatter must put through a caveat to claim land. But don’t do it before year 10 because it alerts the title holder and they can sue for trespass.

Barberree v Bilo
• Couple splits, husband takes and refuses to return motorcycle
• After 2 year limitation period expired (not land, so use 2 years), the husband sold motorcycle to defendant Bilo. Wife demands it back
• Who wins?
  o Wife, who owns the motorcycle
  o Bilo, who can claim on the basis of possession of the motorcycle
• The court reasons that the wife's cause of action against her husband is statute barred as 2 years have passed. She cannot recover from her husband
• But her title was not extinguished, she remains the owner of the motorcycle
  o Is statute barred, but has not lost title like after 10 years of holding land in AP of land
• The husband can only give the buyer, Bilo, possessory rights, not title.
  o Husband never had title (memo dat principle)
• Furthermore, the transfer of the motorcycle from husband to Bilo was a fresh act of conversion. The wife could restart the clock and have 2 years to bring an action against the buyer of the motorcycle, in which case she wins in conversion
  o Each act of conversion restarts the Limitations Act timer
• That means, in effect, that there is no adverse possession of chattels in Alberta
  o The husband could not dispossess his wife by taking the motorcycle
  o After two years the husband is protected but upon husband’s death or anyone he transfers it too the clock restarts
• In Manitoba, after limitation act expires, owner’s title IS extinguished. This shows you how important it is to check legislation
• In AB, adverse possession of personalty cannot really exist. If you’re in AP and limitation runs out, if you sell/give to someone else, the clock starts running again

O’Keeffe v Snyder
• 3 of O’Keefe’s paintings disappear from a gallery owned by her husband
• In 1972 she reports them stolen to the Arts Dealer Association of America
  o The ADAA keeps a registry of stolen artwork
• In 1976 O’Keefe learns that the paintings, which she claimed were stolen, are in the possession of Snyder (owns gallery)
• Snyder says he bought the paintings for $35 000 from Frank
• Frank says they were a gift from dad in 1965 and he rejects the notion that they were stolen.
  o In fact, she says they were stolen in 1942 but he remembers them hanging years before that, so no, not stolen
  o How did father acquire them from O’Keefe? Frank did not know
• O’Keefe said they were stolen after the limitation period at that place (6 years)
• The cause of action accrued in 1946, the day of the alleged theft
• Two versions of facts. Court would have to do finding of fact.
• Count six years from then, and after six years, the person in possession of that property, even the thief, has absolute title to those paintings
• But thief, or anyone with painting, must establish rules of AP, such as open and notorious. Cannot be hidden, cannot be stolen. O’Keeffe didn’t know who had them/who she could sue
• O’Keefe appeals. Her version of theft was held since Snyder couldn’t trace ownership.
• Court held that Snyder did not prove elements of AP. Was not open and notorious
• Held that cause of action accrues when Snyder openly displays the painting in such manner that would put the owner in notice
  o The three paintings were put on the wall in a private residence over a very long period of time and for one day they were exhibited in the Trenton Jewish Community Centre. That was the extent that they were made available to the public
  o Was this showing sufficiently open and notorious to fulfill AP claim? No
  o This appealed
• The next court said cannot use claim of AP in chattels. Only for land
• Suppose your jewelry is stolen and sold. The new owner wears them in Calgary, while the original owner is in Edmonton. Is that open and notorious when you are in a different city?
  o Art is worse, art is hung in private homes, so true owner has no way of knowing painting is being displayed
• So the SC of New Jersey formulates a new rule for personal property, the **Discovery Rule**
  o The cause of action accrues to O’Keefe and clock runs against her only when she first knew or reasonably should have known through the exercise of due diligence, the cause of action, including the identity of the person now in possession (2 years)
  o If she does not have a way of knowing who has painting, her limitation clock does not start running
• The new rule shifts the burden to the true owner to show what they have done to locate their stolen property and recover it
• The court sends the case back to trial judge to make findings of fact as to whether or not O’Keefe exercised sufficient due diligence to locate her art
• After the SC of NJ sends it back to trial, the parties decide to settle
• 3 paintings and the parties split them 3 ways: O’Keefe took one, Snyder took one and lawyers sold off the third one
• In this case we see that the clock runs from the moment of dispossession and the identity of the person in

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possession can change while clock continues to run
  o In New York, when you learn who is in possession of chattel such as painting and you make a demand and the person refuses, that is when clock runs. Not required that owner show due diligence because in New York is where most painting selling and buying takes place, so if you buy something, up to you to make sure it is not stolen

**LaBelle v Guggenheim**
- Held by NY courts that statute of limitations beginning to run against true owner only when true owner makes a demand for return of property and that request is rebuffed. So makes a demand and it is refused, then clock begins to run.
- Discovery rule is difficult to apply.

**Rules for Extinguishment**
- Courts favor. Thief could acquire title in time
- Idea of tacking (adding time to time accrued by previous person in adverse possession)
  o Promotes free trade of goods, helps to reduce litigation
- Open and notorious in respect to personalty.
  o Suppose that your laptop is stolen from you. Could be misunderstanding. Suppose someone finds it. They sit in coffee shop and everyday have laptop out and use it as they are the real owner. Unlike land because land is not moveable. That person is building exc, you should be on notice. Should go with discovery rule, either you knew or ought to have known.

**Gifts**

**What is a gift?**
- A gift is a transfer of property without consideration.
- Property means any interest in real property or personal property, including intangibles.
- A gift is legally distinct from:
  o A promise to give a gift (not enforceable)
  o A contractual promise (is enforceable)

2. **Types of gifts:**
   - Inter vivos (gifts during one’s life)
     o Donative Intent
     o Acceptance
     o Delivery
   - Testamentary Gifts (in a will)
     - *Donationes Mortis Causa* (gifts in contemplation of death)
       o Impending death from existing peril
       o Acceptance
       o Gift to only take effect upon death

**Elements of Gift & Role of Delivery**
- Land used to be transferred through a ceremony known as delivery of seisin (possession) to give notoriety to transaction. Because land couldn’t be physically transferred, delivery was accomplished symbolically through handing over a twig or clod of earth on or near the land, ideally in presence of witnesses. Transaction would be recorded in a charter of feoffment (document describing the transfer) just as a record of the event.

**Elements of a Gift Inter Vivos**
Perfecting gift inter vivos - 3 elements:

1. **An intention to donate** - donor must have the mental capacity to appreciate the nature of the transaction. Must be current intent (can’t intend to give a gift in the future, this is just a promise)
2. **An acceptance** – involves understanding of the transaction & a desire to assume title. A person may refuse a gift – although the law usually presumes that people will accept a gift of something of value
3. **A sufficient act of delivery** – revolves around possession. Delivery is seen as a demonstration that the donor intends to be bound by the act of giving. Intention may also be shown by declaring oneself trustee of a gift for the donee.
   - Delivery element allows donors to change their minds without legal consequence.

**Once all the elements are in place, resultant gift of property is irrevocable as if the recipient had obtained title by virtue of contract**

**Nolan v Nolan Estate**
- PL is a beneficiary of the estate of Cynthia, Sir Henry’s first wife. DF Lady Mary was Sir Henry’s second wife and
inherited his estate

• Dispute over 3 paintings which PL claims were gifted by Sir Henry to Cynthia inter vivos, but appear to have been in the DF’s continuous possession.

Issues
1. Was donative intent proven?
2. Was there delivery of the paintings?

Analysis
1) Donative intention:
• Can donative intent be demonstrated without words of gift?
  o In principle yes (p. 331-33)
    ▪ Onus is on the would-be-done
    ▪ Court must be cautious
  o But in this case the court finds donative intent had not been proven (Court of Appeal not convinced but... they were more willing to accepted that these documents did show an intention to donate but since the paintings were in possession of the DF for 27 years the plaintiff was statute bard from pursuing her case

2) Was there delivery of the paintings?
• Why does the court deal with this requirement?
  o In case they were wrong with the 1\textsuperscript{st} part (i.e. to cover their bases)
• Essence of delivery: donor relinquishes all present and future dominion & control
• Significance of reasons for delivery:
  o Caution the donor
    ▪ The act of surrendering possession is the last chance to change your mind
    ▪ As long as it is still under your control, your intention to make a gift can be revoked, but as soon as you don’t have possession, you can no longer change your mind.
  o Evidence of the gift (for 3\textsuperscript{rd} parties)
    ▪ Delivery allows other parties to know who has title
  o Detrimental Reliance
    ▪ As soon as possession transfer to the donee there is greater likelihood that the donee will start relying on the gift
• Delivery can precede manifestation of intent; confluence required
  o Commonly the delivery coincides with the intent to donate
    ▪ EX: Z loans K a book, but later decides to donate it to him.
  o But it doesn’t actually matter what comes first
• In this case there’s no evidence that Sir Sidney delivered the paintings to Cynthia

Alberta Evidence Act s.11:
• In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party’s own evidence in respect of any matter occurring before the death of the deceased person unless evidence is corroborated by other material evidence

Constructive vs Symbolic Delivery
Constructive: if goods are unwieldy, or if donor is unable to deliver the item (say, due to illness), something less than actual delivery has been found to suffice.
Symbolic: When a representation of the goods is handed over, rather than the effective means of control (such as photograph of item)
Alternatives to Delivery
1. Deeds
2. Declarations of Trust
   a. Ex. "I will give you this car when you are 18" = unenforceable promise
   b. Ex. "I will hold this car in trust for you until you are 18" = sufficient to perfect a gift
      i. No visible act – relying on proof of declaration of trust
3. Others
   • Re Cole: Husband takes his new wife to his house. He points to the furnishings and says: "its all yours". Husband subsequently becomes bankrupt. Who gets the furnishings?
   • Problem: possession is equivocal
      a. 2 ways to view possession
         i. That she has control over the furnishings and what she says goes; or
         ii. That how they use and control the goods is that they share the goods
   • Why aren't the words sufficient to perfect a gift?
      b. In ordinary circumstances both words and delivery are required;
      c. Here relaxing the visible act would be dangerous, leaving only the oral requirement
• So what can the donor do to perfect the gift? A deed
• If someone asks for something, other person doesn’t say anything, person takes it. Silence is ambiguous, can be construed either way

**DMC (donationes mortis causae)**

**Nature and Rationale**
- Gift only becomes absolute with death of donor. If peril passes, gift is assumed to be revoked

**Constituent Elements**
- Donor must be in sudden peril with death impending
- Peril must be substantial

**Delivery Requirements Relaxed**
- Constructive delivery:
  - Change in capacity of possession
  - Delivery of means of access and control likely sufficient if:
    - Donor does not retain access or control and
    - Actual delivery is impractical
- Symbolic Delivery (insufficient: see p344)
  - Instead of delivering the object itself, you give a token/symbol of the object you wish to deliver.
    - EX: it’s your bday, and someone gives you a picture of the gift they wish to give you.
  - It is not constructive delivery because you are not given the means of controlling the object
    - Very likely to be insufficient delivery

**Land**

Application of Principle

**Bayoff Estate**

**Facts:** Mr. Bayoff is diagnosed with terminal cancer, he prepares his Last Will and Testament. He summons A.S. in the presence of his two solicitors and hands her the key to his CIBC safety box, and says “everything there is yours”. However, Bayoff fails to give her the proper form to allow her access. He then passes away. A.S. who was the Executrix of the Bayoff estate under the Will, then gets access to the box. It contains $70K and change.

**Issues:**
1. Did Bayoff make a gift *donatio mortis causa* (in contemplation of death)?
   - Basic elements:
     - Impending death from an existing peril
     - Delivery; and
     - Gift is to take effect only upon the death of the donor
   - Handing of the key to a locked box satisfies the DMC delivery requirement
   - However 2 ways gift failed to be DMC:
     - He intended for her to take possession regardless → *inter vivos*, right away
     - Also, Bayoff was certain of his death – there was no “if”
2. Did Bayoff make an *inter vivos* gift to A.S.?
   - Although the delivery of the key would be sufficient for a gift mortis causa, it was insufficient for a good gift *inter vivos*.
     - Why? Shouldn’t we be more cautious when the putative donor is dead?
   - But not all is lost...
     - The DMC rules are relaxed given the circumstances and the inability to correct the deficiency of an otherwise good gift.

The *Strong v Bird* exception
- Under the exception in Strong v Bird, if:
  - The donor intends to make an *inter vivos* gift; and
  - That intention continued until death; and
  - The gift is undelivered; and
  - The donee takes legal title to the donor’s estate as the named Executor (or administrator on intestacy)
    - Then the donee can perfect the gift (to himself) if she was not executrix she would be denied

**Corroboration**

**Gifts Review Problems**

Elyse’s mother agrees to give her a car for $1000. The car’s actual value is $12,000. Please advise.
- Court would likely rule that this is a contract and not a gift

Sid’s uncle calls him up and promises to give him $500 next week.
- It is just an unenforceable promise
• However, some courts might rule in favour of the donee if they found it unconscionable to renege the gift. Sid’s uncle gives him a cheque for $500. Sid then insults his uncle, and his uncle stops payment on the cheque.
• In Canada, a cheque is not a perfected gift. Not complete until it clears. R gives D a signed paper for her necklace and earrings that says “I make an irrevocable inter vivos gift of my earrings and necklace (which is described) to donee D.”
  • For the necklace, there is nothing she could do at this points to deliver the necklace, whereas for the earrings she could have just handed them over but did not
  • The gift of the earrings would likely fail, unless she also made a declaration of trust that she will wear the earrings for now and then give them.

Scenario 1:
  • Gift when he gave book
  • Bailment of book (loan)
  • Maybe has two copies, one for home one for office
  • One element is delivering it, which he did
  • Up to Ziff to prove he didn’t intend as a gift
  • How do we know gift was perfected?

Scenario 2:
Ziff tells Kaplinsky: “Come by office tomorrow, and I’ll give you my spare copy of Gray’s Elements of Land Law, 5th edition (best 1,434 pages you'll ever read).” But the next day Ziff changes his mind and refuses to hand over the book. Please advise
  • Promise is not something you can rely on

Scenario 3:
  • Contract, not property law

Scenario 4:
Kaplinsky returns to his office to find that Ziff left on his desk a copy of –book- with a note attached saying, “Best 1,434 pages you'll ever read”. A week later Ziff asks Kaplinsky to return the book
  • Equal proposition of bailment and gift

Unit 5: The Doctrine of Estates
An estate confers a segment of ownership as measured by time (a time in the land or land for a time)

Common Law Estates Classified:
1. Freehold estates: fee simple, life estate, fee tail
   a. What it means to be a freeholder is to owe a feudal superior but to have superior possession recognized by the King’s Court
   b. You have seize in the land
   c. Every piece of land, at common law, you can now draw an axis from present moment until infinity. And on that axis, there is not a moment where there is no one seized of the land.
2. Leasehold
   a. Voluntary arrangement between a landlord and a tenant
   b. That lease is not merely a person’s right; it is an estate in land that can be transferred, and all the rules of property apply to that estate
3. Copyhold
   a. Does not exist in Canada

Why create estates in land?
To realize the economic potential of the land (balance interests of utility and autonomy):
  • Encourage stewardship
  • Promote trade: take the time axis and carve it up and sell it to those who value it more
    o Reason why landlord takes his fee simple and gives you a lease interest is that his right to possession at the end of the lease, and your interest to the lease itself, is more valuable than the landlord having sole possession until the end of time. Your transaction makes you both better off
Control future use and ownership (interests of the deceased):
  • Provide for loved ones: “to my wife for life, remainder to my children in fee simple”
  • Keep land in the dynasty
    o To make sure that children don’t consider only their own interests and squander their family’s wealth.
Until the 16th century, land was the primary source of wealth, and was considered not a personal but a family asset.

- Restrict the use of land from beyond the grave: “to EPSB, for as long as the property is used as a school”
  - The person making a gift here stipulates that the land must be used as a school
  - Question: to what extent do we respect the wishes of these grantors?

The law of estates is the product of the tension between autonomy and alienability

**Freehold Estates:**
1. Fee simple
2. Life estate
3. Fee tail (all but extinct, abolished in Alberta)

**Fee Simple:**
- “Fee” – by inheritance, “simple” – can descend to widest range of heirs
- Amplest estate which any tenant can hold. Almost full ownership of land
- An estate of potentially infinite duration – estate passes to any living blood relative or anybody designated by will upon death. If neither exists, property reverts back to the Crown via escheat – *Ultimate Heirs Act*. As good as ownership and can be carved up into smaller estates.
  - Qualified fee simple (Chapter 7) – can also end on specific occurrence
    - Ex. So long as land is used as a school

**Rise of Fee Simple:**
- Heritability
  - Tenurial relationship strictly personal
  - Right to ascension of heir upon payment of relief
  - Tenant’s right to an heir: “To A (tenant) and his heirs”

- Alienability
  - Originally alienation by subinfeudation
  - After Statute Quia Emptores, substitution only: “To A and his heirs”
    - This essentially eliminated the feudal system, because eventually everyone came to hold directly to the King

**Fee Simple Today:**
- Features: alienable (pass it by will or sell it), divisible, of indefinite duration
- An estate of potentially indefinite duration. For example,
  - A, owner of the fee simple in Blackacre (seized of the estate), may devise it to B
  - B, now the holder of the fee simple, may make a grant *inter vivos* (during his lifetime) to C
    - C now has an estate in fee simple in Blackacre
  - C can lease the land to D, and/or create a life estate in E (give E an interest for E’s life)
    - These interests can all exist simultaneously
  - But does the fee simple estate ever end?

**Language Required Today:**
- In most jurisdictions today, the magic words are no longer essential to create an estate in fee simple
- See, e.g Alberta’s *Law of Property Act*, s 7(1): in the absence of words of limitations, the entire estate is transferred, unless a contrary intention is suggested by the instrument
- Wills and Succession Act s 9(2): “A disposition of property by will is a disposition of every legal or equitable interest in the property”

**How can an Estate in Fee Simple end?**
- When drafting an instrument take great care to use precise language!
  - The fee simple absolute: ends by escheat if the current holder of the estate dies and has no legal heirs (dies intestate, i.e left no will). Meaning goes back to the provincial Crown under *Vest and Unclaimed Property Act* in Alberta.
  - Qualified fee simple: can end by escheat or upon a stipulated occurrence (chapter 7)

**How estates are created?**
- Estates can be created:
  - By operation of law (e.g *The Dower Act*)
  - Or by an instrument (a devise or a grant)
Magic Words
At common law, you needed these words to create a fee simple: “To A and her heirs”
- “To A”: Words of purchase (i.e. who owns the estate)
- “and her heirs”: words of limitation – just a description of the duration of the estate (for fee simple)

What about A’s heirs?
- Heirs have NO rights, but mere expectancy (spec successions)
- “and her heirs” simply means “in fee simple”
- Ex. “To A in fee simple” – if inter vivos, would be a life estate because you did not use the right words

Grants vs Devises at Common Law:
In a grant inter vivos:
- “To A”: A gets a life estate
  - A has an interest for his life only
  - When A is dead, the estate is over
- “To A in fee simple”: A still only gets a life estate
  - Fee simple requires the words “and her heirs”
In a devise (by will):
- “To A”: A inherits a life estate
- “To A in fee simple”: A inherits an estate in fee simple
  - Courts attempt to recognize intent of testator as intent is clear but testator isn’t alive to remedy the situation

Fee Tail
Fee tail is now effectively extinct, and has been abolished in Alberta. Any attempt to create a fee tail will create a fee simple.

Purpose: to keep property in the family – any one heir could only lose income from the estate as at the end of his lifetime reverts to someone else (next of kin) usually to lineal descent until the blood line ends. Originated in a statute De donis conditionalibus
- “To A and the heirs of his body”: only to lineal heirs (fee tail general)
- “To A and his heirs male of his body begotten”: sons only (tail male)
- “To A and his heirs female by Elizabeth begotten”: only daughters of A and Elizabeth, no illegitimate daughters of A (female tail special)

Problems of fee tail:
- What happens on “failure of issue”?  
  - Heir died before receiving land (would go back up the family tree)
- “Barring the tail”:
  - A process by which the court would enlarge the fee tail and make it a fee simple
  - Fee tails had limited economic value, so recipients would go to the court to get it transformed to a fee simple (wasn’t right to do)
  - This goes against the wishes of the original creator of the fee tail – should they honor those wishes?
- “Strict settlement”:
  - The father has a life estate with a remainder to his male heir (the heir gets a fee simple)
  - In order to preserve the land in the family and to prevent the heir from squandering the family’s wealth, the father strikes a bargain with the heir that he will pay him money now in exchange for the son exchanging his estate in fee simple for a life estate with remainder to his male heir
    - In effect, all parties act out of self-interest resulting of the preservation of the estate within the family

Life Estate
A life estate can be created
- Expressly
  - Ex. “To A for life”
  - Language to a similar effect eg. “To A for as long as she wishes” or “To A to have and use during her lifetime”
- Faulty grant of an estate in fee simple
- By operation of law

2 kinds of life estate:
- Pur sa vie
  - “To A for life” (to A for the lifetime of A)
• *Pur autre vie*
  o “To A for the life of B” (to A for the lifetime of B)
  o B is the *cestui que vie*, i.e., merely the *measuring life*
• In contrast: “To A for life” followed by A: “To B”
  o B acquires the interest that A had – has a life estate for the life of A (*pur autre vie*)
  o What happens if B dies before A?
    ▪ B’s heirs inherit the unexpired portion of the life estate

Features:
• Lasts as long as somebody is alive
• They’re not the robust property owner but has rights to use, possess, and enjoy
• Still in use in Alberta, often in the case of widows
• No magic words in creating life estates
• Life tenants can use income generated from an estate but are not entitled to keep or redistribute anything on death
• Cannot be unilaterally transformed into any interest of greater duration
• “as long as she needs”, “as long as he wishes”

Expressly – O: “To A for life” (A gets life estate, O retains an interest)
• To A for life – when A dies estate ends; then goes according to grantor’s instructions; will either revert back to grantor’s estate or be left to another in remainder
• *Pur sa vie* – to A for life – for the life of A
• *Pur autre vie* – to A for the life of B – for B’s life
  o B – *cestui que vie* – only a clock, no property interest; no interest or say in the actual estate
  o If B dies before A, B’s heirs would inherit interest for the rest of its duration
• To A for life, then to B – both A and B’s rights created/vested immediately
  o Estates can be transferred before or after they vest into possession but only the entitled portion can be transferred

**Estate in Possession:** “to Terrence in fee simple”
• Unless evidence to contrary this is fee simple

**Estate in Reversion:** O: “To Raymond for life”
• Raymond gets it for his lifetime then when Raymond dies, it reverts back to O.

**Estate in Remainder:** “To Brenda for life, then to Alicia”
• Brenda gets for her lifetime, then fee simple in remainder for Alicia (must wait till Brenda dies)

**Repugnancy:**
What does a grant such as this mean?
• “To A in fee simple (?), but should anything remain undisposed of by A then to B”
• If A gets fee simple, then once A dies, it should go to A’s heirs
• Grantor said, A you have fee simple but when you die this is what I want to happen

**Examples:**
• O: “To A for life”
  o A gets life estate. When A dies, right to possession goes back to O in fee simple in reversion. Reversion does not happen until A dies.
• O: “To A for life” (O dead)
  o A has life estate. When A dies, if O has legal heirs it will go to them. If not, no will, no heirs, it will go back to provincial Crown (fee simple in reversion)
• O: “To A for life then to B for life then to C”
  o Life estate in A. Then life estate in B. Then fee simple in remainder for C.
  o What if B pre-deceased A? Skips and goes straight to C.
  o Can A immediately convey her interests to B? Yes. B would have a estate for life pur autre vie for life of A. Then when A dies, B stays for their lifetime.
  o Can C convey to X while A is alive? Yes but right to possession is postponed
  o O has no more rights. He disposed of everything.
  o When C dies it will go to whoever he left it to in his will or his legal heirs
  o As soon as grant is made, C has fee simple in remainder but must wait until A and B are done first

**Interpreting Inconsistent Gift Overs**
“To A in fee simple (apparently) … but should anything remain undisposed of by A then to B”
• Since there are no magic words, it can sometimes be unclear whether the intended conveyance was a life estate or a fee simple
• What does a grant such as this mean?

3 Alternate Solutions:
1. Treat gift to A as a fee simple and discard subsequent gift over
2. Make the gift to A one of a life estate, remainder going to donees of subsequent gift (B)
3. “Power to Encroach” – the first gift is a life estate with the power to encroach on the remainder
   a. May allow the life tenant to overreach the life interest and take actions such as mortgaging or leasing the property during their lifetime

Re Walker
Facts:
• Interpretation of a gift; deceased left his wife “all my real and personal property” with any portion of estate “undisposed of” after his wife’s death, meant to go to his nephews
• Wife did not die until 20 years later at which time nephews attempted to claim portion of her estate (fee simple in reversion), whereas those in the widow’s will claimed the widow took absolutely (fee simple)
• Options: (1) gift to the first person named prevails (wife fee simple) and gift over is repugnant and fails, (2) first named takes a life estate only, (3) first gift is a life estate with a power to encroach on the remainder

Reasoning:
• Intention of the testator is plain but cannot be given effect; cannot give all rights incident to ownership and then add a gift over that. Have to see which intention predominates – the gift to the wife. Subordinate intention is repugnant to the dominant intention.
• Fee simple prevails, additional gift found void, property – ownership to wife in fee simple.

Re Taylor
“I give, devise, and bequeath all my real and personal estate of which I may die possessed to my wife Kathleen, to have and use during her lifetime. Any estate of which she may be possessed at the time of her death is to be divided equally between my daughters…”
Facts: Wife used portions of estate for 16 years after husband’s death, then left directions in her will for the assets comprised in her estate – was the wife entitled under an absolute interest or was she only granted a life interest?

Reasoning:
• Grants a life estate + power to encroach (but only for maintenance)
  o The fact that there is a power to encroach does not necessarily make it a fee simple
  o Is there a limit on the power of the widow to encroach on the remainder?
  o Yes. Cannot ask for money for cruise. But can encroach for money to fix roof.
  o It could be determined that she could have had the power to encroach for any reason but the court found for some unclear reason that the power to encroach was only for her maintenance
• Clear words indicate intention to give only limited interest, gift over completes testator’s intention to dispose of any left from life interest
Contrast with Walker: testator used clear words to indicate an intention to give only a limited interest so that the gift over presents no problem of repugnancy

Christensen v Martini
Facts: Gives to wife house “for her use” until she no longer needs it, then gives it to the Christensens
Reasoning:
• Court tries to give effect to the testator’s intentions as ascertained from the language and circumstances
• Testator’s intention – to benefit both M and Cs
• 5 Possibilities:
  o Absolute gift to M, hope that would give later to Cs
  o Determinable fee to M, gift over to Cs
  o Conditional fee to M, gift over to Cs
  o Life estate to M, with/out power to encroach, gift over to Cs
  o License of occupation to M, gift over to Cs
Wife given a life estate with no power to encroach – can’t mortgage it and take the money; when she dies or doesn’t need the house, it goes to the Cs (determined by wording of will)

General Rights of Use and Enjoyment
The Doctrine of “Waste”
• There is concern that holders of a life estate may bring down its value, as the life tenant only has an interest in maximizing their short term employment
• Doctrine of waste prevents life tenant from acting unreasonably and interfering with the remainderperson’s interest
  o This can’t merely be negotiated between tenant and holder of remainder as in many cases the holder of the remainder is a child

**4 Categories of Waste:**

1. **Ameliorating:** Acts that enhance the value of land. Courts are obviously hesitant to prohibit or punish the commission of ameliorating waste – usually it increases the value of the land for the subsequent title holders (renovating rundown buildings, turning pasture into arable land)
   a. This is no longer actionable

2. **Voluntary:** Conduct that diminishes the value of the land in the long run (ie. Over-cultivation, destruction of buildings, opening of new mines). Work on already open mine not okay.
   a. However, as a general rule, it is not wasteful to clear land for cultivation or to fell trees to make certain types of repairs
   b. General rule is that a life tenant will be liable for voluntary waste unless they have express permission from the remainderperson

3. **Permissive:** Damages resulting from the failure to preserve or repair property
   a. Responsibility for permissive waste is not automatically imposed on a life tenant – the instrument under which the estate is created must contain such a requirement and unless this is done the life tenant assumes no obligation to repair buildings on the property. If grant silent – no.

4. **Equitable:** Acts of malicious destruction to the property.
   a. Tenant can be restrained by injunction

A grantor may render a life tenant “unimpeachable” (exempt from responsibility) – this waiver permits the life tenant to commit all forms of waste except equitable waste

- Remedies: damages for decrease in value, exemplary damages may be awarded, injunction, if waste has resulted in profit the money can be recovered

**Other Rights and Responsibilities**

**Powers v Powers Estate**

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<tr>
<th>Facts:</th>
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<tbody>
<tr>
<td>Testator names executor and bequeaths property to executor – first, for use and benefit of his mother with executor’s discretion for drawing on income and capital of estate for support and maintenance of estate</td>
</tr>
<tr>
<td>o So, equitable life estate with the power to encroach</td>
</tr>
<tr>
<td>Then, to brother A (who does not have power to encroach), with executor’s discretion on maintenance and heating of the property</td>
</tr>
<tr>
<td>o Upon death of brother A, remainder granted in fee simple to brother B</td>
</tr>
<tr>
<td>Estate also includes savings held in a number of accounts – obligation of the executor to invest the savings and pay the interest to the plaintiff, subject to whatever fees may be payable out of income</td>
</tr>
<tr>
<td>Executor unsure how to manage properties; say he has a tenant, who gets the money? Or if repairs need to be made on the house, where is the money drawn from?</td>
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<tr>
<th>Reasoning:</th>
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<tr>
<td>Regular, periodically recurring expenses such as heating are paid by the property user (life tenant) so that capital is preserved. No obligation to pay heating costs out of the capital of the estate, but rather paid from income of estate.</td>
</tr>
<tr>
<td>What about maintenance/repairs? Depends on type. Repairs necessary for proper preservation should be paid out of capital; those of a periodic nature (like yard work) should be paid from income. Presumption that no requirement of upkeep by tenant</td>
</tr>
<tr>
<td>Insurance? In USA insurance was regular payment and comes from income. In Canada it is unclear – sometimes US approach, other times insurance is considered to benefit successive owners and thus comes from capital.</td>
</tr>
<tr>
<td>Taxes? To be paid by life tenant</td>
</tr>
<tr>
<td>Mortgage? To be paid by life tenant. But some mortgages call for blended payments of interest plus capital – if life tenant making these payments, entitled to reimbursement from remainderman of capital payments</td>
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**Litigation costs?** Testator can encroach if there is genuinely question/debate to be resolved

**Appointing a Trustee**

Settlor: Unto my trustee in trust for my mother for life, with the power to draw on the income and capital for her proper maintenance, remainder in trust for my brother... (legal title held in fee simple to trustee who has instructions on how to
manage the property, if beneficiary starts to do weird stuff the trustee can stop them, trust documents will have specific explanations of what can be done)

- Suppose the house is worth $300,000
- The house could be sold and invested at 5%, generating $15,000 a year
  - All interest (income) goes to the mother for her use until she dies, at which point everything goes to the remainderer
  - If there is money left over from investments (above and beyond the capital of the home) the remainderer is entitled to it
- Or rented out at $15,000
  - The income will be paid to the life tenant
- When the life tenant dies, the remainderer will enjoy possession of the house or the invested funds as the case may be
- What if the mother suffers medical costs?
  - Because the mother can use both the income AND capital for her proper maintenance, she is able to encroach on the capital, resulting in the remainderer receiving less than the original capital ($300,000)
  - She will need to petition the court to do this
- What if the house needs a new roof?
  - If the house needs repairs, the trustee could mortgage (take a loan against) the house and use the funds to pay for the repairs. The remainderer would receive the house along with the loan.
  - The remainderer must then take care of the loan
  - The value of the house will be encroached upon by the trustee
- What if trustee dies? Court can appoint a new one

Life Estates Arising by Operation of Law

- A life estate may be created by either private conveyance or by operation of law (ie. through the invocation of a legal doctrine which, when applicable, automatically confers an estate).
- 2 types of life estates: dower and curtesy

Dower

- Designed to provide safety net for widows; conferred on the widow a life interest in the freehold lands of her deceased husband (common law rules of inheritance did not contemplate the transmission of land to a surviving spouse).
- Conferred upon the widow a life interest in the freehold lands of her deceased husband that he was seised of at the time of his death and 1/3rd real property.
- At common law, dower took precedence over testamentary transfer (life estate for spouse will take precedence over disposing of property in a will). Life estate first THEN goes to will.
- Now obsolete, dower-like interest created by homestead legislation

Curtesy

- Referred to a widower’s interest in the land of his deceased wife – similar to dower but with somewhat different elements and functions.
- Conferred upon the widower a life estate in all of the realty undisposed of at the death of the wife, as long as heritable issue had been born during the marriage.
- Has been abolished in Canada – replaced by Law of Property Act (gender neutral).

The Dower Act

Modern statute drawn from homestead laws that encouraged people to settle and farm unpopulated or under populated areas.

Objectives:

- To protect the widows against creditors, spouse’s children (especially from being kicked out of the home when her husband died)
- Political significance: Grants of land where often made to the husband legally, and the wife’s interests were not recognized. The Dower Act was seen as a political victory that effectively recognized women's rights to property
- 3 main elements: control of disposition of home, life estate, protection from creditors (now dealt with in Civil Enforcement Act)

To whom does it apply?

- Gender neutral (so applicable to wife or husband)
- MUST be legally married (Gay couple can have Dower rights IF legally married)
• Dower rights end on divorce.
To what does it apply?
• Place where they reside.
• What if co-owned?
  o If owned by husband and his brother? Wife has no Dower rights.
  o If owned by husband and wife? Both have Dower rights
  o If husband and wife own Blackacre as joint tenants and husband dies first, the wife takes a survivorship of
    the whole property not just a life estate. Why bother with Dower then? A joint tenant can be transformed
    into a tenancy in common which would then go by your will. Husband and wife are in 25(2), dower is
    relevant, consent is required, and normal Dower rules will apply.
• Mobile home? Chattel. Rules out Dower.
• Leasehold? Dower can apply to a leasehold.
• More than one homestead? You can have more than one but must pick one to live in for the life estate s 19
What if prof says all his personally goes to his Property 440 class?
• Meaning wife would get the house for life but the house would be empty.
• No, s 23 gives a life estate in some personal property (same items as those exempt from seizure in Civil
  Enforcement Act s 88)
• Food for up to 12 months (stuff in fridge/cupboards), medical and dental aids, appliances

How to sell home?
• Buyers agree on price exc and property is to be transferred in 30 days. Go to lawyer to work out transfer
  documents. That is when Dower form is proffered. That is dangerous because if between the agreed day and
  signing of dowers, the owners can get a better offer and the spouse will say they will withhold their dower
  consent.
• Agreement for sale is a disposition. Transfer will be void, and will not close until Dower consent. Right time would
  be better at time of agreement, then plug cannot be pulled. If you sign it then and there, you don't have to have it
  signed again when later documents are signed.
• Consent and no acknowledgement. Properly executed acknowledgement "shall" be formed unless spouse knows
  what they are giving up. Not necessary to have if spouse understands.

Rights conferred by the s 1(c) of the act:
(1) Right of non-owning spouse to prevent disposition** of homestead* by withholding consent, including right of actions
  for damages, insured by Crown
(2) Confers a life estate on the surviving spouse in homestead
  • Any devise of the estate to anyone in the will would be postponed so that the surviving spouse could enjoy the life
  estate
(3) Life estate in certain personal property, together with immunity from seizure by creditors
  • That personal property is also immune to seizure by creditors

"The "Homestead"
• See section 1(d):
  o A parcel of land on which the dwelling house occupied by the owner of the parcel as the owner’s
    residence is situated
  o Limited to 4 adjoining residential lots, or one quarter section of rural land
• Excludes land owned by married person together with third party; s25
• Can extend to mines and minerals; s24

Once a Homestead
• S3(1): When land becomes the homestead of a married person it continues to be their homestead for the purpose
  of the Act notwithstanding the acquisition of another homestead or a change of residence
• S3(2): Land ceases to be the homestead of a married person:
  o When the transfer of the land is registered in the land titles office
  o Release of dower rights is registered in the land titles office
  o A judgment for damages (for unauthorized disposition) is registered in the proper land titles office

Life Estate under the Dower Act
• S18: A disposition by a will of a married person and a devolution on the death of a married person dying intestate
  is, as regards the homestead of the married person, subject and postponed to an estate for the life of the spouse
  of the married person
If a married person died owning two homesteads, the surviving spouse must elect one homestead in which to have a life estate; ss 19-20

Disposition of Homestead
- Disposition defined by s1
- S2(1): no married person shall by act *inter vivos* make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other person at any time
  - A) during the life of the married person, OR
  - B) during the life of the spouse of the married person, unless the spouse consents to the disposition in writing or unless the court dispensed with consent
- S2(2): a disposition in contravention of the Act is an offence punishable by fine or imprisonment

Consent, Acknowledgement, Release
- S25(2): when spouses who hold land together execute a disposition together...
- Otherwise see s4 and Alta. Reg. 39/2000:
  - Consent shall be contained in or annexed to the instrument by which the disposition is effected;
  - Prescribed form
  - Should be presented for registration with the instrument; alternatively, registrar to demand affidavit
    - You go to the registrar and say “I just bought this property”
    - He will ask for the consent form
- S5: acknowledgement by spouse
  - The spouse should also be taken aside and made to understand that they have dower rights and that they are releasing those rights
- Ss 7-9: Dower rights in a homestead may be released by the spouse of a married person

Consent
What does a proper consent look like?
- “Acknowledgement” signed by officiating officer
What if imperfectly obtained?
- Must have properly executed acknowledgement, although may not be 100% necessary if spouse knew what’s going on
How is this monitored?
- Where is Dower consent if Ziff is divorced or not married? If selling property that is not homestead or not married is no Dower necessary? You have to swear to an affidavit that you are not married or that property is not homestead or never live in it.
What if the consent is not given?
- Not always required.
What if land becomes registered in name of third party without consent?
- It happens when somebody cheats. You swear the affidavit that you’re not married but you’re unhappily married. Could be possible that property would end up in innocent third party’s hands. Effect: Wrongful disposition.
Is consent always required?
- No. Not in short term lease, also possible for court to dispense with consent.
- Not when it is not a disposition
- Section 10: dispensing of consent
- Section 7: release of Dower rights can be made by spouse. Works on it’s own. In effect until divorce terminates Dower rights. Write in “both parties will exercise agreements under s 7 in separation agreement.
- Section 9: Parties entering into an agreement like a separation agreement where they agree to give up their Dower rights. Agreement to release Dower rights. Does not dispense in of itself requirement of consent. It is grounds for going to courts in s 10 to get order dispensing with consent.

Problems and Solutions
What if consent cannot be obtained? S10
- (1) A married person who wishes to make a disposition of the married person’s homestead and who cannot obtain the consent of the married person’s spouse
- (4) On the application, the Court may hear any evidence and consider any matters that in its opinion relate to the application, and without restricting the generality of the foregoing, it may consider
- (5) The Court may by order dispense with the consent of the spouse if in the opinion of the Court it appears fair and reasonable under the circumstances to do so.
- (6) The Court may make the order without imposing any conditions or may make the order on any terms and conditions relating to notice, payment into court or otherwise as the Court in the circumstances thinks proper.
• (7) On the order being made and filed, together with the disposition, with the Registrar of Land Titles, the Registrar on payment of the proper fees shall register the disposition in the same manner as if the spouse of the married person had consented to it.

Remedies for Wrongful Disposition:
• 11(1): A married person who without obtaining (i) consent OR (ii) an order dispensing with consent, makes a disposition to which a consent is required by this Act and that results in the registration of the title in the name of any other person, is liable to the spouse in an action for damages.
• s11(2) Quantum of damages;
  o The amount of the damages for which the married person is liable to the spouse is a sum equivalent to
    • 1/2 of the consideration for the disposition made by the married person, if the consideration is of a value substantially equivalent to that of the property transferred, or
    • 1/2 of the value of the property at the date of the disposition,
  o Whichever is the larger sum
• “Insurance” of damages by Crown; ss13-15
  o S13: the Crown will pay any judgment if the married person who committed the fraud is not able to
  o S14: application to provincial fund (1) obtain a judgment for damages, (2) took steps to enforce judgment which bore no fruit – unable to recover
  o S15: If the court is satisfied of the applicant’s position (per s14) the Court may make an order directing payment of the unsatisfied judgment out of the General Revenue Fund.

Do we really need a Dower Act today?
Would it not be better to adopt legislation that deals with matrimonial property on the event of dissolution of marriage or in the event that one of the spouses dies and in that legislation to provide not just for legally married couples but also for other partnerships recognized at common law?
• Abolished in many parts of Canada
• Many other widow protections. Life insurance. If there is no will, the surviving spouse is largest beneficiary in intestate. Matrimonial property law may be applicable upon death
• Why require Dower anymore? Want to keep the consent provisions (valuable)

Valuation of the Life Estate
• Suppose the property is expropriated by the government
• What is the amount of compensation payable to the life tenant? The remainderer?
  o Suppose the life estate pays $15,000/year, and the land was just expropriated – based on actuarial tables the widow’s life expectancy is X, you determine a value

Estate Like Holdings in Aboriginal Land
• When Europeans came to Canada, they did not acquire absolute ownership to all lands. Their system of property distribution was laid over top of the existing aboriginal system of property distribution. Thus Aboriginal land claims are still recognized as valid in Canada.
  o Aboriginal rights are entrenched in the Constitution Act s 35
• Need to find a balance between Western and Aboriginal conceptions of occupancy
• Power over land reserved for Feds, provinces can at best regulate it
• Statutory rights: reserves are a unique way of land holding. In AB there are 140 reserves that were incorporated under 3 treaties (6, 7, and 8). 45 first nations living on reserves and each reserve is managed by a tribal council (usually corporate).
• Individual members hold land under a certificate of possession. Assigns exclusive rights on that house. Rights that are conferred can be devised by will and can also be transferred inter-vivos with approval of minster but only to other band members. And only as long as original holder still lives in reserve otherwise it reverts to Crown.

Nature, Source, and Content
Aboriginal title is *sui generis* (unique) and not to be confused with fee simple.
*Sui generis* in several ways:
• In the sense that its characteristics cannot be completely explained by reference to the common law rules of property or by the Aboriginal legal rules of property
• Also, it predated common law occupation – Aboriginal title is based on rights that existed prior to European occupation
• Exclusive possession and use, but not fee simple – not something less than fee simple.
Main difference between Aboriginal title & fee simple: aboriginal land is inalienable and indivisible (held communally)

**Delgamuukw v British Columbia**

**Facts:**
- Claimed title to plot of land on basis that Aboriginal title was never extinguished. First tried to get “ownership” then changed to “Aboriginal title and self-government”.

**Decision:** Appeal allowed in part, new trial ordered

**Reasons:**
- New trial as grouping of all PLs together (71) was seen as unfair to DF
- Court reaffirms that Aboriginal title exists and provincial governments never had the jurisdiction to extinguish it because it falls under federal jurisdiction under constitution
- Aboriginal title special because: inalienable (cannot be transferred to anyone but Crown), held communally, source in occupancy before sovereignty
- Aboriginal title exists if: (1) land must have been occupied before sovereignty, (2) must be continuous between pre-sovereignty and now, (3) exclusivity (could be shared by various tribes, but Aboriginally).

If they exists = Aboriginal title. If they partially exist = can be claim less than title

**Tsilhqot’in Nation v British Columbia**

**Facts:** Nomadic people. BC granted a commercial logging license on the land. They objected the logging license and sought a declaration prohibiting commercial logging. Wanted claim to Aboriginal title to the land at issue.

**Decision:** Aboriginal title should be granted. BC breached it’s duty to consult. Crown can override Aboriginal title: (1) must have carried out consultation and accommodation, (2) Crown’s actions must have been supported by compelling and substantial objective, (3) Crown’s action must have been consistent with its fiduciary obligation to Aboriginal body in question

**Features:**
- Communal: Vested in all members of an aboriginal nation collectively
- Right to use the land for a variety of purposes:
  - Not just Aboriginal uses or practices (that would be too limiting)
  - Provisions of the *Indian Act* which says that reserve lands can be used for any purpose for the general welfare of the band
  - He also looks at *Indian Oil and Gas Act* which also presumes economic exploitation of reserves on Aboriginal land
  - The use is designed to accommodate present day needs
- Inalienability except to the Crown
  - Cannot be sold/transferred/surrendered to another party as would break special relationship
  - Can’t use land as collateral for a business loan, etc
  - Can’t mortgage out land to other groups
  - These constraints put Aboriginal title at a disadvantage relative to owners in fee simple
- Relationship with the land
- Use must be consistent w/traditional practices:
  - Cannot use land in a way that is irreconcilable with the nature of the attachment of the land which forms the basis of the group’s claim to Aboriginal title
  - Uses which are detrimental to this unique relationship are excluded from Aboriginal title
    - EX: if a group asserts Aboriginal title because it was occupied as a hunting ground, then the group cannot strip-mine the land in a which that would destroy its usefulness as a hunting ground
    - EX: if a group asserts that land was used for ceremonial purposes, it can’t be used for a parking lot
    - Judge uses the concept of equitable waste as a concept to describe the limitations on Aboriginal title
      - Acts that may be irreconcilable may improve the value of the land – even these ameliorative acts would be inconsistent with Aboriginal title
      - What are the remedies if the Aboriginal group tries to use the land in a manner inconsistent with their claim to Aboriginal title?
        - Group could forfeit their claim
        - Crown could get an injunction against that use
- Non-possessory rights (site-specific, short of title)
Rules of Recognition - requirements of a claimant to Aboriginal title:
1. Occupancy of the land prior to and at the time of British sovereignty
2. Continuity between British sovereignty and present
3. Exclusive connection with the land maintained (to the exclusion of other organized groups; may be shown by fact that granted permission to other groups, signing treaties to do w/land)
   a. Where there is only one group claiming possession, only minimal possession is necessary
   • The standard of possession is contextual and flexible
   • Physical occupation is flexible, and may include dwellings, regular use for hunting, closure of fields
     • All of these things tell us whether the aboriginal group’s possession was adequate
   • Oral evidence: evidence that would not be accepted in other cases will be accepted in cases involving aboriginal title
   • Rights demanded cannot be inconsistent with special link btwn aboriginal people and the land
Reasons for exclusivity: (1) proof of title should be consistent with the property interest acquired (2) to eliminate conflict between more than one aboriginal group claiming title to the same land.

Aboriginal Rights Short of Title
Non-possessory, site-specific rights: fishing, hunting, ceremonies, etc.
• For claims to certain practices, the centrality and significance of the practice to the group’s culture must be demonstrated
  o The relevant period of time is prior to contact with Europeans
  o Customs/traditions that arose solely as a response to European intervention do not count
• The court’s task in evaluating a claim for an Aboriginal right is to examine the pre-sovereignty Aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.
• The range of Aboriginal rights flows from the process of reconciliation. Taking the Aboriginal perspective into account does not mean that a particular right, like title to the land, is established.
• Whether or not the group had possession must be made from the perspective of the Aboriginal group.
  o All that is required is demonstration of effective control of the land by the group.
• As for whether nomadic or semi-nomadic people can ever claim title, the answer is that it depends:
  o Whether nomadic people enjoyed sufficient physical occupation is a question of fact. Has a degree of use equivalent to common-law title been made out?
• The requirement of continuity simply means that modern-day claimants must establish a connection with the group that occupied the land at the time of British occupation.
  o A court would not be quick to dismiss a claim.

Extinguishment and Infringement:
Common Law:
• Recognizes Aboriginal rights based on prior occupation, but also that such rights can be extinguished under the principle of sovereignty by a clear, unilateral act by parliament
  o This is still the law in Australia
  o EX: Rupert’s Land granted to HBC by the Crown – what about the Aboriginal rights to the land?
• Another common law method of extinguishment is surrender of the land (bilateral)
  • Bona fide purchaser for value? (Chippewas of Sarnia)
  o If someone can prove that they are a good-faith purchaser for value of the land, then Aboriginal rights may be extinguished without consent and without parliament’s intervention
• Section 38: a band may absolutely surrender to her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve

Honor of the Crown:
• Duty to act in good faith in all its dealings and treaties with Aboriginal people
• Where any act of the Crown may affect an Aboriginal or treaty right, the Crown is under a duty to consult and accommodate
• The Haida Nation case deals with the duty to consult

Haida Nation Case
Involves a case where logging affected land that the Haida had an unsettled claim to
• Courts held that there is a duty to consult even if it is an unsettled claim
• There is a corresponding duty on aboriginal peoples to only bring forward clear claims stating the nature of their interests
• As to the specific obligations that form part of the consultation process, the court proposes a spectrum
  o One end lay cases where the aboriginal case is weak or the potential for infringement is minor
    ▪ Would only result in discussion/notice (notification)
  o At, the other end of the spectrum, the rights are significant or the potential for infringement is substantial
    ▪ In these cases the duty to consult translates to a duty to find a satisfactory interim solution, formal participation in the decision-making process, and also written reasons that show aboriginal interests are properly considered and addressed. Consultation must be extensive.
    ▪ Ought to be compensation for the infringement

**Constitutional Law:**
Common law duties crystallized with the imposition of sovereignty

**Constitution Act, 1982 – s 35:** The existing Aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed
• Unlike the Charter, this extends protection to property rights
• After CA1982, protected Aboriginal rights cannot be extinguished by a unilateral act
  o If rights are infringed upon, the Crown must shown justification – 2 part test:
    ▪ Is the legislative objective substantial and compelling?
      • EX: conservation, economic development, mining, etc.
      • Decided on case-by-case basis
    ▪ Is infringement consistent with special fiduciary relationship between the Crown and Aboriginal peoples?
      • Usually impairment leads to compensation
Section 91(24): Responsibility of Indians and Indian lands are exclusive to parliament

**Indian Reserves**
• This is a unique system of landholding under the *Indian Act*
• Under this system the Aboriginal group is put in possession of a tract of land
• The band allots individual parcels to members of the group who hold under a certificate of possession (a document given to the member by the band council)
  o These rights can be devised by will, and can be transferred in principal to another member of the group but only with consent of the counsel
  o All the rights that flow from this certificate only exist as long as the original holder resides on the reserve. If he leaves, then the land goes back to the counsel.

**Dissolution of Marriage:**
• Matrimonial act and dower act do not apply to the reserve
• No protection for spouses on the reserve
• There has been talk of the inapplicability of provincial laws that give temporary exclusive possession to a spouse that suffers abuse by another spouse
  o These laws do not apply to the reserve
  o There has been talk about whether they should apply

**Metis Settlements in Alberta**
Separate from reserves.
Three types of rights:
1. Metis Title – Right to occupy and make improvements, build, develop. These rights can be transferred & devised, & lesser interest can also be granted (i.e. lease)
2. Provisional Metis Title – Granted for a fixed term with certain conditions which can be renewed; if the provisional title holder meets certain criteria they can acquire “Metis Title” (would have to use it appropriately in accordance w/the wishes of the counsel)
3. Allotments – Granted for fixed term, intended for farming or business purposes (not for residential)

**Estates in Personalty**
• Given that interests in real property can be allocated, what about interests in other property?
• Generally over time personal property interests can be allocated
  o EX: renting a car, borrowing a book from the library
• Also wills. Given the statute of wills which allows everyone to divide their property at their leisure, the courts will respect wishes to devise interests in their personalty to others in the same way as real property.
• Just as you can create a trust for land, you can create a trust for personal property.

Unit 6: Origins and Nature of Equitable Interests
Legal vs equitable ownership are distinguished in Canadian law

Evolution of the Trust
• Describes a conveyance that creates an equitable interest
• How do you create a trust? Will, deed of trust, declaration of trust
• The modern trust involved 3 legal personas and pool of assets
  o Settlor - A legal persona who creates the trust
    ▪ Owns property in fee simple, has absolute property to it
    ▪ Conveys or grants that property into a trust without consideration.
  o Trustee - A legal persona who acquires the trust property
    ▪ Responsible for managing and controlling trust property, investing in it or investing it
    ▪ All of this with settler’s express instructions but also subject to a range of fiduciary duties that require the trustee to act in the best interests of the beneficiary
  o Beneficiary - Legal persona for whose benefits the trust is set up, the property is entrusted to him
    ▪ Beneficiary has no control over trust property, very frequently has no possessory interest at all
    ▪ All they are entitled to is to receive periodic income or distribution of payment from the trust property.
• Trust property itself is some asset or collections or pool of assets
  o Can consist of real or personal property, including intangibles such as intellectual property
  o Today we usually refer to bonds/stocks/other liquid assets that have a market value and a potential to generate income for the beneficiary
• Trust can be created by will or by a deed of trust or even by unilateral declaration of trust.
  o Settlor can serve as trustee temporarily, designating someone else to take over in time
  o Trust can be set up to control assets within the family or for a charitable purpose
    ▪ EX: X, a single parent can appoint her sister in her will as her trustee and instruct sister to hold the legal title to her house and to take control over her bank accounts and to even collect on her life insurance (if she’s dead) and to manage all these for the benefit of her minor daughter, until that daughter can manage her own affairs.
• Trust = flexible legal devise: Legal title almost always transferred to one trustee but the fee simple is united, which permits the trustee(s) to buy or lease the property depending on market conditions or risk, ALL in best interest of beneficiary

The Origins of Equity
• Common law was often unjust in its rigidity; courts of equity called the Chancery were meant to cure this
• Application of equity was at the discretion of the Chancellor (chancellor = King’s conscience)
• Not meant to supplant common law but to complement it, however, where there is a conflict between common law and equity, equity prevails to the extent of that conflict
• Courts eventually fused in the Judicature Act in the 1870’s.
  o S 5 - Superior Courts have jurisdiction over both common law and equity

The Emergence and the “Use” and the “Trust”
• The emergence of the trust is the main contribution of equity to property law
  o Modern trust arose out of the feudal concept of “use”
  o Use was a device under which the legal title was granted to one person to hold for the benefit of another

The Structure of “Use”
A → to B and his heirs → to the use of C and his heirs
  A: feoffor to uses (owner of property)
  B: feoffee to uses (hold legal fee simple but undertake land to the use of C)
  C: cestqui que use (he who benefits from use)
• B is entrusted with managing the property for the benefit of C;
• B is seised of the estate, but C is the beneficiary
• B is bound by conscience to the terms of use;
- Originally C had no legally enforceable claim in the land but enforcement of uses became a central function of the Chancery.
  - C was determined to have an "equitable" interest in the land with B as basically a caretaker
- Chancellor says he can’t say she has legal title because she is not seised and this would go against the courts. But he can summon the uncle and do one of 2 things:
  1. Convey legal title to niece
  2. Put her in possession
Remedy at Chancellor’s discretion – if uncle refuses he will either: Burn in hell or be sent to jail
- One of these 2 is usually enough to get Uncle to follow the remedies of the Chancellor.

**Bona Fide Purchaser For Value**
The equitable beneficiary has rights that are enforceable not only against the feoffee to uses, but anyone else who comes to the land unless they are a good faith purchaser for value.

**A: to B and his heirs → to the use of C and his heirs**
- B is bound by conscience to the terms of the use
- What if someone purchases it from B?
- An equitable interest in land affects all who come to the land except a bona fide purchaser for value
  - i.e. if you were unaware of the use and you paid consideration for the property, then the Chancellor would not be able to remove you of possession.
  - This rule transforms the use – not just a good faith obligation on the trustee, but is a proprietary interest.
    - Equitable interests are as good as legal interests with this one exception

**Statute of Uses, 1535**
- Uses interrupted revenue to the royal coffers and incidents of tenure were based on a particular person being seized of the land. Now, property could pass from father to son without legal transfer of ownership… so no tax revenue
  - King’s answer to this problem was SofU (eliminate uses and restore flow of feudal taxes)
- SofU was intended to enforce performance of feudal incidents (taxes) and close other loopholes
- When person seized to the use, trust, or confidence of another person or corporation, the use is executed, and the equitable interest is converted to the equivalent legal interest.
- In AB, *Land Titles Act > Statute of Uses*
  - Statue of Uses applies, but affected estates remain equitable

**Operation of Statute of Uses, s 1:**
- Where person A is seised to the use of another person B, or B corp, then:
  - B’s equitable interest is enlarged by a corresponding legal interest; and
  - A’s interest is ‘executed’
  - If statute applies, legal seisin is taken from the feoffee to uses and given to the cestui

The idea is that the courts of equity will continue to recognize *cestui que* use as holder of an equitable interest but we are also going to put legal title to the *cestui que* uses so we can collect incidents of tenure (taxes)
- No more separation of legal and equitable title

"To A and his/her heirs, to the use of B and his/her heirs"

**Prior to SofU:** Legal title held by A (feoffee) and equitable title held by B (cestui que use)

**After SofU:** Deprived A of legal title. States is executed by Statute and given to cestui que use who then possesses both the legal and equitable title.

**EXAMPLES**

**A → to B and his heirs → to the use of C and her heirs**
- Before Statute of Uses:
  - B has legal title in fee simple
  - C has *cestui que* use / equitable estate in fee simple
- After Statute of Uses:
  - B is seised of a legal estate for the use of another person, C
  - Therefore, we take the equitable interest of C and enlarge it by a corresponding legal interest
  - C will have an equitable fee simple as before AND a legal fee simple as a result of the SofU
  - B’s interests are executed and he is written out entirely.
**X: to A and her heirs to the use of B for life, remainder to the use of C and her heirs (“use after use”)**

- **Before the Statute of Uses?**
  - A attains legal title in fee simple
  - B gets equitable life estate
  - C obtains the equitable remainder in fee simple

- **After the Statute of Uses?**
  - B gets a life estate in both the equitable and legal interest
  - C gets the remainder in equitable and legal fee simple
  - A is executed out

**X: to A and her heirs to the use of B for life**

- **Before the Statute of Uses?**
  - A would get a legal fee simple
  - B would get an equitable life estate
  - Something is missing when B is dead, who is the beneficiary? A isn’t made to be the beneficiary, so he shouldn’t get it. There is an implied trust in favor of X’s estate.
    - There is a resulting trust in favor of X’s estate.
    - Any time we see there is something missing in the timeline, it is implied that X intended to make a trust in favor of his estates
    - A holds legal fee simple; B has an equitable life estate; the grant X has an equitable reversion (a “resulting trust”)

- **After the Statute of Uses?**
  - B would obtain a legal and equitable life estate
  - The reversion, both legal and equitable, would go to X’s estate
  - A is executed out

**Unintended Features**

**First:** SofU revolutionized conveying practices. Before it, legal title to a freehold estate had to be transferred through the ceremony of feoffment by deliver of seisin. SoFU allowed this to be replaced as effect of it is to move legal title from feoffer to the cestui que use. Statute could be harnessed by conveyancers to transfer legal title from A to B eliminating need for ceremony. Using a method called bargain and sale, A would agree to transfer the property to B at a stated price (eventually even a nominal sum was taken to suffice). Bargain and sale raised a use in equity, imposed on A in favor of B. Statute could then operate, taking legal title from A and placing it in B.

**Example 1:** While in London, X agrees to transfer to Y an estate in Whiteacre, which is located in York

- What does the common law say? Must be a physical ceremony
- But after 1536, X can convey “to my solicitor, to the use of Y”. The Statute of Uses executes the solicitor’s interest, and places the fee simple in Y
  - Statute is stronger than court

**Example 2:** O conveys Blackacre: “to Lady Mary and her heirs when she marries Matthew”

- What does common law say? No. Transfer now with physical ceremony or wait and do physical ceremony.
- But after 1536, O can convenant: “To stand seised for the benefit of Lady Mary and her heirs when she marries Matthew”

**Second:** SoFU thought to have removed the power of landowners to make testamentary transfers. Modern will laws stem from that enactment.

**Third:** SoFU in welding the legal and equitable titles together, created a hybrid form of property, known as a legal executory interest.

**Ways to Avoid the Statute of Uses**

Statute of Uses does not affect all transfers under uses; by constructing transfer in a way not pinpointed by the Statute, purely equitable interests can be produced called a trust. Some terminology changes:

- Feoffer is now “settlor”, fooffee is now “trustee”, cestui que use is now “cestui que trust” or “beneficiary”
- Use and trust are now interchangeable terms

Two primary methods of overcoming Statute of Uses:

1. **Avoidance**
   - Involved creating a limitation that does not fit into the four corners of the legislation – Statute applies where a person is seised to the use or trust of another person or corporation
   - Statute does not apply to personally

**EXAMPLES:**

**Seise to a corporation**
• To A Corp in fee simple to the use of B in fee simple
  o This avoids the statute, because the statute only speaks of a person being seised to the use of another
    person, not a corporation

Give a lease, not a seise
• To A for 999 years to the use of B in fee simple
  o Statute only applies when a person is seised. Here A has a lease.
  o A is not seised of any property because it has a lease, and thus A is not executed out by the statute.
  o The trustee creates a leasehold estate, as a leaseholder cannot be “seized” to the use of another.

Active Duties
• To A to hold the property, to manage it, and pay the rents, and profits to the use of B in fee simple
  o A is a person. A has seisin. Yet courts said they would not execute the use. A doesn’t just stand a seize
    but has active managerial duties.
  o A unaffected by statute as it would be a contravention of the terms of the use
  o A could not convey title to B without violating express instructions as the feoffor to uses as A and no one
    else can collect the rent
  o Any time the settler imposes real responsibilities/active duties on the feoffee, can’t execute the feoffee out

2. Exhaustion
• Statute of Uses was capable of executing only one fee simple of uses. Second use is said to be void. Therefore
  could create instruments that trigger the statute but that it is unable to handle.

EXAMPLES:
To A and his heirs → to the use of B and her heirs → to the use of C and her heirs
  • Before Statute of Uses: We would have a case of repugnancy: A would have fee simple, B would have the use
    and C could obtain nothing as all the legal and equitable interests were held by A and B.
  • After the Statute of Uses: A is executed out. B gets fee simple. C is exhausted.
    o A is seised to the use of B and this falls within Statute. A’s interest is executed and conferred, by
      operation of law, on B (fee simple). The Statute has run it’s course, it is exhausted, full fee simple has
      been shifted from the feoffee and bestowed onto the cestui que use. Although B is seised to the use of C,
      the Statute will not execute this use.
    o If you want to separate equitable and legal title, you use a “use upon a use”

Use Upon a Use
“To A, to the use of B to the use of C” or “To A to the use of B in trust for C”
  • Creates a trust. B is the trustee. C is the beneficiary.

“To B and her heirs → to the use of B and her heirs → to the use of C and her heirs” or “To B to the use of B, to the use of
  (or in trust for) C” or “ unto and to the use of B in trust for C”
  o Statute doesn’t apply because it only applies to a different person. The statute tries to execute that grant
    and fails. Creates a trust. B with legal title, C with the equitable title.

Unto and to the use of A and her heirs → to the use of C and her heirs
  • Statute is exhausted. Equitable interest severed from the legal one.
  • Standard language used today in modern trust “unto and to the use of A” is equivalent to “to A for the use of A”
  • Language in this example is language used for centuries to create a modern trust

A gift “To B in fee simple to the use of C for life, with the remainder to the use of D in fee simple”
  • C with legal and equitable life estate
  • D with legal and equitable remainder in fee simple
  • Statute exhausted

The Term “Trust”
• Nowadays the term “trust” describes a conveyance that creates an equitable interest (as opposed to a
  conveyance designed by the Statute of Uses)
  • But in a transfer the language “to the use of” = “in trust for”

EXERCISES:
To Acme Corp, to collect the rents and profits and invest them in trust for C
  • Active duty = Cannot convey legal title
Successful trust
To X for 99 years in trust for C
• This is a lease, so C would get an equitable estate and X would have a lease (he is not seized to the use of another person).
• Successful trust
To X to the use of C
• X is executed out, and C acquires legal and equitable fee simple
• Unsuccessful trust
To X, 500 shares of the Acme Corp, to hold in trust for C
• Personal property does not attract SofU (only real property)
• Successful trust
To X to the use of A to the use of C
• "use upon use". SofU operates once to execute X out, and that's it. This is a grant to uses with the intention to leave X out and put A in a position of trustee.
• X is executed out
• A takes legal title
• C takes equitable title
To X to the use of Acme Corp
• If a person is seized to the use of a corporation, it attracts the SofU
• Thus, X is executed out and Acme obtains legal and equitable title
• Unsuccessful trust
To X in trust for C
• X likely executed out, C gets legal and equitable title.
• Unsuccessful trust
To X to the use of X to the use of C
• SofU only applies when a person is seized to the use of "another" person, so doesn't apply when a person is seized of themselves.
• X gets legal title
• C has equitable title
• Successful trust
Unto and to the use of X in trust (or to the use of) C
• Same as previous one – "unto and to the use of X" is short for "to X to the use of X"
• The SofU is avoided
• X has legal title
• C has equitable title
• Successful trust
To X in trust for B for life, remainder in trust for C and her heirs
• X is executed out
• B gets equitable and legal life estate
• C has equitable and legal fee simple in remainder
• Unsuccessful trust
To the use of X in trust for C
• "to the use of X" is the same as "to X to the use of X", so X has legal title
• C gets equitable title
• Successful trust
  o If it said "to X in trust for C", X would be executed out and C would get equitable and legal title

Express Trusts
Express as opposed to implied trust. Express trusts are expressly created and subject to all formalities related to the Statute of Uses. They are most often used in wills to donate money or property as well as in investments and another financial ventures eg "Unto and to the use of A in trust for B for life, remainder in trust for C"

Resulting Trusts (and the presumption of advancement)
When title to property is in one party’s name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner
• Incidents where property is said to "result" back to the transferor
• Resulting trust is recognized by the court inferring the intentions of the grantor.
Resulting trusts may arise where there is:
A gap in equitable title → resulting trust
1. A failure to dispose fully or properly the equitable interest
   • If some element of beneficial interest is not transferred it will result back to the settlor
   • Ex: A provides the purchase price, but property is put in B’s name
     o Equity would presume that you did not intend to make a gift of the purchase price, but rather that B holds legal title and A holds equitable title
     o The trust is the product of the intention of the settlor.
       * These are intentions that the court infers from the circumstances.

   Presumption of Resulting Trust
   • Ex: A conveys property to B without consideration
     o Equity presumes that A granted the legal interest but retained the beneficial interest. **Presumption of a resulting trust (general rule)** in favor of A
     • Unless you prove that it is a gift, the fact that you have legal title is meaningless
   • Ex: X buys a boat and registers boat in Y’s name. Title to property is purchased in Y’s name, with X’s money. Equity presumes that X retained the beneficial interest in the property.
     o Presumption: Y holds in (a resulting) trust for X. Legal title is in Y (registered as owner). However, equity will treat that interest as subordinate to the resulting trust held by X, Y is regarded as a bare trustee.
     o Presumptions are rebuttable! You can bring evidence!

Presumption of Advancement
In specific situations (Pecore v Pecore), the reverse is true and the **presumption of advancement** applies.
Depends on the nature of the relationship of the parties to the transaction:
   • Gift is presumed in the transfer from parent to minor child (but not an adult child, per Pecore), when individual stands in the place of a parent
     o Child is presumed to have been given both legal and equitable interests
     o Equity presumes that the donee does not intend to retain beneficial interest and gives the gift to better the other party’s situation in life
     o Resulting trust can be found in favor of parent if it can be shown that gift was not intended
   • For an adult child, even one still dependent on parental support, presumption of advancement is not invoked. So a resulting trust arises unless intention to give a gift can be proven on BOP.
   • Advancement presumed when husband purchased property in name of wife but not vice versa
     o Gift by H to W triggered a rebuttable presumption of advancement in favor of W
     o Gift by W to H, resulting trust is presumed, also in favor of W
     o Has been applied to engaged couples as well but not cohabiting (but no authority)
   • Both presumptions can be rebutted.
     o Presumption of resulting trust can be rebutted by showing that gift was truly intended. If that is proven then the legal and equitable titles are held by the donee and no trust arises.
     o Presumption of advancement can be rebutted by showing a gift was not intended.
     o You can submit evidence to convince the court of the real state of affairs.
   • Ex: A provides the purchase price, but property is put in B’s name
     o Equity would presume that you did not intend to make a gift of the purchase price, but rather that B holds legal title and A holds equitable title
     o The trust is the product of the intention of the settlor.

Matrimonial Property Act, s 36: (only applies on divorce)
Under this Act, Presumption of resulting trust generally applies to transfers made by one spouse to another. An exception exists for assets that are purchased by the spouses as joint owners – in this case the presumption is that both hold a
share of the equitable title. In other words, a gift is presumed.

- "Gratuitous transfers between spouses are subject to the presumption of a resulting trust. However, where property is taken in the name of the couple as joint owners, joint ownership of the beneficial interest is also presumed"
- NOT MARRIED: One buys a boat and registers in both names. Legal title held by both. But equity says no, person who paid is sole owner.
- MARRIED: Once you register in both names, equity assumes equitable interest shared by both.

**Relevant Sections of the Act**

1. In making a decision under this Act, the Court shall not apply the doctrine of presumption of advancement to a transaction between the spouses in respect of property acquired by one or both spouses before or after the marriage.
2. Notwithstanding subsection (1),
   - The fact that property is placed or taken in the name of both spouses as joint owners is proof, in the absence of evidence to the contrary, that a joint ownership of the beneficial interest in the property is intended, and
   - Money that is deposited with a financial institution in the name of both spouses is deemed to be in the name of the spouses as joint owners for the purposes of clause (a).

**Pecore v Pecore**

**Facts:**
- Father accumulated assets worth roughly $1.2 million. In 1994, began transferring these assets into an account held jointly with his daughter. In 1996, he wrote a letter stating he was 100% the owner of the funds and they were not being gifted, so as to avoid taxation. Father paid taxes and controlled accounts until death.
- In his will, daughter named executor. Left specific bequests to daughter's husband, but most of his estate to daughter. Residue of estate (remaining unnamed bequests after debts paid) was to be divided equally between husband and wife.
- Daughter's husband moved to long-term care facility shortly before father died in 1999. Daughter did not turn the joint accounts over to the estate.
- If the gratuitous transfer of the funds is a gift to Paula, they are hers to keep. But if Paula's father retained the beneficial interest in the funds, then they form part of his estate, and both Paula and Michael inherit.
- When father prepared his will, he didn't mention joint accounts to lawyer. He told several people he intended to look after Paula after his death but the system would look after Michael.

**Analysis:**
- Daughter has legal title over funds but question of who retained beneficial interest. If the father intended a gift to her, then she had both legal and beneficial title. If not, she would be legal owner but the father's estate would be the beneficial owners of those accounts.
- There is no presumption of advancement in the case of an adult child.
  - Court presumes adult child holds property in trust for benefit of parent. Why?
    - Adult children are often given property by their parents so that they can manage it in their interest
    - No moral or legal obligation to support an adult child
    - Presumption of advancement cannot be founded on affection only
  - Rebuttable presumption: you can introduce evidence that it was a gift.
- When there is a GT from parent to minor child, presumption is absolute gift (legal and equitable). This rests on social practice and moral duty of parent to advance child's situation in life
- Adult child: Not going to presume advancement when child is an adult. Assume child now holds property in trust for parent/parent's estate. Main reason for this is we have a common situation where child manages assets of elderly parent.
- Court rejects argument of a presumption of advancement could be founded on affection
- Paula says she's like a minor because she's been dependent on her father
- Presumption of advancement criteria: must be from father to spouse or child AND child must be a minor

**Decision:**
- Court began with the assumption of a trust but ultimately determined there was sufficient evidence to establish a gift for the purpose of advancement
- Daughter gets everything

**Modern Trust**
- The term "trust" appears to be used during the 16th century
- A response to the transformation of England to a mercantile and industrial society
- Trustees assume a new role
Constructive Trusts

- Imposed in circumstances in which a person has acquired property for his/her own benefit, at the expense of another to whom the person owes a fiduciary duty
- Refers to circumstances where property is subjected to trust by operation of law, and not as a result of grantor’s express or implied intentions.
- Unlike express trust, it does not come into being of express intentions of settlor, and unlike resulting trust, it is not produced by implied intentions.
- Two types:
  o Institutional – traditional/conventional form
  o Remedial
- Remedy in cases involving land sales:
  o SCC: remedy is damages unless P can demonstrate that the property is somehow unique and that damages wouldn’t be adequate compensation.
- Sale of real property? (Semelhago)
  o If you’re buying a house, sign papers, put down deposit. But vendor burns it down before closing date. You have equitable title and vendor is holding property in trust for you.
  o Who worries you when you have beneficial title? Good faith purchaser. If they pay and close, they have obtained perfect title. They’re not bound by your beneficiary interest because it’s not a registered interest.
  o How can you protect yourself? Subject to financing and inspection. Can put a caveat emptor on it (warning). Just a notice, a warning. It prevents anyone from being a good faith purchaser.
  o Semelhago: In obiter, court says they won’t assume automatically that you’re entitled to specific performance as a remedy when you buy real estate. Not true that all property is unique. Rather, PL must demonstrate that damages would not provide adequate recompense because, centrally, the property at issue is unique. Concept of a constructive trust, that you have equitable title, is linked to specific performance. If it’s not there then just like any sale of goods.

Institutional/ Conventional Constructive Trust

Imposed in equity. It is situation-based; arising in a number of established specific instances without the need for the intervention of the courts (court only enforces). If facts which are necessary to give rise to constructive trust are proven, then the trust comes into being. It exists from time the relevant event occurs.

- Court does not impose trust
- Court merely recognizes that the beneficiary has a pre-existing proprietary interest in the property
- Ex. Express trustee who wrongfully obtains profits from his position will (for that act of infidelity) hold those monies under a constructive trust. Person who unlawfully meddles with trust property, when they knew or ought to have known of the trust, will be treated as constructive trustee. May be imposed to prevent a wrongdoer from profiting from a crime.
- Suggest that constructive trusts arise in instances in which equity wishes to respond to various modes of unconscionable conduct. Common ingredient but not necessary.
  o Vendor of standard house transaction normally assume position of constructive trustee prior to closing of the transaction. Accordingly, vendor must maintain property and not deal with it in a manner that would be detrimental to the interests of the purchaser. However position of vendor is not identical to other construct trustees. Until price is paid in full, array of beneficial rights may still be enjoyed by vendor such as possession, right to rent or any profits derived from property.

Equitable principle of unconscionable conduct

- EX: trustee/anyone in fiduciary position towards beneficiary
  o If they make unauthorized profit and breach of their duty, court holds gains in constructive trust
  o If A is a trustee in property, and is instructed to invest it in CAN savings bonds, and pay income to B. Trustee decides instead to invest in stock market and makes more but pays less than total gain to B. They can’t keep the extra profit, they are in law constructed trustees of those profits.

Other Examples:

- Any 2nd party that comes into possession of trust property with actual notice of the trust, or w/ constructive notice of trust (knew that someone else was beneficiary or ought to have known), they are deemed to be constructive trustees of property in favor of beneficiary.
- Someone who profits from a crime is considered a constructive trustee of proceeds of the crime.
EX: senior prosecutor took bribes from criminals for decision not to prosecute. Took bribe $ and bought property in NZ. His employer obtained judicial declaration that NZ property was held in constructive trust for Crown on basis of breach of fiduciary duty.

- Clearly there was never any intention that Crown would be beneficiary of that property. Person who bought property intended full use and possession. But Crown’s interest as beneficiary is recognized by operation of law, irrespective of owner’s intentions

- Equitable interest person has in property prior to closing sale
  - Intend to buy house and possession is May 1st
  - Before you close (register title of house), you have an equitable interest only (not legal interest)
  - Equitable interest results from law – it would be unconscionable for vendor to sell house to another, or damage it or mortgage it.
  - When you sign your contract, vendor is a constructive trustee of house and purchaser is constructive beneficiary.

Remedial Constructive Trust

- Means of responding to unjust enrichment. Used to provide a remedy in situations in which a title holder of property would be unjustly enriched unless equity compelled him or her to share the property with someone who contributed to acquiring or improving the property
- Most commonly used in Canada in disputes over property acquired during the course of intimate partnership when title to that property is held by only one partner. Basis for compensating those engaged in (otherwise unrewarded) housework labor. This is a proprietary remedy for such work.
- Since 1970s, remedial constructive trust has developed as a means of responding to unjust enrichment.
  - If court finds that PL has proven his case and DF has been unjustly enriched at expense of PL and there’s no juristic reason for enrichment, court can impose a constructive trust over assets representing any remaining enrichment in hands of DF.
  - Otherwise, court will simply award damages
  - Is declared by the court, and because it’s a remedy it only arises from pronouncement of the court.
  - Ex: Suppose a trustee meddles with the trust property, a constructive trust is placed over gains the trustee made from time those events occurred, once the trustee betrayed the settlor’s instructions a trust is created.

The Development of the Remedial Constructive Trust

- **Traditional Position:** You lived with a man without marrying him, you pay the price. Not our job to assist you. No statute to help you, no Dower rights, no contract.
- **Murdoch v Murdoch:** Did work on the ranch with husband. Trial judge said wife made no direct contributions to the husband’s acquisition of the present assets other than carrying out duties expected of a rancher’s wife. If you can show that both of you intended for you to hold legal title. Laskin says where her duties are domestic (not putting forth money to buy the property) the remedy is a constructive trust. He thought it necessary to respond to unjust enrichment enjoyed by the husband. Wanted to take into account wife’s contributions before lands were purchased, as well as participation in the ranching operations.
- **Rathwell v Rathwell:** Similar facts as Murdoch. On the facts, the parties did have shared intention to share the beneficial title. They weren’t expressed but we can infer them on the circumstances. Resulting trust based on common intention. Doctrine of unjust enrichment (1) enrichment, (2) corresponding deprivation, (3) absence of juristic reason for the enrichment. One remedy is to treat legal owner as holding part of the title, such as share of fee simple, on a constructive trust for the party suffering the deprivation.
  - Proving (3) is difficult because it’s vague and vital. Two problems: (1) it is hard to know what counts as a good reason and (2) if the PL must demonstrate that no such reason exists, entails proving a negative, which is a tricky matter (try proving you’ve never been to the North Pole).
  - PL must show that no previously recognized juristic reason to deny recovery applies to present case. Established reasons include: a contract, disposition by operation of law, intended gift by PL, and any other valid obligation founded in common law, equity, or statute.
  - If show that there is no juristic reason, PL has made prima facie case under juristic reason component. DF then bears de facto burden to establish that a novel juristic reason exists.
  - Court decides: (i) new category of juristic reason should be acknowledged, (ii) a special reason (but no new category) exists in the present case that would prompt the court to deny relief to the PL, or (iii) DF has simply failed to rebut the presumption of entitlement raised by the PL.
  - If all components of unjust enrichment are met, there is rise to a remedy (not necessarily interest to property). Two alternatives: (1) personal restitutionary award (monetary payment or restitutionary proprietary reward), or (2) constructive trust. Presumptive order is for monetary payment. But where
payment is an issue and where there is a proven substantial and direct connection between contributions and property at issue, constructive trust may be imposed.

- Other issue is quantum. Can look at value of work for fee-for-service basis or value survived/accumulated wealth investment approach (how much the contributions enhanced the overall wealth of the parties)

- **Pettkus v Becker**: Embraces Laskin’s constructive trust. Acknowledges unjust enrichment and uses constructive trust as a remedy.

- **Vanasse v Seguin**: He worked outside the house, she worked inside the house. She made domestic contributions so she would be entitled under the circumstance to a property interest in the house just like Peters. He was working in tech industry and when he sold, he made millions. She wants that, not just house. Unjust enrichment may result following the breakdown of the relationship where one party retains a disproportionate share of the assets produced by the joint family venture. The existence of the JFV is a question of fact. The claimant must show a nexus between his/her contributions and the assets accumulated by the JFV. Her contributions were sufficiently linked, priority of family, joined economic status, Existance of JFV is question of fact. Judgement restored for her (almost $1 million in addition to child and spousal support)

**Unjust Enrichment Schema**

**Cause of Action**

1. Enrichment
2. Corresponding deprivation
3. Absence of a juristic reason (JR) for the above
   a. No established JR ➔ onus on claimant
   b. Presence of an additional JR ➔ onus on respondent
      i. New JR established
      ii. Case-specific JR

**Remedy**

1. Form of Award
   a. Monetary (presumptive)
   b. Proprietary
2. Valuation
   a. Value received (fee for services)
   b. Value survived (presumptive for JFV)
   c. Other financial considerations (such as conferral of mutual benefits)
Kerr v Baranow

- Couple in late 60’s, lived together for 25 years without marrying.
- Last decade and a half female partially paralyzed
- In 2006, man ended relationship and put woman into long term care facility
- Woman sued for part title of the land saying he would be unjustly enriched if he were able to keep the property entirely for himself. Mr. Baranow counterclaimed that Ms. Kerr had been unjustly enriched by his housekeeping and personal care services.
- Trial: Ms. Kerr entitled to 1/3 interest in property (resulting trust) to show her contribution, and by way of remedial constructive trust as a remedy for her successful claim in unjust enrichment. Rejected Mr. Baranow's counterclaim.
- CA: Allowed Baranow’s appeal
- SCC: Ordered new trial

Whether parties were engaged in “joint family venture”. If parties worked together as a single family and economic unit, that is, as part of a joint family venture, and a link exists between the contributions and the accumulated wealth, the normal approach is to apply the value survived method of quantification. Assumption that couple expected to share in fruits of their partnership with little regard for the state of title of their assets.

Murdoch v Murdoch – led to Remedial Constructive Trust
- Wife often maintained family ranch while the husband was away; sought part of the ranch in addition to support on divorce. As her name was not on the title, ultimately found to not be entitled to any property (there were no matrimonial property laws to protect her then)
- SCC accepted husband’s argument that her contributions were what any farmer’s wife would make – they were gifted to husband and therefore she had no legal or beneficial interest in property
- Strong dissent from Laskin J: there was no resulting trust (no intention of husband to be trustee of property). Laskin planted the seed for constructive trust.

Peter v Beblow – Domestic labour is sufficient to found a claim for unjust enrichment – remedial constructive trust

Facts:
- P and D lived together as partners for 12 years in his house (unmarried). She moved in at his request and became common law wife. She provided valuable domestic services (looked after kids). He mostly works outside of the house and earns $.
- On breakup, they fight over the house. P claims D was unjustly enriched at her expense. She claimed beneficial ownership of the house, which was in his name only.

Analysis:
Elements of unjust enrichment:
- An enrichment
- Corresponding deprivation
- Absence of juristic reasons for enrichment
  - If elements of unjust enrichment are made out, claimant may be entitled to the remedy of a constructive trust.
  - Remedy is not always constructive trust, can be monetary damages.

Court will find constructive trust if:
- Monetary compensation is inadequate
  - Damages are insufficient is there is no chance of collection or there is a special interest in the property
- Claimant’s contribution to property is sufficiently substantial and direct to entitle plaintiff to share of profits upon sale of property.

SCC:
P’s services constituted valuable benefit to P as he paid no compensation for services. Those contributions also enhanced D’s ability to make his mortgage payments. Therefore there is enrichment.

- Services also constitute a corresponding deprivation.
- Main argument before the court: whether or not there is a juristic reasons for D to be enriched at P’s expense.
- Like in Murdoch, D argues P voluntarily assumed role of wife and step mom and provided services out of affection and devotion.

- Was benefit conferred as a gift? Or was it bestowed pursuant to a legal obligation?
- A common law spouse is under no obligation to provide domestic services. If it was argued that P bargained away services in exchange for home and husbandry. Mac’s answer is trial judge found that P did expect to receive something in return, other than drunken abuse.
- It is more likely that the couple expects to share in the wealth, rather than receive compensation for their services. Both partners create something together and there’s expectations that they share the gains.

- What does public policy say about this enrichment?
- Services should be recognized like any other services (particularly in light of their value to the household unit and other partner.

- What about fact that legislature already chose to provide equitable division only for married couples, not common law couples?
- But equity plays role where there is injustice without a legal remedy
- Not to say that a legislative solution is not preferable
- But until legislature decides to recognize common law rights, equity is available

- Determination of damages:
- The court starts by defining the property, then to determine the portion attributable to the plaintiffs efforts.
- Sees no problem with assigning the entire interest in the house to Ms. Peter
- Only criticism is that the trial judge used the value of the service not how much they enriched Beblow

**Bulun Bulun** role of equity

- **Facts:** This case arises out of the sale of clothing material in Australia printed with patterns that infringe the copyright of the Australian aboriginal artist Johnny Bulun Bulun.

- Under copyright law in Australia, there can be protection of a copyrightable property only under the statute (also the situation in Canada).
  - But the applicants argue that even though the artist is the holder of the copyright in law, the tribe as a group communally had an equitable interest in that copyright.
  - The parties that were responsible for infringement conceded that the artist had copyright in the artwork, and that they infringed it.
  - They therefore consented to injunctions that would prevent further copyright infractions.
    - They further argued that given their acceptance of these injunctions, there is no point in further pursuing the claim between them and the applicant.

- Can the tribe, given their customary law, have a communal right in the work?
  - The court holds that such customary laws are not enforceable in an Australian domestic court, because the copyright act determines exclusively owners of intellectual property.

- Obiter: Court was prepared to treat the artist as a person who stands in a fiduciary duty towards his people.
  - He creates artwork with their permission, and borrows their cultural heritage, and because he is a fiduciary to his people, this gives the tribe a right to prevent any cultural misappropriation by a 3rd party
  - Court says the artist did meet his fiduciary obligations by successfully defending his copyright.
  - Court goes on to say that it would be prepared, in an extreme case, to treat the artist (or a person like him) as subject to a constructive trust and recognize communal beneficial interest in the copyright vested communally in the aboriginals.
    - EX: Suppose Mr. Bulun Bulun would permit infringement and not share the money with his people, in an extreme case the court might impress Mr. Bulun Bulun’s intellectual property with a constructive trust.
    - The court reminds that equity might impose a constructive trust on a fiduciary to prevent unconscionable gains.
  - The case illustrates that equity stands ready to protect interests in the appropriate cases by imposing a constructive trust.

Holding: No remedy needed. Haven’t established an equitable interest. No community copyright.

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**Unit 7: Conditional Transfers and Future Interests**

- Property rights can be used by present owners to impose restrictions on future ones.
Ex. A grant or testamentary gift can set limits on future use or ownership of that property

- Law seeks to balance the value of private property versus the value of what the grantor wants.

**Fundamental Concepts**

- Estates – Measuring device of a property interest (life estate, fee simple)
- Seisin – Feudal concept of possession enjoyed by a freeholder
- Reversion – When an owner of an estate transfers a less estate, retains residue in reversion – X to A for life, X maintains a reversion interest in fee simple (gets estate back once A dies)
- Remainder – Present rights to future enjoyment; when a partial estate is passed, with the residue to pass to another, the residue is a remainder → “to A for life then to B” B has a fee simple in remainder

**Absolute Interest:**

“To A and her heirs” (fee simple in possession)
“To W for life then to C” (life estate in possession then fee simple in remainder)

**Condition Subsequent and Determinable Interests** – very similar

**Condition Subsequent Interests** (defeasible)

Compare to this grant/devise: O to A on condition that the property be used as a school

- A acquires a fee simple subject to a condition subsequent
- The condition subsequent is like a “cloud”:
  - A acquires a present right to possession... but if the condition is broken, O can elect to end the estate by re-entering the land
  - O’s future interest is known as the right of re-entry (RoR)
  - If it may be brought to a premature end on the occurrence of a specific event or a condition subsequent. If the condition is broken, a right of re-entry can be claimed by the grantors estate to reclaim the land
- Condition subsequent - Cloud

**Determinable Interests**

Consider this grant/devise: O to A, while used as a school

- A acquires a fee simple determinable
- The determining event is like a “fence post”:
  - A acquires a present right to possession
  - ... but if the determining event occurs, A’s estate ends (“determines”) and O regains the right to possession
  - O’s future interest is known as the possibility of reverter (PoR)
- An interest which reaches a natural end on the occurrence of some specified event. No formal demand for re-entry is required as the estate ends upon the event occurring.

If a cloud (condition subsequent) is invalid then the cloud is removed;
If the fence (determinable interest) is invalid, the entire estate is invalid

**Difference between Determinable and Defeasible (condition subsequent) interests**

Subtle (yet dramatic) differences:

- **Determinable**: O to A, while used as a school/until the land is no longer required for school purposes
  - A receives possessory rights. O has possibility of reverter
  - Should the determining event occur, the fee will end and the property will pass to the grantor (or their estate). A’s estate expires and O has regained the right to possession
  - When dealing with a fee simple determinable, the event is seen as the natural point at which the estate ends (fence post). Estate ends automatically, no formal entry or demand for possession is required by the person holding the right of reverter
- **Defeasible**: O to A on condition that the property be used as a school (subject to condition subsequent)
  - O must enter the property in order to end A’s estate.
  - Here the interest is potentially forever
  - If the condition is adhered to that interest will continue. If it is broken, the right of re-entry may be relied upon by the estate to reclaim the land.

Cloud (subsequent) – Right of re-entry – person holding right of re-entry is not vested
Fencepost (determinable) – Right of reverter – person holding the right of reversion is vested

**How do we ascertain the grantor’s intentions? (Caroline v Roper)**

- Choice of language
Durational language (so long as, while, until, during, etc.) usually associated with a determinable limitation on the estate
- External stipulation (but if, on condition, provided that, if it happens that, etc.) usually indicates a fee simple subject to a condition subsequent
- These are rules of construction and help to determine the intention of the grantor

The instrument as a whole
- Rules of construction

Fee simple subject to executory limitation
- O to A, but if no longer used as a school, then to B (raises no problems in a devise or a trust)
- B’s interest sometimes described as an executory interest
- And A’s interest is described as subject to an executory limitation

Vested Interests, Contingent Interests and Conditions Precedent

Property interests are vested OR contingent

Contingent:
- A remainder is contingent if...
  - Vesting of the interest is delayed pending the occurrence of a condition precedent:
    - O to A for life, then to B if B graduates from law school
    - A condition precedent is like a "bridge", must be crossed before property can be enjoyed
      - If B doesn’t graduate, estate reverts back to O
  - Or if the identity of the remainder person(s) cannot be ascertained at the time of the grant:
    - O to A for life, then to the children of B (B has no children at the time of the grant)
    - Until A died, we don’t know if B has any children, so that remainder is contingent
    - This is important because contingent remainders will be subject to the rule against perpetuities

Vested:
- When no condition or limitation (including ascertainment of identity of the recipient) stands in the way of enjoyment.
  - If the interest is clearly identifiable, then it is vested and not contingent
  - Courts loathe to create contingencies and prefer to construe interests as vested. If it is unclear whether a gift creates a condition precedent or a condition subsequent of a determinable limitation, courts will prefer one of the latter two as they will create vested interests.
  - “To A for life then to B”
    - A is vested as a life estate in possession
    - B is vested since right to possession is not delayed by any condition other than natural termination of the prior particular estate (belonging to A). B is vested in interest (not possession)

Future interest or enjoyment
- Vested in interest: reversions, re-entry, remainders
  - Guaranteed interests and can be sold right away
  - Reversions: Can sell reversion prior to expiration of life estate
  - Reverter: to Edmonton Public School Board while used as a school. The grantor’s estate has the possibility of reverter, which will vest if the property will be converted to a different use. In England, this is not considered a vested interest, but in Canada the Tilbury case held that possibilities of reversion are vested.
  - Remainders: to A for life, remainder for B. B knows that A will die and they will take over that house. They can sell this interest.

Contingent interests:
- Remainders can be contingent... to A for life, remainder to B contingent upon B graduating med school. This is not guaranteed
- Estates subject to condition precedent: to A when A reaches 21. This is a fee simple subject to a condition precedent (there is a bridge to cross).
- Right of re-entry: to A but if A should convert, my estate may re-enter.

The Rule in Browne v Moody (Mcdeen Estate Case)
- Settlor's instructions (Mcdeen Estate): "in trust for my wife during her lifetime. Divide the residue of my estate equally between my sisters A and B if they are both alive at the time of the death of me and my said wife. If only one of my sisters is alive at the time of death of the survivor of me and my said wife, deliver the residue of my estate to the surviving sister, the same to be hers absolutely"
- Both sisters were dead at the time

Alternatives:
### Alternative 1:
- Equitable life estate in the widow, followed by a remainder in A, or B, or both.
- That remainder is contingent, i.e. subject to a condition precedent (surviving the life tenant).

### Alternative 2:
- Equitable life estate in the widow followed by a remainder in A and B equally.
- A and B’s interest vest a morte testatoris, subject to a condition subsequent (divestment of A by B if only B survives the life tenant, and vice versa). (Correct view)
  - Condition subsequent: either sister would be divested in the event that they die.
  - Since neither survived, neither were divested, and therefore the remainder goes to the sisters’ estates and not the settlor’s.

Since Language which is ambiguous allows multiple interpretations and we have to choose. What did the settlor intend in the event that neither sister survived the widow?

- Several presumptions:
  - Presumption of intestacy: if a person goes to the trouble of writing a will, he intends it to cover all possible events.
  - Presumption of early vesting: if we can treat the sisters’ remainder as either subject to a condition precedent or vested subject to a condition subsequent, then we should favor the latter. We prefer to regard the interest as having vested early (i.e. on the death of the testator).
- The court is helped by the rule in Browne v Moody:
  - If the only condition attached to a remainder is surviving the life tenant, as opposed to satisfying some personal test/accomplishment, then the courts will presume, in the absence of any evidence to the contrary, that the remainder is vested and not contingent.
  - The idea is to treat the condition as only a stipulation that postpones enjoyment of the vested interest for the lifetime of the life tenant.
  - If the gift is not only postponed by the life of the life tenant but also qualified with another condition, i.e. marriage or attaining a certain age, then that gift is prima facie contingent, i.e. subject to a condition precedent.
- Idea here is to recognize that the language here is open to 2 interpretations
  - Court is assisted by the presumptions to assume this as a vested interest
  - Courts will go out of their way to make this a vested interest but if the language is clear it will be regarded as a contingent interest.

### The Rule Phipps v Ackers (Kotsar v Shattock)
Settlor: “To pay the remainder of my residuary estate to Olime Kotsar if and when she shall attain the age of 21 years... In the event of the failure of the trust in favor of the said Olime Kotsar, to pay my residuary estate to such charitable institutions as my trustees shall think fit but it is my wish that the greater part thereof shall be paid to institutions whose object is the relief of hardship among elderly people” (Kotsar v Shattock).

- There is ambiguity in the clause “if and when she shall attain the age of 21 years”
  - 1st interpretation: If this is a condition precedent, it is a bridge that has to be crossed, and if she doesn’t cross it then she never takes.
  - 2nd interpretation: She vests on the death of the settlor, but her interest is subject to divestment in case she passes away before her 21st birthday.

- According to the rule of construction in Phipps v Ackers, where (1) there is a gift to A ‘if/when/as soon as’ A attains a specified age or fulfills some other condition; (2) with a gift over to B on failure to fulfill that condition; then (3) A’s interest is regarded as vested at the date the gift becomes effective, subject to being divested if the condition is not satisfied by A.
  - So a condition precedent is transformed into a condition subsequent if these conditions are met. B has an executory interest...
  - The obscenity of this interpretation is shown by the following:
    - To the children of A when they turn 21, but if no child reaches 21, then to B
      - The rule of Phipps v Ackers applies.
    - To the children of A, who turn 21, but if no child reaches 21, then to B.
      - The rule does not apply (there must be a mention of if/when/as soon as, etc.)
      - This is a gift to the children who turn 21. They are the group of beneficiaries identified. Just because of this minor difference of language, the rule in Phipps v Ackers does not apply.

Rule:

*Rule of Construction* - When a gift to a devisee is made subject to compliance with a condition, with a gift over in the event that the condition is not fulfilled, the condition is held to be a condition subsequent (so as to create early vesting), even when it looks like a condition precedent.
Precatory Words and *In Terrorem* Conditions

- Terms are precatory when they fall short of establishing an actual condition or limitation – usually a “request” or “understanding”. In some cases these words may be found as binding and create a precatory trust – this is a matter of construction and is difficult to achieve.
- *In terrorem* testamentary conditions are idle threats which are not meant to lead to a loss of interest.

Transfers

- Reversions and vested interests are fully alienable
- Contingent remainders may be passed by will.

*Caroline Village v Roper*

- Original owner allowed town to use land as a community center. Town wanted to put a basement in, persuaded Roper to give a gift over. Gift stated the land would revert back if it was used for any purpose other than a community center.
- Community center burned down in 1982 and the town wanted to sell the land for commercial use. Roper's estate protested that the gift was not given in fee simple absolute. Town argued that the condition upon the gift was void because it was a condition subsequent (Defeasible fee simple) and the right of reverter in estate violated the perpetuities – (clouds cannot hang around too long)
- The right of re-entry was conditional and the rule of perpetuities applies, because the title may vest too late in the person holding the right of re-entry.

State Limitations of Private Power

Public policy limits to an individual’s power to control property by attaching conditions to gifts. Ownership rights are always subject to the qualification that a private act will not be treated as valid if it offends a countervailing state policy. Two discrete categories of public policy may be identified as grounds for finding a private act to be treated as invalid:

1. Those directly related to the use of property
   - Ex. Promotion of alienability and the need for certainty in property dealings
   - Because property law is heavily affected by efficiency and these things would hinder it
2. The larger spectrum of policy considerations, including matters that may only incidentally have a property dimension. Emerges from the potential of the lure of property and potential for it to be used in a harmful fashion
   a. Rent seeking – pg 252

The Effects of Invalidity

Not all conditions will be enforced...

- Will not enforce conditions that encourage illegal activity or are contrary to recognized public policy
- There are also conditions that are not expressed in terms certain enough for the courts.
  o Ex: on the condition that he marry a wife of German blood
    ▪ What %? The courts will ignore this condition.
  o There are also conditions that violate rules related to remoteness
    ▪ Ex. the rule against perpetuities.
    ▪ Ex: on condition that he never sells the property

Results of Invalidity

**Condition subsequent:**

If a gift is made subject to a condition subsequent and that condition is invalid for some reason, the condition is eliminated and the gift is rendered absolute

- Ex: to my son on condition that he never sees his children.
- If the condition were good, and the son did see his children, he would be divested. However, since the condition is invalid, the son would take absolutely and his interest would not be divested.

**Determinable interest:**

- If the determining event is invalid for some reason, i.e. it is uncertain or violates public policy, then the grantor has attempted to give an estate which is not clearly defined (missing a fencepost). It has a beginning but no end, and so the entire gift fails.

**Condition Precedent:**

- Attached to a gift of real property – entire gift fails if the condition is struck down as invalid.

For personal property, the situation is not so simple:

- English law has a complex test that deals with conditions precedent to the acquisition of gifts of personal property (Rule in Jarman/Feeney on Wills)
If a condition was impossible from the outset, or the condition requires a violation of law, it is unlikely, indeed absurd, that the grantor would attach such a condition to a gift, and therefore we strike the condition and we make the gift a good one.

• Is this appropriate? Since typically this is done with the intent to never give the gift
• If the impossibility of the condition was unknown to the grantor, or the condition has become impossible by an act of god, then the entire bequest fails.

Slight linguistic differences between #1 and #2 (Defeasible vs Determinable) can have a huge practical difference

However, thoughtful drafters can use these differences to express their interests – whether the gift is more important than the stipulation, or if the stipulation is more important than the gift

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Unger v Gossen - Condition precedent – personal property

In this case, we have a testatrix that has 3 nephews living in the Soviet Union and she's accumulated some money which she wishes to leave to them but she's worried about the State taking that money. So:

• Says those that come to Canada within 15 years of my death will qualify for the gift
• The nephews after the will was written, immigrated to Germany
• Soon after that, the Soviet Union fell
• Testatrix lost her capacity to change her Will (regarding move to Germany, and collapse of SU, she had Alzheimer's)
• Canadian law made it impossible for nephews to come to Canada, as they were undesirable from Canadian Immigration perspective
• BUT court assumes that immigration to Canada has BECOME impossible, due to Canadian Law
• Given that the impossibility was unknown to the testator, we might think that the ENTIRE gift failed
• Court refers to Feeney/Jarman, considers it

BUT: Decides to go differently

• Decided to ask which was more important, which was upper most in grantor's mind? The gift or the condition?
• Court easily concludes that the testatrix intended to benefit her nephews, the sole reason the condition was there was to avoid confiscation of the money
• Striking the condition today would NOT offend her wishes, even if they could qualify, as they would be the beneficiaries (no more Soviets to take her money)
• The result is that we now have in addition to all the different rules, we have TWO possibilities when dealing with a condition precedent attached to personal property
  o Court might prefer Jarman/Feeney or might say there is precedent in the Unger v Gossen way
  o If court prefers Unger, don't go with Feeney
• But which is the better rule?
  o Ziff says Jarman rule might be truer to donor's intention then the realty rule, condition subsequent for example
  o But what is the justification for having the different rule for personal and real property? Why not a uniform test for both?
  o Litman prefers the realty test, says its clear and simple to apply
  o He would apply it to personal property as well

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Uncertainty

• Conditions attached to property transfers which are too imprecise may be found to be invalid
• High threshold of certainty for conditions subsequent, lower threshold for conditions precedent, just must be capable of being given some plausible meaning (so called common-sense basis)
• Court strives to put itself in the position of the testator at the time the will was being drafted
• When questions is about whether language of a disposition is sufficiently clear to pass the test of conceptual certainty, then use objective tests not testator’s vantage point
• Enabling the recipients of property to understand the scope of any conditions affecting their entitlements
• Condition subsequent are more vulnerable to invalidity than conditions precedent

Condition Subsequent (and probably determinable):

• Donee must be able to see distinctly and precisely from the outset those actions that will lead to a loss of the interest
• Ex: “the whole of my estate must be used for God only” → hard to know what’s being mandated
• Sifton v Sifton: Condition requiring the donee to continue to reside in Canada was held to fall below that minimum standard, because there were no adequate guidelines as to what sorts of temporary absences or sojourns would contravene the condition

Condition Precedent:

• Lower threshold. All that needs to be shown is that the condition is capable of being given some plausible meaning
• Donee may enjoy the gift so long as it can be shown that he or she falls within a reasonable meaning of the term used.
• “To A if he is tall” → will not fail for uncertainty even though views may differ as to what is “tall”. We can still give it some meaning, it’s not gibberish. As long as A (who is 6’6) can show that he fits within a reasonable definition of that term, the gift can pass, even if the determination may not have been as easy for someone who is 5’10.

Which test?
Gift of Blackacre for life which provides that the property shall pass to B should B “need to return to live here”
• From perspective of A: Life estate subject to a condition subsequent
• From perspective of B: Fee simple subject to a condition precedent
• One person’s condition subsequent is another’s condition precedent
• Both tests are applicable but since test for condition subsequent is hardest to meet, it would determine validity in all cases.
• Could be argued that precedent test is appropriate because stated event relates to B’s conduct. When the event relates to something that A must do (or not do) then the condition subsequent test would seem to be the appropriate one to apply. Problem would still remain for conditions relating to a third party or external event

Remedies:
• Use crisp language
• Further hedge against litigation: create a mechanism within the granting document that is designed to resolve uncertainties if they should arise.
  o Re Tuck: Will called for defeasance if a donee married outside of the Jewish faith. Will also provided that a reference could be made to the Chief Rabbi of England to resolve disputes such as whether a marriage would violate the stipulation. Held as valid preventative measure.
• Method of advanced ruling was criticized on the basis that if the language is too uncertain for the parties then a non-judicial arbiter cannot do any better particularly where that person has no special expertise.
• However, provision in Tuck was tantamount to saying that defeasance would occur when – in the opinion of the Chief Rabbi – the marriage would be to a person outside the Jewish faith. That opinion is ascertainable.
• Although opinion cannot be known from outset, as the test for a condition subsequent appears to require, as long as the done can be in a position to appreciate the consequences of potentially ruinous action before it occurs, that should suffice to meet the needs of fairness.

Sifton v Sifton

| F | To the daughter, the payment of a sum of money annually, until 40. Then pay her everything. Payments were made subject to “The payments to my said daughter shall be made only so long as she shall continue to reside in Canada”.
  • Income generated by trust property, and what is the nature of this equitable interest
    o Determinable: Words of duration (so long as)
    o For determinable gifts, the stipulation is an integral part of the gift. However, in this one, the stipulation is in a separate sentence.
      ▪ Most courts will overlook the duration language and say it is a condition external to the gift (independent clause) |
| I | Daughter wants to go study in England, and the trustee (lawyer) says if she goes, she may violate the condition and be divested of the estate. Suggests going to court for construction. |

• Privy Council says condition subsequent, BUT the condition was void for uncertainty
  o Using earlier case law, court says when a vested interest is subject to condition subsequent, defeasible limitation, the condition must be stated in terms precise enough/clear enough that the beneficiary must see from the beginning, precisely and distinctly, the event upon which the interest will be defeated
• Conceptual uncertainty vs uncertainty of the event occurring
• If the difficulty is in ascertaining whether the divesting event has in fact occurred, will not render the condition void. Nor will questions as to the identity of the beneficiary
• The question of uncertainty concerns ONLY WHICH EVENT OR EVENTS ARE SUFFICIENT TO DIVEST THE GIFT
• Conceptual uncertainty refers to fact that the daughter is unable to know, having read the will, what precisely will cause her to lose the payments
• Courts use objective tests: read the test objectively and say is this precise or not
  o Courts don't look for uncertainty, they don't nitpick
• But if the condition is too imprecise, it will be held void
• In Sifton it was held that the condition was not stated in terms sufficiently precise to allow the daughter from the beginning to know what kind of temporary absences would divest her. Is there a point we could define and tell her: do NOT cross this point, or you'll be divested?
• Problem is not to decide whether she has ceased to be a resident, but conceptually whether they can tell her if they are able to know what would divest her

Back to Kotsar
• Kotsar v Shattock: To pay remainder of my estate to Oime Kotsar...she gets to 21...PROVIDED THAT UPON ATTAINMENT OF SUCH AGE SHE SHALL THEN BE RESIDENT IN ONE OF THE COUNTRIES OF THE BRITISH COMMONWEALTH NATIONS
  o "Sifton in my view, is clearly distinguishable"
  o Dealing with condition subsequent (from rule in Phipps v Ackers)
  o Vested, divested if she does not reach 21 years, or having reached 21 years, she is not a resident in a Commonwealth nation
• Court says that the result in Sifton turns on the use of the words "continue to reside."
  o The words reside, and resident, are not inherently imprecise

Tuft Settlement Case:
• In England, title of Baronet conferred. Proud of this accomplishment, and that title together with estate in Land, wanted to pass to his son.
• Made gift to his son under these terms: if and when and so long as he shall be of the Jewish faith, and he married to an approved wife (approved wife, Jewish blood by one or both parents, has been brought up in and has never departed and at the date of her marriage continues to worship according to the Jewish faith. As to which facts in case of dispute or doubt, the decision of the chief Rabbi in London shall be conclusive). Is this condition certain enough?
• Court did not rule on certainty, but one judge thought it was worth discussing
• Denning: the use of the chief rabbi clause was enough to cure any uncertainty in this grant. He was in the minority for this. Approved wife here means a wife who has a seal of approval from the chief Rabbi.
  o Rabbi opinion is a fact, clearly ascertainable, so it is certain. So maybe not too imprecise
  o Use of 3rd party, Chief Rabbi or immigration authority, to decide if a condition is complied with or not
• Condition precedent does not require the same level of clarity as a condition subsequent. If someone claiming the gift can demonstrate that he falls within a reasonable definition of the condition, he will qualify
• Two standards of clarity requires for conditions: courts are more likely to find a condition subsequent is too uncertain over a condition precedent

Kaplinsky Example
"To Bart for life, on condition that he remains vegan, otherwise to Lisa"
• Bart remaining a vegan, how would you characterize this?
  o Condition Sub, must remain vegan. Imprecise. Bart gets everything no condition.
• So Lisa says hold on, my interest is subject to condition precedent, Bart no longer a vegan.
  o I can demonstrate, he ate meat. I should qualify and the court should not so easily defeat it for Bart by finding his condition uncertain.
    ▪ Require standard for condition subsequent, it is more demanding
    ▪ Let's focus on the actions of the person subject to the condition
    ▪ Bart's conduct, condition subsequent, apply standard of clarity required for CS
• To Bart for life, but should Lisa become vegan, then to her
  o Ok, this is about Lisa, let's treat this as a condition precedent
  o To Lisa, should she become a vegan: if she can show court that she crossed bridge, that she reasonably qualifies, she gets it
• Condition subsequent demands a higher level of clarity, condition precedent not as much
• A determinable interest requires the same level of certainty as a condition subsequent (probably)

Public Policy
• Conditions that contravene public policy will not be enforced
• This leaves judges with lots of discretion – very vague, but usually agreed that should only be invoked when the harm is “substantially incontestable” Ex. Encouraging a recipient to violate criminal law
• Usually found valid: prohibition against remarriage, limiting the age at which the recipient of a gift may remarry, excluding a given person as a potential spouse, restrictions based on religion (condition against marrying outside Jewish faith upheld)
• Invalid: Separating parent from child, general restraints on marriage

McCorkill v McCorkill Estate
Court invalidated a large testamentary gift to a Neo-Nazi organization. In doing so, court extended the reach of the doctrine of public policy as means to challenge the legality of property transfers. Approach affirmed on appeal.

Facts: Will of Harry McCorkill who died in 2004 and left his entire estate to a Neo-Nazi group he belonged to. In 2013, his
sister challenged the validity of the will arguing the gift was contrary to public policy.

**Issue:** Was it invalid?

**Decision:** Yes, invalid.

**Reasons:** Objectives and overall ideology of the group were “disgusting, repugnant, and revolting”. Their mission was hate-inspired and white-supremacist racism. Court held publications constituted a clear violation of the criminal law prohibitions against the willful promotion of hatred, and that engaging in such activity contravened Canadian public policy.

**Sources:**

*Charter* can serve as a barometer of public policy. Strictly, *Charter* does not apply to private transactions. But it does influence the evolutionary development of public policy, in that indirect way the *Charter* can affect the law governing private dealings. It promotes equality and prohibits state discrimination on a number of grounds like race and gender. But just because the government is constrained from infringing these basic rights does not mean donors will be held to same standard.

- Private donors not required to keep even hand
- Direct, unqualified gifts to the sons but not the daughters of a testator or bequests to some religious orders to the exclusion of all others, are almost certainly beyond legal reproach as a form of wrongful discrimination
- By contrast, legislative scheme like that would raise issues of unconstitutionality

**Leonard Foundation Trust Case**

<table>
<thead>
<tr>
<th>R</th>
<th>A condition in a trust (if in the public sphere) can be declared invalid for reasons of public policy.</th>
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</thead>
<tbody>
<tr>
<td>F</td>
<td>Trust created educational scholarships for people who are white, of British nationality or British parentage. Only 25% of money available was allowed to be given to women. The trust favored children of school teachers, military personnel, etc. There is also an interesting provision in the trust to consult the court provided that they consulted with a judge who was qualified (i.e. met the same standards, a white protestant judge). After 60 years there were formal complaints against the trust by the OHRC due to claims that this trust violated the human rights code. Trustee applied to the ONSC for guidance in regards to validity.</td>
</tr>
<tr>
<td>I</td>
<td>Are the terms of a scholarship trust established in 1923 invalid because they are contrary to public policy?</td>
</tr>
<tr>
<td>J</td>
<td>Terms are racist and have religious superiority. Trust does not fail: just remove racist parts.</td>
</tr>
<tr>
<td>R</td>
<td>There are difficulties with finding that the trust violates public policy: balance the freedom of the owner with public policy, might be subjective, public policy has changed since the 1920s. But, although it is privately created, it is operating in the public sphere of universities. Reason for the trust itself is valid: advancement of education/leadership. So, the entire trust should not fail, use the cy-pres doctrine to remove aspects, bring into accord with public policy.</td>
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- What is the problem with this gift?
  - Problem of certainty surrounding the requirements
  - Scholarships were given out at public universities, which are funded by the state. The universities themselves were having problems administrating the gift, and felt that it was discriminatory.
- The courts will not enforce conditions that offend public policy. They might intervene in a case involving an offensive contractual promise. The doctrine of public policy invokes a standard, not a rule, as to what is offensive to public policy.
  - This is not an alien concept to the Common Law; we work with standards all the time (ex: negligence). And yet, there seems to be criticism that the doctrine of public policy would import judicial activism into property law.
    - While the courts continue to be flexible, judges have been somewhat reluctant to recognize new heads of public policy.
    - The familiar categories of public policy are stipulations that:
      - Encourage/incite criminal behavior
      - Undermine parental responsibilities
      - Seek to control marriage (although a condition that forbids marriage before a certain age, or marriage to X, has been accepted)
        - We have seen stipulations phrased in determinable interests, that were interpreted not as restraints against marriage but rather providing means to support the beneficiary until such time as someone else could do that.
        - A condition that done marry within the faith was uncertain, but if drafted with certain terms it could be upheld.
      - While the Charter does not technically apply to civil activities, it protects citizens from discrimination from the government. Yet, private donors are not held to the same high standard.
        - When it came to the ONSC, the judge (who was not protestant) held that he could not find this case to offend
public policy. He was very cautious not to intervene.

- On appeal, the judge held that the trust document had to be read in its entirety. The trustee offered to reword the trust to merely give it to the best qualified WASP (white Anglo-Saxon Protestant), without the offensive preamble. The judge found that this was not acceptable.
- In the judge’s view, a charitable trust had to be regarded as public or at the very least quasi-public. Such a trust could not discriminate on the basis of race or religion without offending public policy.

For a charitable trust, there is the doctrine of cy-pres. It can be invoked for a trust that was created for a charitable purpose but it cannot be carried out in accordance with the wishes of the settlor but was not void from the outset. The judge held that the trust could be rewritten in a way that was no longer discriminatory (mainly the racial and religious aspects).

**Doctrine of Cy-Pres**
This doctrine requires that when a trust is charitable and fails because it was either against public policy from the start or because it has become repugnant to public policy at some later time, then the doctrine of Cy-pres will apply and remove the parts that are against public policy while maintaining the charitable intent of the trust.

**IMPORTANT**: the trust must be charitable and it must be against public policy to invoke the use of Cy-pres

**Restraints on Alienation**

- Property transferred from someone to someone else on condition that it won’t be sold out of the family or that it will only be sold to a particular class of persons, or maybe never (restraints)
- Doctrine of Repugnancy: Restraints are invalid if they are inconsistent with an inherent attribute of ownership (i.e right to transfer property freely)
- Statute Tiemp Torres – the main lords no longer have power to prevent disposition by their tenants.
  - Anyone who has a fee simple may sell it
- Restraints prevent property from being put to its most valuable use & hinders economic efficiency

**5 objections to restraints:**
1. Allow the ‘dead hand’ control of prior owners, not the ever-changing marketplace
2. Make property unmarketable, property being denied its highest and best use
3. Act to concentrate wealth – particularly important in feudal England when land was only asset of value
4. Restraints discourage improvements: can’t sell your land, less likely to improve it – May be difficult to obtain financing, can’t mortgage (no loan security). Limits profitability of investments.
5. Detract from business generally because creditors will know that they can’t reach the property to satisfy debt
6. Another reason sometimes mentioned: restraints on alienation are repugnant to the power of fee simple. Power of alienation is essential to fee simple. Kaplinsky: circular thinking, have to decide what property is, not a reason

**What Types of Restraints are Valid?**
1. **Forfeiture** – A right of re-entry or possibility of reverter may be invoked in the event of a breach
   a. My property to X but if X tries to sell I may re-enter
2. **Promissory restraints** – Someone agrees as part of a contract not to transfer, makes party personally liable for damages. Usually in lease. Purely contractual.
3. **Disabling restraints** – Remove a power of disposal from the owner
   a. Unlike forfeiture, attempted transfer that is in violation of a disabling restraint does not divest the holder of the property. It merely deprives that owner of some aspect of the power of transfer normally found in the bundle of proprietary rights. Purported transfer is treated as null. One cannot give what one does not have (nemo dat quod non habet) and a void act cannot produce a forfeiture.

**Powers of disposal may be abridged in 3 ways:**
1. Restricting the mode of alienation – Ex. May not be sold or mortgaged (but allowing leases)
2. By prohibiting alienation to some class of recipients
3. By precluding dealings for a specific time – SCC has suggested total restraint for any period of time isn’t ok

**Test** – In ascertaining whether the combined mode, class, and time restrictions are unacceptable – “does the condition take away the whole power of alienation substantially?”

- If yes, the restraint is substantial and therefore unacceptable; test is obviously highly flexible
- **Rosher**: Son received a devise of Blackacre subject to the provision that he (or his heirs) could not sell the land without first offering it to his mother for 3,000 pounds. At the time the devise took effect the property was worth 15,000 pounds. A loving son might make such an offer, but the Court must have thought that a rational wealth maximize would not, it was held that the provision was an invalid restraint on alienation. Not allowed to do that. Basically just ensuring he waited until his mother died to sell the land.
In most cases it is theoretically possible for parties who are affected by a restraint to reach a mutually advantageous agreement to remove the restraint.

- Restraint as a condition subsequent can be bought off by purchasing the right of re-entry
- When restraint is disabling, when it removes power of disposal from the bundle of rights of a fee simple owner, it would seem that there is no one with whom to bargain

**Trinity College School v Lyons – restraints on alienation**

- Special relationship between Trinity College and Bennett family which lived next to the school
- Contract signed in 1965 creating a post mortem option and a right of first refusal (for $9375 or less)
- Post mortem option to purchase property upon their death for the sum of $9375
- At the time the school chooses to exercise that option, the property is actually worth 135K
- Bennett daughters claimed the option was void, as their parents had made an inter vivos transfer of the lot to them – under the terms of the agreement, the option did not arise unless the optioners had beneficial ownership at the time of the survivor.
- Justice held that Bennett’s should not be able to circumvent the right of first refusal by transferring property to their daughter, but that the option for a fixed price was unenforceable as an improper restraint on alienation of an estate in fee simple
- Cite Rosher case, where a son was obligated to sell to his mother at 1⁄4 of market price if he wished to sell. This was a restraint on alienation as it would make the son not ever want to sell the land. In this case, the college set the price during life so low that the defendant would never want to sell the land.
- Therefore a full restraint on alienation
- Applies doubly here because particularly as the option was exercisable at the choice of TCS rather than whether the executrix of the estate wished to sell.

**The Rule Against Perpetuities**

**RATIONALE:**

- Promotes efficient transfer, alienability of property, clear title
- Rule promotes alienability by establishing a period of time during which contingencies will be permitted to remain unvested.
- Rule tries to strike a balance between the rights of a prior owner to control the destiny of his/her property, and the rights of current contingent owners and their autonomy to act without being controlled by the “dead hand of the past”. In essence, it’s connected to the goal of promoting economic efficiency, and it attempts to broker the liberty interests of present and future owners.
  - To what extent is it fair for a family that accumulated wealth in one generation to remove it from the market? Why should a family be allowed to amass that much wealth to the exclusion of someone else?
  - Rule is important because it indirectly limits the life of trusts. Rule requires that all beneficiaries be identified within a certain period of time.

**Breakdown of the Rule**

**Stating the Rule:**

“An interest is valid if it must vest, if it is going to vest at all, within the perpetuity period. That period is calculated by taking the lives in being at the date the instrument takes effect, plus 21 years”

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

**Recognize the interests subject to Rule Against Perpetuities (RAP)**

- Contingent Remainders
  - X to A for life, remainder to A’s first daughter to graduate from U of A
    - Contingency: we don’t know if a daughter will graduate
  - Executory Interests
    - X to A and her heirs, but if the property is no longer used for a school then to the City of Edmonton

**‘An interest’**

- Rule applies to almost all contingent interests in property – real or personal, legal or equitable.
- The possibility of reverter (when fencepost is met) is exempted from this rule, considered to be a vested interest
- Once the interest is seen as vested, the rule against perpetuities becomes irrelevant

**“Must vest”**
• Not concerned with interests that last indefinitely, fee simple capable of enduring forever and is not objectionable on that ground. Doctrine solely concerned with contingent property rights. They must vest, either in possession or interest, within the perpetuity period.
• It need not be certain whether the interest will vest or fail, but it must be logically proven that the contingency will be resolved within the stipulated timeframe; if it is possible for vesting to occur outside the perpetuity period, the contingency violates RaP
• Example: to A’s first daughter who graduates from the UofA
  o We don’t care if there is a daughter who graduates... what we want to know is that after a certain period of time that is identified at the beginning, there can be no daughter who graduates from the UofA.
• Common law rule is impatient, does not take a wait and see approach to see if vesting will occur
  o If looking at the matter from the date the disposition took effect, if there is any chance, no matter how unlikely, that the interest may vest outside the perpetuity period then the interest is void.
• If we know that this question will be resolved during the period, either way the rule will be satisfied
• For inter vivos transfer, completion of transaction is the crucial moment. For a will, it is the death of the decedent that starts the clock.

“If at all”
• Utterly indifferent as to whether contingent interest actually does vest, rather rule seeks to know merely whether or not a timely vesting will occur.
• When will we know, one way or the other, whether this contingent interest will vest?
• If we know that this question will be resolved within the period, either way, that will satisfy the rule.
• “To my first grandchild to marry within 21 years of my death” is valid even if no marriage occurs, and even if no grandchild is ever born. It is at least certain that any vesting that does occur will take place before the perpetuity period expires because the condition precedent has been carefully set to remain open only for the duration of the allowable period
• In other words, if a marriage were to take places outside of the period, it would be irrelevant to the gift. Perpetuity rule or no perpetuity rule, that married child would not receive the gift because the marriage does not fall within the scope of the stated condition precedent

“Within the perpetuity period”
• The perpetuity period begins at the creation of the interest.
  o Will: a morte testatoris
  o Deed: when executed (‘signed, sealed, and delivered’)
• The perpetuity period ends 21 years after the death of some life-in-being
  o The trick is who is the life-in-being that starts the clock of 21 years?
  o Duration of all lives in being plus 21 years (if multiple lives in being)

Life-in-being
• Life-in-being is anyone alive at the creation of the interest and that includes the gestation period (a child in his or her mother’s womb counts as a life)
• That life-in-being may or may not be identified explicitly, they don’t have to be connected to the gift (ex: the Queen) but the likely suspect of the life-in-being is the settlor or testator or the person who has the life estate that precedes the contingency or the taker of the gift itself or anyone who affects the contingency.
• Normally the donor, potential recipients, and those entitled to prior interests
  o “To my grandchildren who turn 21” implicated children of the donor since their offspring are the potential takers

Eligible Lives in Being
• Anyone alive at the date the interest is created
  o Or a child “en ventre sa mere” (in utero)
• A group of individuals can serve as measuring lives if
  o Their number is ascertainable; and
  o They must not be capable of increasing in number
• Helpful life in being: Someone who is alive at the time of the gift and who can be used to demonstrate that vesting cannot possibly occur outside that period
• “To my grandchildren who marry during the life of X” does not violate the rule, reference to X being crucial in this determination. Any vesting under this devise must occur during X’s lifetime. Therefore, she is a life-in-being and can be used to demonstrate that the gift must vest, if at all, during the perpetuity period.
• Inter vivos grant: “To the children of A who turn 21”. Assume A is alive. We know that if any children are to turn 21, they must do so no more than 21 years after the life of their parent (A) plus 21 years.
Class Gifts

- For class gifts, if one member might vest outside the perpetuity period, the entire gift fails.
  - “To all my grandchildren who marry within 21 years of my death” or “To all my grandchildren, alive at my death, who marry” → both valid
    - First clause: clear that the period is confined to 21 years from the date the devise takes effect.
    - Second clause: only grandchildren who could possibly take are themselves lives in being
  - “All my grandchild who marry” → invalid
- This can be avoided by providing that only members of the class who meet the stated conditions within the period will be entitled and that latecomers will be excluded
- Application of rules of construction designed to close classes prematurely can also serve to save a gift

Andrews v Partington

- A class will close as soon as one member is entitled to receive a share
- “To all my grandchildren who marry”, without more, violates the RAP (if there are children of the testator still alive). Marriage might occur after all the lives in being have died and 21 years have passed. All the grandchildren alive when gift takes place are lives in being. However, another grandchild may be born afterwards (who is therefore not a life in being). That person may marry at some distant time in the future that is more than 21 years after the last of the lives in being had died. At common law, whole gift is void, no grandchild will take.
- If one of the grandchildren had met the requirement when the will took effect (by the time the testator had died) outcome would change. Class of potential takers is then frozen (by virtue of Andrews). Class would include not only the one married grandchild but all those alive when the testator died. Each such person is a life in being whose interest must vest, if at all, within their own lifetime. After born grandchildren are shut out by virtue of the operation of this class closing rule.

Examples:
X: to A’s first daughter
- Who could be the life-in-being?
  - A – A could not have a daughter more than 21 years after the life of A... duh!

X: To A’s first son who lands on the moon
- Contingency = if and when a son will land on the moon
- When does the perpetuity period begin to run? When X is dead.
- Who can serve as the life-in-being? A.
- Is it possible for one of A’s sons to land on the moon more than 21 years after the death of A? Absolutely.
- So this gift is void for violating the RaP.

X: To A’s first son who lands on the moon before his 21st birthday.
- No son of A could land on the moon more than 21 years after the death of A, so this is a good gift.

In a will, X: to all my grandchildren
- Contingency = don’t know how many grandchildren X will have...
- Are X’s children involved with the grant? Absolutely, without them, no grandchildren
- Can a grandchild be born more than 21 years after the death of X’s children? No, once X’s children are dead, no more grandchildren. Any grandchild born will occur within the lives of X’s children. Therefore no violation of RaP.
- X has 2 children, son 1 and son 2. Any grandchild born to either will be born while the 2 sons are alive. Therefore no violation.

Inter vivos, X: to all my grandchildren
- Can’t use kids as lives-in-being because he could potentially have more kids...
- So this violates RaP because of possibility of remote vesting
  - A grandchild could possibly be born more than 21 years after the death of X

Applying the Common Law RaP

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

1. Classify all interests and identify any contingent remainders and executory interests
2. Examine the facts at the time the interest takes effect (the beginning of the perpetuity period):
3. If it is possible to construct circumstances, however improbable, in which the interest in question would vest beyond the perpetuity period, then the interest violates the rule against perpetuities.
**Proving Validity: finding a validating life**

- If you find a ‘validating life’ – someone alive at the effective date of the instrument, during whose life or upon whose death, or within 21 years later the contingency is certain to be decided (one way or the other), you’ve demonstrated the validity of the contingency...
  - EX – In a will, X: to all my grandchildren
  - You can prove the validity of the contingency... X’s children are the validating lives.

**The Great Perpetuities Massacre**

How to prove a gift violates the RAP in 3 easy steps:

1. Imagine someone (e.g., a child) who can affect the contingency, born after the instrument became effective
2. Kill off all parents, children, etc. (any lives-in-being who could affect the contingency)
3. Determine if the contingent must be resolved within 21 years
   - If it could be resolves in more than 21 years, you have proven the invalidity of the contingency.

**EXERCISES**

"To A for life, remainder to A’s widow for life, remainder in fee simple to their eldest remaining child"

**Widow:** Assume A isn’t married when this took effect

- Remainder to widow is contingent since it’s obvious the donor is not referring to a specific person but rather to an individual, presently unascertained, who may someday be the widow of A.
- Whether such a person will emerge to take the second life estate when A dies is unknown, but because A is a life in being, the contingent gift to the widow is valid. In other words, whether there will be a widow to take the remainder will be known as soon as A (a life in being dies)

**Eldest Child:** Void here

- That interest will vest, if at all, on the death of the widow. Only then will it be known who, if anyone, is the surviving eldest child
- But the widow may not turn out to be a life in being, for there is no guarantee that this person will have been alive at the date the limitation took effect

**X transfers a sum in trust for A for life, remainder to A’s first child who reaches 21**

- Contingent remainder in fee simple = first child who reaches 21
- Find a validating life: Only A and X can be lives in being because the first child is not yet born.
- Is it possible for A’s son more than 21 years after A’s death? No.

**X transfers a sum in trust for A for life, then to A’s first child who reaches 25. (A has no child age 25 or older).**

- Validating life: A
- Imagine someone who is born after the interest takes effect, and then we kill of A and X, and we find that the child will reach 25 more than 21 years after the death of A.
  - Thus, the gift is void

**T devises property to my grandchildren who reach 21. (T leaves 2 children and 3 grandchildren under 21).**

- Validating life: T’s children, because T is dead and can have no more children.
- We know that it is not possible for any of T’s grandchildren to turn 21 more than 21 years after the death of T’s children

**Same as 3, but this time a grant inter vivos**

- T could have more children... so children can’t be lives in being.
- It is thus possible for one of T’s grandchildren to turn 21 more than 21 years after the death of T.
- Gift is void

**T devises a sum in trust for A for life, then to A’s children for the life of the survivor of them, then to A’s grandchildren. (At the time of T’s death, A is an 80-year-old woman with two living children, X and Y.)**

- Even though A is an 80-year-old, the common law does not make any presumptions about A, and is still willing to believe that A could still have children. So A’s children can’t be used as validating lives because the number could increase.
  - A is a life in being. A can’t have any more children 21 years after A’s death... So A’s children vest.
- A grandchild could be born to A more than 21 years after A is dead. So the grandchildren are cut out of this will.
- To fix this... could say “then to A’s grandchildren by her children then living at the time of A’s death.”

**X devises “to my son for life, remainder to his widow for life, then to their eldest child.” (X has one married son).**

- “To my son for life” = life estate, vested interest, no problem there
• We don’t know who the widow is... so we find out who the widow is when he is dead.
  o Is it in violation of the RaP? No, because we can use the son as a life in being, and we will know the
    identity of the widow as soon as the son dies. Son is validating life.
• We also don’t know who the eldest child is...
  o When does the child vest? When the widow dies.
  o So who is a life in being for the child’s interest?
    ▪ Can’t use son because it is possible for eldest child’s interest to vest more than 21 years after his
dead.
    ▪ We don’t know who the widow is...
      • It is possible that the son marries someone who is not born yet at the time of this devise.
      • The widow longer than 21 years after the death of the son, so the eldest child’s interest in
void for violating the RaP.

To A for life, then to A’s children, then to A’s grandchildren, who are alive at A’s death.
• A’s interest is vested.
• At A’s death, we know A’s children AND A’s grandchildren. A’s grandchildren vest at A’s death. Their interest in
the remainder of A’s children’s life estate vests at A’s death.

Avenues of Reform
• A flat statutory perpetuity period, rather than one determined by formula
  o Just make it a flat period... 9 years, 50 years, etc.
  o Don’t have to look for validating lives
• “wait and see” → Key revision in AB
  o Don’t bother with hypothetical, and instead just wait and see whether the contingency is resolved or not.
• Alberta Perpetuities Act (applicable to interests created July 2, 1973 or later)
• Numerous "old interest litigated today (and in the future!), still bound by common law (e.g. Scurry-Rainbow)
• Common law rule still in effect in many other jurisdictions (but not in MB or SK!)

Alberta Perpetuities Act
• The act becomes effective for any interest created after July 2, 1973.
  o Numerous “old” interest are still litigated today and bound by old common law
• Statute presupposes that the common law rule continues to be applied – s 2 – except as provided by this act, the
  rule of law known as the rule against perpetuities continues to have full effect
• s 11 provides a “how to” section on what order the act shall be applied in
  o s 9 – reproductive assumptions
  o s 4 – wait and see
  o s 6 – reduction of age
  o s 7 – exclusion of class members to avoid remoteness
  o s 8 – general cy-pres to honor intentions as best as possible
• s 9 – Rebuttable presumptions as to fertility
  o Males are able to have children at the age of 14 or over, but not under that age.
  o Females are able to have children at the age of 12 but not under, and not over the age of 55.
  o Generally, even if someone is dead there is only a presumption of fertility during those ages (can bring
evidence if the person is alive or dead – harder if dead – as to periods of infertility during age range)
• S 4 – wait and see
  o Don’t treat limitations creating contingent interests as invalid for violating the rule against perpetuities
    based upon the possibility of that interest vesting outside the perpetuity period
• S 6 – remedial age reduction "to grandchildren who reach 30"
  o Void at common law because a grandchild might reach 30 more than 21 years after the death of the
settlor.
  o S 6 says that this position shall be read as the nearest age that would work, so 21 in this case.
  o “to grandchildren who reach 30 and marry”
    ▪ This would not be valid even if it said 21... still possible to vest outside that period.
    ▪ So s 6 doesn’t apply here.
• S 7 – remedial class splitting
  o What it does is that at the end of the wait and see period and if there is one grandchild who vest and one
who doesn’t we split and include the one that does and then cut the other out and close the group
  o To my grandchildren who attain 30 years and marry” (assume that at the end of the wait & see period,
two GC’s aged 26 and 19 married and two grandchildren aged 25 and 24 are unmarried)
We cut out the ones that don’t meet the requirements and only include those that do
- Turns into all of A’s grandchildren who marry

- S 8 – general cy-pres
  - To all of A’s grandchildren who marry
    - Goes before the judge and he can re-write the devise to meet the intention of the grantor
    - But in this case how do you determine this

- S 17: read by reference to Scurry Rainbow
  - The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease or renewal of a lease, whether the lease or renewal is of real or personal property
  - S 17 deals with renewal of interests, whereas S.18 deals with options to purchase

- S 18: for commercial transactions such as options, the perpetuity period is 80 years. If a contract stipulates a longer period, it’s still only exercisable within 80 years.
  - For options transactions, the perpetuity period is flat (80 years).
  - Option must be exercised within 80 years if at all.

- S 19: for interests determinable or subject to a condition subsequent, the contingency is subject to the RaP, and the period is 40 years (“wait and see”) after which the interest becomes absolute.
  - “my house to the Edmonton Library so long as it is used as a library”
  - S.19 says that they only have to use it for a library for 40 years, after which they can do whatever they want (like turn it into a casino!).

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**Scurry-Rainbow Oil (Sask.) Ltd v Taylor**

**FACTS/PROCEDURAL HISTORY:**
- Trial judge held that the lease was void because it breached the rule of perpetuities
- Top lease - oil is discovered on Farmer’s prop. Oil co A (Imperial Oil) negotiates a deal. Oil co B (Scurry Rainbow) makes agreement w/Farmer that will allow B in after A’s lease ends.
  - Their agreement with Scurry Rainbow includes a 42-year limit.
- The 2nd interest may vest outside of the 21-year perpetuity period, so it violates RaP

**ISSUES:**
- Principal question on appeal, is whether the appellants’ oil and gas “top lease” with the late Harry Taylor should be rendered void by the rule against perpetuities.

**HEL D:**
- Commercial Setting—does not make sense for the rule to apply here. Contingent top ease, subject to perpetuities and violated, but Saskatchewan Court of Appeal rules that the rule against perpetuities does not apply to top leases. No similar authority in Alberta, but in Alberta there have been cases related to option (top renew) leases. Option to renew is subject to the rule.

**REASONING:**
- What is the problem with “top lease”? Was the top lease actually contingent?
  1. Top lease is valid only if it kicks in within 42 years (see language of construction)
  2. However, initial Imperial Oil lease was 10 years. If no production, then deal ends. Freeholders thought top lease started in 1959, 10 years after start of first lease in 1949.
  3. The time that you compute the common law perpetuity is when the top lease takes effect. In light of that is there a chance of late vesting? Why is the period just 21 years—because there are no lives in being.
- Type of int Oil co A acquired: profit a prendre (determinable int). Terms of lease: 10 yrs, for so long as thereafter that the substances were produced in the lands.
- Top lease was characterized as contingent: top lease to kick in if the lease ends w/i the first 42 yrs (Oil co B prepared to wait a LONG time)
- Is there a chance for late vesting? Yes.
  - 1949: 1st lease is entered

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**Chapter 8: Leases, Licenses, & Bailments**

**The Leasehold**
An estate in land - conveyance of exclusive possession for a certain term
Tenure that allows for right of exclusive possession against the world including the landlord himself
- Owner of fee simple is seized of property but during duation of leasehold tenant has exclusive possession
Is it a lease or a license? *Metro-Matic* case

- Lease creates an interest, in land, the grant of a license, without more, does not. A license is merely permission to do something that would otherwise amount to a wrong (such as trespass).
  - Licensee, unlike tenant, has no standing to sue anyone in trespass. Licensee has no possessory interest.
  - License is not binding on a purchaser of the land over which the license is granted.
  - Right to revoke a license may (and often will) differ from principles governing termination of tenancies.
  - Licensee of residential premises may not enjoy the same statutory provisions as residential tenants.
  - *If exclusive possession has been conferred then, generally, the interest granted is a tenancy, in Canada.*
- LL has special proceedings to evict a tenant in breach; seize goods, call sheriff, change locks. Licensee and licensor don’t have any special proceedings to help them. They have to sue in court.
- Lease is an estate in land so it is good against the world. If landlord sells property, the buyer takes it subject to the lease (whatever remains of the term). What new buyer buys from LL is only reversion. The license is merely an agreement between parties. License is not binding on successors, assignees, or other third parties. If licensor sells property, the purchaser takes property free and clear, even if they knew of license, they’re not bound by it.
- Residential tenancies legislation protects tenants but doesn’t apply to mere licensees. Law requires you to notify tenant that you will end lease in June but if your mother in law is staying with you, you don’t have to give her any notice.
- License can be revoked generally at any time, although if you paid then equity might enforce your license.
- Lease can only be terminated in special circumstances. Tenant who is wrongfully evicted can sue to regain possession.

**Test for leasehold:** “Exclusive possession for fixed term”

- Acute in England where rent was regulated. Tried to evade tenant protection legislation. What LL did was to not create leases, but sign special licensing agreement and a clause allows them to add people to unit, and other clause says licensee does not have exclusive possession. Intention was to avoid rent controls and other controls. And if it comes up in court then they say it wasn’t a lease, just a license agreement. So now we introduce alternative test for leasehold.

  - **Alternative Test for a Lease:** Denning: Instead of focusing on exclusive possession, let’s look at intention of parties. Did they try to create a personal right (a license) or a property right (a lease)? In 1985 the test came before House of Lords and they rejected Denning’s approach.

  - Intention of parties matters if they intended to create or grant the tenant exclusive possession. If agreement satisfied all effects of a tenancy then it produced a tenancy and parties cannot alter effect of the agreement by insisting they only created a license.

Limitation of use of property – uses for residential use only. No commercial use.

- External legal relationships – Concierge may have possession as long as he is working and has use of that part.
- Obama had exclusive use of areas of White House but depends on his work. Therefore it is a license.
- Court may look at language of the contract to see if it is indicative of exclusive possession:
  - If landlord said, “I keep right to inspect premises from time to time” suggests that tenant does have exclusive possession otherwise landlord wouldn’t need to reserve right.
  - Occupant shall not impede to owner’s right in possession and control, that suggests a license and not a lease.

**Elements of Lease:**
1. Intention to be bound
2. Right to exclusive possession
3. A certain term fixed or periodic

*Metro-Matic Services v Hulmann*

F Deals with laundry room in a building. Operator of coin laundry signs agreement with owner of building saying they will install machines and they will pay fee for that and for next 5 years they operate the room for benefit of tenants. And if you sell building to new land owner, I stay for as long as the arrangement is enforced. Landlord does sell...
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<tr>
<th>Number</th>
<th>Question</th>
<th>Answer</th>
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<tr>
<td>I</td>
<td>Did the coin operator enter into concession agreement with only license or a lease which is valid?</td>
<td>This was a lease and not a license. New purchaser bound.</td>
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<td>J</td>
<td></td>
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<tr>
<td>R</td>
<td><strong>Lease</strong></td>
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<td></td>
<td>• Says lease agreement</td>
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<td>• Has a time period</td>
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<td>• Landlord and tenant</td>
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<td>• Description of premises</td>
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<td>• “Demised premises”</td>
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<td></td>
<td>• You can agree that purpose for a lease is a juice store, laundry, anything</td>
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<td>R</td>
<td><strong>License</strong></td>
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<td>• Nothing can be distress of seizure of goods</td>
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<td>• Employees only have access at reasonable times (not all the times)</td>
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<td>• Putting “access” into the contract</td>
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<td>• A clause stating that before sale they will get an agreement by new purchaser agreeing to be bound by terms (if you have a lease, they’re automatically bound)</td>
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**Assignment of Leases & Subleases**

At common law, the tenant has a right to deal with the unexpired portion of the lease, they can transfer it to someone else. However the agreement between landlord and tenant may restrict those.

**Assignment:** Transfer by tenant of the full interest in the lease. Tenant 1 steps out and tenant 2 steps in.

- LL to T1, T1 to T2 (transfer of entire lease to T2, as long as it goes all the way to the same end date)
- Terms of lease between landlord and T2 are not binding in contract law because of the access of privy of contract. However, property law says, if tenant 2 took the exact legal estate that tenant 1 had, there is privy of estate between LL and tenant 2.
- As a result the covenant or terms of the lease that ‘touch and concern’ the land, and only those covenants, are binding against the assignee of the tenant. It’s as if those contractual terms were glued to the lease so that anybody who takes the lease takes those terms. Same rule applies to LL. If LL1 sold to LL2 there is privy of estate with tenants.
- New LL may want to sign new contract with assignee, resulting in a new LL and T relationship creating privy of contract and estate.

**Sublease (sublet):** Transfer of a part of the unexpired portion of the unexpired lease. Even if it’s the remaining term minus one day. Ex. Your lease goes till Dec but you’re away May to July so you sublease that time

- LL to T1 (head lease), T1 to T2 (sublet). T1 becomes a LL. No relationship between LL and T2 (under privy of contract or estate). T1 retains leasehold interest.
- LL can terminate the head lease, therefore the sublet falls through
- **Merger v DME:** LL could not unilaterally derogate from the lease and assign parking to another tenant
- **Sundance v Richfield:** common law gives tenants the right to transfer leasehold interest to another, but the landlord and tenant may have a covenant that limits the rights of the tenant to do so (without the consent of the landlord, which the landlord cannot withhold unreasonably)

**Merger v DME Foods**

- Merger runs a restaurant. Lakeview told Merger they will take some parking spots and designate them to users of another restaurant. Merger says they will die if they have no parking as no one will come. Had been a lease agreement between original LL and the original T. Then that T assigned the lease to Merger. And original LLs sold commercial property to Lakeview. Original lease, said that the T shall have the right to all the common areas of the property including parking. Express term in the lease that says the T has the right to all the parking spots in common with all other Ts.

I Can Merger enforce against Lakeview terms that were signed between prior landlord and tenant?

J Yes. Merger can enforce parking

R • Need to show terms are parallel and binding
  • Is there privity of estate between Merger and Lakeview? Yes. Because Merger took same legal estate that other tenant had. Lakeview took same legal estate that landlord had. So yes.
  • Is term for parking one that concerns and touches the lease? What does that mean?
  • Case law says that covenants that touch and concern land are those that relate to subject matter of the lease. For example, duty to repair demised premises, obligation to pay rent, cut grass, restriction on right to assign.
• Three ancillary tests:
  o Does the covenant affect the lessor as a lessor, the LL as a LL, and the T as a T?
  o Does the term of the covenant affect the nature, quality, or value of the land? Or the use to which it may be put?
  o Would the covenant lose its value if it were severed from the property?
• Covenant for parking here (CA MB, prior case dealt with giving a “suitable parking area” to the tenant)
• Bottom line for court in Merger is that parking facilities are so essential to success of restaurant that they clearly touch and concern the value of the land. Therefore they cannot designate the parking for other customers.

Limits on Rights to Alienate
May take the form of: (1) absolute prohibition, (2) right to transfer conditional on the consent of the LL, or (3) right of transfer conditional on the consent of the LL that is qualified in some manner.
• LL’s consent shall not be unreasonably withheld
• Prohibition on assigning or subletting does not prevent granting of a license or sharing the property
• Valid reasons to refuse: concern about financial position of new T or likelihood of default will suffice
• Transfer by T without consent will be upheld if it can be shown after the fact that the LL had no reasonable basis to refuse (damages have been recovered where LL’s refusal has been found to be unreasonable)

Obligations of Landlords and Tenants
Covenants
Leases typically include covenants: there are some called the usual covenants, which do not need to be listed. Terms that affect the nature, quality, or value of the land, or the use to which it may be put
• T - Covenant to pay rent, to repair common areas/normal wear and tear, to insure the premises, not to assign without landlord’s consent
  o Repair: Take proper care of place, clean chimney and windows, do little jobs to fix things. Not damage the house willfully or negligently, that his guests do not damage it. And if they do he must repair it. But if house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by the T then the T is not liable to fix them.
• LL - Covenant to quiet enjoyment (peaceful occupation of premises), to provide heat and water, etc.
  o Enjoyment: direct physical interference by LL or others, indirect also (LL allowing carbon monoxide fumes to seep into an apartment making it unlivable). Peace, comfort, or privacy interfered with due to liquids, gases, vapors, solids, odors, vibration, noise, abusive language, threats, fire, the total or partial withholding of heat, electricity, water, gas, or other essential services, or removal of windows, doors, walls, or other parts of premises. Does not protect against wrongful acts of other tenants and does not cover defects present at beginning of term.
  o Tenants have better control over instances of fire over the landlord - responsibility is transferred to the tenant (if it burns down you still have obligations owed to the landlord b/c you should have insured it)
• Failure by one party to perform does not give the other party a right to terminate the estate – unless landlord interferes with right to exclusion, you cannot terminate b/c covenants are considered independent of the estate
  o Unless a covenant is framed as a condition of the lease –you can give a leasehold interest subject to a condition subsequent (covenant to pay rent is a common condition)
  o On a breach of condition by the T, the LL may: re-enter the premises or maintain the lease and sue for damages, or sue for distrain (remedy where the LL can go in and take all the possessions within the property and sell them to reduce damages)
  o Breach of covenant allows one to repudiate the lease by SURRENDER (expressly or by conduct) but never unilaterally – it must be accepted by the other side, there is no power that allows unilateral surrender/termination of the lease

Termination
Ex. Commercial tenant leaves with 20 months left on the lease, rent is $7000 monthly and tenant is 3 months in arrears
• You can look for someone else to take over the lease via sublet or assignment
• Breach a condition in order to terminate the lease (not a good idea) or argue that the T breached a condition and thus the lease is over

Standard Remedies (Goldhar v Universal)
1. Insist the lease is still in force (not accepting the surrender). Sue for arrears and for each rent payment when due
   a. If a tenant defaults, you can sue up to the date of termination unless you leave the store vacant & sue T month my month only
   b. Can’t sue for anything into the future. Does not acknowledge anticipatory breach. Deficiency is on T
2. Accept the tenant’s surrender of the lease. All the terms and covenants of the lease are obliterated. Sue for arrears only. Try and find a new tenant (if found, then lease surrendered and can’t sue)
   a. If new tenant is in for less money, can they sue for the difference? No b/c ONCA says that the leasehold estate now over & so go the obligations. NO DEFICIENCY. It’s on you, can’t go after original tenant
   b. What if LL doesn’t want to be proactive and says you will be sued every month for the rent? Not a good option for you. For the LL, saying they’re going to wait month by month is also not a great option because at some point it’s clear the rent will no longer continue to flow. If you are running a commercial space, you have a vacant space and that’s not good (insurance premiums, possibility for vandalism). And you given impression that isn’t bad. Other Ts will complain too. So option 2 is better. And they start to look for new Ts. But new T won’t be on hook for any deficiency.
3. Notify the tenant prior to re-entering that LL intends to re-let the premises on their behalf – sue for arrears and any shortfall when due – gets over the ONCA problem
   a. Could have accepted keys from first T and notified them that you will search for new tenant on their behalf. LL becomes an agent of the T for purpose of sublet. The new T will be an assignee or a sublessee of the original T. Here the original lease is in force and can sue for deficiency in rent. T2 agrees to pay $700 and T1 owes $900. Well T1 on the hook for $200.

Highway Properties: another option for the LL

4. LL may accept the surrender and serve notice on the T that an action may be brought to recover for damages for losing the benefit of the lease over its unexpired term. One element of such damages would be of course the present value of the unpaid future rent for the unexpired period if the lease less the actual rental value of the premises for that period. Another element would be the loss, so far as provable, resulting from the repudiation
   a. Gets around having to act on the tenants behalf in subletting option above (that get around ONCA issue)
   b. Laskin’s opinion, demise of lease doesn’t mean doing away with all the covenant so that no damages can be claimed
   c. Makes it easier for LL, solves dilemma. You can look for new Ts and you can still sue of outstanding rent. If you find new T that pays lower rent, you can go after the original T.

Notes and Issues:
   • Covenant to operate continuously: dependent on the anchor T (give them favorable terms but covenant to operate continuously) for the successful operation of the entire
     o If the lease does not impose such a covenant, then abandonment will not give rise to the highways property option
   • Duty to mitigate: Part of contract law which goes to remedies – courts will hear evidence as to what you could have done with the widgets had you tried to sell them regardless of the fact that the other party broke the contract
     o LL can sue for prospective damages
     o Canadian law does not recognize duty to mitigate on LL. LL can sit on hands and not do anything and original T will be on the hook for the original lease.
   • Notice: You can exercise option #4, but must let them know where they stand (are they keeping the lease in force, will they accept surrender, relet under #3, exc). Increasingly important to let T know where they stand in the four options. If no notice, then back to traditional law.
   • Efficient Breach:
     o Evergreen: No longer in LL’s interest to have office building, wants to go high rise condo business route, gives notice of 12 months to leave, IBI says no they have an estate in the land, Evergreen throws money
     o The world is a better place where there is more money to be paid out in creating a condo – maximize joint value of the parties b/c IBI is adequately compensated
   • Tenant’s right to terminate on breach: (Metro Matic) “provided that if in the opinion of the T, the LL has been in breach of any of the terms, covenants, agreements contained herein, the T may terminate the lease upon 7 days written notice to the LL”

Highway Properties v Kelly
   • The LL, Highway Properties Ltd, leased a retail location in its shopping center to the tenant, Kelly, "to be used for grocery store and super market". The lease was agreed to and was to take effect for a term of fifteen years.
   • The LL’s shopping center consisted of 11 retail spaces and the supermarket was to be the anchor tenant of the venture.
   • The premises in question was operated as a grocery store by a subtenant. However, the shopping center was not successful and was never fully leased. The subtenant gave notice that it intended to close down its business. It did so and began to remove its goods.
   • The LL filed suit against the T. The T continued to pay rent while unsuccessfully searching for another subtenant. But the premises had been abandoned, and most of the other tenants in the shopping center had also moved out. The landlord took possession of the premises and attempted to find a new tenant.
• At trial the LL claimed damages suffered for rescission but more importantly, also for prospective loss resulting from the respondent’s failure to carry on a supermarket business in the shopping center for the full term of the lease.
• At issue in the Supreme Court was the prospective loss from breach of the lease agreement.
• Came up with fourth remedy.

Evergreen v IBI
• Building in Vancouver is being leased by design consultancies. They pay rent on time and are doing very well. LL decides he wants to covert building to condos. LL tells Ts he wants them out. Ts say they have 3 years left on the lease.
• Suppose you rent a car and the agreement says a bailment for 5 years. Now the property owner says I need this back and you say hey we have an agreement that I get to keep it for 5 years. What can owners do? They come and take the property and under contract have the right to keep it for 5 years. You sue for breach of contract and get damages. What kind of damages? Whatever they will give you. But you want the thing, not the damages. Can you get it? Theoretically yes, if there is equitable circumstances that would persuade the court to give you specific performance. In most circumstances you will get damages.
• Doctrine of efficient breach, they will pay moving, nuisance, and amount to get equivalent property. Breach contract and pay damages if one party is no longer efficient use. Contract law is really about allocating risk. You sign an agreement, but you don’t know if there will be war, strike, increased costs, exc. You need to move, they need to move, what contract does is say if one of us needs to breach, who pays? It allocates risk. IBI says they cannot breach contract. Why not? Because it’s not a contract, it’s a lease, it’s an estate in land. IBI has exclusive possession for a certain term, as long as they’re not in breach, the LL cannot unilaterally cancel the estate. BC Court says Highway Properties now moving closer to contract. Going to let Evergreen cancel the lease. IBI and Evergreen face the prospect of a case before SCC and they settled.
• Similar case comes on to ON CA and they are not impressed with decision. In Ontario a commercial lease is still a conveyance of land.

Guests in a Home
Licenses: Guests staying over at your house, they have permission to stay but no proprietary stake
• Inviting by implication – sellers, people handing out leaflets, political doorknockers, Jehovah’s Witnesses, are allowed to your property initially for their purposes until you revoke the implied invitation (as a “guest”)
• As long as you don’t do anything outside their conditions, cannot be ask to leave a concert having bought a ticket (Davidson v Blue Jays case)
• Jarvis v Toronto case: In some circumstances, a license may be elevated to equitable interest in the land (based on promissory estoppel, detrimental reliance, and unjust enrichment)

Proprietary Status of Licenses

License: Permission to do that which would otherwise constitute a trespass

Contractual License – Subject to being cancelled but examples mentioned in reader where licensor is unable to revoke permission such as when you have a ticket to an event. Case law says as long as you behave yourself you have a right to sit and watch.

License as an equitable interest in land – comes from equity. Todd Development case where there is a land deal where everyone buys lots in skihill development. Clear that subdivision approval won’t be granted for a while. And it isn’t granted. Owner has gone under. Property ends up in hands of third party. Question is the original owner told buyer “here is your lot, you should build, it’s $30k” so takes a loan. New owner is well aware of it. Still wants to kick out person who built cabin. Court mentions the circumstances and grounds under which it would be unconscionable to terminate the license. Generally speaking you encourage someone to rely on a representation that they have an irrevocable license. You can do this by telling them “hey if you build here or improve it you can stay here”. Its not just active conduct. Even by doing nothing you can send a message that they have an assurance they wont be kicked out.

Residential Tenancy Reform

• Protects T from harsh consequences of being evicted
• Regulate the terms of the lease such that the parties are not free to alter
  o May protect Ts but may not in long run
  o Rent control, discourage repairs, and lead to poorer standards
• Cut down on cost of negotiation. Ts not negotiating experts. You get cheaper and less negotiation needed. Any organization can give you a standard agreement.
Areas: greater security of tenure for residential tenants, increased notice periods for termination, fixing of standard obligations of both LL and Ts in a way that is rational and fair, increase in T’s remedies, curtailment of LL’s self-help remedies, establishment of prohibitions on the bargaining away of statutory rights, elimination of dispute resolution procedures that are deigned to be informal effective expeditious and inexpensive, establishment of dispute resolution procedures designed to be informal effective expeditious and inexpensive, creation of LL and T advisory boards, rent control mechanisms

Application
2(1) Subject to subsection (2), this Act applies only to tenancies of residential premises.
(2) This Act does not apply to
(a) a mobile home site as defined in the Mobile Home Sites Tenancies Act,
(b) premises occupied for business purposes with living accommodation attached and rented under a single agreement,
(c) rooms in the living quarters of the landlord, if the landlord actually resides in those quarters,
(d) a hotel, motel, motor hotel, resort, lodge or tourist camp, a cottage or cabin located in a campground, or a trailer park, tour istic home, bed and breakfast establishment or farm vacation home, if a person resides there for less than 6 consecutive months,
(e) a tenancy agreement between an educational institution as landlord and a student of that institution as tenant if the tenant does not have exclusive possession of a self-contained dwelling unit,
(f) a nursing home as defined in the Nursing Homes Act,
(g) lodge accommodation as defined in the Alberta Housing Act that is operated
(i) by a management body under a ministerial order under section 5 of that Act, or
(ii) under an agreement with the Minister responsible for that Act,
(h) repealed 2013 cS-19.3 s25,
(h.1) a supportive living accommodation licensed under the Supportive Living Accommodation Licensing Act,
(i) a correctional institution, or
(j) any other prescribed premises.

• Section 2: what is and isn’t covered by the act

Act prevails
3(1) Any waiver or release by a tenant of the rights, benefits or protections under this Act is void.
(2) If a residential tenancy agreement is in writing, the agreement must contain the following statement in print larger than the other print in the agreement:
The tenancy created by this agreement is governed by the Residential Tenancies Act and if there is a conflict between this agreement and the Act, the Act prevails.

• Rights cannot be waived

Sections 5-6: Termination
• At the end of fixed term, your tenancy is converted to a periodic month to month
Section 7-9: Notice Periods
• Depends who is giving the notice
Section 10: Form of notice
• Notice is no effect unless for one of the reasons given in the statute or a prescribed reason (in regulations to see what prescribed reason is)
  o Due to termination of tenant’s employment by LL
  o Building being converted to condo
  o LL intends to make major renovations
  o LL or LL’s relative intends to move in
  o Other than that, cannot terminate unilaterally
  o But can increase rent but in AB, rent can only be increased 1 a year with 3 months notice (s 14)

Section 16: LL’s Covenants
• Read by force into every lease agreement
• Cannot be waived
• Premises ready for move in
• Quiet enjoyment
• Minimum standards under Public Health Act

Section 17:
• LL has to give you copy of the lease, if they don’t you don’t have to pay rent till you get a copy

Section 21: Tenant’s covenants
• Rent on time
• Don’t interfere with LL or other tenant’s rights
• Keep it clean (both senses)
• SCAN: If you think neighbors have meth lab or brothel, you can make an anonymous complaint and they will be investigated and government will terminate lease if it’s true.
• Tenant’s obligations to vacate on time

Section 22: Right to Assign
• Does it or doesn’t it modify common law?
• RTA: Cannot assign or sublet without written consent of the LL. But LL cannot withhold consent if it isn’t for reasonable grounds.
• Common law: You have unlimited, unfettered, right to assign
• Law for commercial leases and residential are different

Section 26, 27, 29, 30: LL Remedies for Breach by Tenant
• Once again common law is modified
• If tenant is behind on rent, proceedings to recover rent.
• If tenant doesn’t give you possession back in time at end of lease, you can bring the Sheriff in, they’ll force entry, toss tenants stuff out, change locks. And you get to sue tenant for holding use and enjoyment.
• If there is a substantial breach by tenant, LL may terminate tenancy. You will know what that is by looking into substantial breach in definitions section of RTA. Also a series of breaches is applicable to having the lease terminated by applying to court. There is a procedure; run to court and ask right away or send note to tenant saying lease is terminated and they’re ask to leave (in fairy tales they leave right away, or in 10 days you go to court saying they haven’t left). And you get damages.

Section 27: Repudiation by tenant.
• LL can sue for deficiency of rent.

Section 28: LL’s Interference

Section 37: Other breaches
• You can apply to court and get damages, abatement of rent, compensation for performing LL’s obligations, termination of tenancy (if breach is significant), exc

Bailment

One person has temporary possession of the personal goods of the owner
Bailee holds possession - if you borrow a book from the library, rent a DVD, find someone’s ring
• Even if you’re a thief, you’re a bailee of the true owner of the goods.

Minichiello v Devonshire Hotel:

Facts: Parking lot attendant. Guy gives attendant car keys and says to attendant to watch the car because he has valuables in the trunk. Goes to meeting. Comes back and valuables are missing. It’s a briefcase full of diamonds. Worth a million bucks. Parking ticket given to person that includes no responsibility for theft, exc. It was stolen from under their watchful eye through no fault of their own.

Issue: Parking a car in someone else’s lot – transfer car to operator of the lot (bailment) or is the operator giving you a license to park there?
• Bailee would have a standard of care towards the item in possession

BC CA: PL’s statement that there were valuables in the car were sufficient to make the bailee for a ward.
• Lizence: When you’re given permission to occupy premises
• When you park your car you think of it like you bought a licence to park your car there or you’re making a bailment to parking lot owner
• If you take keys with you then it’s a licence but if they have control of your car then it’s a bailment and here it’s a bailment.
• Case wrongly decided from economic perspective. Rule should be one that gives people the right incentives to take risks and precautions. Say you have a roll of film and drop it down at Black’s for processing and they lose it. Now you sue them for the value of the photos that you lost. Generally they say their liability is limited to a roll of film so if it’s $5.99 at shoppers then that’s what you get. Now they have to see what value of photos is. If they’re personal, maybe $100. But maybe they’re wedding photos or from a memorable trip.
• One thing to say they’re responsible for damage, another to say they’re responsible for $1 million for diamonds.
• Suppose you’re Blacks and have been given a role of film. Blacks knows they have to take precautions but can’t take care of each one as if they’re $10k roll each. Who knows the value? The owner. Assigning full liability to the DF when the DF is not in a good position to assign value is not a good rule. You shift risk away from you. Simply put if you have $1 million in diamonds in your trunk, don’t park them in the hotel. If you’re dropping off your precious wedding photos, go to a specialty shop. But it should be on you, not on DF.
• Also the rule in contract. Which is known as rule in Hadley and Baxindale. Says that a DF is excused from losses that aren’t generally foreseeable such as profits lost.
Is bailment always a contract that originates underlying consent or is it enough that the bailee assumes voluntary control over the items?

- Bailment could include terms as to returning the item in same condition or in altered state

**Bailee's obligations:**

- Contrasted with licensor's obligations
- There are underlying questions in property, contract, or tort (liable in conversion if they took the goods and sold them / liable for damages if fail to live up to contractual duties)
- Obligations and duties of care may be set out in the contract or may be implied
  - Strict contractual approach - if didn't live up to duties in the strictest interpretation, then liable
  - **Contextualized "Roman" (modern) approach** – concerned with the benefit of the bailment
    - Sole benefit of the bailor = Low duty of care (doing you a favor right?) & liable for gross negligence only. Only slight diligence is required.
    - Sole benefit of the bailee = High duty of care. Bailee liable for slight negligence and therefore owes a duty of great diligence.
  - **Post modern approach** based on negligence – how would a prudent owner act in the circumstances?
    - General standard of negligence.
  - Bailee who claims to have a particular skill and knowledge will be expected to act accordingly and will be held to the avouched standard

- **Letourneau:** Owner can’t come in during working hours, calls D who tells him to park it on the side street until the next morning, RV stolen & D claims they never got the vehicle and never started a work order for the repairs
  - Has there been a transfer of possession? Occurred when the owner dropped off the RV pursuant to the instructions of the bailee (standard business practice)
  - Reasonable care under the circumstances? If bailment is stolen by an employee then the employer is liable
  - **Reversal of the burden** – Once bailment is established the onus is on bailee to show that they met standard of care & acted reasonably under circumstances OR that loss did not occur through their negligence
  - Waiver of liability clause – Strictly construed by the court (must be made expressly that this was what was intended or implied without ambiguity)
    - **Tercon Industries:** Can contracts use exculpatory clauses even for fundamental breaches?
      - Court says that they are available, but they will not allow generally sweeping waivers of liability

**Punch v Savoy:** Can a bailee bail? (Assignment or sub-bailments)

**Facts:** Lenor Punch goes to Savoy's Jewelry to fix a ring, Savoy sends it to Walker in Toronto to carry out the repairs, Walker wants to send the ring by express post but there is a strike so uses CNRapidex but the ring is lost forever. Punch → Savoy → Walker → CNRapidex

- Why rely on bailment? Showing that there was a bailment in effect, then the reversal of the burden takes effect
- Transfer of possession based on Ms. Punch’s consent to send it to Walker = sub bailment.
- Did that establish a relationship between Punch and Walker? If no consent is needed then Punch can sue Walker directly on the bailment.
  - When a tenant subleases, there is no direct relationship between the LL and the subtenant & so the L goes after the head tenant. Not the same for bailment. Modern position is now that the bailor can proceed on the bailment directly against the sub-bailee. As long as the circumstances would give the bailor the right to terminate the bailment (ask for thing back) and as long as sub bailee knew that the goods belonged to someone else.
    - If she can sue Savoy, she can sue Walker, she can sue CNRapidex
    - So as long as Walker knows that Savoy is not the true owner and takes bailment anyway
  - Implied sub bailment to CNRapidex to courier the ring - she implicitly authorizes the use of a courier as she could not have assumed that Savoy would drive it to Toronto (from Sault St. Marie)
  - Why should punch be bound by limited liability clause that Walker signs with CNRapidex?
    - **Tercon:** courts don’t apply waiver clauses mechanically
- What if you’re moving and the movers break China in boxes? What can you sue them for? Handled goods without proper care = negligence. You’ll win because they were negligent. Except suppose they came and were like “sir here is your box let me put it down very carefully” and they look and the China is broken, what now? Can’t prove negligence. Sue on the bailment. Higher standard of care, and now the burden is on them to prove that they did everything they could in the circumstances to give back the China unbroken.
• **Pioneer** case: Ship from Taiwan to Hong Kong and off the coast of Taiwan, it collides with another ship and all cargo is lost. Millions of dollars of goods. Turns out 2 groups of PLs who held bills of lading showing they delivered their goods to be on ship but through various subcontractors. And other PL are shipping from Taiwan to Middle East and Europe and first leg is delivered by owner of Cage. But BOL is issued by PL. PLs proceed on the bailment. Carrier says he wants a stay of proceedings because it says the terms under which he contracted with shippers will be settled in Taiwan through China Mainland laws.
  o Could be best trained captains but accidents can still happen
  o Court says about clause, Punch did not specifically authorize waiver clause and that’s why they’re going to ignore it
• If Punch sues everyone then they will have to prove they did everything they could.
• Walker has duties of bailee
  • CN Rapidex took into their possession knowing they’re delivering to Savoy. They understand there is someone else that is the owner. But they don’t know Punch at all.
• What could they have done? Write $11k and insure for that much on the shipping. Could have use a tested carrier.
• Punch succeeds down the line suing on the bailment.
• Fundamental Breach: Not to deliver goods.
• Can you get a waiver of liability to cover fundamental breach?
  • Tercon: Parties can contract for an exclusion clause that covers fundamental breach. Court will not readily construe an exclusionary clause as encompassing fundamental breach. The clause may still be set aside even if it says it covers everything. Can set it aside for violating public policy.
• Court in this case does not allow CN Rapidex to assert waiver because CN Rapidex is a bailee and has a duty to deliver goods back
• NO privity of contract between Punch and CN Rapidex but it’s a bailment so she’s able to pursue them and reverse the burden of proof.
• On one hand Punch says I didn’t authorize, I don’t have contractual relationship but they have my goods so I’ll go after them and make the onus reverse
• CN Rapidex says either you go after me for negligence and waiver is something else or you go after bailment and you’re bound by waiver
• She wants to use bailment but it should be warts and all. Or don’t use the one to allow you to reverse burden of proof
• CA held that obtaining adequate insurance was a minimal step that one would expect a prudent owner to take for such a valuable article

**Letourneau v Otto Mobiles Edmonton**

| F | PL left their trailer to be repaired by the DFs. Told to leave trailer on Intuit lot, put key in water tank, they'll fix it the next day. It went missing. Shop says they don’t have a work order for it therefore they can’t tell that it was ever there in the first place. Company has option to put service manager on trial. But he doesn’t work there either and cannot be located. |
| I | Was there a bailment? |
| J | Favor of Letourneau |
| R | **Bailment:** Was there indeed a bailment? |
| | • Temporary transfer of personality property |
| | • Title is not changed. Just possession. |
| | • Change of possession on the understanding that it is only for now and will be returned to the rightful owner. |
| | • DF’s argument is they never recevied the trailer so there is no bailment. |
| | • Another feature: is that property itself is returned to the owner. Could be returned just the way it was given or it may be repaired or upgraded. Like if you give someone grapes and they give you back wine. |
| | **Significance:** The onus shifts to bailee |
| | **Standard of care:** As a prudent owner would under the circumstance |
| | **Waiver:** of liability |
| | • When did change of possession take place? As soon as they dropped it off, the PLs relinquished control and from that point onwards the DFs had possession. Treat it like change of possession. |
| | • Would it make a difference if the PLs had another set of keys? No. |
| | • Suppose it wasn’t a repair and decided not to want their trailer so they wanted to make a gift to auto mobile. They’re going to leave it there with a key so they can pick it up. Is it an effective gift? No. Gift requires: transfer of possession, delivery. Delivery means you relinquish all control and dominion to you and then you’re the owner. But if they kept a key, then there’s no delivery because they didn’t relinquish control. |
| | • **Once there’s a bailment, the burden of proof shifts to bailee. Up to bailee to prove one of two things** |
(how can they escape liability): show they acted prudently to meet duty of care and discharged their obligations as bailee OR that their negligence didn’t cause the loss.
- You didn’t take every precaution but it wasn’t your fault (burnt because of lighting)
- You prove you took every precaution you could (I did everything but it was struck by lightning)
  • What's the standard of care? Based in a theory of contract.
  • How would a prudent owner act under the circumstances?
  • They didn’t do enough. They should have provided a more protected space for after hours drop off. But the Letourneau’s aren’t idiots, they could have foreseen that leaving something on land that isn’t residential, and isn’t protected, that something could happen.
  • Are they contributorily negligent? Common law rule is if you are contributorily negligent at all, you lose everything.
  • Here, judge says that since they followed the instructions to the letter, they weren’t contributorily negligent.
  • Waiver of liability in fine print but there was no working order here.

**Mercer v Grain Storage:**

**Facts:** Grain producer drop off grain to be stored and dried. Not to be sold below 160 euro. The grain is sold below the agreed price.

**Issue:** Is it a bailment?

**Reasons:**
- This was not a bailment because once it was added to the storage it was mixed with others therefore it was a sale.
- But CA said that as long as grower maintained control, it must have been a bailment. Each farmer had property not in individual grains but in the proportion of the whole.
- Stretches bailment to the limit because you’re not getting exact property back.

**Onus of Proof in Bailment:**

A presumption of negligence can arise which the bailee must then rebut in order to avoid liability (opposite of tort for negligence). This is because the bailee is in position to know what transpired. Three parts:

1. **Triggering facts** – Facts that must be proven by the bailor
2. **Short-cut to proof** – Facts that are then presumed against the bailee
3. **Escape route** – Matter that the bailee must prove in order to overcome the shift in onus

PL – Bailor must show that acts complained of occurred during the course of the bailment, not before or afterwards.

- If item is missing, must show loss occurred while goods were in possession of bailee
- If item is damaged, condition of goods when bailed and returned must be proven

For escape route, DF must show:
- That the system in place for the care and safekeeping of the bailed goods was up to the standard required by bailment law, OR
- That any failings in that regard were not connected to the loss

**Bailor Obligations:**

Take reasonable care that the goods supplied are safe and suitable. Bailor must protect against all defects that skill and care can discern and remedy. Standard of liability is one of negligence. If a defect is latent, such that careful detection would not have uncovered it, the bailor will not be liable.

- Liability under *Sales of Goods Act* legislation imposes a higher duty, under which the absence of negligence on the part of the seller is irrelevant.
- Gratuitous bailment for benefit of bailee: bailor will be liable for failing (willfully or through gross negligence) to warn the borrower of known defects that might make the item unfit for its purpose

**Avoiding Liability**

Only apply if it is accepted by the bailor (or bailee as case may be). Easy to determine in written agreements.

Ex parking situation where signs saying company not responsible for any loss to cars.

- Warnings will not apply unless the bailor had either actual or constructive notice of the clause at the time when bailment agreement was struck.
- Location of signs will be a factor in determining if notice was given
- Repeat customer more likely to be fixed with notice than one who is not

**Canadian approach:**

1. Courts will not readily construe an exculpatory clause as having the sweeping effect of absolving a party from liability for fundamental breach
2. Court might decide the arrangement was unconscionable at the time of contract formation such as where there was a significant inequality of bargaining power
3. An otherwise valid exculpatory clause may be unenforceable where the breach is so egregious that the defaulting party should not, as a matter of public policy, be permitted to hide behind the clause to avoid liability.

Assignment and Sub-Bailment
Bailee may sub-bail or assign provided that the terms of the initial bailment expressly or impliedly permit this to be done. Even if not, the assignment or sub-bailment may later be ratified by the bailor.
- Bailor has a direct right of action against a sub-bailee when:
  - Bailor has an immediate right to terminate the principal bailment
  - The sub-bailee accepts an item knowing that it belongs to someone other than the sub-bailor
- Right to sue can exist even if there is no direct contractual relationship between bailor and sub-bailee

Bringing Suit
Breach by bailee may give the bailor right to pursue remedies in tort, contract, or in bailment.
- Bailee who appropriates goods may be liable for conversion
- Wrongful withholding may also be actionable under tort of detinue.
  - Demonstration of wrongfulness must be shown which can be done through showing that a demand for the return of chattel was ignored or refused, or that demand would have been futile

Chapter 9: Shared Ownership

Introduction

Corporate Ownership: (Most important form of shared ownership in the economy)
- If you’re 30% owner of a boat and a bunch of other person/people own the other 70%, you’re allowed to use all of the boat but there is unity in possession (everyone is entitled to everything equally). If you sold it, you’d get 30% of the profits. But you can USE all of the thing.
- Instead, you have a corporation and the corporation owns an asset (say, the boat). You own 30% of the shares and other people own 70%.
  - You divest yourself of right of use and control. The corporation has control so the corporate management decides what to do with assets. You get a vote in the annual meeting.
  - So what do you get? Maybe dividends (if corporate decides to distribute). You have the right to vote and to exit (sell shares to someone else)
- Why would you want to go corporate?
  - Liability: If your asset causes damage, then you don’t have to be held personally legally responsible
  - You aren’t an expert so you’d rather have people who are control the asset.
  - You don’t want to be involved in day-to-day running of it, just want profits
  - Diversification: You can diversify interests to make sure you make money

Pecore v Pecore
- Shared bank account with father and daughter but father only paid in
- Legally: Concurrent owners (because both listed on paperwork)
- Equitably: Apply the presumptions to figure out who has title. Because father put all money forward there is a presumption that he retained sole right in the account.
- Court said actually equitable interests did go to daughter but only on his death. He gave her right of survivorship because he meant to make a gift of it. Survivorship is like a separate proprietary right.

Forms of Joint Ownership:
- Joint Tenancy
- Tenancy In Common
- Obsolete Forms
  - Tenancy by entireties
  - Co-parcenary

Joint Tenancy
Two or more people together own the same interest. They hold the whole jointly and nothing separately. Keys are four unities and right of survivorship.

Advantages:
- Simplified title since the various interests would eventually coalesce into one through survivorship. On death of one joint tenant, the title was subsumed in the other tenants, this avoided tenurial liability.
- Good in context of family holdings in context of estate planning
• Provides insulation from creditors. While debtor/joint tenant’s interests may be seized by a creditor, the right to do so is lost once that tenant dies, at which time the debtor’s interest in the property vanishes.

Survivorship
Shares do not pass on to other tenants, but rather the remaining tenants simply share their shares with one less person. Once only one joint tenant is left they will hold the full interest.
  • Can be converted into tenancy in common (no right of survivorship) by a process known as severance

If Y should die, X will become the sole owner by right of survivorship.
  • One entity is the owner but that entity consists of multiple people
  • Both have heirs. X has heirs and Y has heirs.
  • Therefore, Y’s heirs are now not entitled to anything
  • Recommended for family houses mainly
  • Problems when people don’t realize they were joint owners and were surprised by survivorship.

What if we can’t tell who died first?
Janus v Terschevitz: Newlyweds back from honeymoon and both have a headache and take a Tylenol. Within minutes he collapses. Bring someone in to resuscitate him. Then she collapses. They were victims of the criminal who had tampered with the Tylenol bottles (took out a few pills and replaced with cyanide) in Chicago. Making people die from cyanide poisoning. Happens on evening of Sept 29. Both newlyweds die due to the cyanide poisoning. Death certificates are issued, his for Sept 29 and hers for Oct 1. They’re joint owners as husband and wife and have wills. She is the primary beneficiary of a $1 million dollar insurance policy. And if she died later than him then she gets the policy. But if he out survived her, then the policy goes to his mother. Literally who dies first determines who gets $1 million. She was determined to survive him. She got $1 million and it was passed on through her will.
  • Alberta: Wills and Succession Act says if during life two or more individuals hold property with right of survivorship and all joint owners die at the same time or where you don’t know who was the last, then court will deem them to be tenants in common.
  • Nova Scotia: If they die at the same time in different provinces, they go in order of seniority. Older is deemed to have died first.

Four Unities: Must be present for joint tenancy. If one of the unities is missing then it is a tenancy in common and no right of survivorship. For joint tenancy, you need four unities AND intention.
  • Possession: Refers to the fact that each joint tenant is entitled, concurrently with the other joint tenants to possession of the whole of the land that is the subject of the joint tenancy. Rights must relate to the same piece of property
  • Interest: The interest of each joint tenant must be “the same in extent, nature, and duration”
  • Title: Must arise from the same act or instrument/document
  • Time: Means each joint tenant’s title must vest at the same time
    o Not required for a joint tenancy created by will or deed to uses
    o Ex: “To A for life, remainder to the children of A as joint tenants” a joint tenancy may be created by a gift by will of land to the children born to A, even though the children’s interest will each vest at the time of their respective births. Even though they’re born at different times, they can be joint tenants.

Law Reform In BC and ON: Suggest a joint tenancy shall arise as long as: (1) unity of possession exists, (2) there is an intention (presumed by statute or otherwise) to create right of survivorship

Intention:
If the four unities are present, whether the co-owners held jointly or in common is a matter of the grantor’s intention

Presumption as to intention at common law
At common law → presumption is joint tenancy

Three exceptions (assumed to be tenancy in common):
1. Where money is advanced and secured under a mortgage (tenancy in common)
2. Partnership property (tenancy in common)
3. Where money to purchase property is provided in unequal shares
   a. Ex. A and B buy a house, A pays 75% and B pays 25%, title is only in B’s name. Subject to proof of a contrary intention, B would hold the property on a resulting trust for A and B as tenants in common with A having a 75% share and B having a 25% share. Similar result if title is in A and B names
Equity’s Attitude
No choice but to follow the common law. But has some exceptions: business partners (in common), when money advanced by both parties in unequal shares (in common).

Statutory Intervention

**Law of Property Act s 8**
When land or an interest in land is granted, transferred, exc to 2 or more persons, other than as executors or trustees, in fee simple or for any less estate, legal or equitable, those persons take as tenants in common and not as joint tenants unless an intention sufficiently appears… that they should take as joint tenants
- Common law required you to take active steps to create tenancy in common
- Now you have to take positive measures to indicate you want to create joint tenancy with right of survivorship

**Matrimonial Property Act, s 36(2)(a)**
The fact that property is placed or taken in the name of both spouses as joint owners is proof, in the absence of evidence to the contrary, that a joint ownership of the beneficial interest in the property is intended
- What if “joint tenants” is omitted?
  - If they paid unequal shares, equity would say tenancy in common.
  - Act says if you register jointly then joint tenancy
  - Wife purchases property and registers it in the name of "Husband and Wife as joint tenants" – they both have legal title, but she reserves beneficial interest unless it can be shown that it was intended as a gift
  - If she registers it in his name only? Husband has legal interest, but there presumption that she intended to retain a beneficial interest

Trustees and Executors take as joint owners.

Examples:

O: “I devise Blackacre unto and to the use of A and B in trust for C and D”
- A dies. What is state of title?
  - How do A and B own at start? Legal fee simple
    - Common law presumption: joint tenants
    - Does act reverse? NO because they’re trustees
    - B gets legal estate in fee simple through survivorship
    - B gets legal title. B holds in trust for C and D
  - What did C and D get originally? Equitable fee simple
    - Tenants in common because of the Act.
  - What if C dies too? So A and C dead
    - B still has legal estate in trust for C’s heirs and D
    - C’s estate takes his shares (because tenancy in common)
    - D is unchanged

O: “I devise Blackacre unto and to the use of A and B in trust for A and B”
- A dead. What is state of title?
- Legal: A and B have legal fee simple
  - A and B are trustees for themselves
  - A is gone. B has legal estate
  - Joint tenants
- Equitable:
  - Tenants in common
  - B is now holding for B and A’s heirs
  - A and B’s heirs have rights even if both A and B die. Someone will be appointed from the court to be trustee
  - *Possible to hold legal title in one form and equitable title in another

O: “$50,000 to Don and Betty”
- Betty dead. What is state of title?
- Act doesn’t apply because it’s not land
- Joint tenants. So when Betty died, Don gets right of survivorship and gets all

Tenancy In Common

Requirements and General Nature
If Y should die, her share becomes part of her estate.

- Most widely spread, most common form of concurrent ownership in Canada.

**Differences with Joint Tenancy:**

1. Only unity required is one of possession
   - Distinct, separate interests so there is no reason to have the other unities
2. No right of survivorship
   - When one tenant in common dies, his/her interest in the land does not pass to the surviving tenants in common but forms part of the deceased’s estate and passes in accordance with the will or intestacy rules
   - Right of survivorship seen as inappropriate in commercial settings or in other business dealings. Partnership assets are also held in common. In condo property, common areas are held in common.

**Express Creation and “Words of Severance”**

Assuming unity of possession is present, a tenancy in common can be created:

- By express creation
- Pursuant to a statutory presumption
- As a result of a failed attempt to create a joint tenancy (such as where there is no unity of interest)

**Words of Severance**

- Common law became increasingly willing to find that words in a grant created tenancy in common → words of severance (imply division of the property into shares)
  - Words of severance: Equally amongst them, equally, in equal moieties, share and share alike
  - “To A and B in fee simple, share and share alike” or “To A and B in fee simple in shares alike”
  - Thinking as distinct owners with each property so tenancy in common

**Tenancies in Common Arising by Operation of Law**

- “Failed or imperfect” joint tenancy

**Tenancy in common resulting from severance of joint tenancy**

**Severance**

Any act that destroys one of the essential unities

**Factors and Policies Affecting the Law of Severance**

A joint tenancy can be severed, obliterating the right of survivorship (making it a tenancy in common)

- You lose yours but I lose mine. Mutual loss of survivorship

Presumption of joint tenancies may make a surprise where people didn’t know they were. Courts under traditional approach may be willing to regard acts as severance due to the unfairness of survivorship. In AB can’t be surprised because our presumption is in common. Now a purposeful act is required to create a joint tenancy.

Severance is recognized through (a) unilateral conduct, (b) mutual agreement, (c) a "course of dealing"

**Dictum in Williams v Hensman (Course of dealing)**

Dictum suggesting that an ineffective attempt to transfer title in this way might nevertheless estop that co-owner from later claiming a right of survivorship

There may be severance of joint tenancy "by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common"

- Some Canadian courts have held that even where negotiations between joint tenants do not lead to a binding contract concerning their property holdings, the process of negotiation can constitute a course of dealing sufficient to sever the joint tenancy

**Acts by One Joint Tenant (Re Sorensen & Sorensen)**

Where A and B hold as joint tenants, and A conveys to C, the new co-ownership relationship between B and C must be tenancy in common because unities of title and time are absent

Suppose house is owned by A, B, and C as joint tenants.
• What happens if A passes away? B and C own it
• If B and C die in plane crash? A gets it through right of survivorship
• If C decides he wants out? He can sell it to D. If C conveys to D, what are the parties interests?
  o Typically you’d say you give what you have. Inclined to think A, B, and D are now joint tenants. But that’s not right. Why not?
  o IF D bought C’s interest why can’t D stand in C’s place? No unities anymore. D’s interest couldn’t derive from the same interest or same time as the others. They are not identical in their interests. D can’t possibly be joint tenant.
  o How are A and B standing a vis a vis each other? What changed for them?
    ▪ Intended to have survivorship. And they have unities a vis a vis each other.
    ▪ If A passes away, what happens? B becomes sole owner of what A and B had. A and B can be regarded as one person as joint tenants (with right of survivorship). And D is a tenant in common. D has a 1/3 interest in the property and A and B together have a 2/3 interest that they hold as joint tenants.
    ▪ If D dies, it goes to D’s heirs.
    ▪ If A dies, it’s extinguished and B becomes sole owner of 2/3 interest in house.

Possible Unilateral Actions That Would Work:
• Convey to someone else
• Can convey to yourself (Law of Property Act s 12(1)(d))
  o Severance because new title resulting from this process is obtained at a different time and under a different document than that of joint owners
  o At common law, void. Allowed in AB.
  o Where transfer documents for conveyance to oneself have been prepared, leaving only the matter of registration, severance in equity will be found
• Partial alienation (granting a life estate) should produce a severance because it leaves grantor will only a reversion thus destroying unity of interest
• Mortgage IF it transfers legal title (not in AB)
• Action for partition or forced sale of land

Law of Property Act s 12(1)(d) (transferring to yourself)
An interest in real or personal property may be validly conveyed by a person who holds the property as a joint tenant to that person as a tenant in common
• You could sell to yourself and obliterate the right of survivorship for yourself and other co-owners. But other two owners will have right of survivorship with each other.
• If house left to 3 kids, and each kid doesn’t want their rights subsumed so each kid could severe (convey to self or wife or whatever) so that each of them obliterates the right of survivorship so each have a 1/3 share and can pass on to heirs

Land Titles Act s 65
65 The Registrar shall not register a transfer that has the effect of severing a joint tenancy unless
(a) the transfer is executed by all the joint tenants,
(b) all the joint tenants, other than those executing the transfer, give their written consent to the transfer, or
(c) the Registrar is provided with evidence satisfactory to the Registrar that all the joint tenants who have not executed the transfer or given their written consent to the transfer have by
(i) personal service, or
(ii) substitutional service pursuant to a court order,
been given written notice of the intention to register the transfer

Things That Do Not Work:
• Wills. Survivorship trumps wills and intestacy
• Easements or rent charge (does not destroy unity, they merely encumber a tenant’s interests with some additional rights)
• Mortgages: You borrow money from bank and convey legal title. Lender becomes legal owner. But you have a right in equity to have title given back to you once you pay the loan. You have equitable right to redeem property at end of loan. Known as equity of redemption. Origin of equity. No longer law in AB. Mortgage is no longer conveyance of title to lender, it is a charge on your legal title. In some circumstances the act by a joint owner of getting a mortgage doesn’t affect severance because it doesn’t affect title. Unities in tact, interest of one just has an encumbrance
Assignment or sublease of a leasehold joint tenancy (maybe, maybe not). Some say yes. Some say it only pauses right of survivorship until lease expires. Lease would end on death of lessor meaning it can never interfere with survivorship.

**Sorensen Estate v Sorensen**

<table>
<thead>
<tr>
<th>R</th>
<th>The failed attempt to created an express trust severed the joint tenancy.</th>
</tr>
</thead>
<tbody>
<tr>
<td>F</td>
<td>Spouses divorced in 1969, together held three lots as joint tenants. Mr. and Mrs. Sorenson execute a settlement in 1971. The co-owners created a lease the house for $1 a year for wife. She was to pay all repairs and upkeep. Mrs. Sorenson is later diagnosed with cancer in 1974 and wants to sever the joint tenancy to sell part of the land to provide for her dependent son, Arthur.</td>
</tr>
<tr>
<td>I</td>
<td>Was the joint tenancy severed?</td>
</tr>
<tr>
<td>J</td>
<td>Yes, the joint tenancy was severed.</td>
</tr>
<tr>
<td>R</td>
<td><strong>Settlement agreement?</strong></td>
</tr>
<tr>
<td></td>
<td>• Yes. But in this case, not enough if only the cause the wife’s subsequent conduct indicated that she believed further action was required on her part</td>
</tr>
<tr>
<td></td>
<td>• Because she did other things it made it seem like she wasn’t done</td>
</tr>
<tr>
<td></td>
<td><strong>Charge?</strong></td>
</tr>
<tr>
<td></td>
<td>• No, charge doesn’t effect the main characteristic (survivorship)</td>
</tr>
<tr>
<td></td>
<td>• No. By law of AB a charge is an encumbrance on title. Doesn’t change nature of title. So a mortgage isn’t enough to sever</td>
</tr>
<tr>
<td></td>
<td>• House was leased to wife for $1 until she dies. Argument is that she has a lease during her life and what husband has is only reversion. He doesn’t have same interest as her so 4 unities aren’t there, interests are different.</td>
</tr>
<tr>
<td></td>
<td><strong>The wife’s will?</strong></td>
</tr>
<tr>
<td></td>
<td>• Says property goes to son. Is that sufficient? No. Survivorship trumps wills and intestacy. Will can only deal with interests to your estate. But if property held jointly then it doesn’t form part of your estate.</td>
</tr>
<tr>
<td></td>
<td><strong>Action for partition?</strong></td>
</tr>
<tr>
<td></td>
<td>• When you go to court and say you don’t want to be co-owners anymore and want to do something about it. So you sell the property to one of them or to a third party. She had started the action but died before it was finished. It would have been enough. But didn’t happened so no.</td>
</tr>
<tr>
<td></td>
<td>• <strong>LPA s 19</strong>: if the interest in land that is the subject of an order is held in joint tenancy, the order on being granted severs the joint tenancy and turns into tenant in common</td>
</tr>
<tr>
<td></td>
<td><strong>Declaration of intent to sever?</strong></td>
</tr>
<tr>
<td></td>
<td>• No. Not enough to say to the other co-owner that you intend to obliterate survivorship. Not enough to destroy unities. Unilateral conduct.</td>
</tr>
<tr>
<td></td>
<td><strong>Inter vivos gift?</strong></td>
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<tr>
<td></td>
<td>• No. Delivery is not perfected because she gave the documents to her solicitor and not her son’s solicitor</td>
</tr>
<tr>
<td></td>
<td><strong>DMC?</strong></td>
</tr>
<tr>
<td></td>
<td>• No. Real property cannot be subject of this. Only personal property (besides, her death was impending – usually it is conditional on if I don’t get better I donate vs if I do get better I keep the stuff I’m donating to you)</td>
</tr>
<tr>
<td></td>
<td><strong>Lease to the wife?</strong></td>
</tr>
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<td></td>
<td>• No, does not sever as it was for life of wife not for a term of years and did not affect the main characteristic of survivorship. Given that the wife was allowed to stay in the house during her lifetime, upon her death it all goes back to him (upon his death, his interest in reversion merges with her right of survivorship)</td>
</tr>
<tr>
<td></td>
<td>• Interests of both T &amp; LL change (from fee simple for both to a life estate &amp; an interest in reversion respectively)</td>
</tr>
<tr>
<td></td>
<td>• If the wife has a life estate, there is not joint tenancy (because she has life estate while he has reversion interest = no unity in title!)</td>
</tr>
<tr>
<td></td>
<td>• Lease has to be for a certain term. She has exclusive possession from now till death. She has a life estate in reality.</td>
</tr>
<tr>
<td></td>
<td>• They’re joint tenants. They have fee simple from now till eternity. As landlord’s they carve a life estate for her, only her. Now she has this particular estate and the reversion and he only has the reversion. Thus interests are different, so should sever. Judge calls this a lease.</td>
</tr>
<tr>
<td></td>
<td>• So now, is a lease sufficient to sever? No not enough in this case but open question in real life</td>
</tr>
<tr>
<td></td>
<td><strong>Declaration of trust?</strong></td>
</tr>
<tr>
<td></td>
<td>• Yes. She declares that she holds title in trust for her son. You can create an equitable estate by a deed of trust. You sign it and you hold as a trustee. What this does is convey to the beneficiary the equitable interest in property in question. So in equity, the unities were broken.</td>
</tr>
</tbody>
</table>
|   | • This became a common thing after Statute of Uses because it allowed to create interests in the future. Couldn’t say to my daughter when she turns 21. You have to wait and do delivery of seisin. But after SoU you
could declare yourself a trustee until she’s 21 and then her interest materializes. She says she is now a trustee in her son. So he gets immediately an equitable interest in the property and court says this severs. Why? Destroys unity of same document because there’s a new document. Husband has legal interest and equitable interest. Wife has only legal but no longer equitable interest. Interests are no longer the same so severed

**Acts by Two or More Joint Tenants (Havlik v Whitehouse)**

You have to examine entire exchange, reflect on it, then determine if it was sufficient that they agreed to sever or regarded themselves as severing. *Havlik:* Suggests that courts may be more willing to find that negotiations regarding severance constitute a course of dealing sufficient to sever the joint tenancy in the context of marriage breakdown than in other contexts.

**Agreement or Course of Conduct Generally**

Equity! Suggests courts may be more willing to find that negotiations regarding severance constitute a course of dealing sufficient to sever the joint tenancy in the context of marriage breakdown than in other contexts. When dealings fall short of a firm or explicit agreement.

• Severance when proceeds are divided up
• Severance in equity: by mutual agreement – at common law no severance and still JTs, in equity yes it is

**Mutual and Joint wills**

If there are two mutual wills or one signed by both then it may be viewed as showing an intention to replace the right of survivorship with the pattern of distribution contained in the wills.

Suppose a couple has property held jointly. And suppose both of them make wills disposing for that joint property. We would say they cannot dispose of it because it’s held jointly since when one passes away their right is extinguished. But by creating wills, they have both agreed to regard survivorship as having been terminated. Severance was done in equity. Should be regarded as having agreed to sever. Wills may not always be sufficient.

A couple has joint ownership of the house. Then they write a will together leaving it to the children. That is conclusive that they no longer see it as being subject to survivorship because if you think that you might inherit by survivorship then you can write your will afterwards and give it to someone.

**Failed Negotiations Undertaken “without prejudice”**

In some cases, the courts have been prepared to draw an inference as to severance from negotiations which do not lead to a final agreement.

**Course of Dealing**

Common law couple who held property jointly then they separate. Their lawyers are now negotiating a settlement with property that is held jointly. When you negotiate a settlement and you exchange letter what do you say at the beginning? “Without prejudice”. They exchange a bunch of these but never come to an agreement. He gets murdered. Who gets property? His heirs under his will or her because it was jointly? Court determined they had agreed to sever. The only thing outstanding was the $$ amount. His share does go to his heirs.

**Severance by operation of law**

**Resolving Co-Ownership Disputes**

**Common Law**

We have no position on disputes. You’re adults. You don’t like having property together with someone, you can agree to sell the property to someone, you can agree to divide property into two, if partner is not co-operative then sell your share to someone else.

**Terminating Co-Ownership:**

• Divide co-owned land and each owns a respective parcel
• Could sell undivided property to someone else and divide profits
• Co-owner could sell their interest to the other co-owner
• Last resort: Order for partition or for sale of land
Co-owner can go to court say other is being a baby so they want a forced sale or a forced partition. Court has no discretion but to order one or the other. Co-owners cannot be compelled to stay in present situation. Court can’t turn down the order.

- **AB:** Exception when matrimonial home is involved. Partition and sales proceedings may be stayed pending an application under the Matrimonial Property Act or while order under the act remains in force
- **Concern** is the order being too disruptive to children or spouse

**Other Remedies Under Common Law:** Other co-owner going crazy cutting down all timber, opening mines.

- **Waste:** A co-owner may use the property in the same manner as would an owner who did not share title with co-owners, subject only to a duty to act reasonably. Waste is any conduct which would unreasonably diminish the value of the property. If one is engaged in malicious acts of destruction.
  - Sue them for waste. Court is more liberal and tolerant of actions because all of the co-owners have the right to 100% of the property. Unity of possession. You can strip the land, cut timber. But extreme cases will get you an injunction.
  - Different from law of waste for life tenant & remainder person b/c they hold in different times
- **Ouster:** When one co-owner has unlawfully excluded another (actual expulsion). Probably also includes violent or threatening conduct on the part of one that makes it intolerable for the other to remain. Can extend to where one party’s conduct “made conditions intolerable” for the other or where the circumstances (whether or not fault is attributed) make it intolerable or unreasonable for the parties jointly to possess the property.
  - Ouster: You can sue to have them restored. Action for occupation rent (by assuming defacto possession). Has to be complete ouster. Playing heavy metal at midnight making your life hell isn’t enough. But domestic violence is enough.
  - Requires that you deny the other person’s rights (must be overt) and also includes where one makes life under the same roof unbearable for the other
- **Limited action for account (in equity)** - **LPA s 15**
  - Court orders partition or sale of land by application
  - Sale of land includes distribution of proceeds between the co-owners, or sale of one co-owners interest to the other co-owner willing to purchase the interest
    - Based from **Statute of Ann 1704**?
  - Accounting, contribution, and adjustment - **LPA s 17**
    - Court able to take all sorts of things into consideration when making adjustments toward equitable resolution of concurrent ownership

**Modern Statutory Regime**

**Partition or Sale (Law of Property Act, s 15)**

- Court shall make an order directly. They must give you one of the following:
  - A physical division of all or part of the land between the co-owners
  - The sale of all or part of the interest of land and the distribution of the proceeds of the sale between the co-owners, OR
  - The sale of all or part of the interest of one or more of the co-owner’s interests in land to one or more of the other co-owners who are willing to purchase the interest
- Forced sale will be under direction of court. Court fixes value of land and terms of sale

**Available Relief**

**Accounting (Ontario Law Reform Commission)**

General rule that a co-owner does not have an obligation to account to other co-owners for the benefits derived from possession. Some circumstances where a co-owner may be required to account to the other co-owners for the benefits of occupation, for what is often referred to as “occupation rent”.

- **Agreement:** Agreement between co-owners may make one liable to account. Two main types of agreement: (1) may have agreed to one having sole possession on the terms of making rental or other payments, (2) one co-owner may have agreed to act as agent or as bailiff of the other co-owner with responsibility to account to the latter for her or his share of profits of the land
- **Statute of Anne:** Statute provides accounting in certain circumstances. Must account to other co-owners for benefits which he receives, as a co-owner, from third parties, but not for benefits which he takes from the soil as a result of his own exertions

**Accounting, Contribution, and Adjustment (Law of Property Act s 17)**

- Court may order accounting, contribution, or adjustment
- Family farm left to son A and B. Son A says farm is important so he will stay on farm and work. Son B wants to be a miner. After 15 years, Son B returns and says show me what you’ve done and give me half. Son A says he’s been breakin his back and Son B has been away and now he wants his share? Son B says yes, he has unity of possession, it’s just as much B’s as it is A’s. So they go to court, forced sale, partition, something.
• Court will adjust the parties financial responsibilities. Both responsible for mortgage and property taxes. If Son A paid all of these and he is entitled to adjustment. Son A has been selling canola every year and retaining profits for himself but land belongs to both. Law is clear. A co-owner is entitled to proceeds of their own labor working the land. You grew the canola, you keep all the money. But if you get money from third parties on your land (rented land, leased oil and gas rights), that you need to account for to your other co-owner and that will be adjusted.

Chapter 10: Servitudes

Introduction

Incorporeal Hereditaments: Generally

• Right of the owner of Blackacre to use a path across Whiteacre
• Doesn’t give right to possession. Non-possessory right. Servitude

The Nature of Easements

Basic Concept

Definition: An easement is a privilege without profit annexed to land to utilize the land of a different owner (which does not involve the removal of any part of the soil or the natural produce of the land) or to prevent the other owner from utilizing his land in a particular manner for the advantage of the dominant owner.

• Right to cross over someone else’s land
• They can sign an agreement to give the right. That agreement is worth a whole lot more if it is also binding on someone who buys the land.
• If EK needs to cross ML’s land to get to road. You wouldn’t want to buy EK unless you knew the easement would be allowed.

Why You Can’t Make Whatever Servitudes You want:

Three Economic Concerns:

1. Information Concerns – What can I do? What can’t I do? Numerus clauses principles ensures there’s a standard list of obligations.

2. Re-Negotiability Concerns – You take $100 and they can cross your land, great. But in 20 years, I don’t want the arrangement anymore. You want to be able to tell them it’s not working anymore and you want out. Now need to negotiate and buy back the easement and when these arrangements become complex and involve more than 2 people then you get into serious anti-commons problems. How do you get them to cancel something others have agreed to?

3. Value Concern – If I agree not to do something to my property, if I undertake restrictions, it will make my property less valuable. The law strove to make these arrangements only when another land becomes more valuable. Law wants to make sure property arrangement create value and not destroy it.

Re Ellenborough Park

Facts: Used in war time. Title is conveyed to someone. New owner says whatever that is, it’s not working so they want to build houses. But people who live in the houses in the development facing it say you can’t. Because when their houses were bought, they were promised they could use this park forever and ever. So you cannot develop it, you can never develop it. Let’s assume the original owners got a right to use the park. It was a license. Would it be a proprietary right binding on current owners like 101 years later? None of the parties were privy to the original agreement.

Court: Distilled 4 elements required...

Four Elements:

1. There must be a dominant tenement (which enjoys the benefit of the easement) and a servient tenement (which is burdened)
   - If you want to buy a right of way over someone’s property you can buy a right of way and it will be an easement. But if you’re not a neighbor and live in another town, you cannot buy an easement.
   - No easements in “gross” (but see Land Titles Act s 69)
     i. Deals with municipalities and utility companies and if the right is of a certain kind with municipal need or utility then upon registration the grantee has right to use the land in accordance to terms of the grant and that right runs with the land notwithstanding that the benefit of the right is not a pertinent or annexed to any land of the grantee.
     ii. Utility company can have easement on your land even though they don’t have land that benefits from it
2. An easement must "accommodate" the dominant tenement
   • Attribute of ownership normally associated with the use of the land
   • There has to be sufficient proximity to the land in question for the servient
   • Similar, if not functionally the same, as the requirement in the law of covenants that a convent "touch and concern" the land
   • Has to confer a significant benefit
   • Test is whether the right makes the dominant tenement a better and more convenient property
   • Must be reasonable proximity between dominant and servient tracts, no set amount of space between tracts but type of right should be considered
   • Must be reasonably necessary for the enjoyment of the dominant tenement and not merely confer advantage on the owner of that tenement, as would a contractual right. Underscores policy of tolerating burdens on one parcel only if another is thereby approved
   • See Hill v Tupper: decided that an exclusive right to place boats on a lake did not accommodate the dominant tenement, because such a monopoly was unconnected with the normal use and enjoyment of the land

3. The dominant and servient tenements must "not be both owned and occupied by the same person"
   • But see Land Titles Act, s 68
   • LL can give T easement. So technically freehold title to both is held by LL, possession is not. This is okay and doesn’t go against the rule.
   • Large scale development, allowed to register easements prior to sale (b/c otherwise the seller is owner of both dominant and servient tenement)
   • No longer law in AB. Main reason why you’d have change in law is when you have developer who wants to build large scale development and wants to have certain easements in place before they get buyers. So they have the easement and then sell. Not sell then have to negotiate for easement.

4. The right claimed must be capable of forming the subject matter of a grant
   • Easement must be by grant. You go on the land. Perform ceremony as livery of seisin through which you give them possession of the land. But for an easement we need a different process. Why? Because an easement are a non-possessory interest. You need another technique. So common law says it must be created by a grant. So the grant has to be valid, must be capable grantor, capable grantee, rights can’t be vague, ascertain what they are. Other elements not so clear, rights can’t be merely recreational rights, not sure why. Grant must not require the owner of the servient tenement to spend money.
   • Grant is needed because a transfer of possession is not possible, so grant required to pass ownership.
   • Must be capable grantor and grantee, rights under easement cannot be too vague, grant cannot (apart from fencing easements) require the servient owner to spend money, and it cannot confer a right to possession or control of the servient lands to an extent that is inconsistent with the possessory rights of the servient owner
     o Interest must not be too vague
     o Rights cannot be of a purely recreational nature (use possandi)
     o The right cannot interfere with possession of the dominant tenement, can’t amount to joint possession, and -?-?
       • Placement of gas pipes under property does not constitute easement even though there is constant presence under the land (no interference w/ surface owner’s possession)

Hill v Tupper

<table>
<thead>
<tr>
<th>F</th>
<th>Owner of canal leases some land on it to the PL. Part of the lease includes a sole and exclusive right to put pleasure boats on the water. Tried to prevent competitor from putting rival boats on the canal. Didn’t have proprietary rights but just a license enforceable against canal owner.</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Is this a valid easement?</td>
</tr>
<tr>
<td>J</td>
<td>No. Exclusive right to rent boats is not an easement. It’s a personal license.</td>
</tr>
</tbody>
</table>
| R | An easement must accommodate a dominant land. It may not constitute a purely anticompetitive right for the benefit of a business. The benefit must benefit the land, here the right to exclusive use of the canal was not for benefitting the land itself, not just for the business.  
  • PL was basically trying to invent a new property right. Numerous clauses principle. We know what a fee simple is. If we attach all these new privileges to land then people who purchase it will have a hard time identifying rights and responsibilities. It would make property inalienable. Problem of information costs when you don’t have a good land registry system (couldn’t look up things).  
  • One judge also cited case law in support of proposition that there can be no easement unconnected with use and enjoyment of land. So if you lease property on bank of canal, you can get an easement for parking. But easement to put boats on landlord’s property is a different arrangement.  
  • Rights asserted by PL were for his commercial enterprise. They did not make his occupation of the bank better or more convenient. |
If the ruling means that an easement does not meet the second requirement if it serves only to enhance business activity, then it seems both illogical and inconsistent with the other authority. In this case, the dominant tenement was used in connection with the boating operations, and the monopoly obviously made that enterprise more viable, so the ruling might be too restrictive, even wrong. Another approach to this issue, one that supports the holding, is to regard easements as serving to supply an attribute of ownership normally of frequently associated with land. Viewed in that way, the law of easements is designed to allow such deficiencies to be remedied. Because the bundle of rights over land does not include monopolies of the type found in *Hill v Tupper*, the Court in that case was correct in rejecting the easement claim.

**Easements and Possession: The Pipeline Example**

**Positive and Negative Easements**

**Positive Easements:** Permit the holder to engage in some activity on the servient tenement (eg using a right of way). Typically an easement allows you to do something on someone’s land.

**Negative Easements:** Restrict activities on servient land.

But four kinds of negative recognized by law:

1. Right to receive light through defined aperture usually a window, on the dominant land, which as a necessary consequence, prohibits the servient owner from blocking off the light (you have right through THAT window, your neighbor cannot block light through window),
2. Right to air through defined channel (don’t interfere with ventilation),
3. Right to lateral support (if your building is built against someone else’s you can get right so they can’t do anything to undermine your foundations or cause yours to fall),
4. Right to continue to receive flow of water from artificial streams.
   - Cannot create new forms of negative easement

**Creation of Easements**

- Most effective way: express grant or express reservation from a grant
  - In an express grant, A, the owner or occupier of what will become the servient tenement, gives B, who owns or occupies what will become the dominant tenement, a non-possessory right to make use of A’s land for the purpose identified in the easement
- Grant of easement may be included in the grant of a parcel of land
  - Such as when A subdivides is or her property into lots and grants B a lot along with a right of way to the lot over land that A retains
  - A may also want to retain the right to continue to use the land granted to B for access to A’s land, and may do so by including a reservation from the grant to B, reserving a right of way over B’s land for the benefit of A’s remaining land

**Express Grant**

- All easements are based in a grant created by the dominant owner (can come with estate in land or separately)
- ML grants an easement expressly in the grant (may occur through sale, or conveyed as a stand alone conveyance).
- When no words of limitation are used, the duration is determined according to surrounding circumstances.
- Doesn’t have to be described expressly in grant, can be identified through extrinsic evidence
  - “To EK in fee simple together with an easement in the nature of a right of way over the path marked in Schedule A”
- **Well crafted grant includes:** identify dominant tenement, the servient tenement, the nature and scope of the easement, the time period for which the easement continues, and any rights and responsibilities of either party with respect to the easement
  - If there is an easement for use of a road, it should include who’s job it is to maintain the road

**Implied Grant**

Grantor does not derogate from grant. Proving this is trickier

**Necessity**

<table>
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<tr>
<th>There must be an easement otherwise land is useless</th>
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<tbody>
<tr>
<td>• For example, for land that is landlocked at time of transfer, provided there is some land retained by the grantor over which that access can be exercised</td>
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</table>
Nelson v 1153696 Alberta Ltd

Rabbit Hill is leasing land on quarter section. Parcel A they're leasing is owned by Nelson who operates water ski park. Parcel A is landlocked. Having river access during some parts of the year doesn't mean you have access. To get to the park you go Westbound on a country road, turn left, sharp hill, go right to Rabbit Hill and go left to river. There's a new owner and road runs through his property and he won't allow access anymore. Water ski park has no access. Road to ski hill has been used for 43 years, ski resort built the road and leased from owner agreeing to

### Intended Easements

- Arise by implication to give effect to the common intention of the parties, having regard to the purposes for which the land has been granted
- Similar to those of necessity
- Wong v Beaumont: Intended easement for proper ventilation of a basement was found, because inter alia, without it, the premises which were rented solely for use as a restaurant, would not have complied with the applicable public health codes, nor the lease itself. Would not have been possible for the T to have used the property legally and in compliance with the lease without the enjoyment of the easement of ventilation being claimed. Looking at it another way, given the purpose and terms of the demise, it would have amounted to a derogation from the grant not to recognize the easement over part of the property that had been retained by the LL.

### Rule in Wheeldon v Burrows

- If an owner of property is selling you part of their property and it looks like they're using a lane to get from one property to another. It looks like there is an easement in place, you’re entitled to that easement through that representation.
- Serves as form of consumer protection, allowing purchaser to acquire amenities (easements) that the purchased land appears to enjoy.
- Minor deviation from principle of caveat emptor (buyer beware)
- Sometimes called easement of apparent accommodation
- For Wheeldon to apply:
  - The quasi easement must have been used by the owners or occupiers of the whole property at the time of the grant for the benefit of the part to be granted
  - The existence of the quasi-easement must have been “continuous” and “apparent”, ie there must be some observable physical evidence of its existence
  - Must be reasonably necessary for the enjoyment of the property
- Debate as to whether the last two components are alternatives (or two ways of saying the same thing). Scholars say both must be met.
- Continuous: used to be one that was enjoyed passively (such as a drain pipe). Has been extended to include interests that have continuing physical presence, such as well-known path or road
- Only work in favor of grantee. Won’t work if LL wants to reserve for himself

**Example:** If A owns and occupies a duplex, Whiteacre and Blackacre and A uses Whiteacre as a convenient means of getting to Blackacre. Given that there is unity of title and possession, Whiteacre does not constitute a servient tenement and the right-of-way is not an easement, strictly speaking. Instead law calls that ostensible right-of-way a quasi-easement. When the quasi-dominant land is transferred the rule in Wheeldon v Burrows may come into play. If so, the quasi-easement will blossom into a real easement in the hands of the new owner of the quasi-dominant tenement (Blackacre). The same result would occur if both lots were sold (or devised) simultaneously to different parties.
maintenance. In 1986, Nelson started the water ski park and he began to use the road without having any formal relationship with the property owner with respect to use of road. No access agreement whatsoever. Dispute arose. And denied access to road. Nelson says he has to allow access to road otherwise he would landlocked so there must be an easement of necessity.

R Court says given that it is landlocked. It’s owner may be able to prove easement of necessity but it must show it was there when they were created.

All of the land owned by Crown at one time. Nelson showed that Parcel A sold to CPR and that another quarter was sold to Mr. Street in 1897. But the lawyer for Mr. Nelson didn’t admit into evidence any record showing when NE6 was sold. Court reasoned as follows, if NE6 was sold first then Parcel A became landlocked either when Parcel A was sold or when WN6 was sold. NE6 was already in private hands, an easement of necessity would arise. Otherwise Parcel A would be landlocked. Assuming NE6 was sold.

But if NE6 was sold after NW6 then Parcel A wouldn’t be landlocked at the time that Parcel was created. It would be landlocked only when NE6 was sold. Or when Parcel A was sold.

NE6 and NW6 are two different parcels and it’s the second sale of the two that makes Parcel A landlocked. TJ says because you didn’t enter into record time of sale of NE6 he can’t tell if there is a right of way over NE6 or NW6 so he failed to make his case.

CA: This would be appropriate to admit new evidence. NE6 was sold first. So there is an easement but she’s overruled. It’s the PL’s problem that the lawyer didn’t enter right documentation at trial so they fail to make their case.

SCC: Leave was refused.

You have an easement over whichever one was sold last. More accurate → You wouldn’t have an easement over the one that is sold first.

Should have been easement but lawyer didn’t account for possibility that easement was in NE6 and didn’t submit forms so failed to prove case.

**Wong v Beaumont (Chopstick restaurant)**

F Chopstick restaurant is built and super successful. Bank is upstairs and complains about smell. Local authorities tell basement that they need a ventilation system (duct on side) to vent the restaurant. They ignore and continue to operate as normal. Now authorities interfere as they have complaints that there is no venting. So choice is to build expensive duct or close restaurant. LL won’t allow it because it’s unsightly. Which it was but it’s the back of the building so who cares.

J Intended easement necessary to give intention to parties.

R Going to recognize an intended easement. Denning says easement would have been necessary to give common intention to parties. Because they knew from the beginning that ventilation would be necessary and no way to do it except side of building.

**Reservations**

- On sale or lease of property an owner may wish to reserve an easement over the land that has been transferred for the benefit of an adjacent or nearby tract that has been retained. Interest retained by grantor on a transfer.
- Grantor may transfer Blackacre while at the same time carving out and reserving a life estate in the lands.
- EK owns strip of property . ML says they want to buy from EK. EK is downsizing and is okay with selling some. If you buy property from me that’s fine, but I need easement over the part I’m giving to you. EK is granting fee simple to ML but needs to reserve the easement over part of the land. Grant of fee simple and express reservation over part sold.
  - Law that grantor cannot derogate from grant. If EK sold to ML and EK didn’t reserve the easement in clear terms, the common law will not help EK here. Won’t find easement by implication.
  - Has to be in writing
  - Implied and necessity can be impliedly reserved. That will be less readily found in reservation
- Easement will not be found to be impliedly reserved unless “the facts are not reasonably consistent with any explanation other than that such a reservation was intended. It does not suffice to show that the facts are simply consistent with the implication of the reservation of an easement
  - Has been adopted because to imply a right here undermines the precept that a vendor should not be permitted to derogate from the grant by impliedly imposing an easement on the parcel that has been sold.
  - In addition, established that rule in Wheeldon does not apply to reservations
Estoppel

- Easements can be created through the application of the doctrine of proprietary estoppel
- Courts have used this to protect a person who acts to his or her own detriment in expending money on land that he or she occupies but does not own, under an expectation created or encouraged by the landowner that the occupier will be able to remain there
  - One qualification to the general rule that a person who spends money on improving the property of another has no claim to reimbursement
  - Courts can say occupier has irrevocable personal license permitting his or her continued occupation of the land, or even by declaring that the occupier has a life estate or a fee simple estate in the property
  - Claimants must establish that there was something in their use of their neighbor’s land for access to their own that would make it unconscionable for their neighbor to now insist on his or her legal right to deny that access
- If land that is described in a conveyance as abutting a street, land or way, and if that area is also owned by the grantor, it has been held that the grantee may use that adjacent property as an easement
- You make representation to buyer if they buy this property they can use this. If representation is such that it would be unconscionable to go back, buyer relied on the representation to make their decisions then easement by estoppel with those rights
- Adams v Loughman: Representation was made to a prospective purchaser that a lane was going to be set aside for the use of the land being offered for sale. It was on the faith of that statement that the purchaser agreed to buy the property. Accordingly, grantor and those claiming through him were estopped from preventing the grantee (purchaser) from using the lane as a right-of-way, even though development plans for the lane were later changed

Prescription (But LOA s 69(3))

- Common law recognizes that rights to an easement may emerge out of continuous use. Put frankly, the law pretends that an easement was granted at some time in the past, as evidenced by long, uninterrupted use.
  - For an easement to be created this way, the use of the alleged servient tenement must be “as of right”, that is, without force, without secrecy, and without permission (nec vi, nec clam, nec precario)
    - Some jurisdictions have regularized in legislation, defines a minimum period usually 20 years
- Protects reliance on, and enjoyment of, long-held and unchallenged rights. But courts proceed cautiously with this because finding a prescriptive right imposes a burden on some servient land without compensation being payable to the servient owner. It can punish (and discourage) neighborly co-operation
- You’ve been behaving using an easement for a certain amount of time then common law says that an easement was created hundreds of year ago and we can’t find it now but it exists
- Like the adverse possession of land for easements. Prescription involves recognition of a right, AP works to remove one. Prescription → presumed entitlement → fable of some earlier grant → arising to perfect an existing right. AP is based on a continuing wrong which, by operation of the statute of limitations, can no longer be stopped. It is “possession as of wrong”.
  - Prescription = non possessory rights thus can be supported by acts amounting to far less than the degree of control that is required to make out a squatter’s claim. AP serves to extinguish right of true owner and leads to usurpation of that owner.
- Negative easements recognized under law of prescription can develop in an incipient and passive way. Completely inert behavior can found a claim.
  - Right to light though particular window. Prescriptive easement can arise simply because there has been unobstructed enjoyment of solar access to the window for required prescription period (usually 20 years)
- Positive acts, such as perpetration of actionable nuisance through pollution activities can also gain legal protection under the doctrine of prescription
  - Law of AB doesn’t recognize these

Statute

Special rights may be conferred by statute, including easements on favor of, public or private entities
- There is an easement for the public to cross your land in order to access a public good

Scope, Location, and Termination

General Principles

Scope of an easement, governing matters such as who may use it, where, how, for how long, is a matter of intention. These elements should be described with as much precision as the nature of the easement allows. When perfection isn’t followed, scope and location can be inferred, with disagreement and litigation may follow
- Express grant: One examines wording of the document in light of surrounding circumstances
- Prime consideration in breadth of an easement is purpose for which the grant was initially made
• Physical circumstances may be relevant to constrict otherwise broad rights of use that an unrestricted grant suggests, or vice versa

• Relevant factors:
  o Physical nature of servient lands
  o Past use of area by the parties
  o And the extent to giving an expansive scope to the easement might throttle activity on the servient tenement
  o Things relating to dominant tenement may also be worth considering

• Location of easement may be resolved by looking to doctrine of estoppel. If the deed specifies no precise place where the right is to be enjoyed, the owner of the servient tenement may be unable to alter the route that has been selected and used

• Grantee not entitled to increase the burden on the servient lands beyond the rights initially conveyed
  o However may have been contemplated that easement's use would change over time.

• Laurie v Winch: Farmland (dominant tenement) was subdivided into residential lots. The easement, which was granted as a perpetual right-of-way over a slender lot near the farm, was split into a large number of easements, one of these being attached to each new lot
  o SCC said this was valid. Nothing to suggest it was contemplated that the lands would always be used for agricultural purposes, or that changes in the use of the dominant lands would affect the continued existence of the easement. Original easement of access remained available to the owners of the dominant lands, even though now there were a number of owners using the land as residential property, not as farmland. Holding is consistent with rule of construction that provides that an easement is presumed to attach to every part of the dominant lands.

• In implied easements, extrinsic evidence is often vital to determining the scope of the right. Right granted should not be one iota greater than is necessary to give effect to the implied intention.

• When the easement is one of strict necessity, it is the grantor who selects the access route, an assignment that will govern provided it is convenient (reasonable). That designation may be changed afterwards on consent, or presumably by reason of estoppel.

• Scope of easement obtained through prescription is framed by nature of conduct supporting the claim.

• In general, grant of easement will include such ancillary rights as are necessary for the enjoyment of the easement. Wise to spell these out to the extent possible. When that is not done, there will commonly be inferred rights (not duties) to repair and maintain the relevant place where the easement is enjoyed, including right to remove obstructions. A servient owner will ordinarily be entitled (but not required) to fence a right of way easement.

Application (Laurie v Winch, Malden Farms)

Laurie v Winch

Facts: Owns farm on Lake. Has a bunch of farm buildings that front side roads. Fields are usually accessible by lane to the north. Shepherd says there are a lot of people with money in Toronto that would pay a lot to have lakeshore lots. So he is going to subdivide.

• Retains ownership of lot 33 for himself. Whenever he sells a lot the owner gets a grant of easement to use that road.
• PL purchased 18 and 19 with such an easement. Enter Farmer Smith and his wife purchase land to the east of lot 33. Farm is fenced but there is a gate to allow access to lots and lakeshore road.
• Mr. Lecells buys lot 17. But subject to right of way to the grantor Shepherd his heirs and executors, administrators, assigns for all purposes and all times. Right of way in favor of owner of lot 33 (Shepherd) and any other lands he owns and it is binding on the people who buy those lots.
• Mr. Lecells grants lot 17 to Mr. Smith which is subject to the right of way.

Easement in question.
“I hereby give John Smith his heirs executors and assigns a perpetual right of way over lot 33. This is binding on my heirs executors and assigns”

• In this grant of an easement, which is the servient tenement? Lot 33 (the one that is burdened)
• Which is dominant? Lot 17. And farm.
• So we cannot determine from text which land was intended to be dominant tenement. This is important because subsequently the farm is also subdivided. Each person who buys lot that was once farm now says they have a right over lot 33.
• Not a valid easement because no mention of dominant tenement. Doesn’t say if it’s 33 or the farm.
• Even if there was an easement pertinent to the farm, it is not applicable to every lot in a subdivision.
• Goes to SCC: Every homeowner in that subdivision east of lot 33 has an easement over lot 33
Farm was dominant tenement. Not 17 because it is a servient tenement. It is burdened and not useful lot. Meant as an extension of that lane.

- To find easement attached to every property here, Court must find easement to every parcel and that the burden did not change
- There is nothing in language of easement to restrict its scope. It is not one that is limited in scope
- The SCC says an increased burden must have been contemplate by owners of dominant tenement. Owner of 33 said no they did not have in mind that farm would be subdivided.
- It was all originally one farm which he had subdivided so how is it not expected that the other part would be subdivided too.

Two Points
- Court identified dominant tenement by implication
- Conversion of this farm to this subdivision doesn’t destroy the easement. It now attaches to every lot because it must have been contemplated and nature of burden doesn’t change.

**Malden Farms v Nicholson (Duck sanctuary)**

- Two parcels of land. Land to west are marsh lands, they’re used as duck sanctuary. Owner of this land operates and charges hunters to come and shoot ducks. Marsh cuts across west portion into the eastern land.
- Main point. At one time the owner throws open the gates and invites the public to come and picnic on the beach. Easement: “to Ledyard et al “their heirs and assigns and their agents, servants and workmen, a free uninterrupted right of way ingress and egress for persons, animals, and vehicles through along and over…”

To W & L “together with a right of way for the grantees their heirs and assigns over and upon the lands shown on each of the plans hereto attached marked Ledyard, Bulkley & Chappus right of way”

- Original scope of easement did not contemplate private owner opening public resort open to public where public could park their cars on lot. Land in west had purpose to preserve duck sanctuary. There is something fundamentally different of use of easement. Before, it was ingress and egress for private purpose and now it is one big public picnic.
- Fundamental change in scope of activity. Now just in number of people but in type of activity. That text of the easement is different form the from Laurie. It is narrow, ingress and egress.

You have an easement
It attached to a dominant tenement
Then a successor in title is entitled to make use of that easement
But the scope of the easement depends on the way that the easement was framed and also the court’s interpretation of the easement. What was the scope of the activities that were contemplated originally? Very fact dependent

**Rule in Harris v Flower (NOT ON EXAM)**

If an easement is granted for the benefit of Lot 1, the easement may not lawfully be used, in substance, as a means of crossing over Lot 1 to get to Lot 2.

- Colorable use of the right of way appurtenant to Lot A to benefit Lot B is prohibited
  - Crux of the matter is whether the use being made of the easement is colorable, is the easement really a servitude for the intended dominant tenement, or is it actually enhancing some other property?
- But an ancillary use of the easement is to benefit Lot B is tolerable
- **Pearsall v Power Supermarkets Ltd**: an easement obtained for the benefit of a grocery store was suspended when the store area was expanded. Injunction was ordered preventing the use of the easement because the benefit to the new portion (which was seen as colorable under this rule) could not be separated from the exercising of the legitimate access rights held in relation to the original store
- Another way, test in Flower, premised on an examination of the substance of the use of the right, ignores ancillary uses of the easement for the benefit of nearby (non-dominant) land. But just how forgiving courts will be is not easy to predict.
- In effort to reconcile, suggested that courts will forgive trifling ancillary uses, or those that essentially confer no true benefit on the other lands.
  - It’s all a matter of degree which reasonable people can and will differ

What kinds need to be registered and don’t?

- Very few exceptions. If an interest is not registered then the buyer of land takes it free and clear. Same with covenants.

**Termination of Easements**
Natural Termination/Effluxion of Time
• When time limit for its duration runs its course
• Eg a right of way "for as long as the land is cultivated"
Express Release
• You can buy it back
Implied Release
• Costa v Jenikas
  • Conduct is evidence that they abandoned. Intention to abandon and a sufficient manifestation of relinquishment before the right is considered lost
    o Whether circumstances prove a subjective intention to abandon is question of fact and onus of proof on a party alleging that a property right has been relinquished is a heavy one
    o Even non use for decades may not be enough to demonstrate that the decision to abandon the right was taken by the owner of the dominant parcel. Owners are not considered to have cavalierly discarded an entitlement
  • Intention can be inferred from change in nature of the dominant tenement that renders the easement useless, or by virtue of a similar change in servient lands to which easement holder does not seem to object
Unity of Ownership and Occupation
• Through unity of occupation and ownership of both tenements
Others
Proprietary Estoppel
• “I don’t intend to use this right of way anymore so feel free to build structure on it”. Owner then builds on it. Then you show up and are like “yea I actually do want it”. Yea…no…you fucked up.
• Surrounding circumstances may not prove abandonment, the actions of the dominant owner may support an estoppel, if it would be inequitable for that person to insist that the easement is still in existence.
• Where there is a radical change in the use of the dominant lands, and if that change produces a substantial increase or alteration in the burden on the servient lands, the easement right may be suspended or lost
For easements of necessity, when easement is no longer necessary
• Laurie v Winch: it was necessary to find the farm as the dominant tenement and lot 17 as the servient (why? read the case)
  o The easement was broad in scope and the increased burden was within the rights intended by the parties (he could not claim that he never intended that Mr. Smith would subdivide his property, as he himself did so!)
    ▪ Each and every one of the people in the subdivided lots have a right of way over lot 33
• Malden Farms v Nicholson: two parcels of land on shore of lake Erie, parcel to west used as duck sanctuary while parcel to the east is farm space and a march and a beach
  o Abuse of the easement in running a hotel causes damages & drives the ducks away
  o Is the beach use within the scope of the original easement transferred to them?
  o Owner of the servient tenement is entitled to an injunction to stop the abuse (privately controlled road turned into general commercial use – terminated the easement altogether)
  o Distinguished from Laurie = one is still private use versus commercial use for the public, implied intention in Laurie was that it could be subdivided versus no such intention in Malden to have the general public use the road, the nature of the lands in question where the servient tenement in Laurie was simply a road, was completely passive and had no life of its own versus in Malden there was an active and productive use in the duck sanctuary use of the land that was threatened
• Harris v Flower: colorable use of the right of way appurtenant to Lot A to benefit lot B is prohibited
  o But ancillary use of the easement to benefit lot B is tolerable

Other Servitudes and Servitude-Type Rights
Encroachment: Just an easement
• If you register an encroachment, it will be like an easement
• City of Edmonton v Hotel MacDonald: Hotel wants to redevelop and city wants some of their land but hotel still wants to build on some of it. City says that’s fine but it will be on encroachment agreement. Whatever happens with encroachment hotel assumes full liability. The encroachment shall exist for as long as owner wishes to exercise this right and not terminated without agreement (city would have to appropriate land). Agreement binding against city and owner and successors or assignees. This would have been a license to use the city’s land and this language makes it binding on succession and eithers (sells either land) to encroach stall persists upon selling.
Leases, Licenses, Bailments
A simple agreement between LL and T to allow T’s car to park on LL’s driveway. This could be a lease of a parking space, an easement, a license, or perhaps a bailment.

Profits à Prendre and Related Matters (Tener, Dynex Petroleum v Bank of Montreal)
- Similar to a positive easement
- Profits entitle the holder to take some part of the produce, such as timber, crops, turf, soil, grass, or animals form land belonging to another
- Do not have to be annexed to the dominant tenement
- Right consists in the power to take something form the soil. It’s not a thing itself
- Title to the objects covered by the grant of a profit is acquired through capture, not before: it is a right to win or extract
  - If A is granted a profit to pick berries from Blackacre. Berries are property of Blackacre and not A’s property until they are removed
- Different from easement in one important regard; they may be held in gross. You don’t have to be a neighbor to be benefitted.
- May entitle holder to extract oil and natural gas, that is the type of grant often used in modern mining operations
- Profit can be held with others (in common) or exclusively (in severalty)

Tener
- Government sterilized the property owner’s mineral claims because they’re situated in provincial park. And government passed a law that prohibits mining unless you have a permit which they were told they’d never receive.
- Are they entitled to compensation? Yes IF and ONLY IF they can show the government took something from them. Judges had issues seeing what was taken. Had a right to remove minerals and government took it back.
- 1st reason this is skeptical: Held that the mineral rights remained property of the PL
- 2nd reason: If you look at the TJ where the grant is described, it seems that the PLs were not granted a profit but actually the minerals themselves. You can’t have a profit in your own minerals.
- Ex. Think of a grant of land of what is now AB in the early days of the homestead dominion. You used to get everything including mineral rights. Farmer now wants to dispose of the minerals. Energy company standing by saying they want them. One of two arrangements with company: you want them? I convey them to you in fee simple they now have estate in them. Option 2 is right to work them, you can enter land and remove as much as you like and here’s how much you will pay me for them
  - Both can be permanent or for years
  - Second is profit
  - Colloquially known as mineral lease but it’s not a lease, it’s a profit
- Surface Rights: If you have a profit, you through implication have access
  - Operator does not have access rights even though they have mineral rights in fee simple. They only have access to land in AB if they’ve bargained for it OR they’ve obtained an order dispensing with their consent from the surface right owner.

Dynex v BMO
- Dynex is a company in liquidation that has various assets. Most important are mineral rights (‘oil and gas leases’). They also have many creditors.
- Problem is that there’s more creditors than assets. Creditors have to stand in line and get like 10 cents on the dollar. Except for BMO. They say they’re a secured creditor. When they made a loan, they registered their interest and it’s binding, so they come and help themselves to the assets that fall under security and then when they’re gone, everyone else can fight for scraps.
- Enchant and other companies (other creditors) are like hold on. They had the overriding royalty interest. They provided services to the company and the company in exchange promised them that they will pay a share of oil and gas revenues. BMO says nice but no point. Enchant says overriding royalty was registered in land titles office. It’s a profit, you can register it, and they registered a caveat on this saying they get a cut.
- BMO says no that doesn’t work because our legal department says the caveat is no good because it is not in respect of a property interest. Courts have said property interest cannot be derived from non-possessory interest
- Overriding royalty piggybacks on a profit. Which is a non-possessory interest. In common law there is nothing to register. Enchant take it to SCC and have Justice Major (from AB, understands oil and gas) and says its time for new rule
- Court is going to recognize the overriding royalty as an interest where a caveat may be registered
- Policy is to open up industry to small enterprises who may succeed or fail but they have no choice but to promise overriding loyalty because they can’t pay up front
• Majors J: overriding interest can be in land if by the law of Canada if language used in describing the interest is sufficiently precise to show parties intended the royalty to be interest in land. AND interest out of which royalty is carved, is itself an interest in land. Big deal. Violation of numerous clauses principle. Unusual for parties to decide if something is or isn’t by saying so.

Other interests (Dynex): which of the creditors of a company in liquidation has priority in the company’s oil and gas interests (not enough assets to satisfy the creds)
  o Bank is secured cred of the corp, respondents claim priority based on overriding royalties derived from companies working interests (which were granted in exchange for services), owners of the royalties registered caveats before the bank secured the loan, bank says the caveat is void b/c
  o Oil and gas leases were not actually leases (which is an interest in land over time and not the minerals) but profits instead (or a “working interest”)
  o Overriding royalty or farm-out arrangement:
    • If you promise to pay a share of revenues out of the oil and gas interests found, is it a proprietary interest (can register a caveat) or a contractual obligation (just damages)
      • Common law – a proprietary interest cannot arise out of incorporeal interests
      • SCC - in Alberta a commercial reality exists, language is sufficiently precise to show that the parties intended a proprietary interest versus contractual obligation, the interest on which the royalty piggybacks is itself an interest in land (a profit is an interest in land and it doesn’t matter that it is non possessor)
    • Numerus clauses principle: treats the interest as within the rights and ability of the parties to decide (parties are free to shape any kind of contract they want)
      o but if parties were free to invent new modes of creating interests in land great confusion would ensue (Kapel v Bailey)

Dedication of Public Ways
• Rights to these public lands are subject to various restrictions (such as those imposed by traffic rules)
• Private roads can become public roads under the doctrine of dedication. These elements are necessary (may be implied from surrounding circumstances)
  o Must be an intention to dedicate on the part of the owner
  o Property must be made available for public use
  o Dedication must be accepted by the public
• Canada → Doctrine of dedication has been applied to encompassed not just rights of way, but also public rights over market-squares, parks, wharves, and beaches
• Canada → Government regulation of the use of public property is subject to review under the Charter

Customary Rights
Griffin v Klassen Estate: Question arose as to whether the owners of deceased animals buried in a pet cemetery had a property right enforceable against the successors to the land on which the graves were situated. Held that easements or easement-like rights applicable to human and animal burials are tenable. Under these inomininate entitlements, the grantee and his legal representative, family and friends, hold a right in perpetuity to have the grave remain undisturbed, to erect monuments, to place flowers and plants as are “seemly and customary”, to maintain the grave, and to visit it. An easement of necessity will be implied to and from the grave if it is separated from a public way.

(Freehold) Covenants Running with Property
Difference b/w covenant and easement – covenant requires owner to do or not do something with their own land, easement gives you the right to do something on someone else’s land & covenant is agreement that includes terms obligations that would not count as an easement in Ellenborough park test, covenant are much wider in scope than easements

Covenants in Context
Covenants are harder to enforce than easement.
• Covenant is simply promise made under seal. Like a promise but very binding
Covenants over land can be used to create rights enforceable by one landowner against another, even in the absence of both privity of contract and estate between those parties.
• Resemble public land use controls and can be used to create a planned community aided by a purpose-built legal structure
• Cater to a variety of interests:
  o Used to regulate commercial practices among tenants in a shopping center (limit the kinds of business operations that can be undertaken)
  o Can be used to inhibit competition in commercial settings
Policy Issues

Re Drummond Wren: Dispute over residential lot in Toronto that was subject to a stipulation that the property could never be sold to “Jews or persons of objectionable nationality”
- Wren applied to court for declaration that covenant was invalid
- Order granted, holding, in part, that the covenant was void for uncertainty, and that it constituted a restraint on alienation. Also held that impugned clause was void as being contrary to doctrine of public policy
- Imperiled national unity

Re Noble & Wolf: Validity of land covenant in issue. Case involved a deed containing a prohibition against the sale of cottage lots near Lake Huron to any person of the “Jewish, Hebrew, Semitic, Negro or colored race or blood”. Also provided that intention was to limit ownership in the lands to persons of “White or Caucasian race”
- CA: Nothing about unity and nothing wrong with a bunch of white people wanting to get together for the holidays. At first clause upheld
- Claim that restrictions on transfer represented a danger to public interest was described as fanciful. Nothing here or Wren, that would justify expansion of the doctrine of public policy to prohibit such a term.
- Said that to transform the efforts of these property owners from a modest attempt to create a congenial summer colony into a practice that offends public policy required a stronger imagination than judge possessed
- Before case got to SCC, ON amended law to prevent the creation of discriminatory covenants
- Refused to apply to cottage lots.
- Court resolved dispute without regard to public policy argument. 4/7 held it was invalid for uncertainty, 5/7 thought restrictions on type of occupant could not be binding on subsequent purchaser.
- Doesn’t touch and concern land, it doesn’t improve the land

Other reasons to have concern over restrict convent
- Beware restrictive clotheslines → Not environmentally friendly. Some neighbors don’t want to see laundry hung outside so have to use machine
- Old Safeway: Decided to go upscale few years ago and move to better properties. But properties left behind were left with covenant not to open a supermarket. Creates neighborhoods where there is no where to get fresh groceries. Some can expire and then can open a store. Safeway vigorously defends them
- Racial discrimination

Terminology

Covenant: Promise under seal. Lately need for seal has been discarded in land transactions in some parts of Canada, an therefore continued reference to the law of ‘covenants’ is somewhat inappropriate. For our purposes, a covenant may be regarded as a valid contractual undertaking made by a covenantor in favor of the covenantee

Covenantor: Person who makes the promise

Covenantee: Person who receives the promise (many cases, there is a mutual exchange or promises)

Burden (and servient or burdened land): Land burdened by covenant

Benefit (and dominant or benefited land): Land to be benefitted

Covenantor makes a covenant to covenantee
- X and Y are successors to their respective titles
- Y is entitled to enforce the covenant if the benefit of the covenant runs with the land
- The covenant is enforceable against X if the burden of the covenant runs with the land

Annexation
Express (Contractual) Assignment

“Running” at Law/In Equity in General
In court of law or equity
- Benefit can run sometimes → Has to meet certain conditions but can run
- Burden cannot run in law at all
- Burden can run in equity in limited circumstances
- Means that common law isn’t important in enforcing covenants. You want to turn to equity.

This law develops in 19th century, because England is going through industrialization. Land uses are changing all the time.
• Need to liberate land from traditional agricultural uses and move to more productive uses but want to make sure we’re protecting uses of neighbors
• Another important aspect is urbanization
• Committee in 1832 that recommends to parliament that covenants be made enforceable

Equitable rules are of greatest utility. Not only is the equitable remedy of an injunction frequently the most useful enforcement device, but also it is in the Chancery that the notion of covenants running with land has flourished.

The Running of Covenants in Equity

Running of the Burden *(*Tulk v Moxhay*)

The burden NEVER runs at law!

• No remedies against successors to the original covenantor

*Cappell v Bailey:* Occupier of iron works and they covenant for themselves and their successors to buy lime stone from a particular seller and to transport by certain railway. Then they assigned their interests in the property to the DF, then they tried to enforce covenant against DF. Court held it did not run with the land because enforcing covenant would create a new mode of occupying and using land. It would be a new estate, one that doesn’t come with full privileges/subject to new burdens

• Two concerns:
  o Value Concern: Encumber land to such a degree that would make it less alienable
  o Information Concern: Concerned about ability of future buyers to ascertain which obligations they would be bound by

*Tulk v Moxhay*

<table>
<thead>
<tr>
<th>What was substance of the covenant?</th>
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<tbody>
<tr>
<td>• Free from buildings and made available to owners of the building surrounding the park, get a key and use property from pleasure</td>
</tr>
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</table>

Tulk is original owner who conveys to Elms and Elms agrees to covenant then property makes it way to Moxhay

• He says garden is in disrepair and underused so he will rescue it and build and make it upscale. Tulk says he has buildings and wants to enforce covenant so he cannot build
• Goes to Chancery, never could have meant that this court would enforce equity attached by owner. Couldn’t have meant to say unless this was enforceable at common law, then equity would

Why was the purchaser from the covenantor bound by the covenant?

• Because he knew about it when he bought the property
• He knew predecessor agreed not to build and now he wants to build
• Wants to use it as if it had not been restricted
• Three interpretations:
  o This is like a deed to uses because you knew and you’re bound,
  o Unjust enrichment, you buy land for certain price and you use it at the expense at the person who sold it to you for something you shouldn’t be, you’re taking advantage
  o Nemo dat, you bought property without those uses, vendor could not give those uses to you because they didn’t have them

A covenant was entered into to maintain a parcel of land in central London as a public park. A purchaser of that property, who knew of the covenant, was held to be bound by its terms.

• Court said result did not turn on whether the covenant runs with the land, it added that “if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased”
• On that, framework of law of restrictive covenants running with freehold property has been built
• Decision permits the imposition of land restrictions of unlimited duration
  o *Tulk v Moxhay:* the person who retains the garden will maintain it in good shape and allow others to access it with a fee (a covenant for open space essentially)
  o Burden of a covenant can run in equity – (1) covenant must be restrictive in nature [you can comply with by doing nothing] (2) burden intended to run with Cor’s land, sufficiently described (3) covenant must touch & concern land of Cee [ascertainable from deed - *Spencer* case] (4) req’s of equity [notice!]
    - You cannot take the benefits of the land and not the burdens (unconscionable)
    - Think about it as unjust enrichment (selling it free of the covenant for greater value)
    - *Nemo dat* principle: if you bought land w/o right to build, you can’t sell what you don’t have

*General Requirements*

First, covenant must be negative in substance (restrictive)

Only restrictive covenants will be enforced

• Covenant is considered negative when compliance is possible by the obliged party doing absolutely nothing
• Ex. Land shall not be used for commercial purposes, promise that no construction may occur unless plans are first submitted for approval, any dwelling that is built on the land shall have an area at least 2,000 square feet
• These do not mandate the property be developed at all. Compliance is possible through inaction, even though any development that does occur must be undertaken in a prescribed way
• Ex. To not allow trees to grow past a certain height. You don’t have to plant trees at all BUT if you do they can’t be taller than a certain height

Those that are positive or affirmative in nature will not
• Underscores the idea that it is not the form of the words but the true nature of the duties that is central
• Court can give an injunction for this, it’s an easy solution
• If you can comply with covenant by doing nothing, its negative. If you have to do something it’s positive

**Second, covenant must be made for the benefit of land retained by the covenantee**

• Must be easily ascertainable/sufficiently identified from the deed
  o Extrinsic evidence will not suffice as a means of locating the property to be benefitted
  o If requirement of ascertainability is not met, a party acquiring the servient lands is not bound by the covenant. Rationale is that such a person is entitled to know who may enforce the covenant: that is, the servient owner should be able to ascertain who holds the dominant lands.
• Again, covenant must not have been intended as just a personal promise

**“Touch and concern” (recall Spencer’s case)**

• This requirement, along with #3, means that two properties must be involved. Not needed for 2 properties to be contiguous though there has to be some proximity
• Must be dominant tenement (property to be benefitted) and a servient one (the burdened property)
• As in law of easements, apart from statute, there cannot be a restrictive covenant in gross
• Dominant tenement need not be a freehold estate
  o A lease can support a restrictive covenant, as can the interest of a mortgage
• Existence of competitive overlap is a necessary but not a sufficient condition to find a true benefit to the dominant territory
• Promise must be capable of benefitting the dominant lands. Canadian courts have said the covenant must “touch and concern” those lands

**Swan Properties Ltd v Irving Oil**

Covenant was annexed on a vacant lot in town, prohibiting inter alia the use of the land as a restaurant. A business which included a full-service restaurant in connection with a gas station was located on one of the 12 properties intended to be benefitted by the covenant. Servient tenement was 3.8 or 5.2 km away depending which route you take.

• Attack on validity of the restriction based on lack of proximity failed
• Held that there was a limited customer base for restaurants in the town and the restaurant business on the dominant tenement would be adversely affected if competitors entered the market
• Competition radius construed with dominant tenement at the epicenter. Here assumed that anyone in the town was a potential patron of the restaurant/gas station. A servient parcel within the town would therefore fall within the competition radius

**880682 Alberta Ltd v Molson Breweries Properties Ltd**

Validity of the restrictive covenant annexed to land in Calgary was at issue. Covenant prohibited the use of that land for a brewery and was stated to be taken for the benefit of Molson’s Edmonton operation, some 300 km to the north. Molson advanced argument that the owners of the two properties would be competing for the same clients. Molson’s Edmonton plant supplied beer to Calgary and all throughout AB. Covenant pertained to highly competitive industry with breweries trying to reach same clients. Sales by one company are very likely to reduce sales of the other.

• Accordingly, brewery facility in Calgary fell within Molson’s competition radius.
• Two plants could be rivals for same clientele and therefore Molson would benefit from the covenant located in Calgary.
• Competition-radius argument rejected → If allowed to stand it would not only stand for dominant tenements in Edmonton but potentially anywhere in the world. Such as Microsoft with headquarters acting as dominant tenement.

**Third, covenant must have been intended to run with the covenantor’s land**

(sufficiently described)

• It must have been intended that the burden was to run with the servient land, and that land must be sufficiently described in the covenant
• Another way: the promise given must be one that was not intended to be applicable only to the covenantor
• “Presumption against finding that a restrictive covenant runs with the land”
• Equity will not impose an obligation on a new owner if the original parties has no desire to do so

Fourth, general equitable principles, including the requirement of notice
• All general limitations imposed on the availability of equitable remedies apply
• Enshrined rule that a bona fide purchaser for value of a legal interest without notice will not be bound to comply with a restrictive covenant
• Required level of notice may be refined or altered in a given jurisdiction under the law governing the registration for land
• Come to court with clean hands. Equity will have no jurisdiction over good faith purchaser for value. Someone who doesn’t have notice of covenant is not bound by it

Running of the Benefit: Express Annexation, Implied Annexation, and Assignment
The benefit MAY run at law!
A successor of original covenantee may be “entitled” to the benefit by
• Annexation to the benefited (covenantee’s land)
  o Intention
  o “Touch and concern”
  o Ascertainable, no annexation by implication (Sekretov v Toronto)
• Assignment, OR (don’t have to know, just that it exists)
• A building scheme (don’t have to know either)

Successors to the covenantee may sue the covenantor for damages if:
1. Original covenantee held a legal estate in the benefiting land
2. Successor holds the same legal estate
3. The benefit was intended to run with the land, and
4. The covenant touches and concerns the land

The benefit of a covenant may also be assigned as a chose in action, in accordance with statute.

Smith v River Douglas: The River Douglas Catchment Board agreed with a number of landowners between the River Douglas and the Leeds Liverpool Canal, to carry out some work if some contribution to the cost was given. In 1940 Mrs S, one of the covenantees, sold her land to Smith, which incorporated Snipes Hall Farm Ltd in 1944. In Autumn 1946 the Ellen Brook burst its banks and flooded Smith and Snipes Hall Farm land. They made a claim against the Board for damages in tort and breach of contract. The question was whether not having been privy to the original agreement was a bar to any recovery. Successors in title said they would sue the board for the damage because they agreed to maintain in good condition and sue for breach of covenant. Catchman board made original promise. But can the new owners enforce against the board.
• successors to the covenantee may enforce the covenant (via damages) against the original covenantee if (1) original C’ee held a legal estate in the benefiting land (2) successor holds the same legal estate (3) the benefit was intended to run with the land (4) covenant touches and concerns the land

Spencers case – Successors to covenantee may sue covenantor if they hold the exact same legal estate the original covenantee and benefit intended to run with land and the covenant touches and concerns the land. Entitled to enforce the covenant. But this is useless because as a neighbor who want to claim benefit of covenant because don’t want damages but enforces covenant. Courts at common law can give that because they only enforce with damages (common law is useless to covenants).

Three means by which a benefit can be transmitted: by annexation, through contractual assignment, or via a building scheme

Express Annexation:
• Equity recognizes that the benefit of a covenant can be annexed so as to run automatically with the benefited land
• Benefit must touch and concern the land and it must be shown that the benefit was intended to run
• Appropriate phrasing might include the term “annexation” (but no magic in that word), but should indicate that the benefit was to pass to all successors in title
• Land must be clearly ascertainable from the document
• Extent to which a benefit can run can be limited in the document, such as when the promise is stated to apply only in favor of the registered freeholder
  o If so, benefit will not pass to a party acquiring a leasehold interest in dominant lands

Implied Annexation:
• At common law, not necessary for the transferee of the benefited lands to have notice of the benefit to acquire through annexation
  o Can be “a hidden treasure which may be discovered in the hour of need”
• Might be needed when initial document does not expressly provide that the benefit is to run with specified lands
• **Canadian law does not allow for this**
  - **Galbriath**: Held that the burden of a covenant does not run with the burdened land unless the land to be benefited is sufficiently identified in the document. By extension it is said that if the land is not identified, then even express (let alone implied) annexation is impossible.
  - Canadian law stresses the need for the holder of the burden (even the original covenantor) to know who it is that might seek to enforce the promise. If the land is mentioned but it is not explicitly set out that the burden is to run with it – which is probably a rare situation – there might be room for implied annexation. This remains an open question.

**Galbriath:** Club got federal land and made grants of lots to people. Made them sign grants that occupation of premises was only by a member of club or by special permission of board of directors. Can’t lease it to someone who’s not a member. PL was one of the people who just had to pick fight with club on principle. He conveyed the land that he bought to himself and his wife as joint owners without notice. Argued that the covenant wasn’t binding anyways since it didn’t touch or concern the land. Court agreed. Covenant in question gives the club to choose persons who shall occupy but it has nothing to do with the use to which the land may be put. Imposed not for the benefit of the land but for the benefit of the club. Doesn’t touch and concern land. 1961. Ten years after Noble and Wolf.
  - exclusive prestigious club, P bought the land subject to covenant and then conveyed it to himself and his wife as JT's w/o the covenant
  - Covenant fails b/c the club that was to benefit from the covenant did not retain a dominant ascertainable tenement, covenant to restrict certain peoples based on race did not meet the touch and concern test (does not enhance the value of the land)
  - Covenants and social exclusion – racial and ethnic covenants excluding minorities voided for public policy reasons (ie. *Drummond v Wren*)
  - A person who has no knowledge of the covenant, they would not be burdened with it (if they did know, all the other requirements must be met)

**Assignment:**
• Equity permits a benefit under a contract to be assigned, as an equitable chose in action, and that mode of transfer is effective to allow the grantee of the chose to maintain an action against the original covenantor under general principles of contract law
• Therefore, in the absence of transmission by annexation, the benefit of a covenant may be expressly assigned
• When there is dispute between the assignees of both the covenantor and covenantee, contract principles are obviously no longer relevant.
• Express assignment passes the benefit so as to enable an action against an assignee of the covenantor when
  - The covenant touches and concerns the dominant land and was taken for its benefit
  - The assignment occurs contemporaneously with the transfer of the dominant land
  - That land is ascertainable, at least by extrinsic evidence
• Whether this means of transfer is available in Canada hinges on the same analysis that is applicable to implied annexation
• Need for express assignment occurs only when an express annexation has not occurred owing to the absence of some essential component of annexation. Same deficiencies will prevent the burden from running, that is the impact of Galbraith.
• If so, once the burdened land has found its way into the hands of a new owner, an express assignment of the benefit would be ineffective against that person

**Building Schemes**
Creates, in effect, a local law, under which each property owner is subject to the burdens and is entitled to the benefits of the relevant covenants. When a building scheme is perfected, the result is that each lot owner may enforce the covenants no matter when the individual lots were acquired. Benefit of a covenants under a building scheme can be acquired by early purchasers even as against later ones.

**Assuming relevant covenants “touch and concern” the land, 4 more requirements necessary:**
1. Common vendor
2. Vendor laid out the parcels subject to restrictions that can only be consistent with a general scheme
3. Restrictions intended for the benefit of all parcels within the scheme
4. Purchased on the understanding that restrictions would enure to the benefit of all other parcels
If not met, no building scheme in Canada. The failure of a scheme does not necessarily mean that the covenants are not enforceable.

Common for restrictive covenants to be created en masse within the context of either a commercial complex or a residential development:

- One means of ensuring, for example, that the homes in the neighborhood are all “made of ticky-tacky and … all look just the same”
- Developers may wish to impose a blanket covenant to cover all of the lots in the planned neighborhood. Several ways this can be accomplished: in some provinces you can register a restrictive covenant against your own land. Each parcel may be impressed with a burden, an receive the benefit of all other covenants even before the individual lots are sold off.

### Positive Covenants

**Szymanski v Excel Resources Society**

Clause 1: “That only one private dwelling house, together with the necessary outbuildings shall be erected on any one of the said lots. A block of flats, apartment, tenement house, or any building constructed to accommodate more than one household shall not be deemed a private dwelling house within the meaning of this clause.”

- Only one private dwelling house. Building to accommodate more than one household is not a private dwelling house.
- What is a “household”? Just a family, students sharing together, couples shacking up.
- Court: Structure is a private dwelling and group constitutes one household.

Clause 7: “That no building erected on any of the said lots shall be used for any purpose other than that of or connected with a private dwelling house”

- Argument would be that we have an understand of what a residential use is, you could say this is medical/supportive use. If you had categories, you wouldn’t put this into the residential category.
- Court: Publicly funded body is attempting to provide a living situation for the disabled which is close to being in their own home → this is “borderline” residential.

Clause 8: “No building shall at any time be erected upon the said lots for manufacture, trade, or business purposes”

- Non-profit

Are those clauses effective in prevented the use of the house for being used for 6 unrelated adults living there with some help services?

- Restrictive covenants have not shown themselves to be very good way of restricting land use.
- Very durable.
- Don’t provide right amount of control as they’re subject to interpretation and if you get wrong interpretation then hard to change. Which is why they’ve moved to zoning requirements almost everywhere.

### Basic Position

A covenant compelling the covenantor to spend money or perform an active obligation:

- Traditional Rule: no doesn’t run (Keppell v Bailey, Austerberry v Oldham Corp) because burdens do not run at law at all.
- Nor can such a burden run in equity. Only negative or restrictive covenants fall within the rules now in place.
- Positive covenant can only be enforced against the original covenantor, enforcing party may be either the original covenantor or an assignee of the benefit, at law or equity.

### Rationale

Reluctance of courts to break new ground even though reform might be well warranted. Court declined to abolish rule against running of positive burdens because:

- Complex problems at play could not easily be solved through the necessarily incremental processes of case law development.
- The retrospective effect of a common law ruling could adversely affecting existing property rights.

These concerns illustrate the judicial reluctance to create fancy new interests (numerous clausus policy).

**Rhone v Stephens:**

- Lords concerned with danger of adopting a rule that would result in the enforcement of a personal obligation against someone who had not covenanted to undertake it.
- Doesn’t apply to restrictive covenants, “to enforce negative covenants is only to treat the land as subject to a restriction”. Restrictive covenants deprive an owner of a right that could otherwise be exercised.
• Equity however cannot compel the performance of a positive covenant agreed to by the prior owner without blatantly contradicting the common law rules concerning privity of contract
• Enforcement of a positive covenant lies in contract, enforcement of a negative covenant lies in property; negative covenant deprives an owner of a right over property

*Positive burdens run with leaseholds
• Person who buys land subject to a mortgage has got to realize the failure to pay the payments can produce dire results. The positive obligation is assumed, like it or not. They assume the obligation with eyes open.
• As long as there is policy notice, and covenant does not violate some rule of public policy, owner who takes land subject to a burden can hardly complain.

Market forces will take account of, and respond to, the effect of the positive covenants on alienation. If a covenant renders a property less desirable, it’s price will fall until it again becomes attractive to purchasers.

Argument that someone buying property with a negative covenant will know about the full extent of the obligation being assumed from the outset. It involves no direct expense. However, positive covenant, such as to maintain a wall or carry out construction at some future date, is assuming an obligation of uncertain financial dimensions. No one can forecast future labor and material costs and that indeterminacy places a cloud over the property that may deter the risk averse investor.
• Doesn’t take into account opportunity costs. Forgone investment opportunities incurred by being unable to convert property (owing to the presence of the restrictive covenant) can be significant, and the inability to respond to emerging opportunities is something with which the law governing restrains on alienation is supposed to deal

Limitation due to lack of adequate remedies. Not sure why injunction unavailable

Exceptions
Attempts to Side Step:
• Chain of covenants
• Principle of mutual benefit and burden (Halsall v Brizell)
• Pure principle of benefit and burden (The Ocean Island Case)? Rejected (HL in Rhone v Stephens)
• What remains (Amberwood v DCC)

Chain of Covenants:
Get the other land owner a term that says “should I ever convey, I will include the following stipulation to the next land owner” and get them to do the same thing. They promise not to sell land without those same restrictions
• Sue only for damages.
• Only as strong as it’s weakest link. If anyone has gone bankrupt, then chain is bankrupt ie destroyed

Principle of mutual benefit and burden (Halsall v Brizell)
A person who takes the benefit of a covenant, must also take the burden of it as well.

Halsall v Brizell
Predecessor from DF bought property in subdivision where every buyer acquired a right to use the storm water sewer and some common roads and amenities in the subdivision. Also covenanted that they and their successors would pay a proportionate share of the expenses. 100 years later, one of the owners disputed the amount. Issue was raised that they weren’t bound at all. Court in England held that successors to original covenantor could not sued on covenant, they would also not be entitled to the benefits of the covenant under the deed. If you don’t want to pay, fine but you don’t get to use the amenities.
• Taking form ancient doctrine that a person who is named in a deed and takes a benefit under it will be bound by its burdens even if that person did not sign the deed, Court held that the benefit of the easements could not be enjoyed without also assuming the burden of the maintenance payments
• “the owner of Whiteacre may use the easement located on Blackacre, but in turn is liable to contribute to the cost of repairs and security of those premises” \(\rightarrow\) benefit/burden principle
• To fit within the benefit/burden principle, 4 elements:
  o Adoption of the benefit must be made conditional, expressly or impliedly, on the assumption of the burden
  o The benefit and burden must be related to each other in some material way (merely framing the agreement so that one promise is given in consideration of another is not sufficient)
  o A subsequent owner will be bound to accept the burden only if one can at least in theory accept or reject the benefit
  o The benefit must be one that is enjoyed as of right under the agreement
Pure Principle of Benefit and Burden (*The Ocean Island Case*)? Rejected (HL in *Rhone v Stephens*)

- Strip mining company was given rights to strip mine an entire island. Grant of mining rights also contained a separate clause that required company to replant entire island when they were done. At the end of that they had to restore. Mining company gets the minerals out and transfers rights to someone else. That company at the end of mining says they didn’t sign agreement to replant so they’re just going to leave island as it. Not fair. Chancellor holds that although these were independent clauses, one with mineral rights and one imposing duty to reclaim, he’s going to tether them together. That’s a pure principle of benefit and burden.
  - Can’t have it both ways
  - Can’t eat cake and eat it too
  - Can’t blow hot and cold
- If you take benefit, you’re bound by the burden. Courts have resisted this.
- *Rhone v Stephens*: When you enforce a restrictive covenant, you enforce property. When you enforce a positive covenant, it’s contract
- Idea in case law that if you are taking a benefit and only if you’re taking a benefit, you would be bound by burden as well. But there has to be a natural tethering of those obligations they have to be linked.
- *Amberwood*: just said positive covenants are not enforceable

What remains (*Amberwood v DCC*)

Make benefit of a grant conditional on performance of burden
- If facts establish that benefit was conditional, then burden
- I grant you an easement to my laundry room but only so long as you pay me annually
- If you don’t pay me, you don’t have the easement
- Easement lasts only so long as you do the burden

### Amberwood v DCC

<table>
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<tr>
<th>R</th>
<th>Positive covenants on land do not pass to the purchaser upon a sale of the land; even if the purchaser agrees to abide by the covenant, they are not required to do so.</th>
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<tbody>
<tr>
<td>F</td>
<td>A developer, WHDC Harbour Development Corporation, owned two parcels of land that they divided for separate condominium complexes to be built upon. Durham bought one of the parcels and built a condominium complex before the other lot had been purchased. Both complexes were to share a common recreational facility and park, and share the costs. WHDC agreed to subsidize Durham for the expenses until someone purchased the other lot. Amberwood eventually purchased the other lot, and agreed to pay the costs. They did so for a while, but then stopped and stated that positive covenants cannot pass with a transfer of land. Amberwood was successful at trial which Durham appealed.</td>
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<tr>
<td>I</td>
<td>Can positive covenants “run with the land”?</td>
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<tr>
<td>J</td>
<td>No, not in Canada</td>
</tr>
<tr>
<td>R</td>
<td>Charron, writing for the majority, holds:</td>
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</table>
  - Long settled law that positive covenants do not run with the land, therefore Amberwood prima facie does not have to pay for the costs of the shared facilities
  - They examine two proposed exceptions to the rule – the benefit and burden doctrine and conditional grants of easements – and decide that they do not apply in this case. Although the Law Reform Commission has recommended change in the law of positive covenants, this should be left to the legislatures. |

MacPherson, in the dissent, defines the benefit and burden doctrine in more detail and states that it applies in this case. For this doctrine to apply, the assignee of the positive covenant (Amberwood) must have notice of the covenant. This burden must also be accompanied by a benefit. There might be a qualitative threshold to the benefits and burdens, and there does not need to be a direct link between the two. However, the assignee must me able to exercise a choice about assuming the burdens and benefits. MacPherson argues that these all apply in the case at bar, and thus Amberwood must pay the costs.

### Invalidity and Termination

**Generally**

Covenant may be framed to last for a stated or ascertainable period, or indefinitely.
- Generally, unification of ownership and occupation in one person will terminate the covenant.
- Equitable remedies may be refused when a covenant has ceased to fulfill a useful function
- Owners may agree to terminate the covenant
Public Policy and Other Bases of Invalidity

- Order for modification or discharge may be obtained if it can be shown that the order would be beneficial to the persons principally interested in its enforcement.
- Order for revision/termination may issue if: (1) the covenant conflicts with zoning laws or other regulatory instruments, AND (2) the modification or discharge would be in the public interest.
- Covenant may be void for uncertainty or because it imposes an unacceptable restraint on alienation or by virtue of it being contrary to public policy or human rights protection.