

Property I
Fall 2012

I. PROPERTY: AN INTRODUCTION

II. Property as Things and as Interests in Things

a. The “Bundle of Sticks” Metaphor

b. Rights and Duties

i. Property rights are not absolute ownership

ii. Divided into incidents of ownership

iii. Common Law List

1. Possession

2. Limits:

a. liens;

b. eminent domain;

c. areas where you can bring property (guns, alcohol)

3. Exclusion (Right to Exclude)

a. Limits: see mall and freedom of speech case

b. Cases

i. Adams v. Cleveland Cliffs Iron (soot & vibration/noise)

ii. Jacque v. Steenburg Homes (mobile home)

c. Trespass

i. Physical Intrusion of by a tangible object (Adams- dust and noise not trespass)

ii. Strict Liability violation (Does not require actual injury) (Jacque mobile home)

4. Alienation (Right of Transfer)

a. Not exceeding the rights you own

5. Enjoyment (Right to Use (Quiet Enjoyment))

6. Nuisance

a. Unreasonable Interference with the use or enjoyment

b. Adams v. Cleveland Cliffs Iron (jury hung on nuisance)

c. Balance of Utility v. Harm

d. Unreasonableness of Nuisance

e. Must show actual substantial damages

f. Coming to the nuisance (timing of the house vs timing of the mine)

iv. AM Honore list from p. 3 of Chase/Forrester

1. Exclusive Possession

2. Use and Enjoyment

3. Manage use by others

4. Income from Use by Others

5. Capital value, including alienation, consumption, waste, or destruction (more civil law on the latter)

6. Security (immunity from expropriation)

7. Transmissibility (gift, devise, or descent)
8. Lack of term on these rights
9. Duty to refrain from using property to harm others
10. Liability to pay debts thereon
11. Residual rights on reversion of lapsed ownership rights of others
12. (Heller, The Tragedy of the Anticommons, 111 Harv. L. R. 621, 663, n. 187 (1998), citing Honore, Ownership, in Oxford Essays in Jurisprudence 107, 112-128 (A.G. Guest ed. 1961).)

III. Classification of Property

a. Real

i. Land

1. Permanent Improvements Attached thereto
2. Fixtures (personal property that has been attached to real property)
 - a. Johnson v. Hicks (irrigation)
 - b. Factors for what is a fixture:
 - i. Degree of Annexation or Attachment
 - ii. Buried in Ground/Above-ground
 - iii. Degree of Adaptation (ex. Key)
 - iv. Intention to make annexation permanent

b. Personal

- i. Tangible: ex: books, cars
- ii. Intangible: ex: stocks, bonds

c. Intellectual

i. Copyright

1. Covers Literary and Artistic Expression
 - a. Books, Poetry, Song, Dance, Dramatic works, computer programs, movies, sculpture paintings
 - b. NOT IDEAS
2. Protection attaches when a work is fixed in a medium
3. Cases
 - a. International News Service v. AP
 - i. (Intellectual property rights relative to parties)
 - ii. Quasi-Property (exists until loss of commercial value)
 1. Policy: Necessary to keep news industry afloat
 - iii. Abandonment is a question of intent
 - iv. Dissents
 1. Holmes: Just give attribution
 2. No property rights apply

ii. Patent

1. Protects Ideas
2. Limited period of Exclusive Rights
3. Requirements
 - a. Patentable Subject Matter

- b. Usefulness
 - c. Novelty
 - d. Nonobviousness
 - e. Disclosure so that it can be duplicated
- iii. Trademark
 - 1. Parks v. LaFace (Rosa Parks v. OutKast)
 - a. Not trademark per se
 - b. Right of Publicity (Common Law trademark-like protection)
 - c. Celebrity must show:
 - i. Pecuniary interest in name
 - ii. Identity has been commercially exploited
 - d. Lanham Act (Trademark-like protection)
 - i. Confuses consumers as to affiliation of third party with a product
 - e. Parks' Trademark rights & Lanham Act claim are issues of fact for jury – ∴ remanded for trial
- iv. Trade Secret
 - 1. Formula, practice, process, design, instrument, pattern, or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers

IV. Acquiring Interests in Things: Studies in Possession

- a. Elements of Possession
 - i. Physical control
 - ii. Intent to assume dominion over it
- b. First Possession
 - i. Rule of Capture
 - 1. The person who first possesses an abandoned item becomes its owner (first possessor)
 - a. "First in time, first in right"
 - ii. Abandonment
 - 1. Requires
 - a. Intent to abandon
 - b. Actual abandonment (physical leaving)
- iii. Case:
 - 1. Popov (Barry bonds ball)
 - a. Popov had pre-possessory interest and may have gained possession even outside tortious conduct
 - b. Hayashi had actual possession and may have done so even absent tortious conduct
 - c. Cites case of rotten fruit and sock full of money undivided interests
 - d. Gray's Rule (That Popov did not have possessory right until he established possession despite incidental contact) not applicable because contact is tortious
- c. Subsequent Possession: Losers and Finders
 - i. Generally: The finder has rights to the thing superior to everyone but the true owner (some exceptions)
 - ii. Finder as a bailee: Bailment (rightful possession of goods by one who is not the owner).

Found property	Definition	Result (Common Law)
Abandoned Property	T.O. Physically relinquished with intent to abandon	Finder – no qualifications
Lost Property	T.O. Unintentionally and involuntarily parts with possession	Finder as against all but True Owner (Iowa statute: 12 months full rights to finder who follows requirements)
Mislaid Property	T.O. Voluntarily placed and forgotten (about or where)	Premises Owner, against all but True Owner (expands on ability of true owner to find property)
Treasure Trove	Coins or currency concealed by the owner (antiquity) (not all states recognize) – “of dubious heritage and misunderstood application” (<i>Corliss</i>) – originally went to crown. T.O. prob dead or undiscoverable	Finder, against all but True Owner
Embedded Property	(Embedded in ground, but not a fixture)	Premises owner, as against all but true owner

iii. Lost & Found Property -- Policy Concerns

1. Best protect rights of true owner
2. Keep Peace
3. Rights are relative as between parties
4. Protect Rights of Premises Owners (See treasure trove though... this is the reason some states don't recognize TreasTrove)
 - a. Discourage Trespassers/Vandals
5. Encourage honesty in finders (if no one claims it, they get to keep it)
6. Economic efficiency (better that the property is used than put in a warehouse)

iv. Case:

1. *Armory v. Delamarie* (Chimney Sweep)
 - a. The finder of lost property has rights of ownership against the entire world except the rightful owner.
 - b. You can't transfer greater property rights in a property than you own (ENTRUSTING)
 - c. The transferee (person who buys from chimney sweep) gets only those rights that the chimney sweep has
 - d. If rights of property holder are not protected, it may perpetuate the cycle of theft

v. Fixtures: Considered Part of land

1. degree of attachment,
2. adaptation (ex: key)
3. intent of parties doing the annexing --> MOST IMPORTANT
4. *Don't have to have all of the above factors (*Johnson v. Hicks*--the irrigation case)

vi. Special Cases

1. Employer/Employees
 - a. If employee finds property, do they find for self or employer?
 - i. Case law mixed
2. Premises Owner
 - a. Sometimes Premises Owner is “Finder” even when found by someone else.

- i. Seeks to discourage trespassers
- vii. Rule of Equitable Division: If there are multiple finders who may be entitled to an object, some courts may order the prop sold and the proceeds divided among the finders

d. Adverse Possession

- i. Elements: The requirement that the adverse possessors occupancy of the land be
 - 1. Actual
 - 2. Exclusive
 - 3. Open, Visible, notorious
 - 4. Continuous and uninterrupted
 - 5. Adverse, hostile
 - 6. Implied: All of the above ...for the period of the statute of limitations
- ii. Statutes of limitation
 - 1. Combination of statutory law (# of years is in the statute), some more specific and some details left to CL
- iii. Elements Explained
 - 1. Actual
 - a. Not **Constructive possession**: “implied by law”
 - b. Control
 - c. Needs to be “actual”
 - d. CASE: Schultz v. Dew
 - i. AP protects land by a substantial enclosure
 - ii. AP improves or cultivates the land
 - 2. Exclusive
 - a. Not necessarily just one person possessing; could be more, a family, etc.
 - b. Not an area just open to public
 - c. CASE:
 - 3. Open & Notorious
 - a. Original owner has the **opportunity** to be aware that his/her land is occupied
 - i. Actual awareness not necessary
 - b. Minor encroachment does not provide opportunity for awareness
 - c. CASES:
 - i. Mannillo v. Gorski (steps encroach 15”)
 - ii. Marengo Cave Co. v. Ross (cave entrance below TO’s land - TO did not know cave was on land so he had no notice) Knows or should have known?
 - 4. Continuous
 - a. Requires possession and dominion “as ordinarily the conduct of owners in general in holding, managing and caring for property of like nature and condition”
 - b. Break in Continuity
 - i. Can be broken if left for a while (dependent on nature of property)
 - 1. Consider vacation home example
 - ii. Filing of suit interrupts continuity
 - iii. T.O.’s re-entry into possession

- c. Tacking
 - i. Combines adverse possession periods
 - ii. Requires PRIVITY
 - 1. Relationship between successive possessors
 - a. Ancestor/Heir
 - b. Devisor/Devisee (will)
 - c. Grantor/Grantee
 - 2. NOT simply separate successive adverse possessors
 - d. Seasonal Use
 - i. AP can meet continuity if uses the land when owner normally would only use the land
 - e. Transfer of Title by True Owner
 - i. Does not interrupt running of Statute as long as Adverse Possessor not dispossessed
 - f. Disability
 - i. Can toll claims of AP if the TO is
 - 1. A minor
 - 2. Of unsound mind
 - 3. Someone in prison
 - 4. In military service
 - g. CASES:
 - i. Baylor v. Soska (Encroaching Garage): No privity because not in deed
 - ii. Thornburg v. Haecker (Misplaced Fence): Privity through possession, not deed -- **Majority View**
5. Adverse & Hostile
- a. Does not mean there has to be fighting
 - b. Means that possession is inconsistent with the rights of the TO
 - c. CASE:
 - i. Gruebele v. Geringer (Shared Garage -- statute doesn't run until possession is Adverse)
 - 1. (as opposed to permissive)
 - d. INTENT:
 - i. Maine Doctrine:
 - 1. Intent is essential
 - 2. "Aggressive Trespass View"
 - ii. Conn. Doctrine (Majority):
 - 1. State of Mind is irrelevant
 - 2. Doesn't matter that the Possessor was mistaken
 - iii. Claim of Right (Carpenter) -- NOTE courts can ascribe different meanings to "claim of right" and therefore some courts ascribe "good faith" to this
 - 1. Some States it must be good faith entry
 - 2. "Good Faith View" in some courts
 - 3. that claimant is in possession as owner with intent to claim the land

as his own and not in recognition of or subordination to the record title owner

4. Texas: “that the entry of the claimant must be with the intent to claim the land as his own, to hold it for himself.” *Boyle v. Burk*, 749 S.W.2d 264, 266 (Tex. App. 1988).

6. ... for the Statutory Period

- a. Tacking
- b. Transfer by deed after statute runs
- c. Disability
 - i. e.g.
 1. Incompetency
 2. Infancy
 - ii. Different treatments by jurisdiction
 1. Set Period after Disability
 2. Tolling: Suspension of Statute
 3. No different treatment
 4. Longer Statute for Disability (Texas)
 - iii. **Don't String Together Disabilites**
 1. (e.g. if title passes from one incompetent person to next, and grantee is also incompetent, statute starts when transfer takes place regardless of second disability)
 2. Disability tolling or statute applies to Original Owner, not to subsequent Owner
- d. Statute Does not run until Adverse
 - i. See Permissive Possession in Gruebele (shared garage) above
 - ii. Tenants
 1. When title of T.O. is repudiated
- e. Possessor's Acknowledgment of Lack of title DOES NOT interrupt running
 - i. CASE: *Patterson v. Reigle* (Pa. 1846; p. 94 n. 7)
 - ii. Exception: Possessor offers to buy (thus acknowledges desire to rightly possess -- as opposed to adversely)

iv. Title—if owner sues before statutory period is up, TO can get damages for trespass

1. Title relates back to the time of the starting possession
2. Policies supporting adverse possession
 - a. Don't want stale evidence—encourage people to file early
 - b. Cleans up title disputes
3. Transfer of unmentioned strip (Strip and Gore doctrine)
 - a. Once you have title by adverse possession, you can transfer that title
 - b. The strip is assumed to be part of the deed, even if it's not mentioned
 - c. Case:
 - i. *Brown v. Gobble*--tacking was not the issue, the issue was whether the strip could transfer

- d. Strip = Long strip adjacent to property
- e. Gore = Triangular part of land
- 4. Transfer of Title does not affect run of Statute of Limitations

v. Color of Title

- 1. Written instrument (deed, will, or court judgement)
- 2. Occupancy under a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title, or because of the defective mode of the conveyance used.
- 3. Helps with Actual Possession (defines what you are possessing)
- 4. Shortens statute in most Jurisdictions
 - a. Texas 5 years with “muniment of title” (documentation) AND payment of taxes
 - b. Texas 3 years with “color of title”
 - i. Texas COLOR very strict -- actual chain back to sovereign
- 5. Must be good faith
 - a. Presumed until otherwise proved
 - b. No “Straw man Conveyance”
 - i. Strawman conveyance - a deed is given to someone and then returned to the original to make it legitimate
 - ii. CASE: Lott v. Muldoon (mortgage by ex-husband and then paid off)
 - 1. Reconveyance was not considered strawman because it was for purpose of borrowing money not to gain title.
- 6. A person acting under color of title is more likely to commit herself to the land and make improvements
- 7. Do not confuse with Claim of Right (Good faith view)

vi. Personal Property (Chattel)

- 1. Traditional Elements
- 2. Open and Notorious requirement theories:
 - a. Discovery Rule (NJ, other states)
 - i. As long as owner continues to act in due dil. to find the property, statute does not begin to run
 - ii. Runs when TO knows or should have known where goods are
 - iii. MAJORITY
 - iv. CASE: O’Keeffe v. Snyder
 - 1. Addresses Issue: Open and Notorious
 - 2. Statute runs from time O’Keefe knew or Should have know
 - a. Discovery Rule
 - i. Did she use due diligence?
 - ii. If she had used due diligence, would she have found her paintings?
- b. New York Rule
 - i. Cause of action accrues when true owner first demands return of chattel from good faith possessor

ii. MINORITY

vii. Standard of Proof for Adverse Possession

1. Clear & Convincing (Majority)
2. PoE (Minority)

V. Transferring Interests in Things:

a. Gifts

i. Definition:

1. Voluntary transfer of property
2. Without any consideration

ii. Requirements

iii. 2 kinds of gifts

1. Causa mortis (gift made in contemplation of death)

a. Elements:

i. Donative intent

1. Intent to pass a present interest w/out consideration
2. in contemplation of imm. approaching death

ii. Delivery

1. Constructive (Sherer v. Hyland)
2. Symbolic

iii. Acceptance

iv. Person giving the gift has to make in contemplation of impending death

v. Donor must die of the peril

b. Can be Revoked up until death

i. Title of donee not absolute until donors contemplated cause of death

c. Standard of proof: Clear and convincing

2. Inter vivos (gift made in life)

a. Elements

i. Donative intent

1. Intent to pass title presently, not merely transfer possession
2. A promise to make a future gift is not a gift
3. Clear and convincing evidence

ii. Delivery

1. Constructive - handing over means of obtaining possession
2. Symbolic- handing over object symbolic of the thing given (usually written instrument)

iii. Acceptance

1. Donee can reject, however
2. Acceptance presumed where gift is beneficial to donee
3. W/out evidence of rejection there is no rejection

b. Irrevocable

3. Testamentary (Willed)

- a. Transfer takes place at time of death
 - b. Can be revised or revoked by Testator up until death
- iv. Intent proof:
 - 1. concrete, unequivocal, and undisputed (Scherer v. Hyland suicide)
- v. Types of Delivery
 - 1. Actual
 - 2. Constructive (means: keys; combination)
 - 3. Symbolic (document or other symbol)
 - a. CASE: Gruen v. Gruen (gift of painting) Letter provided symbolic gift of painting from father to son
- vi. Acceptance: Special Issue
 - 1. Can be presumed if beneficial and unconditional for donee

VI. ESTATES IN LAND AND FUTURE INTERESTS

a. Present Estates

i. The Fee Simple

- 1. "To A and his Heirs"
 - a. "Purchase" = "To A" (who)
 - b. "Limitation" = "and his heirs" (what interest)
 - i. Does not convey anything to the heirs, just tells us it's a Fee Simple
- 2. Right to Possession that may last forever
- 3. Court Assumption:
 - a. Fee Simple unless clearly demonstrated otherwise
 - i. (Contrary to rule in feudal times)
 - b. CASE: Dickson v. Alexandria Hospital (Widow gets land for as long as she doesn't remarry)
- 4. Heirs (for intestacy):
 - a. Living People Don't Have "Heirs"!
 - i. "Heirs apparent" is what you call them while you live
 - b. Consanguinity:
 - i. Line goes down 3 generations (to great grandchildren)
 - ii. Then up to Parents and down their line
 - iii. Then up to Grandparents and down their line
 - 1. UPC stops there to avoid...
 - a. Laughing Cousins
 - b. No takers -- goes to state ("escheat")
- c. CASES:
 - i. Stephens v. Casdorph
 - 1. Will signed in same building as, but not directly in front of, witnesses and Vice Versa
 - 2. Attested Will:
 - a. In writing

- b. Signed by testator
 - c. In the presence of at least two witnesses
 - 3. Court holds will not properly executed
 - a. Court ruled not properly executed under WV statute (Testator signs outside of presence then states in presence that he did sign)
 - b. Holographic Will
 - i. Handwritten by testator; unwitnessed
 - 5. Abandonment
 - a. Fee simple estate cannot be Abandoned
 - i. Would create difficulty in tracking the owner
 - ii. Someone should pay taxes
 - iii. Makes adverse possession a messier concept
 - b. Case:
 - i. Pocono Spring Civic Assn v. MacKenzie
 - 1. Worthless property; Civic Assn wouldn't accept as gift
- ii. The (Obsolete) Fee Tail
 - 1. Family Dynasty (A, A', A'', A''', etc.)
 - 2. "to A and the heirs of her body"
 - a. A = Fee Tail
 - b. O = Reversion
 - c. Most states disentail
 - i. Options -- What different Jurisdictions Do:
 - 1. Converts to Fee Simple
 - 2. Converts to Defeasible Fee Simple
 - 3. Converts to Life Estate in A
 - 4. Treated as fee tail but can be disentaileed (re-deeded) as fee simple
- iii. The Life Estate
 - 1. Generally:
 - a. The possessory estate that gives grantee the right to possess real property until their death or some other person's death (pur autre vie)
 - b. "To A for Life" or "To A for the life of B" (plus optional "then" clause)
 - c. Alienable inter vivos for the defining life
 - 2. Life Estate vs Fee Simple:
 - a. Williams v. Estate of Williams
 - b. "To 3 Daughters during their lives"
 - i. Statutory presumption of Fee Simple unless contrary intention expressed in will/conveyance
 - c. Court:
 - i. 3 daughters = LE
 - ii. All 9 children = Remainder in FS
 - 3. Breaking Life Estates
 - a. Long v. Crum

- i. “to Ermabeth for life, then to M&B or the survivor for their lives, then in fee to the heirs of their bodies”
- ii. E, M, & B want to sell land estate in FS to sell
- iii. Can they?
- iv. Statute (Iowa):
 - 1. Provides for court discretion to order sale in case of Life Tenant with permission of reversion holder
- v. Common Law
 - 1. Court can order sale in extreme necessity (e.g. will be lost to reversion holder due to not profitable enough to pay taxes)
- vi. Partition (doesn't apply)
- b. Baker v. Weedon (Wife w/ life estate wanted to sell land to state for highway)
 - i. Trustee has title to the land and acts in the interest of the beneficiaries of the trust

4. Waste

- a. Definition: Impairment of the value of the land
- b. Types:
 - i. Permissive -- Allowing things to fall into waste
 - ii. Voluntary --
 - 1. Affirmative Action/Damage
 - 2. Minerals
 - a. Exception: Open Mines Doctrine
 - i. Life Estate holder can take benefit at rate of prior open mine
 - iii. Ameliorative --
 - 1. Removal of Building would increase value (Pabst)
 - 2. Esp. when surrounding conditions have changed so that removal would increase utility/value
- c. Moore v. Phillips (life tenancy of widow; waste before remainder to child/grandchildren)
 - i. Even though waste is known during lifetime of Life Tenant, remainderman can wait until death to sue for damages
 - ii. but can also seek injunction during lifetime
- d. Melms v. Pabst (replacing old building with modern one increased the value of property)
 - i. Ameliorative waste
 - ii. Exception to the rule that a change to a property constitutes waste because there was a complete and permanent change of the surrounding conditions

iv. The Nonfreehold (Landlord and Tenant) Estates

1. Types

- a. Term of Years Estate (Tenancy for Years)
 - i. Lease ends when term expires (no need for notice)
- b. Periodic Tenancy
 - i. Continues indefinitely from period to period until notice of termination

- c. Tenancy at Will
 - i. Either party can terminate at any point
 - 2. “to T for x years”
 - a. T = Tenancy for years
 - b. O = Reversion
- v. Qualification of Estates Defeasibility
 - 1. Durational
 - a. Fee Simple Determinable
 - i. Requires DURATIONAL language
 - ii. “So long as,” “Until,” or “during”
 - 1. A = Fee Simple Determinable
 - 2. O = Possibility of Reverter
 - iii. Reversion is AUTOMATIC upon end of duration described in transfer
 - b. Fee Simple Determinable on Executory Limitation
 - i. Requires DURATIONAL language
 - ii. “So long as,” “Until,” or “during” followed by “then to B”
 - 1. A = Fee Simple Determinable on Executory Limitation
 - 2. B = Executory Interest
 - iii. AUTOMATIC
 - iv. Subject to RAP
 - 2. Conditional
 - a. Fee Simple Subject to Condition Subsequent
 - i. Characterized by CONDITIONAL language
 - ii. “But if,” “provided,” or “however if”
 - 1. A-Fee simple subject to condition subsequent
 - 2. O-Power of termination (right of re-entry)
 - iii. Requires some action on the part of Grantor to retake possession
 - b. Fee Simple Subject to Executory Limitation
 - i. Characterized by CONDITIONAL language
 - ii. “But if,” “provided,” or “however if” Followed by “then to B”
 - 1. A-Fee simple subject to condition subsequent
 - 2. B-Executory Interest
 - iii. AUTOMATIC (unlike Condition Subsequent)
 - iv. Subject to RAP

Defeasible Interests					
Type	Possessory Interest	Language	Trigger	Future Interest	Future Interest Holder
Durational	Fee Simple Determinable	"So long as," "Until," or "during"	Automatic	Reversion	Grantor (O)
Durational	Fee Simple Determinable on Executory Limitation	"So long as," "Until," or "during" followed by "then to B"	Automatic	Executory Interest	Second Grantee (B)
Conditional	Fee Simple subject to Condition Subsequent	"But if," "provided," or "however if"	Requires action by future interest holder	Power of Termination or Right of Re-entry	Grantor (O)
Conditional	Fee Simple subject to Executory Limitation	"But if," "provided," or "however if", Followed by "Then to B"	Automatic	Executory Interest	Second Grantee (B)

3. Hierarchy of favoritism -- Forsgren v. Sollie

- a. (1) no legal restriction at all over a covenant or defeasible fee (precatory) (no remedy)
- b. (2) restrictive covenant (enforced by either damages or injunction)
- c. (3) fee simple on condition subsequent (remedy=forfeiture after action; court's don't like these)
- d. (4) fee simple determinable (automatic forfeiture)
- e. Policy for Hierarchy: Protect current possessor's interest

4. Factors establishing Power of Termination

- a. Language of the instrument
- b. The nature of the event specified in the condition and its importance to the grantor
- c. The amount of consideration paid for the transfer in proportion to the full value of the estate in fee; and
- d. The existence of facts showing the grantor's intent to benefit the adjacent land by the restriction imposed on the conveyed land

5. Red Hill v. Hammond (ski club -- no lift, but still open)

- a. Condition subsequent not breached; therefore reentry not allowed
- b. Courts want to lean toward not finding a breach; therefore they strictly construe the provisions and resolve ambiguities against forfeiture

6. Defeasible fee with executory language

- a. Hermitage v. Dominion Trust (racist provision)
 - i. Assuming limitation is unenforceable,
 - ii. If *limitation*: T-->School so long as [racially discriminatory limitation], otherwise to Miller school, so long as [...], otherwise to Hermitage
 1. If *limitation* is invalid, makes the entire gift invalid
 2. BUT Hermitage had no such limitation
 - iii. If *condition subsequent*: T-->School, but if [...], then to Miller school, but if [...], then to Hermitage
 1. Courts can void is the condition, NOT the entire gift
 - iv. **Special limitation (duration)** as opposed to **condition**. Language you use

to make fee simple determinable—creates fee simple determinable, but here we are not dealing with land but rather personal property

vi. Statute of Repose -- Applies to Possibilities of Reverter / Powers of Termination

1. Starts to run when interest is created***
 - a. Day of Inter Vivos Transfer
 - b. Day of Death for Testamentary Transfer
2. Run longer than SoL (30-40 yrs generally)
3. Converts FS Determinable and FS Subj to Condition Subsequent to just Fee Simple
4. Policy: Interests in land shouldn't be left uncertain for long periods of time

5. Ludington & Northern Rlwy v. Epworth Assembly
 - a. Statute of repose cancelled previous rights of POT
 - i. Even though Statute passed AFTER transfer
 - ii. Statute included 1-year option to reclaim POT

vii. Restraints on Alienation --

1. "Alienation" -- The right to convey real property
 - a. Intended to preserve marketability
2. Restatement:
 - a. Direct: Promissory, Disabling, Forfeiture Restraints
 - i. Disabling:
 1. Restraint makes transfer impossible for any period of time from the creation of the restriction is *invalid if imposed on any estate*.
 2. A Disabling restraint that allows transfer in some manner is valid, if and only if under all the circumstances
 - ii. Forfeiture: you sell, you lose
 1. Terminates the fee upon attempt to alienate
 2. Restraint on a life estate or term of years estate is *valid*.
 - a. On a fee simple that makes transfer "impossible" is invalid
 - b. Other forfeiture restraints are valid if
 - i. Limited in Scope
 - ii. Limited in Duration
 - iii. Increases value
 - iv. Imposed on "not readily marketable" property
 3. Alby v. Banc One Financial
 - a. Possibility of reverter: deeded property automatically reverted to grantor if grantee mortgages the property during grantor's lifetime is a **reasonable clause**
 - b. Factors court cares about
 - i. Interest of the parties (keep the land in the family)—legitimate interest
 - ii. Limited in scope—yes, only prohibits one type of transfer
 - iii. Limited in duration—Alby's lifetime

iv. Reduced purchase price—consideration

iii. Promissory:

1. Promise not to alienate (sell), with liability if promise is breached
 - a. attempted sale causes forfeiture
2. Restraint is *valid if and only if a comparable forfeiture restraint would be valid.*
 - a. Considers same factors

VII.

a. Future Interests

i. Application of Statutes of Limitation and Repose

FUTURE INTEREST	Ordinary Statute of Limitations	Doctrine of Waiver	Statute of Repose (Kills defeasibility)
Possibility of Reverter (FS Determinable)	Begins to run on breach of limitation (there may be Special Statute of Limitations on breach of limitation)	N/A	Begins to run on Creation of Interest (At Transfer)
Power of Termination - POT (FS Subject to Condition Subsequent)	Begins to Run when holder of POT takes action to re-enter	POT expires if holder does not exercise it within reasonable time (may be shortened by special statute of limitation which begins to run on breach of condition)	Begins to run on Creation of Interest (At Transfer)
Executory Interest (FS Determinable on Exec Limitation OR FS Subject to Exec Interest)	Treated like Possibility of Reverter	N/A	N/A – Covered by Rule Against Perpetuities

ii. Classification by Party

1. Interests in Transferor (Reversionary)
 - a. REVERSION: follows a life estate
 - b. POSSIBILITY OF REVERTER: paired with a fee simple determinable
 - c. POWER OF TERMINATION: paired with fee simple subject to condition subsequent
2. Interests in Transferee (Nonreversionary)
 - a. Rule 1: defeasible fees
 - i. Always an EXECUTORY INTEREST subject to either;
 1. Special limitation (language of duration) or;
 2. Condition subsequent (language of condition)
 - b. Rule 2: defeasible particular estates

- i. If subject to a durational limitation → REMAINDER
 - 1. Life Estate/Term of Years with durational (“for so long as”) language attached
 - ii. If subject to a condition subsequent → EXECUTORY INTEREST
 - 1. Life Estate/Term of years with conditional language (“But if”
 - c. Rule 3: nondefeasible particular estates (e.g. Life Estate, Term of Years Estate)
 - i. It is a REMAINDER if it is capable of becoming possessory immediately upon the ending of A’s estate
 - ii. If B’s interest will not become possessory immediately upon the ending of A’s estate, it is an EXECUTORY INTEREST
3. Distinguishing Reversionary and Nonreversionary Interests
- a. Post-Creation Transfers
 - i. Subsequent transfers of a future interest do not change the initial classification of the interest
 - b. Future interests created in a residuary clause

Future Interests Classifications			
Type of Fee	Sample Present Possessory Interest	Future Interest Created	Future Interest In
INTERESTS IN GRANTOR			
Life Estate	Life Estate	Reversion	Grantor
Fee Simple Determinable	Fee Simple Determinable	Possibility of Reverter	Grantor
Fee Simple Subject to Condition Subsequent	Fee Simple Subject to Condition Subsequent	Power of Termination	Grantor
INTERESTS IN TRANSFEREE			
Defeasible Fees	Fee Simple Determinable on Executory Limitation	Executory Interest	Transferee
Defeasible Fees	Fee Simple Subject to Executory Limitation	Executory Interest	Transferee
Defeasible Particular Estates - Durational Limitation	Life Estate/Term of Years Estate with Durational Limitation (for so long as, etc)	Remainder	Transferee
Defeasible Particular Estates - Conditional Limitation	Life Estate/Term of Years Estate with Conditional Language (But if, etc)	Executory Interest	Transferee
Nondefeasible Particular Estates - Immediate Possession	Life Estate/TOY and B can take possession immediately upon termination of A's Estate	Remainder	Transferee
Nondefeasible Particular Estates - Delayed Possession	Life Estate/TOY but B's interest not immediately possessory (e.g. then to B when he turns 21)	Executory Interest	Transferee

iii. Condition and Classification

1. CONTINGENT and VESTED Remainders

a. Contingent IF:

i. Subject to condition precedent

- 1. Describes conditions under which remainderman GETS interest
- 2. Canoy v. Canoy (Kids had to survive Roger)

OR

- ii. Remainderman is unascertained at the time of the creation of the remainder
 - OR
 - iii. Both
 - iv. Cannot accelerate unless condition is met
 - v. **Alternative contingent remainders**
 - 1. O-->A for life, then to B if B is 25 at time of A's death, otherwise to C
 - a. A - life estate
 - b. B - contingent remainder in FS
 - i. there is a condition precedent, so, there is a contingent remainder in FS
 - c. C - alternative contingent remainder in FS
 - d. you could say: "B and C have alternative contingent remainders in FS"
 - e. O - reversion
- b. Vested: What type?
 - i. Indefeasibly vested IF
 - 1. No condition
 - 2. No class that can increase in number
 - ii. Subject to divestment IF
 - 1. A condition subsequent
 - a. Describes terms of which the remainderman LOSES interest
 - iii. Subject to open IF
 - 1. Class that can increase in number
 - iv. *can be both subject to divestment and subject to open
 - v. Accelerates into possession
 - vi. O--> A for life, then to B, but if B is not 25 at the time of A's death, to C
 - 1. A - life estate
 - 2. B - vested remainder in FS subject to divestment (or subject to executory limitation)--for our purposes, these are the same
 - 3. C - executory interest in FS
- iv. Restraints on Alienation -- Future Interests of Defeasible Fees (FIDF)
 - 1. "Alienation" -- The right to convey real property
 - 2. Traditionally FIDF not transferable by deed or devise
 - 3. Restatement (1st)
 - a. Possibility of Reverter could be transferred
 - b. Power of Termination: By Devise or Descent, but not sold during holder's lifetime
 - 4. Statutes
 - a. Additional treatments of transferability
 - 5. Modern rule
 - a. They are transferable
 - 6. Executory Interest
 - a. Generally transferable

7. Always transferable when transfer is release to the present interest holder

FUTURE INTERESTS IN GRANTEES			
Future Interest	Language	Reversion in Grantor?	Transferrable?
Indefeasibly Vested Remainder	"To A For Life, then to B"	No, remainder certain to become possessory.	Yes; B's Remainder transferrable inter vivos and at death
Vested Remainder Subject to Open	"To A for Life, then to A's Children" A has a child B. B has a vested remainder subject to open.	No. A's Children are certain of possession.	Yes, B's Remainder transferable during life and at death.
Vested Remainder Subject to Divestment	"To A for Life, then to B, but if B dies before A, to C." B has a vested remainder subject to divestment.	No. No possibility of property reverting to grantor.	B's remainder transferable during life, but not transferable at B's death if B pre-deceases A.
Contingent Remainder	(1) "To A for life, then to A's children" A has no children.	Yes	No; no child is alive
	(2) "To A for life, then to A's kids who survive A" A has a kid, B	Yes	B's contingent remainder is transferable during life, but is not transferable at B's death if B predeceases A
	(3) "To A for life, then to B if B reaches 21" B is 17.	Yes	B's remainder is transferable during life, but remainder fails if B dies under 21
	(4) "To A for life, then to B's heirs" B is alive	Yes	No; no one is heir of B until B dies
	(5) "To A for life, then to B if B survives A, and if B does not survive A, to C."	Yes	B's remainder is transferable during life, but fails if B predeceases A; C's remainder is transferable during life and at C's death if A is then alive
Executory Interest	(1) "To A, but if B returns from Rome, to B"	No	Yes
	(2) "To A for life, then to B, but if B does not survive A, to C"	No	C's executory interest is transferable during life and at c's death if A is then alive
	(3) "To A upon her marriage"	No reversion, but grantor has possessory fee until A's marriage.	Yes

v. Why Classification Matters

vi. The Rule Against Perpetuities

1. **No interest** is good unless it **must** vest, **if at all**, not later than twenty-one years after some **life in being** at the creation of the interest
2. Breakdown:
 - a. **No Interest** = nonreversionary future interests see below for those subject to RAP
 - b. **Must vest, if at all** = Doesn't require vesting; just has to vest OR fail by time limit, which is:
 - c. Some **life in being (+ 21 yrs)** = Validating life (plus 21 years)
 - d. Must vest, if at all part 2 = certainty must exist that interest will Vest OR FAIL by time limit at time of transfer
 - e. "No interest is good" = entire violating future interest is stricken; rest of transfer remains

3. Applicable Interests:
 - a. Subject to RAP
 - i. Contingent Remainder
 - ii. Vested remainder subject to open
 - iii. Executory Interest
 1. E.g., City of Klamath Falls v. Bell: the executory interest was void under RAP because there was no validating life that could live as long as the City chose to use the library
 - a. Could be solved by 2 deeds: (1) Current interest (FSD) and (2) Possibility of reverter conveyed separately
 - b. Not Subject to RAP
 - i. Vested Remainder
 - ii. Vested remainder subject to divestment
 - iii. Reversion, Possibility of Reverter, Right of Entry
4. Policy: "Preventing the dead hand of past generations from controlling the disposition of property too far into the future, and of keeping property marketable."

TECHNICAL RULES OF THE COMMON LAW			
	DOD	RISC	DWT
Rule	Contingent remainders are destroyed if not vested at time of termination of preceding estate	If an instrument creates a freehold estate in A and a remainder in A's heirs, the remainder becomes a remainder in fee simple in A.	An inter vivos conveyance attempting to create a future interest in the grantor's heirs is ineffective, so grantor has a reversion
Examples	"To A for Life, then to A's children if they reach 21"	"To A for life, then to A's heirs"	"To A for life then to my heirs"
Result	A who has no children who are 21 at the time of her death, property reverts to grantor	A has fee simple	A has a life estate; the grantor has a reversion
Modern Status	Abolished in Most Jurisdictions	Abolished in Most Jurisdictions	Generally treated as rule of construction (i.e., raises a rebuttable presumption); does not apply in this country to testamentary grants
Modern Results	Possession reverts to grantor; A's children have contingent remainder	A has a life estate and A's heirs have a contingent remainder	Grantor's heirs have future interest given to them under the instrument

Summary of Future Interests

Future Interest	Example	Correlative Present Interest(s)	Subject to RAP?
IN GRANTOR			
Reversion	“To A for life”	Life Estate; Term of Yrs	No
Possibility of Reverter	“To A so long as liquor is not sold on the premises”	Fee Simple Determinable	No
Power of Termination Right of Re-Entry	“To A, but if liquor is sold on the premises, O has a right to reenter”	Fee Simple Subject to Condition Subsequent	No
IN GRANTEE			
Indef. Vested Remainder	“To A for life, then to B”	Life Estate; Term of Yrs	No
Vested Remainder Subj to Open	“To A for life, then to A’s kids.” A has a kid, X	Life estate; Term of Yrs	Yes -- As long as the class remains open
Vested Remainder Subj to Divestment	“To A for life, then to B, but if B pre-deceases A, to C.” B has a vested remainder subject to divestment	Life estate; Term of yrs	No
Contingent Remainder	“To A for life, then to A’s surviving kids”	Life Estate, TOY	Yes
(Springing) Executory Interest	“To A when she passes the bar exam”	Fee Simple, Life Estate, TOY	Yes
(Shifting) Executory Interest	“To A for life, then to B, but if B pre-deceases A, to C.” C has a shifting executory interest	Fee Simple, Life Estate, TOY	Yes

Remainder starts at natural termination of prior estate

Executory Interest can CUT OFF a prior interest (it acts as executioner to the prior estate)

5. Wait and see Rule: Wait until the end of the perpetuities period to see what does actually happen

6. Cy pres Doctrine (Texas): the court rule will modify the conveyance to best reflect the intent of the grantor; reform to validate contingent interests
 - a. Advantages of Cy pres: not intent defeating, you don't have to wait a long time to determine if intent is valid
 - b. Disadvantage: requires litigation to fix
 7. Exception to RAP
 - a. Charity on charity: gift to A charity, then to B charity upon remote contingency
 - i. VALID only with both A and B being charities
 8. Three Classic Traps
 - a. Fertile octogenarian
 - i. Children aren't closed as class until death of parent
 - b. Unborn widow
 - i. To A for life then to A's widow for life then to A's first child if living
 1. A's widow may not be life in being yet, therefore not validating life
 - c. Administrative contingency
 - i. "to my grandchildren, born before or after my death, who are living upon final distribution of of my estate."
 - ii. "Slothful executor"
 9. Wait-and-See Rule
 - a. 1) an interest is valid if it would be under the traditional RAP
 - b. 2) if it would be invalid, we wait until 21 years after the death of all those people involved in the conveyance
 10. USRAP—waiting period is 90 years [at time it is vested] instead of looking to say those particular lives in being are still alive
 - a. Interest is valid if it will necessarily vest or fail within 90 years
 - b. Otherwise, we wait 90 years to see if it is vested
 11. RAP and Commercial Transactions
 - a. Ferrero v. Dennis Rourke
 - i. RAP applies to both right of first refusal and options
 1. Right of first refusal
 - a. Interest in property
 - i. Buying at a fixed price
 - ii. Buying at market value
 - iii. Matching the offer
 2. Options
 - a. Force the owner that you made a deal with to sell it to you within a certain period of time
- vii. Doctrine of Destructibility of Contingent Remainders
 1. Contingent remainder is destroyed if it has not vested at or before the termination of all preceding life estates
 2. Only applies if there is a second event in the conveyance
 3. E.g.
 - a. O --> A for life, then to B if B reaches age 21
 - i. A = Life Estate
 - ii. B = Contingent Remainder in FS

- iii. O = Reversion
 - iv. A dies when B is 17 years old; Doctrine destroys contingent
 - 1. B = nothing
 - 2. O = FS absolute
 - 4. Merger - Only merges vested estates; only destroys contingent remainders where DOD applies
 - a. Unification of LE and reversion destroys intervening contingent remainder
 - i. e.g.
 - 1. O → A for life, then to B if B reaches age 21
 - a. A = Life Estate
 - b. B = Contingent Remainder in FS
 - c. O = Reversion
 - i. THEN O → A before B turns 21
 - ii. Through Merger, A = FSA
 - iii. Contingent remainder is destroyed
- viii. Rule in Shelley's Case
 - 1. Remainder in land to the heirs or bodily heirs of the life tenant is void; it is replaced by a remainder in the life tenant
 - 2. ONLY APPLIES TO HEIRS
 - 3. Most states have abolished; transfer takes effect exactly as transferor states it
 - 4. Narrowly Applied: Only to "heirs", not "issue" or "children"
 - a. NOTE: "Issue" is another word for downstream heirs (natural or adopted) -- defines a class not knowable until death
 - 5. Tax Dodge -- Analogy is Generation Skipping Transfer Tax
- ix. Doctrine of Worthier Title
 - 1. A remainder conveyed to the grantor's heirs is void; it is replaced with a reversion in the grantor.
 - 2. INTER VIVOS! Applies to remainders created in deeds, not wills

VIII. CONCURRENT INTERESTS

- a. Types of Concurrent Interests
 - i. Tenancy in Common
 - ii. Joint Tenancy (with right of survivorship)
 - iii. Tenancy by the Entirety
- b. **Joint Tenancy** -- Favored in Feudal England
 - i. Creation of the Joint Tenancy
 - 1. Created by Four Unities (Lipps v. Crow):
 - a. Unity of Time - JT's interests must vest at the same time
 - b. Unity of Title - JT's must acquire title in the same deed or will (instrument)
 - c. Unity of Interest- Each JT must own equal shares of the same estate (same

- fraction)
 - d. Unity of Possession- Each JT has a right to possession of the whole property
 - 2. O → to A and B: (feudal england) -- OR -- O → to A and B as joint tenants with right of survivorship and not as tenants in common
 - a. A & B = each undivided ½ interest in property as JTWROS
 - i. If A dies, regardless of his devise, B owns 100% FS Absolute
 - ii. If A sells, joint tenancy becomes Tenancy in Common
 - 3. Lipps
 - a. Attempted to create Joint Tenancy in Property he Already Owned
 - i. Held: Joint Tenancy Created
 - 1. Intent clear
 - 2. Court stretches to find Unity of Time and Title
 - 3. (Can't really make a conveyance to yourself)
 - a. Changed the rule
 - ii. Better way to do this: Strawman conveyance
- ii. Rights of Survivorship
1. Interest of JT is not devisable or inheritable at cotenants death; surviving joint tenant owns the property outright at death of other joint tenant
 2. Each own an undivided ½ interest in the property as joint tenants with right of survivorship
 3. Often used as a will substitute
- iii. Severance of the Joint Tenancy
1. Requires an inter vivos transfer by the JT (or a partition, but that's next semester)
 - a. Can straw-man convey to sever JT (A to C and then C to A)
 - b. Unilateral - Requires no permission of other Joint Tenant
 2. WILL won't sever
 3. Lease won't sever
 4. Divorce does not sever (absent statute)
 5. In Re Knickerbocker
 - a. Executed a deed to herself as tenant in common so that she can convey her share to her 2 kids
 - b. Unilateral self-conveyance -- Technically ineffective, but court holds Intent is Paramount
 - c. Policy concern: fraud by secret severance
 - i. Retaining ROS while having trump card of an executed deed waiting to be filed that destroys cotenant's ROS
 1. but no fraud here -- recorded deed
 2. But also, there could be a secret severance even with a strawman
 6. Severance of JT affects the relationship between A and BC if they all have ⅓ undivided interest as JTs with each other when A conveys to X
 - a. A, B, C each have ⅓ interest as JT
 - b. A conveys his interest to X
 - c. So, BC have ⅓ interest each as JT with each other, and a TIC with X
 - d. Unities are not destroyed as to B and C

- e. Each tenant has power to affect the relationship with themselves and the other tenants unilaterally, but NOT the power to affect their relationship to each other

7. Severance by Mortgage

a. People v. Nogarr

- i. O → E & C as JTWRORS and not as TIC

- 1. C → (mortgage) → Parents

- ii. Parents argue JTWRORS severed by mtg; E argues no severance, therefore, she owns property free and clear

- iii. HELD:

- 1. No Severance

- b. Lien theory states: mortgage gives a type of title -- Mortgage does not sever

- c. Title theory states: Mortgage severs

- i. Mortgage (foreclosure by judicial process) or deed of trust (foreclosure by sale)

8. Unseverable ROS

- a. O-->A and B for life, then to the survivor

- i. AB each own a life estate and a contingent remainder in FS

- ii. O has a reversion

- iii. Now, a ROS that can't be severed

- b. A few states "with right of survivorship" actually creates unseverable ROS

9. HOOVER v. SMITH-----I dont think this goes here

- a. O → A & B as joint tenants and not as tenants in common

- b. VA statute: Joint tenancy had no right of survivorship unless language manifestly appears to create ROS.

- c. Court holds that language does not manifestly appear to create ROS

- d. ∴ Joint Tenancy WITHOUT ROS.

iv. The Cotenant's Rights and Duties

c. **Tenancy in Common** -- Favored by modern law

- i. Presumed in Modern Law

- ii. Each cotenant's interest is transferable not only inter vivos, but also at cotenant's death

- iii. O → A and B (*tenants in common*)

- 1. A and B = ½ interest in the property

- 2. A dies with a will leaving everything to C

- a. B and C = ½ interest in the property

d. **Tenancy by Entirety** -- Marital Estate

- i. right of survivorship

- ii. creditor of one spouse can't reach the property

- 1. Only joint creditors can get to it

- iii. Texas doesn't recognize it

Mnemonics:

Adverse Possession: **A(n) ECHO**

Actual (possession)

Exclusive

Continuous

Hostile (adverse & hostile)

Open (and notorious)

plus an echo goes on and on (e.g. for the statutory period)

Policy for Rule in Shelley's Case

evading taxes is RISCy

Rule in Shelley's Case is meant to avoid transferring to a grantee's heirs as part of a conveyance to the grantee. E.g. $O \rightarrow \text{to } A \text{ for life and then to } A\text{'s heirs}$ -- under RISC: it becomes $O \rightarrow A$ (*in fee simple*).

Doctrine of Worthier Title -- Why does it only apply only to Inter Vivos transfers?

Look at what it does: $O \rightarrow \text{to } A \text{ for life and then to } O\text{'s heirs}$, under DWT $O \rightarrow \text{to } A \text{ for life}$

If O were dead though, changing it back (so that O has a reversion), that reversion will actually be going to O's heirs, because O is dead!