Property § 2, Fall 2003. Professor Sheldon Vincenti.

I. Theory

A. Rights and duties

1. Use

2. Inclusion / Exclusion

a) Inclusion: the right to permit use by another (e.g., sale, lease, invitation).

b) Exclusion: the right to deny use by another.

(1) Protected by law

(a) Trespass (on land)

i) *Jacque v. Steenberg Homes* (1997, mobile home moved across private land): Right to exclude is one the most essential parts of prop. rights. Punitive damages for intentional trespass can be appropriate even where actual damages are nominal.

ii) *State v. Shack* (1971, trespass to aid migrant workers): land ownership does not include the right exclude those providing government services to migrant workers.

a. "Title to real prop. cannot include dominion over the destiny of persons the owner permits to come upon the premises."

b. Supremacy clause bears minimally, but some.

c. Rights itc.

1) Famer-owner: entitled to farm w/o interference.

2) Migrants: entitled to access to government aid; entitled to allow visitors of their own choice, as long as there is no hurtful behavior.

3) Aid-providers: entitled to enter farmer's land to provide aid to the migrants.

4) Press: entitled access to workers who do not object to seeing them.

(b) Conversion (of chattels)

i) *Moore v. Regents of UC* (1990, spleen taken): no conversion action where doctors took patient's spleen and used its cells to develop a valuable cell line. Patient had the right to exclude before and at the time of taking, but not after; he never had the right to include.

(2) Limited by law

(a) Anti-discrimination

(b) Rent controls and limits on the right to evict leaseholders

(c) Adverse possession

(d) Public rights to access private beaches

(e) Statutory protection of mortgage defaulters

(f) *State v. Shack* (1971, trespass to aid migrant workers): land ownership does not include the right exclude those providing government services to migrant workers.

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d. Press: entitled access to workers who do not object to seeing them.

(3) Commentary

(a) Consider the right not to be excluded (as in a commons) (Macpherson).

(b) Absolute exclusion rights are fine, b/c "those who exercise absolute rights in a capricious fashion will pay for their folly by losing their markets." Except where absolute exclusion causes market problems (bilateral monopoly, holdouts, transaction-cost obstacles). (Epstein).

c) N.b., transferability (alienability) requires both inclusion and exclusion rights.

(1) Inclusion rights only would not prevent others from using without a conveyance.

(2) Exclusion rights only would not give the right to sell, give, or otherwise convey.

B. Regimes

1. Externalities

2. Types

a) Private ownership: land is parcelled, and each assigned to a single "owner" with both use and exclusion rights.

b) Common ownership: all users have use rights, no user has exclusion rights.

(1) Problems

(a) Freeloaders will overuse the resource since they benefit as an individual but bear only a fraction of costs (which are borne altogether by the community).

(b) Future generations are not considered, there is no incentive. ???

(c) Transaction costs prohibitively high for collective management.

c) Anticommon ownership: all users have both use and exclusion rights (i.e., to exclude non-owner users).

(1) E.g., post-Soviet Russian stores, where all interested parties (owner, tenant, subtenant) had exclusion rights. (As a result, the stores were eschewed for kiosks.)

d) Semicommon ownership: whole resource operates as a commons, but certain economic units of the resource operate as a privately-held parcel.

(1) E.g., the medieval "open-field" system, where peasants "owned" individual strips of land for grain growing, but occasionally, the entire lot was also used for grazing of the peasants' common herd.

e) State (public) ownership: the state has exclusion rights.

(1) N.b., due process is assumed, but not requisite for a state ownership regime.

II. Acquisition

A. First possession

1. Discovery / Conquest

a) *Johnson v. M'Intosh* (1823, indian land): discovery gave both sovereignty and title

(1) discovery gave white men the exclusive rgt. to extinguish Indian title by purchase or conquest -- this implies Indian prior possession doesn't matter: the "character and religion" of the Indians gave apology to Europeans of "superior genius" to claim ascendency. Custom seems to be the basis for the overall holding.

(2) Indians have an title of occupancy extinguishable only by gov't purchase or conquest

(3) Discovery: sighting/finding prev. unknown/uncharted territory

(a) freq. accompanied with landing and symbolic taking of possession

(b) usu. must be "perfected" w/in rsnbl. time by settlement and occupation

(c) n.b. discovery is now essentially obsolete

(4) Conquest: taking possession of enemy territory by force

(a) usu. formal annexation must follow

(b) n.b. conquest is now proscribed by int'l law

(5) Chain of title: U.S. landowners trace title to gov't patents and grants, gov't traces title to discovery of America by white men.

(6) *Johnson* on labor theory: Locke: Indians didn't put in enough labor to join land into a prop. interest in themselves.

b) First in time is first in right: the "venerable and persistent" idea

(1) occupancy theory of priv. prop. origins: at some point (scarcity), priv. prop. became necessary to maintain peace, so people began taking possession of land. Eventually, all land was taken, and it was assumed that whatever you had possession of, you owned (i.e. mankind agreed to first-in-time. A good positive theory, not so good as a normative theory.

(a) by possession, one separates, for one's self property, from the "great commons of unowned things"

(b) Criticism

i) Definition: what constitutes occupancy? what if there are contesting claims?

ii) Allocation: must you occupy every inch (see *Van Valkenburgh* w/r/t adv. poss.)? if you "occupy" the frontier, how much do you get?

iii) Fairness: under occupancy theory, the most powerful among a group of first-in-time wins.

(2) labor theory (Locke): first in time is not assumed, it is natural law. Every man has property in his own person → every man has prop. in the labor of his body. When he mixes his labor with natural resources, he joins it into his ownership. B/c he has exclusive right to his labor, so he has exclusive right to the prop. he joins by it.

(a) But: what if A chops B's tree and makes furniture -- who owns the furniture? or if C paints with C's oils on D's canvas -- who owns the painting?

(b) *Haslem v. Lockwood* (A gathers manure, B takes it before A does): manure orig. owned by animals, but abandoned. A changed cond'n and enhanced value, and was entitled to a rsnbl. time to take it away.

(c) Criticism

i) Allocation: what if there are multiple laborers? Or what if A chops B's tree and makes furniture -- who owns the furniture? Or if C paints with C's oils on D's canvas -- who owns the painting?

ii) Ability: what if people do not have equal inherent abilities (as seems to be the case)?

2. Capture

a) *Pierson v. Post* (1805, the fox): actual taking suff. for occupancy, or pursuit + maiming/killing will do

- **(1)** Dissent: pursuit + "rsnbl. prospect of taking" suff. for occupancy. Looks to custom for basis of hold (see *Ghen*) -- an instrumental/consequential approach:
  - **(a)** encourage fox hunting (n.b. isn't this better achieved under maj.'s view? maj. view may promote more competition)
  - **(b)** ct. must change w/ the times
- **(2)** Maj. looks to ancient writers for basis of its hold:
  - **(a)** preserve peace & order -- i.e. maintain certainty of prop. law
  - **(b)** limit litigation -- estab. a brighter line than dissent suggests

b) *Ghen v. Rich* (1881, whaling customs): ownership when whaler does all that is possible to make the whale his own; local whalers' custom applies b/c effect is limited and precedent prefers such in whaling disputes

- **(1)** local custom: whaler harpoons a whale with marked harpoon, whale sinks and drifts to shore. Finder notifies whaler and gets finder's fee. Df. finder itc claims whole whale. Ct. upholds the local custom -- it whaler does all that is possible to make whale his own, that's suff. for ownership per the custom.
- **(2)** Application of custom permissible itc b/c:
  - **(a)** future application will be "extremely limited" -- i.e. ltd. to local whalers
  - **(b)** whaling would prob. cease o/w
  - **(c)** finders are encouraged by fee
  - **(d)** existence of whaling industry, and the custom itself, is evid. that the custom works
  - **(e)** common L. may very well reach the same result
- **(3)** n.b. three whaling customs (Ellickson):
  - **(a)** fast-fish/loose-fish: whaler owned whale as long as it was fastened to his boat
  - **(b)** iron-holds-the-whale: ownership to whaler who first affixed a harpoon to the whale -- harpoon didn't have to be connected to the whaler's boat
  - **(c)** split: first harpooner and seizer split the value of the whale (closest to *Ghen* rule)

c) *Keeble v. Hickeringill* (1707, duck pond): you're liable for a malicious act a/g another's livelihood, unless it's fair competition (Facts: Df. scares ducks away from Pf.'s pond. Pf. enjoys capturing the ducks and has built the pond to attract them.)

- **(1)** Malicious interference w/ trade: it would be okay if Df. lured the ducks away (e.g. had his own pond), but it is not okay for Df. to scare them away. Ct. wants to encourage those w/ "skill and industry."
- **(2)** Pf. does not own the ducks by capture, nor by *ratione soli*, since Df. scared them away. ★But does Pf. have a prop. rgt. in them b/c of his use of the land (i.e. livelihood)? Cf. *Pierson* -- are these two distinguishable b/c of the diff. btwn. sport (*Pierson*) and livelihood (*Keeble*)?
  - **(a)** diff. values for commercial and private use? (consider the difference btwn. *Pierson*-like situations and an animal lover who scares deer away from hunters)

d) Fugitive resources

(1) Ratione soli: owner has constructive possession of fugitive resources on his land

(a) Problem: T trespasser captures and then possesses wild animal on O's land. T1 steals the animal from T's land. T sues T1 for return of the animal. Who wins? ??? (n.b. if O sued T for return, O would prob. win).

(2) Wild animals

(a) Animus revertendi: intention to return. B owns a wild animal that leaves his prop. but is going to come back (cf. *ratione soli*).

(b) Rule of increase: Owner of the mother owns her offspring. B's bull impregnates C's cow -- who owns the offspring? C.

(c) *State ex rel. Visser*, *Sickman v. United States* (migrating geese): gov't "owns" wild animals just enough to regulate their taking: i.e. gov't "owns" wild animals and may regulate their taking, but "doesn't own" them and isn't liable for dmg. caused by them.

(3) Oil and gas

(a) Considered to be analogous to to wild animals -- constructive ownership per *ratione soli*

i) *Barnard v. Monogngahela Natural Gas*: Landowners A & B over oil, B starts draining the "common" pool -- no remedy to A, b/c A can drain the pool likewise.

ii) *Union Gas v. Fyffe*: A might could get an injunction a/g excessive drilling

(b) Ownership can be assigned for specific purposes. E.g., mineral rights, gas rights, regular use rights.

(4) Water

(a) Groundwater

i) American rule: rsnbl. use -- this is the rule of capture with an exception for wasteful use that causes harm.

a. n.b. English rule: governed by rule of capture -- landowner A over groundwater can pump out as much as he wants, regardless of effects on his neighbors

ii) Lateral support (support provided by surrounding parcels): neighboring land has duty to provide support to the surrounding land that would be given under natural cond'ns. Usu., no duty to support structures. Strict liability for breach -- except, no liability when support fails b/c of groundwater withdrawal.

iii) Subjacent support (support from underneath land): arises when surface rights and subsurface rights have diff. owners. Law is same or similar as lateral support law.

(b) Surface water

i) Prior appropriation (first in time): ownership to first person to appropriate water and put it to rsnbl./beneficial use. Developed in response to scarcity. (western states)

ii) Riparian rights: every riparian landowner (land on water source), has right to use the water. (eastern states)

3. Creation

a) General rule: in the absence of a right recognized in common law or statute, a man's prop. is limited to the chattels which embody his invention. Others may imitate these at their pleasure. (from *Cheney Bros.*).

b) *International News Service v. Associated Press* (1918, news theft): AP wins b/c of "quasi-property," unfair competition; still, news is a public good and can not be acquired as prop. Specific expressions of the news could possibly be acquired.

(1) No property in the "news element" of news:

(a) News of current events is common prop., or *publici juris*.

(b) Writer/reporter did not create the news

(c) Framers did not intend first reporter of a news story to get exclusive rights to it (see Const., Article I, § 8, ¶ 8).

(2) DICTA: There may be property in the "literary element" of news.

(3) Quasi-property: AP has prop. rights as a/g INS, irrespective of its rights as a/g the public.

(a) Exclusion rights to uncopyrighted property do not survive publication: somebody who buys a paper can share its news with anyone, so long as he doesn't interfere with the news agency's right to merchandise that news.

(b) Exclusion rights to quasi-property do survive publication: AP created the stories w/ labor, skill, and money -- INS is trying to "reap where it has not sown," it is a freeloader.

(c) AP did not abandon the news by publishing it: abandonment is a question of intent -- AP clearly did not intend to abandon.

c) *Cheney Bros. v. Doris Silk Corp.* (1929, silk design copycat): *INS v. AP* is limited to its facts and not controlling here, Pf. itc. has not right to exclude whatever.

(1) *INS v. AP* would apply if it set out a general rule; but *INS* does not make sense unless it is limited to its facts, o/w it conflicts with the legislative copyright scheme.

(2) Legislature is the branch that should address the issue here, not the courts.

(3) Distinguishing *Cheney Bros.* and *INS* is not easy: assigning prop. rights in situations like these is a balancing operation.

(a) Is Pf. threatened in its primary market? (*INS* yes, *Cheney* maybe).

(b) Was Pf. able to exploit lead-time? (*INS* no, *Cheney* yes).

d) *Smith v. Chanel, Inc.* (1968, ad claim of equivalency with Chanel no. 5): Df. can claim equivalency b/c it is part of useful competetion.

(1) "Imitation is the life blood of competition." Public benefit of competition could be lost if equivalency claims could not be made.

(2) Great effort and expense in creation is not sufficient to create legally protected rights.

(3) Df. may be a freeloader, but he serves the public in doing so.

(a) N.b., balance this "good" with the "bad" that decisions like this may discourage the original creation/invention.

4. Persona

a) Right of publicity: a privacy right granting a claim a/g those who appropriate one's identity (use your name, picture, etc, w/o your consent).

(1) Right of publicity has been endowed with alienability, heritability.

(2) But, your talents and persona are largely a matter of luck, and are crucial to humanity's development, so they should be spread broadly. (Rawls, *A*

Theory of Justice.)

b) *Moore v. Regents of UC* (1990, spleen taken): Pf. lost conversion claim when cells left his body. Prop. rights in body parts would discourage medical research; plus, patients are protected already by informed consent laws.

(1) No prop. in body parts recognized by current law

(a) Cell line is both factually and legally distinct from Pf's. cells -- patent protects Df's. inventive effort

(b) Goal of Df's. research is to make lymphokines, which are not unique to Pf. -- everyone has them.

(c) Statutes limit patients' control over their excised cells

(2) Prop. should not be extended to body parts

(a) Prop. in body parts would impose tort duty on scientists to investigate the pedigree of every cell line they use -- too great a burden b/c it would discourage medical research.

(b) Legislature is the appropriate branch to change law here, not courts.

(c) Pf. is already sufficiently protected by informed consent and fiduciary duty laws.

(3) Pf. has prop. right in his spleen until it is removed (i.e., the right to exclude), but ct. does not identify where, when, or why prop. right ends at removal.

(a) Statute?: no sale of body parts for transplant (salability might be a temptation to do something dangerous).

(b) Abandonment?: ordinarily, patients don't keep body parts.

(c) No damages?: a removed, diseased spleen ordinarily has little value -- except in these circumstances!

(d) Law of accession?: (see Brown, *Law of Pers. Prop.*)

(4) CONCUR: profound moral, philosophical, and religious problems with a body parts market: effect on human dignity, impact on research, researcher liability, etc.

(5) DISSENT:

(a) Pf. has (limited) prop. right under existing law, i.e. at the time of excision, at least the right to do with his cells was Df. did with them.

(b) Even if there is no existing prop. right, prop. should be extended.

i) Respect for human body, protection from its exploitation.

ii) Unfair bargaining advantage: Pf. would not know the value of his cells.

(c) Informed consent / fiduciary duty breach does not provide an adequate remedy.

i) Pf. must show a causal connection between injury and breach

a. Must show that he would have declined consent if he had been informed.

b. Must show that no rsnbl. person would have consented if informed.

ii) Gives patients only the right to refuse consent, not grant it: patient can never expect to share in the profits.

iii) Does not give a cause of action to those outside the doctor-patient relationship (itc., all exploiters but the doctor).

B. Subsequent possession

1. Find

Comment: "A finder of property acquires no rights in mislaid property, is entitled to possession of lost property against everyone except the true owner, and is entitled to keep abandoned property." Michael v. First Chicago Corp. (1985).

a) Policy

(1) Why reward finders? It promotes honesty. Why reward honesty?

(a) Encourages finder to make public his ownership, and so facilitates reclamation by the true owner. This upholds the basic prop. notions.

(b) Moral aspect: honesty is good for its own sake.

b) General case

(1) *Armory v. Delamirie* (1722, chimney sweep finds a jewel): finder has prop. rights as a/g all but the original owner, but does not acquire absolute ownership. Thief of finder's jewel is liable for value of the finest possible jewel, unless the thief can produce the jewel.

(2) *Clark v. Maloney* (1840, finder finds finder's logs): first finder (F1) has "special prop." title a/g all but the original owner; so when F2 finds F1's logs, F1 has prop. right against F2.

(3) *The Winkfield* (1901, mail lost in shipwreck): action barred when bailor brings a/g present possessor if bailee has recovered from present possessor.

(4) *Anderson v. Gouldberg* (1892, thieves of stolen logs): later thieves (T2) have no action a/g original thieves (T1); T1 has good title as a/g all but the true owner.

(a) But, later good-faith possessors usu. have better title than prior wrongful possessors: prior possession rule is usu. invoked only in support of good-faith possessors.

(5) *Hannah v. Peel* (1945, found brooch): non-trespassing finder has good title as a/g Df. to a brooch found in house owned but uncontrolled and unoccupied by Df.

(a) Df. argues for constructive possession -- ct. says Df. may own the brooch, but did not possess it, constructively or otherwise.

(b) Trespassing finders usu. do not have good title as a/g landowners, occupying or otherwise.

(c) *Bridges v. Hawkesworth* (1847, pound notes on the floor): notes found on Df's. public shop floor and given by finder to Df. to hold is simply a case of the general rule of law, i.e. *Armory*, and finder has good title as a/g all but the true owner.

i) N.b., the notes were found in the public area of Df's. shop -- Df. never had custody of the notes, nor were they "within the protection of his house," before Pf. found them.

(d) *Elwes v. Brigg Gas Co.* (prehistoric boat): lessor has good title (as a/g lessee finders and all the world) to ancient boat found buried in mud on the land, even though lessor was not aware of it until the lessees found it.

(e) *South Staffordshire Water Co. v. Sharman* (1896, rings in the mud): owners in control of land have control of everything in and on the land, such as rings found in the bottom of a pool.

i) "The posession of land carries with it in general . . . possession of everything which is attached to or under that land, and, in absence of a better title elsewhere, the right to possess it also." (Pollock and Wright.)

(6) *McAvoy v. Medina* (1866, pocketbook left in barbershop): finder has no good title to pocketbook that was mislaid, not lost.

(a) Mislaid prop. is a bailment; here, barber is the bailee. N.b., giving custody to the shop-owner is preferred, as it facilitates reclamation by the true owner.

(b) Distinguish from *Bridges* b/c itc. pocketbook obviously mislaid, but in *Bridges*, pound notes were obviously dropped.

c) Special cases

(1) Agent finders

(a) No clear rule. Consider:

i) Lost / mislaid / abandoned distinctions

ii) Place of the find

iii) Principal-agent relationship

(2) Treasure trove

(a) Treasure trove: money, coin, gold, silver plate, bullion hidden in the earth or otherwise.

(b) Treated as any other found prop., i.e. can be either lost, mislaid, or abandoned. (American rule.)

i) *Benjamin v. Lindner Aviation* (1995, $18M in airplane wing): money in airplane wing deemed mislaid: obviously not lost, and no one would abandoned that much money (or would they?). As mislaid prop., landowner gets to keep it.

ii) *In re Seizure* (2000, $82M found in gas tank): money, found in car seized by the government and later purchased, deemed to be abandoned, since owners could not reclaim it without risking arrest. As abandoned prop., finder gets to keep it.

(3) Shipwrecks

(a) General finders law applies, unless the wreck is embedded in another's land.

(b) Wrecks embedded in territorial land become U.S. prop. by statute, and title is simultaneously transferred to the local state.

(c) Maritime law of salvage (old): owner retains title to wreck until he abandons it. Salvager is entitled to a salvage award.

(4) Legislation

(a) Many states have statutes concerning lost prop. (usu. applied only to lost prop., and not to mislaid or abandoned prop.).

d) Remedies

(1) Personal property

(a) Trover: get the value of the item.

(b) Replevin: get the item.

(2) Real property

(a) Trespass: get the value of the land.

(b) Ejectment: get possession of the land.

i) Preferred remedy for prior possessors w/o title.

2. Adverse possession

Comment: "The statute (of limitations) has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose it automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing." Ballantine, 32 Harv. L. Rev. 135 (1918).

a) Policy

(1) Efficicient use

(a) Earning theory: reward beneficial users even by trespassers.

(b) Sleeping theory: renalize owners who sleep on their rights.

(2) Limiting disputes

(a) Cure problems of lack of evidence to title.

(b) Quiet title claims that might drag on otherwise.

(3) Personality theory

(a) Possession is an aspect of personality, and title should go with it.

i) Posner: this is economic, i.e., it is based on diminishing marginal utility of income.

ii) Ellickson: this is psychological, i.e., the loss of an asset in hand is greater than the equivalent lost opportunity (prospect theory).

iii) Singer: this is moral, i.e., it is immoral for a true owner to feed possessors' expectations and then abruptly end them.

iv)

b) Mechanics

(1) The requirements

(a) Actual entry

i) Generally, adverse possessors can acquire title only to that portion of land that they have actually entered and possessed.

ii) Color of title: where the possessor has entered under color of title, they have constructive possession of all the land described in the instrument.

a. N.b., in some jurisdictions, the statute of limitations for possession through color of title is shorter than that for possession by mere claim of right.

(b) Open and notorious possession

i) The true owner must have had a chance to do something about the adverse possession.

ii) N.b., in some western states, adverse possessors must pay property taxes during their possession -- this serves as a device for giving notice to the true owner.

iii) *Marengo Cave v. Ross* (IN 1937): A possession of a cave under B's property was not open and notorious.

a. N.b., *cujus est solum, ejus est usque ad coelum et ad infernos*.

(c) "Adverse" (i.e., hostile) possession

i) Doctrines

a. Objective standard: state of mind of the possessor doesn't matter.

1) The standard in England, and usually in the U.S.

b. Good faith standard: good faith (mistaken) possession is required: "I thought I owned it." See *Van Valkenburgh*. Occasionally used in the U.S.

c. Agressive trespass standard: possession must be openly hostile: "I didn't think I owned it, but I intended to make it mine." See *Van Valkenburgh*.

ii) Claim of right: a party's manifest intention to take over land, regardless of title or right.

Comment: The sort of entry and exclusive possession that will ripen into title by adverse possession is use of the property in the manner than an average true owner would use it under the circumstances, such that

neighbors and other observers would regard the occupant as a person exercising exclusive dominion.

a. *Ewing v. Burnet* (SCOTUS 1837): adverse possession where a party who entered a vacant lot, under color and claim of right, dug sand and gravel, let other dig sand and gravel, paid taxes, and brought actions against trespassers.

1) "Adverse possession can exist even if the occupant doesn't reside on the property or for long periods does not use it at all."

iii) Possession with permission from the owner is not adverse possession.

iv) The true owner and adverse possessor must not both be able to consistently claim the right (see "Concurrent Interests" below).

(d) Continuous throughout the statutory period

i) *Howard v. Kunto* (WA 1970, title for the next lot over): use of a summer home during the summer is sufficient for continuity purposes.

a. Privity: a "voluntary transfer" is required -- a transfer of possession only will do, if there is good evidence that it occurred; and transfer by a deed, even though it describes the wrong lot, is good evidence of such transfer. But, n.b., a transfer by "deed" is not essential.

b. Continuity: "if the land is occupied during the period of time during the year it is capable of use, there is sufficient continuity."

c. N.b., since the Kuntos' deed describes the wrong lot, their claim to title is based strictly on adverse possession, and not at all on color of title.

ii) Tacking: an adverse possessor in privity with an earlier adverse possessor may tack on the prior possessor's time; but where there is no privity between possessors, there may be no tacking. N.b., disabilities do not tack.

iii) Stopping the statute

a. Abandonment: if the adverse possessor abandons the property before the statute has run, the statute stops. If that possessor or a privy returns, the statute starts all over again.

b. Interruption: if the true owner wins an ejectment (even if the possessor isn't ousted), or reenters the property (openly and hostilely), the statute stops. If the possessor or a privy returns, the statute starts all over again. But, n.b., if the owner isn't involved, the possession may, in fact, be continuous.

(e) N.b., in most states, and federally, there is no adverse possession to be had against the government (the sleeping theory).

(2) *Van Valkenburgh v. Lutz* (NY 1952, not a big enough garden): no claim of right and no actual entry because the possession did not satisfy the applicable statute and because the possession was not hostile enough.

(a) First suit: Pf. Lutz gets prescriptive easement against Df., but does not challenge Df's. ownership.

(b) Claim of right from statute: must be protected by a substantial enclosure or be "usually" cultivated and improved.

i) But, n.b., the statute distinguishes claim of right from color of title, which does not require enclosure if the lot is used for fuel or timber.

ii) Itc., the court said there was no enclosure and that the cultivation wasn't good enough because it didn't cover the whole premises.

(c) DISSENT: the state of mind of the possessor doesn't matter, unless he had permission of the owner (which would mean possession was not adverse). Also, the cultivation was good enough -- it was consistent with the use of a "wise agriculturalist," who wouldn't cultivate the whole property.

(3) Boundary disputes

(a) *Manillo v. Gorski* (NJ 1969, new steps 15 in. on neighbor's land): true owner should have "actual knowledge thereof" in cases of minor encroachments on a common boundary for possession to be open and notorious. But mistaken possession is good enough to be adverse.

i) Claim of right

a. Dichotomous doctrines

1) Maine doctrine: rewards premeditated hostility and disfavors mistaken possessors.

2) Connecticut doctrine: the objective standard: the possessor's mind and motives are irrelevant. (Itc., the courts picks this one -- "actual occupancy" is all that is required.)

ii) Open and notorious

a. Where an encroachment is self-evident, it's probably open and notorious. Where it requires an on-site survey to be sure, then it's probably not. The true owner should have actual knowledge of the encroachment.

b. But, if such a rule causes undue hardship on a mistaken possessor (e.g., removal of an improvement would be really difficult), a court of equity may force the true owner to convey upon payment of fair value from the possessor.

1) N.b., courts usu. will force intentional encroachers to remove their encroachment, no matter what the cost.

c. N.b., laches: if you stand by while someone improves your land, you may lose -- you have to step in to stop wrongful possession if you don't want to lose that land through adverse possession.

(b) Resolution methods

i) Adverse possession: see *Manillo* -- in some cases, possessor may have to pay fair value for the land taken, but the true owner will be forced to convey.

ii) Agreed boundaries: neighbors who are uncertain about the boundaries between them may orally agree on a boundary, which will be enforced if they accept that boundary for a long period of time.

iii) Acquiescence: passive acceptance of a long time (but maybe shorter than the statute of limitations for adverse possession) of a boundary is evidence of an agreement between neighbors on that boundary.

iv) Estoppel: a neighbor who represents one line as the boundary (or acts as if it is the boundary) may be estopped from later asserting otherwise if the other neighbor changes his positions in reliance on those representations.

a. N.b., estoppel may also be applied in certain cases where one neighbor is silent as another neighbor acts as if one line is the boundary.

(4) Disabilities

(a) Policy: under the sleeping theory, we want to release the disabled from a vigilance requirement.

(b) Typical provision: 21 year statute of limitations; if the true owner, at the time of the adverse possessor's first entry, was an infant, insane, or imprisoned, then after the 21 years is up, he (or his privy or representative) still has 10 years after his disability is gone to eject.

(c) N.b., disabilities do not tack.

c) Chattels

(1) *O'Keeffe v. Snyder* (NJ 1980, paintings): bona fide purchaser vs. true owner: with chattels, true owner has the burden of showing that the adverse

possession was not open and notorious.

(a) Timeline

i) 1941: Frank Sr. allegedly purchased, or was given, the paintings from Stiegletz.

ii) 1946: O'Keeffe discovers paintings are missing. She doesn't do anything about it until 1972.

iii) 1968: Frank Sr. gives the paintings to Frank Jr.

iv) 1972: O'Keeffe lists the paintings with the Art Dealers Ass'n.

v) 1975: O'Keeffe discovers the location of the paintings (Frank sells to Snyder).

vi) 1976: O'Keeffe demands return of the paintings, then files suit for replevin.

vii) Procedural posture: Pf. O'Keeffe sues Df. Snyder for replevin. Snyder impleads Df. Frank for value of sale if Pf. wins. Summary judgment for Df. at trial (statute has run, so whether the paintings were stolen or intrusted doesn't matter). App.Div. reversed (Snyder couldn't prove all elements of adverse possession).

(b) UCC § 2-403: party with a voidable title can transfer a good title to a bona fide purchaser for value.

Comment: A thief can not pass on good title; otherwise, bona fide purchasers generally get good titles. These are claims by right. Note that a thief can acquire good title through adverse possession.

i) Even if the seller was deceived about the buyer's identity.

ii) Even if the buyer gave a check that bounced.

iii) Even if the transaction was a "cash sale."

iv) Even if the buyer got the stuff through fraud.

v) And if the stuff is given to a merchant who deals in that kind of stuff, the merchant can transfer all the rights the giver had to a buyer in the ordinary course of business.

vi) N.b., a good faith purchaser is any purchaser that was not on notice that matters were amiss.

(c) Open and notorious

i) Discovery rule: chattels are openly and notoriously possessed if reasonable steps by the true owner if reasonable steps would discover the possession. "By diligently pursuing their goods, owners may prevent the statute of limitations from running."

a. Due diligence: varies with each case -- with goods of moderate value, reporting it to the police might be enough; but with goods of high value, more might be required.

b. The true owner's cause of action accrues when she knew or should have known that her goods were gone and could have demanded their return.

1) N.b., NY rule: the true owner's cause of action does not accrue until she actually demands the return of her goods.

(2) Policy: how should we handle disputes between two ignorant parties?

(a) Enforce property rights?

(b) Maintain the security of market transactions?

3. Gift

a) Policy

Comment: In feudal times, when few could read or write, a symbolic ceremony transferring possession was an important ritual signifying the transfer. Land could be transferred only by delivering a clod of dirt or a branch tot he grantee on the land itself. The ceremony was called livery of seisin (chattels had to be handed over).

(1) The delivery requirement

(a) Makes the significance of the gift vivid and concrete to the donor -- he feels the "wrench of delivery" and so should realize a gift has been made.

(b) Unequivocal evidence to any witness that a gift has been made.

(c) Gives the donee prima facie evidence that a gift was made.

(d) Clears up ambiguities as to what was given and to and from it was given.

(e) Helps to prevent fraud.

(f) But, sometimes delivery is difficult or impossible (e.g., a warehouse full of goods).

b) Mechanics

(1) Intent

Comment: Intent may be proven with parol evidence.

(a) May be proven with parol evidence.

(2) Delivery

Comment: Delivery requires objective acts.

(a) Constructive delivery: handing over some object that will open up access to the subject matter of the gift (e.g., a key). N.b., a "symbol" used for constructive delivery is simply one where the difference between the symbol and the thing is less tenuous (than is the case in a symbolic delivery).

(b) Symbolic delivery: handing over something symbolic of the property given (e.g., a written instrument). But, n.b., generally, if an object can be handed over, it must be handed over.

(c) *Newman v. Bost* (NC 1898, bureau drawers): distinguishing constructive from symbolic delivery.

i) Pf.'s claims

a. $3,000 life insurance policy -- decedent gave Pf. the key to to bureau where the policy was. The court says this will not do for delivery of the policy: "where the articles are present an are capable of manual delivery, *this must be had*."

b. Furniture in the decedent's house (besides Pf's. bedroom) -- Pf. owns all that furniture to which the keys fit.

c. Furniture in Pf's. bedroom -- Pf. received this an *inter vivos* gift.

d. $300 from fire insurance claims on piano -- Pf. proved intent, but the court remands for determination of valid delivery.

ii) N.b., gifts *causa mortis*: gifting requirements are strictly enforced, and there are special restrictions on such gifts as well.

a. If a donor who makes a gift *causa mortis* but then lives, the gift is revoked.

b. If the donee is already in possession, there must be redelivery for a gift *causa mortis* (not so with *inter vivos* gifts).

(d) *Gruen v. Gruen* (NY 1986, Klimt painting): hashing out intent, delivery, and acceptance particulars.

i) Df's. arguments

a. No delivery: the court says delivery "must be tailored to suit the circumstances of the case"; here, the donor wanted only to give a remainder, and so shouldn't be required to actually deliver (instruments will suffice). Plus, regardless, the delivery requirement need not be satisfied where it would impose practical burdens on the parties -- it may still be good evidence of a gift, but it isn't required.

b. No intent: the court considers the evidence, which goes both ways, and says most of the evidence indicates there was intent.

c. Gift was testamentary: the court says no, the donor's intent was to give a remainder *inter vivos* (and the court rejects the idea that this will create a loophole allowing testamentary gifts *inter vivos*).

d. No acceptance: as with intent, the court says most of the evidence suggests there was.

III. Interests

A. Estates

1. Historical development

a) Terms and concepts

(1) Feudalism

(a) Seisin: (historically) possession -- it was not heritable and not alienable. Tenants in demesne had seisin -- possessory use of the land -- whereas the lord above him had the rights to all services. Villiens did not hold land by seisin.

(b) Heritability: the ability to inhere land. N.b., the inheritors could be set in stone (and if so there would be no devisability).

(c) Devisability: the ability to determine inheritors by will.

(d) Assize: a court hearing.

i) Grand assize: a sworn panel that settled disputes about real property.

ii) Petite assize: a jury that settled questions of possession.

iii) Assize of novel disseisin: a speedy remedy for dispossessed free tenants, provided for in acts passed in 1166 by Henry II.

iv) Assize of mort d'ancestor: a remedy for heirs dispossessed by the lord -- this required lord to get a judgment before dispossessing tenants.

(e) Services: owed to the king by each tenant in chief; e.g., furnishing 40 knights. These were fixed obligations and so did not keep pace with inflation.

i) Tenure: a right to hold lands underneath a superior lord, secured be providing services.

a. Free tenures: those hold by free men -- vassals, not peasants.

1) Military tenure: e.g., knight service, grand segeanty.

2) Socage (economic tenure): e.g., ploughing, repairs, a red rose, "a leap, a puff, and a fart." These symbols provided evidence of the tenurial relationship.

3) Religious tenure: e.g., singing mass on Friday, praying for the lord's soul (frankalmoign).

b. Unfree tenure (villeinage): serfs -- entirely subject to a lord but free in relation to everybody else. Villeins did not hold land by seisin.

(f) Incidents: liabilities of the tenant to the lord (besides services). Unlike the services, the incidents could be changed with the times, and so kept pace with inflation, and led eventually to alienability.

i) Forfeiture: a tenant who breached his oath of loyalty to the lord forfeited to the lord. N.b., if a tenant was guilty of treason, the kind could seize and keep that tenant's land (even if a mesne lord held it).

ii) Homage and fealty: a solemn ceremony where a military tenant would swear loyalty to his lord.

iii) Aids: lords could demand financial assistance from his tenants. N.b., the

Magna Carta (1215) limited aids to ransom for the lord, knighting of the lord's eldest son, and marriage of the lord's eldest daughter.

iv) Incidents at death of the tenant

a. Wardship and marriage (in military tenures only): the lord became the guardian of any of the tenant's heirs under 21, until they reached 21. The lord could sell any such heir in marriage.

b. Relief: heirs of the tenant had to pay the lord an appropriate sum to come into their inheritance. N.b., because of the low life expectancy during this time, relief was pretty lucrative for many lords.

c. Escheat: the land of a tenant who died without heirs would return to the lord, as would the land of a tenant convicted of a felony.

v) Transferring incidents

a. Substitution: tenants in demesne could substitute a new tenant for himself. This required the lord's consent and homage from the new tenant.

b. Subinfeudation: tenants in demesne could acquire a tenant who rendered services to him -- "adding another rung." This did not require the lord's permission.

1) E.g., L tenures T by knight service. T subinfeudates to the church in frankalmoign. T still owes knight service to L, but when T dies (or L forfeits him), L could not claim incidents from T -- only the frankalmoign owed T. (L can't forfeit T's tenants -- only T himself).

2) Mortmain statute: prohibited subinfeudation of the church. N.b., modern mortmain statutes make gifts *causa mortis* to charity void unless the heirs agree to the gift.

(g) Statute quia emptores (1290): prohibited subinfeudation in fee simple, but so permitted substitution without lords' consent. Substituted tenants would hold for the same services as the old tenant did (if part of the land was substituted, services were apportioned). This established free alienation of land.

(2) Inheritance

(a) Heirs: those entitled to inherit a person's property in the absence of a will (i.e., in case of intestacy). N.b., such inheritance is intestate succession.

i) Ancestors: parents, grandparents, &c. Parents usu. take as heirs if the decedent leaves no issue (but this is by statute, not at common law).

ii) Collaterals: all those related by blood that aren't ancestors or descendents (e.g., brothers, cousins, aunts). Statute will determine what collaterals get what when.

iii) Issue: lineal descendants.

a. *per stirpes*: property devolved in apportionment equally among the direct issue. N.b., this is the default. E.g., if O has 4 children, 1 of whom, A, has three children each and the other 3 with none, then A's children would share one-quarter of the devised property if A died before O.

b. *per capita*: property devolved in apportionment equally among all issue. E.g., if O has 4 children as above, A's children would each get one-sixth of the devised property.

(b) "To A and his heirs": "To A" are words of purchase; "and his heirs" are words of limitation.

(c) N.b., heirs have no present interest, whereas remaindermen do.

(d) N.b., the movement from status to contract (Henry Maine) -- through contract, people can negotiate for their status (instead of be born and

stuck with it).

i) The New Feudalism? Has security in status become more important than income?

a. Job security (e.g., a tenured professor has a property right in his job).

b. Pension funds.

c. Security in property afforded by marriage.

2. Taxonomy

Comment: Numerus clausus: a man cannot create a new kind of estate. Why? When property rights are created, third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them from present holders. Standardization of property rights reduces these measurement costs.

a) Fee simple

(1) N.b., made freely alienable in 1290 with the Statute Quia Emptores.

b) Fee tail

(1) Fee simple conditional: "to A and the heirs of his body" -- intended to prevent current owners from cutting of the inheritance rights of his issue, but the courts constructed it so that A, if issue were born to him, could transfer a fee simple.

(2) Statute de donis conditionalibus (1285): replaces the fee simple conditional with the fee tail, so that "to A and the heirs of his body" does what the dynasts wanted it to do. N.b., every fee tail has a reversion or a remainder after it. Also, the owner of a fee tail could alienate his possessory interest, but this interest ended at his death, and so did not affect the rights of his issue to succeed him at his death.

(a) E.g., "to my son A and the heirs of his body, and if A dies without issue, to my daughter B and her heirs": A gets a fee tail, and B gets a remainder in fee simple to become when and if the fee tail expires.

(3) Forfeiture of fee tail owners: forfeiture was *in personam*, so if a fee tail owner forfeited his interest, the king would take that owner's possessory interest, but on the owner's death his eldest son retook possession.

(4) Disentailment: making land more alienable again.

(a) Taltarum's case (1472): provided a method for tenants in tail to "bar the entail" -- the fee tail tenant brings a collusive lawsuit (a "common recovery") an obtain a court decree giving him a fee simple. N.b., the king could do this, too, with fee tails forfeited to him.

i) Escumbiem: land of equal value.

ii) Warranty in vacuo:

iii) Vouch:

(b) Later, in the 1800s, the common recovery was abolished and fee tail tenants could disentail by conveying a fee simple in deed to another.

(5) Modern American law: fees tail can be created in DE, ME, MA, and RI only -- and tenants in tail in those states can convey fees simple.

(a) N.b., fee tail devises today: statutes in each state now specify what fee tail language now creates.

i) Majority: "to A and the heirs of his body" creates a fee simple in A, but a gift to B during A's lifetime will give a fee simple to B iff A has no living issue at his death. If A does have living issue at his death, B's interest fails.

ii) Minority: "to A and the heirs of his body" creates a fee simple in A, and any gift on A's death without issue is void. I.e., the statute automatically disentails and destroys A's issue's interests, since A could have done that

had he wanted to.

c) Life estate

(1) *par autre vie*: if A conveys his life estate to B, B has a life estate *par autre vie* -- it is measured by A's life (not B's). N.b., if B dies while A's still alive, the property passes to B's heirs or devisees until A dies.

(2) Legal life estates: "to A for life, remainder to B and his heirs."

(a) N.b., each life estate is followed by some future interest: either a reversion in the grantor or a remainder.

(b) Valuation of life estates and remainders

i) Mortality tables.

ii) Interest rates.

iii) Treasury department tables.

(3) Equitable life estates (trusts): the trustee holds legal title, but owes a fiduciary duty to the beneficiaries.

(4) *White v. Brown* (TN 1977, "home to live and not to be sold"): restraint on alienation in a will was not enough to overcome the presumption of a fee simple devise -- so a fee simple is devised but the restraint is void as against public policy, and inconsistent with the nature of the estate.

(a) Will construction: court must determine the testator's intent when the written instrument is ambiguous under the law.

i) Pf. devisee wants a fee simple, Dfs. heirs want Pf. to have a life estate (the restraint on a fee simple evinced an intent to give only a life estate).

ii) Canons of will construction

a. If there's evidence that the testator knew how to some one thing (e.g., convey a fee simple) and then tries to do something else with those words, the testator did not intend to do that one thing (n.b., the majority rejects this canon itc.).

b. Wills should be construed so as to give effect to all words in the instrument.

c. There can be no restrictions on a fee simple -- that is repugnant to the idea of a fee simple.

d. By statute, ambiguities should be construed in favor of fees simple.

e. Wills should be construed so as to avoid intestacy on any part of the testator's estate.

iii) N.b., life estates contribute to deterioration: the life estate holder has little incentive to maintain the property or improve it, and there is no mortgage money available anyhow.

iv) N.b., here the testator intended to give Pf. a nice place to live -- shouldn't we consider that the home is no longer a nice place to live in construing the will (isn't this an easier route to the court's outcome itc.)?

(b) DISSENT: the will isn't ambiguous -- the testator did not want the house sold, and she knew how to give a fee simple -- and a life estate is the only devise consistent with the evident intent.

(5) *Baker v. Weedon* (MS 1972, constructive trust): in determining if a sale of land affected by future interests is proper, consider the best interests of all parties.

(a) N.b., the testator could have devised a fee simple, but maybe he doesn't want the estate to go to collateral heirs.

(b) Waste: property is not being put to its best economic use.

i) The life tenant is getting little income from the land, but the property is worth

a lot and is appreciating rapidly. The heirs don't want a sale so that they can protect their potential to beat the market.

a. Pf's. equities: her service and companionship of the testator.

b. Df's. equities: their expectation in beating the market.

ii) The court can order the sale of land affected by future interests where it finds waste: here the court defines waste generously -- what is in the best interests of all the parties, life tenant(s) and remaindermen.

a. Itc., court orders sale unless life tenant and remaindermen can come to some agreement to protect the life tenant's interests (hypothecation: pledge of proprety as security for a debt, without delivery of title).

d) Defeasible estates

(1) Taxonomy

(a) Fee simple determinable: a fee simple that will end automatically when a stated event happens. Each FSD has an accompanying future interests, usu. a possibility of reverter in the transferor and his heirs, which is not salable. (a/k/a "fee simple on a special limitation.")

i) E.g., O conveys Blackacre "to the School Board, its successors and assigns, so long as the premises are used for school purposes." The fee simple could continue forever, but it will determine, reverting back to O.

ii) N.b., magic words for FSDs: "so long as the premises are used for school purposes," "during the continuance of said school," "until the Board no longer uses the land for a school," and words that indicate a durational aspect. But, words merely indicating a motive will not do -- e.g., "to the School Board for school purposes" gives a fee simple absolute.

(b) Fee simple subject to condition subsequent: a fee simple that may be divested by the transferor when and if a stated event or condition occurs. The divestment is not automatic (as with a fee simple determinable). Each FSSCS has an accompanying right of entry (a/k/a power of termination).

i) E.g., O conveys Blackacre "to the School Board, its successors and assigns, but if the premises are not used for school purposes, the grantor has a right to re-enter and retake the premises."

ii) N.b., magic words for FSSCSs: a fee simple must be transferred, then followed by language permitting divestment upon a condition subsequent -- "but if . . .," "provided, however, that when the premises . . .," "on condition that if the premises . . ."

a. N.b., "to A and his heirs provided always, and upon this condition, that the aforesaid premises shall not be used for a tavern" is ambiguous because it does not explicitly indicate a right of entry -- it could create an FSSCS or impose a covenant. An FSSCS is enforced by forfeiture upon reentry, whereas a covenant is enforced by injunction or damages.

(c) Defeasible life estate: n.b., Restatement 2d of Property, § 6.1: restraints against marriage are construed as narrowly as possible consistent with the language -- it doesn't necessarily restrain against cohabitation without marriage."

(2) *Mahrenholz v. County Board of School Trustees* (IL 1981, interpreting defeasible fee grants): construing between FSD and FSSCS -- the difference is "solely a matter of judicial interpretation of the words of the grant."

(a) Conveyance language: "this land to be used for school purposes only; otherwise to revert to Grantors herein."

(b) Timeline

i) 1973: classes stopped, building used as a storage factility.

ii) May 1977: son conveys to Pf.

iii) Sep. 6, 1977: son releases his interests to Df. school board.

iv) Sep. 7, 1977: the May conveyance is recorded.

v) N.b., if the son had a reversionary interest, he may have had a possessory interest in May 1977, which he could convey. But if he had a right of entry, he would not have had a conveyable interest then, since he had not taken steps to reenter.

(3) *Mounain Brow Lodge v. Toscano* (CA 1968, alienability and use restrictions): alienability restrictions are void, but use restrictions may be upheld, particularly in grants to charities.

(a) Conveyance language: "property is restricted for the use and benefit of the Pf.; and if the property fails to be used by the Pf. or in the event of sale or transfer by the Pf., the property is to revert to the first parties herein."

i) "in the event of sale or transfer by the Pf.": this language is void as against public policy -- it is a restriction on the alienability of land. But this clause is severable from the grant.

ii) "for the use . . . of Pf.": "use" is the right of the holder to enjoy the property according to his own necessities. The court says this clause creates a condition subsequent, and is enforceable even though it may completely impede alienation (the court notes that, for instance, such restrictions are upheld when land is conveyed to a city for city purposes only).

a. Intent: the grantor intended to convey on the condition that Pf. lodge use it for the purposes for which the lodge was formed.

iii) DISSENT: the use restriction prevents alienability itc. just as effectively as the severed clause would have. Also, if the Pf. lodge disbands in 100 years, or more, as is likely, the property would then revert to hundreds of heirs "scattered to the four corners of the earth" -- an administrative nightmare.

iv) N.b., courts generally uphold use restrictions in fees granted to charities, because the restrictions (and defeasible fees in general) encourage gifts to charity. Otherwise, however, the courts rarely uphold use restrictions.

(4) *Ink v. City of Canton* (OH 1965, valuation of defeasible fees in eminent domain): Df. city must use condemnation monies for park purposes.

(a) Granting language: "for the use and purpose of a public park, but for no other use or purpose whatsoever."

(b) Possible holdings

i) Majority: upon condemnation of a determinable fee, there is no reversion, and the grantee takes the whole amount paid. N.b., this may give the grantee a windfall, esp. when the grantee paid nothing.

ii) Mintority: upon condemnation of a determinable fee, property reverts to the grantor if the condemnation prevents the specified use (esp. where the grantee paid nothing).

iii) Restatement § 53: grantee gets the money unless there is evidence that the property would have reverted soon after the taking, not accounting for the taking.

iv) The court's decision: grantee must hold subject to its fiduciary obligations any and all interests in the property, as well as any money it receives in the eminent domain proceedings or in damages to the parts not taken. But, Pf's. get the difference between the value paid to the grantee for general use of the land and the specific use granted. (But grantee gets the money free and clear paid for any structures it built that are taken or damaged.)

(c) N.b., valuation of determinable fees

i) Fee simple determinable: value of the land for the granted use less the possibility of cessation of that use.

ii) Possibility of reverter: full market value of the land less the possibility that the reverter will never become possessory.

e) Leasehold estates

(1) Taxonomy

(a) Term of years: for a fixed period, after which the leasehold expires -- no notice is required.

i) Death of either landlord or tenant has no effect on the duration.

(b) Periodic tenancy: usu. month-to-month or year-to-year. Timely notice is required for termination.

i) Timely notice

a. Year-to-year tenancies require six-month notice (under common law).

b. Less than one-year tenancies requires notice equal to the length of the term or six months, whichever is smaller.

c. N.b., the leaseholder must end his tenancy at the end of period (i.e., not in the middle of one).

ii) Death of either landlord or tenant has no effect on the duration.

(c) Tenancy at will

i) A tenancy at will is terminable by either party (unlike terms of years and periodic tenancies), and terminates automatically under certain situations.

a. Death of either landlord or tenant.

b. Conveyance by the landlord of the underlying property.

c. Assignment by the tenant of his tenancy.

(d) Tenancy at sufferance: arises when a tenant holds over after termination of his tenancy.

i) Usu., L may either evict T (with damages) or consent to a new tenancy (expressly or impliedly). Statutes may require double rent from holdovers in certain cases. Leases imposed on holdovers are on the same terms as the prior lease.

a. N.b., for holdovers on a tenancy at will, the court may adjust the rent to the market.

ii) *Crechale & Polles, Inc. v. Smith* (MS 1974): implied consent to a new tenancy where L fails to evict and accepts rent past the termination.

a. By rejecting T's proposal for a new month-to-month tenancy, L "elected his remedy" -- eviction. But, when L then later accepted a check for a month's rent from T, he has impliedly consented to the creation of a new, month-to-month tenancy.

b. N.b., court could have interpreted L's response as "no new month-to-month tenancy: you can either get out, or stay and renew for the entire 5-yr. term." However, the court here interprets in favor of T, it seems.

(2) *Garner v. Gerrish* (NY 1984): "tenancies at will determinable."

(a) Lease language: tenancy shall continue from May 1, T can terminate at a date of his own choice.

(b) Lord Coke's rule: a lease at the will of one party must also be at the will of the other party, too.

i) But this rule is, for one thing, based on the livery of seisin requirement, it should be obsolete. One court has said such leases shall create a determinable life estate in T, terminable by T at will or at his death. Itc., the court says, holding otherwise would be repugnant to he parties' intentions.

ii) N.b., if T has a freehold here, the L does not owe T any landlord-tenant obligations.

B. Future interests

1. Taxonomy

a) Transferor

(1) Reversion: either certain to become possessory or not. Reversionary interests are conveyable, salable, devisable, and descendible. N.b., there are no "contingent reversions" even though it may seem appropriate in some cases -- these are reversions "not certain to become possessory."

(a) E.g., O conveys "to A for life." O has a reversion in fee simple, certain to become possessory.

(b) E.g., O conveys "to A for life, then to B and her heirs if B survives A." O has a reversion in fee simple, not certain to become possessory -- if B survives A, O's reversion is divested on A's death, and so will never become possessory; B and her heirs take.

(2) Possibility of reverter:

(3) Right of reentry (a/k/a power of termination):

b) Transferee

(1) Vested remainder: the law prefers vested remainders -- if the language is ambiguous as between a vested or a contingent remainder, the courts will construe in favor of a vested remainder.

(a) Absolute

(b) Subject to complete divestment

(c) Subject to partial divestment

(d) O "to A for life, then to B and her heirs, but if B does not survive A to C and his heirs." B has a vested remainder, subject to complete divestment by C (C will divest B if B dies before A). C has a divesting executory interest (shifting).

(2) Contingent remainder: a remainder is contingent if a preceding event must occur for vestment. Contingent remainders are not assignable.

(a) Remaindermen haven't been determined

i) O "to A for life, then to the heirs of B." B is alive at conveyance. This remainder is contingent -- B has only heirs apparent until he dies. N.b., the remainder in fee simple is said to be *in nubibus* or *in gremio legis* (i.e., in abeyance).

(b) Subject to a condition

i) O "to A for life, then to B and her heirs if B survives A." This remainder is contingent -- B will take only if B survives A.

ii) O "to A for life, then to B and her heirs if B survives A, and if B does not survive A to C and his heirs." B has a contingent remainder -- B will take iff she survives A. C has a contingent remainder also -- C will take iff B does not survive A. These are alternative contingent remainders.

(3) Executory interest

(a) Shifting: divests or cuts short a transferee's interest and vests another transferee.

i) E.g., O "to A and his heirs, but if A dies without issue surviving him, to B and her heirs." A takes a fee simple subject to divestment. B takes a (shifting) executory interest.

ii) E.g., O "to A for life, then to B and her heirs, but if B dies under the age of

21, to C and her heirs." B, 15 at conveyance, takes a vested remainder in fee simple subject to divestment. C takes a shifting executory interest.

iii) E.g., O "to the School Board, its successors and assigns, but if the premises are not used for school purposes during the next 20 years, to B and her heirs." The Board takes a fee simple subject to automatic divestment. B takes a shifting executory interest.

iv) E.g., O "to the Library Board so long as the premises are used for library purposes, then to the Children's hospital." The Board has a determinable fee simple. The hospital has a shifting executory interest.

(b) Springing: divests the transferor and vests a transferee.

(c) The Statute of Uses (1536): converted equitable titles to legal titles.

i) Prior to the statute: no future interest could be created that could cut short a freehold; and no future interest could be created that could spring up in the future.

a. E.g., prior to the statute: O conveys Whiteacre "to my eldest son A and his heirs, but if A inherits Blackacre, then Whiteacre goes to my second son B and his heirs." A takes a fee simple absolute, B takes nothing. O can't shift title prior to the Statute of Uses.

b. E.g., prior to the statute: O "to A and her heirs when A marries B." A takes nothing, O has a fee simple. O can't create a springing interest.

c. E.g., prior to the statute: O enfeoffs "X and his heirs to hold to the use of A and his heirs, but if A inherits the family manor, then to the use of O's second son B and his heirs." X takes a fee simple absolute -- courts at law would not enforce the use on X, but courts at equity (the chancery courts) would enforce and X would have to hold seisin for the benefit of the *cestui que use*.

ii) After the statute: uses became legal titles, and *cestui que use*'s the world over took the estates that were held for their use.

a. E.g., after the statute: O conveys "to A and his heirs, but if B returns from Rome, then to B and his heirs." The uses are immediately executed, so A takes a fee simple subject to B's shifting executory interest in fee simple.

b. E.g., after the statute: O conveys "to A and her heirs when A marries B." The use is immediately executed. O retains a fee simple subject to A's springing executory interest in fee simple.

(4) Examples

(a) O "to A for life, then to A's children and their heirs."

i) A has one child B at conveyance. This remainder is vested in B subject to open (to let in later born children -- B's share will not be known until A dies).

ii) A has no children at conveyance. This remainder is contingent -- no taker is yet ascertained.

c) Trusts

(1) Terms and concepts

(a) Settlor: i.e., the grantor.

(b) Corpus or res: the principal of a trust.

(c) Inter vivos trust: trust established during the life of the grantor.

(d) Testamentary trust: trust established in a devise.

(e) Revocable trust: the grantor reserves the right to terminate the trust.

(f) Irrevocable trust: the grantor does not reserve any right to terminate.

(g) Mortmain statutes: prohibits gifts to charity within some specified number of days before death, unless the heirs approve it.

(h) Spendthrift trust: a trust that prevents the beneficiary's interest from assigning, so that creditors can't reach it.

(i) Standard estate planning measures

i) Create an inter vivos revocable trust, partially or fully funded.

a. If the trust is partially trusted, a will is drafted to "pour over" additional property into the fund at the grantor's death.

b. N.b., inter vivos trusts are usually created with the grantor as as both beneficiary and trustee, in order to prevent probate.

(2) E.g., T devises a sum in trust "for A for life, then to B if B survives A, and if B does not survive A, then to such one or more of B's spouse and B's issue as B appoints by will." B has a contingent remainder but with a special power of appointment (to a class limited to his spouse and issue). O has a reversion which will only become possessory if B dies before A and doesn't appoint to B's issue or spouse.

(3) *Swanson v. Swanson* (GA 1999, Bennie): vested remainders are favored over contingent remainders in all cases of doubt.

(a) Granting language: corpus disposed of by grantor's wife, else to each of nine children equally. If any child is dead when the wife dies, the child's share goes to that child's children*, per stirpes*.

i) Each child had a vested remainder, subject to divestment per conditions subsequent -- disposition by the wife, or a child dying before the wife but leaving children. So Bennie's remainder was vested and so passed to his wife per Bennie's will since neither of the conditions subsequent occurred.

2. Marketability

a) **Destructibility of contingent remainders** (hist.): requires that a remainder in land vest at or before the termination of the preceding freehold, otherwise, that interest is destroyed and the next vested estate is seised. This rule has been abolished in most states.

(1) E.g., O "to A for life, then to B and her heirs if B reaches 21." If B is under 21 at A's death, B's remainder is destroyed, and so O takes.

(2) Merger: lesser estates merge into larger estates if they fall into the same hands.

(a) E.g., O "to A for life, then to B and her heirs if B survives A." If A conveys to O, the life estate merges with the reversion, and B's contingent remainder is destroyed.

(b) N.b., but there is no merger if the two estates are created simultaneously in the same person (but they will merge if that person conveys both to another).

(3) N.b., this does not destroy executory interests -- but per *Purefoy v. Rogers*, ambiguities were to be construed in favor of contingent remainders, in order to give the rule the most extensive reach possible.

b) **Rule in Shelley's case**: if one instrument creates a life estate in land in A and purports to create a remainder in persons described as A's heirs (or the heirs of A's body) and the life estate and remainder are both legal or both equitable, the the remainder becomes a remainder in fee simple (or fee tail) in A. (So apply merger.) This rule has been abolished in most states.

(1) E.g., O "to A for life, then to A's heirs." The rule gives A a vested remainder in fee simple, which merges with A's life estate and so A has a fee simple, in possession.

(2) N.b., the rule does not apply to executory interests. Also, it applies

regardless of the grantor's intent.

c) Doctrine of worthier title: in an *inter vivos* conveyance by grantor with a limitation over to the grantor's own heirs (either in remainder or by executory interest), the no future interest is created in the heirs -- the grantor retains a reversion. This doctrine has been abolished in several states.

(1) E.g., O "to A for life, then to O's heirs." O's heirs' remainder is void -- O holds a reversion.

(2) N.b., Cardozo in NY changed the rule to one of construction and extended it to personal property.

d) Rule against perpetuities: strikes down contingent interests that might vest too remotely. If you can't prove that a contingent interest will vest in no more than 21 years after the death of some life in being at the creation of the interest, that interest is void and must be severed.

(1) N.b., lives in being must be alive at the testator's death for devises or at the time of transfer for *inter vivos* conveyances.

(2) Reversionary interests exempt

(a) E.g., O "to the School so long as used for a school." School has a fee simple determinable, O has a reversion. And e.g., O "to the School, but if it ceases to be used for a shool, O has a right to re-enter." School has fee simple subject to a condition subsequent, O has a right of entry.

(b) But, e.g., O "to the School so long as used for a school, then to A and her heirs." This violates the rule -- it could be more than 21 years from A's death that the interest will vest. O has a right of reverter.

(3) Saving clause for trusts

(a) E.g., T wants a trust paying income to A for life, then income to A's children for their lives, then corpus to A's grandchildren. "This trust shall terminate, if not previously terminated, 21 years after the death of the survivor of A and A's issue living at T's death. In such case, the corpus and undistributed income is distributed to A's issue then living, else if no living issue of A to the Red Cross."

i) Or, e.g., "This trust will terminate 21 years after the death of all issue of Joe Kennedy living at T's death." This creates a (probably) very long-term trust.

(4) Examples

(a) E.g., O transfers a sum in trust "for A for life, then to A's first child to reach 21." A's first child is certain to be 21 within 21 years of A's death (plus a pregnancy) -- so A's contingent interest is valid.

(b) E.g., O transfers in trust "for A for life, then to A's first child to reach 25." Unless A has a child 25 or older at O's death, there is no validating life.

(c) E.g., T "to my grandchildren who reach 21." T leaves two children and three grandchildren under 21. The interest will vest or fail within 21 years of T's children's death.

(d) E.g., O "to A for life, then to A's children for their lives, then to B." All remainders are vested in interest upon creation. The rule doesn't apply.

(5) *Jee v. Audley* (Eng. 1787): a person of any age can have a child.

(a) Granting language: T in trust for M for life, then to M's issue, but if M dies without issue to the daughters then living of J.

i) J's daughters would have a shifting executory interest, divesting of M's fee simple when and if M's bloodline runs out -- but if J has an afterborn daughter, that daughter could live for more than 21 years after any other

lives in being had died, so the interests would not vest or fail within the time limit (n.b., that if a gift over to any member of a class fails, the gift fails for the entire class).

C. Co-ownership Interests

1. Taxonomy

a) Tenancy in common

(1) Each tenant has a separate but undivided interest in the property, which is devisable, partitionable, and conveyable *inter vivos*.

b) Joint tenancy

(1) Each tenant has a separate but undivided interest in the property, which is partitionable but not devisable (but, n.b., a joint tenant can convey his interest *inter vivos* -- the transferee becomes a tenant in common).

(a) E.g., B and C are joint tenants. If B sells his interest to D, D gets a tenancy in common, whereas C remains a joint tenant (unless there are no other join tenants, in which case C becomes a tenant in common with D).

(2) Survivorship: a joint tenant's interest expires at his death, and the joint tenancy continues free of the dead tenant's participation.

(3) *Riddle v. Harmon* (CA 1980): strawmen no longer required for destruction of a joint tenancy.

(a) By statute, strawmen were no longer required for creation of a joint tenancy in CA. E.g. A and B could convey their tenancy in common to themselves as a joint tenancy. The court extends this to conveyances by joint tenants that destroy the join tenancy. E.g., A a joint tenant, may convey to herself as a tenant in common.

i) N.b., this creates a possibility for fraud -- e.g., A might convey to herself as a tenant in common, keep the conveyance locked up, and then at B's death destroy it, so as to own a fee simple (otherwise, the conveyance is found at A's death and A's heirs take a tenancy in common). For this reason, such conveyances are required to be signed and delivered.

(4) *Harms v. Sprague* (IL 1984, mortgage of joint tenancy): mortgage is a lien, and a lien on a joint tenant's interest expires with the tenant's death.

(a) Timeline

i) J and W are joint tenants.

ii) J mortgages his interest to S.

iii) J dies, devising his interest to P.

(b) Deed and lien theories of mortgage

i) Under a deed (or title) theory, a mortgage of a joint tenancy interest severs the joint tenancy in that interest. Under a lien theory, the mortgage does not. Note that the lien interest is not therefore valueless to the mortgagee, since he can foreclose on the lien and then bring a partition action, destroying the joint tenancy and getting a tenancy in common.

a. N.b., a mortgage involves two instruments: a promissory note and a conveyance. Also, a "foreclosure" is an action where the mortgagee sues to foreclose the redemption period of the mortgage and recover his equitable interest.

b. N.b., that under the deed theory also, the time unity would be broken when the mortgagor satisfied his debt and reacquires title (but the joint tenancy would, it seems, already be severed by the conveyance in the mortgage).

(c) Survival of joint tenants' interests: a joint tenant's interest extinguishes at

the moment of his death -- this means that any liens on his interest expire at that time also.

i) N.b., this means S loses his security interest in J's joint tenancy -- however, it may still sue J's estate on the promissory note involved in the mortgage.

(5) The four unities: required for the creation of a joint tenancy.

(a) Time: each joint tenancy must be acquired or vest at the same time.

(b) Title: all join tenants must acquire by the same instrument or adverse possession. N.b., a joint tenancy can not be created through intestate succession or act of law.

(c) Interest: each joint tenant must be undivided and identical interests, measured by duration.

(d) Possession: each joint tenant must have a right to possession of the whole. N.b., after creation, one tenant can voluntarily give exclusive possession to other joint tenants.

c) Tenancy by the entirety

(1) Not devisable, both parties must convey jointly to convey *inter vivos*, and it can not be partitioned. Both tenants must be married.

d) Tenancies in community property states

(1) Community property states do not recognize tenancies by the entirety (see ICA § 32.9.12).

(2) Tenancies between married parties are like tenancies by the entirety, but a single party can devise his or her interest. However, that party can not convey, encumber, or seek a partition.)

(3) Married parties can convey to themselves in joint tenancy (or receive in joint tenancy). They may also convey to the community.

(4) The four unities are not applicable.

2. Mechanics

a) Partition

Comment: Partition is an action in equity.

(1) *Delfino v. Vealencis* (CT 1980): choosing a partition method.

(a) Partition in kind vs. partition by sale: Courts prefer to partition in kind. Partitions by sale should be made only when partitioning in kind is impractical or inequitable and the owners' interests would be better promoted by a partition by sale.

(b) Why does Vealencis get such a bad deal (just her tiny lot)?

i) Valuation of improvements

a. Difference in value between the property with and without the improvements.

b. Value of the income stream of the improvements (e.g., a business).

ii) Owelty: a compensatory payment after an exchange of unequally valued land.

iii) N.b., so Vealencis gets one acre worth $70M, whereas Delfino gets the rest worth $700M. But you must setoff Delfino's take with the value of Vealencis's improvements and the detriment her business may cause to Delfino.

b) Ouster and entry

(1) *Spiller v. Mackereth* (AL 1976): unless one cotenant physically bars a cotenant from entry, that cotenant is not liable to the other cotenants for rent. Here M's demand letter of vacation or one-half the rental value wasn't

enough because he wasn't demanding equal use and enjoyment of the premises.

(a) N.b., usu., cotenants are not fiduciaries to each other.

i) Familial cotenants may be.

ii) Cotenant who buys at a foreclosure sale may be required to hold a superior title for the benefit of all his contenants.

iii) Cotenants by adverse possession: the cotenant in possession might be required to hold the tenancy for the benefit of all cotenants.

c) Accounting and recovery

(1) Accounting: if one cotenant is reaping benefits from the co-owned property, his cotenants may bring an accounting proceeding (at equity) to force the cotenant to account for his benefits (based on actual receipts).

(a) If the acting cotenant has had costs that have benefited the other cotenants, he may collect these from each cotenant (up to their proportion) during an accounting. But, if the acting cotenant is in sole possession and realizes all the benefits paid for himself, he can't collect for such costs.

(b) But, n.b., a cotenant has no affirmative right to collect for improvements he's made, unless he had an agreement with his cotenants about it.

d) *Schwartzbaugh v. Sampson* (CA 1936, boxing arena): one cotenant's acts made without the authority or consent of his contenants isn't binding on those contenants, but are otherwise valid to the extent only of the acting cotenant's interest.

(1) Sampson doesn't have a leasehold claim on the entire fee simple. Instead, he has a leasehold claim the Mr. S's joint tenancy interest -- if Mr. S dies, the leasehold expires.

(a) As such, Mrs. S has a number of options.

i) She can call for an accounting and receive one-half of the rent.

ii) She can seek a paritition -- in fact, she could seek a partition of only the four acres where the arena is, and perhaps a partition only for the term of the lease (but this may sever the joint tenancy; nevertheless, such a partition by sale is possible, since leaseholds are salable).

iii) She can get ousted, and so get one-half of the reasonable rent (which may be better than an accounting, which would give her one-half of the actual rent).

IV. Tagalongs