

**PROPERTY - SECTION 2
PROFESSOR BEARD
FALL SEMESTER, 2013
T-W-Th 8:10-9:20, Room 103**

This Syllabus can be found through the Library E-Reserve System

SYLLABUS AND ASSIGNMENT LIST

- I. **REQUIRED CASEBOOK:** Dukeminier, Krier, Alexander, & Schill, *Property* (7th Ed.)

OPTIONAL SOURCES: There are numerous sources on reserve in the law library relative to estates in land and future interests.

NOTE: All page references in this Syllabus are to the Casebook.

YOU ARE RESPONSIBLE FOR:

1. All material assigned in this Syllabus.
2. All material raised in class whether by me OR by your PEERS.

II. **COURSE OBJECTIVES:**

- A. **Case Reading:** At the risk of stating the obvious, *the ability to carefully and critically read cases is an essential skill for any lawyer!* As you are aware, caselaw is one important source of the law, and is *the* source of the evolutionary development of the common law, or judge-made law. In developing the legal skill of case reading, we will:

1. Identify *relevant* facts from all the facts presented in the case;
2. Articulate the rule or rules the Court applies to the relevant facts; and
3. Explain the analysis of the Court in reaching its decision. In other words determine *why* the Court applied the rules it stated, as applicable to the facts it determined to be relevant, in order to reach its decision.
4. Critique the decision of the Court. In other words, discuss whether the reasoning employed by the Court actually explains in a clear and convincing manner why the Court decided as it did and reached the conclusion it did.

- B. **Application of Rules to Different Facts:** Once you have read a case and identified and articulated the rule or rules applied by the Court in the case, we will then learn to determine whether those rule(s) can be applied to similar, but not too similar, facts. We will do this by considering the Notes and problems in the

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casebook following a given case, and through hypothetical scenarios posed, usually by me, but often by your classmates, in class. In this regard, **the questions and suggestions found in this Syllabus with regard to each assignment provide guidance as you prepare for class.**

C. **Problem Solving:** *THE* principal role of lawyers is to *solve the problems* brought to them by their clients. Litigation is ALWAYS a last resort – it is time-consuming, very expensive, and usually leaves all parties dissatisfied – even the victor. In order to avoid litigation, or better yet, to properly plan the best way to resolve, or avoid legal problems, the lawyer MUST understand what rules will apply in the event the parties fail to reach some other arrangement. It is this “default position” that is the beginning of problem solving. In order to solve clients’ problems the lawyer must:

1. Be able to distill from an avalanche of facts, those facts that are relevant to the client’s *real legal* problem.
2. Based on those facts be able to identify and state the client’s legal problem clearly.
3. Finally, be able to explain a resolution of the client’s problem through a determination of the relevant legal rules, and application of those legal rules to the relevant facts that have been identified. Put another way, the lawyer must be able to provide a solution to the client’s legal problem through clear, cogent, analysis of the applicable law as applied to the relevant facts. **IT IS THIS FINAL STEP THAT YOU WILL BE EXPECTED TO SET FORTH TO ME ON THE FINAL EXAMINATION.** The examination will present you with a set of facts brought to you by a client and you will need to determine *which facts are relevant* to the problem and *which rules are applicable* and **THEN APPLY THE RULES TO THE FACTS TO REACH A REASONED CONCLUSION.**

It will take us the entire semester to work through these critical skill objectives. This is a *process*, an iterative process that requires practice and repetition. Through thorough preparation and participation in class you will become better and better at honing these skills. As you know, your legal career began the first day of Orientation. It is called the *practice of law* because you learn and refine your skills for the rest of your life – beginning NOW!

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III. **PROFESSIONALISM:**

- A. **Attendance Policy:** Regular attendance is necessary in this course. Under Law School and American Bar Association rules, excessive absence from class sessions may result in a reduction of your grade in this course or, in extreme cases, dismissal from this course with a grade of F. If your cumulative absences (for any reason) exceed four (4) class sessions, please see me to discuss the problem. Failure to so advise me will be considered a breach of professional standards and responsibility, and will be treated accordingly.

More importantly, I want you to come *to every class*. You should be prepared for class with notes that can aid you if you are called upon. With respect to every assignment, I have raised questions for you to consider as you read and study the material assigned for that day. These questions should provide you with a good starting point regarding what you can expect will be discussed in class. **However, even if you are not prepared I want you to come to class.** If you are not prepared for that day, simply advise me before class, and I will not call on you. This ability to take a “pass” is intended to encourage students to come to class even if there are times when you are not prepared. There is no penalty for taking advantage of this ability to “pass,” UNLESS THE PRIVILEGE IS ABUSED. In the event a student abuses the privilege, the privilege may be revoked, for that student.

- B. **Preparation and Participation (See II. Course Objectives Above):** This class will be conducted utilizing primarily a case method. The Casebook contains numerous problems which will be used as well. In addition, for each assignment I have provided questions for you to consider as you read and study the material assigned for that day. These questions will give you a good starting point regarding what you can expect will be discussed in class. So as you prepare for each class it is definitely recommended that you *write out answers* to those questions and problems presented in the syllabus and the casebook.

You are expected to have read, studied, and prepared the ENTIRE assignment for each class and to be prepared to participate in class discussion of the cases, questions **and problems** assigned. Some assignments will be discussed over more than a single class. You are to read the assignment AS A WHOLE and be prepared with respect to the ENTIRE assignment on the first class day for which the assignment is given. If an assignment extends over more than one day YOU ARE EXPECTED TO **REREAD AND RESTUDY** THE ASSIGNMENT for subsequent days' discussion.

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NOTE: We will NOT cover in class all the material assigned for a given class period, though you remain responsible for reading and understanding **all** the material. Much of the reading will be background information that you will be expected to read, study and learn on your own. *You are welcomed and encouraged* to raise in class, or discuss with me outside of class, questions on any assigned material.

NOTE: I have been known to fall behind the Syllabus, although I intend to do my best to remain on track with the assignments as listed. However, since the class must understand the material before we move on, there is a real possibility that we will not keep up with the Syllabus. In all events, *we will go in the order set forth in the Syllabus* – so if we fall behind the syllabus you CAN judge our pace and keep ahead by at least one day in your reading.

Class participation may affect your grade - See IV.B. Grades and Class Participation, below. While I plan to call on every student at some point in the semester, I also will call on volunteers. I encourage all of you to participate regularly, and to raise your hand. Only the LACK of class participation can negatively affect your grade. Repeated failure to participate or be prepared may result in a downward adjustment of your final grade.

- C. **Office Hours:** My office is Room 128, which is on the 1st floor of the law school. I do not post office hours because I am in the building and available to meet with you between 6:30 am and 5:00 pm almost everyday (excepting, of course, times when I am in class or in meetings). **I encourage you to come by any time you like to discuss class, jobs, family or anything else that is on your mind. I like to talk with students, and try to keep my door “unlatched,” though the door is usually not open wide because of hall noise.** You may also call me at 885-6747 or email me at beardb@uidaho.edu.
- D. **POLICY REGARDING LAPTOP USE IN CLASS:** Unless you have a documented disability accommodation or have otherwise received my *express* permission, I will not permit the use of laptops or any other electronic device in class. I have chosen to implement this **“No Laptops Policy”** for the following reasons:
1. Laptops in class are a significant distraction that detracts from student participation and engagement in class discussion. The very process of class discussion and engagement is critical to learning the skills needed to

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- be a good lawyer.
2. Prohibiting laptop use also strengthens the review process following class, as students must consider the material and class discussion in order to incorporate the material into outlines for future study.
 3. The post-class review will also help students memorize the applicable rules we have discussed. This memorization aspect will be essential come exam time because my exam will be closed book. See IV. B. below.

IV. ACADEMIC MATTERS

A. Subject Matter and Additional Objectives of this Course:

Subject Matter: This course introduces you to the conceptual framework of the anglo-american property system. We will discuss the meaning of “possession,” “ownership,” “title,” and related concepts. We will discuss several methods by which one might “acquire” property. We will learn how property can be divided among several owners, the rights and duties that are created in the different “owners,” how those rights interrelate, and why those rights and duties have been created or developed. (We will also learn why I put so many terms in quotation marks.) In all of this we will discuss the pros and cons of the rules and policies we encounter. So **think critically** and come prepared to advocate and defend your positions, and to be open to being convinced by your classmates of their positions.

Additional Objectives (to II. Course Objectives discussed above): In addition to the principal objectives outlined above I want you to (1) practice discussing the law spontaneously in a group setting; (2) through some group problem solving exercises, learn how to discuss and collaborate with your student colleagues in a smaller setting; and (3) develop a professional (including an ethical) perspective on the material.

- B. Grades and Class Participation: **Final Examination:**** The main component of your grade will be a “three-hour” **closed-book** final exam which is currently scheduled for Friday, December 13 at 1 pm. While the exam is a “three hour exam,” (that is, an exam designed to be completed in three hours) you will be given four hours in which to complete the exam. You may bring into, and use during, the exam **ONLY** pen and paper, or your laptop computer with ExamSoft test software properly downloaded. The final exam usually has a maximum of 100-120 points.

Midterm Examination: *I reserve the option* to give you a midterm examination at the end of the material on Estates in Land and Future Interests (in the 7th or 8th week of class). The midterm will be given and completed during a regular class

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period. More information on any possible midterm will be forthcoming during the semester.

Exercises and Projects: I may have you do one or more other individual or group projects. I currently anticipate that you will have at least one group exercise. The total points available for Exercises and Projects will not exceed 35 points.

The Reading Exercise during Orientation counts for 5 “extra credit points” toward your final grade. I will tally all points other than the Reading Exercise, establish the grade distribution, and then add back in the reading assignment points and adjust any totals that are raised to the next grade level.

Assignments (Case Briefs): The Syllabus below lists the assignments for each class day. **I expect that you will write out a case brief for each *principal* case assigned.** For the first day of class your assignment includes reading this Syllabus carefully. The case briefs are your tools and are to be prepared by you in the manner best designed to aid you 1) in understanding the cases, 2) in answering in class; 3) in participating in classroom discussions; and 4) in preparing your outlines for final exams. **One day each week** I will have you hand in your case brief, at the end of class when you will no longer need it for class discussion. Since you will not be allowed to use laptops in class you will have to bring in printed hard copies or handwritten copies of your case brief for use in class. When I announce at the end of class that you are to hand in your briefs you will put your name on the case brief if you have not done so already and hand the case brief in at the front of class. I will not grade your case brief – but will assure that you have made a reasonable effort to prepare a case brief that will be a real aid in class. **I will ask you to hand in one case brief each week**, but will not tell you in advance what case brief or what day I will ask. There are 14 weeks of class. The case brief assignments will count for 12 points toward your final grade. That is one point per week and two weeks of grace. Failure to hand in a reasonable case brief means no point for that week. I will hand back your case brief by the end of that week once I have recorded who submitted a case brief.

Class Participation: I reserve the right to adjust your final grade upward (but not downward) by one-third of a letter grade for class participation (e.g., from “B” to “B+”). I will *not* lower any grades based on the *quality* of class participation (although repeated failure to be prepared may be taken into account, and may result in a possible lowering of your final grade). I may raise a grade when, in my judgment, a grade received based upon the exercises, projects, and final examination does not accurately reflect the understanding of the material demonstrated by that student through class participation. In short, **CLASS PARTICIPATION CANNOT HURT YOU AND MAY HELP YOU.** For purposes of upward grade adjustments, “Class participation” relates to the **quality**

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of your contributions to class discussion (**including your willingness to ask what may seem to you to be “stupid” or “obvious” questions**) and, **equally important**, your willingness to give time and respectful attention to the questions and comments of your classmates (including your willingness to listen carefully to what may seem to you to be “stupid” or “obvious” questions). The importance of your ability to listen carefully, and respond meaningfully and **respectfully** to the questions and comments of your classmates reflects upon your ability to act professionally, and cannot be emphasized enough.

C. Disability Support Services Reasonable Accommodations Statement:

Reasonable accommodations are available for students who have documented temporary or permanent disabilities. Students should meet with Disability Support Services (DSS) **by the end of the first week of class** to assess if any accommodations are needed for courses and/or examinations. All accommodation requests are then submitted by DSS to Dean Dodge for final approval. DSS serves as the sole evaluator of medical documentation and determines reasonable accommodations on a per semester basis. The College of Law does not have the authority to evaluate or grant disability accommodations without DSS first submitting a recommendation. You may contact DSS by:

- Visiting the Idaho Commons Building, Room 306
- Calling 208-885-6307
- Emailing dss@uidaho.edu

It is ultimately the student’s responsibility to seek a disability accommodation, and until an accommodation is approved by DSS and Dean Dodge, **no student will be entitled to receive any accommodations**. To learn more about DSS, visit its website at <http://www.uidaho.edu/studentaffairs/taap/dss>. Please review the College of Law Catalog and Student Handbook for more information on the disability accommodation process.

- D. **Missed Classes:** Currently I do not anticipate that we will miss any scheduled classes this semester. However, I may cancel classes to allow you to attend/participate in special events in the law school. In the event that I do cancel any classes, I will give as much notice as I can, and **WE WILL MAKE UP ANY MISSED CLASSES**.

V. ASSIGNMENT LIST

The following is the list of assignments. Any changes in the order or content of the following

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list of assignments will be announced in class in advance.

To the left of the assignment I have noted the class day and calendar date on which the material is scheduled to be discussed.

The Assignment sets forth the pages to be covered in class. Note that we are not covering all the material in the book. You are not responsible for, and we will not cover, material on pages that are not assigned. So pay close attention to the pages assigned. You are to brief each *principal* case that is in the materials assigned for that particular day. It is wise to jot down notes and questions you may have on the shorter note cases, and the notes in the casebook, but that is not required. You are *required* to brief each *principal* case. See IV.B above regarding grades and assignments.

Study guide questions are provided to help you focus your reading as you prepare. The study guide questions will give you insight into what I – your professor – think is important about that particular material.

Finally, Objectives for each Class are listed at the end of the Day’s Assignment. These are the “take-aways” I want you to have at the end of class.

A. THE FUNDAMENTALS

**Day 1&2
8-27/28** **The Syllabus – First you MUST read this Syllabus completely and carefully through page 8 (at least skim the balance) for the first day of class. Come prepared with questions! At the end of the first day you will hand in three (3) questions you have about the Syllabus. ALWAYS BRING PAPER AND PEN/PENCIL TO CLASS!**

- **Preface from the First Edition** - P. xxxi; **Perspectives (primarily economic) on Property** - P. 39-55. This material makes reference to preceding material on the “rule of capture”. If you do not fully comprehend those references, fear not, we will go back to those topics in greater detail. This is largely background reading to give you a sense of some of the conceptual underpinnings of property. In the course of your reading (today and during the semester) keep in mind the following broad questions - **What IS property?** What is “wrong” with Communal Property? What is “wrong” with Private Property? Is it fair to say that "Property is what the state says it is?"
- **Acquisition by Discovery** - P. 1-18. Would the Piankeshaw agree that the title received from them was inferior to that received from the US government? Who, in every "normal" sense, was "first in time?" – the plaintiff or the defendant. Do you think Justice Marshall believed in the “justice” of these rules? If not, why did he apply the rules he did? Is this a question of the “competence” of the Court to affect the rules it applies? *Whose* rules are being applied in this case? Where did

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the Rule of Discovery come from (whose rule is it)? Where did the Rule of Conquest come from (whose rule is that)?

OBJECTIVES FOR CLASS: 1) To appreciate the importance of the “Rule of Law” to society, and the limitations on the Court’s ability to “make” law – “institutional competence.” 2) To identify the rules applied by the Court. 3) Introduction to the idea of “chain of title.” 4) To consider the “justice” of the result.

Day 2&3
8-28/29 **Acquisition by Capture** - P. 18-39. What is the *purpose* of the rules (both majority and dissent) stated in *Pierson*? In *Pierson*, do the majority and dissent agree as to the fundamental purpose – the “instrumental ends” - to be achieved by application of their respective rules? What is that instrumental end? Are the rules advocated by each of the majority and the dissent the best tailored to accomplish the instrumental ends sought by the proponent? Hint – How many foxes are there today (or whales or salmon or other wild fish)? Are *Ghen* and *Keeble* consistent with *Pierson*? That is, can you apply the rule articulated in *Pierson* and achieve the same result in those cases – or are those cases different? What other considerations are taken into account in *Ghen*? In *Keeble*? How do you reconcile these decisions? Note the application of the rule of capture *by analogy* to other resources. Is this appropriate? Does it make sense? Are the results achieved reasonable?

OBJECTIVES FOR CLASS: 1) To recognize that the law is more than a set of rules to be memorized (though of course you will need to memorize the rules we encounter in this class) – many considerations inform the rules applied by a Court. 2) To understand that instrumental ends and policies affect the rules that may be applied, and the way in which existing rules are construed and applied to a given situation. 3) That a problem that may appear to involve one body of law may well involve other areas of the law.

Day 4
9-3 **Acquisition by Creation - Property in One’s Ideas and Expressions (an Introduction to the Idea of Intellectual Property)** P. 56-70. Is “property” the best way to view the rights and liabilities of the parties in cases like *International News Service* and *Cheney Bros.*? In some of them? Might these cases be better considered as a matter of contract? Or tort? What are the competing policies involved in the protection of intellectual property? Why is “intellectual property” so different from “other,” “tangible” property? How do the protections for “intellectual” property differ from the protections for tangible property? What considerations are the same or different in formulating the rules and protections for intellectual property as opposed to “tangible” property? How does the digitization of intellectual property affect your analysis? Your viewpoint? What do you think about Vana White’s claim in the *Samsung* case?

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OBJECTIVES FOR CLASS: 1) To see that the nature of a problem informs its resolution. 2) To understand that calling something one thing does not necessarily automatically provide a good solution to the problem. 3) To appreciate the limitations on the “institutional competence” of the Court.

Day 5 **Property in One’s Own Person** P.70-88. Do you "own" your body? Does the concept of tort liability in *Moore* adequately protect one’s interest in one’s own body? The majority seems to recognize that one does have an interest in one’s body parts so long as they are part of one’s body. Does the majority in *Moore* **apply** any rule that justifies termination of that interest when the body part is removed? If so, be prepared to identify the **specific language** in the opinion that sets forth the rule that justifies terminating the interest upon removal.
9-4
Rights to Include and Rights to Exclude P. 88-96 How does the concept of a “right to exclude” apply in the analysis of the remedies available for a wrong such as was suffered by Moore. What considerations are involved in *Jacque* as opposed to *Shack* in establishing boundaries to the right to exclude, a right which seemingly is at the core of what we think of as “property rights.”

OBJECTIVES FOR CLASS: 1) To examine *critically* the reasoning of the Court. 2) To see that judges are subject to human concerns and biases. 3) To see both sides of an argument. 4) To appreciate “institutional competence.”

Day 6 **Subsequent Possession** – Unlike the material so far, the following material presupposes that there IS a prior “possessor”/”owner” but that we don’t know who that person is, or that person is not around.
9-5
- **Acquisition by Find** P. 97-116. Why do we protect finders? Without the sort of protections provided in *Armory*, what would happen if only THE owner could recover possession or damages for being dispossessed? In *Hannah*, what is the basis for Peel to claim any right to the jewel found by Hannah? Why does such a basis carry any weight? What interests is the law seeking to protect? Does the court in *Hannah* satisfactorily explain *why* the rule from *Armory* should be applied on the facts of this case? In *McAvoy* and the notes following are the distinctions between "lost," "misplaced," and "abandoned" property meaningful? Helpful in deciding the disputes likely to arise in these fact settings? Realistic?

OBJECTIVES FOR CLASS: 1) To recognize a failure of analysis, that is, a failure to explain adequately *why* a court decided as it did. 2) To examine critically legal rules and determine whether the rules make sense or achieve their ostensible purposes.

Day 7&8 **Acquisition by Adverse Possession** (Theory and Elements) P. 116-134. Why
9-10/11 does the law recognize adverse possession? Is this not "legalized stealing?" At bottom, at its most fundamental, Adverse Possession is a Statute of Limitations -

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What IS a statute of limitations? Why are the additional “elements” of adverse possession – 1a) actual entry, giving 1b) exclusive possession that is 2) open and notorious, 3) hostile/adverse/under claim of right, and 4) continuous – necessary. (Hint – when does the statute of limitations start if I punch you in the nose? Is there any doubt when the time begins to run?) Under the *reasoning* of the majority in *Van Valkenburg* is there any way for Lutz to satisfy the elements of adverse possession – specifically can anyone ever satisfy the element of hostile/adverse possession?? Disregarding facts provided by the editors in the bracketed portion - where do MOST of the relevant facts for this case come from? The Majority opinion, or the dissenting opinion? Why do you think the Court of Appeals finally rules against Lutz?
- **Color of Title and Constructive Adverse Possession** - P. 134-141. What is a synonym for “constructive?”

OBJECTIVES FOR CLASS: 1) To learn to question the stated reasoning of the Court. 2) To ask critical questions about the underlying motivations and possible biases affecting the decision of the court. 3) To learn to read opinions, other than the majority opinion, carefully for the insight and understanding they lend to the reasoning in the majority opinion. 4) To appreciate the law as a truly human institution, with all its positive and negative attributes.

Day 8&9 **Establishing Adverse Possession** P. 142-150. How easy is it to establish title
9-11/12 by adverse possession? What two types of “tacking” might be involved in
Howard v. Kunto? Which sort of “tacking” was critical to the Kuntos prevailing
in the case. Why do we recognize disabilities that will “toll” the statute of
limitations in some cases and not in others? What does it mean to “toll” the
running of the statute of limitations?

OBJECTIVES FOR CLASS: 1) To learn how “tacking” operates and what is required. 2) To dig beneath the facts in the case to try and discern what is really going on. 3) To examine critically rules for their practical effectiveness and necessity.

Day 10 **Adverse Possession of Chattels** P.151-164. When applied in the context of
9-17 personal property, why is the discovery rule discussed and applied by the
Supreme Court in the *O’Keefe* case “fairer” than the strict rules of adverse
possession applied by the Court of Appeals? Note that there are really three
possible rules for determining the true owner’s right to recover personal property
that has been lost or stolen. What are these three rules?

OBJECTIVES FOR CLASS: 1) To recognize the evolution of the law when it happens. 2) To identify the sorts of arguments that may cause a Court to move the law forward to apply rules that have not before been applied. 3) To consider the policies behind adverse

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possession and whether they make sense in a slightly different setting (land versus personalty).

Day 11 **Finish FUNDAMENTALS**
9-18

B. ESTATES IN LAND AND FUTURE INTERESTS (Herein of the division of Property Temporally (By time) and among multiple owners) Our study of estates in land will focus on the concept of property division between two or more people. We will study the main interests in land and consider how the series of interests arose historically, and the purposes and policies behind the limitations placed on the ways land may be divided along temporal lines. In this section we will read cases that construe language in a document that is ambiguous. In learning to identify and label interests in land we will focus predominantly on the problems presented in the Casebook. You will study the rules relating to trusts, and class gifts in Wills and Trusts after the first year.

“PRESENT” INTERESTS IN PROPERTY

Day 12 **The Fee Simple** - p. 183-198; What is a "fee simple"? Define a "fee simple absolute" in your own words. What is alienability? Define alienability in your own words. What is Heritability? Define heritability in your own words. Focus on Problems P. 194-195 and 196-197. (READ ON YOUR OWN p. 198-201 on Fee Tail and come to class with any questions you may have. How does a "fee tail" differ from a "fee simple"?) Some VOCABULRY: When I refer to a "fee" or a "fee simple" I mean a "fee simple absolute." This is to be distinguished from the "fee simple defeasible" we will discuss next week. As noted in the Casebook certain words that were *required* to create a fee simple historically, are no longer required, but are often included in a gift or devise. *It is essential that you understand the distinction between "words of purchase" and "words of limitation."* As we will see even some courts today forget this critical distinction and that creates difficulties.

OBJECTIVES FOR CLASS: 1) To recognize the importance of historical provenance for the law and legal system. 2) To gain a sense of how evolutionary the common law is and why lawyers employ what seem to be unnecessary requirements. 3) To recognize the importance of words and their proper usage.

Days 13 **The Life Estate** - p. 202-222; What rules do the court (and the dissent) in **White v. Brown** rely upon to reach their respective results? What do each of the opinions claim is the overriding concern in construing a will? Which opinion do you believe better achieves that objective? Note how the majority and dissent

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strive to achieve the same goal by applying essentially the same rules in construing Jesse Lide's will and yet they reach different results. How can this be?? Which party in *Baker v. Weedon* is the most "deserving"? Is the court too solicitous of the heirs - focus on the math and the assumptions regarding the value of the land. If you had been the lawyer for Anna what might you have done to have avoided this long drawn out litigation? What is the difference between *Affirmative Waste* and *Permissive Waste*? What considerations did the Court in *Woodrick v. Wood* look at in determining the existence of waste in that case? Should the court have awarded any damages to Plaintiff in that case? Was the measure of damages awarded appropriate?

OBJECTIVES FOR CLASS: 1) To understand that words are often ambiguous and must be interpreted. 2) To dig into facts and determine whether the conclusions drawn from facts on their face are accurate. 3) To see the difference between affirmative and permissive waste.

Days 14&15 **Defeasible Fees** - p. 222-251; What kinds of defeasible estates exist?
9-25/26 How do you tell the difference? (Although we will discuss defeasible estates in the context of a Fee Simple Defeasible, as the notes at the end recognize, any estate in land – even a leasehold estate – can be made defeasible upon the occurrence of an external event.) In *Mahrenholz* the determination of whether the interest given was a “fee simple subject to a condition subsequent”, or a “fee simple determinable” was THE determinative factor - *why*? If you understand why this distinction is the key to the case, you will understand the case. You will need to make a detailed “chain of title” starting with the Huttons in 1941 and tracing who got what and when depending on which interest the Huttons retained in 1941. (HINT - The key is found at the end of the carryover paragraph on the top of p. 228 and by remembering what happens when the defeasing event occurs under a fee simple determinable.) In *Mountain Brow Lodge*, there is a serious concern about unreasonable restraints on alienation. What is wrong with restricting alienation of property? *Ink v. City of Canton* is another valuation case. Is it “harsh” as the court says on pg. 246, to give the entire award to the defeasible fee owner? Is the question of whether the City paid for the defeasible fee relevant? Did the Ink heirs get paid for their interest but then were also allowed to keep their interest? Question 2 p. 248.

OBJECTIVES FOR CLASS: 1) To follow the “chain of title” relating to the various interests to property being transferred. 2) To be able to pull from a case the single issue, resolution of which will lead to a reasoned conclusion. 3) To recognize that opposing policies are often involved in deciding a case and will necessarily inform the analysis. 4)

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To be able to analyze the reasoning of a court and see that the result does not achieve the likely ends desired.

“FUTURE” INTERESTS IN PROPERTY

Why are interests labeled “Present” and “Future?”

Day 16 Reversions, Possibility of Reverter, Rights of Entry - p. 253-257. Focus
10-1 on Problems p. 256 – Remember – the Reversion is that interest kept by the
grantor when s/he gives away vested estates of lesser aggregate quantum than s/he
had.

OBJECTIVE FOR CLASS: To be able to identify when a reversion is present in a grant.

Day 17&18 Remainders - p. 258-263. Focus on Problems p 261. In particular our focus will
10-2/3 be on discerning when a remainder is *vested* and when a remainder is *contingent*.
NOTE the differences based solely on the words used; In the Question on p. 262
the issue is whether the deceased person has any property interest that can be
passed to heirs.
Executory Interests - p.264-273 Focus on Problems on p. 270; Is it accurate to say
that "executory interests" are the catch-all for future interests in transferees that do
not fall into any other category? **NOTE The Chart on Page 274**

OBJECTIVES FOR CLASS: 1) To learn a methodical approach to identifying a remainder. 2) Learning to follow that method to then determine whether a remainder is vested or not. 3) To appreciate that a change in wording may completely change the interest created.

Day 19 Common Law Rule Against Perpetuities p. 285-291 Focus on Problems p.289-
10-8 290

OBJECTIVE FOR CLASS: To learn a methodology for applying the Rule Against Perpetuities.

CONCURRENT INTERESTS IN THE SAME PROPERTY - Simultaneous Ownership

Day 20 **Concurrent Interests** - Forms; Severance of Joint Tenancies - p. 319-335;
10-9 Problems p. 322. In *Riddle v. Harmon* did the lawyer for Ms. Riddle commit
malpractice? In *Harms v. Sprague* you need to understand what it is about the

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interest a mortgagee receives under a mortgage that may operate to sever a joint tenancy - See Note p. 333-334. Why the switch in the law's preference from joint tenancy to tenancy in common? Should lack of notice of severance bind a later taker from the surviving owner?

OBJECTIVES FOR CLASS: 1) To understand the distinction between a tenancy in common and a joint tenancy with right of survivorship. 2) To see the confusion surrounding the words that will and will not be considered to create a JTROS, and why that matters. 3) To appreciate how technical the law can be in applying concepts such as title.

Day 21 **Relations Among Concurrent Owners** – Partition, sharing benefits and burdens
10-10 - p. 337--358; Does Mrs. Swartzbaugh have any effective remedies? When can a tenant in possession recover "carrying costs" (e.g., taxes, mortgage payments) from the tenant not in possession?

OBJECTIVES FOR CLASS: 1) To recognize that the common law does not always provide adequate or meaningful remedies. 2) To appreciate how the lack of legally satisfactory remedies affects the lawyer's position in helping the client.

Day 22 **FINISH ESTATES IN LAND AND FUTURE INTERESTS**
10-15

C. LANDLORD TENANT LAW

Day 23 - **The Leasehold Estates and The Lease** - P. 419-431 Why does it matter HOW
10-16 the leasehold is characterized (term of years, periodic tenancy, tenancy at will). As with estates in land, how do you construe language so as to "plug the tenancy" into one of the existing boxes. Is the principle of *numerus clausus* (see p. 197-198) less significant in the leasehold context? What is the election to which a landlord is put with respect to holdovers? Consider the possible alternative arrangements that might be viewed as a lease, e.g., a license, a life estate, or something else. What main issue presents itself when considering how to characterize a transaction between two people involving the use of property?
Delivery of Possession - P. 438-442 Note the distinction between the English rule and the American rule regarding the Landlord's obligation to deliver possession - which rule do you think is preferable? WHY?

OBJECTIVES FOR CLASS: 1) Be able to identify the principal leasehold estates recognized at common law. 2) Understand the difference between the American and

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English rules regarding delivery of possession. 3) To understand why characterization of a property interest as a leasehold, as opposed to a freehold estate, is so important.

DAY 24&25 **Sublease and Assignment** – P. 442-459. What is the distinction between an assignment and a sublease? Privity Reprise 1- How is the liability of the successor affected based on whether there is Privity of Estate, Privity of Contract, or both? In *Ernst v. Conditt*, note FN 18 and the Court’s confusion in using the terms privity of estate and privity of contract. After *Kendall v. Ernest Pestana, Inc.* is it possible in California for a landlord to reserve a right to refuse consent to assignment for any reason, or no reason at all??

OBJECTIVES FOR CLASS: 1) To understand the critical difference between a sublease and assignment. 2) To understand the separate grounds for liability represented by privity of estate and privity of contract. 3) To understand how assignment and sublease relate ONLY to privity of estate. 4) To understand that privity of contract ONLY exists if there is an “agreement,” and is unaffected by privity of estate.

DAY 26&27 The Defaulting Tenant: The Tenant in Possession, P. 459-469; The Tenant Out of Possession, P. 469-481. Is there really any self-help available to the landlord in Minnesota after *Berg*? Are Summary Proceedings sufficient to protect the Landlord? How does the doctrine of mitigation imposed under a case like *Somer* relate to the requirement that a landlord be reasonable in consenting to an assignment as in *Kendall*??

OBJECTIVES FOR CLASS: 1) To appreciate why self-help remedies might be needed, and yet why they are viewed so negatively. 2) To recognize the merger of contract principles in this area of property, and why mitigation is important. 3) To question critically, the parameters and requirements for mitigation in the straight contract context, and then as applied in the landlord-tenant context. 4) To recognize the complementary nature of some legal rules, e.g. reasonable consent to transfer and mitigation.

DAY 28&29 Landlord’s Duties – Tenant’s Rights: Quiet Enjoyment and Constructive Eviction, P. 482-492; Implied Warranty of Habitability, P. 493-505 Tenant’s Duties – Landlord’s Rights P. 505-508. WHY does the law recognize constructive eviction if the tenant still has actual possession? What is the difference between the tenant’s remedy of constructive eviction and the tenant’s remedies if there has been a breach of the implied warranty of habitability? What duties does a tenant owe to the landlord given the developments of constructive eviction and the warranty of habitability?

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OBJECTIVES FOR CLASS: 1) To understand the *remedy* of constructive eviction and how it differs from the Implied Warranty of Habitability. 2) To recognize the pros and cons of these developments (greater responsibilities on landlords, better recourse for tenants) on available housing.

DAY 30 The Problem of Affordable Housing P. 508-515
10-31

OBJECTIVE FOR CLASS: To appreciate the complexities of the problem.

DAY 31 **FINISH LANDLORD-TENANT**
11-5

D. SERVITUDES - Easements, Real Covenants, Equitable Servitudes

DAY 32 Chap. 10 - EASEMENTS - Background P. 763-774. Where have we seen the
11-6 “two to transfer” rule before? Does it make any more sense in the context of
 easement creation as in *Willard* than it did in the other context? Does the
 Church’s attorney have a malpractice problem? **Easements by Estoppel** P. 774-
 779 What did the landowners do (or not do) in *Holbrook* that estopped them from
 claiming the right to exclude the Taylors? What is the effect of the ruling in
 Holbrook?

OBJECTIVES FOR CLASS: 1) To understand the distinction between a “reservation” and an “exception.” 2) To appreciate why the law sometimes takes a while to become “rationalized.” 3) To understand how estoppels generally works. 4) To appreciate the effect of an estoppels in this context.

DAY 33&34 Easements by Implication, Necessity and Prescription – 1) Easements Arising by
11-7/12 Implication From (a) Prior Use, (b) Necessity, 2) Easements by
 Prescription and
 Public Prescriptive Easements - P. 779-812
 The Court says Van Sandt had notice of the sewer line running across his yard.
 What should Van Sandt really be held to have notice of? Does Van Sandt have
 any other recourse you can think of against Royster and Gray? Why did Othen
 lose? Prepare Problems 3&4, P. 794.

OBJECTIVES FOR CLASS: 1) To analyze critically the assumptions underlying an opinion and see the fallacy of the assumption. 2) To realize that other remedies and

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possibilities for recourse exist – even if one may not be fully aware of all the rules. 3) To see the distinctions between an easement arising by implication a) from prior use, or b) from strict necessity. 4) To see how a failure of *sufficient* proof may defeat a seemingly meritorious claim, and accordingly, the need for attention to the smallest detail.

DAY 35 Assignability of Easements - P. 812-820. Be sure to trace the ownership
11-13 of Lake Naomi and be able to explain how the Lutherans came to acquire
 their interest, and how Frank and Katherine acquired their interests.

OBJECTIVES FOR CLASS: 1) To review the “chain of title” and see the various property interests of the parties. 2) To understand who had what property, identifying the interests, and how they were transferred.

DAY 36 Scope of Easement - P. 820-830. Compare *Brown* with *Jacque v.*
11-14 *Steenberg Homes*, P. 89-90 – Can the rationale of the decisions be squared with
 each other? If you walk across my property, causing absolutely no damage, can I
 stop you?

OBJECTIVES FOR CLASS: 1) To see how application of a rule in a particular factual setting may seem inappropriate until the “bigger picture” is considered. 2)

DAY 37 **Termination of Easements; Negative Easements; and other novel easements –**
11-19 P. 831-847. In what ways can easements be terminated? What IS a negative
 easement? Should there be any restrictions on the scope or creation of Negative
 Easements TODAY?

OBJECTIVES FOR CLASS: 1) To identify the reasons negative easements are limited.
2) To determine whether those reasons are relevant to today’s circumstance.

DAY 38&39 **RUNNING COVENANTS; Real Covenants** - Privity Reprise 2 –
11-20/21 P. 847-853; **Equitable Servitudes** - P. 854-859. What does privity mean in the
 context of a real covenant? Is it different depending on whether the concern is the
 benefit or burden aspect of the covenant? What rights and obligations were
 created by the deed from Tulk to Elms? Focus on Problems Page 853.

OBJECTIVES FOR CLASS: 1) To understand the different definitions of “privity”
depending on context. 2) Understanding the distinct elements required to establish a
covenant running at law versus a covenant running in equity. 3) Appreciate that “an

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injunction is for sale.”

THANKSGIVING BREAK – NOVEMBER 25-29

DAY 40 **Creation of Covenants** - P. 859-864 – In *Sanborn* what would the McLeans have discovered regarding *their* parcel if they had searched each of the 91 deeds in their subdivision, and talked with each of the 91 owners in the subdivision? How could this whole problem have been resolved in the original platting?
12-3

OBJECTIVES FOR CLASS: 1) Identify the problems this case creates for lawyers seeking to know the interests that are applicable to a given piece of land.

Day 41 **Validity and Enforcement of Covenants**, P. 864-876. How does the Court in *Neponsit* tie the benefit of the covenant to the land so that the burden can be enforced? In *Neponsit* is the Court enforcing a real covenant or an equitable servitude?
12-4

OBJECTIVES FOR CLASS: 1) To appreciate the why the law has such a difficult time enforcing covenants that impose affirmative obligations on the servient landowner. 2) To see how the “touch and concern” element is used by courts to restrict enforcement of covenants that are not favored.

DAY 42 **Termination of Covenants** P 882-896 Does it make sense that covenants are so strongly protected (consider Cardozo’s statements quoted in *Rick v. West*. Would it make more sense if the person could be forced to sell the servitude for damages?
12-5

OBJECTIVES FOR CLASS: 1) To understand the requirements for termination of covenants. 2) To compare the apparent strength of protection before a covenant can be terminated, with the seeming lax protection for certain easements as in *Brown v. Voss*.