LAW 440

PROPERTY

LITMAN

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Lesson # 1

What is Property

Bundle of Rights (Honore's List)

1) possession, management, and control
2) income and capital (profitability)
3) Transferability (inter vivos, and on death).
4) Protection under law
5) Product of labor
6) Alienability
7) Use and enjoyment: does not necessarily include profitability or privacy (Victoria Park Racing v. Taylor).
8) **Exclusive Control: most important (right of exclusion).**
9) **Destruction:** *Wishart Estate:* Will instructed that 4 horses be shot; could not dispose of property in a manner that was contrary to public interest (inhumane). = ***demonstrates that rights are not absolute.***

Burdens: social costs, maintenance costs, taxes.

Forms of Property; Holder of Rights:

A) Private Property: Individuals and corporations: most often own private property. This means that they hold the right of exclusion.

Collective Entities: 1st Nations, Hutterites: collective property. Community holds right of exclusion (everyone not in the group can be excluded), or member may be excluded depending on rules of the community, still private though.

B) Public Property: Public property is state owned. State holds the right of exclusion, based on collective interests, more restricted than individuals now because of the Charter.

C) Common property: no one has right of exclusion so it is not property at all (Air in most cases).

Key Characteristics of Property

1) Divisible: Property is severable: Residuary: once lease is up = all rights return to original owner; Bailment: lending someone personal property; leases; easements; natural resource exploitation; subsurface rights; power of sale (grant someone else

the authority to sell my property); Power of Disposition: let someone else determine who gets my stuff after I die.

2) Variable: notions of property are in flux (quasi-property).
3) Owned by one or more (severalty or concurrent).
4) Qualified or Regulated: Regulates property rights: we do not have exclusive rights (how high our houses can be, how big, where, etc.). If government doesn't like what courts have decided (ex race track owner didn't want public broadcast) court said he had no property rights, but later that year the legislature legislated to make a property right.

Causes of Action
Personal Property: Trespass, Conversion, Detinue, Replevin, Self-Help, Negligence.
Real Property: Trespass, Nuisance, Rylands v. Fletcher, Negligence.
Theories/Justifications for Private Property
Economic Rational: Property promotes economic efficiency + incentives to produce, which creates surplus which can be redistributed. Key elements are: **transferability, universality, and exclusivity.**
Tragedy of the Commons: Someone will cheat when there is common ownership.
Labor Theory: Promoted by Locke, argued that people are entitled to have what they themselves have produced.
Dessert Theory: Morality and justice = we should allow those that deserve private property should get it (those who encourage growth, development, wealth, etc.).
Personhood: Theory that humans need to control stuff; so due to inherent human nature (selfishness) we produce private property (property lets us express ourselves). Problem is when you inherent property some people become wasteful.
Promotion of Freedom (negative and positive): Property creates autonomy.
Good: property is empowering, which promotes ideas/expression = liberty.
Bad: You can hide from society, and wealth/property can lead to coercion.
Occupancy: Person who possesses should get it, but as soon as you accept this theory you quickly move on to another theory.

Novel Claims: What Things may be Property?

1) **Standard Incidents:** Does it look like property: ***(rights in the bundle, especially: economic value, transferability, exigibility, possessability, product of labor).***
2) **Functional/Policy Approach:** In general look at: labor theory, economic theory, personhood, and freedom approached. Specifically, look at: ***legal process, justice, certainty, autonomy & dignity, fairness/unjust enrichment (Woodward), encourage activity (INS).***

Generally ideas/information/skills/etc. **(intangibles)** are not regarded as property – (a) impractical due to the # (b) best for public interest to share. However, in order to promote incentives, some ingenuities are accorded the status of property under patent law, and precise expression of ideas (but not content in general) are protected by copyrights **(both protected by legislation).** Some confidential info is also protected (lawyers).

Numerus clausus principle: (notion developed in regards to real property and has extended) is that the law should be slow in recognizing novel claims as property in regards to real property. But, philosophy reflects all forms of property, but new facts = courts have to adapt.

1) Limiting rights reduces information/transaction costs
2) Helps minimize anti-commons behavior
3) Difficult to reduce a (property) right once established (precedent); so got to be sure we want the right before we create it.

INS v. Associated Press:

INS took stories gathered by AP and used them = AP wanted an injunction to prevent INS from copying + selling their current and older stories from bulletin board and earlier editions of AP.

News was deemed to be quasi-property, because:

1) Of the labor involved in collecting the stories.
2) News had an exchange value for a few hours (time limit = quasi property).
3) Not a right in rem (against the whole world), because only competitors can be (temporarily) excluded.
4) After exchange value is done, news has to be disseminated for the public good.

Decision driven by the fact that INS was free riding (unfair competition).

NBA v. Motorola:

STATS pager gave quite regular updates of NBA games. NBA wanted STATS to stop what they believed was a misappropriation of their labor/games. Court said that STATS was not in direct competition with NBA (NBA has copyright to broadcast and disseminate the games) and they were gathering their own information (not unfair competition like INS because NBA was not in competition with Motorola and even if NBA and STATS were in competition it would not matter because STATS exerted its own time and labor in gathering the information).

Victoria Park Racing v. Taylor:

Taylor owned land beside the racetrack, built scaffolding which allowed one to see into the racetrack which allowed the radio to broadcast the races. = VP sought an injunction because it lost them attendance/$.

Cause of action is nuisance. What is nuisance? Infringement of enjoyment and use of land and land only, and the interference must be substantial, and the interference must be unreasonable. Judges agreed that it was a substantial (financial) interference.

Majority says, not unreasonable, because $/privacy are not elements of use and enjoyment (build a larger fence, etc.), because there was no precedent to tie to this claim = very conservative approach. Thus, not unreasonable for people to watch neighbors from their property.

Dissent includes policy consideration in their decision (Economic incentive) and thus say it should be property.

Moore v. Regents of University of California:

Moore underwent treatment for hairy-cell leukemia; Dr. realized that $ could be made from his cells from Moore's spleen = after it was removed Dr. patented a cell line. However, Dr. did not inform Moore of the economic potential of his spleen/cells.
Court looked at:

1) California Statutes: Statute says that when a body part is removed it should be destroyed = no ownership rights; so, then why should doctors get rights?). But, this statute is irrelevant because this statute only focuses on a disposed body part (Moores spleen was not disposed of).
2) No precedent. = Legislature better able to deal with the issue (experts).
3) Look to policy: balancing need to have incentives for science vs. people's rights over their own body.

Majority, said no property interest because the patented cell line is legally distinct from the cells taken from Moore + would hinder scientific progress. Judgments 3 Reasons for judgment:

1) On balance the relevant policy considerations lean against tort.
2) Legislature is better suited to deal with the problem.
3) Conversion is not needed to protect the patient's rights (as he has other causes of action- Fiduciary Duty). = leaves the door open that conversion could be used in a similar case if the facts were different.

Cases now can and do treat human material as property like, when it is appropriate: *Davis* a US case coming from Tennessee, where one spouse wanted a frozen embryo to come to life and the other did not. Trial court said look at child's best interest = do not bring the child to life. Court of Appeal said it was a trust making each Davis a trustee meaning all decisions had to be unanimous = embryo stays in the freezer.
Hecht case from California: Hecht was married with adult children but he left sperm to his girlfriend. Family challenged because wills cannot pass on anything other than property – court said sperm was property like so he could do it.
Overall, body parts are still undefined in terms of property, but courts in US are leaning towards giving human bodies as property like.

Woodworth v. Woodworth:
Parties were married, and both parties planned their life around him getting a law degree. Held that degree was property because fairness dictates (unjust enrichment) that wife should be compensated. Court decided it was irrelevant that degree did not have exchange value, and argued value was not too speculative.

Matrimonial Property Act (p.45) now impacts this. Basic regime is that court may distribute all property owned by each spouse or both spouses. May make the distribution of property acquired during the marriage equal unless it would not be just and equitable. Gifts, inheritance, property prior to marriage is exempt (but only the original value is exempt = if the land went up in price over the marriage the profit is distributable).
But property is not defined.

Gould

Gould's estate sued (for the tort of appropriation of personality) author for publishing an unauthorized biography after Gould's death. But, the property right of personality extends only to endorsements so estate lost the claim, even though society wants to provide incentives to develop special talents. ***Line between writing about a person and using the name for endorsement.***
Good for public to know the information of the book, and author had exercised his own creativity in creating the book.

Novel Claims in Court- Summary for Determining whether it will be Accepted

1) What is best for social policy (Moore).
2) Is it a matter for court or legislature (Moore).
3) Individual autonomy v. Public concerns (Gould).
4) Implications (economic, social, psychological)
5) Integration of new technology (Moore).
6) Intention of individuals (Woodworth)
7) Fairness and Alternative remedies to considering object property.

Lesson #2

Sources of Canadian Propery Law

A) Doctrine of Tenures: Originated in 1066 with the Norman Conquest, whereby all the land was symbolically given to the King (so only king owns land = sovereign title). 1st grants of land were from the Crown to tenants in chief (lessorlords), who in turn subinfeudated. Key was that each subinfeudation imposed benefits and obligations: Benefits were land and protection.

Free Tenures

Free tenures is tied to the notion of socage (A tenure of land held by the tenant in performance of specified services or by payment of rent, and not requiring military service (typically agriculture)), which created certainty of obligations (I owe 50 bushels of grain).

1) Knight Service was the most common (40 days per year of service per person).
2) Serjeantry: Grand (those who performed ceremonial service for the king), and Petty (general labor). In response to the aristocratic need of splendor.
3) Frankalmoin or Divine: Need for spirit
4) Free and Common Socage: Least aristocratic. Agrarian Tenure. For subsistence.

Unfree Tenures:

Unfree tenures were less honorable, because no certainty of obligations, instead you did whatever the person above you wanted.

Incidents of Tenure:

1) **Those that arouse during the lifetime of the parties:** Homage (tenant became the lords man), fealty (oath to the lord), and the aids (finiancial support to lord for specific occasions – knighting of eldest son, marriage of eldest daughter, ransoming of the lord.

2) **After death:** Escheat (no blood heir, or when someone committed a felony = lord got the land), Relief (payment for inheritance of tenure), Wardship, and Marriage.
    1) Oaths or allegiance
    2) transfer of taxes
    3) death duties payable on decent of land to an heir
    4) Escheat
    5) Doctrine of estates.

System eventually crumbles because:

1) You would forfeit your tenure for a serious wrong (failure to perform your obligations, or a very serious offense (lost a war = guilty of treason) – family lost right to land). "King bargained for knight service but only got pepper" saying refers to how removing one person would make the whole pyramid unworkable, as no one to fill his missing material.
2) Escheat: describes the loss of your tenureial interest on your death without any blood relatives = same problem that arouse with forfeiture. Real problem when the plague hit.
3) Inflation: A pound a year when the deal was signed did not have the same worth as inflation changed overall value.
4) Got too confusing, as too many obligations owed to too many people.

B) Solutions

1) Quia Emptores (1290): Prohibited further subinfeudation (did not abolish existing tenures though). Replaced subinfeudation with **substitution** (transfer of land outright). Escheat remained.
2) Tenures Abolition Act (1660): Converted all (knight and serjeantry) tenures into free and common socage, and removed some of the least desirable incidents of tenure. + Stated that all future transactions would be in the form of Free and Common Socage, which meant that only obligation that was now required was $ (taxes). However, over time $ too stopped being collected. Changed how people looked at land (before they would say I use the land – now said I own the land). Escheat remained important: Notion was that in most areas the eldest son inherited, but if there were no blood relatives the land would revert back to the overlord.

Bona vacatia: means escheat with personal property – difference is that good goes to the Crown, example of royal prerogative (escheat not royal prerogative because overlord not necessarily the Crown gets the land = getting land back because of residuary which is a property concept).

C) Modern Remnants:

1) Canadian (common law) land is tenurial (not allodial): provinces are the successors to Crown and they own all public lands and divide up/grant land (in the form of an estate) to private interests by letters patent. **All land free and common socage.**
2) Ultimate Heir Act: Crown is the ultimate heir (if there is no living blood relative or no will = Crown gets your real and personalty property). Different than

escheat because UHA is legislation not a prerogative + UHA allows land to willed away (non-blood relatives can inherit).

3) Doctrine of Estates:

Doctrine of Estates

Crown owns the land, we own estates. An estate is "the bundle of rights" that we hold over a given area of land for a period of time.

a) Freehold estates: these estates do not have a fixed time period (you do not know how long the estate will last).

1) Fee Simple: has potential to last forever: goes to blood relative or will designate = as long as there are heirs the estates remains.
2) Fee Tail: also has potential to last forever; endures as long as there are lineal descendants – if no descendant land reverts back to the Crown.
3) Life Estate: property is granted to a person for their life only and then goes back to grantor/someone else designated or the Crown if original grantor is dead.

3 above are the pure forms of estates; there are hybrids, as conditions can be attached (this will be explained in depth later in the course).

General rule is free hold estates cannot be extended to personal property.

b) Non-free hold estates (lease estates): You definitely know how long the estate will last.

Adoption of Englsih Law

1) **Imperial Law**: Doctrine of Discovery vs. Conquest: Canada was a British conquest = Meaning land had pre-existing laws; thus, laws changed gradually not immediately. Eventually means imposed laws.

Doctrine of Secession: transfer of title through negotiation (what we believe happened with Aboriginals), but Abos are not bound to tenurial system like the rest of us.

2) **Received Law**: Laws that apply to colonies by their own force:

Ex. **NWT Act (July 15 1870):** Reception date for AB; Act was passed by Ottawa and stated: "The laws of England as they existed in July 15, 1870 shall be enforced in NWT, as long as they apply and make sense," or until they are superseded by legislation.

A.G. Alberta v. Huggard Assests: AB wanted a variable royalty rates (LG could change without legislative process). Companies said variable royalty was in conflict with free and common socage (NWT Act) (in order to comply with free and common socage there had to be certain amounts guaranteed) = ended up in the JCPC – Lords said variable rates were not uncertain, but even if they were legislation can override common law notions.

Other Historical Features

Doctrine of Martial Unity: Historically at common law upon marriage there was a merger of legal personalities. Meant in practice that the benefit of the property of the wife went to the husband, and following her death the man got a life estate. Man had to provide maintenance and support. Ways around the system, the wealthy used the system of equity to go around the doctrine of marital unity (used trusts). Now a historical fact =

notion of universal ownership has overcome the old notion = men and women separate legal entities.
Impact of English law on Aboriginal land rights: Idea is that the current legal regime remains after contact, they had defacto-possession, as they defended their territory + built on it + used it. = Clearly they had property rights (possession). When sovereignty was asserted and the Crown title is asserted (radical (Crown) title does not eliminate other forms of interest – Abo interests), as British had to recognize the legal regime that existed before you got there. Abo title is sui generous (unique title).

Summary:
Only FREE AND COMMON SOCAGE in Canada; Doctrine of Estates and escheat remain. Overall, principles governing property are those that were received, with legislated alterations or possible legislative alteration.

Property In The "Canadian" Legal Context:

1) **International Law:** NAFTA (in particular) – NAFTA's foreign investors are protected from expropriation or nationalization; restricts "takings" (must be for a: public purpose, cannot be discriminatory, follows due process, an give fair compensation). Civil-Political Covenant protects right not to be deprived of property because of discrimination.

2) **Constitutional Authority, Jurisdiction, over "property" (powers of Parliament, Provincial legislatures and Municipalities:** both feds and provinces can pass property laws – but most are provincial (Land Titles Act, Ultimate Heir Act are provincial). 92(13) key section. But bankruptcy is federal. = Division of powers issue does exist but core authority is provincial.
Municipalities also involved (zoning/regulations), but these are just provincial inventions.

3) **Protection of property under Canadian law:** Began with the Magna Carta = take away property only through due process + compensation, and this notion has snuck its way into Canada. Provincial and Federal Bill of Rights generally duplicates Magna Carta's provision but does not include mandatory compensation. These Bills of Rights are not supreme so can be overruled by another statute.
Alberta Personal Property Bill of Rights: If provinces takes away tangible personal property compensation must be provided (bonds, shares, etc could still be taken without compensation).
Also, Expropriation legislation and Common Law notion: when land taken away there has to be compensation = Land is very protected under legislation, but not constitutionally.

4) **Charter of Rights, explicit and implicit, ss. 7 & 15 of the Charter:** Taking of the Japanese during WWII probably could not occur in post 1982 because of discrimination (s. 15 equality provision), or the right to life, liberty, and security of the person (s. 7) not because of property provisions; so, indirectly property can be protected under the Charter.

5) **Other Protections:**
   a) Section 35 Aboriginal and Treaty Rights: Ordinary legislation cannot take away Aboriginal title or reserve title.

b) NAFTA, (Mexican and U.S. "resident investors")

NAFTA protects investments in business and property of foreign nationals. Result is that Mexican/American owners can get greater protection than Canadians – NAFTA overrides the constitution.

c) Statutes (Criminal Code), Alberta Expropriation Act

d) Common Law: Courts assume that governments do not take property unless expressly expressed, and that if property is taken = $.

Basic Divisions in the Law of Property

1) **Real Property vs. Personal:** Rights in relation to land vs. Personal (moveable) Property. Term Real came from the action, in that in regards to land a person could get the real thing (land) back, while personal property you only get compensation.
2) **Corporeal (tangible) vs. Incorporeal (intangible):** Corporeal = interests capable of being held in possession (land). Incorporeal = interests that are non-possessory (easements). Corporeal and incorporeal hereditaments (inheritable).
3) **Chattels Personal:** Choses in possession are for tangible property; and choses in action are for intangible property - copyrights (choses in action are enforceable only by the courts – as you cannot regain possession = all you can claim is to have your rights enforced).
4) **Chattels Real:** Refers to a lease, because it is a hybrid, as leases are contracts that have become viewed as real property. Allows a tenant to recover their leased land (thus they get the "real" thing).
5) **Legal Interests (Common law) vs. Equitable Interests (Courts of Equity):** Land titles office would show you the legal owners, does that mean for the sure that the owner lives there or that the person has the right to collect $ for rent (most often owner does enjoy the equitable interests). However, sometimes legal title is transferred without equitable interests – so, title has be split meaning that legal title is a burden as you do not get to enjoy the benefits of the land (If this is the case then the legal owners are trustees and the equitable owners are beneficiaries).

Equitable interest Equity Courts recognized equitable notion as a property law interest, while common law did not. Today defined in statutes. Examples:

a) Security Interest: when you have down payment to buy a piece of land = you need a loan. Bank want security which you have as you are about to buy a house = Mortgage. I became a mortgagor (I pay $ + interest), and in the process the bank obtains an encumbrance interest (protect to ensure repayment) while I am the legal owner (fee simple owner).
b) Beneficial rights: holder has rights to use in manner normally associated with ownership
c) Managerial rights: holder has control, but no general entitlement to exploit the object.
d) Remedial rights: power to go to courts for relief

Importance of Distinctions?
Classification of property interests are important, because they are meaningful distinctions (land is more stable/stationary/unique than personal property – more generic/moveable). Significance is that it has implications for how you transfer each form of property – land has registry system. But, most personal property can be transferred without any registry system – because it would be too complex to provide serial #'s for everything. Soft registry's do exist (car registration).
The way in which land was inherited was different than how personal property was transferred, and even today language is not exactly the same. Landlord-tenant very important = statutes; while personal property (bailment) relies on common law.

Unique Interests:

a) Aboriginal Title: It is a unique interest that is an interest in land and personalty. Title does not come from the Crown, as it predates the Crown. + It is a constitutionally protected interest. + Special conditions on Abo's – in order to sell/lease land Abo's have to surrender the land to the Crown and the Crown has to approve the sale.
b) AB Metis Settlements:
c) Others.

Social Context of Property in Canada
Property has a profound impact on lives; hard work vs. lottery winner; different social groups have different access; Redistribution is contemptuous: Fraser Institute (give enough for survival vs. not enough for survival to motivate).

Rock Resources Inc. v. British Columbia: **(Common Law-Taking: Chattels Real)**
Court ruled that Rock had a property interest (exploitation of minerals), because it had exchange value ($ was for the right to exploit) + legislation referred to exploitation of minerals as a chattel.
So, was there an interference with property: Yes because the Crown took the property right away, because legal asset was now worthless because of the Park Act = this was a regulatory taking. Crown argued it cannot be a taking because there was no proof that minerals existed within the Park; court said the property right was the right to take minerals if so present.
Was legislation clear on the taking? If legislation was unclear then there could be no taking (because it is assumed property will not be taken) – legislation was not clear in respect to no compensation.
BC said if it was a right to land compensation would have been provided, = since legislation does not say you are entitled to compensation you are not entitled to compensation. Majority of the court said a right at common law to compensation, unless legislation specifically says no compensation. Dissenting judge agrees that since minerals are viewed as personalty property, that implicitly mineral rights were not to be compensated.
Why would province start to call mineral expropriation a chattel? Had been called a chattel real before (where compensation would be guaranteed)? Reason they changed it

to a chattel was because they wanted to be able to take without compensation – but court said this was not explicit enough – because of common law notion.

Brown v. R. in Right of British Columbia: **(Aboriginal Unique Rights)**
Trial court said BC could tax electricity on reserves even though Indians/reserves are federal jurisdiction, because electricity was not deemed to be included in the personal property that was excluded for taxation under the Indian Act s. 87.
Court of Appeal disagreed: Agreed that electricity was personal property, but that s. 87 exemptions should not be viewed narrowly like the trial judge did.
Aside: SCC approach to understand statutes: Text (read text), Contextualization (understand context), and Purposive Approach (what was the purpose in this context). Court could have used a purposive approach and said tax does not apply because reserve peoples are the least able to pay.

Lesson #3 Physical Dimensions of Property Ownership

Cujus Est Solum ejus est Usque ad Coelum et ad Inferos: This maxim means that whoever owns the soil owns all the way to heaven and to the depths of the earth. However, in practice this maxim is unworkable; so, it is subject to many qualifications.
Above the Surface, Including Airspace: General rule is that the owner of the surface holds an entitlement to the airspace up to a certain height above the ground – ***that which can be used or occupied. Prevailing theory is to treat airspace as a possessory right (Dildow).***

Didow v. Alberta Power: AB constructed a 50’ power line that had cross-arms which over hanged P’s land by 6’. Court ruled that this was a trespass (unjustified interference with someone’s land), because of right of possession (it was irrelevant that P was not using the space) – arms were a low level intrusion that interfered with P’s use and enjoyment. However, Court also said that owner’s right to possess/occupy airspace is limited by height (although they do not define what height).

Anchor Brewing case: does not matter how high intrusion is as a trespass is a trespass (an intrusion by a structure located on the defendant’s land necessarily constituted a trespass to the plaintiff’s airspace) = does not get rid of the problem of aircrafts.

Fountinebleu Hotel Corp. v. Forty-five Twenty-five Inc.: Building created a large shadow, which hurt the business of the plaintiff (pool, etc. at the hotel). Court said not interference to possessory rights, although it did indeed hurt use and enjoyment – but this was just a byproduct. New building was ignoring the zoning requirements, but court said had they built lawfully the shadow would have been the same, so they were out of luck.

Below the Surface

Edwards v. Sims: Edwards “found” and developed a cave system – his land had the only access; however, most of the caves were located under his neighbor-Lee’s land. The majority of the court said that the maxim applied in this case = Edwards was on

Lee's property, because Coarse Theorem would argues that parties will negotiate. Ziff says airspace is more important to the public interest than the subsurface is. Dissent says only what you can possess should be considered your's, and since Edwards did all the work the cave should be his.

Economic Perspective:

Majority in Edwards was protecting:

1) Universality: All the way to the depths of the earth
2) Exclusivity: Owner has clear and legally protected control inside his boundary.
3) Transferability: Rule makes things clear (reduced transactions costs), which helps transferability.

Coarse Theorem: either share profit, or one side buys the other one out. This case the government expropriated the land and opened the caves. Problems is sometimes parties are irrational/transaction costs are not zero. But likelihood is deal (somehow) will be struck. In Edwards, the caves are unless ($0.00) for case's winner; thus, in his best interest to sell rights or sell land to loser. Loser is better off paying as he will still make money.

1) Need to know who owns the property to begin negotiations: Thus, property definition is important.
2) Law should strive to promote negotiation by reducing transaction costs.
3) However, people still can be irrational = make rules that reflect the likely outcome if market was perfectly efficient.

Mines and Minerals

Provinces in general own the lands (reserves are federal). When province makes a grant of land, based on common law principle mines and minerals and surface rights would be transferred (exception was gold and silver). Now have legislation, Public Lands Act = crown now keeps m&m rights for themselves when they grant land, automatically. 1890 is when Crown started reserving m&m. However, in transfers amongst people common law principle (m&m sold unless expressly withheld) remains.

Not uncommon to have separate titles for surface rights and m&m. Although most land in AB Crown has rights over m&m (90%), while most surface rights have been granted. Split title exists a lot around railways, as they were granted m&m rights along with surface lands. However, even if title is split surface owner owns everything under the land other than m&m.

Public Lands Act: S. 35(1) Crown keeps m&m automatically, unless they expressly grant them away.

Mines and Minerals Act: Generally defines key terms including, minerals (s. 1(1)(f). S. 10 Outlines explicitly the common law rule that gold and silver are not granted if m&m are granted. Need special grant for gold and silver.

Law of Property Act: s. 7 When land is transferred from one owner to another m&m are transferred unless expressly withheld. Clarifies what a mineral is: s. 56; and, surface substances (57 clay and marl -58 sand and gravel). Are these (clay, marl, sand, and gravel) minerals or otherwise; legislation says surface owner owns surface substances until stripping reaches a certain depth.

Surface Rights Act: Common law rule was when you had a m&m grant you also got a reasonable right to enter and look for m&m (limit damage, minimal interference). Surface Rights Act: now supersedes the common law rule (although similar). Section 12(1): no longer have implied consent, as you now need consent of owner and occupier of the land; or have become entitled to entry by the Surface Rights Board. Means that compensation will be provided to the surface owner; this does not mean a stake in the minerals, instead they get a disturbance of their land compensation (not a % of the m&m's unless they had minerals rights in their grant).
In order to get a right of entry you need consent, look to definitions:
Owner: means the person under the Land Titles Act (logical). OR
Occupant: a person other than the owner in possession of the land, someone that has interest on the land under Land Titles (bank for example), or any other party that has already been granted a right of access. Thus, companies have to negotiate (separate consent and consideration) for right to m&ms' and right of access.

Evolution of conveying land:

1) Preliterate society had no registration systems = **Livery of Seizin** (seizin meant possession of land, under a claim of free hold). At time this meant you would hand a clump of dirt over to new possessor in the presence of local members = a symbolic transfer, but a transfer nonetheless.
2) Then Britain got more literate, aristocracy saw this system as inefficient = concept of a **DEED** (formal document) that said who owned the land and who he wanted to transfer the land to (what was included, how much, etc.). SIGNED-SEALED-DELIVERED. Problem was this was open to fraud (witnesses and the old checks and balances no longer present). Criminal law helps but limited scope.
3) So, turn to government to create a **Deed Registration System** – all documents can be found in one place (reduces fraud and forgery a lot), but system was only as good as the title of the person who possessed the land you are trying to obtain: LAND SEARCH = you have to trace the title back as far as it goes to make sure title is good all the way back. Judge made a rule that said if ownership can be traced back 60 years then the title is good (although legislation in some areas has changed this number to 40, 50 years).
4) Torrens (Australian): created a better system. LAND REGISTRATION/TITLES SYSTEM (Deed registration system still exists in Ontario): under this system the government will guarantee that the land title is accurate = protects the purchaser subject to the exceptions.

Land Titles Act

s. 62: every certificate of title under this act is (unless owner has participated in fraud) … conclusive proof … that, that person does have that estate or interest. Thus, this Act protects the bona fide purchaser from "invisible" conditions, but applies only estates that are recorded (if neighbor failed to register her right of way then she is out of luck). Exceptions: miss-description of boundaries; s. 61 "overriding interests," as they are still attached even if not listed in the title: Subsisting reservations (including royalties to the Crown), taxes owing, public highway/right of way/easements, any subsisting lease not

longer than 3 years, right of expropriation, any easement/right a way granted by an AB Act). So, if acquiring land be careful of these exemptions.
In new world of internet this exemption list should get shortened.

Panther Resources v. Canadian Northern Railway
Zilbert Hills sold 2 parcels of land (Railway Right Away and SW) to Northern. No mention of m&m was made in the transfer document – so at common law CNR should have got m&m. However, Railway Act stipulated that railways did not get m&m unless expressly granted. Despite this Land Titles office gave m&m to CNR. Later Zilbert gave remaining land to his sons, again no mention of m&m, but common law rule = boys got them.
Northern went broke = feds (CNR) now have m&m. And in 1945 Right of Way parcel corrected by Land Titles = Hills sells rights to 5 people, but SW parcel still owned by CNR and its heirs.
CNR grants m&m to Panther and court looks back = m&m deemed to be Zilbert's estate's as railway never got them, and sons did not either as land that was given to them did not include SW parcel.

Anderson v. Amoco Canada Oil and Gas
When crown granted land to CPR to complete the railway, common law notion applied in which everything was conveyed. Initially in CPR granted land to people they made no reservations; however, CPR started withholding coal and petroleum and by 1912 CPR was withholding everything.
"Petroleum" in this case became an issue because Anderson's pool had liquid and gas, before drilling there is more liquid than there was after drilling. Definition of petroleum is liquid; however, at what point this is measured became important (Anderson wanted it measured after drilling (less liquid) while Amoco wanted it measured before drilling (more liquid).
Court says measurement occurs at time m&m granted, because this maximizes certainty – easier to determine % before area is disturbed. Further, Amoco owns petroleum which means that it also owns natural gas because it can trace its ownership into natural gas.
Law of capture does not apply: Law of capture states that whoever captures the gas/liquid owns the gas/liquid. Example if a pool of oil is located under 3 separate pieces of land it belongs to whoever drills it. Designed to maximize exploitation, but court says this does not apply.

Lateral Boundaries Bounded by Land
In AB location of land is described by a system of township surveys (province divided up into squares – meridians, townships, ranges, sections). Cities are described by Settlement Plans (divided by legal subdivisions – Plan, block, and lot #'s).
When problems arise land can either be surveyed or adjourning property owners may establish a boundary:
Conventional Line Doctrine: Fictional doctrine is that parties will create the original boundary. Parties can agree to any boundary within the limitations of the law (cannot create a lot smaller than zoning requirements), this line becomes the line.

General Principles

Law of adverse possession: Build fence on wrong side of the boundary = you are occupying land that is not yours but it becomes yours. S. 69 of the Law of Property Act: when I build in error over my property line = I am entitled to place a lien on neighbors land for value of improvement, due to my fixture enhancing your property value. OR I can acquire the property if it is so just in the eyes of the court. However, invader has to pay compensation to neighbor if it so acquired.
Trees/roots/shrubs: Overhanging branches can be cut off, because they are a nuisance. And law says you can abet the nuisance (cut the branches down), but you cannot keep the fruit as the fruit belongs to them. When tree is on the property line more murky – say it belongs to whoever planted it, if planted with consent then both people own it. (Volunteer vegetation on the property line is common property).
Fence Line Act: $ obligations can be imposed on the non-building neighbor if said neighbor is getting enjoyment out of the fence. Go to arbitration first to determine % of costs and maintenance.
Tracing: *Amoco* shows this principle (although it did not apply in the case, because Amoco rejected capture law largely on basis that no one would want m&m rights if people in the same lot could have a free for all). Essentially means that if you can trace ownership of secondary stuff from your original ownership you own secondary stuff too.

Lateral Boundaries Bounded by Water

Common Law:
At common law if a body of water was completely contained in a lot = belonged to the owner. More common that waterway overlaps with multiple owners (lake side or river through your property) = you owned to the center of the body of water. Then the notion changed, as any navigable water became Crown property.
Public Lands Act:
S. 3(1): beds and shores + all natural bodies of water (to high tide/water marks) are AB Crown land, and legislation is retrospective in that previous grants are also subject to this legislation (unless expressly granted away by the Crown). Has to be permanent and natural. Crown can explicitly grant these rights away.
Water Resources Act:
S. 3(2) Water belongs to the Crown. At common law you could capture water –subject to some limitations (if used for domestic purposes you could take as much as you wanted regardless of how it impacted downstream owners).
S. 21: says that a person who owns land next to a body of water can divert water for household purposes – “household purposes” = 1250 cubic meters per house per year (enough to keep a family of 5 in water), but it has to be for domestic purposes.
s. 49: need to apply for a license to divert for extraordinary purposes.
The Crown owns to the high water line (water and land).

Riparian Rights: A Riparian owner is one who owns right up to the high water line. Thus, riparian rights are extended only to riparian owners = use water from the body of water (for such things as drinking water, irrigation, or industrial purposes – depending on

jurisdiction). S. 49 of the Water Resources Act outline that in order to extract water for extraordinary purposes one has to apply for license, and no unlicensed extraordinary use. Common law rules of access, right to prevent flooding still apply until legislated. Drawing of water now regulated by legislation.

Accretion: during drought the shore will become larger or active river will make bed bigger. If you are a riparian owner (ownership up to the bed) = you get the benefit of accretion. Why does riparian owner get this right, because if water increases they will lose property (FAIRNESS); ECONOMIC FAIRNESS – you bought waterfront property you should get it; CERTAINTY; REDUCED TRANSACTION COSTS. However, accretion must be gradual and natural.
Accretion is an inherent right, but it can be excluded in the granting document.

Nastajus v. Edmonton Beach: Nastajus and 2 co-plaintiffs (owners of lots 2 and 3), and they are claiming ownership over land where water has receded (accretion). Edmonton Beach is the heir to original developer, thus they claim they are themselves riparian owners (as lots 2 and 3 are square lots) and thus developer and now EB owns between square edge and high waterline.
Trial judge looks at all the lots (free hand drawn and square lots) and determined that all owners (even the square lot owner's) are riparian owners.
Court of Appeal overturned (allowed the appeal). Square boundaries do not go to the waters edge no matter how you look at it. And further, even the free hand drawings boundary stops where the line is drawn (thus not riparian owners either). Thus, accredited lands belong to (most likely) Edmonton Beach, as the Crown would not challenge as they would not win.
Have to have accompanying text to be a riparian owner.
Adverse possession does not apply unless, owners actually possessed it, which they most likely did not.

Implications of Ownership

1) Support of the Land: One cannot cause subsidence (movement of soil) on neighboring land. Strict liability exists for subsidence, and it applies to buildings as well. Duty extends to land in its "natural state" only and thus court cases are often fought over whether land is still natural. (Battle ground of geologists/engineers).
2) Servitudes: A right possessed by one to use another's property.
3) Restrictive Covenant (Control neighboring land).
4) Nuisance: Can use this tort to limit unreasonable interference with your use and enjoyment of your land.
5) Incidental Rights: include voting entitlements, payment of rates/taxes, school attendance. And, Easements.

The Law of Fixtures

Fixture: a chattel that becomes affixed to the land (product of a physical act). Economic rational to protect the reasonable expectations (interests) of the buyer. Best to deal with fixtures in contract.

1) This is an important distinction as fixtures are automatically transferred with sale of land, while chattels only transferred if expressly included.
2) Ademption Doctrine: if you do not have in your estate what you claim to have the gift fails (suppose you sold land that you wanted to be sold for you children after your death and you considered the gift real property the gift would fail; however, if you treat your will's notion as equitable conversion of property (personal property) then the gift succeeds (as long as you can trace $ back to the pre-conversion status).
3) Doctrine of Abatement: what happens if person dies with debts – creditors get first crack at all the stuff in the will (common law had default rules on which stuff should be sold first – absent directions in the will: common law says personal property goes before real property).

Equitable Doctrine of Conversion: in the eyes of equity, personal property will be deemed to be real property if there is a direction to convert its form in a legal instrument like a will (for example in a will you say you want your land to be sold and profit to be given to my children = court will say it is a gift of personal property not real property because it is direction to convert its form; can also say I want my $ to purchase land = gift is real property). "Equity deems of conversion as done that which ought to be done."

Fixtures in Reality:

Homes: People are always affixing chattels (bookshelves). However, when you have a mortgage you are just adding to the security interest of the mortgagee. (Rarely do mortgage documents deal with fixtures).

Leases: Common law originally said fixture was the owners not the renters. Later this changed to include trade fixtures, then ornaments and agriculture fixtures. = Now tenants can remove their fixtures, as long as it does not do irreparable/substantial damage.

- Have to remove by end of determinative leases.
- Remove within reasonable time for periodic leases.
- Forfeiting ones lease = forfeiture of fixtures.

Canadian (Fixture) Test

Begin with the presumption that if it is resting on its own weight it is a chattel, if not then it is a fixture. Courts rely on this when test is too close to call.

1) **Nature/Degree of Annexation:** refers to permanency of object which is affixed (how firm is the object affixed to the land). What about a fridge – it is plugged in (attached) but is easily removable = courts will likely say it is a chattel. Typically deal with these "controversial" fixtures through contract.
2) **Object/Purpose of Annexation:** was the purpose of the attachment to enhance the land or for the better use of the chattel as a chattel. Thus, an object resting on its own weight can be a fixture, if the purpose of that chattel was to improve the land it is resting on **(keys to a house are fixtures)**.
3) Also look to what law describes as being a fixture, and at contracts.

Stack v. Eaton Co. (1902): Question regards shop shelving and electrical light fittings, was shelving enhancing premise or was it enhancing the shelving (probably the shelving but court said the other) – shows problem of the test as object of annexation is not mutually exclusive (the object enhances both the chattel and the land). As court said there was no intention to change the object's status as a chattel.

LaSalle Recreation v. Cdn. Camdex Investments: Villa (hotel) bought a hotel and borrowed money from Camdex = Camdex is a mortgagee (so they obtained a security interest in the land). Villa went bankrupt = Camdex took the land and sold it (a normal activity). This default sale of land was bought by White Spot, and Chester was appointed by the bank to make this sale.
Prior to going bankrupt Ville had bought a carpet from LaSalle. LaSalle sues Camdex in conversion for its carpet.
Court says the carpet was used to enhance the land (object of annexation test) = Camdex can do whatever they want with the carpet as it was a fixture.
Problem was LaSalle registered their security interest in the carpet in the wrong place. They should have registered in the Land Titles Office, but they registered it in the Office of the Register of the Companies. ***Shows importance of registering conditional sales agreement in Land Titles before the carpet is affixed*** **(conditional sales agreements apply only to signing parties – does not bind third parties but Land Titles would).**

Diamond Neon v. Toronto-Dominion Realty Sign was attached to the land (unsure about how well attached). Diamond Neon could have registered their sign under the Personal Property Security Act (in Alberta): can protect personal property by registering it in the Personal Property Registry – which gives me priority over buyer or any previous mortgagee: Then have to register under the Land Titles Registry to get a complete security interest over future 3rd parties. Common law said that you could register a caveat title to land when you had a chattel that was affixed (Australia and UK have accepted this but unclear if it would fly here).
PPSA permits lessors of chattels to register when lease if for 1 year or more or indefinite.

Dissent said it was a chattel, because the ultimate purchaser sold the sign. But people can by a house and sell parts of it; so, this is not super compelling. His example of a door (the address is a fixture, the name on the door is a chattel). Therefore, since the sign was designed to enhance itself and not the land = not a fixture.

Personal Properties Security Act
If A stole materials from B and used them to build a house; B cannot sue C as they are fixtures. B can only get A for theft. (Common law).
If B registers security interest in the PPS registration C is the owner and B is a mortgagee (any new money falls under a different rule) – if B wants further protection he has to register it in the land titles office (then B is covered for all future transactions).
What happens if C defaults on his promise to pay for the furnace? Furnace company has registered in both PPS and Land Titles Act – Furnace company could go get the furnace s. 36 of PPSA says any affected by a claim may either pay off the amount owing on the

object or the value of the object whichever is less. The bank (the mortgagee) would pay off the furnace because C is bankrupt and they want to sell the house with a furnace in it. If company decides to remove the furnace: they may have to give other security interest holders a deposit (in case they wreck stuff during the removal).

The Transformation of Chattel Ownership

Introductory Principles:

1) **Tracing** this is a key introductory principle as it impacts who will be deemed to own transformed chattels. Can you trace your ownership back to before transformation occurred.
2) **Fault:** Who is to blame for the transformation also impacts results
3) **Economic Fairness**

1) Confusion/Intermixture: When objects come together so that you cannot distinguish. If you can distinguish between the parts you just separate them. If you cannot separate them you generally get back what you have contributed to the mixture (a rough estimate) when it is an innocent mixture.
2) Accession: the unification of two or more chattels. Artificial accession - Auto-body paints my car accidentally. Primary rule is whoever owns the principle chattel (the greatest economic valued chattel) gets the accessioned object. So, if car is cheap and paint is expensive the painter could get the car. (General Rule).

Natural Accession: whoever owns the mother owns the offspring.

a) Injurious removal test: can the items be removed without substantial damage to the principle chattel.
b) The 'separate existence' test: has the separate identity of the acceded chattel been lost (as when as plank is added to a ship).
c) The 'destruction utility' test: would the removal of the combined items destroy the utility of the principle chattel (such as by taking tires off a truck)?
d) The "fixtures" test: looking at the degree and purpose of annexation, has the accession occurred?

3) Alteration: means changing personal property. Neighbor cuts down your tree and makes a sculpture. Basic rule is that unless you are dealing with perishables the owner of the original personal property maintains ownership (due to tracing principle). When neighbor made an honest mistake (sculpture) the basic rule is that tree owner gets the sculpture. But if sculpture is far more valuable than tree, courts will often say sculptor just has to pay compensation for the timber (courts maintain discretion here).

Wrongdoer in alteration and accession tends to lose, while under intermixture it just means they lose the contentious issues.

Indian Oil v. Greenstone Shipping: **Intermixture**

Intermixture case, but P says that there was wrongdoing so normal rule should not apply. The oil was deliberately mixed and our oil was being used to fuel the ship = we got less than we contributed. So they argue for compensation (all the oil that was on the boat –

even though some of it was D's). Evaporation and unpumpable oil likewise P claimed should be all D's problem.
Court said intermixture is designed to place parties where they would have been without the intermixing, not to punish wrongdoers; thus P got only what they contributed. However, whenever there is ambiguity you side with the victim so wrongdoing does come into play (give P generous estimates). Important case because the notion that the wrongdoer lost everything was basically killed in this case.

***McKeown v. Cavalier Yachts:* Accession**
McKeown is claiming a boat. He hired Cavalier to build the boat, but before it was finished Spartex bought the business. McKeown then renegotiated agreement, he did not know that business had been sold (he traded his boat + paid 2000 + his hull was the primary chattel).
Cause of action was detinue – court can give the object back if it is unique (which this boat was) or damages at the time of trial.
Spartex argued that the boat was there because they bought the business and there contribution was worth more than the hull (so their additions have to be the principle chattel) so they are also arguing accession.
Court determines that the principle chattel is the hull (and injurious removal test meant that they could not be adequately separated), even though the hull was worth less much less than the combined total of the additions. **Turning point is that the additions were added incrementally so at no time was the addition worth more than hull.**
Case probably decided because of policy reason **Principles of equity say that rules of property can be bent to accommodate the harshness of the rules (awarding 4409 to Spartex).** Court took an incremental approach, but they could have taken a global approach just as easily (the additions as a whole) in which case the result would have been different.
Problematic as we are trying to provide economic fairness, and Spartex incurred the most financial loss.
1) McKeown has to pay $4409 to Spartex. **Very controversial** (difference between amount paid and the value of the boat), problematic because he has no contract with Spartex. Thus, court treated this as an incontrovertible benefit but just in reality it was just a benefit (he got more than he paid for) – incontrovertible benefit is different than a benefit in than incontrovertible have to paid regardless of who has possession (if the 4409 was the amount it took to make the boat pass a safety inspection).
2) 20000 claim be assigned (chose in action) to spartex
3) McKeown has to pay the tax.

Gidney v. Shank
Gidney and Shank is not an incontrovertible benefit as Gidney did not have to make the improvement – it was by choice). Had the government legislated a minimum standard for canoes then it would be an incontrovertible benefit as all owners have to pay this improvement. Keeps people from just making improvements and forcing me to pay. (Owner should get to choose).

Unjust enrichment in this case is property, Gidney knows the canoe is not his, but he wants compensation for this. Court says it is an enrichment but it's not unjust (no contract, no agreement, no incontrovertible benefit).

Jones v. De Marchant
Plaintiff gave her husband money to buy pelts for her to make a coat. Husband bought 18, but on the side husband promised D that he would give her a fur coat. Husband stole wife's pelts and a coat was made (4 pelts added by husband). D did not know where the pelts had come from. P figured it out and wanted the furs back.
Alteration, intermixture, and accession all apply in this case.
Court said P got the coat, because they could not distinguish the pelts (intermixture), the pelts are now a coat (alteration), accession (pelts cannot be seperated) and her title survived throughout.
Jurious rule test:
Wrongdoer tends to lose out, when it is intentional conduct, had it been negligent the result may have been different. Even had the wife only contributed 4 pelts the result would most likely have been the same, as husband's conduct was intentional and wrongful.
If P hated the coat and only wanted compensation (Conversion) – P would be entitled to the full value of the coat, because husband did not obtain ownership of the 18 pelts. So, her title can be traced to the finished coat and thus can claim all 22 furs.

Lesson #4 The Concept of Possession

Possession in Law: Possession is title (against the whole world). Legal possession is very important as it establishes prima facie title (ownership) for personal property (was true for real property before modern registration system).
Possession establishes property rights: Right to obtain and a right to retain.
"You cannot sell what you do not own."
The rule is that the previous possessor always has a better right.

The Elements of Possession
Animus and Factum: Animus means intention to possess the object. Factum means physical control over the object. One needs to have both to have legal possession.

Factors Relevant to Possession

1) Degree of Physical Control: Physical control exists on a spectrum. I have physical control over an object in hand, and fairly good control over my laptop in front of me, but weak control over my car, I have keys to a lock – but this is constructive possession and it too exists on a continuum (how good is the lock, how many keys are there, etc).

2) Knowledge of existence and Nature: Knowledge of existence is relative as well, I know what is in my hand, but I have only a good idea what is in my pocket. What if something is found in my car that I never knew I had?
3) Rights of landowners and occupiers: have a constructive right of possession over goods found in their premises that they did not know of.
4) Things found in chattels
5) Means of access: Again this is a constructive factor relevant to possession.

Constructive Possession: Legal fiction, constructed to make system workable. Differs from actual possession, as factum and animus are not diluted substantially.

Possession vs. Custody: Custody is not legal possession, instead it refers to a situation where one has physical control only (another fiction). The master retains legal possession when his employee physically possess an object under this principle. Only time legal possession is transferred is when the object is transferred to an **independent contractor.**
Applies mostly to employees/servants.
Bailment = bailee has possession, but bailor retains right to obtain possession.

Immediate and Postponed Right of Possession:
If you contract it out you can OBTAIN your possession either when the contract expires or after a reasonable time. If stolen/lost you have an immediate right to possession.

THE LEGAL CONCEPT OF POSSESSION
1. A buys a wristwatch and wears it. A's property interest is legal possession (no registry of watches like land = not definitely legal title) but prima facie ownership.
2. A gives her watch to her servant B to polish it. B aquires physical possession for the benefit of her master = constructive possession applies as A maintains possession (mental and B's is for the betterment of A). = Custodial possession.
3. A gives the watch to C to be repaired. This is a bailment. C now has the legal possession as bailment's are transfers of property. A maintains a future right of possession (right to obtain), he gets it back when watch is fixed/contract says so/reasonable time. If watch not repaired at time contract expires A can demand the watch.
4. D steals the watch from C. D has both physical and mental control (legal possession). C has an immediate right to obtain possession. If theft occurs during the time when A was not in possession (unless his baille was negligent - absent fault on apart of C, A does not have an immediate right of possession) (C does) – so even if A sees D he cannot get the watch, unless he says he is acting as an agent for C.
5. D sells the watch to E. D has no title = you cannot sell what you do not own. So, E does not acquire title, but E does acquire D's possessory interest (legal possession). The significance of this is that D can no longer possess the object. C maintains an immediate right of possession (unless C was careless in which case A maintains superior right of possession). So, if was not careless then A has a postponed right of possession.

6. E loses the watch and it is found by F. E only has possessory rights; thus, E and C have superior rights to possession to F (C's claim is better). Court rules on the relative possessory rights of each involved party.

Common Law Rules for Animals

At common law you got a qualified property right (your's for as long as you possessed it) over wild animals if you could establish possession. What is wild is context specific (depends on what is indigenous in the area, as if it not an indigenous wild animal people hold absolute property rights over the animal).
The who kills the animal gets property rights generally, although *Ghen and Rich* demonstrates that a custom (area specific) can impact this notion. This is an economic based custom to ensure fairness. Litman says this is different than Post in that he was not a commercial hunter.
In AB the Wildlife Act has impacted this. You need a license to gain possession over wildlife = license can grant you possession over wildlife and its babies; however, if it escapes the rights revert back to the crown. However, even wrongful possession creates possessory rights. If killed by accident one must obtain permission from the Minister to obtain the carcass.
Domesticated animals: You have unqualified ownership over domesticated animals on your property. Treat it as any other chattel if it escapes. Test is does it have a habit of returning (thus even a wild animal can be domesticated).
Pierson v. Post:
The court gives two notions of what is required for a qualified property right:

1) If you have actual (secure) physical control you are good.
2) However, they also say that when physical control is practically inevitable you have enough physical control.

Pierson was a free rider, who at the last minute took the fox = unmoral; but the issue is one of law.
Glen v. Rich:
Custom of the area said whalers had distinct harpoons = when whale found a small finders fee would be paid, but the whale would go to the shooter.
Custom will also help you determine when you have sufficient physical control.
If you have done everything you can possibly do = you get possession rights (Ghen and Rich). For example anchoring to find lost treasure.

Baseball: *Popov v. Hayashi*
Case invented the notion of a pre-possessary right **(taken significant but incomplete steps to obtain possession which was interrupted by an unlawful act)**, because a mob had assaulted Popov before he could secure the ball. Hayashi was the first to establish adequate possession
Sets possession requirement high, as one must stop both the ball's and ones own personal momentum.

Adverse Possession

Ultimate reward for squatting: economic rational is problematic; reason it is allowed is to eliminate stale claims and fulfill expectations. However, you can removed at anytime with nothing for 10 years (and incur a maximum of 2 years liability for trespass).

Limitations Act: is designed to eliminate stale claims (contract, tort, and property claims), as evidence and witnesses deteriorate.
3(1)a 2 year rule from when P has actual or constructive knowledge that you have suffered a legal injury occurred and D is responsible
3(1)b says or 10 years after claim arouse (unless there is fraudulent concealment – 4(1)), whichever arises first = ultimate 10 year limit.

In regards to adverse possession:
s. 3(4) says 1(a)'s 2 year rule does not apply to possession of real property = you have 10 years for real property not 2 years.
s. 11 once 10 years has run without the owner (P) imitating the action D has immunity from P's lawsuit.
s. 2(4) says you cannot adversely possess Crown land. Rational is it would be impossible to supervise all of its land.

Once 10 years is Up
Quieting Title: **Land Titles S. 74.** However, current AB AP legislation does not have a section that says after 10 years the title of the old owner is extinguished. So, currently one could argue that the original owner just cannot sue for his property back, but he is still the owner = original owner can get back his house under the doctrine of self help. However, others argue that the courts will imply that title has been extinguished based on 1) Bentham's notion, and 2) US personal property cases = title extinguished after limitations period expires).

Elements of Adverse Possession: Balancing rights of squatter and owner.

1) 10 years of possession
2) Continuous possession: do not be literal here.
3) Actual possession: get what you possessed only. Unless it was a bad land transfer, or if owner had m&m.
4) Exclusive possession: Use must be to the exclusion of all others. *Keefer:* strip of land was not exclusive + he used it as easement dictated, while garage was exclusive.
5) Needs to be adverse: Cannot have landowners permission.
6) Inconsistent Use: when a wrongdoer is claiming AP he must have used land in a manner inconsistent with owners wishes. When innocent agent this is not a requirement (*Teis case).*
7) Open and Notorious:
8) Peaceful: US says yes, probably not a requirement in Canada, unless it is used to punish a wrongdoer.

Land Titles vs. AP:

AB says LT is paramount. So, if after 10 years the owner sells his land and AP has not Quieted Title then AP will have to start all over again. AP can file a caveat which is much quicker than LT to make owner aware of his rights.
If land sold after 9 years; AP starts at 0 as new owner has clear title.

Personal property adverse possession? If it is possible then period is 2 years, and it is harder as you are not "advertising" your adverse possession when you have a stereo in your living room.

Law of Finding

Finder: Someone who obtains an object that has been unwittingly dropped. This does not include mislaid (baseball glove at a field) or cached (hidden) items. Mislaid and cached items belong to the house. However, often the three terms are muddled together.

Obligations: A finder must take reasonable steps to find owner, and must care for the object. Can be held liable for conversion.
Rights: Best claim in the world, besides original owner. However, this right is relative:

1) Employees who find goods in the course of employment do so on behalf of their employer – unless prearranged contract or if employer does not assert rights.
2) Occupier of land/chattels: has superior title to affixed items if in occupation of the chattel/land at time object was unwittingly dropped.
3) Occupier of building: has superior right if they have a constructive intent to control chattels therein.

Factors favoring the constructive possessor: chattel imbedded or attached, totally private lands, intention to control the area, finder not a wrongdoer.

Bird v. Fort Francis:
A trespassing finder prevailed over the police who had taken money away from the finder and eventually gave it to the city treasurer. Wrongdoing is not punished.

Parker v. British Airways:
P found watch in airport lounge, gave it to an employee and asked if it was not claimed to have it returned to him. P was awarded the watch. Case says that a trespasser would not receive the benefit of finding. This is probably the superior finding = trespassers cannot benefit from finding.

Treasure Trove & Historical Artifacts
Finished gold and silver belong to the Crown.
The *Historical Resources Act* s. 32(1) says historical/cultural/scientific artifacts belong to the Crown as well.
Abandonment
Requires an intention to relinquish title (an indifference as to the fate of the chattel coupled with sufficient acts of divestment).

Law of Gifts

<u>Elements of a Gift</u> – Intention, Delivery, Acceptance.
Intention to gift: not usually problematic – normally courts find intention. However, issue can be contentious sometimes: Lord Beaverbrook Art Gallery – a bunch of paintings were either loaned (bailment) or donated to the Art Gallery and Beaverbrook's estate wants the paintings back.
Presumptions help find intention:

1) Presumption of gift: Historically a gratuitous transfer from husband to child or wife the presumption is that it was a gift (if husband did not intend this the onus is on him to prove on the balance of probabilities). Remains a sexist doctrine although some lower courts have applied this to women too.
2) When A gratuitously transfers to B (a stranger in law) = presumption of resulting trust, which states that B holds thing in trust for A. (Thus, presumption that gift was not intended).

Presumptions important as they help in close cases, and determine who has the onus of proving what.

Delivery: general rule is that when possible actual delivery is required. Constructive OK were impossible or impractical is acceptable – if it is an inter vivos gift this has to be complete delivery (need to hand over all keys) while DMC only requires partial delivery. Symbolic delivery requires careful language and still usually not good enough, as no built in protections to protect donor (easy to give a picture, harder to make a formal delivery or deed).
Usually deliver to donee but can also deliver to donee's agent (Casey Jr. in Innes v. Potter).

Alternatives to Delivery:

1) Deeds to gifts (signed, sealed and delivered): This is a response to the impracticality of delivering gifts (across a far distance, etc). It was deemed to be trustworthy because it is formal and speaks to intention of parties. Could also probably have constructive delivery on a deed.
2) Declaration of trust: declaring in any serious way – then the beneficiary actually has the property and trustee has nominal rights. Intention is clear when spoken or written; however, courts can look at actions to say no intention to gift, but intention to create a trust. However, courts have also said imperfect gifts should not be fixed by declaring it a trust (but often courts bend this rule).

Acceptance (is presumed when there is something of value, and presumption of non-acceptance when there is no value). Although donee can reject the property soon after learning of the gift if he/she so wishes (at first opportunity) – you can reject a gift in the face of bankruptcy.

<u>The Role of Possession and Delivery:</u> Delivery (transfer of possession) provides tangible proof of a gift. In the absence of consideration, this is the main way that intention can be shown concretely.

<u>Gift Classifications</u>

1) **Inter vivos:** An absolute gift (non-revocable) between living people. The gift is completed when all the doctrinal elements are met (does not matter what order).
2) **Donationes mortis causa (DMC):** Absolute gift where a person is in reasonable peril and is contemplating death. Gift is made immediately (once all doctrinal elements are met) but not perfected until donor dies. Donor can revoke before perfection and gift is automatically revoked if donor recovers (or dies from circumstance unrelated to the peril) or changes his mind.
3) **Testamentary Gift:** Property passes on death or arguably later when estate is fully administered. These are conditional gifts through will or intestacy. Ademption – cannot give away what you no longer have.
4) **Bird and Strong:** on death person gains title retrospectively. Failed attempt to give an inter vivos gift and then donee becomes the administrator of the estate and subsequently perfects the gift.

Gifting Land + Intangibles

You have to execute the formal transfer form, and it has to be delivered to the donor and the duplicate certificate of title has to be filled out.
Choses in Action (stocks, bonds, etc.): Document specified by the relevant legislation has to be filled out and delivered.

Evidentiary Requirements: s. 11 of the Alberta Evidence Act: It applies in Bird and Strong, DMC, or inter vivos: when you are trying to get property or the estate is trying to get property from you = collaboration requirement. This provision does not apply to testamentary gifts as they are dealt with in the will.
Collaboration – witnesses and writing are best, although courts have been quite flexible (things like a history of gift giving).

Statutory Modifications

Hoiland v. Brown: Judge held that there was an intention to make a gift, and she wanted it. However, motorized vehicles require registration when making a gift = statutory provision superimposed on the common law notions of gifting. So, for motorized vehicles a gift requires more than common law elements in BC.
Litman disagrees with this ruling, as it appears that the legislation presupposes on owes the vehicle prior to registration. So, gift should have been perfected, but created a personal obligation to register the motorcycle.

Limitations on Ability to Gifting:

1) Avoiding or giving preference to creditors (legislation).
2) Creditors get first crack at an estate.
3) Dependant's get second crack: claims under Dependants Relief Act and related Adult Interdependent Relations Act. Example suppose child cannot make a living – wife gets 1/3 and 2/3 remaining will be divided amongst children but this is not enough for the one child. Child can get more for the proper support and maintenance of dependants (p. 5) determined on how they have become accustomed to living (unless they have been insufficiently treated). Dependants can also ask for a will to be overridden when not included at all. Dependants are

children (under 18), spouses, and invalid adult children. And adult interdependency act adds to this list.

4) Then claimants under the will and others get a crack at the estate.
5) Undue Influence:
    a) Coercive Gifts: factual inquiry into whether free will overpowered but persuasion is fine.
    b) Undue influence is a presumption in fiduciary relationships, patients, clients, nursing home residents.

Innes v. Potter: stocks for daughter, gift passed at time father gave stocks to partners son. The fact daughter never knew of the gift until death was irrelevant.
Why was it an inter vivos gift? His intention was that the stocks were his daughter's from the time he relinquished control, although he did not want her to use and enjoy the property until after his death and it was not will like (not testamentary). And it was not a DMC gift because he was not in reasonable peril.

Re. Bayoff Estates: This was not testamentary, because he handed the key over before he died. However, this was not a DMC, because Bayoff was facing certain death and thus could not be revoked = it was an inter vivos gift that failed because delivery was insufficient. Judge says had this been a DMC the gift would have succeeded because he had relinquished control – the key was given away. However, most courts have said that when partial control is given up that this will constitute delivery. Suppose he had two keys to his safety deposit box = judges standard in this case would not be sufficient.
How much control is required to be given away in a DMC? The degree for DMC is less than inter vivos, because DMC can be revoked and DMC cases the donee is limited in what he can and cannot do (give away).
Inter vivos gift was not valid because the delivery was not actual nor was it constructive because the forms were not completed properly.
However, she got the gift, because of the Bird and Strong doctrine: during his lifetime donor must have intended and attempted to make a gift and up until his death he believed the gift to be perfected, and the donee becomes the executor/executrix - who can then perfect the gift.
The gift is not perfected until after death; so, problematic to call it an inter vivos gift. So, it looks like testamentary gift (perfected on death), but this would make it liable to creditors to be paid off (unlike an inter vivos gift). Ultimately, it was a doctrine created for fairness and thus has holes but works nonetheless.

Doctrine of Estates

Fee Simple:

General Principles: easy to sell or get a mortgage (as long as significant security), Fee = inheritance. Simple = who may inherit (generally inheritable = descendants, ancestors, collaterals). Until 1540 real property could not be willed away, before that primogeniture. **No matter who got it there would be a single heir.**
Only blood relatives are heirs (technically speaking).

Common Law: **"To A and his/her heirs"** implicates generation after generation of heirs, because plural heirs applies to future generations (historically you could have only one heir).
Words of Limitation: The words "and his heirs" are words of limitation (how long the fee simple will last).
Words of Purchase/Substitution: tells us who gets the property ("to A" are the words of purchase).
Measure the estate on the descendants of A (prior to 1540); however, if A sold property to B then the measurement of the estate began being measured by B's heirs. (A was the only person who actually got anything, until 1540).
Only these words would create a fee simple. However, if you made a mistake – by giving B a life estate instead of a fee simple, the grantor could fix it with B's permission.
Following 1540 errors were quite frequent = in a will judges take a constructive approach = open to interpretation.

Law of Property Act (p. 35): s. 7 No words of limitation are required in the transfer or conveyance of land. So, if you have a fee simple and you convey your land you convey a fee simple (unless there is contrary intention).
Wills Act (p. 94): s. 23 Lapsed gifts go to residuary beneficiary.
s. 26 when real property conveyed without words of limitation = fee simple unless contrary intention.
s. 34: These provisions apply when you make a gift to child, other issue or siblings and they predecease you (if a brother is your residuary beneficiary (but he predeceases you) then per stirpes his heirs get it), and s. 35 says spouse/interdependent is not entitled to preferential share as provided for by Intestate Succession Act s. 3.
Issue: means lineal descendants.
Lapse: If you die and name a beneficiary who predeceases you = the gift fails.
However, Intestate Succession Act: the estate shall be divided per stirpes amongst the issue (this provision means that grandchildren will split what their parent would have gotten had they not died.
Suppose I give everything to my brother. My brother had 2 children and 1 child had a child. My brother and his two children were killed in a car accident = "per stirpes" would mean the grandchild would get my entire estate.
If only one child dies with my brother in the crash (and that child had 4 kids) then my one child will get ½ and my other child's children will split ½ 4 ways (per capita).

Tottrup v. Patterson: Frank makes some specific gifts and the residuary to his brother Fred (residuary usually = main beneficiaries). However, when Frank dies, Fred is already dead (you cannot make a gift to a dead person). If a residuary gift fails (legally called lapse) = intestacy kicks in unless there is multiple or alternative residual beneficiaries. (Frank's heirs get the stuff).
However, Frank's daughter challenges that the gift lapsed, because she argues she is Frank's heir. (She argues that heir in this case is a word of purchase and not one of limitation (she is saying absolutely and forever are the words of limitation).
Judge says the wills language ordinarily dictates the length of the estate (duration = words of limitation) = creates a fee simple.

Court says the onus is on P to prove the words did not mean what they have meant historically (and she loses because the will was professionally drafted and the words are a work of art).
Judge examined "to A or A's heirs" and determines this would be considered alternative beneficiaries.
If there was a gift "to A (representing all my brothers) and their heirs" and the will maker knew that one of the brother was already dead one can infer testator intended heirs to have an alternative meaning. **Thus, intention of the will maker at the time of drafting is important.**
Since, daughter cannot rebut historical meaning = she loses (the words are limitation).

Fee Tail:
These are quite rare. The idea was to keep property in the family, dynasty control. The problem is you can only convey what you have = you can only convey an interest for your life (not as attractive as fee simple) and when you die land reverts back to grantor. Thus, there was a major problem with alienability as only interests for life could be conveyed.
If the grant was made after 1540, there is a residual owner (the grantor in 1541) as he could not grant away everything = got to trace residual owners heirs (look to will of heirs) = very complex tracing. There were fictitious ways to convert fee tail into fee simple, bizarre logic but they wanted to get rid of them.
"To A and the heirs of her/his body" (or a suitable variation) would create at common law a fee tail. Estate lasted as long as there are lineal descendants (children, grandchildren, etc.) – could be refined to only male/female heirs. However, today this would create a fee simple as per legislation.

Unbarrable Entail: "To A, but should she die without issue, to B." But, in AB this creates a conditional fee simple (condition being the birth of a child). So, only way to "keep it in the family" is to grant successive LE (but this is frustrated by rule against perpetuities).
S. 9 Law of Property Act (34): any devise or limitation that previously would have created an estate tail creates an estate in fee simple.
s. 28 Wills Act (95): applies to people with no lineal descendants (no issue): "**To A but if his issue die out to B and her heirs**." At common law you would say this is (probably) a fee tail to A and if his descendants die out then B gets it (instead of residuary notion). S. 28 says that words are to be read so as to not create a fee tail: so instead create a conditional fee simple.

The Life Estate
Word fee is does not apply, because fee = inheritable.
Conventional
Pour sa vie: estate measured by your life.
Pour autre vie: estate measured by the life of another.
Life estate last as long as "original LE" life lasts. A can sell his interest to B = B LE measured by A life. If B goes first then at common law first occupancy got it. Now

legislation **(s. 3 of the *Wills Act*)** says B can will his interest away, and then it reverts back to residuary owner.

By law

Dower: wife receives LE
Curtesy: husband receives LE
Homestead: Homestead rights found in the Dower Act (LE to surviving spouse).
Remedial: through equity to prevent unjust enrichment

Creation

Ideally LE owner gets the interest while legal owner maintains capital benefits. However, when wills says "LE to wife, and remainder to my son" problems arise, because wife needs money while alive but she cannot touch the capital.

Three Options:

1) Life estate with remainders (harsh for above reason) – although LE can encroach if he/she has remainders consent.
2) Fee Simple (remainders are repugnant (Walker) because LE can sell all capital).
3) Power to encroach.

No magical words, instead looks for paramount intention to determine which of the three. Message is that it is best to be explicit when drafting a will.

Re. Walker "I give all my property to my wife, and should any portion remain …" Court held that primary intention was to grant Fee Simple to wife. So, since she had a FS remainder clause was repugnant. Case important as it holds a middle ground exists.

Re. Taylor All property to wife for her lifetime, anything remaining at the end would be divided by daughters. Court accepted LE with the power to encroach option, because (court determined) that the wife was limited to what she could do for maintenance. Court read this in to reach a desirable result.

Encroachment and Disposition:

Encroachment applies to personal property, not real property. Need to have power of disposition – can either be disposition to sell or disposition to sell and then encroach on $ - depends on the terms of the will.

General Powers and Use and Enjoyment

Settlement Concept: The idea is "To A, for his life, and remainder to B." The LT and remainder-person's interests must be balanced – LT is the income beneficiary and remainders are capital owners. Problem is LE are not alienable (not much of a market for LE) = hard to raise $ + without power of disposition LT needs capital owners consent (may be unwilling, may be a child, etc.).

LT can lease their LE, if farmers lease LE planter is entitled to crops that have yet to be harvested when LE owner dies.

Only legislation we have is ***Settled Estates Legislation*** (1856 British statute) - part of the law of Alberta due to NWT Act (s. 6(2) in 1870. Allows tenant to grant 21 year leases,

and guarantees this time regardless of when life estate owner dies. And allows them to raise $ to make drainage on farm lands.

<u>Who pays Expenses: *Powers v. Powers*</u>

Four (fuzzy) rules are established in Powers – Trustees also bound to these rules:

1) An ordinary recurrent (maintenance) expense is paid by life tenant (water, heat, taxes, house insurance, sanding floors, painting, lawn care).
2) Who benefits from the service determines who pays the bill. Heat, water = benefit the life tenant. What about a mortgage that requires $462 a month payments for an addition made to LT's house = the life tenant pays the interest and capital owner pays the capital.
3) Salvage interest (earthquake causing foundation damage, or re-shingling the roof [although this seems like a periodic expense]) are to be paid by capital interest owner.
4) And expense relating to the replacement of a fixture comes from capital owner (deck, fencing, furnace). Although these could go either way (I am 20 and furnace only lasts 20 years = unrealistic to think beneficiary is going to benefit from the furnace).

Periodic expense rule makes the most sense, look to it first.

<u>Waste and Liability:</u>

Waste refers to a LT permanently altering real property.

1) Ameliorating Waste: guilty of waste even when you make improvements. However, courts generally not too sympathetic to P in these types of cases. When P's land gets improved he is generally not entitled to compensation. However, if you change the character of the place then you may be liable (bungalow into a tall-lean home).
The personhood argument is probably available here.

2) Permissive Waste: failure to take action from deterioration. LT are exempt from liability unless granting document says otherwise.

3) Voluntary Waste: Punching a whole in the wall (active/deliberate act). What about natural resources – can you cut down trees or use minerals (when mineral title is on title). General rule is LE cannot exploit trees or minerals, unless someone has already opened a mine/oil and gas well. Timber in England addressed by Estover Doctrine: allowed enough timber for fireplace/fences/make furniture (was limited to personal handicraft = cannot sell timber and use $ to buy fence posts/furniture). Canada said we have enough timber so can use sell reasonable amounts of timber (probably annual growth). Documents creating LE (Wills) can contain a clause that says LE is "not impeachable for waste" (another form of encroachment).

4) Equitable waste: malicious and wanton act of destruction/damage. Can have waiver from liability (**s. 71 *Law of Property Act*** = can protect oneself from equitable waste doctrine as well).

5) Waste also protects: tenants entail, mortgagor – mortgagee relationship, free hold interest – future interest. Thus, balancing current owners and future owner applies to more than LE and beneficial owners.

Raby Castle: equity says that even if you have not liable for waste clause that you cannot commit waste unconscionably.
City of New West Minister v. Kennedy: Family fell behind in taxes, city gave redemption notice (had one redemption year to pay) failure to pay = property seized. Kennedy's had a fee simple but city potential future owner; so doctrine of equitable waste applies. Kennedy's dismantle the home = fee simple says they can waste their own property, but you did so unconscionably so you are liable for equitable waste.
You can be protected from equitable waste s. 71 (P42): so if you want to give complete protection you say "not impeachable for waste, including equitable waste."

Other Stuff Regarding LE
Selling LE: LT can sell LE to another. (**s. 3** ***Wills Act***).
Lease: allowable for 21 years ***Settled Estates Act*** (1856).
Mortgage: ***Judicature Act*** **(s. 6(2)).** LT can only mortgage if – he has permission of remainders or if he is given the power in the deed/will.

Life Estate by Operation of Law
Common Law – Dower/Curtesy: Designed to provide shelter to wife later extended to husband (primogeniture). Right ran with the land (purchaser bought property subject to dower rights unless spouse waved them), gave LE in 1/3 of spouses land.
These rights were **abolished by s. 3 (dower) and s. 4 (curtesy) of the** ***Law of Property Act***.
Now have *Dower Act* based on US Homestead legislation.
Dower Act
Generally:
1) Exempts (part) of the family home from creditors.
2) Requires the non-owning spouse to consent to any disposition.
3) Provides LE in the home to surviving spouse following the death of the owner.

Civil Enforcement Act: I owe $ and lose in court = creditor becomes a judgment creditor. S. 10 says many things exempt from civil enforcement (Farmers have160 acres of land exempt if home one the land and land comprises part of the farm). S. 88 principle residents of debtors are exempt for a value up to the amount provided for in regulations (only 40,000). Other exemptions 12 months of food. Clothing, motor vehicle, appliances as prescribed in regulations. If good worth more than regulations provide good can be seized and you get amount returned prescribed in regulation.
So, home now has limited protection because of limited amount.

What is a Homestead:
1) **Definition s. 1(d):** Homestead is a parcel of land on which the dwelling house that is occupied by the owner of the parcel as the owner's residence (not more than 4 city blocks, or more than 160 acres).
2) **S.** 25(1): When married person is a joint tenant, tenant in common, or owner with a third party other than the spouse Act does not apply. Dower does not apply when more than 2 people on title.

3) 25(2): When husband and wife jointly sell the property (consent is achieved) and the Act does not apply. However, dower rights remain with concurrent ownership, which is why consent is required.

Mines and Minerals: s. 24(1): Dower rights under the Act extend to m&m. So, when m&m on same title as the homestead consent in writing is required. If worried about them, prior to marriage, one can have titles separated and then dower will not apply.

More than One Homestead? Yes there can be more than one homestead **(s. 1(3**), but when spouse dies then surviving spouse has to chose 1 for his/her LE (**s. 19(1)**).

Duration of Homestead **(s. 3)**:
s. 3(1) Once land becomes a homestead it remains a homestead pursuant to s. 3(2).
1) s. 3(2)a: when it is properly registered in land titles (requires consent).
2) s. 3(2)b: when dower rights released and registered in land titles (as per s. 7).
3) s. 3(2)c: when there is a judgment is registered in land titles, against the married person in respect of any land disposed of by the married person (fraud, false consent, false affidavit).

Disposition of the Homestead: This is defined in **s. 1:** a inter vivos act by a party. Examples: A transfer, agreement for sale, leases for more than 3 years. A mortgage pr encumbrance intended to change the land with the payment of money, that is executed by the owner of the land. Through a will. A mortgage by deposit of certificate of title or other mortgage that doe not require the execution of the document.

Consent:
s. 4 says you fill out a form and register it in Land Titles. But you can also consent in the transaction.
s. 5 Spouse is required to acknowledge that they have agreed to the transaction (to demonstrate free will).

Remedies:
s. 2(3) You can by fined 1000, or imprisoned for 2 years.
Void vs. Voidable: Up to the time of registration of the Land by the 3rd party the transaction can be undone.
s. 11: However, damages against your spouse may be collected. Action for damages for loss of Dower Rights – s. 11(2) is the sum equivalent for ½ of the transaction, or if transaction below market value they get ½ of the market value. Suppose house is worth 300000 and he still owes 75000, and husband makes an improper disposition and he gets 310000. So, wife is entitled to ½ of the 310000 and husband on the hook for the amount of (75000).
s. 12-16 If spouse cannot be found, or if spouse a dead beat (moved to Mexico) then the insurance fund ($ comes from tax on every land tile transaction) will compensate them. Usually have to have a judgment that cannot be enforced.

Termination/Loss of Dower Rights:

1) Divorce: 1970 ABCA said if you divorce you lose dower rights.
2) Death:
3) Release: **s. 7** supported by an affidavit s. 7(2), that is executed and sworn 7(3), and it is registered in land titles 7(4). S. 8 you can undo a release before it is registered in Land Titles s. 8 (Caveat).
4) S. 9 Consideration through a separation agreement in contract is valid release, as long as it is fair s. 10.
5) Proper consent under s. 9.
6) Estopple: bad conduct (saying we are not married, when you are, and then claiming dower rights).
7) Seizure in execution: Husband's creditors get all his property exempt 40000 in value of the home. And the creditors will also have to compensate the wife for her life estate.

At common law dower and cutesy existed because only blood relatives inherited property and thus the doctrine stepped in to protect spouses. Today we have freedom of disposition, freedom to make a will, intestate succession act, and we have Dependents Relief Act – if spouse on his/her death did not give you adequate maintenance and support then court can overturn wills provisions.
Others say Dower Rights ensure there is a home for the surviving spouse.
There is nothing in the Act that gives occupation rights. So, you have power to prevent sale during both spouses' lifetimes; however, you have no right to live in the house until after spouse dies (because you have a life estate all by yourself). However, you can get an order for possession under the Matrimonial Property Act (s. 8?)

Life Estates in Personalty

There are no estates in personal property. Personal property is held allodially (you actually own it) unlike land were you only own an estate – while the Crown owns the land. Personal property you own outright. Ziff makes the point that a gift for a year is really a gift forever, or else it is a bailment, or else it is impossible (because you cannot grant personal estates).
Exceptions and Qualifications
1) You can create estate like interest in a will. A has a life estate in the $ in my bank and remainder to B. Does not apply to consumables, but Litman says this is not completely true for wills/trusts because 1 years worth of food is exempt from seizure s. 23 Dower Act.
2) Trust: some are testamentary (will) and others inter vivos – both can work as long as they are time limited. Does not apply to consumables
3) Statutory:

Shelly's Rule

The Classic Formula: `to A for life, remainder to A's heirs'
To A for life = life estate at common law. Remainder to A's heir looks like words of purchase, but Shelly's rules converts them into words of limitation = these words convey

to A a fee simple. Shelly's is a Rule of law only applies if words of purchase have specific meaning.

Qualifications:

1) All of this had to be in one document: if it was granted to A in one document and to remainder in another = Shelly does not apply.
2) Estates of the same quality: So, if the gift to A being legal and gift to heirs being equity would mean the rule did not apply
3) Mediately of Immediately: If will said "To A for life, then to B for life, remainder to A's heirs" = A gets (a fee simple) and can use it until his death, then B gets it, then when B dies it reverts to A's heirs. Even if grantor said he did not want Shelly to apply, it applied because Shelly is/was a rule of law that was created by the courts.

The Threshold Question of Construction: the meaning of `heirs.' Rule of law only applies if words of purchase have specific meaning: For example "To A, remainder to Joe Smith" = Shelly does not apply. Same with "To A, remainder to A's children" = Shelly does not apply. Word has to be "heirs" as this refers to infinity. So, if remainder is anything less than generation after generation then Shelly's rule does not apply.

Why have Shelly

Absent Shelly's rule A would get a life estate, and on his death eldest son (heirs) would get a LE (all his father had) – property would be transferred by an inter vivos gift (thus no tax would be due). Then next eldest son would get a LE from his grandfather when his father died. So, Shelly's rule was to allow king to collect his taxes; by making what should have been LE into fee simples.

Or perhaps to explain heirs. Will maker wanted to give land to generation of "heirs" thus the phrase "To A for life, remainder to A's heirs" was an attempt to explain the fee simple doctrine.

Application in Alberta

Wills Act s. 27: Gift to "heir," according to this section 'heir" means, absent contrary intention, those designated in the Intestate Succession Act (spouses and children) which are not infinite = Shelly's rule should not apply.

Interpretation Act s. 26(3): province has an interpretation act and it says singular also applies to the plural (unless clear intention otherwise) so the fact that above section say "heir" also includes "heirs."

Some AB courts have said Shelly's rule was never received in Canada, although this have never been formally accepted.

However, in the mid 1980's there was an Ontario case that said Wills Act s. 27 was not designed to punt Shelly's rule – Litman thinks this is wrong, as it only applies to heirs when intention was generation after generation.

Make sure to check out Hypothetical's in notes (Prop –Lesson #5).

Lesson #6 – Origins and Nature of Equitable Interests

Development of Equity: Early on the common law was a strict body of law. Custom and tradition = flexible society, so common law was strict to compensate. Example: common law accepted people could borrow $ for land mortgagee would get the land for security, and only when last payment made did mortgagor get his land. This meant that if you made all but the last payment then lender got the land.

People started going to the king for special justice. After a while too many people started coming to the king = handed the matter over to the Chancellor (by 15th century it was regarded as a court of conscience). Chancellor eventually became overwhelmed too so he delegated authority.

1727 Maxims released: "equity is equality," "he that hath committed inequality, shall not have equality," "equity regards not the circumstances but eh substance of the transaction," etc. This caused conflict – **equity would trump law** – eventually this rule got incorporated into the common law (17th Century notion). Rule was equity followed the law, unless it did not want to.

Equity developed remedies including the injunction and the order of specific performance. 1870 courts were merged.

`Use' Terminology

1. Feoffor: is the grantor in law
2. Feoffee: is the recipient at law
3. Cestui que use: is the beneficiary at equity.

Concept of a Use: T (the feeoffor) grants "To A (the feoffee) and her heirs to the use of B (cestui que use) and his heirs." The idea of a use is a conveyance that separated legal and equitable title. Before equity intervenes you enforce the legal title. So, A can do what she wants (fee simple) at common law. However, B could say this was for my benefit so A should not be able to do whatever she wants = court of equity accepted this argument and title could be split. Equity creates beneficial title = Use and enjoyments + benefits ($) go to B.

Under Land Titles: A is listed as the owner, B can caveat and say I have an equitable interest.

Historic Uses for the Use:

If husband only had equitable interest dower did not apply.

Marital Unity did not apply if daughter held land in equity.

Uses were not recorded: So if B was always in trouble with creditors you would convey legal title to someone else so that B could avoid creditors (however, eventually legislation filled this loophole).

Before 1540 you could not make a will. So, property could not be inherited by anyone besides eldest son. But you could say "To X to the use of myself for life, then to the use of my wife, then to the use of my daughter" in an inter vivos gift = essentially a will.

Mortmain (perpetual ownership): avoiding taxes.

Managing the property – hand property over to sister in trust for soldier's son in equity.

The Statute of Uses **(1535 Britain)**
The Crown was pissed that people were using uses to avoid paying taxes; so, Parliament (comprised mostly of common law lawyers) was persuaded to pass the Act. The goal was to end uses. **Act's main provision applied "where a person is seised to the use/trust or person or corporation" to remove the legal title from the feoffee and give it to the cestui que use = tax loophole closed.** The problem was that uses were in such widespread use that lawyers found ways around the Act.
Basic Operation of the *Statute of Uses*
"To A and her heirs to the use of B and his heirs." A's estate would be immediately executed = B (cesti que use) would get both legal and equitable title.
Getting Around the Statue

1) Basic approach: Avoidance
2) The imposition of active duties: If legal owner had active duties statute did not apply
3) Grant to a leaseholder: Seision only applies to freehold estates, so leasehold estates exempt from the statute.
4) Property held by a corporation: Statute only applied to natural persons (as trustees – they can be beneficiaries under the statute).
5) Being seised to one's own use: "To A and his heir, to the use of A and his heirs, to the use of B and her heirs" Statute would execute A – giving A equitable and legal title, but B remains with equitable title (so statute not applicable).
6) Exhausting the Statute:
   a) Use upon a use: Statue could only execute one fee simple use. So, "To A, to the use of B, to the use of C" would exhaust the statute. So, B would have legal title and C would have equitable title. **Consecutive uses** are different: "To A and his heirs to the use of B for life, for the use of C" = A gone, B gets a life estate, and C a fee simple in remainder.
   b) Use after a use:

Effects of the Statute of Uses

1) Wills: First Wills Act was born, as the old "wills" that uses had made could no longer be made.
2) Conveyances: Transfers prior to Statute required symbolic transformation (people had to travel to hand clump of dirt over). Following Statute "To A, to the use of B" would grant B legal and equitable ownership outright through documentation.
3) Executory Interests: immune from many common law principles.

Modern Trusts

1) Settlor (feoffor).
2) Trustee (feoffee)
3) Cestui que trust (or beneficiary).

The standard form of creating a trust today is: ***Settlor transfer property to "T in trust for B."*** The Statute of Uses does not apply very often anymore, because the trustee has active duties – the property that is in the trust (cash, bonds, etc) is personal property (statue does not apply to personal property) and often the trustee is a corporation. So, if

there are no active duties, and trustee is not a corporation, and trust is for land then Statue of Uses would catch it.
Thus, some have argued to use the words "To T in trust for T, in trust for B," but in AB simple language remains.

<u>Examples of Valid Transfers</u> (gifts contained in an inter vivos transfer):

1) To B for 99 years in trust for C (for 99 years): B has a leasehold interest, not freehold so Statute does not apply.
2) To B Ltd. in trust for C: Statue only applies to people not corporations.
3) To B to collect rent and profits and invest these to the use of C: Active duties are created (which are reasonable interest not just tax avoidance).
4) To B the sum of 10000, to hold in trust for the benefit of C: Statute only applies to real property.
5) To A to the use of B to the use of C: Exhausted the statute of uses (concurrent)
6) To B to the use of B to the use of C: B is siesened to himself = B gets legal and equitable title, but C has equitable title.
7) Unto and to the use of B (means to B to the use of B) to the use of C: Same as above example with different language.
8) To the use of B in trust for B.

<u>Example of Bad Trusts</u>

1) To B to the use of C: Statute operates = C has full title.
2) To B to the use of C Ltd.: B is a natural person and C is a body politic = C has complete ownership.
3) To B in trust for C: trust/use mean the same thing.
4) To B in trust for C for life, then in trust for D in fee simple: B is removed by the statute, C gets a life estate, and D gets a fee simple. So, it is merely a delay in completing the execution of the statute.

<u>Express Trusts:</u> When people actively create a trust. For such things as minor children, or others who lack capacity, wills create them often. Also income trusts.

<u>Remedial Trusts</u>

1) **<u>Situational/Institutional Constructive Trusts:</u>** These are trusts imposed by equity, in response to unconscionable conduct. (A vendor in a standard house transaction normally assumes the position of a constructive trustee prior to completing the transaction = vendor can collect rent in the place, but cannot waste the property).

   a) when an express trustee misuses funds = $ is constructively beneficiaries.
   b) To prevent a wrongdoer to benefit.
   c) When a person meddles with property that he knew or ought to have know was trust property.

2) **<u>Resulting Trusts:</u>**

   a) When the benefits under a trust have not been properly disposed of by the settler: "To A Corp. in fee simple, in trust for B for life" = remainder of the beneficial fee simple is not mention, so it will results back to settler (as A has legal title only).

b) Unmet Conditions: "To my first child to reach 21 years of age." = until condition met equitable title cannot pass.
c) When a deed/trust is ineffective (trust contravenes public policy, or was created by fraud/duress) = beneficial title results back to settler.
d) Gratuitous Transfers: When A buys property and places title to in the name of B, a resulting trust is presumed to arise in favor of A. And this means A has both legal and equitable ownership due to the Statute of Uses. **Notion can be rebutted if it can be shown a gift was truly intended.** This notion is presumed in gifts from father to child (probably mothers treated the same as fathers today), or husband to wife (although Matrimonial Property Act now impacts this).

Peter v. Beblow: A case were Canadian courts have gone further than situation trust. In the 70's spouses were suing x-husbands, but all property was in husbands name = argument was that some of the property was held in trust for women – eventually the courts agreed based on unjust enrichment.
Unjust Enrichment requires:

1) Enrichment: Husband got domestic service from spouse/partner.
2) Corresponding Deprivation: P needs to have made a contribution (gardening, house care, cooking), and tax deduction. Court said tax deduction not applicable because wife had not lost anything (was not at her expense). Thus, be careful enrichment corresponds to the deprivation.
3) No juristic reason for retention: Beblow says her services were just part of the give and take of a relationship, court says this leads to feminization of poverty. By the time the case was heard, unjust enrichment had been addressed in Matrimonial Property Act – Beblow said common law relationships not addressed so I should be free. Court said this did not preclude unjust enrichment from applying.

Thus, Beblow lost in regards to unjust enrichment. However, what is the remedy for the unjust enrichment:
Preferred remedy is to provide compensation (not property), but Beblow did not have $ = it would be inadequate (also inadequate if personhood applies). A property based remedy can be provided if compensation inadequate and person can show that P's services made its way into the property that one seeks to impose a trust (proprietary nexus). This means that the value received is irrelevant and what matters is the value survived [the $ saved from her has to be spent on the house (this is untraceable)], but the trust was created on the house, because $ made it way into the family assets (Court is admitting it is impossible for the nexus argument in most cases to actually be traced into the house). Therefore, indirect proprietary nexus was applicable in this case, but SCC says unless there is a strong reason for allowing indirect evidence direct proprietary nexus is required.
Constructive Trusts can be a remedy to unjust enrichment. Beblow has legal title, but Peter has equitable title (beneficial title), this secures the duty to convey = Peter will get the property.

Manhattan Bank: Lots of $ was paid to the bank, and in error a second payment was made. Money belonged to P, however, bank had gone bankrupt. Creditors get $ first

(some are secured – have interest in the bank and its $) others are unsecured (including customers). P tried to prove trust – then bank would only have legal title to the $ and customer would have equitable title. Thus, trust assets are reserved for beneficiaries (exempt from legal owner's creditors). Court said trust was good, but you cannot say which $ in the bank is P's, but the court said it is in there somewhere (which was good enough).

Rules of Equity
Trustee cannot use and enjoy property at all (when it is a constructive trust there is a duty of conveyance). Typical trusts – trustee must invest and the beneficiaries get the benefit. Remedies: equity passes injunctions (stop doing something or start doing something). Special Equitable Rules:

1) First in time rule: who had equitable title first gets it. This is different than legal interest – pretend Beblow sold (his legal interest in the land) before Peters could caveat title. When legal title and equitable title conflict through a bona fide purchaser of value (without notice) then the legal owner will prevail – purchaser must either have known or ought to have known trustee was breaking the rules for conveyance to be void able.
2) Equity will not suffer a wrong to remedy an injustice.
3) Equity follows the law (usually).
4) Those who come to equity must do so with clean hands.
5) Equity imputes and obligation to perform an obligation.
6) Equity deems done that which ought to be done.
7) Equity will presume equal distribution.
8) Equity is more worried about intent than form

Lesson #7: Conditional Transfers and Future Interest

Future Interest:
If you transfer property "To A for Life" intervivos = a present interest.
If it is "To A for Life if he marries my daughter" = a future interest. "To A for Life, remainder to B" = B has a future interest and A has a present interest. If A is dead = D has a present interest.
"To A for Life" = A has a present interest, grantor (reversion) has a future interest.
Estates: Can be present or future.
Seisen: A legal term meaning possession of land under a claim of freehold – called actual seisen/seisin in fact. Seisin in law is a type of seisin that gives rise to immediate right of possession. One cannot be siesed of personal property.

Reversions: Present right to a future enjoyment.

1) "To A for Life, remainder to B for life" – creates **pure reversion** to grantor.
2) "To A for life, remainder to B if he marries." Cannot say for sure whether B will acquire the property = Grantor has only definitely granted a life estate, and the possibility that a fee simple may be granted (Grantor has granted **reversion subject to the deafeasance**).

3) "To A in FS or until A leaves the province" = qualified fee simple, fee simple determinable = **Possibility of reverter.** If A leaves the province land reverts automatically.
4) "T A in FS, but if A leaves the province then his interest shall be forfeited" = not a pure fee simple, in substance it does what #3 does, but it is different = **right of reentry.** Grantor must take possession or sue for the lands if A leaves the province.

Remainders – Successive Interests/Gifts Over: "To A for life, remainder to B in FS" B is a remainder interest because it does not revert back to grantor. (Present right to a future enjoyment).

Contingent vs. Vested

Contingent: "To A in FS, if B graduates with a LLB." Nothing conveyed until a condition precedent is fulfilled. Condition precedent is a bridge that must be crossed before person is entitled to the gift.
Vested: "To A in FS." No contingent strings attached = you are entitled to the income immediately.

Methods Controlling Property Use

Private:

1) Estates subject to a condition subsequent: Restriction aims to make you lose property you already own (similar determinable, but different due to wording **[but, if, provided that]**). Refer to defeasable interests. Proprietary interest, as a right of reentry is created. Rule against Perpetuities applies.

What happens if "To A in FS, but if she remarries to B." Assume A remarries does B get property immediately. The language indicates a condition subsequent = creates a right of reentry for the grantor, but the grantor has granted his reversionary interest to a remainder B = B has to exercise a right of entry.

2) Determinable Estates: fundamentally the same as CS but wording is different = temporal words like **while, during, so long, until.** Proprietary interest, subject to possibility of reverter.
3) Estates subject to a condition precedent: Proprietary interest. "To A is she attains the age of 21" = condition precedent. But there is always a hidden condition subsequent (grantor still has legal title – but his interest is condition to a condition subsequent – when she turns 21 he will lose the property.
4) Contractual Terms: No proprietary interest unless we put it in. But promise can be enforced through contract.
5) Trust Conditions: Used like a condition precedent. Vendor and purchaser contract for the sale of land. P makes down payment (and condition precedents – financing). Hand over money in exchange for title documents. Title documents are sent to lawyer on trust condition that they are not filed until $ is received by other parties lawyer.
6) Precatory Words: unenforceable restrictions on property (hope, desires, wishes).

7) Interim Conditions: : appear to create legal obligations, but there are no consequences for violating the conditions (they too are unenforceable). They deal only with personal property.
8) Restrictive Covenants: I have two blocks of land, one is empty and I want to sell it. However, I do not want a house built there. So, I can create restrictions (contract – but this only binds purchaser). Restrictive covenant can bind future purchasers or the purchasers heirs forever. = A proprietary restriction. There are ways to bring these to and end (can be time limited or perpetual).
9) Waste:

Public: Set back requirements, zoning laws, by-laws, (many more): all have their own consequences – businesses can be closed down, no permit = can be knocked down.

The Creation of Determinable and Conditional Estates

Determinable: "To A in FS or until she remarries" = determinable interest = reverter principle applies automatically.
Conditional: "To A in FS, but if she marries her interest shall may be forfeited and I may reenter" = condition subsequent = grantor has to take a positive step to regain the property.
Distinction is a determinable estate (has another temporal restriction) that last for a temporal time (until she remarries or forever if she does not remarry)
Condition subsequent: the estate is defeated by an external condition.
Conditions defeat the estate, determinable interest place a restriction on land.

What are the Distinguishing Factors:

1) There is no test
2) Language (words of duration) to indicate a determinable interest (words indicating duration). Conditional words (but, if), reentry is a clear word = conditional estate..
3) Grammatical Construction: Grammar associated with subsequent words following the grant.

These are just evidence for one or the other, as they are not determinative. Sifton case says words of duration did not create a determinable interest.

Why the Distinction Matters

What if "until she remarries" is held to be invalid (contrary to public policy) the whole gift fails if t is a determinable interest. If gift is void on public policy as a condition then the condition is removed and the gift is absolute. Thus, major difference in how law treats the two. Conditions are more flexible – grantor has to take it back (can decide his condition was stupid and leave land in parties name).
Possibilities of reverter are vested interests = RAP does not apply, because it only applies to contingent interests.

Law of Property Act s. 63: The following are equitable interests in land – right of first refusal = now it is an (equitable) proprietary right) = so today RAP would apply to this first right of refusal.
School offered to sell land at current (today's) purchase price. Court said this was the proper definition of "current" price, because of the **Doctrine of Contra Preferendum** = who wrote the contract will loose the ambiguous terms, and doctrine is to applied at the

time the contract was formed (judges should not use hindsight although they usually do). Instead they should say general trend is land goes up.
Perpetuities Act 19(1): Does not matter if it is a condition or determinable interest as they are treated the same, when they are perpetuities (they remain distinct for other purposes).

Essex Case: Grant said "it was the school boards as long as property is used for school purposes; otherwise it reverts back to me at its current price."
What was the intention of this clause?

1) Condition subsequent create right of reentry. Rule against Perpetuities applies to right of reentry; so if the interest does not fall in the time of perpetuity period (explain latter) then the reversion interest has expired – applies because it is a conditional interest (sometime in the future the school will stop using the property for school purposes but if this happens in 1 million years we do not want reversion to still apply).
2) IF this is a FS determinative interest – possibility of reverter: At common law rule of perpetuities does not apply, because they are vested interests.
3) Could be a contractual right of first refusal – RAP does not apply to contract.
4) Option to buy = RAP applies because it creates contingent interests.

Ultimately, though Judge has discretion under Education Act if the condition has operated for 50+ years to make his own ruling. This is how case was decided, but judge wanted to show it another way(s).

Judge said it was a condition subsequent = right of reentry (conditional interest) and RAP abolished interest.
Or if he was wrong it is a right of first refusal (contractual) = Education Act applies and you lose anyways.
Court said it is not an option to purchase, because the optionee (grantor) does not have any control over his power to buy the property (the School Board does). = Right of first refusal is only option. If this is the option what does "current price" mean. Right of first refusal is a contractual right = RAP cannot apply to right of first refusal at common law.

Vested and Contingent Interests

Vested: By definition it is not contingent.

1) "To A for life, remainder to B in FS," = A is vested in **possession and interest**, while B is vested in interest only (when A dies possession will given to B). B's estate is contingent on A's death.
2) "To A for life, or until he graduates university," A's estate naturally terminate either when he dies or when he graduates. B's interest gets vested either when A dies of A graduates.

Contingent Interests:
These are somewhat problematic – grantor still owns it but a potential future interest has been created (should I fix it up to give it away?).

1) "To A for life, remainder to B if she marries," does B's interest begin when an estate is naturally terminated. No, because there is a condition precedent – she

must marry before she can get the estate. If she marries before A dies – B has to wait until after A dies to get the property.

2) "To A for life, remainder to B in FS if she survives A." B's interest is contingent, because she has to survive longer than A (condition precedent) – if B goes first land reverts back to grantor subject to defeasance (all G has granted is a life estate, but if B survives A then defeasance takes over and Grantor loses it all). If it was only to B for life, but B died first B's estate gets the $.

Why the Distinction Matters: "To A if she marries" = A is not entitled to use and enjoy until she marries. If it is $ she is not entitled to interest or capital until she marries.

Making the Distinction: *Whitby v. Van Luedecke*:
"To A and L for life of the 1st to die, remainder to the survivor for her life, remainder to others." No condition precedent for life estate #1. 1st remainder if it is vested (RAP does not apply) if it is contingent which court held because we do not know the person who would get LE #2 = it is a contingent interest. Thus, remainder is struck and the "others" get the property once one of the life tenants dies. This is a very peculiar application of RAP.

Public Trustee v. Heath: **When courts are unsure if an interest is vested or contingent, court will assume it is vested (makes everything easier). And the courts like to vest as quickly as possible.**
"To my granddaughter when she reaches 21 or when she marries." Problem was when testator died granddaughter was only 19. Looks contingent, but this gift was followed with "Lorna gets the property if my granddaughter fails to meet either condition." Thus, the granddaughters interest is vested (even though it looks contingent) because of the rule wanting vested interest (Phipps and Ackers rule). Thus, the second party's interests are contingent. (Lorna cannot get anything until granddaughter fails to get it).
Courts will if at all possible categorize a gift as vested.

Rule of Phipps and Acker: "To A if or when A attains (21 for example) with a gift over in the event that he/she were to die before reaching that age the age threshold is to be regarded as a condition subsequent and not cp = A would take immediate vested estate subjected to being divested if he/she dies before turning 21.
Rule has been applied to both reality and personalty. However, it is only a rule of construction not a rule of law.

S. 33-34 of the Trustee Act: where there is a trust that is created either vested or contingent interest in the beneficiary then the trustee has discretion to pay income to the beneficiary. This reverses the common law notion that a contingent interest means you are not entitled to the income.

Characterizing Interests

1. "To A for life, remainder to B."

Both A and B acquire legal estates. A acquires a life estate that is vested both in interest and possession. B acquires a remainder in fee simple - saying "absolute" is unnecessary - that is vested in interest and but not in possession. It is a fee simple interest because grantors are presumed to convey all of their estate unless they manifest an intention to the contrary (a point I won't bother repeating for the other hypos).

2. "To A for life, remainder to B if she marries."

A's interest is vested in interest and possession. B's remainder interest is a contingent legal interest in fee simple. B's interest is contingent because B doesn't take automatically on the death of A, that is upon the "natural" termination of A's prior life estate. Rather there is a condition precedent for B to acquire remainder interest. The grantor's interest is a legal reversion in fee simple subject to defeasance (unless B marries Grantor gets property back).

3. "To A for life, remainder to A's widow."

Again, A's interest is vested in interest and possession. The widow's legal remainder interest is a contingent fee simple interest. The widow's interest is contingent because we don't know her identity. Indeed, even if A is happily married, the widow on his death may be, given the vagaries of life, someone who is unborn at the date of the grant. Shades of what the rule against perpetuities calls the "unborn widow problem" (to be explained later). Another way of explaining why the widow's interest is contingent is to say that there is a condition precedent to her estate falling into possession other than the natural termination of A's life estate, namely being A's wife at his death and, of course, surviving him. This really amounts to ascertaining the identity of the widow.
Again, the grantor has a reversion subject to defeasance.

4. "To A in fee simple but if he does not get his LL.B. by the year 1998 his interest shall cease."

A acquires a qualified legal fee simple. The words of condition, "but if", suggest that A's interest is a fee simple conditional (condition subsequent). The word "cease" arguably implies a durational limit on A's estate in which case it would be a fee simple determinable. The mixed signals make debatable whether the estate is conditional or determinable. There is no grammatical basis for preferring the conditional form over the determinable form. So this one can't be answered categorically. You need to explore both possibilities. Perhaps, but only perhaps, the profile of the conditional language is stronger than the language of duration. If it is a fee simple subject to a condition subsequent, the grantor has a right of entry on condition broken. If A's interest is determinable, the grantor has a possibility of reverter.

5. "To A for life or until 2016, then to B."

A has a vested (both in interest and possession) legal determinable life estate. It will come to an end, January 1, 2016, unless it terminates earlier if A dies before that date. B's interest is a legal fee simple, vested in interest but not possession. The grantor retains no reversionary interest.

6. "To A in fee simple or until he marries B and in that event to C."

A acquires a qualified legal fee simple. The words of duration, "or until", suggest that A's interest is determinable fee simple. However, "in that event" smacks of "but if" and might be regarded as words of conditions. Again this is debatable but the durational words do have a higher profile here. C's interest is interesting. C gets a fee simple if and only if A marries B but C's interest is nevertheless vested. This is because C gets automatically upon the natural termination of A's determinable estate, namely when A marries B. However, since A may die without marrying B, C's vested interest is subject to being divested, that is it is subject to defeasance. The grantor retains no interest because either A or C will end up with a fee simple. Hence there is no room for a reversion.

7. "To A to the use of B for life, but if B marries X, then B's estate shall pass to C."

Despite the use of the word use, the limitation does not create an equitable interest. Assuming A is an ordinary person, not a corporation, none of the exceptions to the operation of the Statute of Uses seem to apply, hence A is executed out of the picture, leaving B with the life estate. However, B's life estate is subject to defeasance if B marries X. Words of condition suggest that this is probably a life estate subject to a condition subsequent. Hence, C, who gets upon the defeasance of B's qualified life estate acquires a contingent interest. It is contingent because there is a condition precedent other than the natural termination of A's life estate to B acquiring her interest, namely B marrying X. Note this is not natural termination of B's life estate. This event will defeat B's life estate. The little trick here is that C does not acquire a fee simple because the estate that the grantor says C should acquire is B's estate. Hence, C acquires a life estate and this means that the grantor has retained a reversion.

Creating Valid Conditions: Limitations on Private Planning Devices

The effect of Invalidity

1) Condition Subsequent: Sifton case: "remaining a resident of Canada" = if invalid CS it is struck and gift passes unconditioned.
2) Condition precedent: If a CP to land is deemed invalid = the whole gift fails.
3) Determinable interests: If the determining event is invalid (determinable event void for certainty) = the whole gift is lost (we would not know when her estate comes to an end). Sifton case could have been held to be a determinable interest – gift would have failed (real and personal property treated the same under determinable interests).

Re. Going Case: Deals with personal property. Condition was they had to be good members of the Protestant faith. Court says we do not have to examine public policy because they have not met the CP so there gift fails anyway. If a CP fails = whole gift fails (both real and personal according to the court).
However, Ziff 231-232: CP and personal property = some courts say if a contingent gift of personalty and the condition is invalid sometimes the contingency only fails and a non-contingent gift is given and sometimes the whole gift fails. Litman likes the real property rule in all cases, as grantors wanted the condition.

Conditions Contrary to Public Policy: Judicially created set of principles that can say this gift goes too far (very flexible doctrine). If CP and Determinable interests are invalid = whole gift fails (maybe CP with personal different), Condition subsequent = gift passes.

1) Conditions that impact state interests (violate criminal law).
2) Conditions that promote separating parent-child.
3) Conditions that promote people remaining single (rule of construction) usually.

Re. Leonard Foundation Trust: In 1920's Leonard created an inter vivos trust for education, that discriminated on: race, nationality, gender, religion. ONCA said it was discriminatory and therefore void on public policy grounds. Court used cy-pres doctrine (allows courts to rewrite provisions in charitable trusts where offending provision is not the dominant intent of testator) to rewrite offending provisions.
Re. Ramsden (PEISC): set up trust for Protestant students – was deemed acceptable and not contrary to public policy. Said Leonard distinguishable as it was based on blatant religious supremacy and racism. *U of Vic v. BC*: followed similar reasoning.

Cf. Fox v. Fox Estate (1996): One of the sons marries someone the mother does not approve of (outside of her religious faith) = she cuts him off. Could the executor use this ground for discretion to cut him off. Court said this was contrary to public policy. This was a private dispute (unlike Leonard). Thus cases are confusing.
Kay v. South Eastern (2003 Australia): Will said I appoint Kay to be my executor and trustee of my will. Gave gift to hospital, "only for white babies" was held to be valid. It too was a charitable gift, court said we should treat charitable gifts leniently (exactly opposite to how Robbins treated Leonard trust).

Restraints on Alienation: Notion that alienation is integral to property interests + undermines economic potential (so improper alienation is deemed repugnant as a property interest = unacceptable restraints are void).
Three Types of Restraints

1) Forfeiture Restraint: when a right of reentry or possibility of reverter is available for breach (if you try to sell when subject to this restraint you can lose the property).
2) Promissory Restraint: Purely contractual – unclear if these apply in Canada.
3) Disabling Restraint: Removes power of disposal (to some people).

How much Restriction is too Much:

1) Class of permissible alienees: to whom can donee sell to (is the class expanding or contracting can be relevant if it is a small class).
2) Time limited restraint? SCC (1920) said a complete restraint for 1 day is invalid; however, modern cases say complete temporary restraints may be acceptable (give family a time to think things out clearly before making hasty sales).
3) Mode or nature of the restraint: (what are you being prevented from doing) – are you only prevented from leasing/leasing with a mortgage – selling is the most problematic. "Shall not dispose" = lease/sale not allowed but mortgage would (because lender gets and encumbrance).

Re. Macleay (1875): "To John as long as he never sells to anyone other than family." Court held this restriction to be OK, as only John was restricted and he could still lease/etc. Test is if it is substantial restriction of alienation then the provision is invalid, if it is not substantial the restriction is permissible.
Older cases (like Macleay) accepted most restrictions. Litman thinks that today many would be held to be invalid. So, today a (nearly) full restraint for a long period of time with a small class of potential buyers will be struck down.

BC Forest Products: Employee bought a house from his employer. He signed a contract that said he ceased to be employed by the company they could repurchase at a fixed price. He ceases employment, but he takes issue because $ was too low = challenges provision for restraining alienation. Court said restraint was only contractual and not proprietary. Employee could dispose of the property however he wants (but he would be sued by the company for breach of contract). He had create a chain of covenants – his heirs etc have to agree to the same terms he agreed to (so that they can buy property back (or collect damages) even if he disposes of it). Thus, if you want to restrain someone use contractual restraint as they are immune from doctrine of invalid constraints.

This seems problematic, because contractual restraints can have the same effect (You can have my house, but if you sell it, you can only sell it for 1$). Why aren't contractual restraints contrary to public policy? Not repugnant to property interest like proprietal restraints are. But Litman says they should be repugnant of public policy grounds.

Contractual Restraints are different than proprietal restraints. Contractual terms cannot be repugnant, because he created a contractual obligation himself. If it was propretial it can be repugnant because it goes against ideals of property. How do you distinguish? Language of restraint: is it contractual or proprietal (language of condition: Rights of entry or possibility of reverter).

Uncertainty and The Various Tests

1) Conditions Subsequent/Determinable Limitations: You need absolute certainty (precisely and distinguishably) or else it is uncertain (and thus it is invalid). "To A until she reaches 25." Condition, not the gift will fail.
2) Condition Precedent: Need only show condition is capable of some reasonable meaning. Some vagueness will be tolerated: "To A if he is tall" is debatable but courts allow it.

Why is there a different test: Matter of fairness CS = you are divesting someone of their property, so they are held to be invalid more often. CP's are created by the donor so he wants some leeway or he would have drafted it differently. Problem is every CP is also a CS so it's a matter of interpretation.

***Sifton v. Sifton*:** Condition: "To my daughter so long as she remains a resident of Canada," was challenged for uncertainty. Court said it was a CS, because daughter had to do nothing to get property (not a CP) + some ancillary stuff. Termination clause is not certain (do not want to divest people of property unless they know the condition definitely). Thus, condition was void for uncertainty = daughter gets gift without condition.

Re. Tepper: "To nephews provided that they remain within the Jewish faith and shall not marry outside the Jewish faith." Court held it to be a CS, because they got estate immediately but lose it if condition met. Court emphasized that just because it was a CS did not make it necessarily void for uncertainty.

Legal Remainder Rules

Common law wanted someone land to be alienable, thus rules were designed to help passage of seisen: So, to have someone seized at all times + to prevent fancy interests.

Rule 1: No remainder may be granted in futuro unless supported by a prior particular estate

The rule does not have to a remainder, so rule really means "no interest may be granted in futuro." "To A if in 2 days" is fails this rule, because there is a gap in seisen.
"To A for life remainder to A if she marries" may or may not have a gap in seisen..

Rule 2: A remainder must vest at or before the termination of the prior particular estate (the timely vesting rule)

Usually remainder following a life estate: “To A for life, remainder to B” is OK because B’s interest is vested. “To A for life, remainder to B on his next birthday” = void at the onset (ab initio) for gap in seizen. “To A for life, remainder to B if she marries” = if A is married on A’s death no gap in seizen, if she is not the remainder is struck after the fact (expo facto).
The effect of invalidity: If remainder interest is struck it reverts back to the grantor.
Application to class gifts: “To A for life, remainder to B’s grandchildren.” What if at A’s death 5 grandchildren are born, but 5 more have yet to be born. The rule was devised in ***Festing v. Allen***: If part of a class had been created that part will take the entire remainder interest, and those yet unborn would be excluded. Festing and Allen is a rule of construction – not law – so grantor can exclude it if they desire.

Rule 3: No remainder may take effect by cutting short a prior particular estate
You cannot cut short a life estate. “To A for life, remainder immediately to B on his 35th Birthday.” Court said this a shifting interest and is too fancy. IT is OK to say “To A for life, but if B reaches his 35th birthday he gets it.”
The effect is that the whole remainder was void. However, the provision continues operate for the grantor = A’s life estate can be cut short by the grantor: thus “To A for life, remainder immediately to B on his 35th Birthday” = when B reaches 35 land goes back to grantor.

Rule 4: No remainder may take effect after a grant of a fee simple
After you have given away a fee simple there is nothing reaming (dah); however, this rule applies to determinable and defeasable interests as well.
Remainders are struck in favor of the grantor.

LRR Hypothetical’s
Assume that the following inter vivos grants are made by X the fee simple owner of Blackacre. You may need more facts. Identify when and analyse the limitations based upon the possibilities.
1) To T Corporation in fee simple in trust for A if she marries.
Legal remainder applies only to legal interests, not equitable ones. Since T is a corporation SOU’s does not apply.
However, it were not an equitable interest it would fail as A’s interest springs up in futuro that is not supported by a prior estate = it would violate Rule #1.

2) To A for life, remainder to A's first daughter to marry.
A has a valid life estate that is vested in interest and possession. There is a possible gap in seizen = we have to wait and see. If there is a married daughter on A’s death we have timely vesting, if not expo facto gift fails and reverts to grantor (based on rule #2).

3) (i) To A in fee simple, but if A graduates from law school, then to B in fee simple.
A is valid. B’s remainder violates rule 4, as you cannot have a fee after a fee. Grantor however maintains a right of reentry if condition met, as condition operates for G.

(ii) To A in fee simple or until he graduates from law school, then to B in fee simple.

FS is determinable – but principle remains the same as above. Only difference is grantor has possibility of reverter instead of reentry. All grantor has to do is assign reversionary interest to B to get desired result.

4) (i) To A for 10 years, then to B in fee simple if he attains 21 years.
A's leasehold is fine (vested, etc.). B's interest is contingent, but there is a gap of seizen because a lease is not a freehold estate (thus not seised). B's estate is not supported by anyone who is seized nor is it vested. Violates rule #1.

(ii) To A for 10 years, then to B in fee simple.
No problem in gap of seizen, because courts created a fiction that B's interest is vested and immediately seised (no condition), subject only to a prior leasehold estate.

5) To A if he survives this conveyance by 1 year.
Void because there is an immediate gap in seizen, because it springs up in futuro. = violates rule #1.

6) To A for life, and then for those of his children who marry *after* his death.
Void, because at A's death there will be no vested interest = we know ab initio that this provision will be void. Rule #1 violate for same reason as #5.

7) To A for life, remainder in fee simple to A's children who attain 30 years of age, provided that if any of these children become insolvent, then to the children of these children provided that they attain 25 years of age.
"To A for life" is valid – vested in possession and interest.
"Remainder in FS to A's children ..," requires us to wait and see (ex post facto) – only ones who are 30 at time of grantors death get (Festing and Allen). If no 30 year old children there is a gap in seizen and the gift fails).
Grandchildren are a remainder following a fee simple (violates rule #4). = Gift would revert back to the grantor if a child goes insolvent.

8) To A for life, remainder in fee simple to those of A's nephews and nieces who are or later attain 25 years of age.
Severance of good and bad parts is possible when it reflects most likely intention of settlor. This would mean only those who have complied at G's death get: Rule #2 (Ex post facto), as there is a possibility of a gap in seizen.

9) To A in fee simple or until A remarries in which case Blackacre is to go to B in fee simple on her birthday following A's remarriage.
A's estate is valid.
B's estate is invalid, because Rule #4 is violated: you cannot have a remainder following a fee simple = conditions continue to apply but they favor the grantor.

Executory Interests

The courts understood that the SOU united legal and equitable title; however, courts knew that it was not designed to make equitable interests subject to legal remainder rules.

Thus, the courts held that executory interest (executed by the SOU) were immune from all legal remainder rules (just like a equitable interests). The only except to equitable interests is that the case of ***Purefoy v. Rogers*** held that the timely vesting rule (rule #2) still applies to executory interests.
Testamentary Gifts: Wills unlike inter vivos transfers cannot be "fixed" by grantor; so, when required courts will interpret a normal grant as a constructive trust. As a matter of construction SOU executes wills in Canada (just as an inter vivos gift). Thus, only on LRR, ***Purefoy v. Rogers,*** applies to wills.

Assume the following limitations are found in both grants and devises. A the fee simple owner of Blackacre makes the following conveyances and devises.

1) **"To X to the use of X in fee simple in full confidence that X will utilize the land for A if A marries".**

"X to the use of X" = Statue of Uses has no application as X is seized to the use of himself. "In full confidence" is precatory (hope, wish, desire) = moral not legal obligation.
So, X has a vested FS subject to a moral obligation.

2) **2. "To T Corporation in trust for B in fee simple or until A marries, remainder in trust for C."**

"To Corporation" = statute of uses does not apply. Result is T gets legal title and B gets an equitable determinable FS. C gets an equitable remainder in FS that fall into possession only if A marries. If A dies unmarried C's interest is divested.
If B and C were legal interests they would violate LRR #4.

3) **"To T to the use of B if B marries."**

Statute of uses will operate = T is executed, making B full owner (if B marries). This is an executory interest so the springing interest (contingent on him marrying) is allowed (the only LRR that applies is Purefoy and Rogers). The grantor holds on to the property until B marries, subject to being divested.
Had it not been a legal interest it would have been invalid for gap of seizen (LRR #1).

4) **"To T to the use of B for life, but if B marries X then to the use of C immediately".**

"To T to the use of B for life" – No active duties, not a corporation, etc. = use is executed. = "To B for life, but if B marries X then to the use of C immediately." Looks like a rule 3 problem, because C could cut short B's life estate. However, this is an executory interest so only LRR #2 applies (Rogers). So, C can cut B's life estate short.

IF this were a legal grant – grantor would get property back (either right of reentry or possibility of reverter depending on construction).

5) **"To T to the use of B for life, and then to the use of the first child of B to graduate from law school after B's death".**

"To T to the use of B for life" would be executed by the Statute of Uses.

"Then to the use of the 1st child of B to graduate from law school after B's death" = there is going to be a gap in seizen. However, it is a executory interest so only wait and see (Rogers) can apply. = A valid executory interest in springing form.

6) **6. "To T to the use of B for life, remainder to the use of those of B's children who marry."**

"To T to the use of B" will be executed by SOU, leaving us with "To B for life, remainder to those of B's children who marry."
This is an executory interest – however, it is a wait and see situation.
The Festing and Allen rule says class that is married on death of B get $. If no children married it reverts back to the grantor.

Rule against Perpetuities

Why the Rule:

1) Promotes alienability and productivity of property: contingent interests are not as alienable (you will pay more for a vested property as it is certain). More transaction costs to unite contingent interest members to alienate the property, than to have a vested interest.
2) Limits control of the "dead hand" of the past: If will contains a contingency clause that is (nearly) impossible = I can control property forever, which is not reasonable.

Importance of these policies: they help us understand why we have RAP and when to apply them. Scurry-Rainbow, said applying the strict rule was not just, because the top lease encouraged productivity – thus, top lease contingency improved productivity so court did not apply RAP.

The Rule

The rule applies to contingent interests in property (real property, personal, tangible, intangible, legal or equitable), it has to be a contingent proprietary interest (contract not subject to the rule).
The interest must vest if it is going to vest at all, within the perpetuity period (taking the lives in being at the date the instrument takes effect, plus 21 years (plus a gestation period).

1) "An interest:" Applies to almost all contingent interests: real and personal, legal and equitable. The main exceptions are possibility of reverter as it is considered vested, and contractual obligations.
2) "Must vest:" Either in possession or interest. The exact size must be known at time interest arises (so it can be divided up amongst a class properly), and wait and see is not available.
3) "If at all:" Must know from the time the interest is created that vesting will absolutely only occur within the perpetuity period. (If it is possible to vest outside the period the gift is invalid). Posthumous reproduction was the only non-possible thing courts accepted.
4) "Within the perpetuity period:" Duration of all lives in being (a helpful life in being is someone who can demonstrate that vesting cannot occur outside the period) + 21 years (and a gestation period).

a) At common law 120 -135 years the longest possible.
b) Modern legislation Perp. Act: (s. 18(1) 80 years and s. 19(2) 40 years.

Have to know rules or else situations like *Lucas v. Hamm* can occur. Grandchildren were to get once the will was probated; court held (correctly) that this violated RAP – one cannot know for certain that will be probated within 21 years = gift invalid and lawyer got sued.

<u>The "Life in Being"</u>

The rule will not wait and see: the second interest begins there needs to be a life in being.
Literally any person alive at the creation of the interest but not every such person is a helpful life in being for the purposes of the rule.
Helpful life in being: someone, of whom you can say, that within 21 years of their death (plus a gestation period), vesting will occur if it ever occurs. "To all A's children if they attain 21." A is our helpful life in being. Once you find a helpful life in being you know the provision is valid.
Doesn't matter who in theory (as long as they are alive at the time interest is created): stranger, relative such as parent, prior interest holder, oneself, a survivor. "To all my children who marry within 21 years after the last baby who is born in Edmonton in 2006 dies." (Larger the class = the larger the period).
However, if the class becomes too large, administration can become impractical and gift can fail (not because of any perpetuity problem) but because of administrative impossibility (e.g., to my first lineal descendant to marry after the death of the survivor of all persons currently living."

<u>Remote Vesting In Cases of Class Gifts</u>

The possibility of remote vesting of even a single member of a large class of beneficiaries invalidates a gift at common law.
Example: "To A for life, remainder to all of B's grandchildren who marry." Assume, at the time of the grant: A is alive, B is 100 years old, B's only child C1 predeceased B. Assume that two of B's grandchildren, GC1 & GC2 are married but that GC3 is not.

1) The gift fails at common law because a class gift only vests when all members are vested.
2) Even if all 3 grandchildren where married gift would still fail as law presumes 100 year old grandma could still have another child.
3) Sometimes class gifts can be saved by the class closing rules (Andrews v. Partington).
    a) If at the earliest moment for distribution, one or more members of the class have met the required contingency the class closes (thus precluding any after born from having a crack), giving all living members of the class 21 years to meet contingency.

Example: "To A for life, remainder to all of B's grandchildren who marry" and one or more are then married). Above examples facts: GC1 and GC2 have met condition as early as possible = class closes. GC3 has 21 years to meet the condition to get his 1/3 (if he does not GC1 and 2 get to split his share). GC3 becomes the helpful life in being (his life determines the length of the perp. period.

Perpetuities Hypotheticals

Examine the limitations below with a view to determining whether they satisfy the common law rule against perpetuities. Answer any questions set out. For all the limitations assume A has a fee simple and is the testator of a will which contains the trusts set out. Assume as well that the will clearly imposes active duties on the trustees. (Why is this last point important?)

1. Devise "on trust to B's 1st child to graduate in law before the death of X, Y or Z." (Assume: B, X, Y, and Z survive A.)

Contingency is: be the first child of B to graduate law, within the period outlined (either the first death of XYZ or the last death of XYZ). Thus, we will have a life in being (either first one to die, or the survivor of the three) = no possibility of remote vesting.

2. Devise "on trust to B's 1st child to graduate in law before the expiration of 21 years from the death of the survivor of X, Y, and Z." (Assume: B, X, Y, and Z survive A.)

Valid, as we have a life in being (survivor) + another 21 years after the death survivor.

3. Devise "on trust to the issue (lineal descendants) of B to graduate in law within 21 years of the death of the last survivor of all persons who shall be living at my death."

Survivor of all persons in the world is my life in being, and vesting will occur within 21 years of that person's death (if at all). Administrative difficulties = invalid unless it is saved by class closing rules.

If anyone has already satisfied condition (on the day of will makers death). So, if on will makers death at least one issue has graduated law the class will close. Only the issue who have been born on the day of will makers death get a chance to collect (if not the ones who met the condition split their share).

4. Devise "on trust to B's first child to graduate in law after my death." (Assume: (i) B and several children (none of whom have yet graduated) are alive. (ii) B is deceased but several of her children (none of whom have graduated) are alive.

This is an individual, not class gift. If B is already dead = the children of B will graduate if at all during their lifetimes (since B is dead children are their own life in being).

If B is still alive there are no helpful lives in being. B cannot guarantee she will not have another child who will graduate first, after more than 21 years of his/her siblings deaths.

5. Devise "on trust to B's first grandchild to graduate in law after my death." Under what factual circumstances would this limitation satisfy the rule against perpetuities?

If B is deceased and all her children are deceased it is valid. As then grandchildren are their own lives in being.

If one child alive – possibility is that she could have another grandchild.

6. Devise "on trust to B's first grandchild to graduate in law before the expiration of 21 years from my death." (Assume: B is alive and has several children and "ungraduated" grandchildren.)
We do not need a life in being because there is a temporal requirement. Thus, vesting will occur within the 21 year period.

7. Devise "on trust to B for life, then on trust for the first of B's sons to marry." (Under what factual circumstances would this limitation satisfy the rule against perpetuities?)
If B is alive the gift will fail, because a parent cannot guarantee he will not have an after born to satisfy condition first (all possible people who can met the condition must be alive when the interest initially arises) = then children are their own lives in being.

8. Devise "on trust to B for life, then on trust for any widow of B for life, then on trust for the eldest child of B then living." (Assume: B is on his deathbed and happily married to X. A's only child Z is alive.)
This is the unknown widow problem.
B not a life in being, because: Eldest child might vest after 21 years of B's death (If B's widow survives B by 21+ years).
Z not a life in being because B could have more children, and Z could die leaving unborn to get.
X is not a life in being because she may not be B's widow (they could get divorced and B could remarry). In fact B could marry someone who was not alive at the time the interest was created = INVALID.

Perpetuities Act: Applies to all instruments taking effect after July 1, 1973 (s. 25).
S. 2: Common law continues to operate except as provided for by the Act.

S. 3: No disposition creating contingent interest is void solely for the fact that is it possible to vest outside the perpetuity period.

S. 11: Outlines the order in which to apply the sections: 9, 4, 6, 7, 8. Only move to next provision if the previous one does not save the devise.

S. 9: Presumptions for evidence of parenthood. 9(1)a: men 14+ can have children, women 12-55 can have children (although these are rebuttable presumptions – can do testing, etc.).
Thus, the devise: "To A's grandchildren who marry" which would have been invalid at common law if either A, or any of her children were alive (for fear of future born) can be saved. If A is a female above 55 and she has only daughter who are also above 55, as the class of potential beneficiaries is closed (grandchildren are there own lives in being).

S. 4: Wait and see (for 21 years after the death or your life in being) if the provision will vest in time (does not have to be definitive at time interest created).
It only speaks to interest that may fall outside – if you have a helpful life in being then s. 4 not relevant as provision is already valid at common law.

s. 5: Says who can be the life in being (s. 5 only applies to wait and see provisions under s. 4).
s. 5(1)a says you have to fall in 5(2) and be alive and ascertainable (unless there is administrative uncertainty). If nobody meets these requirement then we wait and see for 21 years (s. 5(1)b.

Helpful Life in Being's
5(2)a: the person by whom the disposition is made if it is inter vivos, if it's a will he cannot be a life in being as he is no longer alive.
5(2)b: a person who the disposition was made for:

i) Any member of a class (as long as the class is not too large – administratively uncertain). If there was an inter vivos gift to 5 grandchildren (there are 6 lives in being grantor + grandchildren). Common law class closing principle still applies – but if no one in the class meets requirement when interest is created then:
   - Class can grow as it remains open until it is naturally closed for contingency interests where one simply is born into a class (by the death of the last of A's children for a gift "To A's grandchildren.").
   - If there is a further contingency interest (besides just being born into a member of a class) the class does not close until the first person meets the condition. For example: "To A's grandchildren who attain 21" when A dies he has 2 children but no grandchild = class does not close immediately, but it will close when first grandchild reaches 21. This grandchild collects her ¼ or whatever share immediately (depending on how many grandchildren are alive on the day she reaches 21). Then we wait and see to see how many of the other living grandchildren make it to 21 – if none do she gets the remaining gift.

ii) Not sure

5(2)c: A person having a child/grandchild within clause 5(2)b.
5(2)d: Any person who takes a prior interest (previous Life Estate).
5(2)e: Unborn widow problem eliminated as a gift in favor of spouse/adult interdependent valid even if the person is unnamed/unborn at time interest created.

S. 6: Age Reduction: can reduce age to a minimum of 21 years.
"To A's grandchildren who attain 30," but after 21 years no children have reached 30 – the age can be reduced to as low as 21. If some grandchildren under 21 they are simply excluded from the gift - s. 7(1), to avoid the common law notion that if all members do not vest in time the gift will fail.
s. 8 (Cy-pres Provision): If you still have a perp. problem after you have waited and saw – the provision if at possible will be reformed to make the gift resemble grantors intention (as long as it conforms with perp. rules). Example if provision was that grandchildren had to marry, but none have = this provision can be replaced with a maturity requirement (no case law on what courts can/will do with s. 8).

s. 17: talks about options and rights of first refusal for leases (they are exempted from the rule).

s. 18: contracts to buy interest in property with a contingency you can wait and see for 80 years for interests listed in s. 18(2).
s. 19: Rights of entry and possibility of reverter have a flat period of 40 years. (Most people believe common law has no role in this anymore – just apply the 40 years, although perhaps you apply common law first [unclear]).

Lesson # 8: Leases, Licenses, and Bailments

License:

1) License is usually created by contract (sometimes by implication – a bus stop bench: implication that you can sit there until the bus comes, or a concert: you can stay as long as you behave).
    a) If not in contract it is revocable at will.
    b) Not an interest in land so it binding on 3rd parties unless equity intervenes.
2) It allows you to do something that would otherwise be considered a trespass, by giving you a right of physical occupancy.
    a) You are not given exclusive possession.
3) Examples: lodges/hotels.

Lease:

1) A lease is a grant of exclusive possession (the distinction is a matter of substance not form = if we call something a license in contract it may be a lease). What is granted is called a demise.
2) Tennant gets an estate (leasehold estate). Thus, it is an interest in land so 3rd parties are bound to it (must register all leases of 3+ years with land titles).
3) Landlord remains seized to the land (but possession suspended), and he maintains a reversionary interest (right of reentry upon repudiation [when landlord can reasonably infer that tenant will not meet obligations of lease]).
4) Length of lease is certain.

Why Does the Distinction Matter?

1) Legislation: Until recently licenses were not covered by RTA. Need to know now, because some rights cannot be contracted out of + some provisions (s. 69 or Land Titles implies terms into leases of 3+ years) apply only to leases.
2) Binding Effect of 3rd Parties:
    a) Proprietary Estopple: when licensor request licensee to spend $, causing the reasonable expectation that licensee can stay.
    b) Constructive Trusts: If when you purchase land and agree to accept a license and you enjoy a benefit from this equity will usually bind you.
3) Remedies: recovery of possession and trespass.
4) Other: You can only register interest in land with Land Titles.

Making the Distinction: The "true bargain"

A license can have a fix term, notice of termination, regular rent = very hard to draw distinction.

Contract: Look to terms of contract first to determine their true intention (has there been transfer of exclusive possession). Exclusive possession – leases; while sharing – license, but labels are not necessarily determinative.

1) Labels: calling something a lease/license is not determinative (Aslan and Muphy).
2) Words/terms: Again fixed terms, regular rent, etc. is not determinative.
3) Why is possession limited: The fact possession limited does not mean for sure it is a license, as it depends on why. For example a landlord can entry for emergencies but not for regular services.

Metro-Matic Services Ltd. v. Hulmann: Many washers and dryers were installed in an apartment. Company argued they had a lease to ensure they could continue to collect money. They had keys + unlimited access (but they could not exclude landlord or tenants) so court held that it was not a lease.

Aslan v. Murphy: The language was one of license (not granting exclusive possession: between 10:30 – 12:00 there was no right of occupancy + possibility they would have to share). The court said there was no way people could share, because the size of the room was too small, and the 10:30-12:00 obligation was never enforced. Thus, relationship in practical reality = the arrangement was a lease. Landlord had ability to access the room = it was argue that this meant you did not have exclusive possession. The court said if it is for the purpose of repair/emergency that is OK.

Duke v. Wynn: Rights that would make something a license must be (intended) to be enforced. They cannot be a sham to avoid other obligations only.

Types of Leases: When RTA does not apply the common law does.

1) Periodic Leases: Tenancy that occurs for recurring units of time (week to week, month to month, year to year). Time of tenancy is amount of notice required, 6 months for year to year.
2) Fixed Term: This is a tenancy that we know exactly when it will begin and exactly when it will end – a lease for the duration of the war is not a fixed term (as we do not know when the war is going to end). If a tenant goes beyond the fixed term and the tenant pays rent and you accept it, it can become a periodic lease (determined by how often the rent is paid).
3) Tenancy at Will: This is a tenancy that last as long as parties want it to. Common in real estate transactions – Example: if a purchaser gets possession before $ is transferred = a tenancy at will. They can be revoked at any time.
4) Tenancy at Sufferance: Situation where someone is over holding (staying after expiration) without permission.

Legal and Equitable Leases:

Unimpeachable legal leases = leases that fully comply with common law formalities. Legal leases must include: words of demise, grant exclusive possession, parties are clear + clear obligations. Leases must also comply with the Statute of Frauds: Leases of 3 years or more must be in writing and signed by parties. When formalities missing:

1) Implied Periodic Lease: If there is regular payment. Those terms that can be carried over from fixed term will be implied into the periodic tenancy (as far as they are applicable).
2) Equitable Lease: Agreement to lease: Walsh v. Lonsdale – equity deems done that ought to be done. Sufficient acts of part performance between the parties to show

an existence of an agreement – then the court may order specific performance (however this is equity so it is completely discretionary).

Equity trumps law.

Commercial and Residential Tenancies

Distinguishing: Key is to work with the legislation. RTA:
s. 1(m): Tenancy means a **written, oral, or implied** agreement to rent a residential premises (thus formalities not required for the Act to apply).
s. 2: Outline what is excluded from RTA: mobile homes, business purposes with attached accommodations (*Connolly* says look to "totality of circumstance" primary purpose + attachment test), rooms in the living quarters of the landlord if the landlord actually lives in those quarters, hotel/motel/resort/lodge/etc if person there for less than 6 months, students in dorms unless it is self-contained dwelling unit, nursing home, social care facility, a correctional institution, any other prescribed premises.

Important Provisions of RTA

s. 3: You cannot contract out of the benefits and protections of the RTA. But you can add rights and obligations, just not alter the Act.
S. 6 says landlords can only terminate a lease for s. 11 (employee),s. 12 reason (condominium conversion), or under s. 29 for substantial breach of s. 21, or s. 30 for damage or assault, or under regulations s. 2. [One way a landlord can punt a tenant is through rent increases: 26 tenancy weeks for weekly tenancy; 6 tenancy months for monthly tenancies; other periodic tenancies require 180 days].
Commercial Leases: There is little statutory interference – contract governs the relationship.

Assignment and Sub-Lease

Common Law: Tenants interest is freely alienable and thus can be assigned for sublet as long as there is no term in the lease to the contrary.
Assignment: Occurs when tenant's full interest in the lease is conveyed.

1) When you assign the original lessee is still liable for covenants through privity of contract (unless there is a contrary arrangement).
2) Landlord gets privity of estate against assignee, which means that the landlord can only enforce REAL COVENANTS: those that touch and concern the land (typical example is a rent clause - important as landlord can go after assignee for rent). Personal covenants do not run with the lease. However, terms of head lease are implied (to the extend possible into the assignment).
3) Tenant and assignee also form a relationship: Contract of assignment is formed – this is what dictates the obligations.

Sublease: When less than the full interest is conveyed. No legal relationship between landlord and subtenant. Subtenant is responsible to the sublessor (original tenant), who is responsible to the landlord. If the main lease is terminated so to is the sublease.
Indemnity Agreements: These are agreements that seek to mitigate liability. For example under assignment: if assignee does not pay the landlord can sue either tenant or the assignee. Thus, tenant will put in indemnity agreement to protect himself from the assignees failures.
Limits on Alienation:

1) Leases frequently restrict a tenants ability to alienate:
    a) Absolute prohibition – does not preclude the granting of a license or other quasi-alienation.
    b) Landlord's consent required
    c) Landlord's qualified consent – typically this means not unreasonably withheld.
2) RTA s. 22(2) now says that consent cannot be unreasonably withheld.

Commercial Alienation:

Contractual Limits: *Sundance*, had the following clause: "The Lessee shall not be entitled to assign or sublet any portion ... without written consent which consent shall not be arbitrarily or unreasonably withheld, however. ..." Shopping mall that has an anchor tenant (Beaver Lumber and another), and a restaurant – restaurant eventually was sublet to Swiss Chalet. An issue arouse over parking because of Swiss Chalet – interfered with loading of lumber. This was a % rent situation, rent calculated on % of sales – thus mall wanted Beaver to make $ = this was a purely economic issue. Issue was whether parking was integral and spoke to the nature of the business. Most cases do not consider parking to be integral component of the lease (usually dealt with separately). However, majority said parking was integral.

Predicting Outcomes:

1) Strict construction: Since it is a limit on alienability the courts will apply a strict test. Thus if you want everything excluded you have to exclude everything (Sundance could have granted licenses, etc.).
2) Is refusal to alienate reasonable: Test is a modified objective one (what the reasonable non-residential landlord do).
    a) Purpose of the clause Courts try to determine the real purpose of the clause – worried about keeping out bad tenants (not paying rent) or using for a contrary purpose, and not trying to keep out minorities.
    b) *Sundance* says a landlord may refuse assignment or sublet "reasonably" on pure economic grounds.
    c) Effect of Breach: If there is an assignment or sublet without consent = substantial or fundamental breach. This gives the landlord the right of reentry (*Highway Properties*).

Assignment of Equitable or Landlord Rights

Landlord's can only assign privity of estate.
Equitable leases: These are leases that arise when you have a non-residential lease that has not complied with the formalities. All you can assign under equitable lease are benefits (thus you can grant them possession, etc. which assignee can enforce against the landlord) but you cannot grant them the obligation to pay the rent.

Obligations and Remedies

Common Law + Contract:

1) Quiet Enjoyment: Peaceful occupation of the premise.

a) Right to take Possession. This right is protected from direct physical interference or indirect interference (carbon monoxide fumes) from the landlord or others claiming through the landlord. Wrongful Acts of other tenants is not covered under QI. Thus, landlord is not responsible for loud music of apartment 7G.
b) Short Form of Leases Legislation: QI is implied into every lease.
c) Contractual modification (commercial): You can explicitly cut out this common law rule through contract.

2) Landlord must not Derogation from the Lease
   a) Purpose of lease: Landlord cannot do things that make the premise substantially less fit for the purposes that were intended. Landlord must also ensure tenants do not significantly interfere with other tenants – for example a pawn shop in a mall that significantly interferes with other tenants.
   b) Contractual Modification (commercial): This can be contracted out of.
3) Tenant must act in a Tenant-like Manner: Tenants agree to not commit voluntary waste – you must prevent damage. No general obligation for the tenant to repair anything. However, you must take certain, reasonable steps to preserve the property (overflowing toilet for example). Reasonable wear and tear is not tenant's problem in residential context.
4) Habitable: This applies when you move in (heat, no bugs). Under common law this was just a move in obligation. These are always addressed under contract in non-residential leases. City bylaws (Public Health Regulations) impact these (proper heating, no bugs in a restaurant, etc.), as does legislation.

Residential Tenancies Act

Landlord's Obligations (s. 16):

a) Available for tenancy at the beginning of the tenancy.
b) Landlord (nor landlords delegate) can interfere significantly with possession or peaceful enjoyment of the premises.
c) Housing must meet minimum standards of the *Public Health Act and Regulatins.*

City bylaws also impose obligations on landlords.

Tenants Obligations (s. 21):

a) Rent will be paid when due.
b) Tenant will not interfere significantly with either landlord's or other tenants.
c) No illegal acts or carry on an illegal trade.
d) Tenant cannot endanger persons or property.
e) No significant damage.
f) Maintain a reasonably clean premises.
g) Tenant will vacate the premise at the expiration of the tenancy.

Remedies

Commercial:

1) Nature of the Lease
2) Forfeiture: A breach by a tenant of a term that is "on condition that," gives the landlord the option of forfeiture (if landlord chooses not to exercise then he can

sue for compensation). Courts do not like enforcing forfeiture = strictly construed + landlord must absolutely comply with reentry provision.

3) Distress/Seizure: The landlord may impound goods until payment is received.
4) Frustration:
5) Surrender: Can occur when tenant expressly surrenders (tenant reconveys the demised premises) or through operation of law (when an act of repudiation (substantial breach) is accepted by the landlord).
    a) Refuse to accept surrender by waiting + sue for rent due + ancillary damages.
    b) Accept the surrender (landlord resumes possession). Landlord maintains the right to sue for past breaches.
    c) Landlord can act as the tenant's agent and re-let. Landlord maintains the right to sue for tenant's breaches.
    d) Landlord may accept the surrender but maintain the right to sue for loses under the unexpired portion of the lease (*Highway Properties*).

Residential:

Termination by Landlord:

s. 5: Notice must be given and it must be in the form prescribed in s. 10.
s. 6: Termination must be for employement reasons (s. 11) or condo conversions (s.12).
s. 7: Weekly (1 week, s. 7)
s. 8: Monthly (3 tenancy months)
s. 9: Yearly (90 days).
s. 13: Periodic tenancies are implied from periodic tenancies.
s. 14: Notice to increase rent.

Remedies

s. 26: Landlords remedies: non-payment of rent = only $ is recoverable.
s. 27: Repudiation of tenancy.
s. 28: Termination for substantial breach by landlord – Public Health violation for example (14 days).
s. 29 Termination for substantial breach by tenant (14 days).
s. 30: Termination for damage or assault (24 hours).
s. 31: Distress provision – under what circumstances landlord can sell goods.

Tenants Rights:

s. 37: Tenants remedies
s. 38: Right of Repudiation
s. 39: Tenant's compensation.

Bailment

Elements:

1) Bailment is a temporary transfer of **possession** of personal property from a bailor to bailee. When possession not transferred
2) Can be contractual (for reward) or gratuitous: impacts standard of care.
3) Can be voluntary or involuntary: impacts standard of care.
4) Involuntary-gratuitous transactions become bailment's only if bailee voluntarily assumes possession of goods with authority (unless it is a constructive bailment – reasonable chattel inside another chattel).

5) Bailment at will: good can be reclaimed at any moment by bailor. Or for a fixed Term.

***Dorico*:** If bailor fails to pick goods up on termination of fixed period, bailee can take less care, but still must take care of goods.

Obligations of Bailor

Bailor has to ensure that in bailment for reward that the good is suitable for the purpose it is being hired for (So, if Safeway's cart wheel falls of and I get injured – bailor has breached its duty). Bailor must take reasonable care (those that skill and care could remedy) to ensure goods are safe and suitable.

The standard is higher for gratuitous bailments – bailor liable when he willfully or negligently does not warn bailee about a defect.

Obligations of a Bailee

Must be clear it is a bailment, as licensee's have very different obligations than do bailee's. Bailee responsible for general law (which is all a licensee is responsible for) + bailment principles:

1) If contract specifies certain treatment of the good the bailee bound by strict liability.
2) General levels of care are either defined in contract or implied:
    a) Bailment for the sole benefit of bailor: low standard of care (bailee only liable for gross negligence).
    b) Bailment for sole benefit of bailee: very high standard of care (bailee liable for slightest negligence).
    c) Mutual Benefit: average standard of care (due diligence required).
    d) Modern approach is to apply standard negligence across the board, although some courts still look at historical divisions.
3) Vicarious Liability

The Onus of Proof in Bailment Claims

General Rule: If P can prove bailment + damaged/unreturned good then negligence is presumed. Rational is that the bailee is the person best able to know what has transpired.

The three elements of a reverse onus clause:

1) Triggering facts (stuff that bailor must prove):
    a) that the act complained of occurred during the course of the bailment (not before or after)
    b) Condition of goods before and after must be proven.
2) The short-cut to proof (stuff that is presumed against bailee)
3) The escape route (how bailee can rebut the onus):
    a) The system that was in place for caring for the goods was up to the standard required by the bailment.
    b) That any failings in regard to taking reasonable care were unrelated to the loss.

National Trust v. Wong Aviation: Bailee was flying a bailed plane and both were lost in unknown circumstances – since bailee was unable to account for what happened the reverse onus was not applied.

Evading Liability: Exculpatory Clauses

Exculpatory clauses attempt to remove/reduce liability from the bailee (of no force if fine print or hidden term) – it is possible to contract out of all liability in Canada. However, these clauses are hated by courts:

1) Only valid if accepted by the bailor. Signed contract, or was given actual or constructive notice (how obvious was sign, how many times had customer been there, etc.) at the time bailment began (parking lot)
2) Clauses are interpreted narrowly (strict 4 corner interpretation).
3) Fundamental Breach: Bailee's in Canada can be absolved from core bailment obligations.

Assignment and Sub-Bailment

The right to sub-bail occurs if bailee has express or implied consent to sub-bail (or ratification after the fact). If it is an invalid sub-bailment then bailee is breaching bailment = he is responsible for all consequences flowing from this action.

Sub-Bailee's Obligations

Bailor has direct cause of action against sub-bailee when:

1) the bailor has an immediate right to terminate the principal bailment
2) When the sub-bailee accepts the goods knowing that they belong to someone other than the sub-bailor.
    a) Unauthorized sub-bailments lead to strict liability: still need to show damages.

Tort action is available against 3rd parties when a permanent injury to bailor's reversionary interest (even when right to possession has been postponed). Once bailment terminated (term up, breach) bailor can pursue the action.

Punch v. Savoy: Exculpatory clauses in the context of a sub-bailment:

Bailee sub-bailed with implied consent to a sub-bailee. It was held that the bailor could only be bound to the clause if bailor had expressly or impliedly consented to such a clause.

Lesson #9: Shared Ownership

Introduction to Traditional Forms of Co-ownership

Shared private property is a very common thing (keeps people together). Joint tenancy allows you to do things by avoiding transaction costs – as survivorship transfer property at the instant I die (me and my wife are joint tenants = survivor gets it automatically). Prevents transfer to administrator to will and then to beneficiary. Also allows probate: the filing of an application and the checking there was a proper list of assets to see if administrator has authority to transfer property. Probate costs calculated on small % of value of the estate.

JT is common for spouses and later for parents and children. However, joint tenancy can trigger capital gains taxes amongst children and parents, and multiple owners complicate

things: If one tenant wants to hold out – lots of transaction costs to force holdout to sell or participate.

Concurrent Ownership: Four Kinds (Only 2 Matter):

Joint Tenancies: Doctrine of survivorship applies ***jus accrescendi***: removes your property interest when you die. Theory is that there is single ownership that will be placed in the hands of the survivor. However, property makes rent $ each party is entitled to an equal share.

The 4 unities are absolutely required (Rule of Law): PITT.

1) Possession: Co-owners must be entitled to possession of the property. All JT's are thus entitled to use the very same spot at the very same time (this causes problems). This element is required for tenancy in common as well.
2) Interest: Interest must be equal (overlapping LE means no JT, same if one is contingent and other not).
3) Title: Parties must derive their joint tenant status from the same act/instrument/document: "To A, reserving the right to make further LE" and then a later grant "B entitled to property for the life of A" Problems are perhaps not unity of interest (one LE measured by ones own life, other measured by someone else's life) + documents different.
4) Time: "To all my children on their 18th birthday." Unity of time is not met (interests must be created at the same time) = this grant would create a tenancy in common.
    a) Time not required if conveyed in a will: A devise stating "To A for life, remainder to A's children as JT's" creates a JT – each child gets his/her at different times (when they are born).
    b) Time not required if the beneficiaries take under a trust.

Making Distinction Between JT and TIC

General rule: Need all four for a JT, so when you have all 4 you have a JT. However, you can have all four unities and still have a tenancy in common. Thus, you need to look to grantor's intention:

1) The presumption of intention at common law: Presumed a JT was created. Common law liked idea of un-fragmented estates (JT will end up being owned by a single person – as the second a JT dies his interest is gone so he cannot will it away). While tenancies in common get fragmented, which creates complications and hurts alienability.
2) Equity's presumption: Went the other way (sometimes), said doctrine of survivorship was dumb for being arbitrary. It made sense only in some circumstances (marriage), but what about business partners (they do not want surviving partner to get all they have worked for):
    1) Thus, in business context (partnerships), when $ secured under a mortgage, when property bought in unequal shares, equity presumed a tenancy in common (otherwise equity would go along for the law's ride).

Thus, you could be a JT in law and a TIC in equity: If 4 unities present in a business context – law presumes survivor is the sole owner. Equity says that it was a tenancy in

common = in equity when a tenant dies it passes through will/intestacy, while in law sole survivor takes.

3) Statutory intervention (*Law of Property Act*, s. 8): When co-ownership of LAND (provision does not alter personal property presumptions) is held by two or more persons in either law or equity those tenants take as tenants in common unless contrary intention. If there is contrary intention you still need 4 unities to make a JT.
4) Trustees (*Law of Property s. 8*): Common law presumption continues to operate for trustees. Assume A,B,C are co-trustees: if they took as tenants in common then their share would be transferred to their heirs (you could get incompetent trustees this way). Instead we allow survivor principle to reign to (help) ensure good trustees.

Corporations: Shareholders in corporations are not co-owners, because corporation owns everything. Shareholders have a chose in possession only (right to dividends, or whatever).

Tenancy in Common

Requirements and General Nature:

1) Requires unity of possession only (although it can have all 4 unities).
2) You can have % ownership, but each tenant is still entitled to possession of the whole.
3) On death property devolves in accordance with normal principles.

Creating a TIC:

1) Express creation and `words of severance: Words of severance make a TIC: “To A, and B as JT and not tenants in common, to share and share alike (or in share alike, or 50% each, or any other language to indicate % ownership” = court will hold it to be a tenancy in common. Because, JT have only one share.
2) Statutory presumption (Law of Property Act, s. 8): Presumption when LAND held by 2 or more people that it is held as a TIC.
3) By operation of law: Intestacy: if A dies with no spouse but three children with no will = each children will co-own the estate as tenants in common.
4) `Failed' joint tenancy: By operation of law if 4 unities are not met, even if grantor says I want them to hold as JT.
5) `Severed' joint tenancy: If people hold a JT, you can convert you interest into a tenancy in common (when spouses stop getting along for example).

Tenancy by entireties: (*Law of Property Act*, s. 5) has abolished it:

Co-parcenary: Eliminated in AB as well, occurred when daughters inherited when there was no male heir.

Wilson v. Munro: Wilson bought an orchard; he put it in his and Munro’s name as JT. They stop getting along, Wilson argues he has provided all the $; so, since Munro is not my wife there is a presumption of resulting trust. So, Wilson and Munro are trustees for Wilson exclusively as a beneficiary. Court accepted this argument. Munro tried to rebut the presumption by showing that the original conveyance was a gift (court said no

evidence that it was intended as a gift). However, the court found there to be a constructive trust (15% of the value) in favor of Munro for her contributions.
Thus, they are joint tenants in law. TIC in equity with Wilson having 85% interest and Munro a 15% interest because of constructive trust.

Matrimonial Property Act: Act only applies when there is a breakdown in marriage. Some property exempt (property you bring in, property you inherent during) presumptively everything else divided 50-50 (court given discretion but usually split 50%). **s. 36:** Says when judges make a decision under this Act – the court shall not apply the presumption of gift doctrine, before or after marriage. A conveyance from husband to wife = a presumption of resulting trust applies (not the common law presumption of gift). However, you do apply gift doctrine in 36(2) if: (Common Pool Rule) Spouses are joint owners (subject to evidence to the contrary), same applies to a joint bank account (subject to evidence to the contrary).

Transformation of a Joint Tenancy into a Tenancy in Common: Acts of Severance

At CL people were free to sever on their own accord without other JT's knowledge. (Just convey to 3rd party and then have it conveyed back to break 4 unities).

1) Transfer to non-joint tenant and registration of transfer (***Land Titles Act, s. 65***): Register shall not register a transfer that would sever a JT,
    a) Unless all JT execute the transfer.
    b) If all JT's give written consent.
    c) Or if Register knows that all JT's have been served with notice then severance can occur. (either personal notice or court order).

Argument that severance has occurred before the Register even gets this opportunity – through a: Declaration of a trust?

2) Acquisition of further interest by a joint tenant: CL theory says if A, B hold as JT for the life of B, remainder to X. If one tenant acquires X's interest = TIC because not the same interest.
3) Conveyance to oneself: *Law of Property Act* s. 10-12: s. 12(1)d allows JT to convey to themselves as a TIC. 12(3) says this conveyance if registered in Land Titles (subject to LT s. 65).
4) Transfer to JT: As soon as this happens no longer have the four unities.
5) Declaration of trust (*Sorensen*): Nothing has happened to legal title – only equity will recognize that they are TIC. Thus G owes it "all" legally but only a ½ interest in equity.
6) Granting of a lease or life estate: Argument is that a granting of a lease from a JT, severs JT as one person has a present interest the other has a future interest (no unity of interest) – some courts say lessee is an agent of JT while others say one of these devises does sever the JT. Counter argument is that it just postpones survivorship. (VERY DEBATABLE).
7) Mortgage (or charge) (*Land Titles Act*, s. 103): At common law to get a mortgage you had to convey title to bank (was OK for JT as otherwise they would not have gotten funding as their interest could disappear at any time due to survivorship). **S. 103:** Says that the lender gets an encumbrance (no transfer of title like at

common law) registered on title – but encumbrance does not interfere with the four unities: thus, banks make other JT encumber their interest as well.

8) Commencement of court proceedings (*Law of Property Act*, s. 19): Sometime co-tenants require a partition (sale order), which can be granted. However, **s. 19** = court order makes the severance, not the filing of the claim (thus if claim filed only, and JT dies survivorship applies). Thus, if you do not want survivorship to apply: convey to yourself (LOP s. 12(3), remember to serve notice to be able to registrater in Land Titles (s. 65).
9) By will: The making of a will doesn't work, because the will only effective after death, while survivorship effective before death. If both JT get together and make a mutual will severance may occur – both agree to treat themselves as TIC by granting their share away then court may accept TIC. This does not work if husband and wife merely happen to draft the same idea in a different document/time.
10) By "ouster": What if one JT changes the locks and keeps other one out. This does not affect possession unity as locked out JT still has right to possession. What if you get an order for possession under *Matrimonial Property Act* – does this severe possession (some courts say yes; others say no, because it is just delayed right to possession).

Severing through trust: *Sorenson v. Sorenson*: Wife declared she was holding as a JT in trust for her son. Court held that this severed JT, because there is a disruption of the unities in equity – son got a ½ interest in equity (law not affected). Thus, before declaration JT in both law and equity – after trust JT in law (husband and wife), and father and son each have ½ share as TIC in equity. Sorenson says you can severe outside of the Land Titles system - through equity –by declaring a trust.

If wife dies first husband becomes son's trustee, as the doctrine of survivorship still functions. In equity husband entitled to ½ share as it has been severed (so ½ of estate will go to husbands heirs).
If husband dies first his heirs will get ½ share

Havlik v. Whitehorse et al: Edward wants to severe JT. His lawyer wrote other JT's lawyer, requesting consent to sever (or else they would seek a court order). Response is that severance OK (form was not signed) but they were not willing to pay taxes = court said this response was just negotiation. Edward dies before negotiations complete = JT still or not? Court said there was no severance. Had the other JT been a spouse then survivorship probably would have been punted if they were estranged because the conduct of parties indicates they have a distinct share.
Edward should have conveyed to himself, by giving other JT notice.

***Stonehouse v. AGBC* (SCC)** (discussed in Havelick): Husband and wife were JT. Wife executes a transfer document to her daughter. The document is not registered, and wife dies. Court says this had the effect of severance, despite there being no impediments to daughter registering. Why? Law of gifts says land transferred when: sign, sealed, delivered (we do not seal anymore) so mother did all she could.

Impact of Land Titles s. 65 on *Stonehouse*: As soon as transfer document, and Duplicate Certificate of Title handed over could the daughter caveat equitable title under land titles – absent meeting the requirements of s. 65. When you caveat title notice is sent to legal owners, and the owner of the lands can then challenge the caveat (then daughter would have to show cause). Daughter would have to show she has a beneficial interest – equity deems as done that which ought to be done. But, should legal title, ought to be transferred to the daughter? This is different than Sorenson (as that case son was never supposed to get legal title). **Do not know for sure which way this case would go. Sorenson seems to be good law, but Sorenson was not intended to get legal title. Declaration of trust = unilateral (and potentially secretive) transfer, without approval of Register or other JT's is OK, but is secrecy of document severance OK.** If promise is made to sell property interest to a third party, and the transfer document and a Duplicate Certificate of Title is handed over = contractually 3rd party gets damages. However, specific performance is unlikely unless s. 65 requirements are met. Thus, Litman says s. 65 precludes ruling in Stonehouse = s. 65 impacts peoples ability to severe even in equity. Do not want secret deals to let JT's speculate the market at the other JT's expense (if I die first documents become public, if other JT dies first I will take it all).

Severance by Operation of Law

1) Murder: Impulsive murder of other JT. Common law invented notion of equitable severance = murderer owns in law, but only ½ in equity (and murder precluded from getting the other half).
2) Bankruptcy: If one JT (H) goes bankrupt, and three days later other JT (W) dies. Does D's creditors get it all or does W heirs get it. On the date of bankruptcy there is severance.
3) Seizure of property by a creditor – legislation permits seizure of debtors property. Seizure does not give severance. But courts usually order public sale – once sale is complete then there is severance. Example: If H owes 20,000 to creditors, and H and W own a 50000 painting as JT the creditor can seize the painting. Severance does not occur until unities disrupted (when either creditor or 3rd party purchaser takes title). If painting sold H gets 5000 and W gets 25000.
4) Divorce: Does not severe a JT automatically. However, usually JT issue is severed early on – when negotiations are ongoing, courts usually assume distinct interests.

Rights of Use and Possession During Co-Ownership

Possession: Co-ownership (doesn't matter if TIC or JT) = both parties can occupy all the premises. If one party chooses not to take advantage of your right not to possess you are not entitled to any compensation. If you are ousted you are entitled to sue for occupation rent. Or if there is an agreement between parties for one party's interest to be leased – rent must be paid under K.

Alienation: All co-owners full entitled to alienate the land. However, it is subject to s. 65 of Land Titles Act.

Alterations to Property/Waste:

All co-owners can use and enjoy all the property. However, what happens if one tenant logs the entire property without the consent of the other JT?

1) Ziff says co-owners have been liable for both equitable and voluntary waste. (Problem is voluntary waste – could apply to cutting down 1 tree = conduct has to be unreasonable) thus probably just equitable waste.
2) ***Statute of Anne*** says if you get more than your just share or proportion you must account for it – thus if JT1 sells all the timber, JT2 is entitled to half or nearly half.

Payments and Accounting: There are benefits and burdens with property, which are both shared equally by co-owners. Often however one tenants bears a disproportionate share of the burden = this party can get $ from other tenant. However, courts will not enforce these (they would have to micro-manage co-tenants). Thus, you can get an accounting, but only after the co-tenancy relationship has ended. This means pre-partition (sale) there is no accounting of burdens associated with property (one exception is that if on JT has spent $ to save the property – if this is the case the court will enforce other JT to kick in SALVAGE CASES EXCEPTION).

***Osachuk v. Osachuk* (MBCA 1971):**

Occupation rent not (normally) payable simply because one owner has enjoyed exclusive occupation. However, on partition of sale the party in possession can claim expenses which opens the door for other owner to claim occupation rent. *Statue of Anne* only applies when $ is actually collected, a free lease is not.

Termination of Co-Ownership: Partition and Sale

Common law: At common law there was no power to order a partition, this changed but then no power for sale was granted (led to very undesirable divisions) = eventually common law began allowing partition with power to sell.

Modern statutory regime: *Law of Property Act, ss. 14-3*:

For REAL PROPERTY

S. 15 A co-owner may apply to court to terminate an interest in land – court can award:

a) A physical division of land (rural property usually)
b) Sale at auction with division of proceeds.
c) Sale to one of the co-owners.

There may be accounting required to ensure each party gets its just % + sometimes one party says I want compensation for paying all the bill for the last 20 years (lots of discretion under s. 17(2) – whether one co-owner has excluded the other, Anne Statute, basically just codification of the common law): If you have been carrying burdens, but also live on land, you may be subject to occupation rent. (Occachuk case).

S. 16: If auction 15(b) returns less than market value the court refuse the sale, and make any further orders it sees appropriate.

S. 17: When partition sale ordered the court can order an accounting of contribution and adjustment, and compensation can be ordered for unequal distribution of the property. Court is given lots of discretion under s. 17(2) – whether one co-owner has excluded the other, whether one parties has enjoyed disproportionate benefits/burdens, who lived on the land subject to occupation rent.

s. 19: Court order severs a JT.

s. 20: 20(1) A termination of co-ownership is not a disposition under the *Dower Act.* 20(2) On termination of the co-ownership the land ceases to be a homestead.
s. 21: Notwithstanding 15(2) the court can stay proceedings until a disposition is made under the *Matrimonial Property Act* or while an order under that *Act* remains in force.
s. 27: Sometimes parties will enter into agreements to not allow partition for sale – these are valid only so long as maintaining it will not cause undue hardship).

Co-Ownership of Personalty
Run By the Common Law: Common law rules regarding tenancy prevails in personalty, thus JT (and survivorship) are presumed. This also means that there is partition and sale are not available. However, s. 12 *LOPA* says that a JT can turn into a TIC. Co-owners of chattels cannot be liable to the other for tort/conversion unless there has been destruction of the good – thus sale to a third party not normally actionable, but owner can only sell his share.
Joint Bank Accounts: Sometimes people pool funds into a common bank account (sometimes one party contributes same amounts, sometimes very different). Parties are free to use and enjoy the property (no accounting of funds available). *Re. Bishop* case says it is a common pool – any deposits or expenditures that are made are free from obligation to account, and any property acquired is held according to the tenure of the transaction: if H buys shares in his name then they are his shares. This prevents use from having to do gift/resulting/constructive trust analysis. This way also makes sense because Matrimonial Property Act says parties will split 50-50 anyway.
If you say it is not a common pool: what husband puts in there is a presumption of gift, while what wife puts in is a presumption of resulting trust. Thus, common pool approach is much easier and more readily adopted by courts. *Jones v. Maynard* cases says this is not necessarily true: husband had acquired business assets and they were held to be owned by wife too, because parties had agreed the pool was for both parties. Here court was worried about fair division of matrimonial distribution – now legislation impacts this anyway.

Lesson #10: Easements

A proprietary right to use the land of another for a specific purpose!

Nature & Vocabulary
E.g., right of way = Legal options: license which is a personal choice that can be gratuitous – revocable at will or under K. Easement is another option – it is (proprietary) thus binding on 3rd parties. Significance of proprietary nature of easement: enforceable against strangers, including successors and assigns of original parties (or purchasers).

Pre-conditions to existence of easements

1) Must be Dominant Tenement and a Servient Tenement: DT (land which gets benefit of the easement) and servient tenement (land which suffers a burden).
2) DT must be "accommodated" by easement over ST
3) DT and ST must either be owned or occupied by different persons.

4) Easements Lie in Grant: incorporeal heriditements – abstract form of property. I cannot possess an easement – thus they were transferred through a grant and not handing over a clump of dirt

There Must Be a Dominant and Servient Tenement

No easements in gross (easement must be associated with a piece of land): its all about land benefiting from other land: A personal benefit is not enough – if you are going to deprive one piece of land you must benefit another piece of land.

The Pet Cemetery case: A farmer started a cemetery for pets. One year the farmer decides to retire and sell = new owner says you cannot come on my land. There should not have been a easement found in this case as there was no dominant tenement (there is not land that is getting a corresponding benefit). Court nevertheless found an easement existed. Dented the notion that a dominant tenement is required, although most people think it was wrongly decided.

Normally dominant tenements (dominant and serviant) are side by side. But the properties need not be contiguous. **Utilities right of way: *s. 69 LTA*:** Arguable these qualify would qualify without legislation (dominant tenement being the power station). However, s. 69 removes this problem – when the Crown grants public utilities the instrument granting this right is registerable in LT (removing this dominant tenement requirement).

The subject matter of the easement must "accommodate" or benefit DT

Enhances the DT by enhancing use and enjoyment, improving its amenities, making it a better and more convenient place to live, (it is a benefit to flush sewage, easier to drive through than around, etc.).

Ellenborough Park: easement had domestic utility. People got to walk around the park – became a quasi-backyard.

1) Mere personal or business benefit to owner of DT doesn't satisfy test of accommodation
2) Accommodation is what counts: DT & ST need not be contiguous
3) Easements are of "practical utility & benefit", hence it is said that easements of recreation and amusement don't qualify. E.g., individuals given rights to attend events such as horse races or other sporting events – Litman says this is because there is no dominant tenement.

Query whether the principle is correct? E.g., right to water ski on adjoining private lake, right to golf on adjoining private course: Being able to use it would enhance my use and enjoyment but still not necessarily allowed to use it (Usually dealt with in K).

Different Owners or Occupiers of DT and ST

Wong: Landlord (owed the entire building) granted easement that ran over a portion of building he occupied (benefiting another portion of the building occupied by restaurateur tenant).

If DT and ST both occupied and owned by same person easement would be superfluous. At common law if you tried to grant an easement over your own neighboring land – courts would say no: Acquisition of ST or DT by owner of the other results in merger (common law).
S. 68 Land Titles Act appears to override this form of merger by permitting easements to be created by common owner of DT & ST. People can grant their own easements (exception to merger).

Easement Must Lie In Grant
This is because easements are incorporeal hereditaments, hence they can not be created by livery of seizen.
Lie in grant spawns several requirements

1) There must be a capable grantor and grantee (owners & or/occupiers of DT & ST, of age, of capacity), or under s. 68 the owner of both.
2) The subject matter of the easement must not be "indefinite." Certainty requirement.

Ellenborough: jus spatiandi (right to wander over the field of another without restriction) is too indefinite. But (a) right to wander in the park was upheld as sufficiently specific and (b) such rights have been upheld in cases involving ST in the nature of beach lands
.
Unrestricted right to receive air or sunlight = too indefinite but not so if the rights are to receive these things through a defined aperture (right to get light through a window, or x amount of air). Unsatisfactory state of the law – Litman says you could argue the entire property is an aperture.

3) The easement may not overburden, sterilize, render inalienable the ST or burden the owner of the ST him or herself
   a) This is a function of public policy. Its o.k. for individuals to make burdensome contractual requirements which affect the land or the parties but not to make perpetual proprietary arrangements which have this effect Hence: grants which require ongoing expenditures can only bind the parties contractually.

Negative easements are invalid - which prevent owners of ST from doing something on their land as opposed to permitting owners of DT from doing something on ST - cannot be created as "easements": E.g., easement of shade which prevents building from being torn down. You can enter into a restrictive covenant for this – as they have appropriate checks and balances.
Possessory easements were historically always struck down. But as ***Shelf Holdings*** demonstrates, that is not always the case: The law is in a pickle – cannot have possessary easements (they are incorpoaral heirdiements) but there are possessory easements or numerous kinds: pipelines of all sorts (oil and gas, sewage, water), electrical lines, even in the form of private arrangements, are of great practical importance.

a) Fixtures theory: However, usually pipelines not there for the better use and enjoyment of the ST lands = they cannot be fixtures in all cases.
b) Substantial interference theory (which looks at nature and location of "object") and its affect on ST; only when a large object interferes with the functioning of

the land should policy say we have an easement (from a theoretical perspective this is crap, but in reality it seems to work).

c) Real answer is it would make things too difficult to hold them not to be easements.

Creation of Easements

1) Express grant or express reservation: can reserve the right of easement if selling.
2) Some jurisdictions, not Alberta, can acquire rights through use (prescription) = if you walked your dog everyday then you could acquire (requires you to not have permission). Not adverse possession because it is mere use not exclusive use. ***Law of Property Act, s. 69(3)*** not outlaws this.
3) Legislation: Condominium Legislation – easement of subjacent and lateral support implied in favor of every unit.
4) Proprietary Estopple: When someone promises the laneway can be used (and then the property is purchased on this promise) or when land conveyance describes it being against the street = entitled to pretend property really is against the street.
5) Implied Easements: ***Wong v. Beaumont:*** All you had was a normal lease, parties did not know you had to vent the exhaust. Necessary to make implication in order to comply with the law requiring venting (really imputing intent to parties, not merely implying intention given that the parties were unaware of legal requirement for venting). Need to imply to make the lease have legal effect.
   a) Reality of the case is that implied easments arise as an operation of law, not through implied intentions of parties (the parties did not know they would have to be vented).
6) Implied Easements of "absolute necessity": e.g., without such an easement land is "land-locked:"
   a) At common law easements would arise from necessity – you got one implied. Original theory is such easements are a product of public policy, not an implication of intention.
   b) Modern cases have embraced "reasonable implication" as the proper approach and do not require "absolute necessity" expanding scope of possibilities. If parties want to explicitly negate they can.
   c) Note: When easement is implied, choice of route belong to owner of ST but route cannot be inconvenient to DT (path must be reasonable).

7) Implied Easements Arising From Quasi-Easements: Quasi-easement exists when one is using one's own land in a manner which would be an easement, if it were the land of another (e.g., owner of both adjoining lots A & B driving over lot B to get to lot A, without registering the right in LT).

Under ***Wheeldon v. Burrows*** a grant of the quasi-DT, lot A, can give rise to an easement if certain requirements are met. However, the grant of the quasi-ST will not give rise to an implied easement by reservation unless the reservation is explicit (derogation from grant). If purchaser is burdened (ST) by a quasi-easement then it is invalid. If purchaser is receives benefit (DT) then it continues to operate.

The requirements:

1) The grantor must at date of grant actually have been using the quasi-easement to benefit the QDT; and
2) either the use in question must be reasonably necessary for the use and enjoyment of the QDT &/or quasi-easement must have been continuous (permanent presence)
3) & apparent (in the sense of discoverable upon careful inspection (physical evidence).

<u>When Do Easements Bind Purchasers of the ST?</u>

1) Clearly they bind purchasers when they are recorded on their title (& are otherwise valid). Thus, check LT when purchasing.
2) But easements within the scope of s**. 61(1)(f) of the *Land Titles Act*** also bind purchasers, even if not recorded (overriding interests). Examples: royalities, unpaid taxes, public highway or right of way. Have to do an independent search to find out if these apply, because they are not registered in LT.
   a) These are easements arising by operation of law, not out of contract (or is this mistaken)?

Shaganappi: s. 61(1)(f) (the old 65(1)(g)covers off statutory easement but also easements which arise by law, including, according to Shaganappi implied easements. Now why is that problematic? Court held that s. 61(1)f says that implied easements apply by operation of law. Thus, they are binding whether or not registered. We have always said that implied easements arouse from intention – Shaganappi says they are an invisible cloud against title. You need representations from the other party that there are no implied easements.

<u>A Brief Excursion Into the Issue of Scope of Easement</u>

Easements permit passage, not possession (or obstruction) and one can't even tarry (I cannot park my car on an easement – I can only pass through).
Too often original scope is not explicit and must be discerned from all the circumstances (especially the purpose of the easement): put traffic limits, traffic size, etc.
Myriad of circumstances in which issue arises but courts proceed basically with a gut reaction as to whether the new additional burden is fair given the original bargain. Significant new burdens are not tolerated. Owner of DT must purchase additional rights. (Winch case, new burden arising from subdivision of farmland acceptable but in Malden easement to service a farm evolved into an easement to facilitate large numbers of patrons of a major campground/picnic ground operation to provide access the beach).

<u>Termination:</u>

1) When time limits expires.
2) When ownership of both tenements is united.
3) Can be released through agreement or by implication (abandonment – requires intention to abandon + sufficient relinquishment of control).
4) Estopple:
5) Drastic change in DT lands function.