

## Collins' Fall 2008 Property I Syllabus

**Readings.** From Dukeminier, Krier, Alexander & Schill, *Property* (6<sup>th</sup> ed. Aspen 2006) and this syllabus. Unless otherwise announced, prepare one numbered assignment for each class.

Some assignments include provisions from or citations to Colorado Revised Statutes (CRS). In many instances these will not be discussed in class; they are included to show you the Colorado version of the kind of rule discussed in the reading assigned.

**Questions and office hours.** I encourage your questions, in or out of class. (1) I normally stay after class to answer questions. (2) Ask questions by email to richard.collins@colorado.edu. (3) Visit my office, Room 426. Office hours this term are Tuesdays 4.00-5.00. You are welcome at other times that do not interfere with classes. In addition to Property, I have classes from 2.30 to 3.45 on Tuesdays and Thursdays. You can make an appointment for an office visit, by email or orally after class.

**References.** You may wish to consult reference books in the library. Some are cited in the casebook. You need not pursue most of these citations, but it is helpful to do so on occasion. The best short reference work is Hovenkamp & Kurtz's *Principles of Property Law: The Concise Hornbook Series* (6<sup>th</sup> edition, West, 2005). The most up-to-date long reference work is *Thompson on Real Property* (Thomas Edition, Michie Co 1994). It is forbiddingly thorough at 15 volumes. The best older work is *American Law of Property* (A James Casner, ed, Little, Brown 1952-54), 8 volumes. On the subjects of estates and future interests (chapters 3 and 4 of the casebook), Moynihan, *Introduction to the Law of Real Property*, is a readable short work. Moynihan also touches on concurrent ownership, chapter 5 of the casebook.

**Final examination.** Expect a three to four hour, essay final to which you should bring your casebook, syllabus, and relevant writings posted on the course website. You may also bring your class notes and any outlines written by you, either alone or with other students who are taking Property this semester. No other materials may be consulted during the examination. In particular, old exams and answers, and commercial outlines, are not permitted.

Questions on the final examination will be based on modern law and will arise in Coronado, a mythical, common-law state of the United States that has typical American property laws. The Coronado Legislature has passed the following statutes; their significance will emerge as we go through the course.

- a. Acts abolishing the destructibility of contingent remainders, the tenancy by the entirety, the fee tail, dower, and curtesy.
- b. A wills act, a married women's property act, a statute of frauds, and a summary eviction law.
- c. Acts presuming that, absent a showing of contrary intent, a written instrument or oral conveyance transferring property (1) transfers all of the transferor's interest; (2) to two or more persons creates a tenancy in common.
- d. A 20 year statute of limitations for recovering possession of or quieting title to real property, a 10 year statute for the same when based on color of title and payment of taxes, and a 6 year statute for other claims relating to property (such as claims for damages or to recover chattels).

## Assignments

### A. Fundamentals

#### 1. xxxi, 1-17

*Johnson v M'Intosh* is a very complex case with which to begin our study. It does make an important, basic point about law and property, but we shall not examine its legal rules in depth, and none of them will figure in the course examination. Therefore, you need not give it the close attention required for other assignments.

The Court's opinion is long and necessarily heavily edited. Unfortunately, editing obscures the facts and causes some of the casebook's notes to be misleading.

The Court recited that Johnson and Graham claimed land in Illinois under a 1775 purchase from the Piankeshaw Indian Nation. The United States bought the same land from the Piankeshaws under an 1808 treaty. In 1818 the Government patented (granted) a tract of the land to M'Intosh, and Johnson and Graham sued him to contest title.

This was a test case; much more was at stake than M'Intosh's patent, and Daniel Webster represented the claimants. Their claim recited both the 1775 transaction and a 1773 purchase by the same buyers from the Illinois Indian Nation. The latter tract was later purchased by the United States under several treaties with the Illinois Nation.<sup>1</sup>

Both private purchases were made at elaborate gatherings at British army posts. The price of the 1773 tract was alleged to be at least the equivalent of \$24,000, and the 1775 tract at least \$31,000. If true,<sup>2</sup> these were relatively high prices by the practices of the day. The U. S. paid less per acre under the later treaties.

The Court at page 8 and the casebook's notes recite the debate about whether tribal title of Native Americans based on hunting or other uses of land involving only occasional human presence should be recognized. Many European settlers argued not, known as the "terra nullius" or wasteland claim, invoking John Locke's labor theory of value and the leading international law authority of the day, Emmerich de Vattel. But the Supreme Court and Congress rejected the argument and recognized tribal title based on any kind of use or possession. See *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835). To the extent that the casebook suggests otherwise, it is incorrect.

This does not mean that purchases of Indian land were fair. There was often coercion or fraud, and many violations of law had no legal redress. These defects increased after 1814, when tribes ceased to be a threat to the security of the United States, and again after 1829, when President Jackson defied court rulings favoring Indians. But none of these wrongs arose from failure of the courts to recognize tribal ownership under the terra nullius theory.

The tribes involved in *Johnson* were paid twice for the land, and the earlier deals appear relatively fair. Many examples of clear unfairness toward Native Americans can be found, but the transactions

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<sup>1</sup> One of the original purchasers was named Johnson; the claimants in the case were his son and grandson. For many years before the lawsuit, they had unsuccessfully lobbied the U S government to recognize their title by executive or legislative action. They could not sue the U S to contest title because of sovereign immunity, so they had to wait until there was a private owner to sue.

<sup>2</sup> There had been no trial, so there was no judicial determination of the amounts paid.

in this case were likely not among them.<sup>3</sup> In light of the facts of *Johnson* and the legal rule recognizing tribal title based on any kind of use, in what sense did the case involve conquest? This is not a rhetorical question; there was a kind of conquest. But it was not seizure of land at gunpoint. Assuming that these sales were voluntary, just what was imposed on the two Indian nations and when?<sup>4</sup>

The principal legal rules discussed in the case were: (1) European nations and their American successors divided the Americas by a deal among themselves to respect the first to discover territory new to them, modified by the results of their many wars with each other, such as Québec, and of purchases, such as Louisiana and Florida. The *Johnson* Court called this the rule of discovery, and the book correctly notes that it has no current use. (2) Ownership of land acquired by conquest will not be questioned by the conqueror's courts. The unusual aspect of the *Johnson* opinion is openly admitting this. (3) England and other European nations adopted national rules of preemption, forbidding private purchases from Native American nations without sovereign consent. This rule governed the *Johnson* case.<sup>5</sup> The rule has been statutory law of the United States since 1790, now codified at 25 U. S. Code § 177. If the rule is as bad as the book's notes imply, why does it survive with support of modern Indian nations?

## 2. 17-23

CRS 2-4-211. **Common law of England.** The common law of England so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament, made in aid of or to supply the defects of the common law prior to the fourth year of James the First [1607], [exceptions omitted], and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.

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<sup>3</sup> For example, the later treaties by which the United States acquired tribal title from these Indian nations followed their military defeat, so the tribes were under duress to agree to them. The balance of power was otherwise in 1773 and 1775.

<sup>4</sup> Consider also the Court's alternative explanation for its decision, reported at 21 U S (8 Wheat) pages 592-94 but omitted from the casebook:

"Another view has been taken of this question, which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

"As such a grant could not separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a Court to say, that different consequences are attached to this purchase, because it was made by a stranger. By the treaties concluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made, is to set up their title against that of the United States."

<sup>5</sup> *Johnson* and *Graham* alleged in the alternative that they had consent of the British Crown for their purchases, but the courts held otherwise. Had they sustained that claim, they might have won the case.

3. 23-27
4. 27-31 (end of prob. 1)
5. 32-35
6. 35-50
7. 51 (top half), 58 (note 2)-69.
8. 69-86
9. 86-93
10. 95-99
11. 99-112
12. 112-29

The Colorado statute set out below was amended this year to add subsections (3)-(5) in reaction to the case of McLean v. DK Trust, Boulder Dist. Ct. No. 06CV982, *appeal pending*. Plaintiffs successfully claimed a strip of land in the vacant lot adjoining their residence based on proof of adverse possession of at least 21 years. At trial they admitted that they knew they had occupied land of another. Defendants took their loss to the press and gained strong public and press support. Plaintiff McLean is a retired district court judge, and plaintiff Stevens is a lawyer, which generated many public statements of hostility toward lawyers and judges. The district judge who decided the case is on the November ballot for retention; defendants are promoting his defeat. The Legislature reacted by amending the statute.

The record in the case strongly supported awarding plaintiffs an easement (right-of-way) over the disputed strip of land. Fee title by adverse possession was less clear. The court's opinion did not discuss the easement alternative. Why not? Will the appellate court consider this alternative? Why or why not?

**CRS 38-41-101. Limitation of eighteen years.** (1) No person shall commence or maintain an action for the recovery of the title or possession or to enforce or establish any right or interest of or to real property or make an entry thereon unless commenced within eighteen years after the right to bring such action or make such entry has first accrued or within eighteen years after he or those from, by, or under whom he claims have been seized or possessed of the premises. Eighteen years adverse possession of any land shall be conclusive evidence of absolute ownership.

(2) The limitation provided for in subsection (1) of this section shall not apply against the state, county, city and county, city, irrigation district, public, municipal, or quasi-municipal corporation, or any department or agency thereof. No possession by any person, firm, or corporation, no matter how long continued, of any land, water, water right, easement, or other property whatsoever dedicated to or owned by the state of Colorado, or any county, city and county, city, irrigation district, public, municipal, or quasi-municipal corporation, or any department or agency thereof shall ever ripen into any title, interest, or right against the state of Colorado, or such county, city and county, city, public, municipal, or quasi-municipal corporation, irrigation district, or any department or agency thereof.

(3)(a) in order to prevail on a claim asserting fee simple title to real property by adverse possession in any civil action filed on or after July 1, 2008, the person asserting the claim shall prove each element of the claim by clear and convincing evidence.

(b) in addition to any other requirements specified in this part 1, in any action for a claim for fee simple title to real property by adverse possession for which fee simple title vests on or after July 1, 2008, in favor of the adverse possessor and against the owner of record of the real property under subsection (1) of the section, a person may acquire fee simple title to real property by adverse possession only upon satisfaction of each of the following conditions:

(i) the person presents evidence to satisfy all of the elements of a claim for adverse possession required under common law in Colorado; and

(ii) either the person claiming by adverse possession or a predecessor in interest of such person had a good faith belief that the person in possession of the property of the owner of record was the actual owner of the property and the belief was reasonable under the particular circumstances.

(4) notwithstanding any other provision of this section, the provisions of subsections (3) and (5) of this section shall be limited to claims of adverse possession for the purpose of establishing fee simple title to real property and shall not apply to the creation, establishment, proof, or judicial confirmation or delineation of easements by prescription, implication, prior use, estoppel, or otherwise, nor shall the provisions of subsections (3) or (5) of this section apply to claims or defenses for equitable relief under the common-law doctrine of relative hardships, or claims or defenses governed by any other statute of limitations specified in this article. Nothing in this section shall be construed to mean that any elements of a claim for adverse possession that are not otherwise applicable to the creation, establishment, proof, or judicial confirmation or delineation of easements by prescription, implication, prior use, estoppel, or otherwise are made applicable pursuant to the provisions of this section.

(5) (a) where the person asserting a claim of fee simple title to real property by adverse possession prevails on such claim, and if the court determines in its discretion that an award of compensation is fair and equitable under the circumstances, the court may, after an evidentiary hearing separately conducted after entry of the order awarding title to the adverse possessor, award to the party losing title to the adverse possessor:

(i) damages to compensate the party losing title to the adverse possessor for the loss of the property measured by the actual value of the property as determined by the county assessor as of the most recent valuation for property tax purposes. If the property lost has not been separately taxed or assessed from the remainder of the property of the party losing title to the adverse possessor, the court shall equitably apportion the actual value of the property to the portion of the owner's property lost by adverse possession including, as appropriate, taking into account the nature and character of the property lost and of the remainder.

(ii) an amount to reimburse the party losing title to the adverse possessor for all or a part of the property taxes and other assessments levied against and paid by the party losing title to the adverse possessor for the period commencing eighteen years prior to the commencement of the adverse possession action and expiring on the date of the award or entry of final nonappealable judgment, whichever is later. If the property lost has not been separately taxed or assessed from the remainder of the property of the party losing title to the adverse possessor, such reimbursement shall equitably apportion the amount of the reimbursement to the portion of the owner's property lost by adverse possession, including, as appropriate, taking into account the nature and character of the property lost and of the remainder. The amount of the award shall bear interest at the statutory rate from the dates on which the party losing title to the adverse possessor made payment of the reimbursable taxes and assessments.

(b) at any hearing conducted under this subsection (5), or in the event that adverse possession is claimed solely as a defense to an action for damages based upon a claim for trespass, forcible entry, forcible detainer, or similar affirmative claims by another against the adverse possessor, and not to seek an award of legal title against the claimant, the burden of proof shall be by a preponderance of

the evidence. If the defendant is claiming adverse possession solely as a defense to an action and not to seek an award of legal title, the defendant shall so state in a pleading filed by the defendant within ninety days after filing an answer or within such longer period as granted by the court in the court's discretion, and any such statement shall bind the defendant in the action.

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The 2008 amendment added the requirement that adverse possession in Colorado henceforth require proof that an adverse possessor “had a good faith belief that the person in possession of the property of the owner of record was the actual owner of the property and the belief was reasonable under the particular circumstances.” This is similar to the common-law decision of the New York court in *Van Valkenburgh*. As note 4 on pages 126-28 states, many American states do not require proof of this element; until this year, Colorado was among them.

A prominent decision coming out the other way was *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826 (Alaska 1974). The Scouts had record title to a 9.24 acre parcel. Peters was a Tlingit Indian who had occupied a small part of this land for about 40 years. The court ruled in favor of Peters, stating, “His beliefs as to the true legal ownership of the land, his good faith or bad faith in entering into possession . . . are irrelevant.”

13. 129-36

CRS 38-41-108. **Rights in possession seven years - color of title and payment of taxes.** Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, who for seven successive years continues in such possession and also during said time pays all taxes legally assessed on such lands or tenements shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his paper title. All persons holding under such possession by purchase, devise, or descent, before said seven years have expired, who continue such possession and continue to pay the taxes as provided in this section, so as to complete the possession and payment of taxes for the term, provided in this section, shall be entitled to the benefit of this section.

How do the new parts of the Colorado 18 year statute affect claims under this one? How do the new parts of the Colorado statute affect claims like those in *Mannillo v. Gorski*?

14. 136-44

The diagram on page 138 does not match the opinion. The lots designated A and B in the opinion are D and C on the diagram.

CRS 38-41-112. **Legal disability - extension of two years.** Persons under legal disability at the time the right of action first accrued who, at the time of the expiration of the limitation applicable, are still under such disability shall have two years from the expiration of a limitation to commence action, and no action shall be maintained by such persons thereafter.

15. 144-57

16. 157-59, 166-72

## **B. Estates and Future Interests**

17. 173-76 (end of 1), 179 (middle)-89 (class discussion 181-89)

CRS 38-30-107. **Estate granted deemed fee simple unless limited.** Every estate in land which is granted, conveyed, or devised to one, although other words necessary to transfer an estate of inheri-

tance are not added, shall be deemed a fee simple estate of inheritance if a lesser estate is not limited by express words or does not appear to be granted, devised, or conveyed by operation of law.

CRS 38-30-106. **Tenant in fee tail takes in fee simple.** In cases where, by the common law, any person may be or become seized in fee tail of any lands, tenements, or hereditaments by virtue of any devise or conveyance, or by any other means whatsoever, such person, instead of becoming seized in fee tail thereof, shall be deemed and adjudged to be seized of such lands, tenements, and hereditaments in fee simple.

As the readings indicate, the fee tail played an important role in English dynastic history, and it was not abolished there until 1925. It is part of the story in many English novels, such as *Pride and Prejudice*.

18. 189-97 (omit notes and problems on page 189; class discussion 189-97)

19. 197-206 (bottom)

20. 206-15

21. 215-24 (the note at pages 221-23 will not be discussed in class)

CRS 38-41-119. **One-year limitation.** No action shall be commenced or maintained to enforce the terms of any building restriction concerning real property or to compel the removal of any building or improvement on land because of the violation of any terms of any building restriction unless said action is commenced within one year from the date of the violation for which the action is sought to be brought or maintained.

22. 225-32

23. 233-40 (class discussion problems on 238-40)

24. 240-43, 244 (bottom)-51

Footnote 18 on page 246 recites the rule that lives in being include fetuses from conception if later born alive. The origin of this rule is amusing and instructive. When the destructibility rule (pages 241-43) was in force, O (an English landowner) conveyed Blackacre to A for life, then to A's first son and his heirs. A died without a son, but a son was born to A's widow six months later. In *Reeves v. Long*, 83 Eng. Rep. 754 (K.B. 1695), the professional judges of the King's Bench followed a 1670 precedent and unanimously held that the remainder was destroyed. Counsel appealed to the House of Lords, most of whom were great landowners and not lawyers. The Lords reversed and held that when the son was born, the remainder vested retroactively to the time of conception. The Lords are still Britain's highest court, but today only professional judges in the house called the Law Lords rule on cases, Britain's supreme court within the house. For obvious reasons, the rule of *Reeves v. Long* has been invoked in modern debates about abortion rights, although it does not clearly support either side.

25. 262-74

Colorado's statutory replacement for the Rule Against Perpetuities is codified at CRS 15-11-1101 to 1107. For interests created after 1991, it replaced the common-law rule with a version of USRAP using a validity period of 90 years and eliminated RAP's application to commercial interests. See USRAP discussion at pages 264-66. For pre-1991 interests, it directs courts to reform interests that violate the rule to conform most closely to grantor's intent. A 2006 amendment extends the validity period to 1000 years for noncommercial interests in trust created after 2001. For noncommercial interests not in trust, the 90-year rule continues.

26. Problems at page 15 of this syllabus

### C. Concurrent Ownership

27. 275-84 (omit no. 3 on 278)

CRS 38-31-101. **Joint tenancy expressed in instrument - when.** (1) Except[ions omitted], no conveyance or devise of real property to two or more natural persons shall create an estate in joint tenancy in real property unless, in the instrument conveying the real property or in the will devising the real property, it is declared that the real property is conveyed or devised in joint tenancy or to such natural persons as joint tenants. The abbreviation "JTWROS" and the phrase "as joint tenants with right of survivorship" or "in joint tenancy with right of survivorship" shall have the same meaning as the phrases "in joint tenancy" and "as joint tenants". Any grantor in any such instrument of conveyance may also be one of the grantees therein.

Because Colorado does not recognize the tenancy by the entirety, we shall not study it.

28. 285-91 (top)

CRS 38-11-101. **Personal property in joint tenancy - how created - vesting upon death.**

(1) An estate in joint tenancy in personal property is created if, in the instrument evidencing ownership of such property, it is declared that the property is conveyed, transferred, bequeathed, or held in joint tenancy or as joint tenants, whether or not additional words are used relating to tenancy in common or survivorship. The abbreviation "JTWROS" and the phrase "as joint tenants with right of survivorship" or "in joint tenancy with right of survivorship" shall have the same meaning. Upon the death of any such joint tenants, the title to and ownership of such personal property passes immediately to and vests in the surviving joint tenant or tenants. Any grantor or transferor in any such instrument of conveyance or transfer may also be one of the grantees or transferees therein

29. 291-303

30. 303-10

31. 310-13 (top—omit the problem), 321-35

### D. Leaseholds

32. 361-68

CRS 13-40-107. **Notice to quit.** (1) A tenancy may be terminated by notice in writing, served not less than the respective period fixed before the end of the applicable tenancy, as follows:

(a) A tenancy for one year or longer, three months;

(b) A tenancy of six months or longer but less than a year, one month;

(c) A tenancy of one month or longer but less than six months, ten days; . . .

(4) No notice to quit shall be necessary from or to a tenant whose term is, by agreement, to end at a time certain.

CRS 38-10-106. **Conveyance - trust - power must be in writing.** No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto shall be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.



For a decision contrary to *Garner v. Gerrish*, see *Kajo Church Square, Inc. v. Walker*, 2003 Tex. App. LEXIS 3103, 2003 WL 1848555.

33. 368-88

The discrimination materials from pages 376-84 will not figure in the course examination; read them for general knowledge. We'll discuss them briefly in class.

34. 388-94 (end of no. 2)

35. 394 (no. 3)-402

36. 403-10, first ¶ on 417 (definition of "surrender")

CRS 38-12-510, effective September 1, 2008, forbids self-help evictions from residential premises. CRS 13-40-104(1)(d) requires landlords to give three days' notice in writing to defaulting tenants before suing to evict. CRS 13-40-111 provides for an eviction hearing between five business and ten calendar days thereafter.

37. 410-21

CRS 38-12-103. **Return of security deposit.** (1) A landlord shall, within one month after the termination of a lease or surrender and acceptance of the premises, whichever occurs last, return to the tenant the full security deposit deposited with the landlord by the tenant, unless the lease agreement specifies a longer period of time, but not to exceed sixty days. No security deposit shall be retained to cover normal wear and tear. In the event that actual cause exists for retaining any portion of the security deposit, the landlord shall provide the tenant with a written statement listing the exact reasons for the retention of any portion of the security deposit. When the statement is delivered, it shall be accompanied by payment of the difference between any sum deposited and the amount retained. The landlord is deemed to have complied with this section by mailing said statement and any payment required to the last known address of the tenant. Nothing in this section shall preclude the landlord from retaining the security deposit for nonpayment of rent, abandonment of the premises, or nonpayment of utility charges, repair work, or cleaning contracted for by the tenant.

(2) The failure of a landlord to provide a written statement within the required time specified in subsection (1) of this section shall work a forfeiture of all his rights to withhold any portion of the security deposit under this section.

(3) (a) The willful retention of a security deposit in violation of this section shall render a landlord liable for treble the amount of that portion of the security deposit wrongfully withheld from the tenant, together with reasonable attorneys' fees and court costs; except that the tenant has the obligation to give notice to the landlord of his intention to file legal proceedings a minimum of seven days prior to filing said action.

(b) In any court action brought by a tenant under this section, the landlord shall bear the burden of proving that his withholding of the security deposit or any portion of it was not wrongful.

(7) Any provision, whether oral or written, in or pertaining to a rental agreement whereby any provision of this section for the benefit of a tenant or members of his household is waived shall be deemed to be against public policy and shall be void.

38. 421-31

39. 431-40

In *Blackwell v. Del Bosco*, 558 P.2d 563 (Colo. 1976), the court refused to adopt a warranty of habitability by judicial decree. The Legislature took no action until this year, when it adopted the following statute, effective September 1, 2008, and applicable to leaseholds created or extended from that date.

**CRS 38-12-503. Warranty of habitability.** (1) In every rental agreement, the landlord is deemed to warrant that the residential premises is fit for human habitation.

(2) A landlord breaches the warranty of habitability set forth in subsection (1) of this section if:

(a) A residential premises is uninhabitable as described in section 38-12-505 or otherwise unfit for human habitation; and

(b) The residential premises is in a condition that is materially dangerous or hazardous to the tenant's life, health, or safety; and

(c) The landlord has received written notice of the condition described in paragraphs (a) and (b) of this subsection (2) and failed to cure the problem within a reasonable time.

(3) When any condition described in subsection (2) of this section is caused by the misconduct of the tenant, a member of the tenant's household, a guest or invitee of the tenant, or a person under the tenant's direction or control, the condition shall not constitute a breach of the warranty of habitability. It shall not be misconduct by a victim of domestic violence or domestic abuse under this subsection (3) if the condition is the result of domestic violence or domestic abuse and the landlord has been given written notice and evidence of domestic violence or domestic abuse as described in section 38-12-402 (2) (a).

(4) In response to the notice sent pursuant to paragraph (c) of subsection (2) of this section, a landlord may, in the landlord's discretion, move a tenant to a comparable unit after paying the reasonable costs, actually incurred, incident to the move.

(5) Except as set forth in this part 5, any agreement waiving or modifying the warranty of habitability shall be void as contrary to public policy.

(6) Nothing in this part 5 shall:

(a) prevent a landlord from terminating a rental agreement as a result of a casualty or catastrophe to the dwelling unit without further liability to the landlord or tenant; or

(b) preclude a landlord from initiating an action for nonpayment of rent, breach of the rental agreement, violation of section 38-12-504, or as provided for under article 40 of title 13, C.R.S.

**38-12-504. Tenant's maintenance of premises.** (1) in addition to any duties imposed upon a tenant by a rental agreement, every tenant of a residential premises has a duty to use that portion of the premises within the tenant's control in a reasonably clean and safe manner. A tenant fails to maintain the premises in a reasonably clean and safe manner when the tenant substantially fails to:

(a) Comply with obligations imposed upon tenants by applicable provisions of building, health, and housing codes materially affecting health and safety;

(b) Keep the dwelling unit reasonably clean, safe, and sanitary as permitted by the conditions of the unit;

(c) Dispose of ashes, garbage, rubbish, and other waste from the dwelling unit in a clean, safe, sanitary, and legally compliant manner;

(d) Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, elevators, and other facilities and appliances in the dwelling unit;

(e) Conduct himself or herself and require other persons in the residential premises within the tenant's control to conduct themselves in a manner that does not disturb their neighbors' peaceful enjoyment of the neighbors' dwelling unit; or

(f) Promptly notify the landlord if the residential premises is uninhabitable as defined in section 38-12-505 or if there is a condition that could result in the premises becoming uninhabitable if not remedied.

(2) In addition to the duties set forth in subsection (1) of this section, a tenant shall not knowingly, intentionally, deliberately, or negligently destroy, deface, damage, impair, or Remove any part of the residential premises or knowingly permit any person within his or her control to do so.

(3) Nothing in this section shall be construed to authorize a modification of a landlord's obligations under the warranty of habitability.

**38-12-505. Uninhabitable residential premises.** (1) A residential premises is deemed uninhabitable if it substantially lacks any of the following characteristics:

(a) Waterproofing and weather protection of roof and exterior walls maintained in good working order, including unbroken windows and doors;

(b) Plumbing or gas facilities that conformed to applicable Law in effect at the time of installation and that are maintained in good working order;

(c) Running water and reasonable amounts of hot water at all times furnished to appropriate fixtures and connected to a sewage disposal system approved under applicable law;

(d) Functioning heating facilities that conformed to applicable law at the time of installation and that are maintained in good working order;

(e) Electrical lighting, with wiring and electrical equipment that conformed to applicable law at the time of installation, maintained in good working order;

(f) Common areas and areas under the control of the landlord that are kept reasonably clean, sanitary, and free from all accumulations of debris, filth, rubbish, and garbage and that have appropriate extermination in response to the infestation of rodents or vermin;

(g) Appropriate extermination in response to the infestation of rodents or vermin throughout a residential premises;

(h) An adequate number of appropriate exterior receptacles for garbage and rubbish, in good repair;

(i) Floors, stairways, and railings maintained in good repair;

(j) Locks on all exterior doors and locks or security devices on windows designed to be opened that are maintained in good working order; or

(k) Compliance with all applicable building, housing, and health codes, which, if violated, would constitute a condition that is dangerous or hazardous to a tenant's life, health, or safety.

(2) No deficiency in the common area shall render a residential premises uninhabitable as set forth in subsection (1) of this section, unless it materially and substantially limits the tenant's use of his or her dwelling unit.

(3) Unless otherwise stated in section 38-12-506, prior to Being leased to a tenant, a residential premises must comply with the requirements set forth in section 38-12-503 (1), (2) (a), and (2)(b).

**38-12-506. Opt-out.** (1) If a dwelling unit is contained within a mobile home park, as defined in section 38-12-201.5 (3), or if there are four or fewer dwelling units sharing common walls or located on the same parcel, as defined in section 30-28-302 (5),

C.R.S., all of which have the same owner, or if the dwelling unit is a single-family residential premises:

(a) A good faith rental agreement may require a tenant to assume the obligation for one or more of the characteristics contained in section 38-12-505 (1) (f), (1) (g), and (1) (h), as long as the requirement is not inconsistent with any obligations imposed upon a landlord by a governmental entity for the receipt of a subsidy for the residential premises; and

(b) For any dwelling unit for which a landlord does not receive a subsidy from any governmental source, a landlord and tenant may agree in writing that the tenant is to perform specific repairs, maintenance tasks, alterations, and remodeling, but only if:

(i) The agreement of the parties is entered into in good faith and is set forth in a separate writing signed by the parties and supported by adequate consideration;

(ii) The work is not necessary to cure a failure to comply with section 38-12-505 (3); and

(iii) Such agreement does not affect the obligation of the landlord to other tenants' residential premises.

(2) For a single-family residential premises for which a landlord does not receive a subsidy from any governmental source, a landlord and tenant may agree in writing that the tenant is to perform specific repairs, maintenance tasks, alterations, and remodeling necessary to cure a failure to comply with section 38-12-505 (3), but only if:

(a) The agreement of the landlord and tenant is entered into in good faith and is set forth in a writing that is separate from the rental agreement, signed by the parties, and supported by adequate consideration; and

(b) The tenant has the requisite skills to perform the work required to cure a failure to comply with section 38-12-505 (3).

(3) To the extent that performance by a tenant relates to a characteristic set forth in section 38-12-505 (1), the tenant shall assume the obligation for such characteristic.

(4) If consistent with this section a tenant assumes an obligation for a characteristic set forth in section 38-12-505 (1), the lack of such characteristic shall not make a residential premises uninhabitable.

**38-12-507. Breach of warranty of habitability - tenant's remedies.** (1) If there is a breach of the warranty of habitability as set forth in section 38-12-503 (2), the following provisions shall apply:

(a) Upon no less than ten and no more than thirty days Written notice to the landlord specifying the condition alleged to breach of the warranty of habitability and giving the landlord five business days from the receipt of the written notice to remedy the breach, a tenant may terminate the rental agreement by surrendering possession of the dwelling unit. If the breach is remediable by repairs, the payment of damages, or otherwise and the landlord adequately remedies the breach within five business days of receipt of the notice, the rental agreement shall not terminate by reason of the breach.

(b) A tenant may obtain injunctive relief for breach of the warranty of habitability in any court of competent jurisdiction. In any proceeding for injunctive relief, the court shall determine actual damages for a breach of the warranty at the time the court orders the injunctive relief. A landlord shall not be subject to any court order for injunctive relief if the landlord tenders the actual damages to the court within two business days of the order. Upon application by the tenant, the court shall Immediately release to the tenant the damages paid by the landlord. If the tenant vacates the leased premises, the landlord shall not be permitted to rent the premises again until such time As the unit would be in compliance with the warranty of habitability set forth in section 38-12-503 (1).

(c) In an action for possession based upon nonpayment of Rent in which the tenant asserts a defense to possession based upon the landlord's alleged breach of the warranty of habitability, upon the filing of the tenant's answer the court shall order the tenant to pay into the registry of the court all or part of the rent accrued after due consideration of expenses already incurred by the tenant based upon the landlord's breach of the warranty of habitability.

(d) Whether asserted as a claim or counterclaim, a tenant may recover damages directly arising from a breach of the warranty of habitability, which may include, but are not limited to, any reduction in the fair rental value of the dwelling unit, in any court of competent jurisdiction.

(2) If a rental agreement contains a provision for either party in an action related to the rental agreement to obtain attorney fees and costs, then the prevailing party in any action Brought under this part 5 shall be entitled to recover reasonable attorney fees and costs.

**38-12-508. Landlord's defenses to a claim of breach of warranty - limitations on claiming a breach.** (1) It shall be a defense to a tenant's claim of breach of the warranty of habitability that the tenant's actions or inactions prevented the landlord from curing The condition underlying the breach of the warranty of habitability.

(2) Only parties to the rental agreement or other adult Residents listed on the rental agreement who are also lawfully residing in the dwelling unit may assert a claim for a breach of the warranty of habitability.

(3) A tenant may not assert a claim for injunctive relief based upon the landlord's breach of the warranty of habitability of a residential premises unless the tenant has given notice to a local government within the boundaries of which the residential premises is located of the condition underlying the breach that is materially dangerous or hazardous to the tenant's life, health, or safety.

(4) A tenant may not assert a breach of the warranty of habitability as a defense to a landlord's action for possession based upon a nonmonetary violation of the rental agreement or for an action for possession based upon a notice to quit or vacate.

(5) If the condition alleged to breach the warranty of habitability is the result of the action or inaction of a tenant in another dwelling unit or another third party not under the direction and control of the landlord and the landlord has taken reasonable, necessary, and timely steps to abate the condition, but is unable to abate the condition due to circumstances beyond the landlord's reasonable control, the tenant's only remedy shall be termination of the rental agreement consistent with section 38-12-507 (1) (a).

(6) For public housing authorities and other housing providers receiving federal financial assistance directly from the federal government, no provision of this part 5 in direct conflict with any federal law or regulation shall be enforceable against such housing provider.

**38-12-509. Prohibition on retaliation.** (1) A landlord shall not retaliate against a tenant for alleging a breach of the warranty of habitability by discriminatorily increasing rent or decreasing services or by bringing or threatening to bring an action for possession in response to the tenant having made a good faith complaint to the landlord or to a governmental agency alleging a breach of the warranty of habitability.

(2) A landlord shall not be liable for retaliation under this section, unless a tenant proves that a landlord breached the warranty of habitability.

(3) Regardless of when an action for possession of the premises where the landlord is seeking to terminate the tenancy for violation of the terms of the rental agreement is brought, there shall be a rebuttable presumption in favor of the landlord that his or her decision to terminate is not retaliatory. The presumption created by this subsection (3) cannot be rebutted by evidence of the timing alone of the landlord's initiation of the action.

(4) If the landlord has a right to increase rent, to decrease service, or to terminate the tenant's tenancy at the end of any term of the rental agreement and the landlord exercises any of these rights, there shall be a rebuttable presumption that the landlord's exercise of any of these rights was not retaliatory. the presumption of this subsection (4) cannot be rebutted by evidence of the timing alone of the landlord's exercise of any of these rights.

38-12-511. **Application.** (1) Unless created to avoid its application, this part 5 shall not apply to any of the following arrangements:

- (a) Residence at a public or private institution, if such residence is incidental to detention or the provision of medical, geriatric, education, counseling, religious, or similar service;
  - (b) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser, seller, or a person who succeeds to his or her interest;
  - (c) Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;
  - (d) Transient occupancy in a hotel or motel that lasts less than thirty days;
  - (e) Occupancy by an employee or independent contractor whose right to occupancy is conditional upon performance of services for an employer or contractor;
  - (f) Occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative;
  - (g) Occupancy in a structure that is located within an unincorporated area of a county, does not receive water, heat, and sewer services from a public entity, and is rented for recreational purposes, such as a hunting cabin, yurt, hut, or other similar structure;
  - (h) Occupancy under rental agreement covering a residential premises used by the occupant primarily for agricultural purposes; or
  - (i) Any relationship between the owner of a mobile home park and the owner of a mobile home situated in the park.
- (2) Nothing in this section shall be construed to limit remedies available elsewhere in law for a tenant to seek to maintain safe and sanitary housing.  
agreements entered into or extended or renewed on or after the effective date of this act.

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The Legislature also amended CRS 13-40-111 to provide that when tenants want to contest eviction based on the warranty of habitability, they must pay into the registry of the court, at the time of filing their answer, all rent due less any expenses incurred based upon the landlord's failure to repair the residential premises.

40. 440-49 (omit problems on 441)

In *Mile High Fence Co v. Radovich*, 489 P.2d 308 (Colo. 1971), the court replaced the common law of landowners' tort liability with a general negligence rule. The general assembly then restored many of the common-law rules by enacting CRS 13-21-115.

Landlords' tort liability will not figure in the course examination.

**CRS 38-12-301. Control of rents by counties and municipalities prohibited.** The general assembly finds and declares that the imposition of rent control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution which would control rents on private residential property. This section is not intended to impair the right of any state agency, county, or municipality to manage and control any property in which it has an interest through a housing authority or similar agency.

## Problems

These involve conveyances of land to which O has a fee simple absolute. Assume the statutory scheme for Coronado, pages 1-2 of this syllabus. Identify the interests each person owns after each conveyance. Identify which interests are and are not subject to the common-law rule against perpetuities and apply the rule. When a problem has parts a, b, etc., it is a series of conveyances involving the same land. Identify the interests after each conveyance.

1. a. O to A for life, then to B & B's heirs if B survives A.  
b. A to C for 10 years.
2. a. O to A for life, then if A survives O, to A & A's heirs.  
b. O dies; O's will devises the land to A.  
c. A dies intestate.
3. O to A for life, then to A's children who reach the age of 25. A has three children, B, C, and D, ages 33, 37, and 39.
4. a. O to A for life.  
b. A to B for B's life.
5. O to A for life, then if B marries, to B for life or until B divorces, then to C. B has never married.
6. a. O made a will that gave Blackacre to A for life, then to A's eldest child for life, then to A's surviving grandchildren. A had two children, B 17 and C 9.  
b. B died.  
c. O died.
7. O to A & A's heirs so long as liquor is not sold on the premises, or if it is to B & B's heirs.
8. a. O to A & A's heirs so long as liquor is not sold on the premises.  
b. O dies; O's will devises the land to A.
9. O to A & A's heirs, but if A dies without surviving children to B & B's heirs.
10. O to A, an unmarried man, and to B and her husband C, as joint tenants.
11. O to A for life, then to the first child of A to reach 21. When the conveyance is made:  
a. A has no children.  
b. A has one child, B, age 4.  
c. A has one child, C, age 21.
12. O to A for life, then to B & B's heirs, but if B predeceases A to C & C's heirs.
13. O to A for life, then to B & B's heirs when B reaches 21. B is 11.
14. O to A & A's heirs when A reaches 25. A is 3.
15. O to A for life, then to B for life, then to B's children.
16. O to A for life, then to A's widow for life, then to B & B's heirs, but if B is not living at the death of A's widow, to C & C's heirs. A is married to W.