# Property

## Present Estates

### Freehold Estates

* **Fee Simple Absolute**
  + Longest potential duration
    - Since it is inheritable and devisable, it can last forever unless owner dies intestate (in which case it *escheats* to the state)
  + Created by language "A to B and his heirs" or even just "to B"
    - A person is generally presumed to convey fee simple absolute unless otherwise specified
  + Fully alienable - it can be sold or leased without any restraints (any such attempted restraints would be void)
    - Possible exception: partial restraints under very specific circumstances (e.g., targets an individual/small group or lasts for a short time period)
* **Fee Tail**
  + Created by language “to B and the heirs to his body” or “to B and his issue/his children”)
    - Property would revert back to grantor if grantee (or someone in his direct line) died without issue
  + Virtually no states recognize this anymore; those that do allow it to be converted to fee simple absolute
* **Life Estate**
  + Lasts for the life of the grantee
    - Exception: Life estate pur autre vie, which lasts for life of someone other than the grantee ("A to B for the life of C")
  + Created by words of limitation, such as "to B, for life"
    - Can also created by implication: "to B, and after B’s death, to C"
  + Always accompanied by future interest
    - Either reversion (to grantor) or remainder (designated third party)
  + Transferable, in which case it becomes life estate pur autre vie
    - However, this does not get rid of future interest.
      * This means it is not inheritable or devisable
  + Life tenant can use property, but has duties to maintain it and not to commit waste (which he is liable for)
    - **Affirmative/Voluntary waste** - Acts that injure property, reduce its value
      * Exception: open mine rule; depleting resources not waste if part of normal use of land
    - **Permissive Waste**: Failure to act
      * Allowing property to fall into disrepair (only responsible for ordinary maintenance, not replacements/structural repairs)
      * Failing to pay property taxes, mortgage interest (not principle)
      * Liability capped at actual/reasonable rental value of property
    - **Ameliorative Waste**: acts improving value of property but decreases subjective value to future interest holder
      * Rare; difficult to prove; recognized by only a few states

### Defeasible Estates

* **Fee Simple Determinable** - ends automatically on the occurrence of a stated condition (e.g., from A to B for as long as the property is used as a school)
  + Grantor retains possibility of reverter; automatically terminates and thus returns to granter upon occurence of stated condition
  + Conditional nature must be made clear ("so long as", "while", "until"); simply stating that you are conveying "for the purpose of” X is not enough.
* **Fee Simple Subject to Condition Subsequent** - ends at the election of grantor upon the occurrence of stated condition
  + Grantor retains *right of entry* or *power of termination*;
  + Can be created by language like "from A to B though if B does X, A has right of entry".
    - Even absent the explicit mention of the right of entry, Courts generally interpret limiting language like "provided that X", "but only if X", or "on condition that X" as creating a FSSCS
* **Fee Simple Subject to Executory Limitation** - terminates automatically when the condition occurs, and then transfers to a third-party. Similar to FSD, but if condition triggered/violated, automatically goes to third-party rather than reverting to grantor.
  + This third-party has an *executory interest*;
  + "From A to B; but if B ever consumes alcohol, then to C"

## Future Estates

### To Grantor

* **Reversion** - Occurs at the end of a finite estate (meaning estate is certain to end). A reversion is implied when it is unclear who property goes to at the end (e.g., "To B for B's life"()
* **Possibility of reverter** - Possibility of property reverting back to grantor; kept by grantor when conveying a FSD; automatically turns into possessory interest upon the condition being triggered/violated
* **Right of entry** - aka power of termination, created by granting FSSTCS; must be exercised in order to reclaim estate (i.e., through lawsuit)
  + Not traditionally transferable inter vivos under common law, though this has been relaxed in modern jurisdictions

### To Third Parties

* **Remainder Interests** - equivalent of reversion except with third party instead of grantor; happens **automatically** when estate naturally expires (e.g., a life estate, estate for years)
  + **Contingent Remainder** - remainder interest either given to an person yet to be ascertained or one that is subject to a condition precedent
    - Condition precedent - Condition must be satisfied *before* interest is vested (contrast with condition subsequent)
    - Ex: "to B for life, then to B's children" where B does not have any kids yet (interest won't vest until he does)
    - Ex: "to B for life, then to C if C is a legal adult at the time of B's death"
  + **Vested Remainder** - Grantee is ascertainable and interest is not subject to any conditions, or prevented in any other way, from becoming possessory upon preceding estate expiring
    - **Vested Remainder Subject to Open** - Granted to a group, where at least one member is alive and ascertainable, and others are not alive or ascertainable at the time of conveyance. The grantee is conveyed an interest, but it is not clearly defined at this point since others may eventually joint him in claiming a share of the interest
      * Also referred to as Vested Remained Subject to Partial Divestment; members already ascertained have to share remainder with new members of the class
      * "A conveys to B for life, then to B's children." (B has kids but could have additional ones in the future; open for this class of potentially qualifying members)
      * However, once class closes, those who would otherwise join the class future can no longer claim share of interest;
        + This can happen through setting an explicit date for closing the class
        + Absent such a date, law has typically recognized class as closing whenever distribution occurs/at least one member gets immediate possessory interest
    - **Vested remainder subject to divestment** - Remainder interest subject to condition subsequent
      * "A conveys to B for life, then to C for as long as C is financially solvent"
      * "A conveys to B for life, and then to C; but if C is an alcoholic, then to D"
* **Executory Interest** - equivalent of right of entry or possibility of reverter for third-party; if it only vests by cutting previous estate short (e.g., divesting someone other than grantor) or if it doesn't become possessory automatically upon previous estate ending, then it is an executory interest not a remainder
  + Shifting Executory Interest - takes from one grantee and gives it to another
  + Springing Executory Interest - takes from grantor and gives to grantee

### Rule Against Perpetuities

* Rule that prevents conveyance of interests that could vest far in the very distant future.
  + To vest = to give an immediate, fixed right of present or future enjoyment (as defined by West's Encyclopedia of American Law).
  + Interest must vest or fail to vest within a certain period, measured from the lives of the persons involved, else the future interest is void
  + Primary purpose is to prevent limitations/qualifications on property that continue to affect ownership long after persons involved are dead
* Common law approach:
  + "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest" - John Chipman Gray
  + Some life in being at the creation = any of the parties relevant to the conveyance that are alive and ascertainable at the time it is made
    - To be used as measuring life, life or death of person must affect vesting
  + In other words, if the interest could hypothetically vest after measuring life dies and 21 years pass (regardless of how improbable), it is immediately void
    - However, only the future interest that violates the RAP fails, not the entire conveyance
* Some modern jurisdictions (aka the Wait-and-See Approach):
  + Future interest must vest or fail to vest within 90 years of conveyance. If the interest hasn't certainly vested after 90 years, it is voided
* Applies to:
  + Vested remainder subject to open and contingent remainders
    - Example: To A for life, then to his children, then to his grandchildren who graduate college
      * Assuming A already has 1 grandchild who graduated college. Possible that subsequent grandchildren are born and graduate college 21 years after everyone dies, therefore it violates RAP.
      * **All-or-nothing rule**: If it could violate RAP for one class member, is violates it for all
  + executory interest
    - Example: "A conveys to B for so long as the property is used for residential purposes, then to C" could take decades after A's death before C is entitled to possessory interest
  + purchase options
* N/A for future interests that are held by the grantor:
  + reversion
  + possibility of reverter
  + right of entry
* Where future interest is stricken down by RAP, grantor gets possibility of reverter
  + Example: A to B, for as long as property is not used to sell Alcohol, then to C.
    - B has FSD
    - C would have executory interest, but since it is possible that alcohol is still not sold on property 21 years after all parties, it is stricken by RAP
    - Thus creates possibility of reverter in A (not subject to RAP)
* Perpetuity saving clause - prevents conveyance from being voided by RAP by ensuring that vesting occurs w/in permissible time period
  + Using example from earlier: A to B, for as long as property is not used to sell Alcohol during his lifetime, then to C.
* Exceptions:
  + Where gift to one charity with remainder/executory interest to another charity

## Landlord and Tenant Law (Leasehold Estates)

* A lease, in the traditional common law view, is a conveyance of the rights to use and enjoy (i.e., rights of possession) for period of time; this naturally favored landlords
  + Eventually, this began to trend towards a more contractual view which frequently relied on law of contracts to resolve disputes
    - Given disparities in bargaining power, modern view treats leases more like regulated contracts; much more tenant friendly

### Term of Years (aka Tenancy for Years)

* Lasts for fixed period; automatically terminates at a pre-specified time
  + Does not necessarily have to be measured in years; could last a few weeks or months
  + Notice not required to terminate at pre-determined time
* Statute of frauds - requires leases of a certain duration be signed in writing
  + In most modern jurisdictions this is any lease with a duration of more than 1 year

### Periodic Tenancy

* Lease for automatically renewing time period; continues indefinitely until a party gives notice of termination
  + e.g., month-to-month, year-to-year
* Advance notice necessary to terminate
  + Traditional common law rule: must give notice at least one period in advance, but no longer than 6 months
    - This would mean 6 months notice for year-to-year, 1 month notice for month-to-month
    - Notice must be given by last day of previous period notice else not effective
      * Example: if month-to-month starting June 1st and you find out you are moving on October 2nd, earliest you could terminate is November 31st
  + However, typically regulated via state statute now: year-to-year requires only months notice
* Can be created:
  + Explicitly - lease agreement says it is month-to-month
  + Implicitly - if no duration specified, court will presume periodic tenancy with period based on rent payment
  + Other - where lease is defective (e.g., violates SOF), but landlord continues accepting rent

### Tenancy at Will

* No fixed term and can be terminated at will without advanced notice (at least at common law)
  + Modern jurisdiction have trended towards requiring reasonable advance notice
* Usually only recognized if created using very clear and explicit language
  + Disfavored for obvious reasons

### Tenancy at Sufferance

* Type of tenancy in holdover situations, where tenant overstays lease (i.e., remains in possession after lease expires). Landlord can either elect to:
  + Continue to accept rent, implicitly creating new periodic lease equal in duration to the rent/renewable period of the original lease (max is year-to-year)
    - Usually month-to-month; if lease was 1 year or longer, becomes year-to-year
  + Evict/sue (as tenant would be trespassing at this point)
    - Original lease may include provision stating tenant is liable for increased or even doubled rent in holdover situation; some statutes may do this as well (e.g., New Jersey)
* Remedies in these situations usually come from state statute now instead of common law

### Rights and Obligations in Leasehold estates

* **Obligations of Tenants**
  + Must fulfill the obligations explicitly contained in the lease
    - Includes making rent payments on time and at agreed upon rate for entire duration (unless otherwise specified)
    - Also includes vacating property upon expiration of the lease
    - When T abandons property without intent to return and stops paying rent, this is a breach; L can sue for owed rent
      * Modern exception: Property is destroyed through some fault other than T's own (e.g., natural disaster, arson, etc.)
  + Must refrain from committing waste or nuisance
    - Ordinary wear and tear is exempted
    - See section on Life Estates for more on waste
    - Some leases have terms that completely shifts burden of repairs/maintenance onto the tenant; generally enforceable unless has the effect of waving warranty of habitability (this is not something you can contract around)
* **Obligations of Landlords**
  + Delivery of possession - L has duty to ensure rights of possession are delivered to T when lease starts
    - Majority: Delivery includes actual, physical possession. This meant if trespasser/holdover still on property, L responsible for expelling them. Failure to do so would result in breach
    - Minority: Historically, American jurisdictions only required L to convey legal rights of possession. T would need to enforce rights himself. This is now a minority rule
  + Implied covenant of quiet enjoyment - imposes duty on L not interfere with T's possession/occupancy/beneficial use of the property
    - Implicit in all lease agreements and can't be disclaimed
    - If L (or L’s agent/person with paramount title) breaches this covenant and it constitutes an eviction, tenant is relieved of duty to pay rent and may even be entitled to damages. Eviction can be:
      * Actual eviction - L (or agent/person with superior title) ousts the tenant from part or all of the premises
        + T can terminate lease and is entitled to benefit of the bargain
        + In case of partial eviction, can keep lease and withhold rent until parts of property interfered with are restored

Although restatement endorses partial rent abatement proportional to part taken, this is not case in most states and full abatement is excused (possible exception is where third-party w/ paramount title is responsible)

* + - * Constructive Eviction - substantial interference with use/enjoyment; so substantial that it justifies T leaving property reasonably promptly; affirmative defense in actions for failure to pay rent
        + Occurs when L negligently performs or fails to perform duty owed to T, such as making repairs, removing unsafe conditions, removing nuisances, and in-turn T suffers **substantial** loss of the use and enjoyment of premises

Generally, duty does not cover neighbors and third parties unless LL has notice of problematic activity and some reasonable control over it yet fails to do so

T must abandon the property reasonably promptly in response to interference

* + Implied warranty of habitability - requires L to ensure property is delivered and remains in a safe, liveable condition (i.e. one reasonably fit for human occupation).
    - Recognized in many states, but only applicable to residential property
    - If breached (e.g., T notifies L about condition, L fails to do anything about it), T can:
      * withhold rent until it is corrected
      * get it fixed himself and deduct costs from rent
      * sue for damages, rescission, or even injunctive relief (e.g., specific performance)
    - Violation of IWH can also be used as affirmative defense if being sued for breach (e.g., for failure to pay rent)
    - Most jurisdictions have housing codes that can interact with the IWH, but the way it does varies:
      * Noncompliance with code might be automatically treated as breach (similar to negligence per se)
      * Noncompliance might create rebuttable presumption of breach
      * The two might be treated independently
  + Duty to Mitigate - where T abandons property, L has duty to mitigate harm by attempting to re-let the property; T liable for the remaining difference
    - Can also accept T's abandonment as an offer of surrender; retakes possession and lets T off the hook as of that date
      * L needs to be careful when trying to re-let in order to mitigate loss; this could be interpreted as his implicit acceptance of the surrender; L should make his intent clear
* **Rights and Remedies of Tenants**
  + The right to be free from discriminatory treatment
    - Under § 3604 of the FHA: It is unlawful to:
      * Refuse to negotiate, or deny a dwelling to a person because of race, color, religion, sex, familial status, or national origin
      * offer inferior services or terms based on the above categories
      * advertise in a discriminatory way, indicating a preference or limitation in reference to above categories, as well as disability status
      * misrepresent the availability/status of a dwelling based on the categories above (including disabled)
      * induce a person to sell or rent any dwelling by representation regarding the entry or prospective entry into the neighborhood by individuals of a class defined by one of the above categories (including disabled) (e.g., can't accelerate white flight for profit).
  + Protection against retaliatory eviction - residential property only
    - T cannot be threatened with eviction, increased rent, or withholding performance of obligations (e.g., repair) because T filed complaint or legal action
    - Retaliatory eviction an be invoked as a cause of action against L or as defense in eviction proceedings initiated by L
    - Contractual waivers of this defense/cause of action are not enforceable
    - Rebuttable assumption of retaliation if occurring within certain amount of time after complaint/legal action was taken (90-180 days)
* **Rights and Remedies of Landlords**
  + To secure the obligations of T or remedy his failure to perform them, L may:
    - Hold a security deposit and pay back with interest.
      * Normally limited to 2 months’ rent, but this can be circumvented by styling a security deposit as “advance rent.”
    - Commence summary eviction proceedings (Notice to T, quick trail)
      * Alternative to self-help
    - Provide a new lease with the same conditions to a holdover T.
    - Bring action to recover unpaid rent that is past due
      * Moreover, contract law doctrine of anticipatory repudiation (aka anticipatory breach) may allow lawsuits for unpaid future rent under the modern contractual view of leases.
        + When party evidences lack of ability or intention to perform K (either through clear statement or action that clearly implies it), the other party is entitled to terminate contract and can sue for the extent to which they were deprived of the benefit of the bargain

### Tort Liability in Landlord/Tenant Relationships

* Landlord Liability
  + At common law, LL are generally not liable for to T or T's invitees for injuries sustained on the leased property
  + Exceptions
    - Latent defects - Injuries sustained by hidden defects that L knew (or reasonably should have known) about and failed to disclose
    - Common areas - Injury's sustained due to failure to exercise reasonable care in detecting/correcting hazardous conditions in areas of property still under L's control
    - Negligent repairs - Injury sustained resulting from defective repairs performed by L on the leased property
    - Potential liability for criminal acts committed by third-parties
      * Some courts have held landlords liable for failing to provide reasonable security, thereby allowing criminal third-party to cause harm to tenant
  + Modern trend towards increased liability - more common to general negligence principles applied; LL have duty of reasonable care which is breached when they create unreasonable risk of harm.
* Tenant Liability
  + T liable as social host for harm sustained by his own invitees on the leased property

### Transfer of Rights under a Lease

* Because lease is simultaneously a contract and property conveyance, privity of estate and privity of contract exist between LL and original tenant
  + **Privity of Estate**: Relationship that exists between parties with successive interests in the same property (i.e., present L and present T)
  + **Privity of Contract**: relationship that exists between parties to a K, person who is not party to the K cannot avail himself of the K’s terms
    - Always privity of K between original parties to agreement (absent a novation), as well as any subsequent parties who expressly assume the obligations of the original K
* By Landlord
  + Can be freely assign property interest to another party (e.g., through selling the property)
  + If party is assigned all L's rights and thereby assumes its obligations, any K claim that could have been asserted against original L can be asserted against the new one
* By Tenant
  + Can freely transfer interest in lease unless explicitly prohibited in the agreement
    - If instead requires L's consent, there must be a legitimate and commercially reasonable justification for withholding this consent (e.g., concerns about subtenants financial condition)
    - Consent can be implied by L accepting rent payment from transferee
    - Consent to one transfer waives need for consent in future transfers unless explicitly reserved by L
  + Transfer can either be a sub-lease or an assignment
    - **Assignment**: when tenant transfers entire remaining interest in the lease (i.e., for the rest of the lease term)
    - **Sublease**: when tenant transfers anything less than the entire remaining interest; original (head) T retains portion of remaining lease term and has right to possession once sub-lease term expires
    - Determine which exists by looking at intent of the parties as manifested in the transaction
    - Sublease nor assignment automatically ends original T's obligations under lease
      * As noted above, still privity of K (unless L agreed to release original T through a novation) between original T and L, but not between new T and L.
        + This means sub-tenant/assignee can't sue L for breaching contractual provisions (or vice-versa)
      * Depending on whether it is an assignment or sublease, there may not be privity of estate between L and current T
        + If sublease, then no P of E since they do not share successive interests in the land (head tenant is in-between them, has reversion)

L can't sue ST for unpaid rent; ST can't sue for breach of implied covenant of quiet enjoyment

However, L can sue to evict assignee for unpaid rent and/or violations of covenants that touch & concern the land, while assignee can sue for breach of implied covenant of quiet enjoyment

### Fixtures

* Fixtures are personal property/chattels that are attached to real property such that becomes part of the real property, meaning it can't be removed
  + In other words, when tenant moves out, these things remain with the landlord; tenant can be liable if removed
* Test for determining whether personal property or fixture focuses on intent, degree of attachment, and how integrated it has become to the use of the real property
  + Intent: if there is an agreement between the parties (e.g., landlord and tenant) that something is or is not a permanent fixture, this controls
    - However, if dispute involves another party who was not part of the agreement (e.g., a sublessee), the intent expressed in the agreement might not be determinative if it would contradict the expectations of a reasonable person
      * If two parties have agreement that something is not intended to be a fixture, but an ordinary person would clearly assume it is (e.g., because it is so integrated into the property), agreement has no bearing on property rights of non-party to the contract.
  + If no agreement that clearly manifests intent, look to other factors:
    - Extent of attachment, including how the item was attached (duct tape vs. nails vs. welding) and how difficult/damaging removal would be
      * Even if not physically attached to a given piece of real property, there are some things the law recognizes as being constructively attached
    - Whether it was adapted to the use or enjoyment of the real property
      * However, generally does not apply to "domestic fixtures" (not actually a fixture), things attached to the property as decor or to make tenant's life more comfortable (e.g., shelving, blinds/curtains, home appliances, etc.)
      * Nor does it generally apply to "trade fixtures" (also not a real fixture), which help tenant carry out their trade/business

## Restraints on Alienation

* Restraints on alienation can be direct or indirect
  + Direct restraints - specifically restrict transfers of land (e.g., "not to be sold")
  + Indirect restraints prevent certain uses which might affect alienability (e.g., "to be used as a school")
* Three categories
  + **Disabling restraints**: attempts to render any transfers of the property void
    - However, these restraints are generally void themselves
  + **Forfeiture restraints**: would automatically transfer the property away from the owner if they attempted to sell it
    - Void when applied to fee simple absolute; may be enforceable in the context of life estates, leaseholds
  + **Promissory restraints**: are separate promises not to transfer; enforceable by bringing action for breach (usually damages)
    - Courts have treated their permissibility similar to forfeiture restraints: void on fee simples, but ok on others
* Finally, they can be absolute or partial. The absolute and partial categories are more applicable to direct restraints than to indirect ones
  + Absolute restraints bar alienation to anyone at any time
  + Partial restraints prevent alienation only to certain people, or only for certain periods of time, or only until an outside condition is met
    - Even in the context of a fee simple, a partial restraint might be permissible if limited to a small group or a short period of time.
* Summary of the restraints permissible for different types of estates:
  + **Fee simple**: All absolute restraints are void. Partial restraints are okay if limited to a small group or a short period of time
  + **Life estate**: Absolute disabling restraints are void. Absolute forfeiture and promissory restraints are okay. Partial restraints are okay if reasonable in purpose, effect, and duration.
  + **Leases**: Direct restraints (e.g., restriction on sub-leases), both absolute and partial, are okay, but must be reasonable; Likewise, indirect restraints (restraints on use) are okay if commercially reasonable, unless they are at odds with public policy

## Concurrent Interests (Co-Tenancies)

There are three types of co-tenancies

### Tenancy in Common

* Separate but undivided interest in property (i.e., no party has exclusive right to a part of the property); each has a right to possess and use the entire property
  + This simultaneous right to possession (aka "unity of possession") is the only required "unity"
  + Interests (% share), title, and time of acquisition can all vary among co-tenants
* Interest can be freely leased or sold; also typically has no right of survivorship
  + If A and B are tenants in common of property and A dies, A's share does not to go B
  + Instead, it goes party designated in A's will
  + This allows it to be devised or inherited
* TiC is the default
  + Presumed to have been created whenever conveyance/devise is made to multiple persons to enjoy at same time.
  + If creation of joint tenancy is defective or is unclear what form of co-tenancy was intended, it is likely interpreted to be an TiC
* Two ways to terminate

### Joint Tenancy

* Requires four "unities", not just that of possession
  + Unity of possession: All joint tenants have full rights
  + Unity of interest: All tenants have the same share of interest (e.g. 50-50) and same duration of interest
  + Unity of title: All joint tenants are conveyed property by the same deed/will/adverse possession
  + Unity of time: All interests vested at the same time
* Defining feature is rights of survivorship
  + When one joint tenant dies, the others take the deceased's interest automatically
  + Makes a JT non-devisable/inheritable
* Used to be created automatically whenever all 4 unities were present. However, it now usually requires explicit language about the right of survivorship
  + Example:"A conveys to B & C as joint tenants, not as tenants in common, with a right of survivorship"
* Can be terminated unilaterally by severing one of the 4 unities:
  + Conveyance to third party by a joint tenant - this severs unities of time and title
    - JT still exists between original parties; however, they become tenants in common with new party, meaning no longer right to survivorship w/r/t his share
    - Some jurisdictions even permit conveying to oneself in order to convert JT into TiC
  + Mortgage by a joint tenant - however only in (minority of) states recognizing title theory of mortgages instead of lien theory
    - Under lien theory, legal title remains with the mortgagor unless there is foreclosure, whereas under mortgage theory, there is conveyance of title that makes mortgagor a tenant in common
  + Lease by a joint tenant (courts are split) - severs unities of possession and title
    - Some jurisdictions have found that leases do not sever a joint tenancy, preserving rights of survivorship.

### Tenancy by Entirety

* Tenancy by the entireties require the four unities of the joint tenancy plus a fifth (marriage)
  + Recognized in ~half of states
  + Have right of survivorship - if spouse dies, surviving spouse takes
* Spouses treated as one economic unit
  + One spouse acting alone cannot convey or encumber the property
  + Tenancy can't be severed unilaterally
* Termination can only occur if:
  + Spouse dies
  + Divorce or mutual agreement/release
  + Joint creditor executes claim

### Rights & Duties of Co-Tenants

* Possession - Each co-tenant has a right to possess
  + No single co-tenant has exclusive right to possess any part of the estate
  + Similarly, no co-tenant can deny another co-tenant possession (ouster)
    - Ouster only exists when a co-tenant’s actions have no legitimate purpose (unlike something such as changing locks, which can have a legitimate purpose.), and the ousted party demands and is rejected entry.
    - If this happens, can sue for ejectment to recover possession and potentially monetary damages on top of it (e.g., reasonable portion of the rental value during ousted period)
* Rent and profit sharing
  + As a general rule, no obligation to pay rent to another co-tenant
    - Exception: rental value as a remedy for ouster
    - Exception: Where rent is from lease of property to third-party
  + Co-tenant who profits from the lands natural resources must also account to others for their fair share
* Contribution
  + Can collect from others for fair share for taxes & mortgage payments
  + However, majority rule is no right contribution from others for repairs or improvements to property, absent an agreement to that effect
    - Minority rule allows contribution, but only for necessary repairs
    - However, reasonable cost of such repairs will be credited to the co-tenant who made them in an accounting or partition action
* Waste - If a co-tenant makes the property worse, they can be sued for waste

### Partition

* Common and joint tenancies can be partitioned, following petition to court, in two ways:
  + **Partition in kind**: Property is physically partitioned, with each owner gaining a portion (which they are the sole owner of) equivalent to her share
    - If one co-tenant awarded more valuable part, may be required to compensate others
      * This is called an owelty: Give all of the property to one party and compensate the other (The same outcome can result in partition by sale.)
    - Benefits:
      * Keeps property in owners' hands
      * Preserves subjective value of property
      * Prevents strong co-tenants (who would buy the property under partition by sale) from timing sale to harm weak co-tenants
      * Preserves ownership by minority interest holders
  + **Partition by sale**: Property is sold and the proceeds divided according to share
    - The more extreme remedy, but actually quite common. Often elected when partition in kind would be impractical
      * Preserves asset configuration
      * Flexible, because divides money instead of land
      * Easier and cheaper to administer
  + Alternative is to work it out between co-tenants and then file uncontested petition with court to make it a matter of record

## Easements and Licenses

### Easements - an Overview

* An **easement** is a non-possessory interest in real property that grants someone (other than the owner) **rights to use** the property for some limited purpose
  + The use of the property by the easement holder would otherwise constitute trespassing
  + Some of the most common examples of easements include right to use private driving path over owners land or rights to use land to install cabling or electrical wiring.
* Two types of easements:
  + **Easement Appurtenant**: attach to a parcel of land; directly benefits the use and enjoyment of parcel of land to the detriment of another
    - Servient estate -> the burdened property (property that easement passes through)
    - Dominant estate -> property whose benefited is served by the easement
    - Fact that it attaches to the land means it automatically passes title whenever the dominant estate is transferred (i.e., it belongs to the land, not to a person)
    - Law generally presumes easement is appurtenant unless made clear otherwise
  + **Easement in Gross**: exists for the benefit of an individual person instead of a parcel of land; not tied to the land
    - No dominant estate, just a servient one
    - Since not attached to land, it does not pass with title
    - Example: The rights of utility companies to their power lines are usually easements in gross
* Can be of the affirmative or negative variety:
  + Usually affirmative, meaning it grants dominant estate the right to do something
  + Albeit rare, can also be negative, which prohibits the servient estate from doing something (e.g., restricts them from building some obstruction)
    - Do not give right of entry to anyone, but instead gives dominant estate right to prevent something from being done by servient estate
      * Generally restricted to securing air, light, water, roads, support, and fences
    - No implied negative easements or negative easements by prescription
* Easement holder, not the servient estate, is responsible for:
  + Repairs, necessary or otherwise
  + Reasonable restoration of the servient estate, such as after installation underground cabling or pipes

### Creation of Easements

* Express Easement - most common way to create is an express grant of easement to someone else
  + Since interest in real property, subject to statute of frauds and all deed formalities
    - Signed, written deed granting and conveying easement (or "right of way")
    - Failure to satisfy SoF (e.g., oral conveyance), may instead result in granting of a license instead
  + Express easement can also be created by reservation when land is sold
    - Under old common law rules, this had to happen in separate steps--seller reserving easement in land being transferred and then subsequently granting it to third party
    - Now can directly reserve on behalf of third party
* Easement created by implication - court may find that easement was implied, even if not expressly provided for
  + Courts less hesitant to recognize implicit grant than implicit reservation, as the latter involves interpreting in favor of the grantor, even though he could have explicitly reserved the easement in the deed if he really intended to do so.
  + **Easements Implied by Necessity** - where (1) the parcels were once under single ownership, (2) the easement is strictly necessary, and (3) the easement was strictly necessary at the time of division
    - Necessity doesn't require showing land is unreachable without the implied easement, but that there is no alternative for accessing the land is reasonably available.
      * Fact that easement is far more convenient than other alternatives does not render it necessary
  + **Easements Implied from Prior Use** - where (1) the parcels were once under single ownership, (2) a pre-division use extended to the servient tenement, (3) the use is apparent upon reasonable inspection, and (4) it is reasonably necessary to recognize the easement
    - Traditional example: A has one large plot of land; builds house near upper boundary of the plot and uses driveway to connect house to highway that runs parallel to the lower boundary of the plot. A splits the plot vertically in half, selling the upper-half (including house) to B. B could likely get court to recognized implied easement, allowing him to use driveway
    - Determining reasonable necessity weighs multitude of factors in cost-benefit (financial cost, difficulty of alternatives) type test that is not all that dissimilar from that of nuisance.
* **Easement by prescription** - created by operation of law after long and continuous use; similar to adverse possession;
  + Requires:
    - (1) open & notorious use - use needs to be such that it gives notice to the owner
    - (2) hostile & under claim of right - adverse use that would give owner cause of action
      * If orally given permission, then no easement by prescription (may be license though)
      * the adverse use also needs to be one that only he, not the general public, engages in.
    - (3) continuous & uninterrupted throughout the statutory period
      * At common law, period was 20 years; usually the same period the state uses for adverse possession
      * Non-daily or seasonal use is ok if consistent with normal use
  + Unlike adverse possession, don’t need exclusivity (term takes on different meaning here, as noted below)
    - However, must be exclusive in the sense that the general public isn't also using the land this way
    - Don’t have to pay taxes on the land
* **Easement acquired by estoppel** - where substantial reliance on use of easement would lead to unjust result if beneficiary were suddenly deprived of it
  + Requires:
    - Consent of owner to use (i.e., license)
    - Owner knows or should know the person will materially change position, relying on the belief that the allowance will not be revoked
    - Person indeed reasonably believes allowance will continue indefinitely and, in response, materially changes his position (e.g., by making significant investments)
  + Not all states recognize this. In states that don't, a license is always revocable and cannot ripen into an easement

### Scope and Termination of Easements

* Use of easement limited to its original scope. This can either be:
  + Explicitly stated in the instrument creating the easement (e.g., the deed), in which case it controls
  + If created by prescription, estoppel, or implication based on prior use, courts usually determine the scope by looking to the type of use that gave rise to the easement by operation of law.
  + If created by implication based on necessity, courts usually limit scope to what is necessary
* Changes to the easement, including its size, location, frequency of use:
  + The scope of use may change to suit reasonable development of the dominant tenement
    - Limited to what could have been reasonably contemplated by parties who created the easement
  + Neither the easement holder nor the servient estate owner can unilaterally relocate the easement or shrink/enlarge it. Only way this can be done is through mutual agreement
    - Easement can only be used to benefit the dominant estate; Can't divide into smaller ones, let them use it too
* Termination - easement can end in the following ways:
  + **Expiration pursuant to express terms** - explicitly contains expiration date or condition on which the easement expires
  + **Merger** - If dominant estate owner acquires ownership of servient estate (or vice versa)
    - Once terminated by unified ownership, does not automatically revive if the owner sells one of the estates; has to be re-established
  + **Release** - easement holder signs document of release
    - Like express grant or reservation, must comply with SoF and deed formalities
  + **Abandonment** - owner stops using it and independently manifests an intent to abandon
    - Non-use alone is not enough; nor is oral manifestation of intent to abandon
      * Must be physical (e.g., construction of a alternative driveway)
  + **Termination by estoppel** - if the holder manifests an intent to stop using, and the servient owner materially changes position in reasonable reliance
  + **Termination by Prescription** - servient estate owner (or someone else) uses property in a way that prevents the holder from using it for the required statutory period
  + **End of Necessity**: if easement implied by necessity and the necessity ceases to exist (e.g., land becomes easily accessible by some alternative way)
  + Other ways include destruction of the servient estate, taking by eminent domain, or good faith purchaser acquires servient estate without notice of easement

### Transfer of Easements

* Transferring benefits of easement (i.e., by easement holder)
  + Easement appurtenant - automatically passes with title whenever dominant estate is transferred
    - No way to detach easement from land in order to transfer it independently
  + Easement in gross:
    - If personal easement in gross, cannot transfer rights to someone else unless clearly intended by parties to be transferrable
      * Else, new party would need to re-negotiate separately
      * If original beneficiary sells or dies, easement in gross terminates
    - If commercial/utility, is generally treated as freely transferrable
* Transferring the burden of an easement (i.e., by servient estate owner)
  + Always binding on subsequent owners of servient estate with one exception: **lack of notice**
  + If good faith purchaser acquires servient estate without actual or constructive notice, and the deed was not properly recorded, it is not binding on

### Licenses and Profits

* A **license** also grants allowance to use property for limited purpose, but unlike an easement, this is merely a contractual right instead of a property interest
  + This makes the allowance revocable by the property owner at will (although it may give rise to contractual damages in action for breach)
    - But see, easement by estoppel (above), which may make it irrevocable
* A **profit** is a non-possessory right to go on and remove a natural resource from someone's land
  + Basically governed by the law of easements

## Other Property Rights

### Rights of Support

* Rights to have the land physically supported in its natural state by neighboring properties
  + Lateral support - support given by adjacent properties and thus enforceable against adjacent properties
    - Example: Neighbor starts excavating on border of property, causing large portion of your property to collapse
    - Strict liability for damage, but only to land in natural state;
      * Where improvement to land, such as the erection of any buildings, one must show that damage would have occurred even without them (i.e., their weight did not contribute to the collapse)
      * Even where SL is not available because of this limitation, could still attempt negligence claim
  + Subjacent support - support given to property from below
    - Relevant almost exclusively in the context of mining/oil, where another party has ownership (e.g., mineral rights) of area below surface;
    - Also strict liability; may also be strictly liable for improvements of the land that pre-date mineral rights being split-off from property above

### Water Rights

* Riparian rights - evolved under common law, consists of right of an owner to take and use water from rivers, streams, or any other natural watercourse that physically touchers their land (either flowing through it or serving as border)
  + Can take and use water from this water without any liability to other holders of these riparian rights, but **cannot unreasonably alter its natural flow** (i.e., unreasonably impair its quality, volume, etc.)
  + Similar rights existing in non-flowing bodies of water (e.g., lakes and ponds), though they are instead referred to as littoral rights.
* Sub-surface water rights - most American jurisdiction also apply a **reasonable use test**
  + Can use/draw from underground water source, but cannot unreasonably diminish its quality or volume for neighbors
  + Where groundwater source is shared, must also limit its use to on the property (e.g., can't start water bottling operation unless have absolute control)
* Surface Water (Runoff) - old common law approach allowed diversion of surface water onto neighboring property unless was done for purpose of damaging it
  + Some American jurisdictions still allow free alteration of surface water flow, though some that do may hold diverter liable for negligence if damages others property
  + Others prohibit any alterations to the flow of standing water or, more commonly, only permit reasonable ones

### Air Rights

* So long is at does not affect the use/enjoyment of neighboring properties, owner of property has right to reasonable use/enjoyment of airspace directly above property
  + Although once basically unlimited, federal (FAA) and state regulations partially determine the altitude at which these rights cease
    - Courts have also placed vertical caps on the airspace to which these rights extend, which varies based on the setting
  + Owner of property has limited rights against unwanted intrusions/nuisances in this space

## Restrictive Covenants

* Restrictive covenants - set of promises legally enforceable promises for enhancing or preserving value of land; these promises run with the land and can thus be enforced against subsequent owners (as opposed to binding only the the original land owners)
* Two types, distinguished by enforcement
  + **Real Covenants** - party seeking enforcement through legal remedies, such as monetary damages
  + **Equitable Servitudes** - party seeking enforcement through equitable remedies, such as specific performance or an injunction

### Elements Required for Enforceable Real Covenants

* **Enforceable contract** - Formation/enforceability is essentially governed by the law of contracts; if it would be void or unenforceable under K law, not enforceable as covenant either
  + This includes compliance with the SoF
* **Intent** - must be formed with intent to run with the land, rather than end with the current landowners (as a normal K would)
  + Needs to manifest intent to bind subsequent landowners to the promises as well
    - Can be satisfied through explicit language stating as much
* **Notice** - person against whom enforcement is sought must have notice (exception is if it is a donee)
  + If properly recorded, this automatically satisfies notice
* **Touches and concerns land** - covenant must affect the use or value of the land or owners interest in the land; can't be used as a loophole for making personal promises (i.e., those unrelated to land) automatically binding on subsequent parties
  + It is important to distinguish benefits (enhance usefulness/value) and burdens (restrict usefulness/value) of promise
    - Where one party seeks enforcement of promise that burdens land but only benefits them personally (i.e., in gross, as opposed to benefiting another piece of land or property interest), courts will find it does not touch & concern the land
  + Third Restatement replaces touch and concern requirement with another test for enforceability against successors. RST focuses on public policy and advocates reasonableness as benchmark of enforcement. Requires courts to consider:
    - Purpose and goal of the covenant
    - Fairness of arrangement, and
    - Degree of interference with personal autonomy
* **Privity of estate** - two kinds
  + **Horizontal privity** - privity among creators of covenant, need shared interest in land, whether it be simultaneous (e.g. landlords and tenants) or successive (e.g. transfer of fee simple) interests.
    - Needed for burden of promise to run with the land (but not the benefit)
    - Example: A & B own neighboring ranches in Texas. Create covenant where both agree not to build oil wells on land. B subsequently sells ranch to oil prospector, C, who proceeds to start drilling and builds a well. A's attempt to enforce covenant against C would fail since A & C never had simultaneous or successive interests in the land
      * Lack of horizontal privity prevents burden from running with the land
      * However, if it was the other way around and A built the oil well after B sold his land, C could enforce the benefit of the covenant since it runs with the land even without horizontal privity
    - **Vertical Privity** - privity between creators and their successors, requires succession in estate between the original covenantor/covenantee and their assignees in interest
      * Required for both the benefit and the burden to run, however:
        + For burden to run, successor must take full estate
        + For benefit to run, successor only needs some interest (usually just possession)

### Termination of Real Covenants

* Terminate in many of the same way that easements do:
  + Expiration (predetermined in agreement creating covenant)
  + Release or express waiver (all parties in mutual agreement)
  + Abandonment (repeated violations without any enforcement taken)
  + Merger (all land concerned comes under common ownership)
  + Destruction, condemnation, or taking of land by eminent domain
  + Changed conditions - varies; some jurisdictions rarely allow it
    - Third Restatement says: If changed conditions make a servitude impossible/unsuitable to enforce, a covenant can be terminated (if impossible)/modified (if unsuitable) to accomplish the purpose for which the servitude was created

### Equitable Servitudes

* Today, not many lawsuits seeking to enforce real covenants; instead, it is much more common to seek equitable relief (i.e., enforce an equitable servitude) rather than seek monetary damages
* Equitable servitudes have most of the same requirements as do real covenants, but **without the privity requirement**
  + Enforceable under law of contracts
  + Shared intent to bind successors
  + Notice, which in addition to actual notice, can be satisfied by:
    - Record notice (most common type of constructive notice) - Each jurisdiction keeps public records of all transactions affecting title to real property, capturing each change in ownership dating back to original owner (aka chain of title). Publicly recording chain of title (if the restriction is contained in it) provides constructive notice.
    - Inquiry notice - presumed to have notice (not sure how different this is from constructive)
  + Touches and concerns the land
* Equitable servitude implied from common scheme (aka reciprocal negative servitude) - usually arises where land is sub-divided and sold as part of common development scheme (i.e. a subdivision plan) for a residential neighborhood. Even if the restriction is not contained in purchaser deed of one of the lots, if majority of lots part of the common scheme contained restrictive covenants and the purchaser has notice (actual or constructive) that lot is part of same scheme, court will imply same restrictive covenant.
* Defenses against enforcement of equitable servitudes:
  + Unclean Hands - person is guilty of the same violations
  + Acquiescence - person is aware of the covenant being violated by others but does not object to it
  + Laches - person delayed enforcement too long (e.g., waiting until building was completed before taking action)
  + Estoppel - If person leads another to rely on the belief that covenant will not be enforced (either by words or actions), he may be estopped from enforcing it

## Adverse Possession

* The riskiest way to obtain legal title of property; effectively permits a continuous trespass that lasts long enough and meets certain conditions to ripen into legal title to relevant tract of land
  + Once this occurs, successful adverse possessor has both paramount title to the land and defense to any trespass claims
  + However, face significant consequences/costs if not successful (e.g., sued for trespass before statutory period necessary for taking AP)

### Requirements Adverse Possession

* **Actual** - must actually possess/occupy the land; requires that AP show they use or maintain the property as true owner would
  + If only occupy part of land, can only get title to that part through AP
    - Exception is taking land through **color of title** - where individual thinks they own land but defect with document which appears to transfer title actually renders it legally ineffective. Under these circumstances, even if the person physically occupies only part of the land they ostensibly own, possession of the rest can be established constructively, giving them AP of the entirety of the land
      * Note: the part of the land that is physically occupied must be reasonable in proportion to the entire thing; enough so that it would give real owner notice
      * Reasons deed could be defective: fails to match lot described, incorrect bounds, improperly executed
* **Continuous for statutory period** - possession must be continuous and without interruption for entirety of the required statutory period, which under common law is 20 years (although some states have different lengths ranging from 10-30 years)
  + Does not mean must physically occupy property at all times; depends on whether the occupation was consistent with the ordinary expected use based on the nature of the property (i.e., how the true owner would occupy it)
  + Some courts may permit tacking, meaning AP can tack on occupation time of a previous possessor for purposes of satisfying the statutory period, but only if exists vertical privity between the two
    - Example: A owns land that B adversely occupies for 10 years. B moves away and gives this land to C, where he proceeds to be its sole occupant for the next 10 years.
    - Also applicable to owners: statutory period for ejection does not restart when real owner sells to another owner
  + Many states also recognize tolling. Where disability (e.g, imprisonment, mental or physical illness tha prevent owner from bringing claim) exists at time cause of action accrues (time of initial entry), the running of the statutory period will not begin until the relevant disability disappears (e.g. owner reaches majority age, regains mental health, etc.) and then allow owner additional 5-10 years, depending on state, to take legal action
* **Hostile with a Claim of Right** - must be acting adversely to the interest of the true owner by claiming the land as his own in defiance of the owner’s title
  + Does not actually require malicious or hostile intent, nor an explicit declaration that one is claiming property for themselves
    - In most states, motive doesn't matter. Can be good faith belief that property is their own or knowledge that it belongs to someone else
  + Just need to intend to use land as if it was one's own, which is adverse to real owners interests in exclusive possession and use
  + There cannot be AP where real owner has given permission to use/possess the land
  + Prevents one co-tenant who is only occupant on the property from getting exclusive title via AP, as this is not adverse to other co-tenants interest since he is already entitled to the full use of the property
    - However, this is not case if co-tenant ousts or excludes the others
* **Open and notorious** - possession/use must be visible enough give notice to the true owner so he can defend his rights
  + This requirement is failed when the use cannot be observed by a reasonable observer
* **Exclusivity** - AP’s use must be exclusive throughout statutory period, meaning the real owner or the general public are not using/occupying the land at the same time
  + However, possible that two or three different people could acquire title via AP and become co-tenants
  + Use by the owner during the period is also a strong indicator that the AP's occupation is not hostile

## Conveyances

* A more conventional and arguably less problematic way to acquire legal is via a conveyance (e.g., sale of land)
* This is a multi-stage process, with the two biggest steps being:
  + Parties reaching agreement on terms of sale (i.e., a contract of sale)
  + Tender and acceptance of the deed at closing in exchange for payment (i.e., performance)

### Contract of Sale

* Contract for the sale of land, like any other contract, must satisfy the requirements for enforceability under the law of contracts (definiteness, mutual assent, supported by consideration, absent fraud/duress/unconscionability) in addition to the Statute of Frauds
  + Need some sort of writing signed by parties that captures the essential terms of the sale including:
    - Description of the property to be sold
    - Names of the parties
    - The price
    - Note: Closing date is typically not deemed to be material, although most of these contracts include it
  + Exceptions to the SoF that can result in enforcement of a contract that isn't in writing:
    - **Part performance** - court will enforce oral contract where one party has rendered performance in-part that is clearly tied to some agreement
      * "Part performance" must generally be more than payment and acceptance, but also taking of possession and/or making improvements/modifications
    - Estoppel - party may be estopped from denying the validity of the contract where one party has detrimentally relied on the agreement
* **Equitable Conversion** - doctrine that, in effect, recognizes the transfer of equitable title at the time of contract formation
  + Note: equitable title <> legal title, which still remains with the seller until closing
    - The seller retains legal title (allowing them to stay in possession for the time being), which it holds in trust for the buyer as security for the agreed price (a personal property interest)
  + As a result, the risk of loss between the K formation and closing shifts from seller to buyer (unless otherwise agreed upon)
    - Buyer incurs the cost damage to the property, unless it was a result of sellers failure to protect it; buyer entitled to any insurance proceeds disbursed to seller if property is destroyed
  + Death
    - If buyer dies before closing, can devise equitable title to heirs, who could sue to enforce contract through remedy of specific performance
      * Remember, uniqueness of land makes it one of the few types of contracts where this remedy is available
    - If seller dies before closing, he has no real property to devise; only personal property which entitle recipient to payment of sales price
* **Marketable Title** - implied warranty in every land sale contract that will provide deliver title in marketable condition at time of closing
  + Does not need to be perfect, but reasonably acceptable (i.e., **reasonable buyer would not object to**). No significant threats of litigation or doubts about affecting market value
    - Idea here is that buyer should not be forced to accept conveyance that is materially different than the one bargained for
  + Things that could adversely effect the marketability of the title (aka an encumbrance), leading to a breach, include:
    - Easements or restrictive covenants that render it unmarketable
      * Again, only those reasonable buyer could object to; would not be reasonable to object to utility easements for power company or a known and visible driveway easement that served the neighboring property
      * Recorded easements can be documented in the agreement and excepted from implied warranty; easements neither openly visible nor mentioned in the agreement can become an encumbrance
    - Liens- includes mortgages, but only if sales proceeds are not sufficient to satisfy it
    - Title defects - defects in the chain of title (e.g., unrecorded deed)
      * If title acquired via adverse possession, need judgement in quiet title action and to record title
    - Problems with land description in the record
    - Violations of restrictive covenants
      * Example: Violation of requirements in original subdivision plan
    - Violation of statutes, regulations, and ordinances (e.g., zoning laws/regs)
      * Exception: Violation of a housing or building code
  + If not marketable, buyer must notify seller of the defect and give him a reasonable time to cure it, even it postpones closing (see exception below)
    - Unless agreement specifies/facts indicate otherwise, it is not presumed that time is of the essence, meaning not necessarily a material breach if not done by closing
      * Must render complete performance within reasonable time
    - However, if agreement specifically states that time is of the essence, failure to perform by closing date is a breach
    - If defect is not cured but buyer proceeds to accept the deed and close out the deal, can't sue for breach
* Condition of the Property - no implied warranty of fitness of purpose, habitability, etc.
  + General rule: seller has no duty to ensure property itself is free of defects, but some states make exception for duty to **disclose serious defects that are not known or obvious to the buyer**
    - Traditional common law took caveat emptor approach
    - Some states have started to deviate from this approach legislatively by enacting mandatory disclosure statutes for any known material matters related to the physical condition of the property
    - State courts also trended in this direction (see above); most also recognize liability for negligent misrepresentation and fraud/deceit for intentional concealing defects
* Remedies for breach
  + Rescission - can elect to terminate the contract
  + Damages - may be entitled to monetary damages as well
    - As is the general rule in contract law, damages to give benefit-of-the-bargain -> difference between market value at closing and agreed upon price
    - However, majority of states limit to restitutionary damages where seller acted in good faith, which basically entitles refund of their down payment (aka earnest money)
    - If the buyer is the one that is in breach, earnest money deposit may be kept by seller as liquidated damages if specified in the agreement (must be reasonable in proportion to the sales price)
  + Specific performance - buyer can get SP to proceed with sale and deduct damages from the purchase price (so long as it is within reason)
  + Note: real estate contracts tend to be subject to a number of contingencies that need to be meet in order for performance to be due (i.e., a condition precedent)
    - Examples: contingent on ability of buyer to obtain financing, the property completing inspection, or being appraised at a certain value
    - When these contingencies are not met in time, rather than a breach, contract simply becomes null and void (unless other party agrees to waive it)
      * Usually requires good faith attempt to satisfy contingencies; can't purposely not look for financing in order to get out of contract without breaching it

### Tendering and Acceptance of the Deed

* The deed is the legal instrument that transfers legal title to the land
  + Common law doctrine of merger by deed - land sales contracts merges into the deed upon acceptance of the deed, meaning any violations of the prior agreement are no longer actionable
  + Estoppel by deed - Grantor estopped from denying conveyance of land he lacked title to when deed was signed/delivered but later acquired (when this happens, it goes automatically to the grantee)
    - Defense not available if subsequently sold to another bona fide purchaser, but could still sue for damages
  + Is not a contract itself; does not need to be supported by consideration to be valid
* Must satisfy the statute of frauds
  + Means the deed must be it be signed by grantor (at the very least), in writing, and contain the following:
    - **identification of the parties** - must generally identify the individual to whom land is being conveyed, although extrinsic evidence is admissible if precise identity cannot be ascertained
    - **words of conveyance** - varies based on the type of deed (see more below)
    - **description of the property** - does not need to be exact, but enough to identify the land conveyed. If it doesn't, becomes void
      * Not a good idea to just say something like "my lot on the north side of town", even if extrinsic evidence can be used to help identify it, as may cause future problems
      * Multiple different ways to measure and describe land, including by map or various surveying techniques
        + Most specific is metes and bounds description, which always controls if there are inconsistencies
  + Fraud and forgeries
    - Forged deed is void
    - Where result of fraud, may be void or simply avoidable depending on the type of fraud
      * Where seller obtained title through fraud-in-the-factum, deed is void; can't legally convey title, even to good faith buyer
* Delivery and acceptance - Deed must be delivered by seller before title can be transferred. For this to occur, there needs to be intent from transferor to pass title. The deed is not deemed to have been delivered until grantor intends to convey immediate and irrevocable interest.
  + Extrinsic evidence can be brought in to show intent
  + Rebuttable presumption that deed has been delivered when:
    - Grantee takes physical possession of the deed (i.e. physical delivery)
      * Similarly, there is presumption of non-delivery where grantor retains possession of the deed and dies (although this can be rebutted too)
    - The deed was acknowledged before a notary
    - Deed was properly recorded
  + Conditions on delivery
    - Conditions that are only expressed orally, and not contained in the deed, are usually unenforceable and grantee has title regardless of whether condition is satisfied
    - Delivery conditioned on some occurrence, if contained in the deed, may or may not be enforceable
      * If conveying a future interest in the present, it is valid (A retains estate subject to executory limitation, conveys executory interest to B which becomes possessory upon condition being met)
      * If conveys a present possessory interest in the future, courts may not consider deed legally delivered
  + Delivery via third-party - acceptable, but any evidence that grantor has power to recall deed renders delivery invalid (remember, must intend to convey interest immediately and irrevocably)
    - In these cases, conditions on third party's delivery to grantee are usually treated as enforceable, even if only expressed by grantor orally
    - Escrow agent is commonly used intermediary
      * Title is transferred away from grantor at time of delivery to escrow agent, but grantee can't take full title until condition is satisfied
      * Must be written contract stating conditions for delivery
      * Can't reserve power to recall once in escrow
  + Acceptance - acceptance upon delivery is event triggering the transfer of title; no going back after this point
    - In most places, this is automatically assumed unless there are clear evidence to the contrary (e.g., buyer explicitly rejects -> no delivery)

### Types of Deeds

* **Warranty Deed** - contains a number of promises as to the quality of the title being conveyed, known as covenants of title
  + Two types of warranty deeds:
    - General warranty deed (aka full warranty deed) - warrants title against all defects whether they arose before or after the grantor took title.
    - Special warranty deed (aka limited warranty deed) - only warrants against defects arising since the grantor acquired title (i.e., no defects that he caused)
      * Grantor promises the buyer that they did not violate any of the 6 covenants (see below) but offers no protection against defects caused by previous owners.
  + The standard/usual title covenants contained in a general warranty deed are:
    - *Covenant of Seisen* - promises that grantor owns the interest in land the deed purports to convey
    - *Covenant of Right to Convey* - promises that grantor has the power to convey that interest
    - *Covenant Against Encumbrances* - promises that property is being transferred free of encumbrances
      * As noted above encumbrance is anything that might diminish value, such as restrictive covenants, liens, mortgages, etc.
      * To avoid breaching this, deeds generally state that property is subject to real estate taxes, covenants, conditions, restrictions, and easements apparent or disclosed by public record, as well as all applicable zoning regulations
    - *Covenant of Quiet Enjoyment* - promises that grantees enjoyment of the land will not be disrupted or interfered (e.g, eviction) by someone with better title
    - *Covenant of General Warranty* - promises that grantor will defend grantee from anyone attempting to claim title
    - *Covenant of Further Assurances* - promises that grantor whatever is reasonably necessary, such as the execution of additional documents, to perfect the title the deed purports to convey
  + First three covenants are present covenants - if they are to be breached, must be at the time of delivery; personal to the grantee and do not run with land, meaning subsequent grantees can't sue original grantor
  + Last three covenants are future covenants - they are breached later when third party with better title disrupts enjoyment of the land; these covenants typically run with the land, benefitting subsequent grantees
  + Where breach of covenants, grantee generally can recover money damages
    - If total failure of title, can recover the purchase price plus interests
    - If partial failure, proportionate reduction in price
      * If lesser estate conveyed = price paid - actual value of estate
      * If encumbrance = amount paid to remove it, or if it can't be removed, reduction in value
* **Quitclaim Deed** - grantor makes no warranties or promises regarding titles to the grantee
  + Effectively states that grantor is conveying interests to grantee, whatever those interests are
    - No recourse for any failure of title
    - Still have the implied warranty of marketable title from the sales K, but remember the sales K merges into the deed upon delivery/acceptance
  + Conveyance language includes:
    - "Grantor hereby releases, surrenders, and relinquishes any right, title, or interest that he may have"
    - "Grantor does remise, release, and quitclaim" or "Grantor conveys and quitclaims"

## Recording

* Main purpose of recording is to give **notice** to the world, not necessarily to make title valid
  + At common law, the rule for resolving competing interests was "first in time, first in right", meaning the person who acquired interest first had priority (similar to first to invent, in the patent context, as opposed to first to file)
    - This could result in harsh outcomes for individuals who had no notice of prior interests, even if they acquired it in in good faith
  + Every state has enacted a system to allow public recordation of interests in property, in addition to statutory protection of good faith purchasers of property from earlier, unrecorded interests
    - Ex: Recording office clerk files copy of deed and indexes it in a grantor index and grantee index
* There are 3 types of recording statutes intended to protect subsequent property buyers (although only two are really relevant in the context of real property)

### Types of Recording Acts

* **Notice Acts** - Statute that protects a subsequent buyer if they are a Bona Fide Purchaser (a "BFP", someone purchasing *for value without prior notice*, actual or constructive). Thus subsequent buyer only prevails in the absence of notice
  + The effect of the "for value" requirement of a BFP means that devisees or heirs are *not* protected. This is usually the case for those awarded judgement liens as well.
  + What counts as notice?
    - Actual notice (obviously) - when subsequent purchaser actually knew of prior interest
    - Record Notice - type of constructive notice if deed is recorded in chain of title. If prior is properly recorded, the subsequent purchaser *cannot* be a BFP
      * Note: deeds improperly recorded (e.g., too late or too soon) such that they are out of the chain of title, often called wild deeds, do not supply effective notice
    - Inquiry notice - another form of constructive notice in which subsequent buyer is aware of something that suggests, and with some reasonable amount of investigation, would have revealed the preceding interest.
  + About half of states have on of these statutes, which will often employ the language "in good faith" instead of without notice.
* **Race Acts** - protects a purchaser from an earlier interest if the purchaser records his or her interest first. Winner of this "race" to record gets priority. Doesn't matter if subsequent buyer has other type of notice, they can still prevail if they are first to record
  + Although these statutes strongly incentivizes recording quickly after acquiring interest, very few states have them (at least in the real property context).
* **Race-Notice Acts** - Combination of the two types of statutes above: subsequent purchaser is only protected if they have no prior notice AND are the first to record
  + Eliminates the possibility of a subsequent purchaser getting priority even when they know about the prior interest, something that can occur under a Race Act statute
  + The other ~half of states have a Race-Notice statute

### The Shelter Rule

* When a good faith BFP of property with a preexisting interest subsequently conveys/devises their interests, the transferee also receives (or "takes shelter in") the protections provided by the recording statute.
  + Consistent with the principle that transferees acquire all the rights of the transferor
  + This is even the case if the transferee knew about the prior interest, so long as the transferor didn't

## Mortgages

* **Security interests** are an enforceable legal claim that attaches to property (i.e. collateral), real or otherwise, in order to secure repayment of a debt or performance of some other obligation.
  + Provides creditor with quick, easy recourse in event of default and/or priority over other creditors if debtor files for bankruptcy. This lowers the risk for creditor, allowing them charge lower interest rates than they would if unsecured
    - Example: if default on home loans, can foreclose, sell house, and apply proceeds to outstanding loan
  + Note: in the US, the "lien" is sometimes used interchangeably with security interest, although the term lien also tends to denote a narrower set of security interests created by operation of law (i.e., non-consensually)
* In the context of real property, the primary instrument creating a security interests is the mortgages although their exists alternatives as well
* **Mortgages** are means of securing loan by creating a security interest in real property which mortgagee (creditor) can enforce to satisfy outstanding debts in the event that the mortgagor (debtor) defaults.
  + This definition reflects the now widely accepted Lien Theory, under which a mortgagor retains title of the property and mortgagee merely holds a lien
  + It can be contrasted with the more historical Title Theory, which some states still recognize, under which a mortgage was considered an actual transfer of title to the mortgagee that would become void if the debt was paid off.
    - Under Title Theory, mortgagee can technically take possession of property and do whatever with it (e.g., rent it out) unless there is language in the mortgage preventing repossession prior to default (there usually is). However, the additional legal risks and duties for a mortgagee in possession make this relatively unattractive
  + As noted earlier, the Lien/Title Theory distinction is relevant in the context of join-tenancies and their termination.
* While mortgages are typically used to finance the purchase of the same real property to which the security interest attaches, this is not necessarily the case
  + Example: you can take out mortgage on home to enable purchase of a new boat
* Mortgages must satisfy statute of frauds, meaning they need to be in writing (though may be subject to part performance or estoppel exceptions to SoF)

### Equitable Right of Redemption

* Also known as the equity of redemption, is doctrine which provides debtor in default right to pay late and redeem property.
  + At any point prior to foreclosure, debtor can still redeem the property if he pays arrears (missed payments + interest), unless mortgage has acceleration clause, in which case the full amount of the unpaid debt becomes due upon default
* This right arose over time as those who faced harsh outcomes under the mortgage-by-conveyance system (where mortgagor could forfeit right in land while remaining liable for debt), petitioned courts of equity for relief.
  + At old common law, mortgages usually consisted of conveyance of fee simple to mortgagee with bond/indenture (defeasance) stating it would reinvest in debtor if debt repaid by certain date (thereby divesting lender). If debt had not been repaid by this date (called "law day"), property automatically vested in the mortgagee. This was thus really conveyance of fee subject to condition subsequent that is disguised as a conveyance fee simple absolute.
* Clogging the right of redemption - Court's do not allow waiver of one's right of redemption prior to default through a clause in the mortgage itself
  + However, this right may be waived later on in separate transaction supported by consideration
* There is also a statutory right of redemption in some states. The key distinction between this and the equitable right are that the former *can be exercised after foreclosure*.
  + Can redeem property from person who purchased it at foreclosure sale for purchase price plus interest, although the time window varies by state.

### Foreclosure

* Foreclosure is the process by which the mortgagee seeks to terminate the debtor's equitable right of redemption, thereby foreclosing the possibility of the debtor redeeming it
  + Right of redemption created uncertainty around mortgagee's ability to repossess and sell mortgaged property; at common law, mortgagee's would turn to courts for an order that barred mortgagor from redeeming property, giving mortgagee fee simple absolute.
* In modern jurisdictions, foreclosure happens through (public auction) sale, either as part of judicial proceeding or where party has power of sale (see *Deeds of Trust* in "Alternatives to Mortgages" section below)
* Notice requirements: Must give notice to mortgagor of intent to foreclose; amount of time in advance this notice must be given can vary by state statute
  + Further, in judicially supervised/administered foreclosure sale, all holders of junior interests must be notified and made party to the action;
    - Omission of "necessary" parties from the foreclosure results in their interests surviving, even if they would have otherwise been extinguished
  + Rationale: gives opportunity to redeem property and prevent their interests from being wiped out
* Proceeds of foreclosures sell are typically applied based on the following order of priority:
  + First, to the expenses related to the sale
  + Second, to pay off mortgage debt; if multiple mortgages, “first in time” gets priority unless recording statute provides otherwise
    - Unrecorded mortgages are typically subordinate to all other recorded interests, regardless of order in time
    - Purchase Money Mortgages have priority over others from around the same time, even if they are recorded first
    - Contractual agreements between mortgagees (e.g., subordination agreement) can alter priority; so can modifications to senior mortgages that materially prejudice junior interests (the extent to which they do becomes subordinate to junior interests)
  + Third, any junior interests (e.g., second mortgages, Home Equity Loans, HELOCs, judgement liens);
  + Finally, to the debtor if there is anything left over
* When property is purchased at foreclosure sale, new buyer takes property **clear of any junior interests**, which are wiped out by the foreclosure, but **not clear of senior interests** (nor of a statutory right of redemption if there is one)
  + Junior interests are any interests (i.e., liens) that are subordinate to the one being foreclosed on. They are extinguished regardless of whether they are paid off with the sale proceeds
    - Similar to lower ranking or unsecured claims in bankruptcy; entitled to leftovers, but if there are none, lien holder is out of luck
      * Where mortgagor defaults on first mortgage, junior lien holders have the option to cure the default to prevent their interests from being wiped out in foreclosure
        + In such cases, junior lien holder can seek reimbursement from mortgagor (in addition to what they already owe), and if paid off entirely, becomes subrogated to rights of the senior interest
    - **Exception**: see exception for omitted parties above
  + Senior interests (e.g., a first mortgage) stay with the property when sold, meaning if someone with a junior interest forecloses, buyer takes it subject to first mortgage (which obviously would suppress sale price);
    - Sale proceeds not applied to first mortgage and mortgagee can still foreclose if default
* Deed in lieu of foreclosure - instead of going through judicial foreclosure process, mortgagor can agree to transfer all interests in the property. Allows mortgagee to repossess much faster by skipping legal process (though debtor still liable for any deficiency; likewise, they are entitled to any surplus)

### Transfers

* When mortgaged property is sold, absent an agreement between the mortgagee and mortgagor to release the latter from his obligations, the mortgagor remains personally liable for upon.
* New buyer (transferee) of property securing mortgage can assume the mortgage or take title "subject to" it
  + With an assumption, both the original mortgagor and the new buyer are personally liable for the debt. If there is failure to repay the loan, the mortgagee can sue either one or both.
    - If original mortgagor makes payments, can seek reimbursement from transferee since they are the ones w/ primary liability (mortgagor is secondarily liable)
  + Where the new buyer only takes the property "subject to" the mortgage, they do not become personally liable to the mortgagee upon default. However, the mortgagee can still foreclose on the property. New buyer thus still has interest in ensuring mortgage is not defaulted on. Nonetheless, if there is still deficiency after sales proceeds applied only original mortgagor can be sued
    - In most jurisdictions, this is the default
  + Neither assumption nor taking title "subject to" discharges the original mortgagor; in both situations the original mortgagor becomes a surety w/r/t the mortgage obligation
    - Subrogation is an equitable remedy to prevent unjust enrichment of the mortgagee at the original mortgagor's expense when the latter (or any other person) pays the mortgage debt on behalf of the new buyer (transferee).
    - In such cases, original mortgagor (or subrogee) may become of the owner of the mortgage and the rights of the mortgagee, which would include the right to foreclose on the mortgage lien.
* Original mortgagor can escape personal liability, however, if released from the mortgage obligations or if the terms of the original loan agreement modified (either of which requires original mortgagee to agree to)
  + In some jurisdictions, modifying terms of the lease which transferee assumed automatically discharges original mortgagor
* Some mortgages have "due on sale clauses", which state that mortgage becomes fully payable if the underlying property is sold
  + There are also "due on encumbrance" clauses which accelerates mortgage upon taking on a second mortgage (i.e., "encumbering" the property)

### Alternatives to Mortgages

* **Deeds of Trust** - Similar to a mortgage, but involves the debtor transferring legal title (while retaining equitable title) to a 3rd party-trustee who holds it until loan is paid off
  + In this relationship, the debtor is the trustor and the lender is the beneficiary
  + In the event of default, this trustee may have power of sale (depending on language in trust deed and the state), allowing the trustee to foreclose and auction the property off themselves without needing to go through courts
    - In states that allow it, this gives deed of trust a huge advantage over traditional mortgage
* **Installment Land Contract** - sometimes referred to as a contract for deed, is a contractual arrangement in which seller retains title until final installment is paid pursuant to payment schedule.
  + Historically, these contracts would contain forfeiture provisions, which provide that upon default, contract voids and title remains with seller (along with all payments up to that point)
  + Equitable mortgages doctrine - even if forfeiture provisions described above are enforceable, courts in most states generally treat these arrangements as mortgages w/r/t to rights of the buyer in order to prevent inequitable results
    - This may give buyer equitable right of redemption and/or require seller to go through foreclosure process (in which buyer entitled to surplus)
    - This doctrine has also been applied to a few other type of arrangements that are effectively "mortgages in disguise"
      * Conveyance of fee simple absolute accompanied by separate instrument promising to reconvey if debt repaid in full - court may allow parole evidence to show that transfer of fee simple was to secure loan and thus establish the existence of what is effectively a mortgage
      * Conditional sale repurchase - conveyance of security interest disguised as a sale-leaseback arrangement; land is "sold" for sum (i.e. loan) and immediately leased back to seller who has option to repurchase at end of lease period during which seller makes regular lease payments
        + To determine whether an arrangement is legit sale-leaseback, court will attempt to infer parties intentions by looking at things like lease payments; where payments bear closer resemblance to interest payments (based on sale amount, duration of "lease", market interest rates) than to fair market rental value, there is evidence this is effectively a mortgage

## Eminent Domain and Land Use Regulation

### Eminent Domain and Condemnation

* **Eminent domain** refers to the power of federal (and state) governments to acquire private property for public use
  + "Public use" does not necessarily mean it will the property appropriated by the government will actually possessed and used by it, just that it must serve a *legitimate public purpose*, which may entail re-distributing it to someone other private party (e.g., railroad companies)
  + Where this power is exercised and private property is taken via eminent domain, the original owner is entitled to just compensation (i.e., the fair market value of the property interest, usually determined at the time of the proceedings)
    - 5th Amendment **Takings Clause** - "nor shall private property be taken for public use, without just compensation"
      * Incorporated and enforceable against the states via 14A
    - If only partial taking (see below), only compensated for the part that is acquired plus any additional decrease in value to the property (i.e., if the sum is greater than component parts)
  + Some of the most common exercises of eminent domain have been for roads, railroads, government buildings, and utilities.
* **Condemnation** refers to the formal act of exercising eminent domain to take private property (or a partial interest in it, such as an easement) for public use
  + Although easy to confuse, condemnation in this sense != the act of local government deeming a building uninhabitable (i.e., a condemned property)
  + Condemnation can be full or partial:
    - Partial Taking - only acquires portion of the land as opposed to the entire parcel, leaving the owner with the remainder
      * In the context of leased property, a tenant still obligated to continue paying rent, but may receive condemnation award for the amount of the property he would otherwise enjoy absent the taking
    - Full Taking - government acquires property in fee simple absolute; o
      * In the context of leased property, tenant is relieved from rent obligations, as lease is effectively terminated
  + Condemnation usually occurs through formal condemnation proceedings--initiated by the Government filing a condemnation action--where compensation is determined
    - Property owner can also contest the Government's exercise of eminent domain here (e.g., by challenging the purpose of the taking)
* **Inverse Condemnation** - property owner sues government (asserting 5A rights) for just compensation where it has taken property or impaired its value/utility without going through formal condemnation proceedings
  + Inverse condemnation action is initiated by the property owner instead of the government
  + As noted above, inverse condemnation not only applies where government physically seizes/occupies land or otherwise dispossesses person of the property, but also where a government action or policy causes the marketability or usefulness of the land to greatly depreciate (i.e., a **regulatory taking**)
    - *Takings per se* - In the former case (physical invasion), Court can determine owner is entitled to just compensation without needing to go through any balancing tests
      * Also applies when the effect of regulation is to cause property to lose *all* economic viability
    - To determine whether inverse condemnation is applicable in the latter case (regulatory takings), courts attempt to determine whether the governments use or regulation of the property goes "too far". The "too far" test, as articulated in *Penn Central*, considers three factors:
      1. the nature of the government regulation (e.g., its purpose)
      2. the economic impact on the property
      3. the extent to which the regulation interfered with owners "reasonable investment-backed expectations"

### Zoning and Land Use Regulation

* The authority of local governments to regulate land is delegated to it by the State, which belongs to it as part of its general police power
  + To the extent that Federal government has this power (over federal lands), it typically stems from Article IV, Sec. 3: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"
  + States grant this power to local governments through an **enabling act**
    - These acts are nearly identical across the different states, as nearly all have implemented boilerplate language from the Standard State Zoning Enabling Act
    - Local government's regulation of land use can't exceed that which is authorized in the enabling act; zoning ordinances that do are void and will not survive *ultra vires* challenge
    - A zoning ordinance must also be "rationally related to a legitimate governmental purpose"; must also generally be part of a comprehensive plan (no arbitrariness or "spot zoning")
* Zoning laws/ordinances typically divide and classify land based permitted use
  + Zoning can be cumulative, meaning uses designated as "higher-use" are also allowed in any lower-use zones
    - Zones for residential use generally the highest-use in cumulative zoning, meaning it is permitted in other lower-use zones (e.g., commercial and industrial) in addition to residential zones
    - Zones may be further sub-divided; for example, a residential zone may divided into area where only single-family dwellings are allowed and another where multi-family dwellings are also allowed)
  + Non-cumulative zoning restricts uses permitted in a zone to one use (e.g., zones exclusively reserved for commercial use)
  + In addition to regulating use, zoning laws/ordinance may also regulate things like lot sizes, building height, or space between buildings
* Non-conforming properties - ordinances contain provisions for determining what happens to properties that are non-conforming as a result of new or modified zoning regulations (required to for due process reasons)
  + Some states will permit old non-conforming uses to continue (i.e., to "grandfather" it in)
  + At the very least, most states states require that give owners reasonable time before ending the non-conforming use (e.g., to amortize their investment and/or adapt to new conforming uses)
    - Failure to allow non-conforming use to continue for reasonable period may violate Constitutional takings clause, amounting to a regulatory taking
    - Exception: if non-conforming use is serious risk to public wellbeing
  + Local governments can also allow **variances** (i.e., permitted deviations from specified use) on case-by-case basis;
    - To receive a variance, owner must typically make argument in front of zoning board, who then determines whether:
      * Enforcing the zoning ordinance would (1) create unnecessary hardship for the owner that are (2) unique to the property and (3) are not self-induced
      * Allowing the variance would (4) not result in harm to public welfare (5) nor frustrate the overall purpose of the ordinance
    - Variances are granted to the property, meaning they accompany the property when transferred to a new owner
    - Note: Some ordinances explicitly provide **special exceptions** for specific types of uses under certain conditions (e.g., upon applying for and receiving permit), but despite the name, these are different from variances
      * These special exceptions are very similar to something referred to as a **conditional use**--particular uses that ordinance states are permitted if certain standards it sets forth are met--whereas variances involve a non-conforming use not mentioned in the ordnance at all
      * For these special exceptions or conditional uses, the application is decided by the zoning board or municipal governing body, respectively, without needing to demonstrate hardship