NAILING  THE BAR

Simple REAL PROPERTY Outline

Tim Tyler, Ph.D., Attorney at Law

NINETY PERCENT of the LAW in NINETY PAGES®

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Simple
Real Property
Outline

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NINETY PERCENT of the LAW in NINETY PAGES.®

This eBook gives a simple explanation of the **BLACK LETTER LAW** and **BRIGHT LINE RULES** of **REAL PROPERTY** law.

It would take thousands of pages to completely explain **REAL PROPERTY LAW**, but such extensive knowledge is unnecessary to succeed in law school or on bar examinations.

This eBook gives a simple explanation of **REAL PROPERTY** law for law students. The purpose of this eBook is to provide law students with an **understanding** of the general rules of **Real Property** law without a lot of unnecessary detail.

This eBook simply tells beginning law students the **BLACK LETTER LAW** and **BRIGHT LINE RULES** they need to know to succeed in law school. The explanation is given in **plain English** with the aid of **examples**. Other than that, this book has --

- **NO EXTENSIVE HISTORICAL DISCUSSION OF THE LAW**
- **NO FLOW CHARTS**
- **NO CHECK LISTS**
- **NO EXTENSIVE CITATION OF CASE LAW**
- **NO PRACTICE QUESTIONS**
- **NO EXAM APPROACHES**
- **NO EXTENSIVE DISCUSSION OF DETAILS**

The reason for these omissions is that they are **UNNECESSARY** and **more CONFUSING than helpful** to beginning law students trying to gain a basic understanding of the law.

YOUR PROFESSOR will probably focus on the details of the law in one or more narrow areas of personal interest. Those details are not covered here. **As you realize a need for more detailed knowledge** in a particular and narrow area of law, consult an appropriate **hornbook from your library** or some other authoritative reference source.

OTHERWISE, eTHIS BOOK HAS ALL THAT YOU NEED to understand basic **Real Property Law**.

UNDERSTANDING THE LAW IS NECESSARY BUT NOT ENOUGH to succeed in law school! You must also be able to **explain** how the law applies to fact patterns presented on examinations.

THEREFORE, after you have developed an understanding of the law using this eBook, you MUST make additional efforts to prepare for your law school exams. To do that, use Nailing the Bar's **How to Write Essays for Real Property Law School Exams (Ge)**.

Details on that publication and how to obtain it are given at the back of this book.

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Law school students are generally told to buy the latest edition of hard-bound casebooks and hornbooks that are inordinately expensive.

A big part of your "law school education" is the gradual realization that you can learn the law better, faster, and much cheaper by using "commercial outlines" and "canned briefs" than by trying to read casebooks and hornbooks. These materials explain the law to you in understandable terms. And if you want to see the original case decision, why not go on the internet to see the real case decision? One excellent source for viewing federal cases and the cases of many states is **http://lp.findlaw.com**. Why not read what the justices really said instead of trying to decipher a hacked up version?

Mistakes You Find

We make mistakes like everyone else. If you find mistakes in this book please tell us so we can correct them. By "mistake" we mean typos, calculation errors, reference errors and things like that. Just send us a message at **info@practicalsteppress.com**.

But we definitely do not want to hear about differences of opinion about arguable issues. So if your professor says the rule is different that what we say here, humor your professor. But also do your own independent study and decide those issues for yourself.

Table of Contents

Chapter 1: Overview of Real Property Law

Real property law is less uniform than most other areas of law. States are more often split on issues, and often are split several different ways! It is often not clear what the "majority" and "minority" views are on some issues.

And the history of real property law involves many arcane terms. Knowing a little about them is of some value. But law schools and bar exams usually test your knowledge of what the common law and broadly adopted modern rules are NOW and not ancient history that has been abandoned. And MBE (Multi-State Bar Exam) answers that cite arcane terms are almost always wrong answers.

So, the main focus here is current real property law, and not the historical development.

1. There are Only Two Types of Property

There are **two types** of "property." **Real property** is the **surface of the earth** and **everything attached to it,** and every other type of property is **personal property**.

The term **"property"** means something can be **"owned"** so that the "owner" can **prevent others from possessing, using or enjoying it**. That is what gives property value.[1]

Property can also be either **tangible** (physical things) or **intangible** (rights), but that distinction has little importance in the case of real property where the value of the land (the thing) springs only from the right (the intangible aspect) to occupy and use the land, now or in the future.

2. Seven Real Property Interests

An **"interest" is a legally enforceable right**. Desires that are **unenforceable** at law or equity are not interests but only **"expectations"** that convey no legal rights.

There are **seven distinct interests in land** relevant to the study of real property:

1. **ESTATES**: The right to OCCUPY land (including life estates, remainders, possibility of reverter, right of entry and executory interests).
2. **EASEMENTS**: The right to CONTROL land for a LIMITED PURPOSE.
3. **COVENANTS**: LEGAL RIGHTS arising from land ownership.
4. **SERVITUDES**: EQUITABLE RIGHTS arising from land ownership.
5. **SECURITY INTERESTS**: A pledge of land as SECURITY for a DEBT.
6. **OPTIONS**: An intangible RIGHT TO BUY land.
7. **WATER RIGHTS**: The right to USE WATER on or adjacent to land.

[1] For example, air is valuable but is not property because one cannot feasibly stop others from using it.

3. Two Types of Estates

There are two types of estates. **Current estates** (also called "possessory estates") are the right to occupy land in the present. **Future estates** are the right to occupy land in the future.

A **vested** interest in land is one that one the law deems clear and certain enough that the law will enforce it, and **current estates are always vested** in the **titleholder.** Future estates may be vested or unvested depending on the circumstances.

4. Restraints on Alienation are Generally Disfavored

Property is usually, but not always, **"alienable,**" meaning it can be conveyed by **sale, gift**, or **inheritance.** Public policy favors freely transferable property because it promotes efficient allocation of resources.

So **the law disfavors restraints on alienation** of property. Unreasonable restrictions on the free conveyance of property will generally be void by law.

5. Different Interests in Land are Conveyed in Different Ways

Real property interests can be 1) given as **gifts**, 2) **inherited** under the laws of intestate succession, 3) **taken** by "adverse possession" or "prescription", or 4) **sold** under a contract.

The means by which interests in real property are "conveyed" vary with the type of interest

- ESTATES may be "conveyed" by **sale, gift** or **inheritance.**
- EASEMENTS are created and conveyed by being **"granted."** After they are created they are usually "appurtenant" to real property and conveyed along with the land to which they are attached. Some easements are "in gross" and may be inalienable. If they are alienable at all they may be conveyed by **sale, gift** or **inheritance.**
- COVENANTS and SERVITUDES are created when **"granted"** and cannot be conveyed separately from the land to which they pertain.
- SECURITY INTERESTS are created when **"granted."** Afterward they are generally freely alienable by **sale, gift** or **inheritance.**
- OPTIONS are created when "granted," usually in exchange for something of value. They may be conveyable thereafter by **sale**, **gift** or **inheritance**.
- WATER RIGHTS are generally established by statute and may either **"run with the land"** or be freely alienable by **sale**, **gift** or **inheritance** depending on State statutes.

Chapter 2: Freehold Estates

An **estate is the right to occupy land**, and they can be either **freeholds** or **non-freeholds**.[2] **Freehold estates** are the legal right to occupy **in perpetuity or for life**. Non-freehold estates are **leaseholds,** the right to occupy land for as long as some other party, the landlord, allows. Non-freehold estates will be explained in Chapter 6.

Estates are dimensioned by space (physical area) and time (length of estate duration and possibility of termination by a condition.) Generally **estate holders can not convey a greater or "larger" estate than they hold**.[3]

1. Current Freehold Estates

Current (i.e. "possessory") **estates** are the immediate right to occupy the land, while **future estates** are the right to occupy the land in the future. The holder of a current freehold estate **"holds the fee"** and that simply means the **immediate right to occupy or use** the land.

There are three types of current freehold estates: **fee simple**, **life estate** and **fee tail**.

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A. Fee Simple Estates

Fee simple estates are the right to occupy land **immediately,** 1) **in perpetuity,** 2) with **free alienability**.

1) Fee Simple Modernly Presumed

A grant in fee simple is presumed modernly whenever there is a conveyance of land, unless there are words of conveyance to indicate otherwise, but the **common law presumed a life estate** instead of a fee simple. So at common law in order to create a fee simple estate the **language of conveyance had to say** a grant was to "[grantee] and his heirs."

> **For Example:** Bevis' will said, "Blackacre to Butthead." In the common law this was presumed to be a gift of a **life estate,** but modernly it is presumed to be **fee simple.**

2) Alienability and Passage of Title to Heirs

Unless fee simple estates are created subject to express conditions they are freely **alienable,** called **"fee simple absolute"** and will **pass to the heirs** of the title holders at their deaths. [4]

[2] While the assets decedents leave to heirs are called testamentary "estates," that is only a homonym.
[3] The exception is that a bone fide purchaser for value without notice can receive title to more of an estate than the seller actually had a right to convey. This will be explained later.
[4] "Heirs" are those that will take from a decedent by the terms of a will or the laws of intestate succession.

3) Fee Simple Absolute is the Largest Estate

A fee simple absolute estate is the "largest" of the current estates. Grantors holding title in fee simple absolute may grant any "smaller" estate such as a life estate.

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B. Life Estates

A **life estate** is a current estate, the right to occupy land **immediately** and for **as long as one or more people live** that is conveyed from a grantor to a grantee. Modernly the creation of a life estate **requires language of express intent** such as "for life," but at common law a life estate was presumed anytime an estate was granted without the phrase "to [grantee] and his heirs."

1) The Life Tenant, Measuring Life, and Remaindermen

People who own life estates are called **life tenants**, and unless otherwise specified life estates end when the life tenants die. If a life estate is granted for the **"joint life"** of two people it terminates **when the first dies**. If it is granted for the **"lives"** of two people it terminates **when the last dies**. If it is granted for as long as **some other person lives**, besides the life tenant, the other person is called the **"measuring life,"** and the life estate is called a **life estate per autre vie**.

When a life estate ends at the end of the measuring life it is called a **"natural termination."** Then another person called the **"remainderman"** has the right to take possession.

2) Life Estates Create Reversions and Remainders

A remainderman always owns the future estate following a life estate. If the grantor does not name someone else to be the remainderman, the remainderman is the grantor (or the grantor's heirs), and the future estate is called a **"reversion."** Otherwise when someone else is named the remainderman the future estate is called a **"remainder."**

3) Life Estates Generally Alienable for Measuring Life

Life tenants have the right to occupy the life estate but don't have to, and a life tenant can lease the property to someone else. But the grantee remains the life tenant. The lease will terminate if the life estate terminates.

> **For Example:** Dick has a life estate in Blackacre. He leases to Harry for ten years. Dick is still the life tenant and measuring life. The lease terminates when Dick dies.

Modernly life estates are alienable, and if a life estate is sold or given away the new owner becomes a new life tenant. But the measuring life does not change, and if the life tenant's life is not the measuring life the estate is called a **life estate per autre vie.**

Modernly if the life tenant of a life estate per autre vie dies the life estate passes to the heirs of the life tenant. But that was not allowed at common law and the life estate per autre vie terminated.

4) Duties of Life Tenants to Remaindermen

Life tenants have five duties to the remaindermen:

1. **Not to commit waste**, unreasonable destruction or damage to the property;
2. To make **reasonable repairs** to the property (but not repair substantial damage),
3. To **pay property taxes** (up to the rental value of the property);
4. To **pay interest** on mortgages (up to the rental value of the property);
5. To **pay a portion of mortgage principal payments** if any are paid by the remainderman (or otherwise surrender the life estate.) The portion is determined actuarially based on the life expectancy of the life tenant.

5) Waste Means Unreasonable Property Changes

Life tenants have a duty not to allow or commit **waste, changes in the property caused by unreasonable acts or failures to act**. Three kinds of waste are forbidden. **Permissive waste** is an unreasonable failure to act that damages the property. Unreasonable acts are **affirmative waste** if **property values are reduced** or **ameliorative waste** if property values are **increased**.

Wear, tear and depletion from normal use of the property is not unreasonable so it is not waste. The life tenant has a right to use the property in a reasonable manner. Using the property the same way it has been used in the past is never reasonable, so timber can be harvested if it was harvested in the past. The same goes for mining, etc. even if it reduces the property value.

Structural changes that are 1) **reasonably needed by the life tenant** to effectively use the property, and that 2) **do not reduce the value** of the property are **not waste**.

But any other **voluntary act** by the life tenant that causes **significant structural changes** is waste along with any **unreasonable failure by the life tenant to protect** the property.

A life estate can be terminated if the life tenant commits waste. The life tenant can also be enjoined, financially liable to the remaindermen and subject to punitive damages.

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C. Fee Tail Estates

Fee tail estates are the **same as fee simple estates EXCEPT they cannot be conveyed to anyone except the issue of the grantee**. The "issue" are the grantee's lineal descendents.

A grant of an estate in fee tail is never presumed and would always require express language that the estate was granted "to [grantee] and his issue" as opposed to "and his heirs" for a fee simple estate or "for life" for a life estate.

The fee tail is no longer of much importance in either the United States or England. Most States do not recognize them and there an attempted fee tail estate just creates a fee simple estate. In many other States a fee tail estate is recognized only for one generation so the grantee gets a life estate and the issue of the grantee get a remainder in fee simple.

Only four States (Delaware, Maine, Massachusetts and Rhode Island) completely honor fee tail estates, and they all provide a statutory means for converting the fee tail into a fee simple.

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D. Types of Defeasible Estates and Doctrine of Equitable Waste

Estates are **"defeasible"** if they can be terminated by express conditions. There are three types:

- **"Estates subject to an executory interest"** are those that terminate with possession transferred to a grantee (not back to the grantor) upon the failure of a condition.
- **"Determinable" estates** are those that return possession to grantors (or their heirs) upon the failure of a **condition precedent**. Types of condition are explained below.
- **"Estates subject to conditions subsequent"** are those that return possession to grantors (or their heirs) upon the failure of a **condition subsequent**.

Defeasible estates are "smaller" than absolute estates, so the holder of a defeasible estate cannot convey a "larger" absolute estate that would be free from the condition.

Defeasible estates always imply future estates that will become current estates if conditions fail. Under the **Doctrine of Equitable Waste**, every holder of a **defeasible estate** has a duty **not to act in an unreasonable manner** that would reduce the value of the property to the holders of the implied future estate, even though the future estate is uncertain. Since future estates following defeasible estates are uncertain, the duties under the doctrine of equitable waste are less restricting than the similar duty of a life tenant.

2. Conditions Precedent and Subsequent

The law disfavors the creation of uncertain interests in land, but it favors giving effect to the intentions of grantors. To balance these two goals the law recognizes two types of terminating conditions, **conditions subsequent** and **conditions precedent**, and they are distinguished only by **the syntax used in the language of conveyance**.[5]

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A. Conditions Subsequent

Conditions **subsequent** are conditions **stated as an "afterthought" in a clause following the clause** that creates an estate, in either a trailing sentence or (usually) separated by a comma from the statement that conveys the estate. Typically they are introduced by the word "but" to indicate the contrary result that is intended to take place if the condition fails.

> **For Example:** Tom's will says, "I give Blackacre to Dick, but if he fails to survive me then to Harry." Since the phrase "but if he fails…" is stated **AFTER the clause that conveyed the estate**, separated from it by a comma, it is a **condition subsequent.**

[5] Although this is only a difference in syntax, semantics is the mother's milk of lawyers.

A condition subsequent can either **terminate a current estate** or **prevent the grantee of a future estate from taking possession** of a current estate.

> **For Example:** Tom's will says, "I give Blackacre to Dick, but if he stops farming the land then to Harry." Since the phrase "but if he stops…" is **AFTER the clause that created the interest** this is a condition subsequent.

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B. Conditions Precedent

Conditions **precedent** are conditions **stated as a "triggering" or "continuing" conditions in the same clause** that creates an estate. Typically they are introduced by the words "if," "as long as," "until" and "for as long as." They **can be stated either before or after** the words that convey the estate, as long as they are stated within the same clause.

> **For Example:** Tom's will says, "If Dick survives me I give him Blackacre." This is a condition precedent because it is in the **SAME clause** that creates the estate, and it has the same effect as it would if it said "I give Blackacre to Dick if he survives me."

Conditions precedent can either **terminate possession of a current estate** or **prevent the holder of a future estate from taking possession** of a current estate.

> **For Example:** Tom's will says, "To Dick I give Blackacre for as long as he farms the land." Failure of this condition precedent would terminate Dick's current estate.

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C. Conditions Precedent Automatically Terminate Estates

Failure of a condition precedent will automatically terminate an estate without any action by the holder of the future estate created by the condition precedent.

> **For Example:** Tom's will says, "To Dick I give Blackacre for as long as he farms the land, and then to Harry." This grants Dick a current estate subject to a condition precedent with the implied future estate to Harry. If the condition ever fails the rights of Dick and his heirs to possess the land automatically terminate and Harry and his heirs automatically have the right to occupy the land.

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D. Failure of a Condition Subsequent Requires Prompt Action

Failure of a condition subsequent will NOT automatically terminate an estate. Rather, the holder of the future estate created by the condition subsequent **must take prompt action or else the court may hold that the right to possession was waived** and the future estate terminated.

> **For Example:** Tom's will says, "To Dick I give Blackacre, but if the land is not farmed to Harry." If Dick and his heirs ever stop farming the land their current estate **will not automatically terminate** because it is subject to a condition subsequent. Rather, Harry (or

his heirs) must take prompt action to claim possession of the land and terminate possession by Dick (or his heirs). If prompt action is not taken the court may hold that the right to possession was waived. In that case the future estate would be terminated.

3. Future Freehold Estates

Future estates are the right to take possession of land **in the future**. Once the holder of a future estate has a right to take possession the future estate becomes a current ("possessory") estate.

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A. Eight Possible Future Estates

There are **eight possible future estates**. Five of them follow the "natural termination" of a current estate. A "natural termination" is one not caused by the failure of a condition, and it almost always is the end of a life estate upon the death of the life tenant. But a lease for a fixed period of time also naturally terminates at the end of the lease period.

Three other three types of future estates follow the **termination of defeasible estates** upon the failure of a condition, either a condition precedent or subsequent.

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B. Reversions

A **reversion** is a future estate that 1) **follows the natural termination** of a current estate that was 2) **retained** by the grantor because it was not granted to a grantee.

> **For Example:** Tom's will says, "Blackacre to Dick for life." This gives Dick a **life estate** with an **implied reversion** to Tom's heirs since no remainderman was designated.

A diagram of the transfer of possession using a **reversion** is as follows:

Tom → Dick for life → Tom or his heirs

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C. Indefeasible Remainders

A **remainder** is a future estate 1) **following the natural termination** of another estate that was 2) **conveyed to a grantee in the same instrument** as the other estate. An **indefeasible remainder** is one granted **without terminating conditions.**

> **For Example:** Tom's will says, "Blackacre to Dick for life and then to Harry." Dick is given a **life estate,** and Harry is given a **remainder in fee simple**.

A diagram of the transfer of possession using a **remainder** is as follows:

Tom → Dick for life → Harry

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D. Vested Remainders Subject to Conditions Subsequent

A **vested remainder subject to a condition subsequent** is a remainder conveyed subject to a **condition subsequent** that must hold to take possession. Many courts consider remainders subject to survival conditions to be "vested remainders subject to a condition of survival," even if the conditions are phrased as conditions precedent. But other courts hold that if survival is phrased as a condition precedent the result is a contingent remainder as described below.

Since vested remainders subject to conditions subsequent might fail, alternative future estates are implied. They are **rights of entry** held by the grantor if no grantees are expressly designated or if grantees are named they are **alternative remainders** subject to the same conditions subsequent.

> **For Example:** Donald's will says, "Blackacre to Huey for life and then to Louie, but only if he is married, and if not to Dewey." Louie has a **vested remainder subject to condition subsequent** and Dewey has the **alternative remainder**.

Since conditions subsequent do not work automatically, the holder of the right of entry or alternative remainder must take prompt action or the right to possession may be waived.

A diagram of a **vested interest subject to condition** might be as follows:

Tom → Dick for life → Harry (if condition holds)
OR OTHERWISE → Tom's heirs by **right of entry**

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E. Vested Remainders Subject to Open

A remainder given as a class gift to an open class is a **vested remainder subject to open.**

Rule Against Perpetuities Applies. Even though a class gift is called a "vested" remainder the Rule Against Perpetuities may apply as explained in Chapter 4.

A diagram of possession for a **vested remainder subject to open** is as follows:

Tom → Dick for life → Open Class

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F. Contingent Remainders

A **contingent remainder** is a remainder granted either 1) to an **unborn** or **identifiable grantee** or 2) **subject to a condition <u>precedent</u>** that must hold to take possession.

Since a contingent remainder might fail, an alternative future estate is implied. It is a **possibility of reverter** held by the grantor if no grantee is expressly designated or if a grantee is named it is an **alternative contingent remainder** subject to the same condition precedent.

> **For Example:** Tom's will says, "Blackacre to Dick for life and then to his youngest son." This creates a **contingent remainder** because the "youngest son" is an **unidentifiable grantee**, and a **possibility of reverter** is also created since Blackacre will revert to Tom's heirs if Dick dies without having any living "sons."

Since conditions precedent work automatically, the holder of the possibility of reverter or alternative contingent remainder does not have to take any action to gain the right of possession.

Rule Against Perpetuities Applies. Contingent remainders may be void under the RAP.

Now Freely Alienable. Under common law contingent remainders were not alienable, but modernly they are alienable in most States, by statute or by case law. They can generally be conveyed by sale, inter vivos gift, devise (will) or intestate inheritance.

A diagram of the transfer of possession using a **contingent remainder** might be as follows:

Tom → Dick for life → <u>Grantee</u> (if condition <u>precedent</u> holds),
OR OTHERWISE → <u>Tom's heirs</u> by **possibility of reverter**

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G. Conditional Remainders versus Continuing Conditions

Contingent remainders and vested remainders subject to conditions subsequent are called "conditional remainders" because they are subject to conditions that must hold **for the holder to <u>take possession</u>** of a current estate. They should not be confused with remainders that will necessarily become current estates but will be **defeasible current estates** because they will be subject to **continuing conditions**, whether precedent or subsequent.

> **For Example:** Tom's will says, "Blackacre to Dick for life and then to Harry for as long as he farms the land." Harry does NOT have a "contingent remainder" because the condition is not one that must be satisfied for him to <u>take</u> possession. It is a condition precedent that must hold for him to <u>keep</u> possession. So Harry has a **remainder subject to a continuing condition** that will become a **determinable estate** when he takes possession.

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H. Possibility of Reverter

A **possibility of reverter** is a future estate that 1) follows termination of a prior estate (a **"determinable" estate)** by the failure of a **condition precedent** and that 2) was **not expressly granted** to a grantee.

Since possibilities of reverter are based on conditions precedent they work automatically. The holders of the possibilities of reverter do not have to take any action to get the right to possession.

> **For Example:** Tom's will says, "Blackacre to Dick for life as long as the land is farmed." Dick's life estate is subject to a condition precedent, so it is a **"determinable life estate"** and Tom retains a possibility of reverter for his heirs.

A diagram of the transfer of possession using a **possibility of reverter** is as follows:

> Tom → Dick (condition precedent?? → **possibility of reverter** to Tom or his heirs)

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I. Right of Entry

A **right of entry** is a future estate that 1) follows termination of a prior estate (an **"estate subject to a condition subsequent"**) by the failure of a **condition subsequent** and that 2) was **not expressly granted** to a grantee.

Since rights of entry are based on conditions subsequent they do not work automatically. The holders of the rights of entry must take prompt action to get possession or else they may be deemed to have waived their right to possession, and then the future estate would terminate.

> **For Example:** Tom's will says, "Blackacre to Dick for life, but only as long as the land is farmed." Dick has a **life estate subject to a condition subsequent,** and Tom retains a right of entry for his heirs by implication. But if the farming of the land stops title will NOT return automatically to Tom's heirs and their right to recover the land may be waived if they fail to take action to recover title.

A diagram of the transfer of possession using a **right of entry** is as follows:

> Tom → Dick (condition subsequent ?? → **right of entry** to Tom or his heirs)

— o0o —

J. Executory Interests

An **executory interest** is a future estate that 1) follows termination of a prior estate by failure of condition (either termination of an **"estate subject to a condition subsequent"** or a **"determinable estate"** subject to a condition precedent) and that 2) **was expressly granted** to a grantee (i.e. not retained by the grantor expressly or by implication.)

If the executory interest is conditioned on failure of a condition subsequent it will not work automatically and the holders must take prompt action to get possession. But if it is conditioned on failure of a condition precedent it will work automatically.

Rule Against Perpetuities Applies. Executory interests are unvested future interests and always subject to the Rule Against Perpetuities.

A diagram of the transfer of possession using an **executory interest** is as follows:

Tom → Dick (condition ?? → **executory interest** to Harry)

4. Miscellaneous Common Law Rules and Terms

The common law developed various rules regarding estates that are often stressed at length in real property classes but you don't really need to have a detailed knowledge of them. Any MBE (Multi-State Bar Exam) answers that refer to old feudal concepts will almost always be wrong answers. Here is a brief listing of some common law rules and terms.

1. **Seisin and Livery of Seisin**: "Seisin" is the feudal concept of legal ownership and "livery" means conveyance of ownership.
2. **Destructibility of Contingent Remainders**: Common law courts of law often declared contingent remainders void. They were said to be "destructible."
3. **Rule in Shelley's Case**: This rule is that if people are granted **life estates** and the **remainders** are granted to their "heirs" they are really granted the land in **fee simple**.
4. **Doctrine of Worthier Title**: This rule is that grantors of life estates cannot also grant remainders to their own "heirs" but instead must retain reversions.
5. **Statute of Uses**: England's courts of law might deny a person "legal" title to land that a court of equity said they held "equitable" title to based on a "use." This statute resolved some of this absurdity and made some previously "illegal" land transfers legal.
6. **Merger Doctrine**: This rule is that people who hold successive estates in the same land really hold the larger estate and the smaller estate merges into it.

   For Example: Tom gives Blackacre to "Dick until Bob is 21, then to Bob for life, then to Dick and his heirs." If Bob dies before he becomes 21, Dick holds two successive estates, the latter a fee simple. Under the merger doctrine the smaller merges into the larger so he holds title in fee simple only.

Chapter 3: Vesting of Class Gifts and Future Estates

A future estate or class gift is "vested" if the law deems it clear and certain enough to be enforced in a court of law and passed to heirs by inheritance. Vesting is not an issue for current estates, except class gifts to open classes, because they are always considered **"vested in possession"** in the titleholder.

The **law favors early vesting** of future estates because they cause uncertainty that reduces property values. And vesting of future estates is important because **unvested future estates may be voided by the Rule Against Perpetuities**.

1. General Rules for Gifts

Future estates are often gifts, either during life (i.e. "inter vivos gifts"), or at death by a will (i.e. "testamentary gifts".)

Gifts are **voluntary** conveyances **without exchange of consideration** from "donors" to "donees". They are complete upon the conveyance of the thing given or a symbol of it (a "**token chose"**.) And unless they are gifts causa mortis gifts are **irrevocable** when the donor 1) intends to make the gift, 2) delivers the gift itself or token chose (e.g. keys to a car) and 3) it is accepted by the donee, the donee's agent or an independent agent for transfer to the donee.

A current gift of a future estate must be distinguished from a promised future gift. A promise of a gift is unenforceable at law. So-called "gift promises" are always revocable at law but might be enforced at equity under a theory of promissory estoppel to the extent justice requires.

A **gift causa mortis,** a gift made in contemplation of death, is **generally revocable**, contrary to the general rule. The law disfavors them because they are made under duress, not clearly voluntary and are often **"will substitutes"** attempting to distribute property at death outside of a will. They are always revocable if the donor does not die, and some courts find them always revocable if the donor subsequently commits suicide.

2. Class Gifts and the Rule of Convenience

A "class gift" is a gift of a single amount to be shared equally by a group of donees, uncertain in number, so the share of each member is unknown with certainty until the class "closes." A person is a **class member** if they 1) **meet class requirements** 2) **while the class is open.**

The language of conveyance defines **who class members are,** and it may also define **when class members can take possession** of the gift in 'beneficial enjoyment.' In the case of land that means when the donees can occupy the land. If the class definition for a class gift is ambiguous, the intent of the donor always controls.

A **class "opens"** when the interest shared by the class members is **first created**. An inter vivos gift is created upon the conveyance (e.g. delivery or recording of a deed.) Testamentary gifts are 'created' at the instant the testator (the decedent) dies.

Under the **"Rule of Convenience"** classes that are **not empty** (there are existing members) when a gift is first given will **close when the first member of the class can take possession** of the gift.[6] **Unconditional gifts** can be possessed immediately so the class for an unconditional gift to a non-empty class causes the class to close immediately. But if a gift to a non-empty class cannot be taken immediately by any of the existing members (e.g. because they are too young), the **class will close at the moment the first member can take possession of the gift**.

Otherwise, **if the class is empty** at the time the gift is first created, **the class remains open until it "closes naturally"** because **it is impossible for new members to come into existence**. No presumptions of fertility are made, so if the gift is to "children, nieces, etc." the class remains open until the potential "parents" of gift recipients die because until then it is presumed more class members could be born.[7]

3. Vesting of Class Gifts

The share of each member of a class is **vested as soon as the member qualifies for entry** into the class. As long as the class remains open the member's share is **"vested subject to open"** or **"vested subject to partial divestment."** When the class closes the member's share is **"vested in interest**," and if the member is qualified to take possession of the share it is **"vested in possession."**

If there are stated conditions for existing members to **remain members** of the class or **retain possession** of shares of a class gift after they have vested in possession, the members have **"vested defeasible interests,"** and it may be termed **"vested subject to total divestment."**

But if a class might remain open for over 21 years the interests of future potential donees remain unvested and this may violate the Rule Against Perpetuities as explained in the next Chapter.

4. The Simple Rule for Vesting of Future Estates

The rules for vesting of future interests often seem complex but they all boil down to a simple rule that can be stated two different ways:

Future estates are **VESTED IF**:

1. They are **retained by grantors** (for themselves or for their heirs), OR
2. They are **remainders** given a) to **identifiable grantees** b) **free from conditions precedent**.

Conversely one can say that future estates are **UNVESTED IF:**

1. They are **contingent remainders**,
2. They are **executory interests,** OR
3. They are **gifts to an open class.**

[6] This is true even if people in the class could not take immediate possession due to stated conditions such as age, educational attainment, etc.
[7] This is sometimes called the "**fertile octogenarian presumption."**

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A. Future Estates Retained by Grantor are Always Vested

Future estates retained by grantors for themselves or their heirs, either expressly or by implication, are always vested. There are three types: **reversions, possibilities of reverter** and **rights of entry**.

These are always vested future estates because the grantors were initially **vested in possession** with both current and future possession rights. And after giving away the right to current possession the grantor remained vested in the rights to the future estate.

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B. All Remainders are Vested Except Contingent Remainders

All remainders except contingent remainders are vested. So if a remainder is granted to 1) an **identifiable grantee** and it 2) is **not subject to a condition precedent** it is vested.

Many courts view remainders that are only subject to a condition of survival to be **vested subject to a condition of survival** regardless of whether it is phrased as a condition precedent or subsequent.

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C. Contingent Remainders and Executory Interests are Always Unvested

Contingent remainders and executory interests are always unvested.

> **For Example:** Tom's will says, "I give Blackacre to Dick and his heirs, but if the land is ever not farmed then to Harry." Dick is **vested in possession** with a **current estate,** a **fee simple subject to a condition subsequent.** Harry has an **executory interest** that will allow him to claim possession if Dick or his heirs ever stop farming, but it is **not a vested interest because it is an executory interest**, and they are never vested. And if the farming of the land stops title will NOT return automatically to Harry, so he will have to take some type of action – probably bring suit to eject Dick or his heirs. And his right to get possession may be waived if he fails to take prompt action to get possession.

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D. Gifts to Future Members of a Class are Unvested

The shares of class gifts that will later belong to future class members are unvested until the members qualify for entry to the class.

> **For Example:** Tom's will says, "I give Blackacre to Dick for life and then to his children." The shares of the future estate given to Tom's <u>future unborn children</u> are unvested because **class members vest when they enter the class.**

Chapter 4: The Rule Against Perpetuities

The Rule Against Perpetuities (hereinafter "RAP") is important to three areas of law, wills, trusts and real property. For real property law it voids any future estate that might not vest until far in the future. Modernly it has been modified, but it is still a very important concept to understand.

The common law Rule Against Perpetuities is **"No interest is good unless it must vest, if at all, within twenty-one years of a life in being at its creation."**

To cover the possibility of a child being conceived but not born at the creation of an interest, the 21 year period of the RAP was extended by common law for an **additional gestation period** (e.g. nine months.)

The time period for the RAP is measured by the life of a person who was clearly alive at the time the future estate was created, and they are called a **measuring life**. The RAP effectively means every future estate is void from the beginning unless it necessarily must **either fail or vest** within 21 years after the death of all the people alive when it was created, and anyone alive at the creation of an interest could immediately die.

The RAP can only void an **unvested future estate** so it only has application to 1) **contingent remainders,** 2) **executory interests,** and 3) **class gifts to future members of open classes.**

And the RAP can NEVER be violated if the grantee of a future estate is identified by name, because their life becomes the measuring life, and the gift must vest in their lifetime or else fail upon their death. So the **RAP can only be violated when the grantee is identified only by a description** such as "widow", "child", "grandchild", "niece", etc.

1. The Measuring Life

The **measuring life** for application of the RAP is a person who **must be alive** when a future estate is conveyed, and that will generally be:

1. The **grantor** to an unidentified grantee;
2. Some **life tenant** after whose death the unidentified grantee can take possession, or
3. A **person who necessarily must give birth** to the unidentified grantee.

2. Common Situations When the RAP is Violated

Future estates conditioned on certain terms frequently violate the RAP.

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A. Gifts Conditioned to Over 21 Years Almost Always Violate the RAP

Future estates conditioned on ages or timeframes over 21 years almost always violate the RAP.

> **For Example:** Tom's will says, "I give Blackacre to my first child to be 30 years old." This violates the RAP (if no children are over 30 at Tom's death) because Tom could die leaving his wife pregnant (with little Doofus.) And then Tom's wife could die. That is the last measuring life because Doofus was not alive when the future estate was created. Since he would not vest for more than 21 years this violates the RAP.

But the RAP is **never violated** if a conveyance is expressly conditioned to vest or fail in a time limit of 21 years or less.

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B. Uncertain Conditions Without Time Limit Usually Violate RAP

The RAP is usually violated by conveyances subject to uncertain conditions without time limit.

> **For Example:** Tom's will says, "I give Blackacre to my first grandchild to pass the Bar Exam." This violates the RAP (if no grandchildren have passed the Bar Exam when Tom dies) because a grandchild (Doofus) could be born after he dies, and all other people could die. Doofus would not be a "measuring life" because he was not alive when the estate was created, and he might not pass the Bar Exam for over 21 years.

Some courts have even held that gifts to be made after "probate" or "payment of taxes" violated the RPA because it could take over 21 years to happen, but this is an extreme minority view.[8]

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C. Future Gifts to "Third Generation" Children Often Violate the RAP

Gifts to **children of a third generation (e.g. grandchildren, nieces, etc.)** often violate the RAP.

> **For Example:** Tom's will says, "Blackacre to Dick for life, then to my nieces." The remainder to the "nieces" is void unless **both of Tom's parents are dead when he dies** because otherwise one of them could give birth to another child (Tom's sibling) that would not be a measuring life. Then everyone else can die and that sibling could have a daughter born to them (Tom's niece) more than 21 years later. So this violates the RAP.

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[8] The vast majority of courts assume administrative procedures will be completed in a reasonable time.

D. Future Gifts to "Widows" Often Violate the Rap

The RAP is often violated when a future estate is given to the "widow" of a person because there is no assurance the person who ends up being the "widow" was alive when the at the creation of the future estate. This is called the "unborn widow" situation.

> **For Example:** Tom's will says, "Blackacre to Dick for life, then to Dick's widow for life and then to Dick's surviving children." The interest of the "children" is void because Dick could 1) marry a woman born after Tom died, 2) have a child by her, 3) die and 4) she could live for more than 21 years after that.[9]

3. Class Gifts Void to All if Gift is Void as to Any Member

At common law class gifts were totally void if the gift to any member of the class violated the RAP. But modernly courts often hold that a class gift is subject to **implied conditions** that either the **class must close as necessary to make the gift valid,** or that class **membership is restricted** to grantees that do not violate the RAP.

Modern statutes also often adopt a **wait and see approach** under which future estates are not void if they actually do vest by the end of the statutory period (which can be up to 99 years.

[9] TIP: To see if the RAP is violated try considering the last person named in the facts as the measuring life.

Chapter 5: Concurrent Estates and Marital Property

Freehold estates are frequently **concurrent estates** held jointly by two or more people who may be called **concurrent owners** or **co-tenants**. This is always the case with **marital property** held in joint title by a couple during marriage.

1. The Three Forms of Concurrent Ownership

Under the common law and broadly adopted modern rules two or more people can have concurrent ownership of property in **"joint title"** in three forms: **tenancy by the entireties, joint tenancy** or as **tenants-in-common**. These are referred to as concurrent estates or "**joint title forms**."

In some States a married couple can also hold title as **community property**. But students are generally supposed to use only common law and broadly adopted modern rules to answer "real property" questions on Bar Exams. So when answering "real property" questions, including the MBE (Multi-State Bar Exam) questions concerning real property, students should usually just discuss the three joint title forms explained here.

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A. The Four Unities

Two of the three types of concurrent estates, **tenancy by the entireties** and **joint tenancy,** can only be created if four criteria are met. These are called **the four unities** (mnemonic=**PITT**):

1) **Unity of Possession:** The joint owners must have **undivided interests**.[10]
2) **Unity of Interest:** The joint owners must have **equal interests** or shares in the property.
3) **Unity of Title:** The owners must obtain title by the **same instrument** (**deed or will**.)
4) **Unity of Time:** The interests of the joint owners must **vest at the same time**.

The third joint title form, **tenancy-in-common,** only has to satisfy one of these requirements – **unity of possession** – and does not have to satisfy the other three requirements.

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B. Each Co-Tenant has the Right to Free Use of All of the Land

Concurrent owners (i.e. co-tenants) may partition the land by agreement. Otherwise they each have an undivided interest and right to **freely use all of the land**, regardless of their individual share, as long as they **do not prevent other co-tenants from using** the land too.

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[10] "Undivided" means that the land is not partitioned and each owner has a right to use the entirety of it.

C. The Right of Survivorship

Two types of concurrent estate, **tenancy by the entireties** and **joint tenancy**, are subject to a **right of survivorship,** and that means a co-tenant's share of ownership expires with their death, leaving their heirs without any title to the property, until there is only a single owner left alive.[11] The last surviving owner owns the entire estate free from any further conditions of survivorship.

> **For Example:** Bevis and Buffy own Blackacre as joint tenants with the right of survivorship. Bevis dies and his will says, "I leave my entire estate to Butthead." Since Bevis' claim to the land expired upon his death, Buffy took sole ownership at that time. Bevis' share of Blackacre is not in his "estate" after death there is no interest left to pass to Butthead.

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D. The Abandoned Use of the Straw Man

Under the common law the requirements of "unity of time and title" were so strict a person that already owned land could not reconvey it to themselves in the form of either **joint title** or **tenancy by the entireties** without first passing title through the hands of a third party called a "straw man." The "straw man" would then reconvey property back to the person that originally owned it in a sham transaction that satisfied the "four unities."

> **For Example:** Bevis owns Blackacre when he marries Buffy, and wants to hold the land in joint tenancy with her. To do this under the old common law, Bevis had to convey the land to someone like Butthead who would act as the "straw man." Bevis would convey, "Blackacre to Butthead" in exchange for Butthead's conveyance of "Blackacre to Bevis and Buffy as joint tenants." This sham transaction would vest both Bevis and Buffy **at the same time in the same instrument**, satisfying the four unities.

Modernly the need for this has broadly been eliminated by statute.

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E. All Concurrent Estates can be Partitioned

All three types of concurrent estate can be terminated and partitioned by agreement of the parties.

In addition, two types, **joint tenancy** and **tenancy-in-common,** can also be severed by a court order issued at the request of one of the parties, and usually the equitable right to partition is absolute. A **tenancy by the entireties** cannot be severed by court order.

When land is partitioned by the court a physical division (called a "partition in kind") is preferred, but a sale of the land and division of the proceeds is possible when physical division is impractical or violated zoning laws.

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[11] Consequently, joint tenants cannot convey their shares to their heirs at death.

F. Tenancy by the Entireties

Under the common law a **validly married** couple was viewed as a single unity and all property **conveyed to the couple during marriage** that satisfied the **four unities** was held as **tenancy by the entireties.** Tenancy by the entireties did not apply to property acquired by the spouses before marriage.

Tenancy by the entireties embodies a **right of survivorship** so that if one spouse dies the other automatically acquires full title. And it can not be terminated except by the **consent of both spouses.**

1) Tenancy by Entireties Still Presumed in Many States

Modernly twenty-two (22) States still recognize tenancy by the entireties and in almost all of them it is the presumed form of ownership for marital property when the four unities are satisfied. It is generally a rebuttable presumption, but it is strongly presumed in a few States.

Twenty-eight (28) States do not recognize tenancy by the entireties at all.

2) No Termination Without Consent

Neither spouse can terminate a tenancy by the entireties or convey the other spouse's interest in property during marriage without the consent of the other spouse. And after divorce most States deem the property previously held as tenancy by the entireties is held as tenants-in-common.

But a husband and wife can agree to terminate a tenancy by the entireties modernly and change the form of joint title into a tenancy-in-common, or joint tenancy where that is allowed.

3) Modernly Conveyance by One Spouse Generally Prohibited

Modernly most States that still recognize tenancy by the entireties **prohibit spouses from conveying interests in a tenancy by the entireties without spousal consent**.

But under the common law a husband could unilaterally convey land held in a tenancy by the entireties. But if he did, it did not terminate the wife's "rights of survivorship" in the land. Then, if the husband died before the wife, she got the land back from the buyer. But if the wife died before the husband, the buyer kept the land.

4) Joint Partial Conveyance to Tenant-in-Common

A husband and wife holding land as tenants by the entireties may jointly convey a portion of the land to a third party who will become a tenant-in-common with respect to each of them while each spouse remains in a tenancy by the entireties between them. If no express provision is made otherwise HALF of the property will be conveyed to the tenant-in-common and the married couple will retain the other half.

> **For Example:** Bevis and his wife Buffy hold Blackacre as tenants by the entireties. They reconvey Blackacre to "Bevis, Buffy and Butthead." This would cause Butthead to take HALF the land as a tenant-in-common with respect to each of the others, and Bevis and Buffy are still tenants by the entireties with respect to each other holding the other half of

the land. If Bevis dies Buffy receives his share by the right of survivorship and continues to hold half the land as a tenant-in-common with Butthead.

5) Attachment by Creditors of One Spouse Generally Prohibited

Modernly most States prohibit creditors of one spouse alone from attaching land held by both spouses in tenancy by the entireties. But some States do allow a lien to be placed on the land. Where a lien is allowed it cannot be executed as long as the non-debtor spouse is alive, and if the debtor spouse dies first the lien is extinguished.

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G. Tenancy-in-Common

Tenancy-in-common is the modernly presumed form of concurrent estate in all States except between married couples in those States that continue to presume tenancy by the entireties. A tenancy-in-common interest has these characteristics:

1) **Unity of possession** is the only one of the "four unities" that must be satisfied, meaning that each tenant-in-common has a right to use all of the land, regardless of the size of the co-tenant's share of the land;
2) **No right of survivorship** is implied;
3) **No marriage requirement** applies;
4) Co-tenants can hold **unequal sized shares**;
5) The share of each co-tenant **can be attached** or seized by legal process;
6) Co-tenants **can alienate their shares** without the consent of the others; and
7) Shares can be **created at different times**.

1) Modern Presumption Opposite of Common Law

Modernly **tenancy-in-common** is recognized in every state and generally the **presumed form of concurrent estate.** The three situations when joint title will not be a tenancy-in-common are when the conveyance: 1) **expressly created a joint tenancy,** 2) was to a **married couple and satisfied the four unities in a State that presumes tenancy by the entireties,** or 3) was to **fiduciaries** holding the property for a beneficiary. This is **opposite the common law** which presumed a joint tenancy any time the four unities existed.

2) Exception: Interests Held by Fiduciaries

If two or more fiduciaries jointly hold property for the benefit of a beneficiary, the property is presumed to be held between them in joint tenancy if the four unities are satisfied.

3) No Right of Survivorship and Shares Freely Alienable

There is no implied right of survivorship with a tenancy-in-common and the shares of each co-tenant are freely alienable. Upon the death of any co-tenant in a tenancy-in-common, the ownership rights are distributed to the heirs of the decedent.

A person that buys, is given or inherits a share in a tenancy-in-common becomes a co-tenant with the other owners, enjoying the same share and rights as the previous co-tenant from whom they received their share.

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H. Joint Tenancy

Modernly a **joint tenancy** is a concurrent estate that **must be expressly created** in the language of conveyance that creates the joint interest. It has the following characteristics:

1) It can only be created if the **four unities** are satisfied;
2) **Titleholders can alienate their shares** without the consent of the others;
3) The share of each co-tenant **can be attached** or seized by legal process; and
4) It embodies a **right of survivorship** so that death extinguishes each co-tenant's share in favor of surviving co-tenants.

The "four unities" were explained above with respect to tenancy of the entireties. A joint tenancy is exactly like a tenancy of the entireties, as explained above, but for the following differences:

- There can be more than two joint owners;
- There is no marriage requirement; and
- Each share is freely alienable without consent from other co-tenant.

1) Joint Tenancy Not Presumed Modernly

The common law presumed joint tenancy, but modernly only about 40 States recognize joint tenancy at all and it is **NOT presumed**. Where joint tenancy is recognized **express language stating "joint tenancy with right of survivorship" is often required to create** one, and some courts hold that any ambiguity in the language, at all, will result in the creation of a tenancy-in-common instead of a joint tenancy. [12]

> **For Example:** At death Doofus' will says, "I give Blackacre to Bevis and Butthead **as joint tenants**." In most states this would NOT create a joint tenancy because it does not expressly say "with right of survivorship" or something equally specific.

If a deed providing for a joint tenancy with right of survivorship is conveyed in a State that does not recognize the form, it may be treated as concurrent life estates with the remainder of the first to die vested in the survivor in fee simple.

An **exception** to the general rule is that in States that recognize joint tenancy it may be presumed **when two or more fiduciaries hold property in trust** for the benefit of a third person.

[12] This is not always true. In California a deed that says the parties take their interests as "joint tenants" is sufficient to create a joint tenancy and the additional phrase "with right of survivorship" is seldom used.

2) Freely Alienable Creating a Tenancy-in-Common

Joint tenants can freely convey their shares during life (not at death because their shares are subject to the right of survivorship) and the new owners of the shares will be tenants-in-common vis-à-vis the other co-tenants. When a share held in joint tenancy is conveyed the joint tenancy is said to have been **"severed."**

When there are more than two joint tenants to begin with, the conveyance of any share leaves the original owners joint tenants as to each other, and tenants-in-common as to the new co-tenant.

> **For Example:** Huey, Louie and Dewey hold Blackacre as joint tenants. Huey sells his share to Tom. That leaves Louie and Dewey joint tenants with respect to each other and tenants-in-common with respect to Tom. If Louie dies Dewey takes his share by survivorship leaving Dewey with 2/3 and Tom with 1/3.

3) Modernly Conveyance to Self Allowed

Modernly titleholders can create joint tenancies for themselves and other co-tenants by direct reconveyance without resort to the "Straw Man" ploy required by the common law as was explained earlier.

4) States Split on Effect of Mortgage on Joint Tenancy

States are split on the effect a mortgage by less than all co-tenants has on the joint tenancy.

Lien Theory States. Most States follow the "lien theory" view that a mortgage on some joint tenancy shares does NOT sever them from the joint tenancy, so the right of survivorship survives the conveyance. But these States are divided on the effect this has on security interests, as explained below.

Title Theory States. Some States follow the "title theory" view that a mortgage granted by a joint tenant severs the share from the joint tenancy and terminates the right of survivorship. The mortgaged interest becomes an inheritable tenancy-in-common, and the mortgage holder can foreclose on the property to recover the outstanding debts of the conveying party.

> **For Example:** Bevis and Butthead own Blackacre as joint tenants in a **title theory state**. Bevis mortgages his interest and then dies leaving his wife Buffy as his sole heir. Buffy gets Bevis' share of Blackacre by inheritance in a title theory State because under the title theory view granting a security interest severs the joint tenancy. The lender can foreclose on Buffy's interest to recover Bevis' debt.

5) States Split on Effect of Death on Mortgages in Lien Theory States

There are two conflicting views in lien theory States on the effect death has on security interests (i.e. rights of mortgagee to foreclose and collect on a mortgage.) In some States the security interest **survives** the death of the joint tenant, and in other States the security interest **expires** with the death of the joint tenant.

For Example: Bevis and Butthead own Blackacre as joint tenants in a **lien theory state**. Bevis mortgages his interest and then dies. In a lien theory State Butthead gets Bevis' share by survivorship. But in some lien theory states the **security interest survives Bevis' death**, so the lender can foreclose against the one-half interest in Blackacre that Butthead got from Bevis. In other lien theory States the security interest expires.

6) States Split on Effect of Leases on Joint Tenancy

States are also split on whether leasing a share of a joint tenancy severs it from the joint tenancy. Most States hold that it does NOT. But any lease of a joint tenancy share is subject to the right of survivorship, so the lease is voided if the lessor (leasing co-tenant) dies.

7) Other Acts May Terminate Right of Survivorship

Many courts have held that various acts may terminate the right of survivorship and convert joint tenancies into tenancies-in-common.

- Some courts hold that if a joint tenant (not all joint tenants acting together) **enters into an agreement to sell their share** it is severed from the joint tenancy. So if the co-tenant dies before the sale is complete their heirs will inherit the sales proceeds.
- Almost all States hold that joint tenants who murder other joint tenants cannot take any share by right of survivorship. It effectively **converts the joint tenancy** share to a tenancy-in-common so the murdered co-tenant's heirs inherit their interest.

2. The Rights and Duties of Co-Tenants

Concurrent estates create certain rights and duties between the co-tenants.

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A. Fiduciary Duties Between Co-Tenants

Each co-tenant (concurrent owner) owes a **general duty of good faith** toward each other co-tenant. And co-tenants that receive their interests in the land at the same time through the same instrument (i.e. same will, deed or land sales contract) generally have a **fiduciary duty** toward each other.

As a result of the fiduciary duty between co-tenants, any co-tenant that **buys an additional interest** in the land (e.g. at a foreclosure sale) **holds it in trust** for the other co-tenants and they **may elect to contribute toward the purchase price** within a reasonable time so their shares in the land are not reduced.

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B. Right of Reimbursement for Ouster

Each co-tenant has a right to free use of the entire property, subject to the rights of the other co-tenants to do the same. So no co-tenant can be **prevented or otherwise refused permission to use** the land by other co-tenants. If this occurs it is called an **"ouster,"** and any co-tenant that has

been ousted from the land has a right to **recover the fair rental value of the land as damages** from the co-tenants that have caused the ouster.

Ouster generally **requires physical acts to prevent occupancy** because simple demands that co-tenants pay rent or get off the land are without any legal effect.

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C. Right to Rents and Reimbursement for Depletion

If any co-tenant **leases the land** to third parties the other **co-tenants have a right to shares of the net rent** receipts in proportion to their shares of the land.

Furthermore, if a co-tenant **depletes the value of the land** (e.g. by cutting and selling timber, mining coal, etc.) the other co-tenants have a right to be paid the **amount the land value is reduced.**

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D. No Right to Profits or Benefits Absent Ouster or Depletion

Each co-tenant has the right to freely use the land and **keep all profits and benefits** from the use of the land, other than 1) rental income from third parties unless there has been either 2) depletion or 3) reimbursement of fair rental value for an ouster.

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E. Right to Reimbursement for Necessary Expenses Only

Each co-tenant has a **right of reimbursement for necessary expenses that benefit co-tenants** (e.g. payments for taxes, insurance, mortgage debt and necessary repairs to the estate.) Some courts allow a **tenant with sole occupancy** only to be reimbursed for necessary expenses exceeding the rental value enjoyed from sole use of the land. Many courts will not allow a suit for reimbursement against co-tenants that are not occupying the land so the remedies of the co-tenant seeking reimbursement are limited to1) **deduction of expenses from rents received** from third parties OR 2) **recovery upon the sale or partition** of the estate.

But beyond necessary expenses co-tenants have **no right to reimbursement for other expenses or personal losses incurred in the use of the land.**

> **For Example:** Bevis and Butthead own Blackacre as joint tenants. Bevis farms the land while Butthead lives in the city. Some years Bevis makes profits and some year he has losses. If Bevis has not 1) rented the land to others, 2) depleted the land or 3) ousted Butthead, Bevis does not owe Butthead any share of his profits. And if Bevis' losses are not the result of necessary expenses (taxes, etc) exceeding the net value of his use of the land, Butthead does not have any liability for any part of them.

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F. No Right to Reimbursement for Improvements

Co-tenants have NO right to reimbursement for the cost of improvement to the estate, but upon sale or partition will be given credit for the amount the improvements increased property value.

3. Distribution of Property upon Termination of Marriage

Modernly married couples can usually hold concurrent estates in the same forms as unmarried people, but regardless of title form, each State has rules for the distribution of marital property upon **divorce** or **death**.

Further, most States have enacted **"homestead" laws** to shelter personal residences from creditor judgments, and these protections have particular application to the **protection of surviving spouses** from claims against a deceased spouse's estate.

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A. The Minority Community Property Approach

A few States follow the "community property" approach for distributing property to spouses upon the termination of a marriage.[13] In addition, at least one State follows the provisions of the Uniform Property Act which embodies many of the community property concepts.[14] None of those States recognize tenancy by the entireties, so all jointly-held property in community property States is usually held as tenants-in-common, joint tenants or "community property".

Community property laws vary significantly, and in answering "real property law" questions on Bar Exams the "majority common law view" explained below should usually be followed. If State Bar Exams pose "community property" questions the laws of the particular State (e.g. California) should be used. Nailing the Bar's "Simple California Community Property Outline" gives a complete and concise explanation of that body of law, and Nailing the Bar's "How to Write Essays for California Community Property Law School and Bar Exams" explains how to prepare for those exams. Information on those publications can be found at www.PracticalStepPress.com.

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B. The Majority Common Law View

Most States (about 40) do not use the community property approach, and these are generally called the "common law" States. While States vary they follow the same general approach, and the law tested is explained here.

1) Common Law Rules of Dower and Curtesy Near Abandoned

The old common law rule called **dower** continues to be followed in only about six jurisdictions.[15] Two of those apply dower only to widows (i.e. surviving wives) and apply a different common law rule called **curtesy** to widowers (i.e. surviving husbands). The other four apply dower rights

[13] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.
[14] Wisconsin.
[15] Arkansas, District of Columbia, Kentucky, Ohio, Michigan and Iowa.

to both widows and widowers and have abandoned curtesy as a separate rule. In addition to the States that still recognize dower and curtesy in general, Virginia recognizes dower and curtesy rights that arose before 1990.

Dower Rights of Widow. Under the common law the husband could hold title to all real property in his own name and had the power to sell the land without the consent of the wife. Further, a widow was not an intestate heir of the deceased husband and all of the deceased husband's property went to his oldest son.

To prevent widows and younger children from becoming indigent **dower rights** preserved for a widow a **life estate in <u>one-third</u> of all real property owned by the husband** during the marriage that **would have been inheritable by the wife's issue**. Dower rights did not apply to personal property (e.g. money.) But they did apply to property the husband acquired <u>before</u> marriage.

Curtesy Rights of Widower. Common law also provided that a widower (i.e. surviving husband) was not an intestate heir of a deceased wife. But the surviving husband received a **life estate in <u>all</u> land owned by the wife in fee simple or fee tail** during the marriage **IF children were born alive to the wife during the marriage.**

> **For Example:** Buffy owns Blackacre when she marries Bevis, and a month later she dies. Her will gives everything she owns to Butthead. In a State with curtesy rights Bevis gets NOTHING because <u>no children were born alive during the marriage</u>.

Continuing Importance of Dower Rights. Although dower and curtesy have been abandoned in most States, they still are important in some situations. Dower rights may still exist on land in the dower States that a client owns, is considering buying, or that the client's deceased former spouse owned during marriage. They can cloud property titles in the dower States so it is important that **both spouses sign every deed every time any married person sells land.**

Also, if a client was ever married to a person who 1) is deceased and 2) <u>owned real estate in a dower State during the marriage</u> there may be a valid claim against the land.

2) Modernly Elective Shares Protect Surviving Spouse

Over 40 common law jurisdictions protect surviving spouses from being "disinherited" in the will of a deceased spouse through **"elective share statutes."**[16] Elective share statutes allow a surviving spouse to renounce or disclaim the testimonial gift in a deceased spouse's will and elect instead to take a statutory share (usually one-half or one-third) of the **deceased spouse's property at death,** including **personal property** and **property owned by the spouse before marriage**. In most States **the length of the marriage is not considered**.

Some States also provide that intra vivos conveyances can be set aside and property recovered if the intent of the transfer was to circumvent or frustrate the elective share statutes. Likewise, some States apply elective share statutes to funds controlled by the decedent through trusts and similar arrangements that might frustrate the intent of the elective share provision.

[16] In dower states the surviving spouse may have a claim to both dower rights and elective share rights.

The elective share statutes only apply to testamentary gifts. If deceased spouses die intestate, the various State rules of intestate distribution apply instead.

3) Equitable Distribution in Divorce

Modernly all of the common law States follow the **principal of equitable distribution** of marital property, **property acquired during marriage from the earnings of the parties**, in divorce. This generally means an **equal distribution** of the marital property, but the divorce court has **substantial leeway** to decide what is equitable based on the duration of the marriage, the age, health, earning capacity and wrongful conduct of the parties, and so forth.

4) Abandoned Common Law Rules

Many early common law rules are now abandoned. The following are generally abandoned ideas. The various odd terms are "law school trivia" that is not tested, so don't bother memorizing it.

- Under early common law **a married woman ceased to be separate legal person.**
- Under the doctrine of **"coverture"** the wife's personal property became the husbands**.**
- Under the doctrine of **"jure uxoris"** the husband controlled the wife's real property.
- Property **acquired during marriage** was held in **tenancy by the entireties**.
- **Husbands could sell all marital property** but not end the wife's right of survivorship.
- **Husbands could hold title to all property** and keep it in a divorce.
- **Courts would order husbands to pay alimony** after divorce. Most States have now adopted the concept of spousal support and eliminated alimony. It has much the same purpose and effect but is conceptually different.

Chapter 6: Non-Freehold Estates

A non-freehold estate is a **leasehold**, an estate **for a period of time** granted to a **leaseholder** or **tenant** ("lessee") by the **landlord** ("lessor".) Leaseholds are usually granted in exchange for rent. But leaseholds create a **landlord-tenant relationship** and give tenants **rights of exclusive occupation** that are protected by **eviction statutes.** That is what distinguishes them from "licenses" (e.g. rental of a motel room) that only create a temporary "innkeeper-guest" relationship.

There are four basic types of leaseholds:

1. A **tenancy at will**: A tenancy that can be **terminated by either party at any time**;
2. A **tenancy for years**: Any leasehold for **one set time period** (even less than a year);
3. A **periodic tenancy**: A tenancy for **repeated time periods** (e.g. "month-to-month"); and
4. A **tenancy at sufferance**: A tenancy **until the landlord decides to evict or renew**.

1. The Creation and Character of Leaseholds

The main differences among the various types of non-freehold estates (leaseholds) are the **notice requirements for terminating or renewing** the leasehold for another period of time.

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A. The Tenancy at Will

A lease that can, by its terms, be **terminated at any time by both parties** is a **tenancy at will**. Some courts hold that any lease that can be terminated by even **one party** at will is a tenancy at will. But some courts hold that tenancies at will must be for an **indefinite period** of time.

There is no notice requirement for terminating a tenancy at will, and they **terminate automatically** if the **lease is assigned** or **either party dies**. Most courts hold that **subleases** do not terminate tenancies at will. Assignment and subleasing will be explained below.

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B. The Tenancy for Years

A **tenancy for years** or **estate for years**, despite its name, is a lease for **any fixed or computable period of time**, whether more or less than a year. It does not matter if the lease that can be **terminated by conditions outside the parties' control** as long as it cannot be terminated in a way that makes it a **tenancy at will** as explained above.

> **For Example:** Bevis leases Blackacre to Butthead for six months under an agreement that lets Bevis terminate the lease at his option. Most courts hold this is a tenancy for years because it is for a **fixed time period**, even though Bevis can terminate it.

A tenancy for years terminates at the end of the lease period **without any notice requirement**, and if a tenant holds over (does not vacate) at the end of a tenancy for years it creates a **tenancy at sufferance.** The tenancy at sufferance is explained below.

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C. The Periodic Tenancy

Periodic tenancies are leases that keep repeating, one time period after another (e.g. month-to-month, year-to-year) until one of the parties gives the other a proper notice of termination.

Periodic tenancies **are presumed** when leases providing for periodic rent payments don't specify the length for the lease. They can also be created by **express agreement**, as the **result of a holdover** from a tenancy for years (as explained above), or when a **tenancy for years is void by statute** (e.g. it violates the Statute of Frauds.)

1) Proper Notice is Needed to Terminate Periodic Tenancy

Periodic tenancies **automatically keep repeating until proper and timely notice to terminate** is give by one of the parties. To be proper the notice must state that it applies at **the end of a specific rental period**, and to be timely it must give the **legally required advance notice**.

Notice of termination for a year-to-year lease must be give **at least six months in advance**, and notice of termination for month-to-month and week-to-week leases must be given **at least one full period in advance,** unless the lease agreement expressly specifies otherwise.

> **For Example:** Bevis leases Blackacre to Butthead on a year-to-year basis automatically renewing each September 1. On April 1, 2000 Bevis gives notice that he will not renew the lease for the year beginning September 1. This is not valid notice because it did not give Butthead adequate notice. He had a right to <u>at least six month's notice</u> so he had to be notified by March 1. Butthead now has a right to stay until September 1, 2001.

2) Most States Allow Tardy Notice to Apply to Next Period

Under common law tardy (late) termination notices were void and without any effect, but most States now hold they are effective for terminating a lease at the end of the <u>next</u> rental period.

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D. The Tenancy at Sufferance

Tenants that hold over (don't leave) at the end of tenancies for years or periodic tenancies become **tenants at sufferance.** Landlords have the right to **elect** to either 1) **evict** tenants at sufferance, or 2) **bind them** to a new lease. The landlord can always elect to evict a holdover tenant, but the landlord can also bind them to a new lease by giving them proper notice.

At common law landlords could bind holdover tenants to new leases if they held over any part of the land, just one day, and for any reason. But modernly landlords generally can only bind tenants that hold over 1) all the land, 2) willfully for a 3) substantial period 4) without justification.

1) Notice Needed if Rent Not Paid

To bind holdover tenants to new leases **landlords must give notice** to the tenants unless there is an exchange of rent. The notice can be oral, and once given the notice is **irrevocable** so landlords are barred from taking any further action to evict.

But holdover tenants are automatically bound to new leases, and no notice from the landlord is necessary, if the tenants **pay rent** and the landlord accepts it. Then the parties are automatically and **irrevocably bound** to a new lease, and the landlord's **right to evict is waived**.

2) Holdovers Usually Bound to Periodic Tenancy

Most courts hold that holdover tenants are bound to **a periodic tenancy** with periods equal to **how often they paid rent** under the prior lease, even if the prior lease was a tenancy for years. But in some courts holdover tenants are bound to new leases exactly like the previous ones.

Landlords only have a legal right to bind holdover tenants to new leases at the **same rental rate** as the previous lease. But if holdover tenants **consent to pay more or start paying more** in response to the landlord's demands for higher rent, that binds them to pay a higher rent.

3) Negotiating Landlords Waive Right to Bind

Landlords that negotiate with holdover tenants during the holdover period **waive the right to bind** the tenant.

> **For Example:** Bevis leases Blackacre to Butthead under a one year lease under which Butthead makes one annual payment. As the end of the lease Butthead holds over and Bevis negotiates the terms of a new lease with him. Bevis cannot suddenly bind Butthead to pay rent for another full year because he **waived that right by negotiating a new lease during the holdover period**.

2. The Landlord's Rights and Duties

About the landlord's only right is **to collect rent** from tenants. Under the common law the right to collect rent was **independent from the landlord's duties** to the tenants, so tenants had to pay rent even if the landlord was in breach and vice versa. Modernly the landlord's right to collect rent is increasingly viewed as dependent on the landlord's concurrent performance of duties.

Landlords have **three specific duties** under the **landlord-tenant relationship**:

1. An **implied warranty** (or covenant) **of quiet enjoyment**;
2. An **implied warranty of habitability** in the case of residential dwellings; and
3. A limited duty of **due care** under application of general tort law;

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A. The Implied Warranty of Quiet Enjoyment

Under the **implied warranty** (or covenant) **of quiet enjoyment** landlords have a duty to give tenants possession and use of property free from **unreasonable interference** by:

1. People with **paramount claims** to the property;
2. **Landlord** and landlord's agents;
3. Tenants and people in **common areas** controlled by the landlord.

1) Interference by Paramount Title Claim

Landlords that lease property make an implied promise that no one with **superior legal rights** will **unreasonably interfere** with the tenant's possession and use of the property.[17]

- **Claims by Owners.** Landowners always have paramount claims to tenants (as when someone poses as the "landlord" and leases land without legal authority.)
- **Future Estates.** Existing future estates always have paramount claims to tenants as when landlords only hold life estates or defeasible estates subject to termination.
- **Claims by Prior Lessee.** The first tenant to lease has a paramount claim to all subsequent tenants that lease the same property.
- **Prior Mortgagees.** Existing mortgagees have paramount claim to all tenants that subsequently lease the property.

Tenant's Remedies. Tenants that discover a paramount claim after leasing but **BEFORE possession** can always **terminate the lease** if it is likely to interfere with possession, and some courts hold they may terminate the lease even if interference is unlikely.

Tenants that discover paramount claims **AFTER possession** cannot terminate the lease until the paramount title holder **demands possession or otherwise takes action to evict**.

2) Interference by Landlord and Landlord's Agents

The landlord may not act directly or through an agent to unreasonably interfere with the tenant's use and possession of the leasehold. If a landlord physically prevents the tenant from using the property at all, it is an **actual eviction**. In some States a landlord's use of force or threats to evict a tenant from the property is codified as a **forcible entry**.

If the landlord prevents the tenant from using a substantial part of the property it is a **partial eviction**, and in some States this is codified as a **forcible detainer**. However, the scope of the partial eviction must be substantial rather than insignificant or de minimus.

If a landlord simply interferes so much with the tenant's use of the property that the tenant abandons the premises it is called a **constructive eviction**.

[17] There is no "implied warranty" when a tenant leases with **actual knowledge** superior claims exist.

3) Interference by Tenants and People in Common Areas

Traditionally the landlords' only duty to prevent people (except the landlord's own agents) from violating the tenant's right to quiet enjoyment was limited to two situations:

1. The landlord has a duty to prevent **lewd or immoral** acts by tenants; and
2. The landlord has a duty to **control people in common areas**.

But the **modern trend** is to hold landlords liable for failing to prevent **other tenants** from **violating their own leases** in ways that deny other tenant's their right to quiet enjoyment.

> **For Example:** Bevis rents Butthead an apartment under a lease that prohibits loud noise. Butthead throws wild drunken orgies. Bevis has a duty to act under both traditional and modern views because the orgies **violate his lease** and are **lewd.**

4) Tenant's Remedies for Eviction

Actual Eviction. A tenant that has been actually evicted from the property by the landlord (e.g. by changing locks) or by the demands or threat of a party with paramount title has **no further obligation to pay rent,** the lease is **terminated**, and the tenant may seek **damages**.

Partially Eviction. Most courts hold tenants that have been partially evicted by the landlord from a substantial portion of the property can **stop paying rent completely** and still occupy the rest of the property. A minority holds that a tenant must pay **proportionate** rent if the partial eviction does not substantially deprive the tenant of the use of the property.

Constructive Eviction. Tenants that **actually vacate** the property because of the landlord's acts or failure to act can **terminate the lease, stop paying rent**, and **seek damages** but **only if they actually vacate** the premises **at the time** of interference or shortly thereafter.

5) Tenant's Remedies when Not Evicted

Tenants that are not partially evicted and don't actually vacate must **continue to pay rent** but may **seek damages** for the **breach of the implied covenant of quiet enjoyment**.

> **For Example:** Terri, a totally disabled single mother, paid below-market rent for a "Section 8" apartment. FPI Management, Inc. took over, and FPI's employees turned Terri's water off over 40 times in three months to force her out. Terri wouldn't leave. Instead, she brought an action against FPI for damages for breach of quiet enjoyment.[18]

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[18] True story; I represented Terri. She offered to settle for $1500. FPI's insurance carrier, Fireman's Fund, refused. Its attorneys vowed to teach Terri a lesson. Terri won in arbitration. The defendants demanded trial de novo. It went to a jury trial. Terri got ten times more, and Fireman's Fund's total costs exceeded $115,000. Terri learned a lesson. She learned how stupid Fireman's Fund insurance company is.

B. Implied Warranty of Habitability for Dwellings

Under the common law tenants were required to maintain leased property and landlords had no duty to make property habitable. But modernly the **implied warranty of habitability** usually requires landlords to maintain **habitable dwellings**.

The implied warranty of habitability **applies only to dwellings** in almost every State.[19] Courts are split on the types of dwellings covered by the implied warranty of habitability. Some courts apply it to **all dwellings**, others apply it only to **urban** dwellings or dwellings subject to **housing codes**, and some jurisdictions only apply it to **apartments** and other **multiple unit dwellings.**

The implied warranty of habitability is violated if the landlord allows the condition of a dwelling to deteriorate below minimum standards **AFTER the tenant assumes occupancy** unless the tenant caused the condition. When a tenant causes a dwelling to be uninhabitable the landlord has no duty to repair the condition.

Habitability standards may be set by statute, and the usually require dwellings to be free from vermin, hot and cold running water, electricity, heat, cooking facilities, watertight construction, and sanitary plumbing. In addition, violations of health and safety codes usually violate minimum habitability standards, but violations of other building code do not necessarily make dwellings "uninhabitable."

1) Not When Catastrophic Events Beyond Landlord's Control

Generally, landlords have NO duty to correct damage caused by **catastrophic events**, such as storms and fire, or destruction by third parties like burglars.

2) Courts Split When Defects Exist at Beginning of Lease

The implied warranty of habitability is always violated by **concealed conditions** when the tenant assumes occupancy. Concealed defects in the property are called "latent defects."

But courts are split on whether the implied warranty of habitability is violated when conditions in a dwelling are known or should be known to tenants when they assumed occupancy. These are called "patent defects." Some courts hold that tenants **impliedly waive** the implied warranty of habitability if they assume occupancy of a dwelling with patent defects. Other courts hold that any such **waiver is invalid** whether it is express or implied. Yet other courts hold a **waiver is invalid if the defect threatens health or safety.**

All courts hold there is **no waiver when landlords expressly or impliedly promise they will repair** patent defects to induce the tenant to take possession.

[19] Statutes may provide otherwise, of course, but a 1988 case in Texas may be the only one where a court imposed an implied warranty of habitability on commercial property.

> **For Example:** Bevis rents a cottage to Butthead saying, "It's only $200 a month 'cause it ain't got no heat." Butthead moves in and then refuses to pay rent because the house has no heat. Some courts would find that he waived the implied warranty. Other courts would hold that Bevis has a duty to repair after Butthead takes possession.

3) Remedies of Tenants When Dwellings Uninhabitable

Catastrophic or Third-Party Damage. Generally tenants may **terminate leases and vacate** if dwellings are uninhabitable because of catastrophic events or acts by third parties (not the tenants). But if the tenants stay in possession they must continue to pay rent as promised.

Pay and Deduct. State laws often let residential tenants who 1) give landlords **adequate notice** of defects that 2) the landlords **fail to repair** within a reasonable time 3) **pay** for the repairs themselves and 4) **deduct the expense** from future rent payments due under the lease. This is called **"pay and deduct."** Generally, a tenant in **arrears** on rent may NOT deduct repair expenses from past rents owed, and can only deduct them from future rent as it comes due. And there are limits on the amount a tenant may pay and deduct where the right is set by statute.[20]

Termination and Damages. Residential tenants may always **terminate leases and vacate** if they have 1) given **adequate notice** of 2) **material defects** that make dwellings uninhabitable, and 3) the landlord **fails to repair**. If the defect was **not waived** by the tenant the tenant may also **seek damages** from the landlord for failure to repair. The damages would be for reimbursement of rent for the period the dwelling was uninhabitable (prior to vacating), moving expenses and other expenses necessary to get alternative housing.

Injunction, Rent Abatement and Rent Withhold. Tenants that do not terminate the lease and vacate may 1) seek an **injunction** to force the landlord to repair the property, 2) seek a **rent abatement**, and 3) in most jurisdictions may **withhold rent** until the landlord completes repairs.

Withheld rent almost always must be held in escrow pending judicial resolution. When several tenants combine to withhold rent it is called a **rent strike** that may be authorized by statute subject to court oversight. Rent placed in escrow will be allocated between the landlord and the tenants at the resolution of the dispute.

The court may resolve the dispute by ordering the landlord to **repair and reimburse** the tenants for past rents exceeding the **fair market value** of the dwellings given their condition. Alternatively the court may order the landlord to **reimburse tenants and reduce future rents** to reflect the substandard condition of the property without repairs.

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[20] In California a tenant can only 'pay and deduct' up to one month's rent, twice in any 12-month period.

C. Landlord's Duty of Due Care Based on Premises Liability Theory

The duties of an occupier of land (both landlord and tenant) based on **premises liability** is usually studied (and tested) in classes on tort law, not real property.[21] It will only be touched on here in summary fashion Landlords and occupiers of land have the following duties:

1. Duty of due care to PEOPLE OFF THE LAND.
2. Duty to inspect and repair in COMMON AREAS under the landlord's control.
3. Duty when LEASING FOR PUBLIC USE. A landlord who leases land to a tenant that will allow **public admission** has a **duty to inspect and repair** at the time of lease **unless he reasonably believes** the necessary precautions will be taken by the tenant before the public is admitted.
4. Liability for NEGLIGENT REPAIRS. A landlord that **negligently repairs** property is directly liable to anyone injured as a result.
5. Duty to MAKE PROMISED REPAIRS. A landlord that **promises to repair** leased property **assumes a duty** to do so.
6. Duty to disclose CONCEALED DANGERS. A landlord has a duty to disclose **known, concealed, dangerous conditions** at the beginning of the lease and afterward until the tenant has had time to discover the dangers.

Initial Duty to Tenant: The landlord has a duty at the **beginning** of the lease to reveal **known hidden dangers** on the land to the tenant, but after that there is no general duty to **inspect** the land for hidden dangers.

Public Use Exception: The landlord has a duty at the **beginning** of the lease to **reasonably inspect** the land for hidden dangers if the landlord knows the **tenant will allow the general public to enter** the land. This generally would apply to a lease of **commercial property**.

Common Areas: The landlord has a continuing duty to **reasonably inspect common areas**.

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D. Landlord Duties Based on Privity of Contract

The parties to a lease have general rights and duties based on contract principals, and some rights and duties are peculiar to contracts for the lease of real property.

1) Lease Agreements for Known Illegal Purposes are Void

Lease agreements for purposes that **both parties know are illegal or violate building, health and safety codes** will generally be **void**. But courts may partially enforce rental agreements that are only partially illegal, where the illegality is incidental, or where one of the parties is less guilty of illegal intent.[22]

Of course, if **only one of the parties knows** that the property is being rented for illegal purposes the agreement may be **voidable** by the other, innocent party on a claim of mistake or fraud.

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[21] If your real property class will be tested on this use Nailing the Bar's "Simple Torts Outline." See www.PracticalStepPress.com for details.

[22] Parties that are "equally guilty" are said to be **in pari delicto** and the court will help neither of them.

2) Leases Subsequently Illegal Not Generally Voided

Most courts hold that lease agreements for purposes that **subsequently become illegal** as a result of changes in the law **will NOT be voided** and tenants must continue to **pay rent** UNLESS the property has **no other feasible use**. A minority view is that the agreement is terminated.

3) Leases Generally Not Voided by Frustration of Purpose

Most courts hold that lease agreements are not terminated by **frustration of purpose** or **commercial impracticability** unless 1) **both parties knew** the tenant's purpose for renting the property, and 2) events that were **not reasonably foreseeable** have 3) rendered the tenant's purpose **totally or almost totally frustrated.**

4) Contractual Duties Are Not Escaped by Property Sale

Landlords that enter into lease agreements with tenants have duties to them based on **privity of contract** and generally cannot escape those duties by selling the property to a new owner. [23]

But a landlord that buys property subject to an existing lease and then sells it again, without entering into any new contract relationship with the tenant, has no further duties to the tenant because they no longer share either privity of contract or privity of estate with the tenant.

5) New Landlords Takes Possession Subject to Lease

New owners of leased property take it **subject to the lease** and assume the duties of a landlord based on **privity of estate** with the tenant.[24] The lease agreement may also have created **covenants that run with the land** and the new owner takes possession subject to those covenants. Covenants running with the land will be explained in detail later. But the new landlord's duties are only based on real property law, not contract law, unless the new owner expressly agrees to assume the duties of the original contract via a **delegation**.

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E. Landlord's Remedies

When tenants breach the lease agreement the landlord's remedies are 1) to charge against **security and damage deposits**, 2) **accelerate rents** due, 3) **terminate** the lease and 4) **evict**.

State rules vary for **security and damage deposits**. Deposit amounts may be limited by law, landlords may have to put them in trust accounts, and interest may have to be paid on deposits.

Lease agreements for tenancies for years often contain **"acceleration clauses"** that let landlords demand immediate payment of all future rent payments when tenants fall into arrears. If the tenants cannot pay the landlord has grounds for seeking a damage award of all future rents instead of having to wait until the end of the lease term before seeking damages.

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[23] "Privity of contract" means that by entering into a **contract relationship** the parties assume legal duties.
[24] "Privity of estate" means that the **landlord-tenant relationship** creates legal duties between the parties.

The rules for normal lease agreement termination were explained above. But lease agreements also generally provide that landlords may immediately **terminate tenancy if tenants breach** by failing to pay rent or otherwise violating the terms of the lease agreement. If the tenant does not vacate they become a holdover tenant, and the landlord may elect to evict as explained earlier.

1) Eviction

Eviction procedures are strictly controlled by State statutes. Often statutes give tenants additional time in which to pay rent due.

When landlords intend to evict tenants for failure to pay rent or any other reason they must give the tenants proper notice as provided for by statute, and the tenants have a right to request a trial.

2) Exception: No Retaliatory Eviction

It is generally illegal for a landlord to evict tenants in retaliation for availing themselves of their legal rights. This includes bringing **legal actions** for breach of the implied warranty of quiet enjoyment or the implied warranty of habitability. Also it includes **complaints** about violations of health, safety and building codes, the use of **repair and deduct** and **withholding rent** in escrow in the manner provided for by statutes.

3) Exception: Eviction From Low-Income Housing

Landlords cannot generally evict tenants from low-income housing projects funded from **tax-exempt sources**, or tenants otherwise receiving **federal rent subsidies** (e.g. the federal "Section 8" program) unless the landlord can prove at a hearing that the tenant

1) failed to pay rent, 2) substantially violated lease agreements, or 3) or used the dwelling for illegal purposes including use of illegal drugs [25]

4) Self-Help and Forcible Eviction Usually Illegal

In many if not most States **self-help eviction is prohibited** and landlords MUST use only the legal process to evict tenants. Some States allow landlords to **peaceably** evict tenants (by changing the locks perhaps) while the tenant is absent or otherwise where there is **no touching of the tenant or the tenant's possessions**. A few States allow landlords to use **reasonable** force (by removing possessions in the tenant's absence, perhaps.)

A landlord that **unlawfully evicts** a tenant may be liable in tort and also face criminal penalties.

[25] Generally see 42 U.S.C. 1437f.

5) Surrender and Abandonment by Tenant

Tenants may abandon the property without notice, and if a landlord that believes a tenant has abandoned many States allow the landlord to send the tenant a "notice of belief tenant has abandoned." If the tenant does not then deny abandonment in a timely manner the landlord may then treat the property as abandoned without being accused of trespassing or "wrongful eviction."

When the tenant has abandoned, the landlord has three possible courses of action in many States:

1. **Leave Empty and Sue**;
2. **Accept Tenant's Surrender**; and
3. **Re-let for the Tenant**.

Leave Empty and Sue. Many States let landlords **leave abandoned property vacant and sue** the tenant for rent as it comes due. A growing minority of States does not allow this, and in those States the landlord has a **duty to mitigate** by trying to rent the abandoned property.

Where landlords are allowed to leave the property vacant and sue, the suit can only be for **past** unpaid rents and not for rents not yet due. This makes this approach unattractive.

Acceptance of Tenant's Surrender. Landlords may accept the tenant's surrender of the property in all States, but then the **tenant has no further duty to pay rent**. A **"surrender and acceptance"** can be expressly declared by the landlord, and it is implied when landlords remove the tenant's remaining belongings or if they enter the property to do major alterations. But entry of the property only to secure it (e.g. from vandalism) does not imply surrender and acceptance.

Re-Renting for Tenant. Landlords may **re-let** abandoned property to new tenants on behalf of former tenants in all States. Most States require the landlord give former tenants **notice of intent to** re-let or else a surrender and acceptance is implied. But no notice is required in States where a landlord has a **duty to mitigate.** Landlords that re-let may keep <u>all</u> rents collected, even if they exceed rents due, and the former tenants remain <u>liable for any rent deficiencies</u>.

3. The Tenant's Rights and Duties

The tenant's basic rights and duties are:

1. A right to **quiet enjoyment**,
2. A right to use the property for **all legal uses** not expressly prohibited by the lease,
3. A right to **pursue legal remedies** without retaliation,
4. A right to a **habitable dwelling** (if the lease is for a dwelling),
5. A duty to **pay rent** and act in the manner agreed in the lease agreement,
6. A duty to **avoid waste**, and
7. A duty to **use the property reasonably**.

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A. Tenant's Duty to Pay Rent

As explained above, tenants generally have a duty to pay rent **except** for the following:

1. **Illegal** agreements are void if both parties knew they were illegal.
2. **Subsequent Illegality** if it leaves **no feasible alternative use.**
3. **Frustration of Purpose** if **both parties knew** was tenant's intent.
4. **Actual Eviction** if caused by **landlord** or party with **paramount title**.
5. **Partial Eviction** from substantial part of property if caused by landlord.
6. **Constructive Eviction** if caused by interference
    a. by **landlord** or **others landlord had a duty to control,**
    b. by **catastrophic events or damage caused by third parties,** or
    c. because **residential property is uninhabitable** due to landlord's failure to maintain.
7. **Pay and Deduct** if tenant **in possession** of dwelling must pay for necessary repairs.
8. **Rent Withhold** if into escrow by tenant **in possession** as provided by statute.

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B. Tenant's Duty to Repair and Avoid Waste

The tenant has a legal duty to avoid waste. Waste was explained previously in Chapter 2 with respect to duties that a life tenant owes a remainderman, and with respect to the duties the holders of defeasible estates owes to the holder of the future estates implied. Generally:

- All tenants have a **duty to avoid damaging** the property.
- All tenants have a duty to **repair damage caused by their own acts**.
- Commercial tenants have a **duty to maintain and make minor repairs.**
- Residential tenants generally **duty to maintain and notify but NOT repair dwelling.**
- Tenants have **NO duty to repair major structural damage** caused by forces beyond their control.

Where there is an implied warranty of habitability, tenants renting dwellings generally have a **duty to maintain the dwelling and notify the landlord** of needed repairs.

Where there is no implied warranty of habitability (e.g. rural residential dwelling, warranty waived, etc.) the tenant has the same duty to repair as a commercial tenant.

A **commercial property tenant has a duty to all minor repair damage** to the property that occurs, regardless of the cause (not, of course, damage caused by the landlord).

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C. Tenant's Duty to Use Property Reasonably

Usually lease agreements require tenants to **obey tenant rules.** Beyond that, tenants have implied duties to use the property in a legal and reasonable manner.

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D. Tenant's Rights and Duties Regarding Fixtures

A fixture is personal property that has been attached to leased real property. A tenant has a right to attach fixtures that are **reasonably necessary** for the tenant to use the leased property in the manner that had been contemplated by the parties at the time of the lease.

Other than reasonably necessary fixtures, it is **waste** for tenants to attach fixtures that will **substantially and permanently change** the nature of real property, even if property values are increased.

Courts are split on the right of tenants to remove fixtures at the end of a lease. Some Courts, especially older ones, hold tenants may remove fixtures if they were installed **solely for the tenant's use**, with **intent to remove** them at the end of the lease. Other, more recent Courts, hold there is only a right to remove fixtures **if the premises can be restored to the former condition**.

If tenants are allowed to remove fixtures they must do it in a **timely manner** at the termination of the lease or they become the landlord's property. For a **tenancy of years** fixtures must be removed no later than the end of the lease. For all other tenancies fixtures must be removed within a **reasonable time after termination**.

Trade fixtures may always be removed by a tenant unless removal would cause **clear damage** to the landlord. Trade fixtures are fixtures used by a tenant in carrying on a trade or business. But after removing trade fixtures tenants must restore the property to substantially the original condition or the landlord has a right to damages.

Tenants must repair all damage caused by attachment of fixtures or landlords have a right to damages.

4. Subletting and Assignment of Leases

The law favors free alienation of property. So both the landlord and the tenant are free to convey their interests in a leasehold unless the lease agreement expressly forbids it.

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A. Subleases

A **sublease** is an agreement between an original tenant and a third party (a "sub-tenant") that allows the sub-tenant to occupy either 1) **part of the land** or 2) **all or part of the land for a shorter period of time that remains on the lease** between the original tenant and the landlord.

After a sublease the original tenant **remains in a landlord-tenant relationship** with the landlord under the **original lease agreement**, but also is in a **separate landlord-tenant relationship** with the sub-tenant under a **second sublease agreement**. The original tenant and landlord continue to have duties to each other based on both privity of contract and privity of estate. And the original tenant and sub-tenant also have duties to each other based on privity of contract and estate.

But the sub-tenant is only responsible to the original tenant and has **no duties to the landlord**, UNLESS the sublease agreement between the original tenant and the sub-tenant makes the

landlord an **intended third party beneficiary**, but that is usually not the case. So generally the landlord cannot seek damages from the sub-tenant.

The following diagram shows the landlord-tenant and contractual relationships between the landlord (L) and the original tenant (OT) and the separate landlord-tenant and contractual relationships between the original tenant and the sub-tenant (S):

L↔OT ↔S

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B. Lease Assignments

A **lease assignment** is a conveyance of all rights and duties a tenant has under a lease agreement to a third party (an "assignee".) It necessarily conveys **all the land for all the time remaining in the lease.** It just transfers the original agreement and there is no second rental agreement between the tenant and assignee.

Once **lease assignments are accepted by assignees** they have all of the rights and duties remaining under the lease agreement as if they were the original tenant.[26] The assignee steps into the shoes of the tenant and has a direct landlord-tenant relationship with the landlord, and the original tenant no longer has a landlord-tenant relationship with anyone.

By accepting a lease assignment the assignee incurs primary contractual liability to the landlord under the original lease agreement between the original tenant and the landlord, but the original tenant retains secondary contractual liability under the lease agreement.

If an assignee breaches the lease the landlord's primary remedy is damages from the assignee and secondarily from the original tenant for breach of contract. If the landlord collects damages from the original tenant, the original tenant has a right to seek indemnity from the assignee.

> **For Example:** Larry the landlord rents a suite of law offices to Orville the original tenant for a five year period. Orville then assigned the entire lease for the remaining lease period to Alan the assignee, and **Alan accepts** the assignment. If Alan fails to pay the rent to Larry, Larry can sue Alan directly. And Larry can also sue Orville because he was the original promisor in the lease agreement. But if Orville has to pay Larry damages he has a right to indemnity from Alan.

The following diagram shows the direct landlord-tenant relationship between the landlord (L) and assignee (A), the secondary contractual right of the landlord to seek damages from the original tenant (OT), and the contractual right of the original tenant to seek indemnity from the assignee:

L↔A
↓ ↑
OT

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[26] If the "assignee" does not accept the lease the assignment is not effective, and they are not bound.

C. Only Express Provision Can Prevent Assignment or Sublease

Since the law favors free alienation of property, lease terms that prohibit subleasing or assignment will be strictly construed. Only an **express condition** can prevent a lease from being assigned or subleased. And to be fully effective the lease terms must expressly state that any assignment or sublease is **void** or **null** or that any attempt to assign or sublease will **terminate** the agreement. Otherwise any assignment or sublease is still valid, even if it breaches the lease. But the landlord can only recover damages if injury is actually suffered.

Further, if a lease only prohibits assignment it can be subleased, and if the lease only prohibits a sublease it can be assigned.

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D. Lease Provisions Requiring Landlord's Consent to Assignment

A lease may expressly prohibit assignment without the landlord's consent, most often to prevent assignment to a financially unsound assignee. Modernly landlords **cannot unreasonably deny consent** to an assignment, and most modern courts continue to follow the common law rule that if the landlord consents to any lease assignment it **waives all future rights to object** to subsequent assignments.[27] A minority of modern courts reject this rule.

5. Eminent Domain and Condemnation of Leased Land

Condemnation means the government prevents the use of land and it may include a seizure of all or part of the land through **eminent domain**. If the government physically takes part or all of a parcel of land the due process guarantees of the 5th and 14th Amendments require payment of **fair market value** as compensation. If the land is under a lease at the time of the condemnation special rules apply to the distribution of the compensation between the landlord and the tenant.

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A. Compensation for Total Condemnation

If the government **totally takes** land under a lease the **lease is terminated** and government will pay an aggregate amount of:

1. The **fair market value** of the land will be calculated, **disregarding the fact it was under a lease agreement,** and that amount will be ADDED to --
2. The **present value of the future rental receipts** the landlord would have received under the lease.[28]

[27] This is called the "Rule of Dumpor's Case."
[28] The term "present value" means the discounted value of the future income stream of rent payments when calculated at the time of the condemnation, given prevailing interest rates.

This aggregate amount will be distributed between the tenant and landlord as follows:

1. The **tenant first is paid the present value of any higher rents** that the tenant may have to pay to obtain comparable space for the rest of the lease period. (This reduction, if any, reflects that the value of the land will be less if it is leased at rents below fair market levels.) Tenants get **no special damages for lost profits or relocation costs**. Then,
2. The **landlord gets the balance** of the aggregate amount. Everything left goes to the landlord. If the rent is not set at below fair market levels the landlord gets everything and the tenant gets nothing.

   For Example: Bevis leases a warehouse to Butthead for 5 years at $5,000 a month. Four years later, the government seizes the land. The appraised value of the land without regard to the lese is $950,000. The present value of the $60,000 Bevis would receive in the last lease year has a present value of $50,000. Therefore the government will pay $1 million. But if Butthead has to pay $7,000 a month for the next year to get comparable space he will be paid the present value of that (say, $20,000) and Bevis then gets the rest, $980,000. This amount reflects the fact his land was leased for rents below fair market levels.

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B. Compensation for Partial Taking of Land

Almost all courts hold that in a **partial taking** the government must only pay the **reduction in the fair market value** of the land without adjustment for the existing lease. But courts are split on how this amount is distributed between landlords and tenants. Two approaches are logically consistent.

> **For Example:** Butthead leases a building from Bevis. The City then takes some of the land to widen the street. That reduces the building's fair market value from $1 million to $950,000, without regard to the fact the land was subject to a lease or what the lease terms are. Under almost all views the government must pay $50,000 for the actual reduction of the property value regardless of the lease terms.

1) Common Law View: No Termination or Rent Abatement

Many courts follow the **common law** rule that when there is a partial taking of leased land

- The tenant gets the amount, if any, that the **fair market rental value** of the property (not the actual rental value to the tenant) **is reduced for the rest of the lease period,** and
- The **landlord gets the balance.**

Under this approach 1) the **lease is not terminated** and 2) the **tenant must continue to pay the same rent**, even if the taking substantially impairs the tenant's normal use of the land.

If the fair market rental value of the land is not reduced, the tenant gets nothing, even if the rental value to the particular tenant was reduced. And the tenant may get compensation even if the fair market rental value is more than the tenant is paying.

> **For Example:** Bevis leases a building to Butthead. There is one year left on the lease at $5000 a month. A taking by the City reduces the building's fair market value by $50,000, and fair market rental value is reduced by $1000 a month from $8,000 a month to $7000 a month. Under the common law view Butthead, the tenant, gets the reduction in fair market rents for the rest of the lease, $12,000 ($1000 X 12 months.) Bevis, the landlord, gets the rest, $38,000.

Landlords often suffer from this approach even though the tenant is supposed to continue paying the same rent. If the tenants are paying less than the fair market rental value of the property they can walk away from the property and the landlord cannot prove damages.

> **For Example:** Suppose Butthead is paying $6,000 a month under his lease in the example above. He can walk away with the $12,000 he got from the government and **Bevis, the landlord, cannot prove damages** since he has a duty to mitigate by re-renting the building for $7,000 a month.

And, if tenants are paying more than fair market rent the landlord can only come out even when the tenant remains in the property and continues to pay rent for the rest of the lease.

2) Alternative View: Termination or Rent Abatement

Many courts now follow a different view that the tenant does not get any share of the government payment and the **landlord gets it all**, but,

1. Either the **lease is terminated** if the taking causes substantial interference with the tenant's use of the land, OR,
2. If the interference is not substantial the lease **continues at a reduced rent** reduced to reflect the effect of the taking on the tenant's normal use.

Under this approach the landlord never loses because he gets paid the entire amount by which the fair market property value was reduced.

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C. Use of Eminent Domain to Facilitate Private Development

Traditionally government agencies (e.g. cities, counties) have used the power of eminent domain to facilitate public development such as highways and airports. But in *Kelo v. City of New London* (2005) 545 U.S. 469 the U.S. Supreme Court held that government can condemn private land holdings (e.g. residential property) simply to resell it to other private parties (e.g. auto dealers) wanting it for development for other purposes.

6. Rent Control

Occasionally rent control laws limit rent increases and prohibit landlords from terminating existing periodic tenancies. They may also prohibit landlords from demolishing existing housing, converting apartments to condominiums, etc. Rent control laws are constitutional if they are 1) based on **legitimate government concerns** and 2) provide the landlord with an **adequate return** on investment.

7. Abandoned Common Law Concepts

A number of old common law concepts and rules regarding leaseholds are now abandoned. Law books and professors often discuss them but no detailed knowledge is necessary. Some of them are:

- The common law had **no implied warranty of habitation.**
- Under common law the **covenants in rental agreements were independent covenants** so tenants had to pay rent even after landlords breached their duties and vice versa.[29]
- At common law tenants had to pay rent even if buildings were **destroyed** (e.g. by fire).
- Under common law leaseholds were **personal property** for purposes of inheritance rather than real property. Modernly there is no distinction.
- Under common law landlords generally had **no tort liability to tenants** after the tenants occupied the land.

[29] These are now viewed as **dependent covenants** so that a material breach of one excuses the other party.

Chapter 7: Deeds and Land Sales

Deeds convey interests in land and must describe the land's boundaries with an understandable **legal description**. Land can only be accurately described by boundaries, not by **physical area** since that would produce ambiguous results.

1. Methods of Land Description

Three methods of land description are used: **metes and bounds, government survey** and **plat.**

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A. Metes and Bounds Method

Survey markers called "monuments" were established in the first parts of the United States that were settled (typically east of the Mississippi River), and parcels of land may be described by a series of distances and directions ("calls") from those monuments in a manner that results in the description of **an enclosed area**.

The "monuments" referred to in any description by metes and bounds must be clearly identifiable, and any property described as being bounded by a "road" or "stream" extends to the **centerline** of that land feature.

> **For Example:** Blackacre may be described as "that area beginning 300 feet North at 0 degrees from Monument 001 at the top of Devil's Peak , thence North at 0 degrees for 2 miles, thence East 90 degrees for 3 miles… , returning to the point of beginning."

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B. Government Survey Method

In States that were settled later in history (typically States west of the Mississippi River or north of the Ohio River, but excluding Texas) each county was surveyed and divided into square miles ("sections"). Each square mile enclosed 640 acres of land, and each six-by-six mile square area called a "township." Each of the 36 "sections" in each "township" is identified by a number (1 through 36.) In these areas land may be identified by section and township.

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C. Plat or Map Method

A plat or map method is commonly used to identify parcels in urban areas. Developers subdivide the land into individual lots and record a map or plat showing the location of each lot. Individual lots would be referred to as "lots" on "blocks" of a "map."

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D. Incorporation of Other Land Descriptions by Reference

A deed may also **incorporate other deeds or documents by reference** and when that is done those documents must be clearly identified.

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E. Land Boundaries Described by Streams

Parcel boundaries defined by streams may or may not change when the streams change course. If the stream changes course quickly (e.g. because of a flood) it is called an **avulsion,** and the **boundary does not change** – it stays at the center of the previous stream bed. But if the stream changes course slowly it is called an **accretion** (in the case of silting) or a **reliction** (in the case of erosion) and **the boundary changes** with the change in the stream's location.[30]

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F. Rules for Resolving Land Description Errors

When land descriptions in deeds are wrong because they do not reflect reality or the intent of the parties the land sales contract is void. Since the parties have no legal contract or legal remedy the only alternative if an equitable remedy. The contract may be **reformed** by a court of equity. The courts will generally apply standard rules:

- Courts will try to give **effect to the intent of the grantor and grantee** if they shared the same intent. To determine intent the court will consider evidence of **physical boundaries** and **subsequent acts** of the parties that indicate what they meant to convey.
- If the grantor and grantee had conflicting beliefs the court will resolve description mistakes and ambiguities in deeds **in favor of the grantee if the grantor caused the ambiguity** by failing to accurately describe the land when delivering the deed.
- If there is a conflict between the directions and distances stated in a land description courts will generally accept the directions as accurate and change the distances.
- Grantors cannot convey land they do not own, so courts will award grantees compensatory damages when grantors promise more land than is actually delivered.

2. Application of the Statute of Frauds

The Statute of Frauds is usually studied in classes on contract law. It requires conveyances of interests in land to be in writing to be enforceable in a court of law. An oral conveyance can only be enforced in a court of equity.

The writing proving a conveyance of land would typically be a **sales contract, deed**, **will,** or written **grant of an easement**.

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[30] Avulsion, accretion and reliction are esoteric terms. Don't spend a lot of effort memorizing them.

A. Statute of Frauds Requirements for Land Sale Contracts

The Statute of Frauds in every State requires **contracts** for the sale of real estate to be in writing. Typically the **contract** must show the following information:

1) Names of **the parties** (grantor and grantee);
2) Description of **the land** for which an interest is being conveyed;
3) Description of **the interest** that is being conveyed (life estate, fee simple, etc.);
4) **Language of contractual agreement** (covenants of each party);
5) **Terms** of the contract (purchase price, terms of payment, closing date, warranties, etc.);
6) **Signatures** of the parties.

1) Written Memorandum May or May Not Prove Oral Contract

The Statute of Frauds may be satisfied by a **memorandum of an oral agreement** containing the required information if it bears **the signature of the party to be bound** by the agreement.

But **preliminary memorandums** do not always prove oral contracts were established. Sometimes they show the parties wanted to wait for a written agreement before being bound.

2) Part Performance Doctrine May Allow Enforcement in Equity

A contract that fails to satisfy the Statute of Frauds cannot be enforced **at law** but may be enforceable **in equity** in two cases.

- First, if the party to be bound **admits to a contract to convey land** it can be enforced in equity;
- Second, a contract to sell land (not a "land for land" swap) may be enforced in many States under the **part performance doctrine**, a particular use of the concept of **detrimental reliance** (and/or promissory estoppel.)

Part Performance Doctrine. Under the part performance doctrine **specific performance** of an unwritten land sale contract will be **enforced in equity** in many States if one of the parties has acted in a manner that is **unequivocally related** to the claimed oral agreement.

Nature of Unequivocally Related Acts. The type of unequivocally related acts needed to enforce the part performance doctrine must be an act that **cannot be reasonably explained by other possible motivations.** State requirements vary but this often depends on **whether it is the buyer or the seller that is seeking specific performance**:

- **Sellers** demanding specific performance (payment of money) generally must prove:

    1) They **conveyed the property** to the buyer (delivered the deed); OR
    2) The buyer a) **made a down payment**, b) took **possession** of the land, AND c) **made substantial changes** to the land that lowered its value.

- **Buyers** demanding specific performance (delivery of title):

    1) In many States must prove:
        a) Either they **changed position in reliance** on the seller's oral agreement; OR
        b) The **seller gave them possession of the land**.
    2) Some other States require that the **buyer has taken possession** AND either:
        a) **Paid all or most** of the agreed upon price; or
        b) **Made valuable improvements.**

3) Written Modification and Rescission Usually Required

Most States require all **modifications** of land sales contracts to be written, but some States will allow oral modification. And most of the States also require **rescissions** of the agreement to be written unless allowing an oral rescission causes the opposing party no undue hardship.

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B. Equal Dignity Rule for Contractor with Real Estate Broker

Under the **"equal dignity rule"** some States require written contracts **between real estate agents and their principals** or else contracts entered into by the real estate agents will be unenforceable.

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C. Statute of Frauds Requirements for Real Estate Leases

Under the common law the Statute of Frauds originally did NOT require a writing for a lease of real property for a period **of three years or less**, but modernly most States require a written lease if the **lease period is more than one year**.

But most States do NOT require a writing for leases of a year or less, **even if the lease will not end until more than a year after the date the lease is executed**.

1) Writing Needed If Option to Renew Beyond Year

In most States a writing is also required for a tenancy of years if the **lease contains a renewal option that would allow the lessee to extend the total lease period beyond a year**.

2) Void Lease Creates Periodic Tenancy

Most courts hold that a tenancy for years that fails to satisfy the Statute of Frauds results in a periodic tenancy (e.g. month-to-month lease). Periodic tenancies were explained in Chapter 6.

3. Land Sale Contracts

Land can be sold by using either an **installment sales** contract or a **lump sum** contract.

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A. Installment Sales Contracts

Installment sales contracts are seldom used. Under this approach the buyer makes a down payment and a series of periodic payments but **does not receive the deed to the land** until all payments have been made. Then the seller delivers the deed to the buyer. Sometimes the deed is held in escrow (i.e. in trust for the buyer) by an independent third party.

Under an installment sales contract the **seller retains both legal and equitable title** until the buyer has completed performance by paying all of the required payments. Buyers that fail to make timely payments **default** and may **forfeit** all of their rights to buy the land under the contract.

Installment land sales contracts disadvantage the buyer, and are only used by buyers that have no other choice because of bad credit, outstanding judgments and lack of funds for a down payment. Since buyers do not hold equitable title to the land they may be **evicted** if they default on the payments, as any renter would be evicted, without the statutory foreclosure protections that generally apply to landowners.

If the terms of an installment sales contract are **unconscionable** or if forfeiture and eviction are **inequitable**, courts may set aside those contract provisions or otherwise provide the buyer with equitable relief. When a defaulting buyer has paid substantial toward the purchase price, courts often will order the seller to return some or all of those amounts to the buyer.

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B. Options to Purchase Land

An option is a legally enforceable, irrevocable right of an "option holder" to buy property on prescribed terms for some agreed period of time. The option constitutes an offer by the landowner to sell the land to the option holder, and the offer is irrevocable for the agreed upon option period.

If a landowner "grants" an option it creates an **interest in land** that is required by the Statute of Frauds to be in **writing**. Options can generally be **recorded to give public notice**. If an option is not recorded, a bone fide purchaser for value that buys the land without notice will take the land free of the option holder's interest.

When option holders "exercise" options they "accept" the offer embodied in them, creating lump sum contracts to sell the land. When option holders do not exercise the options within the option period the option expires and the offers to sell the land lapses.

Absent some express prohibition otherwise, an option is freely alienable and can be sold by the option holder. In fact, this is often the option holder's motive in buying the option.

Sometimes an installment contract for the purchase of land is written as a **"lease-purchase option"** giving the option holder a lease on the land with an option to purchase the land.

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C. Lump Sum Land Sales Contracts

Lump sum or single payment land sales contracts are the most common kind and the rest of this section applies to them. Usually parties enter into a land sales contract of this type with the assistance of a real estate broker.

Earnest Money. Usually the buyer gives the seller an amount of money called "earnest money" that acts as **liquidated damages for the seller** if the buyer subsequently repudiates the contract or otherwise fails to make a good faith effort to secure financing to complete the agreement.

Marketable Title. A seller of land generally makes an **implied promise** to deliver **marketable title** by entering into a land sales contract, but the seller may only promise to sell the land by a **"quitclaim"** deed that provides no warranties or guarantees about the quality of title.

Security Interests and Mortgages. Buyers usually borrow money to buy land, and lenders usually demand a mortgage on the land so it acts as "collateral" for the loan. The lender receives 1) the buyer's **note** (i.e. promise to repay) and 2) a **security interest** in the land (a "mortgage") in exchange for lending the purchase money to the buyer.

Escrow and Closing Date. Generally land is sold through a process called escrow. When escrow begins it is called the "opening" of escrow. When the seller has delivered the deed and the buyer has delivered the purchase money to the "escrow officer," the escrow officer will pay various amounts (e.g. real estate brokers, prior mortgagor, taxes), and record the necessary documents (e.g. new deed, mortgage documents, etc.)

When this process is completed it is called the "close of escrow," and the date escrow closes is called the **"closing date."**

Title Insurance. In order to guard against the risk that the land is subject to undiscovered defects that might reduce the land's value, the buyer may purchase **"title insurance."** This will generally be required by lenders of purchase money to the buyer.

The title insurance company will research existing claims against the land and insure the buyer against any losses caused by any undiscovered claims. In some States this research process is called **"reading the abstract"** and in other States it is called a **"title search."**

Settlement Date. The land sales contract usually will specify a date, or the latest date when the exchange of money for land is supposed take place, and that may be called the **"settlement date."** The settlement date might be called the "closing date" in the contract, but that means the anticipated or agreed closing date that might be different from the actual closing date of escrow.

Between the date a land sales contract is executed and the settlement date the buyer will typically inspect the property and have it appraised. The buyer may also survey the property and have the title researched.

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D. Effect of Failure to Perform by Settlement Date

Usually time is not of the essence in a land sales contract, and unless the contract **expressly states** that **"time is of the essence"** or **a party knows** that the other party's circumstances make timely performance essential. When timely performance is not essential a party's failure to perform by the settlement date is a breach that **does not void the contract or excuse performance** by the other (non-breaching) party. It merely provides a basis for a **damage award** for **additional interest expense** or **lost rents** for the period in which close of escrow is delayed.

On the other hand, **if time is of the essence**, failure to perform in a timely manner is a **major breach that excuses the non-breaching party from further performance** and also gives them grounds for damages. In this case damages would be measured by either the **difference between the contract price and the fair market value of the land** or otherwise by the losses the breach caused the non-breaching party.

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E. Failure to Deliver Marketable Title Generally Major Breach

An implied promise of land sales contracts is that the seller will deliver **"marketable title,"** one that is **free from reasonable doubt** in both **law and fact on the settlement date**, and failure to deliver marketable title is generally a major breach on the part of the seller.

Land is generally sold with a **warranty** or **grant deed** and those terms imply a promise by the seller to deliver title free from defects. An exception to this general rule is when land is sold with a **quitclaim deed**. In that case there is no implied promise to deliver title free from defects.

Title defects are things that cast the title of the property into doubt like 1) legal description errors and 2) claims of adverse possession. And, **encumbrances** are such things that would interfere with the buyer's use and enjoyment of the property like 1) liens, 2) mortgages, 3) violations of existing zoning, 4) servitudes, 5) rights of reverter, 6) easements, 7) dower rights and 8) restrictive covenants. These are explained elsewhere.

The seller **delivers marketable title** if there is no condition **on the settlement date** that would unreasonably interfere with the ability of the buyer to own, enjoy and use the property.

The **seller fails to deliver marketable title if the existing use** of the property **violates existing zoning rules**, but not simply because the buyer's intended future use of the property would not be allowed by current or future zoning rules.

1) Reasonable Businessperson Standard

Under the "reasonable businessperson standard" a title is "reasonably free of doubt" if a **reasonably prudent and experienced businessperson** would find it acceptable. This is a higher standard than a "reasonable man" test. It is often said that the title is NOT marketable if the buyer is **"buying a potential lawsuit."**

2) Failure to Deliver Title Free of Defects is Major Breach

If a seller fails to deliver marketable title to the land that is free of defects it is a major breach.

3) Failure to Deliver Title to all Land Promised is Major Breach

If a seller fails to deliver marketable title to all of the land promised it is a major breach.

> **For Example:** Seller promises to sell Buyer "Blackacre" described as follows:
>
> > "Lot 7 of the 'Plat of Mission Court' as recorded in the Office of the County Recorder in Book 1 of Maps, Map No. 5."
>
> Seller delivers a deed that says,
>
> > "Lot 7 of the 'Plat of Mission Court' as recorded in the Office of the County Recorder in Book 1 of Maps, Map No. 5,
> >
> > EXCEPTING THEREFROM the westernmost two inches of said Lot 7."

This is a major breach because Seller has not delivered title to all of the land promised. The fact that Seller has only failed to deliver the western 2 inches of the land promised is irrelevant because that two inches was part of the land promised.

4) No Marketable Title Promised with Quitclaim Deed

A **"quitclaim deed"** only conveys the seller's rights in the property to the buyer without any express or implied warranty what those rights are. Nevertheless, a few courts have held that a seller that promises a quitclaim deed has an obligation to deliver marketable title since every party in every contract has an obligation of **good faith and fair dealing** and all contracts require a **"meeting of the minds"**. (See *Wallach v. Riverside Bank* (N.Y. 1912) 100 N.E. 50.)

5) Other Failures to Deliver as Promised Generally Minor Breaches

Generally sellers that tender marketable title to land as legally described in the sales contract but otherwise fail to perform as promised will be in minor breach.

> **For Example:** Seller promises to sell Buyer "Blackacre" which is described as being "40 acres". Seller tenders marketable title to the land described in the sales contract, but a survey shows that it is only 39.5 acres. Seller is not in major breach so Buyer generally cannot void the contract. Buyer must pay for the land, but may seek an offset for damages if any can be proven.

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F. Doctrine of Equitable Conversion

Under the **Doctrine of Equitable Conversion** most courts hold that **a buyer receives "equitable title"** to property when a land sales contract is executed but the seller continues to hold **"legal title"** until the close of escrow, **if the contract can be enforced by specific performance**.

1) Distribution When Seller Dies Intestate

In most States the rules of intestate succession provide that when a land seller dies intestate before escrow closes, the purchase money belongs **to the decedent's heirs**. But a few States that follow the common law rule that the money belongs only to the decedent's **"next of kin"** (e.g. surviving spouse) and not to the intestate heirs (e.g. possibly including the decedent's siblings.)

2) Distribution When Seller Dies Testate

If a land seller dies with a valid will (i.e. "testate") before the close of escrow the sale proceeds will generally be distributed the **same as all other property if the will does not distinguish between real and personal property.** And otherwise, if the will was executed BEFORE the land sales contract, the sales proceeds generally are **distributed as personal property**. But if the will was executed AFTER the land sales contract AND the will says the parcel of land being sold is to go a particular heir, THEN the sales proceeds will generally be **distributed to that heir**.

3) Distribution When Property is Destroyed

States are sharply split on how equitable conversion applies when the subject matter of a land sales contract is destroyed before the close of escrow.

Common Law. Most States follow the common law rule that the **buyer assumes the risk** of loss at the time the land sales contract is executed. Therefore, if property is damaged or destroyed before the close of escrow **the buyer suffers the loss UNLESS the seller is at fault** and caused the loss by neglect, default or unreasonable delay in performing the contract.

Massachusetts Minority View. In some States the **seller retains the risk** of loss until the close of escrow, even if the buyer takes possession, IF the structural damage is substantial. Therefore, if property is substantially damaged or destroyed before the close of escrow **the seller suffers the loss even though the buyer is occupying the property**.

Possession View. Eight States, including California, New York, Illinois and Michigan, hold that the **risk of loss shifts from seller to buyer when the buyer takes possession** of the property. So in this view if property is damaged or destroyed **before the buyer occupies the seller suffers the loss,** and if the damage occurs **after the buyer occupies the buyer suffers the loss**.

4) Distribution of Insurance When Property Destroyed

Most States hold that if **property insured by the seller is destroyed** before the close of escrow and the buyer was at risk under the doctrine of equitable conversion, the **seller holds the funds in constructive trust** for the buyer, unless **the sales contract specified otherwise**. Effectively this would be an offset against the amount the buyer owes.

But in a few States the seller reaps a windfall and can keep the insurance proceeds while the buyer remains liable for the purchase price of the property.

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G. Assignment of Land Sales Contracts

Generally land sales contracts may be assigned by either party. If the seller assigns the contract, the buyer is obligated to pay the seller's assignee. If the buyer assigns the contract, the seller is obligated to deliver the deed to the buyer's assignee.

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H. Broker's Right to Commission When Sale Fails

A few States hold that real estate brokers working under agreements that entitle them to commissions only have a right to the commissions when sales go through. But most states hold that the broker is entitled to the commission if they find a **ready, willing and able buyer**, **even if sellers change their minds** and decide not to sell. And a minority of States holds that brokers are even entitled to commissions if they find ready, willing and able buyers who later default on the purchase agreements.

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I. Requirements for Breach of Land Sales Contracts

The parties to a land sales contract are **obligated to tender performance** on the settlement date, or the closing date if it is delayed beyond the settlement date through no fault of either party, and the duties of each party are concurrent duties that are to be performed simultaneously.

A party **breaches** to a land sales contract if they 1) **repudiated** the contract or otherwise are 2) **completely unable to perform**.

But a party **does NOT breach** a land sales contract by merely failing to perform UNLESS the other party 1) **tenders performance** and 2) **demands return performance** that is not forthcoming.

> **For Example:** On April 1 Bevis agrees to sell Blackacre to Butthead. But Butthead discovers Doofus has an easement across Blackacre so he repudiates the contract and demands his earnest money back **Butthead will lose** because he breached the contract by repudiating. Bevis is NOT absolutely unable to perform because he could pay Doofus to release the easement.

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J. Remedies for Breach

The two remedies for breach of a land sale contract are **damages** and **specific performance**. Damages can always be awarded, and specific performance will almost always be awarded.

1) Damages When Sale Fails

Damages will generally be calculated as the non-breaching party's lost **benefit of the bargain**.

If the **seller breaches** that will generally be the amount the **fair market value** of the property **exceeded the contract price** EXCEPT that if the seller **acts in good faith but fails to deliver marketable title** some States only give the buyer **out-of-pocket expenses**.

And if the buyer breaches that will generally be the amount the **contract price** of the property **exceeded the fair market value** EXCEPT that **if the contract limited the seller's remedy** to keeping the earnest money as **liquidated damages**, the seller is limited to that amount.

2) Damages When Property Sold with Hidden Title Defects

A buyer has a right to recover **out-of-pocket expenses** when they are promised marketable title but later discover defects that the buyer has to remove by taking legal action. And when the defects cannot be cured, or cannot be cured without substantial effort, the buyer has a right to recover the **excess of the contract price over the fair market value** in light of the defects.

3) Specific Performance

Specific performance to enforce real estate sales contracts will be granted as an alternative to damages **except when:**

1) **Lack of Mutual Performance by Seller**. The court may not order a buyer to pay for land when the seller has not tendered marketable title, or the court may condition the buyer's performance on the seller's delivery of marketable title.
2) **Lack of Mutual Performance by Buyer**. The court may not order a seller to deliver title unless the buyer tenders payment of the total purchase price.
3) **Frustration of Purpose**. The court may not order a buyer to pay if events after the contract was executed made the property unsuitable for the buyer's purpose, a purpose known to the seller.
4) **Significant Effort Needed to Clear Title.** The court will not order a seller to deliver marketable title if it would require substantial legal effort.

Specific performance is an alternative to money damages but the court may also award the non-breaching party incidental expenses caused by the breaching party's failure to perform.

4. Protections for Bone Fide Purchasers for Value

A **bone fide purchaser for value without notice** (BFPVW) is a buyer that 1) **exchanges valuable consideration** for an interest in property, in 2) **good faith** (without wrongful purpose or intent) and 3) **without notice** of other existing claims against the same property. The law generally protects BFPVWs from conflicting claims to protect and foster commerce and trade.

Parties receiving property by inheritance or gift are not BFPVWs, and neither are buyers that purchase with **actual, constructive** or **inquiry notice** that conflicting claims exist.

Constructive Notice. Property buyers are charged with having **constructive notice** of all title defects and encumbrances shown in public records whether they have actual knowledge of the conflicting claims or not, if a reasonably diligent title search would have revealed them.

Inquiry Notice. Property buyers are charged with having **inquiry notice** of all title defects and encumbrances that could or should have been discovered by conducting a reasonable inspection of the property whether they have actual or constructive knowledge or not.

A few courts continue to hold that a **quitclaim deed** anywhere in a buyer's chain of title charges the buyer with **inquiry notice** that there is a title defect. The majority now rejects this rule.

5. Delivery of the Deed

The conveyance of title to land is generally evidenced by delivery of a **deed** showing:

1) **Present intent to convey** an interest;
2) Identification of **the grantor and grantee**;
3) **Description of the land** (as explained previously);
4) **Description of the freehold interest** that is being conveyed (life estate, fee simple, etc.);
5) **Language of conveyance** indicating intent ("… I hereby convey…")
6) **Signature of the grantor** (i.e. some identifying mark as where grantor is illiterate.)

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A. Intent to Convey Implied by Deed Delivery

The **most important requirement** for land to be conveyed by delivery of a deed is that there must be a **present intent to convey** the land. There is generally a rebuttable **presumption of intent to immediately transfer** ownership of land if the grantor:

a) **Physically "delivers"** the deed to the grantee or the grantee's agent,
b) **Publicly records** the deed;
c) Gives the grantee a **token chose** (as explained below);
d) Places the deed in **escrow** with an **independent third party,**
   i) Subject to a valid, enforceable land **sales contract** even if the escrow is revocable;
   ii) Subject to a **condition certain** to occur, or
   iii) Subject to **conditions beyond the grantor's control** UNLESS the grantor
      (1) **keeps possession** of the land treating it as if it is his own, AND
      (2) conditions the conveyance on the **grantee surviving the grantor**.

A present intent to convey an interest will even be found if the grantor **retains a right to revoke,** or makes the conveyance **subject to a condition of survival**. In these cases the conveyance will be presumed to be a **defeasible estate subject to a condition**.

A deed is **delivered into escrow** if it is given to an **independent third party** who agrees to act as the "escrow agent." Delivery of the deed to the grantor's own agent is NO delivery at all, and delivery to the grantee's agent completes delivery as if it was given to the grantee personally.

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B. When NO Intent to Convey is Presumed

There is a rebuttable **presumption of NO intent to immediately transfer** ownership of land if the grantor:

a) **Retains control and dominion** over the deed without delivery of a token chose;
b) Places the deed in **escrow** with an **independent third party** that is,
   i) **Revocable** and **not subject to a land sales contract**;
   ii) Irrevocable but subject to a **condition under the grantor's control**;
   iii) Irrevocable but,
      (1) **Grantor keeps possession** of the land treating it as his own, AND
      (2) The grant is subject to the condition that the **grantee survive the grantor**, AND
      (3) The deed does **not meet the requirements of a valid will**.

Deeds are generally viewed as **will substitutes** that must **satisfy all of the requirements of a valid will** if the grantor 1) **keeps possession** of the land treating it as his own and 2) places the deed in escrow with an independent third party **subject to a condition that the grantee must survive** the grantor. (See for example *Atchison v. Atchison* (Ok. 1946) 175 P.2d 309.)

> **For Example:** Bevis gives Butthead a deed that conveys Blackacre to Doofus and says, "Give this deed to Doofus if he outlives me." This would be an **invalid** conveyance because there is **no present intent to convey**. Rather it attempts to use the deed and oral instruction as a **will substitute**, and that is invalid as a will because wills must be written.

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C. Events Causing Title to Irrevocably Pass

Once land title transfers it is irrevocable. Generally title to land irrevocably passes to the grantee:

a) Once a **deed is delivered and accepted** by the grantee;
   i) Even if the grantee gives the deed back, because the grantee cannot return title to the grantor without executing another deed;
b) Delivery of a **token chose**; or
c) At the instant **escrow conditions are satisfied**,
   i) UNLESS the **relation back doctrine applies**;
   ii) Even if the escrow agent **does not deliver the deed** to the grantee at all, and

iii) Even if conditions fail but the escrow agent delivers the deed anyway, EXCEPT for the case when the **grantee sells** to a **bone fide purchaser for value**.

1) Title Conveyance by Token Chose

A **token chose** is a symbol that can be delivered as a substitute for delivery of the deed.

> **For Example:** Bevis puts a deed conveying Blackacre to Butthead in his safe deposit box and **hands Butthead the key** to the safe deposit box with the purpose and intent of conveying the land. That is the delivery of a token chose and is as effective as handing Butthead the deed itself.

But if the grantor merely puts the deed in a location that the grantee has access to, without more evidence of present intent to convey, it is NOT enough to show an intent to immediately convey ownership of the estate to grantee.

2) The Relation Back Doctrine

Under the **relation back doctrine** title defects and encumbrances that might arise during escrow are ignored if property is **subject to a valid, enforceable sales contract**. The moment of title passage will be **related back** to the moment the property was **placed into escrow** in the following circumstances:

1) **Grantor Conveys to Third Party (Not Bone Fide Purchaser) During Escrow.** If a grantor conveys land to any person that is not a BFPVW while sale of the same land to a different buyer is pending in escrow, title passes to buyer in escrow.
2) **Grantor's Marriage.** If the a single grantor gets married while a sale of land is pending in escrow the new spouse gets **no dower rights** in the land.
3) **Grantor's Death or Incapacitation.** If a grantor dies or becomes incapacitated while sale of land is pending in escrow title passes to the escrow buyer nevertheless.
4) **Grantee's Death.** If a buyer of land pending in escrow dies title passes to the buyer's estate nevertheless.

3) Bone Fide Purchaser Gets Title if Grantor Delivers

If a grantor conveys land to a **bone fide purchaser for value without notice (BFPVW)** while sale of the same land to a different buyer is pending in escrow, title **generally passes to the BFPVW** and the relation back doctrine is not applied. The escrow buyer's remedy is to bring an action for damages against the grantor.

4) States Split if BFPVW Gets Title by Escrow Agent Error

States are split on whether a BFPVW receives title after an accidental or deliberate release of a deed from escrow that was subject to **conditions that have not been satisfied**. In most States the **BFPVW does NOT get title** and must seek damages from the grantee, but in some States the BFPVW keeps title. In that case the grantor would have to seek damages from the escrow holder.

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D. Acceptance of Deed Generally Presumed

To be effective a deed must be accepted by the grantee, but acceptance will generally be presumed if a conveyance benefits the grantee.

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E. Deed Discharges Contract Under Common Law Merger Doctrine

Under the **common law merger doctrine,** all **contractual duties** imposed on the buyer and seller by the sales contract **are discharged and replaced** by the duties expressly created by the **deed** when the seller delivered the deed to the buyer.

The **deed provisions totally redefined the relationship between the grantor and the grantee**. Further, **deeds carry no implied promises or warranties.**

The modern trend is to increasingly view the merger doctrine with disfavor.

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F. Two Basic Deed Types: Warranty and Quitclaim Deeds

There are two basic types of deeds, a **quitclaim** deed and a **warranty deed**.

Quitclaim deeds simply grant to the grantee all of the rights that the grantor had in the land described, whatever they may be, without any guarantee or warranty what they are.

A **warranty deed** is one that expressly warrants one or more guarantees. These generally can consist of one or more of **six basic covenants**:

1) **Covenant of Seisin**: The guarantee that at the time of sale the grantor has peaceable possession of a freehold estate (i.e. not a 'squatter'.)
2) **Covenant of Right to Convey**: The guarantee that at the time of sale the grantor has the right to convey the land to the grantee (e.g. not prohibited by some contract, court order or statute.)
3) **Covenant Against Encumbrances**: The guarantee that at the time of sale no other rights or interests in the land (e.g. easements, mortgages, etc.) exist that will decrease the value of the land to the grantee.
4) **Covenant of Quiet Enjoyment**: The guarantee that in the future the grantee will be given quiet enjoyment of the land and will not be interfered with by the grantor or a third party with paramount title (as previously explained for leaseholds in Chapter 6.)
5) **Covenant of Warranty**: This guarantee is that in the future the grantor will compensate the grantee if the covenant of quiet enjoyment is violated.
6) **Covenant of Further Assurances**: A guarantee or promise that in the future the grantor will take further action as necessary to give the grantee any documents necessary to defend the property title. The covenant of further assurances is not widely used.

1) Present Covenants Apply to Sale and Don't Run

Most courts hold that the first three covenants above, 1) the covenant of **seisin**, 2) the covenant of **right to convey** and 3) the covenant against **encumbrances** can only be breached at the time land is sold because they are only covenants concerning the situation that exists at the time the land is conveyed. But a large minority view is that these do run with the land.

If one of these covenants is breached (e.g. widow Jones holds undisclosed dower rights) the breach of covenant takes place at the time of the sale, and the **statute of limitations** starts to run. By the time grantee discovers widow Jones' claim it may be too late to recover from grantor.

Further, these covenants are only from the grantor to the grantee and **do not run with the land** to future owners.

2) Future Covenants Apply to Future and Do Run

All courts hold that the last three covenants above, 1) the covenant of **quiet enjoyment**, 2) the covenant of **warranty** and 3) the covenant of **further assurances** can be breached after the land is sold because they are covenants concerning future events.

If one of these covenants is breached (e.g. Doofus claims to hold paramount title) the breach of covenant takes place at that time (e.g. Doofus moves to evict the grantee). The **statute of limitations** only starts to run when the covenant is breached.

These three covenants **do run with the land** so they can be enforced by future owners, and most States hold this is **true even if the land is held by the grantee of a quitclaim deed**.

3) Money Damages Limited

Most courts hold that the remedy of a buyer of property found to have a **totally defective title** or that has been **evicted by a party with paramount title** is **limited to money damages** in the sum of 1) **the purchase price paid**, 2) **interest expense**, and 3) **out-of-pocket expenses for improvements** to the land, but 4) **not more than the increase in land value** from the improvements.

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G. Special Warranty Deeds

No covenants are implied by warranty deeds but statutes can define **"special warranty deeds"** that imply certain warranties if certain words or phrases are used. Under some schemes grantors are held to have covenanted that they are not aware of and have not themselves created any title defects or encumbrances in certain cases. The grantor's liability to remote grantees under these covenants may also be limited by the statutory scheme.[31]

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[31] For example California Civil Code § 1113 provides that a "Grant Deed" implies certain covenants.

H. Grantee Taking with Knowledge Does Not Waive Express Covenants

Most courts hold that once the grantor expressly warrants property is free from title defects and encumbrances, the covenants are binding even if the grantee accepts the deed knowing encumbrances exist. In other words, **the grantee that accepts a deed with knowledge of a defect does not waive** the right to enforce the express covenants in that deed.

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I. Estoppel by Deed

Under the doctrine of **estoppel by deed** if a grantor delivers a warranty deed to land that the grantor doesn't actually own at the time, title does not pass because the grantor has no claim to the land. But if the grantor subsequently comes to own the land previously conveyed, the title to the land immediately passes to the grantee at the moment the grantor acquires the title. [32]

Many courts recognize this principal, but most courts hold estoppel by deed is **not binding against subsequent good-faith purchasers without actual knowledge of a prior transfer.** These courts hold it is unreasonable to expect purchasers to conduct title searches without limit into time periods before the sellers acquired the land to see if they "sold it before they got it."

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J. Modernly Home Builders Subject to Implied Warranty

Modernly in most States **builder selling dwellings are subject to an implied warranty of habitability** that requires the dwellings to be built with reasonably skillful construction. Most States also hold **builders liable for faulty construction by independent sub-contractors**. And most courts seem to hold that the implied warranty of habitability **runs with the land to subsequent purchasers** that can also bring an action against the original builder.

This is an area in which the law is rapidly evolving and **very different from the common law** where there was no implied warranty of habitability, and the general rule was ***caveat emptor*** (i.e. "buyers beware".) It is also an exception to the general rule that deeds carry no implied warranties.

A home **buyer can only sue the builder** for breach of implied warranty of habitability, NOT a previous owner that was not the builder, and the implied warranty does **NOT apply to commercial buildings**, and actions are subject to various statutes of limitation.

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K. Seller's Duty to Disclose Known Concealed Defects

Many States also now hold that every **seller of real property has an affirmative duty to reveal known material defects that a buyer can not reasonably be expected to discover**, especially when the **seller caused the concealed defect**. A number of States also require sellers to give buyers a **written disclosure statement** revealing all known defects in the property.

[32] This concept also may be called the "Doctrine of After-Acquired Title".

This modern trend is a **sharp change from the common law** which held that a person who sold property was only liable **deliberately concealing defects or misrepresenting** the property.

The modern trend is also **contrary to the common law merger doctrine** that the duties of the buyer and seller under the land sales contract are discharged once the deed is delivered by the seller to the buyer.

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L. Formalities of Seal, Attestation and Acknowledgment

Some States require the grantor's signature on a deed to be attested (e.g. witnessed), and some require it to be acknowledged by a notary public. In earlier times some States also required deeds to bear a private "seal" but few States require that now.

6. Sales of Condominiums and Cooperatives

Individual units in a **condominium** development are conveyed in the same manner as other property except the **common areas** of the development are held by all condominium owners together as **tenants-in-common** acting together as a **condominium association**.

The owner of any condominium unit is free to sell the condominium to any other person, and owners of condominiums are not able to "select their neighbors."

But a **cooperative** (coop) is a building (usually an apartment building) owned by a corporation, and each resident in the building is just a shareholder in the corporation. But each shareholder has the right to enter into a **proprietary lease** for a unit in the building, and a duty to pay mortgage debts, interest and maintenance expenses.

Shares in the coop cannot be sold without approval of the coop corporate board of directors, so the owners of coop shares are "able to pick their neighbors."

Chapter 8: Mortgages and Foreclosure

A **mortgage** grants a lender (the "mortgagee") a **security interest** in the land as collateral for repayment of a loan evidenced by the borrower's (the "mortgagor's") **note**. While the mortgage and note are actually two different documents, they are conceptually linked and create a "mortgage package." Neither holds much real meaning without the other.

The thing that distinguishes a sale financed by a mortgage from installment sales is that the buyer gets the deed and equitable title to the property from the seller immediately whereas in an installment sale the buyer does not get the deed or equitable title until all of the payments have been made under the contract.

1. Mortgage as Deed Subject to Condition Subsequent

A mortgage is effectively **a deed granted to the lender subject to a condition subsequent** that the rights of the mortgagee (i.e. lender) will terminate **if the borrower makes all payments in a timely manner**. When all mortgage payments are completed in a timely manner the mortgagee's interest in the land is extinguished. Since the mortgage is an **interest in land** it is recorded to protect the lender's claim against the land.

While a mortgage conveys **legal title** (i.e. ownership) to the mortgagee, the mortgagor retains **equitable title** (i.e. possession and use). In **title theory** States the act of the mortgagor in granting a mortgage to the mortgagee will convert the mortgagor's interest in a joint tenancy to a tenancy-in-common interest, while in **lien theory** States the joint tenancy will not be severed.

Under the common law a mortgagor (borrower) has no right to prepay a loan. Statutes in many States require lenders to allow prepayment, but a pre-payment penalty may apply.

2. Priority of Mortgage Claims

Each security interest in the land has superior claims against all subsequent claims which become **"subordinate claims"**. The "first" mortgage is superior to all other claims, and subsequent claims are often referred to as "seconds", "thirds", etc.

3. Foreclosure Process

Mortgages usually have an **acceleration clause** that makes the entire mortgage amount due if the mortgagor defaults on scheduled payments. Then, if a borrower defaults on payment of the entire amount due, the lender can **foreclose** on the land under the terms of the mortgage. The foreclosure process is entirely statutory and varies between States.

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A. Strict Foreclosure

A few States allow the lender to take property in exchange for canceling the mortgagor's debt. This is called **"strict foreclosure."** Most States now require foreclosure sales.

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B. Foreclosure Sales

Generally mortgagees holding mortgages in default must have the subject properties sold at a **foreclosure sale** to recover the debt. In most States foreclosure sales are **public sales**.

In some States foreclosed property may be sold in a **private sale** if the borrower granted the lender a **deed of trust** that lets the lender or a third party hold title to the property as a "trustee". The trustee may sell the property in a private sale in **good faith with due diligence** to get the highest possible price. And in some jurisdiction the foreclosure sale is conducted by a public officer (e.g. a "sheriff's sale") under judicial supervision.

If mortgaged property sells for more than the amount due the mortgagee, the mortgagor gets the excess as a **return of equity**. If the property sells for less than the amount owed, the mortgagee can get a **deficiency judgment** against the mortgagor in most States.

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C. Doctrine of Equity of Redemption

The law disfavors forfeitures, and under the **Doctrine of Equity of Redemption** a defaulting mortgagor is often given a statutory period in which to redeem the property. The right is statutory and varies by State.

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D. Priority of Claims in Foreclosure

The proceeds of a foreclosure sale are allocated to the claims against the land in their order of priority. If sale proceeds are insufficient to pay all claims against the land the holders of unpaid claims can seek deficiency judgments for the unpaid balances against the mortgagor.

4. Sale of Mortgaged Land

When land subject to mortgages is sold the mortgage can 1) be **paid**, or 2) the buyer and lender can enter into a **novation**, or 3) the buyer can **assume the mortgage**, or 4) the buyer can take the land **subject to the mortgage**.

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A. New Mortgage or Novation of Old Mortgage

If a party selling land has an existing mortgage with a **"due on sale clause"** or **"acceleration clause"** any sale of the land to a new owner requires the existing mortgage to be paid off. In that case the mortgagor will be paid the amount due from the buyer's purchase money, and the buyer usually will get a **new mortgage** on the property from a different lender. The old mortgage is then cancelled and a new mortgage is created.

In some cases the original mortgagee may agree to a **substitution of the buyer's note for the seller's note**. In this case there is a **novation** and the buyer's note is substituted in place of the seller's note. The **seller's note is cancelled** and returned. But the original mortgage remains effective, and the mortgagee continues to have the same security interest in the land.

Whether the old mortgage is paid off or there is a novation the **seller has no further liability**.

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B. Assumption of Mortgage

If there is no "due on sale" or "acceleration" clause on the seller's mortgage the buyer may be able to **"assume the mortgage,"** agreeing to be **personally liable** for it.

In this case the **lender will be an intended third-party beneficiary** of the seller-buyer agreement, so the lender will have standing to bring an action against the buyer for breach of contract. But since there has been **no novation** the **seller still remains secondarily liable** to the lender as well.

If the buyer that has assumed a mortgage fails to make the payments the lender can **foreclose** and also get a **personal judgment against both the seller and the buyer.** In that case the seller can also get a **personal judgment against the buyer** for breach of contract.

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C. Taking Property "Subject to Mortgage"

If there is no "due on sale" or "acceleration" clause on the seller's mortgage the buyer may buy the property **"subject to the mortgage," without agreeing to be personally liable** for it.

Since the **lender is NOT an intended third-party beneficiary** of this agreement, the lender has no standing to bring an action against the buyer. And since there has been **no novation** the **seller remains liable** to the lender.

The lender can **foreclose** and get a **personal judgment against the seller (mortgagor)**, but the lender cannot get a judgment against the buyer. But if the lender gets a judgment against the seller the seller can then get a **personal judgment against the buyer** for breach of contract.

5. Assignment of Mortgages by Mortgagee

Mortgagees often "package" and sell or "assign" mortgages to other organizations like the Federal National Mortgage Association ("Fannie Mae".) The mortgage (security interest) and mortgagor's note are conceptually linked and will always be sold together as a unit.

Chapter 9: Recording Statutes and Title Search

Deeds are valid as soon as they are properly delivered to grantees, and under the **common law** the first person given a deed often had priority. But modernly land interests often must be publicly recorded pursuant to State recording statutes to be **protected** from potential conflicting claims by **other grantees, unrecorded easements,** possible **covenants and restrictions**, etc. [33]

Most recording statutes require that for the recording of an interest to be effective the **entire chain of title** by which the grantee received the interest **must be recorded**.

Recording rules vary by State, but there are three general types: **race, notice** and **race-notice statutes**. Despite the "race" aspect of recording statutes they often give grantees a "grace period" in which to record conveyances.

1. The Common Law Priority of Claim Rules

Under the common law the earliest claim to the land prevailed over later claims if both claims were legal claims or both were equitable claims. This was characterized as "First in time; first in right." But an equitable claim would fail to a later legal claim by a **bone fide purchaser for value without notice** (BFPVW).

One exception to the rule of "First in time; first in right" was that **parties might be estopped** from asserting claims if their own actions caused them to be bound by the principals of promissory estoppel or detrimental reliance.

Under the common law BFPVW s were generally buyers **without actual notice**, and perhaps **without inquiry notice**, since there was no concept of "constructive notice."

> **For Example:** Bevis gives Blackacre to Butthead as a gift. Then Bevis sells Blackacre to Doofus, a BFPVW who 1) paid valuable consideration, 2) acted in good faith and 3) had no notice of the prior gift to Butthead. Doofus' claim prevails over Butthead's under the common law because he is a BFPVW with a legal claim, even though Butthead's equitable claim arose first.

2. Race Recording Statutes

State recording statutes vary but one type is the "race" statute under which **the first grantee to publicly record prevails,** whether it is a BFPVW s or not.

> **For Example:** A **race** statute might read, "Every interest in land is invalid against a conveyance **that is recorded first**."

Pure race statutes retain one feature of the common law – that the "first" in time prevails. But it protects the first to record, not the first to receive an interest. And generally the prevailing claim does not have to be by a "purchaser" or BFPVW.

[33] The public office will photocopy or microfilm the document, record it in a log and return the original.

> **For Example:** Bevis lives in a state with a "race" statute. He agrees to sell Blackacre to Butthead. Then he sells Blackacre a second time to Doofus. Under a "pure" race statute they race to the courthouse, and the first interest recorded prevails.

3. Notice Recording Statutes

Another type of recording statute is the **"notice" statute**. Under a "pure" notice statute **the last grantee to receive an interest without notice prevails,** whether it is a BFPVW or not. It does not matter if the prevailing grantee records the interest or not, but if it is not recorded it could be invalidated later by subsequently created interests.

> **For Example:** A **notice** race statute might read, "Every interest in land is invalid against **subsequent conveyances** to grantees taking **without notice**."

But many notice statutes actually require the prevailing claim to be a "purchaser" making them a BFPVW, so in that case the claim that prevails is simply the last BFPVW to take their interest.

> **For Example:** Bevis lives in a state with a "notice" statute. He sells Blackacre to Doofus, a BFPVW. Doofus does not record. Then Bevis sells Blackacre to Butthead, another BFPVW. Butthead prevails whether he records or not because he is the last to take without notice.

4. Race-Notice Statutes

Under a **"race-notice" statute the first grantee to record who took without notice prevails**.

> **For Example:** A **race-notice** race statute might read, "Every interest in land is invalid against conveyances that are **publicly recorded first** by grantees taking **without notice**."

Here again, most "race-notice" statutes actually require the prevailing claim to be a BFPVW, so in that case the claim that prevails is simply the first BFPVW to record their interest.

> **For Example:** Bevis lives in a state with a "race-notice" statute. He sells Blackacre to Doofus, a BFPVW, and then sells to Butthead, another BFPVW, before Doofus records. Here the first interest recorded will prevail because they both took without notice.

5. BFPVW Must Buy for Adequate Consideration

To qualify for a BFPVW a buyer must pay "valuable consideration" and a conveyance for a nominal amount like "a dollar" will generally be treated as a gift. Further, a mere **promise to pay** is not considered valuable consideration unless it is in the form of a **negotiable instrument** that is subsequently conveyed to a third party. But, the **cancellation of an existing debt** is generally viewed as sufficient valuable consideration.

6. Situations with Circular Priorities

Three claims can have circular priorities in a State with a **"race-notice"** statute if one of the grantees fails to record. Most courts give the lowest priority to the party that failed to record.

For Example: Donald mortgages his land sequentially to Huey, Louie and Dewey in a State with a race-notice recording statute. Huey fails to record. Louie takes with actual knowledge of Huey's claim and then records. Dewey takes his interest without actual knowledge of Huey's claim and then records. Then Huey records last. **Nobody has a "first" mortgage.** Dewey's claim is superior to Huey's. Louie's claim is superior to Dewey's. And Huey's claim is superior to Louie's. Most courts will make Huey's claim subordinate to the others because he is most at fault for causing the problem.

7. Other Title Defects May Always be Challenged

The recording statutes only govern which of several possibly valid title claims prevail. They do NOT prevent a title claim from being challenged for **lack of deed delivery, fraud, forgery, lack of capacity**, etc.

8. Recording of Other Interests

In almost all States **long-term leases must be recorded**. If they are not, the statutes usually provide that a BFPVW of the land will takes free of the lease. Many States define a "long-term" lease as seven years or greater, but in other states it is less than that.

However, to be a BFPVW, the buyer must be without notice of the existing long term lease, and a buyer will often be charged with **inquiry notice** of a leasehold since the land will usually be occupied by the tenant.[34]

Certain other claims against land **cannot be recorded** including claims of **adverse possession, pending land sales contracts** and **short term leases**.

9. The Grantor-Grantee Index and Title Search

The chain of title is generally searched by using a **grantor-grantee index** system. There is another system called the **"Torrens system"**, but few states use it. Various problems arise when deeds go unrecorded or are recorded out of order. These are often referred to as **"wild deeds"** or recordings **"outside the chain of title."** Fair-market buyers may be held to lack implied knowledge of prior claims that are outside the chain of title, even if they are recorded.

Buyers generally **physically inspect** property to look for evidence of unrecorded easements or adverse possession, and they have **title searches** conducted by attorneys. An **"abstract of title"** is a history of the property that will be reviewed by an attorney. And buyers may purchase **title insurance** against the risks of undiscovered interests in the property.

[34] See for example *Martinique Realty Corp v. Hull* (1960) 64 N.J. Super, 599.

Chapter 10: Adverse Possession

The law of adverse possession is statutory so it varies from one State to the other. **Adverse possession** means that a person may gain legal title to land by **occupying it long enough statutes of limitation bar** the owners of record from bringing an ejectment action. The most common application of this is in **boundary disputes**.

Once a person has established a right to land by adverse action they can deed it to anyone else with impunity, and valid title will be conveyed. In some cases this **starts a new title chain.**

1. Public Policy Reasons for Adverse Possession Statutes

State laws allow adverse possession for several **public policy reasons**. The courts don't want to litigate **stale claims**, and having statutes of limitation on land claims helps **clear land titles** and **improves property values**. It also **simplifies title searches** by eliminating the need to look at early records.

Adverse possession is entirely statutory, and statutes usually exempt **government** land and **utility company** land from being taken by adverse possession. Likewise, a **spouse cannot seize marital property** or the separate property of the other spouse by a claim of 'adverse possession'.

2. Elements of Adverse Possession

A claim of title by adverse possession requires that the claimant take **open, actual, visible** and **exclusive possession** of the land in a manner that is **hostile** to the rights of the "true" owners, and keep it **continuously** that way for the **length of time** required by statute. The elements of this rule can be remembered by the mnemonic HELUVA:

1. **Hostile Possession**: Holding the land in opposition to or defiance of the rights of the owner of record;
2. **Exclusive Possession**: Holding the land alone, not sharing it with the owner of record;
3. **Lengthy Possession**: Holding the land for the length of time required by statute;
4. **Uninterrupted Possession**: Continuous possession without interruption;
5. **Visible Possession**: Holding the land openly, visible for the owner of record to see; and
6. **Actual Possession**: Holding the land physically and not just claiming possession.

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A. Hostile Possession

A claim of title by adverse possession requires that the claimant be **on the land without legal right or permission**, effectively **in defiance** of the rights of the true owner. This is referred to at law as "hostile" possession, but it does not mean the possession has to be violent or angry. The overriding rule is that there is no hostile possession and no basis for a claim of adverse possession when the owner expressly gives the claimant permission to be on the land.

Many States require that adverse possessors **claim a right** to be on the land, but most States do not require this to be done with a bone fide belief of legal right. They just require a claim that should put the owner of record on notice of their adverse intentions. Not all States require this.

A few States will deny adverse possession to **admitted "squatters"** that have no "bone fide" belief that their claim to the land is just. [35] These states hold that letting "bad faith" possessors take land away for honest folks will reward trespassing. But a few other States are exactly opposite, denying adverse possession to "honest but mistaken settlers" that hold good faith but mistaken beliefs that they hold valid title to land, on the grounds that they are not hostile enough.

But most States let both admitted "squatters" and "honest but mistaken settlers" claim title by adverse possession as long as they have taken the land in a manner sufficient to put the owner of record on notice that prompt legal action is required.

But even "squatters" cannot gain title by adverse possession if they have **stayed on the land by promising the owner of record they would leave if asked** because then there is no hostile act.

1) No Hostile Possession Against Easements or Future Interests

Hostile possession can only be taken against **current** ("possessory") **estates** that would have a right to seek an ejectment (eviction) so adverse possession will not run against future interests or easements.

2) Generally No Hostile Possession by Tenants

Tenants **occupy land with permission** of the owner, so tenants cannot claim ownership by adverse possession. In the case of **holdover tenants**, the landlord may elect to treat them as **tenants at sufferance** and allow them to remain on the land under a periodic tenancy.

But if a landlord **elects to evict** holdover tenants and they remain on the land as trespassers, or if tenants **repudiate a lease** and yet stay in possession, then the tenant would be in hostile possession sufficient to claim adverse possession. Statutes in some States toll the adverse possession period for a while after a tenant holds over.

3) Hostile Possession by Co-Tenant Requires Ouster

Co-tenants each have a right to use the entirety of the property. So a co-tenant only can take hostile possession by **OUSTING the other co-tenants, actively blocking them from using the land** or at least **putting them on notice** of an intent to block them from using the land.

4) Purchase of Another's Land Begins Hostile Possession

Any **purchase of land** or **claim of ownership** to it (whether valid or not) or **taking of possession under color of title** (under the provisions of a **faulty written instrument** of conveyance) is hostile to all other parties that claim ownership or title to the same land. So any party that takes possession of land under any claim of title takes hostile possession in most States.

[35] In fact, adverse possession is what the "squatter's rights" were about in the old cowboy shows, and it was common for discouraged gold miners and pioneers to simply grab land and start farming it.

5) Possession in Violation of Statute of Frauds is Hostile

Likewise, a person that takes possession of land pursuant to an gift or purchase that violates the Statute of Frauds (or any other statute for that matter) holds it in hostile possession (even if it is held with the permission of the owner of record) in most States because possession is contrary to the legal rights of the owner of record. This may **even be the case when the grantor continues to live on the land**.

> **For Example:** Bevis tells Butthead he is giving him Blackacre but keeping a life estate for himself. Bevis continues to live on Blackacre while Butthead pays the property taxes. Most courts hold that Butthead has **hostile possession** even though Bevis has actual possession because Butthead's claim of the remainder is hostile to Bevis' right to challenge the legality of the conveyance.

6) Boundary Disputes and Agreements

States vary widely in the treatment of boundary agreements. Most States hold that if two adjoining landowners **fix a boundary in the wrong place by agreement** there is still enough hostile possession for adverse possession to apply. But some States hold that there is **no hostile possession** if the land is held by agreement between the parties.

Some States apply a **"Doctrine of Agreed Boundaries"** that holds boundary agreements become permanent if they are to settle a boundary dispute or caused by reasonable uncertainty about where the true boundary should be placed once the parties act in reliance on the agreement. Some States require that a fence or boundary markers be placed on the agreed boundary. But if parties simply agree to put a boundary line in the wrong place knowing it is wrong the agreement is generally unenforceable unless it satisfies the Statute of Frauds.

Almost all States hold that if adjoining landowners merely reach a **tentative agreement pending a survey** there is **no hostile possession**.

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B. Exclusive Possession

The party claiming adverse possession must take exclusive possession of the property. That means that they cannot share it with 1) the **owner of record** or 2) the **general public**.[36] But, of course, two or more adverse possessors can take hostile possession jointly.

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C. Open, Actual, Visible Possession

A party claiming adverse possession must **occupy the land** and EITHER 1) put the owner of record on **actual notice** of a claim of right to the land OR 2) **occupy and use the property in such a "notorious" manner** such that it would or should have made the owner of record aware.

[36] If the owner is not excluded there is no adverse possession, but possibly a basis for claiming a "prescriptive easement" has been created.

Many statutes provide that if the adverse possessor surrounds the land with a **"substantial enclosure"** (i.e. a fence or wall) that is sufficient to give the owner of record notice. Also, where the adverse possessor **pays the taxes** on the land it is sufficient to give notice that the adverse possessor claims to be the true owner of the land.

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D. Continuous, Uninterrupted Possession

The hostile possession by the adverse possessor must be **continuous rather than sporadic**. But the adverse possessor can leave the property at times in a manner consistent with any other landowner's use of similar property. And if the property would normally be used only on a seasonal basis (e.g. a summer cabin), using it for one full season (e.g. one summer) counts as use for one full year toward fulfilling the statutory period.

1) Interruption of Possession Terminates Running of Statute

If the owner of record files an eviction action against the adverse possessor it **tolls the running** of the adverse possession period, and the **running of the statute for adverse possession is terminated** completely if:

- The **adverse possessor abandons** the property;
- The **adverse possessor discontinues** possession for an extended period of time;
- The **owner of record reenters** the land in a **notorious, hostile, open** and **actual** manner and **reclaims possession** of the land; OR
- The owner of record **obtains an eviction order**.

2) Ouster by Third Party Terminates Unless Land Retaken

If a **third party** (e.g. a second adverse possessor) **ousts** an adverse possessor, it terminates the adverse possession period unless the ousted adverse possessor **regains possession** of the property. Then most courts hold that the **statutory period begins running again from where it left off**, and some courts even allow the first adverse possessor to count the time the second adverse possessor held the property.

3. Length of Possession

The statute of limitations for adverse possession is set by the various statutes of the States, but in about two-thirds of the States it must be 15 to 20 years. But in a third of the States it is less.

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A. Owner's Disability May Extend Statute of Limitations Period

The statute of limitations period for adverse possession is generally **extended** when the owner of record suffers from a **disability at the beginning of adverse possession.** This is often tested.

The adverse possession period will be **extended until the disability ends and for an additional statutory period** after that. If the disability is ended by the owner's death the owner's heirs must act before the end of the statutory period. Generally the statute of limitations will be extended when the owner of record is an infant (a minor), mental incompetent, imprisoned and even outside the jurisdiction (e.g. a serviceman abroad.)

An owner's disability **must exist when the hostile possession began** to extend the adverse possession period, and if the owner suffers from more than one disability at the beginning of adverse possession, the statutory period will be extended to **the end of the last disability**. But **only disabilities that exist at the beginning** of adverse possession will extend the statute of limitations, even when there are initial disabilities overlapped by subsequent disabilities.

> **For Example:** Butthead takes hostile possession of Blackacre when the owner, Bevis, is 12 years old in a State with a 5 year adverse possession statute and 2 year extension beyond disability. Bevis goes into a coma. Bevis must wake up and evict Butthead by the age of 20 because he only gets 2 years after he becomes an adult at age 18. He was not in a coma when Butthead took possession so the statute is not extended for that.

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B. Tacking Aggregates Sequential Adverse Possessors

The principal of **tacking** lets adverse possessors claim credit for the time a previous adverse possessor held the land if there is **privity** between the sequential adverse possessors, a conveyance relationship based on sale or gift of the land.

But, there is **NO privity when** the previous adverse possessor has simply **abandoned** the land or where the second adverse possessor has **ousted** the previous possessor.

> **For Example:** Bevis takes Blackacre in hostile possession for four years in a State with a 10 year statutory period for adverse possession. Then Bevis sells his interest to Butthead who holds in hostile possession for six more years. Since Bevis sold his interest to Butthead they were **in privity** and that lets Butthead claim possession for ten years.

4. Effect of Adverse Possession on Other Interests in the Land

The great majority of States hold that estates may be conveyed while the land is held in hostile possession without any effect on the running of the statute of limitations for adverse possession.

While adverse possession is **not effective against existing future estates and easements** when hostile possession begins all new interests in the land are created subject to the running of the statute, so adverse possessors will generally take title free from future estates that were created after hostile possession began.

A few States hold that estates cannot be conveyed after hostile possession begins. In those States any such conveyances are null and void.

5. Rights and Liabilities Created by Adverse Possession

While the statute of limitations for possession is still running the owner of record's claim to the land is superior to the adverse possessor's, and the adverse possessor's claim to the land is superior to that of all others.

During this period the owner can bring **ejectment** and **trespass** actions against the adverse possessor and seek compensation for actual damages, profits from the land and an award of fair market rental value.

But the adverse possessor' possession of the land gives superior standing to all third parties and the adverse possessor and may bring similar actions for ejectment and trespass against third parties entering the land (without the owner's permission.)

After the statute of limitations for adverse possession has finished running the adverse possessor effectively **gains title** and has **no liability to the owner for anything**.

Once title to land is gained by adverse possession it is the same as any other land title. It can be conveyed by deed and cannot be conveyed by oral agreement or lost by a declaration of abandonment.

Usually adverse possessors only obtain title to areas held in hostile possession by **physical occupation**, **cultivated**, **enclosed** by fencing, used for **grazing** or regularly used for **hunting**.

But when land is held **"under color of title"** created by a written instrument, the adverse possessor gains **"constructive adverse possession"** to the entire area described in the instrument, even if it was not all occupied, used or enclosed by the adverse possessor, as long as 1) the written instrument describes a contiguous area, and 2) the adverse possessor held a portion of it in hostile possession and 3) the owner of record did not hold any portion of it at any time during the entire period adverse possession, but 4) the adverse possessor gets no part held by third parties during the adverse possession period.

> **For Example:** Bevis has hostile possession of Blackacre for six years in a State with a five year statutory period for adverse possession. Butthead, the owner of record, arrives and tells Bevis to "get off" his land. Bevis apologizes, says "I hereby give the land to you Butthead" and leaves. Sorry, Butthead, but you are **too late.** Bevis owns it and his rights to the land cannot be voluntarily abandoned or orally transferred back to Bevis.

6. Adverse Possession Claims Not Recorded or Subject to Title Search

Title gained by adverse possession **can not be recorded**, so a title search will not reveal it. Also a physical inspection of the land might not reveal that an adverse possession claim exists either, so just because nobody is occupying the land does not guarantee an adverse possession claim does NOT exist.

Title gained by adverse possession **will not be marketable title** unless the adverse possessor brings a **quiet title action** to obtain a **judicial determination of title**. Once a judicial determination is made, it may be recorded to establish a title record, and then the title is marketable.

Chapter 11: Easements

An easement is a right to use or control the use of land owned by another person, but **not to occupy the land** except to a narrowly limited extent. An easement holder "exercises" the easement by asserting the rights it conveys. The difference between an easement and a current estate is that an easement allows shared occupation of land for a limited time and/or purpose.

Easements are usually **affirmative easements**, giving the holder a specified right to enter and use the land of another person.

The common law only recognized **negative easements**, conveyances of rights that gave the holder the right to prevent another landowner from using land in a specific way, for purposes of **air, light** and **lateral support**. Those easements that gave the holder the right to control the use of adjacent land so it would not deprive their own land of air, light or lateral support. All other rights to control adjacent land were considered covenants or equitable servitudes.

1. Easements Appurtenant, in Gross and Profits

Easements are usually **appurtenant,** tied to the holder's ownership, use and enjoyment of adjacent lands, but sometimes they are **in gross,** personal to the holders without regard to ownership of any particular lands.

Easements appurtenant give the holder of a parcel of land called the **dominant estate** (or dominant "tenement") the right to use or control other land called the **servient estate** (or servient "tenement".) The dominant and servient estates are usually contiguous, and the benefit of an easement appurtenant is always directly linked to the use and enjoyment of the dominant estate.

Easements appurtenant are only conveyed along with the conveyance of the dominant estate and can not be conveyed otherwise.

Easements in gross give the holder the right to enter and use the **servient estate** without regard to ownership of any other lands. Traditionally easements in gross could not be conveyed, assigned or divided among other people. Modernly courts will let easements in gross be conveyed more readily if they are for commercial purposes (e.g. an easement for utility lines) and less readily if they are for personal uses (e.g. hunting rights.)

A **profit** (which may also be called a "*profit a prendre*") is the right to remove minerals or other natural resources from land. It is often called "timber rights," "mineral rights," etc. It is similar to an easement in gross except **a profit is usually freely alienable** while an easement in gross often is not. Other than that a profit is treated the same as an easement in gross.

2. Five Ways Easements are Created

The five ways easements can be created might be remembered by the mnemonic **RIPEN**:

A) **Reservation**: Seller of servient estate expressly reserves easement for self;
B) **Express Grant**: Owner of servient estate expressly grants easement to holder; and
C) **Implied by Use**: Seller of dominant estate keeps servient estate implying easement;
D) **Implied by Necessity**: Seller of servient estate keeps dominant estate requiring easement.
E) **Prescription**: Adverse use of servient estate for prescription period creates easement;

The **Statute of Frauds** requires a **writing** to create express easements by **express grant** and **reservation**, and they are also **subject to recording requirements**.

The common law often held that a deed could neither grant nor reserve an easement to benefit a third party that was neither the grantor nor the grantee of the deed. This prohibition that anyone who was a **"stranger to the deed"** could not be given an easement is now mostly abandoned.

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A. Easements by Reservation

An **easement by reservation** is an express retention of an easement when the owner of both the dominant and servient estates sells the servient estate and keeps the dominant estate. Some courts hold that an easement by reservation must be "reasonably necessary."

> **For Example:** Bevis divides his land into two parcels. He keeps Blackacre and sells Whiteacre to Butthead, **expressly reserving for himself a right of way** across Whiteacre (the servient estate) to reach Blackacre (the dominant estate) from the public highway.

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B. Easements by Express Grant

A **grant easement** is an express **conveyance of an easement** from the owner of the servient estate to the easement holder, usually the owner of the dominant estate.

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C. Easements Implied by Use

An **implied easement by use** (which also may be called an easement by implication) is created when landowners **divide their land, sell one part** (the dominant estate), **and keep the rest** (the servient estate) **without expressly granting** an easement that the **dominant estate reasonably needs** across the servient estate. The courts will find these events created an implied easement by use (or "easement by implication").

> **For Example:** Bevis divides his land into two parcels. He sells Whiteacre (the dominant estate) to Butthead and keeps Blackacre, **but fails to grant** Butthead an easement to cross Blackacre (the servient estate) that Whiteacre **reasonably needs.** The court will hold this created an **implied easement by use**.

Once created, an implied easement by use will continue to exist until it is no longer reasonably necessary. But the need for an implied easement by use must exist at the time the land is divided to create the dominant estate, not because of later events. And many courts also hold that the land had to have been previously used for the easement purpose before it was divided, even if the use was not apparent to the parties at that time. But some courts have held that if the parties intended to use the land for the easement purpose when the land was divided, that is all it takes.

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D. Easements Implied by Necessity

An **easement implied by necessity** is created when landowners **divides their land, sell one part** (the servient estate), **and keep the rest** (the dominant estate) **without expressly reserving** an easement that the **dominant estate must have** across the servient estate. The courts will find these events created an **easement implied by necessity**, but **only for as long and to the extent it is really necessary.**

An easement implied by necessity only will be granted when the easement is **strictly** (or absolutely) necessary, as opposed to an easement implied by use where the need only has to be **"reasonably" necessary**, because it is the **fault of the land developer for failing to reserve** an easement, so the developer is held to a stricter standard. And an easement implied by necessity **will last only as long as it remains necessary**.

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E. Prescriptive Easements

A **prescriptive easement** is one created by open and regular use of land that continues for long enough that statutes of limitation bar the owner from bringing any action to stop it in the future. The statutory period for a prescriptive easement **begins to run** when the owner first could have asserted a cause of action. Prescriptive easements cannot be claimed for just air, light, views, etc.

A prescriptive easement is similar to a claim of adverse possession, but many courts will find a prescriptive easement **even where land is being used with the owner's permission** as long as the use has continued for an extended period of time.

The same types of "disabilities" that apply to adverse possession usually apply to prescriptive easements, and they will extend or toll the statutory period needed for a prescriptive easement. And the concept of "tacking" also applies to prescriptive easements, although it is related to privity of estate in the dominant estate to which the easement is appurtenant rather than to privity between sequential adverse possessors.

3. Location and Use of Easement

The servient estate holder can reasonably control the location of an easement that is not otherwise expressly specified, and the location of the easement can be implied by behavior of the parties. But once the location of the easement is established neither party can change it unilaterally.

An appurtenant easement can only be used to **benefit the dominant estate,** not to benefit other lands beyond the dominant estate. If the dominant estate is conveyed the benefits of the easement run with the land. And if the dominant estate is divided, the easement can be used to benefit each part of the land that was benefited by the easement before the division. But **the burden on the servient estate cannot be increased.** So the dominant estate can only be developed to the extent it does not increase the burden on the servient estate.

An easement **can also be used by the servient estate**, and the servient estate can **also let third parties use it**, too, as long as it causes no unreasonable interfere with the dominant estate holder's use of the easement.

The easement holder can take **reasonably necessary steps to maintain** the easement, so an easement for a right of way gives an implied right to maintain a roadway on the easement.

An easement always burdens a servient estate, and the burden runs with the land to the new owners. Even adverse possessors take title to land subject to the existing easements. But if the servient estate is subdivided, the easement **only continues to burden the portion of the estate where the easement is located** and the other portions of the divided servient estate are no longer burdened.

4. How Easements Terminate

The mnemonic **SURE NAP** can be used to remember the seven ways easements terminate:

1) **Stated Conditions**: Express grant easements terminate by their stated conditions;
2) **Unity of Ownership**: Easements expire if the dominant and servient estates are owned by the same person;
3) **Release**: The holder of an easement may terminate it by a written release;
4) **Estoppel**: The holder of an easement may be estopped by his own acts from exercising the easement to the extent necessary to protect the servient estate;
5) **Necessity**: An easement may be terminated by necessity or the ending of necessity;
6) **Abandonment**: An easement can be terminated if both the words and actions of the easement holder evidence an intent to abandon; and
7) **Prescription**: An easement can be terminated by adverse possession that prevents the use of the easement for the period of time prescribed by statute.

Express easements created by grant or reservation will terminate **according to their stated terms**, if there were any, and they also terminate when they **no longer have any purpose**.

Easements of all types also terminate if there is a **merger of ownership** between the dominant and servient estates so that both estates are owned by the same entity.

And easements can be terminated by having the easement holder sign a **written release.**

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A. Termination by Estoppel

Based on the theory of **detrimental reliance**, an easement holders' own actions may cause them to be estopped from exercising an easement. The court will only limit the easement holder to the extent justice requires.

> **For Example:** Bevis never uses his easement to cross Whiteacre and he tells Butthead, the owner of Whiteacre, that he can build a brick garden wall across the easement. After Butthead builds the wall Bevis will be **estopped** from asserting his easement rights.

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B. Termination Based on Necessity or Lack of Necessity

Termination of an easement may be necessary when 1) it places a **materially increased burden** on the servient estate and 2) the increased **burden is unavoidable**. Sometimes this is called termination by **forfeiture**.

And an **easement implied by necessity** terminates when the necessity that required the easement in the first place no longer exists.

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C. Termination by Abandonment But Not Lack of Use

An easement is **never terminated by lack of use alone**, and easements are **never terminated by abandonment based on words alone**. But an easement may be terminated by abandonment if the easement holder shows intent to abandon by BOTH WORDS AND ACTIONS.

> **For Example:** Bevis' failure to use his easement across Whiteacre will not terminate it, but if he SAYS he is abandoning it AND then builds a stone wall across the right of way, **his words and actions together are enough to cause termination by abandonment.**

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D. Termination by Prescription

An easement can be terminated by prescription the same way one might be created by prescription if the use of the easement is prevented for the period of time prescribed by statute.

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E. Miscellaneous Situations Causing Easement Termination

A few other miscellaneous events might also cause termination of an easement.

Destruction of Servient Estate. If the part of the servient estate where the easement is located is destroyed (e.g. roadway swept away by river), the easement is terminated.

Tax Sale of Servient Estate May Terminate Easements in Gross. A tax sale of a servient estate may also terminate easements in gross, but easements appurtenant are not affected.

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F. Invalid Easement Becomes License

The Statute of Frauds requires easements to be in writing because they are interests in land. If an easement fails to satisfy the Statute of Frauds (and has not been used long enough to become a prescriptive easement) it is only a **"license"** to enter and use the land. A license to enter land is **revocable at will** by the owner of the servient estate.

Chapter 12: Restrictive Covenants and Servitudes

Chapter 7 explained three covenants that may "run with the land" when it is conveyed with a "warranty deed": the covenants of **quiet enjoyment**, **warranty** and **further assurances**. Other restrictive covenants and "equitable" servitudes are possible as well.[37]

Restrictive covenants and equitable servitudes are both promises by one landowner (the "promisor") to another landowner (the "promisee".) Due to historical development and differences between the English and American courts, there is confusion and inconsistency in the recognized differences between covenants and servitudes. English courts held that covenants were enforceable in a court of law while servitudes were only negative promises (i.e. not to do something) that could be enforced in a court of equity. The distinction is now muddled and you must be aware the terminology is often inconsistent in case law.

Nevertheless, the better distinction remains that:

> **Covenants** are **required acts the landholder has a legal duty to DO;** and
> **Servitudes** are **forbidden uses of the land the landholder has an equitable duty to NOT DO.**

The basic difference between covenants, servitudes and other contract promises is that **covenants and servitudes run with the promisor's land**, binding future owners of the same land to the same promise, and the original promisor is usually released from all further liability.[38] This is very different from contract law where contract duties must be expressly assumed by a delagatee and the party that delegates the contract duties usually has continuing liability based on privity of contract.

Further, the **benefits of a covenant or servitude run with the promisee's land to new owners**, and this is different from contract law where contract benefits are only transferred to assignees by express assignment and delivery of notice of the assignment to the promisor.

But covenants and servitudes will NEVER burden a **bone fide purchaser for value without notice** (BFPVW), and they will almost never apply to **adverse possessors, either.**

Below covenants will be explained first followed by equitable servitudes.

[37] Covenants and restrictive servitudes (along with zoning codes) are often are referred modernly to as being the "Codes, Covenants and Restrictions" or "CC&Rs" that control land use.

[38] The original promisor who sells is generally released from all further liability because privity of estate is terminated and courts often ignore liability based on privity of contract. This is inconsistent with the usual approach when landlords sell property subject to an ongoing lease or when tenants assign a lease.

1. Requirements for a Covenant to Run With Land

For covenants to run with the land they must first be based on a legally enforceable contract between the original parties. In other words, a promise by one landowner to another that is unsupported by consideration in exchange is never going to be an enforceable covenant.

In addition to being legally enforceable between the original parties, a covenant must satisfy **four additional requirements** to **run with the land** to bind and benefit future owners of the land, and here's a tip -- the mnemonic **TIPS** may help you remember them:

1) **Touch and Concern the Land**: To run with land, covenants must **touch and concern land.**
2) **Intended to Run**: To run with land the original parties have to have **intended** that result.
3) **Privity of Estate**: To run with land covenants must be based on two types of privity:
   a) **Horizontal Privity:** A property relationship between the **original parties**; and
   b) **Vertical Privity for Burdens to Run:** An **unbroken, total succession of estate** from the original promisor to the current owners of the promisor's land.
   c) **Vertical Privity for Benefits to Run**: Some **legal interest in some portion** of the original promisee's land is generally all that is required.
4) **Statute of Frauds**: For a covenant to run with the land it must be in writing.

2. Covenants Must Touch and Concern Land

All States have some requirement that covenants do not run with the land unless they "touch and concern" the land, but there is no real agreement as to what that means exactly. Generally:

1) A covenant that has not run with the land to anyone must be enforceable at law between the original promisee and the original promisor;
2) Covenants ALWAYS run to benefit the promisee's land if the covenant **touches and concerns it**, so future owners of the promisee's land can get damages from --
   a) the promisor (if the promise was personal or concerned land still owned); OR
   b) the current owners of promisor's land **if the burden concerned the promisor's land**;
3) And States are **split about 50-50** on whether the burden of a covenant runs with the promisor's land when it does not benefit any land of the promisee.
   a) Nevertheless, courts generally allow **homeowner's associations** (as promisees that own no land) to seek damages for breach of covenant from current owners of a promisor's land (e.g. to collect promised dues);
4) And covenants NEVER run to any land if they do not concern anyone's land.

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A. Non-Competition and Trading Agreements Concern the Land

Nearly all States agree that if land is conveyed subject to a promise of non-competition or a promise of exclusive dealing the benefit and burden of the agreements touch and concern the land of the parties. But any agreements of this type may be subject to court scrutiny as an illegal restraint on trade.

> **For Example:** Bevis sells Blackacre subject to a covenant that all trees harvested from it will be processed in Bevis' mill. This promise touches and concerns the land.

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B. Benefit of Covenants Affecting Promisee's Land Always Run

Covenants that affect the promisee's land (and meet the other requirements of intent, statute of frauds, etc.) ALWAYS run with the land to benefit the promisee's assignees. The assignees can always bring an action for breach by the original promisor whether the burden is related to any land owned by the promisor or not.

Covenants in a **warranty deed** from seller (promisor) to buyer (promisee) run with the land to assignees of the buyer and most courts hold that **intermediate quitclaim deeds** or other deeds without warranties (e.g. a sheriff's deed following foreclosure) **do not stop the benefit** of those covenants from running to the new owners of the land.

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C. Burdens of Covenant Do Not Run in Two Situations

If all other requirements are satisfied (e.g. intent, privity, etc.), there are only **two situations when the burden of a covenant** (as opposed to a benefit) **will not run with the land to bind new owners** (of both freehold and leasehold estates) **to fulfill the covenant:**

1. A **bone fide purchaser for value without notice** (BFPVW) **takes free of covenants** and does not have to fulfill them. While the term "purchaser" is used, this applies equally to lessees as well. So a person who leases land without knowledge of a covenant running with the land takes possession free of the burdens of the covenant.

2. The **States are split about 50-50** with half holding that the burden of **a covenant does not run with the promisor's land if it does not concern land of the promisee**.

   For Example: Bevis sells land to Butthead subject to a covenant he and all future owners will always buy Bevis drinks. Butthead then sells to Doofus. About half the States find Doofus bound because **the covenant ran** with the land he bought, and about half don't because **the promise did not concern land of Bevis.**

   An **exception** to this is that **most States** hold that the **burden of homeowner's association dues will run** with land to new owners even if the homeowner's association does not own any land itself. Even the States that hold the burden of the fees will not run with the land to burden the future owners the burden of the fees often forms a basis for a lien on the land itself that will allow the homeowner's association to foreclose on the land, even though it cannot get personal judgments against the new owners of the land.

3. Intent for Covenant to Run is May be Express or Implied

The original **promisor must intend for a covenant to run with the land** or else it will not bind and benefit future landowners. If the original promise by the promisee is expressly made to both the promisee and the promisee's "assigns" that proves intent the covenant was to run with the

land. Otherwise the original parties' intent for the covenant to run with the land may be proven by implication from the nature of the agreement and other external evidence.

4. Two Types of Privity Required for Covenants to Run

The **main distinction between covenants and equitable servitudes** is that for a covenant to run with the land **strict privity of estate** is required, and it must be both **"horizontal"** privity and **"vertical"** privity. But courts are split on the exact "privity" requirements.

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A. Horizontal Privity Always Required Between Original Parties

Horizontal privity means a property relationship had to exist between the **original parties** – the promisor and promisee – at the time the covenant was established for it to run with the land.

An **exchange of promises between neighbors can not create a covenant that runs**, even if it is a legally enforceable promise supported by consideration on both sides. The **common law and widely held modern view** is that covenants that run with the land **ARISE ONLY WHEN the promisor and promisee share a property relationship** that involves the lands affected. It is said that the original parties can not be "strangers to the title" subject to the covenant.

1) English View: Only Landlord-Tenant Covenants Run

The English view has always been that only a **landlord-tenant relationship** will create the **horizontal privity** needed for a covenant to run with the land.

2) Modern American View: Covenants During Land Conveyance Run

The American view in every State but Massachusetts is that besides covenants in landlord-tenant relationships there is also enough horizontal privity for a covenant to run with the land if it is **a promise between parties when land interests are conveyed between them**, including:

- Covenants **landlord and tenant in creating a leasehold**,
- Covenants made when **granting an easement**,
- Covenants during a **partitioning of land between co-tenants**, or
- Covenants when **one party conveys an interest to the other**.

But covenants made <u>after</u> land is conveyed lacks horizontal privity and will NOT run.

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B. Vertical Privity Needed to all Successors in Interest

Vertical privity means certain relationships must exist for the covenant to run from the **original parties** – the promisor and promisee – to their assignees (i.e. successors in interest).

1) Burdens Run Only if Assignee Gets Entire Estate

For a landholder taking possession from the promisor to be subject to the burden of covenants running with the promisor's land the landholder **must receive the entire estate** of the promisor, whether it is a freehold or leasehold estate.

So, the burden of a covenant **between a landlord and tenant only runs** to a new tenant if the new tenant is an **assignee who receives the entire lease for all of the area leased for all of the time remaining in the lease.** In other words, subtenants (sub-lessees) are not bound by the burdens of covenants running with the land. This was explained in Chapter 6 in that a subtenant who takes possession from a lessee has no duty to fulfill the covenants of the less to the lessor.

For the burden of a covenant **between a grantor and grantee of a freehold to run to subsequent grantees of the freehold,** they must receive **same type of freehold estate** but it **can be for a smaller geographic area**.

> **For Example:** Bevis holds Blackacre in fee simple subject to a covenant that he will help maintain a roadway. Bevis gives Butthead a life estate in Blackacre. Butthead is not subject to the burden of the covenant because he received a **different, smaller type of freehold estate** than Bevis held, a life estate and not a fee simple. But if Butthead were given half the land in fee simple he would be burdened by the covenant.

2) Benefits Run if Landholder Gets Any Part of Estate

Any landholder receiving an interest from a promisee can claim the benefits of a covenant running with the land if 1) they get **legal title** (freehold or leasehold) to 2) **any portion of the estate** of the promisee. For example the grantee of a life estate can claim all of the benefits of a covenant even though the grantor of the life estate has retained a reversion or given the remainder to someone else. And covenants a seller (or lessor) of land owes to buyers (or lessees) run with the land to the benefit of all subsequent holders of any part of the land, whether they are buyers, donees, lessors or subtenants.

> **For Example:** Bevis leases Blackacre to Butthead and is bound by an implied covenant of quiet enjoyment that he will not interfere with Butthead's ability to use and enjoy the land. If Butthead subleases or assigns any part of his interest to Doofus, Bevis is similarly prohibited from interfering with Doofus' use and enjoyment of the land.

5. Original Promisor Usually Free of Liability for Covenant

Most courts hold that promisors that **make covenants and then sell the land generally are no longer liable for the covenants** because **privity of estate terminates**. But **lessees** that make covenants and then **assign the lease** remain liable for the covenants.

> **For Example:** Bevis buys Blackacre from Butthead subject to a promise he will maintain a boundary fence. If Bevis later sells Blackacre he is generally no longer responsible for maintaining the fence. But if Bevis had just leased Blackacre from Butthead subject to the same covenant he would remain liable for the fence, even if he assigned his lease to some other party.

The only **exception** is that some courts hold a landowner that promises to make a **finite series of future money payments** that concern the land and then sells the land will continue to be obligated to make the payments after the sale because of privity of contract.

6: Requirements for Equitable Servitudes

While use of the term is muddled in case law the better definition of an equitable servitude is a **forbidden act the landholder has an equitable duty to not do.**

Equitable servitudes were first recognized in the old English case of ***Tulk v. Moxhay*** which held that a promise that cannot be enforced in a court of law as a covenant might be enforced in a court of equity as a servitude that runs with the land if **four requirements** are met, and they are generally more relaxed than requirements for covenants. A mnemonic that might help remember these elements is **TINS**:

1) **Touch and Concern the Land**: To run with the land an equitable servitude must **touch and concern land** of the promisee or promisor or both to some extent.
2) **Intended to Run with the Land**: The original promisee and promisor must **intend** that the equitable servitude will run with the land to bind and benefit future landowners.
3) **Notice**: The burden of an equitable servitude cannot be enforced against a person **without notice**. Certainly this is true of a purchaser (i.e. a BFPVW) but probably is also true of donees.
4) **Statute of Frauds**: For an equitable servitude to run with the land it must be in writing.

Two main differences between covenants and equitable servitudes are 1) **no "privity" is required** for an equitable servitude to run with the land, and 2) the equitable servitude may bind ANY owner of the promisor's land that **takes with notice of the restriction.**

Since injunctive relief is often a more desirable remedy than money damages, and the requirements are less rigid, promises between landowners are **more likely to be enforced as equitable servitudes than as covenants**.

7. Equitable Servitudes Must Touch and Concern Land

To run with the land equitable servitudes must "touch and concern" the land, but the requirements are less demanding that in the case of a covenant:

1) Equitable servitudes ALWAYS run to benefit the promisee's land if the promise **touches and concerns it**, so future owners of the promisee's land can enforced it against --
   a) the promisor (if the promise was personal or concerned land still owned); OR
   b) the current owners of promisor's land **if the burden concerned the promisor's land**;
2) And States are **split about 50-50** on whether the burden of an equitable servitude runs with the promisor's land when it does not benefit any land of the promisee.
   a) The **English view and view of many American courts** is that equitable servitudes **do not run to burden** future owners of the promisor's land **unless it also benefits the lands of the promisee**. Many other American courts (half?) hold the opposite view.
   b) Nevertheless, American courts generally allow **homeowner's associations** (as promisees that own no land) to enforce equitable servitudes for their members against the current owners of a promisor's land (e.g. to not paint homes weird colors.)

3) And equitable servitudes NEVER run to any land if they do not concern anyone's land.

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A. Promises That Concern Land Enough for Servitudes to Run

Running of Burden. Almost all courts hold that promises that **restrict the promisor's use of land** will "touch and concern" the land enough for the **burden to run with the land**, binding future owners, including non-competition agreements that restrict actual use of the land.

Running of Benefit. Most courts hold that any promise that **improves the use and enjoyment** of the promisee's land "touches and concerns" that land enough for the **benefit to run with the land** to future owners, even if the land is not immediately adjacent to the promisor's land.

An **exception** is that some courts have held that promises like **non-competition agreements** do NOT "touch and concern" land if they **only affect land values** and do not otherwise affect the physical use or inherent quality of the land so the benefits of the promise do NOT run.

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B. Equitable Servitude May Not Run if Promisee's Land Not Benefited

English courts and perhaps half of the American courts hold that the burdens of an equitable servitude **will not run** to burden future owners of the promisor's land **if the benefits of the promise have nothing to do with the promisee's land**. About half the American courts take the opposite view that the burden will run.

> **For Example:** Bevis sells Blackacre to Butthead based on Butthead's promise that he will not sell liquor on the land (because of Bevis' beliefs.) Butthead then sells Blackacre to Doofus who knows of the agreement. Under the English view (shared by half the States) Bevis cannot stop Doofus from selling liquor because the promise did not benefit any land he owned himself. But half the States would enforce the promise.

An **exception to this general rule** is that most courts do find that **promises to a homeowner's association** (e.g. a promise not to build a 3-story house) create equitable servitudes that **do run** with the land to new owners of the promisor's land even if the homeowner's association does not itself own any land benefited land by the promise.

8. Intent to Benefit Land Required for Servitude Benefit to Run

The benefits of an equitable servitude will only run with a parcel of land if the original written agreement was intended to benefit that particular parcel of land. The fact that the promise would benefit the land is not enough, even if the promisor knew it, unless benefiting the land was the intended effect of the promise. Written evidence is required by the Statute of Frauds, so **evidence of an oral statement of intent to benefit the land is generally NOT sufficient**.

In all States except California **external evidence** such as **documents and maps** can be used to prove the promisor's intent was to benefit a particular parcel. Generally evidence of a **general**

development plan will be allowed in this regard. California requires that evidence of a general development plan or other intent must appear in the promisee's deed.[39]

9. No Privity Requirement for Equitable Servitudes

Unlike covenants there is **no privity requirement for equitable servitudes** to run with the land. Therefore, **a promise from one neighbor to another can create an equitable servitude** that runs with the land. And once created, equitable servitudes run to bind later owners of the promisor's land and benefit later owners of the promisee's land, except that they will almost never run to **adverse possessors**.[40]

10. The Burden of Equitable Servitudes Run to Those With Notice

Covenants and equitable servitudes are never binding against **bone fide purchasers for value without notice** (i.e. a BFPVW.) But covenants can be enforced against other landowners (i.e. donees) even if they took without notice, as long as there is vertical privity.

In contrast to covenants, the holding in *Tulk v. Moxhay* that established equitable servitudes stressed that the landowner took his interest in the land with knowledge of the restriction. Modernly the **burdens of equitable servitudes are generally NOT enforceable** against landowners **who obtain the land without notice of the restriction**. But, if a land use restriction is recorded the landowner is charged with **constructive notice**. And if reasonable inspection would have revealed the land use restriction the landowner will be charged with **inquiry notice.**

Some cases hold that land purchasers are also not bound by equitable servitudes unless they are also given notice about who **can enforce the restrictions** against them.

But the **requirement of notice applies only to the running of the burden** of an equitable servitude. The majority of courts hold that **there is no notice requirement for benefits to run** to future owners of the promisee's land.

There are three ways a purchaser may be given adequate notice of the existence of an equitable servitude, **actual notice, constructive (record) notice** and **inquiry notice**. If the purchaser receives notice in any of these ways the purchaser is not a BFPVW and will be subject to the burdens of covenants and equitable servitudes.

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A. Actual Notice.

The burden of an equitable servitude runs to landowners that take possession of the land with **actual knowledge** of its existence.

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[39] See *Werner v. Graham* (Cal. 1919) 183 P. 945.
[40] Apparently only one court has held that equitable servitudes run to adverse possessors.

B. Constructive (Record) Notice

The burden of an equitable servitude runs to landowners that take possession of a parcel of land with **constructive notice** because the restriction was **publicly recorded**. The landowner is charged with constructive notice of:

- **Restrictions in the Deed.** A landowner is charged with constructive notice of all restrictions **stated** in, **incorporated** by reference or **alluded to** in the deed to the parcel.

- **Restrictions Required to be Recorded.** A landowner has constructive notice of all land restrictions recorded if they are the type of restriction **statutes require to be recorded**. Most recording statutes require covenants and equitable servitudes to be recorded.

- **Restrictions in Parallel Records if Evidence in Chain of Title.** If evidence of land use restrictions appears in the parcel's **chain of title** there is a duty to **search parallel records** for more information, even records **outside the chain of title**.

- **Restrictions in Common Development Plans.** If the parcel was developed by a builder as part of a common development plan the landowner is charged with constructive notice of restrictions recorded with the **plat** or **map**.[41]

- **Restrictions in Prior Deeds in Tract.** If the parcel is a lot in a tract development with visible evidence of lot restrictions, the landowner is charged with constructive notice of restrictions in deeds for other lots sold before the owner's lot.

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C. Inquiry Notice

The burden of an equitable servitude runs to landowners that take possession of a parcel of land with **inquiry notice** because the location of the parcel and the surrounding land use made it **reasonably apparent** that use of some of the land in the area was restricted, and as a result the landowner had a duty to determine the nature of the restrictions.

11. Implied Reciprocal Equitable Servitudes

An **implied reciprocal servitude** means that a landowner's use of a parcel in a 1) **general plan of tract development** is restricted from use in the same manner that the 2) **recorded deeds** of other nearby lots have written restrictions, even if the landowner's own deed does not display the same written restrictions.

Most courts will apply the implied reciprocal servitude theory if the **developer orally promises** the earlier buyer that all subsequent deeds issued will be subject to the same restrictions. And some courts hold that **no express promise is necessary** because uniform restrictions are implied by the fact the lots are all in an area of common development according to a general plan.

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[41] While a recorded general development plan may be used to prove constructive notice, California alone does not allow admission of the common development plan to prove an equitable servitude was intended to run with the land **unless the existence of the development plan or other expressions of intent appear in the deed**.

For Example: Bevis develops a housing tract called Mortgage Hills. Butthead buys lot 101. His recorded deed says, "No mobile homes." Then Doofus buys lot 102. His deed is silent on whether he can put in a mobile home or not. Because it is a tract development, and because Doofus can see there are no mobile homes in the tract, Doofus is on inquiry notice that other deeds may be restricted. And he has a duty to research the restrictions that apply to other lots, because they may also apply to his lot.

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A. Standing to Enforce Equitable Servitudes

Several parties have **standing** to enforce listed restrictions and covenants that are 1) **reasonably definite** when a 2) **tract** is actually developed according to **3) a written development plan**:

- The **developer** of the tract can enforce the equitable servitude **if he still owns remaining lots** in the area;
- **Later lot purchasers** can enforce **against earlier purchasers if an intent to benefit them can be shown** because a **common development or building plan** exists or used to exist as proven by:
    - **oral testimony**, or
    - the fact **lots sold earlier in the same tract had the same restrictions**, or
    - because the **breaching party's deed expressly said** other property owners could enforce the equitable servitude.
- **Earlier lot purchasers** can enforce **against later purchasers if an intent to benefit them can be shown** on any of three theories:
    - Because they are **intended third-party beneficiaries** of the sales contract between the developer and the party to be enforced if **their deed bore use restrictions**,
    - Because **the developer made an express written promise** that later lots would be subject to the same type of restrictions, or
    - Because an **implied reciprocal servitude** existed if the party seeking enforcement:
        - bought land in a **tract with an existing common development plan**, and
        - their **deed bore use restrictions**, and
        - their **deed was duly recorded**, and
        - the party to be enforced **bought in the area later**.
- **All lot purchasers** can generally enforce against **purchasers of lots that were created by sub-dividing lots of the original tract** if they could have enforced the same provisions against the original lot before it was subdivided.
- **All lot purchasers** can generally enforce **against the developer** when he later buys and develops other nearby land if **the developer promised them** the nearby land would be subject to restrictions AND the developer had **recorded a plat** (map) showing the land as being part of the development before he bought it.

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B. Architectural Review Requirements Generally Valid Servitudes

Most courts will uphold **reasonable architectural review requirements** for lots in a tract development by an architectural design committee as equitable servitudes that run with the land. But **if the tract developer reserves** (to himself or a homeowner's association) **broad powers to waive or release lots in the development from the use restrictions**, none of the restrictions will run with the land. If the developer only reserves a narrow or limited right to modify land use restrictions within the spirit of the overall development plan, they will not be invalidated.

12. Requirement of Homeowner Association Approval of Sale Generally Invalid

Restrictions that prevent the sale of units in a planned development without the homeowner's association's approval are **generally invalid**. Exceptions generally are:

- Restrictions giving the homeowner association **a right of first refusal** are valid.
- **Condominiums and cooperatives** can prevent the sale of units to buyers that are financially unqualified to meet the **financial needs** of the development.
- In some States (e.g. New York) **condominiums and cooperatives** can prevent the sale of units to buyers that would **inconvenience other residents** (e.g. "celebrities.")

Restrictions for purposes of racial discrimination or other illegal goals are always invalid.

13. Events That Terminate Equitable Servitudes

Events that terminate an equitable servitudes are:

Abandonment. If developers sell some lots with restrictions but then **completely stop applying the restriction to all of the rest of the lots** sold many courts will hold the restriction was abandoned and no longer applies to any of the lots.

Acquiescence. A **continuing failure to enforce** servitudes may result in them being waived.

Change of Circumstances. If changing circumstances in a tract development or the surrounding neighborhood make enforcement of a servitude **unreasonable for every lot in the development** most courts will not enforce them. But not otherwise.

Condemnation. If the government condemns land burdened by a servitude and takes it for public use the servitude is terminated, but courts are split on whether the parties that were to be benefited by the servitude have a right to compensation.

Laches. Equitable servitudes are an equitable remedy so the equitable defense of laches may be raised if the party seeking enforcement has **unreasonably delayed enforcement causing prejudice** to the party to be bound

Chapter 13: Zoning and Land Use Restrictions

Local governments may establish reasonable land use restrictions typically referred to as "zoning laws." For zoning laws to satisfy the due process requirements of the 5th and 14th Amendments they must 1) **substantially advance legitimate State interests** and 2) government must compensate landowners if they are denied the **economically viable use** of their land.

1. Permanent Occupation or Public Easement is a Taking per se

The courts generally regard government acts that cause **permanent physical occupation** of private property or create a **public easement** to be a **taking per se** that will be subjected to **stringent review**, even if the physical occupation is very minor.

> **For Example:** Bevis owns an apartment building. City requires him to let competing cable TV companies string their cables on his building. This was **held to be a taking** because it was a government act causing a permanent physical occupation of space in the building. (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.)

2. Closer Relationship Required to Legitimate Public Needs

A **closer relationship** is required between law laws restricting land use and legitimate Government needs **than the mere rational relationship** that otherwise justifies due process. The State must show land use restrictions have a very **"close fit"** or relationship to a public purpose.

> **For Example:** Bevis wants to expand his beach house. State denies a building permit unless he grants a **public easement** for people to cross his land to the beach. State argues that the larger home will block the public's view of the sea and improved beach access is needed. This is a **taking per se** so there must be **a close fit** between the State's needs and its demands. (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825.)

3. Use Restrictions are Not a Taking if Land Retains Useful Value

In general, the possibility of a zoning change is a risk every property owner takes, and overall zoning laws help protect and improve property values. So a change in zoning laws that **only reduces the value** of land is generally **not a taking**.

> **For Example:** Bevis pays $300,000 for a lot zoned for "commercial" development but City rezones the lot to "residential" causing the lot's value to fall to $100,000. This is not a taking because the land still has viable economic value.

But a land use restriction that is so radical the owner is effectively **denied ALL economically viable use** of the land **is a taking.**

> **For Example:** Bevis pays $300,000 for a beachfront lot zoned for "residential" development, but then County issues an ordinance that no development of any type will be allowed. This is a taking because the lot has no alternative uses so a denial of all possible "development" renders the land totally without economic value. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003.)

4. Restrictions Needed to Protect Public are Not a Taking

A landowner has no right to use land in a manner that harms the public, and may be required to maintain or modify the land in a manner necessary to protect the public. Therefore land use regulations needed to **protect** the public, promote the **public benefit**, prevent a **nuisance** or **protect the environment** are **not a taking**.

> **For Example:** Bevis has cedar trees on his land that are infested with a pest that is harmful to nearby orchards. The pest cannot be effectively eradicated without removing the trees. He is ordered to remove and destroy the trees at his own expense. This is **not a taking** since the measure is necessary to **protect other members of the public**.

5. Even Temporary Taking Deserves Compensation

When there is a permanent taking of land by the government the landowner deserves compensation equal to the fair market value of the land. And when there is a **temporary taking** it is still a "taking" and the landowner deserves **compensation for the period of deprivation**.

> **For Example:** Bevis has a farm. County enjoins him from farming the land after Butthead, a naturalist, announces the farm is the only known habitat of the rare and endangered "imaginary fairy shrimp." After a three-year court battle Bevis proves that the "imaginary fairy shrimp" is a figment of Butthead's imagination. Bevis has a right to compensation for the three years he was prevented from using his farm because he was subject to a temporary taking. (*First English Evangelical Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304)

6. Land Use Restrictions May Violate Other Constitutional Protections

Land use restrictions that do not violate the 5th Amendment prohibition against "takings" of property may still be unconstitutional because they violate the 1st Amendment guarantees of freedom of expression and the 14th Amendment guarantees of due process and equal protection. Many of these considerations are more the subject of a constitutional law class.

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A. Due Process

Every government act must be rationally related to a legitimate government purpose. And if government acts infringe important personal rights they must be substantially related to important government needs.

If a land use restriction or zoning ordinance infringes upon **fundamental rights**, behavior that is traditionally recognized and accepted in the concept of ordered liberty, **"strict scrutiny"** applies and the government must show a **compelling need** for the law in order to **attain a legitimate public need**.

> **For Example:** Bevis owns a house zoned for "single family" occupancy, defined as "husbands, wives and immediate children." Bevis' grandson lives with him, and City orders Bevis to remove the "grandchild" because he is not a "child." This ordinance is **unconstitutional** because it is traditional for related family members to live together, and the City has **no substantial need** to redefine the traditional "family." (*Moore v. City of East Cleveland* (1977) 431 U.S. 494)[42]

In contrast to *Moore* the court held in other cases that zoning ordinances that prohibit more than **two** unmarried, unrelated individuals form living together in a residential area is constitutional.

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B. Equal Protection

Ordinances that are intended to discriminate against **races, nationalities, sexes, sexual orientations,** etc. will always be unconstitutional violations of **equal protection**, but ordinances that only have the effect of discriminating against races, nationalities, etc. are not unconstitutional violations of federal guarantees of equal protection **unless intent to discriminate is shown**. Nevertheless such ordinances may violate State laws.

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C. Spot Zoning Constitutionally Invalid

Zoning plans and land use restrictions must be reasonably uniform. The use of "spot zoning" to arbitrarily and discriminately zone a **small area for a significantly different use** will almost always be held to **violate equal protection and due process**.

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D. Some Variance Process is Required

Zoning schemes generally will violate due process unless there is **some provision for variances** and a variance **appeal process** to provide flexibility for special exceptions that would otherwise result in undue hardships to particular individuals.

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E. Other Freedom of Expression Issues

Ordinances that establish "architectural review boards," architectural or design standards or otherwise prohibit certain behavior for aesthetic reasons (e.g. clotheslines, satellite dishes, cars in the driveway, bright house colors, "garden gnomes" in the front yard, etc.) are **generally upheld**, even though they may limit freedom of expression, as long as they are reasonable in scope.

[42] The *Moore* court split 5 to 4 and the majority did not apply a strict scrutiny standard.

Chapter 14: Incidental Land Rights and Duties

The ownership of land carries with it certain incidental rights and duties that are often more the subject of a class on tort law. They will only be touched upon briefly here.

1. Ground Water

Under the common law there was no restriction on the amount of ground water each land owner was allowed to use, and that remains the general case today. This right is appurtenant to the land.

2. Surface Water

Modernly there are two general approaches to allocation of surface water between landowners. Where ownership of land is necessary for access to surface water, the water rights are appurtenant to the land.

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A. Common Law Riparian Rights

The common law approach still followed by most States is that the right to use **surface water** is called a **"riparian right"** that does NOT give the first users in time superior rights.

Under this approach every landowner has a right to a **"reasonable amount"** of surface water, but the reasonable amount usually depends on a hierarchy of priorities between different uses. The hierarchy of uses is typically as follows:

1. **Unlimited Right**: Each landowner has an unlimited right to use water for **drinking**, **bathing**, **raising farm animals** and in some States for **small-scale irrigation**.
2. **Some Arid States:** In some arid States **large-scale irrigation** has preference without limit over commercial use.
3. **Right to Surplus Water Only**: Only surplus water can be used for **commercial** use and in many States for **large-scale irrigation**.

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B. Prior Appropriation Approach

In 17 States (mostly arid Western States) surface water rights are appropriated, and usually the first party to use water from a certain source has superior rights to it. Other States allocate water rights though a permit process. These rights are often more like **intangible personal property**.

About 9 States, including California and Texas, use a **combination of both the Prior Appropriation and Riparian Rights** approaches.

3. Air and Sun Rights

Under the common law a landowner also owned the rights to the air above the land without limit. But modernly a landowner only has a right to be **free of unreasonable interference** from airplanes flying over his land.
But landowners still own the air above the land, so they have the right to build structures vertically on the land as high as they want, within the restrictions of zoning laws, even if it blocks the **views**, **sunlight** or interferes with the **TV and radio reception** of neighboring landowners. Almost all courts hold that **"light and air easements"** cannot be created by implication or necessity and must be expressly reserved or granted.

4. Miscellaneous Tort Based Rights and Duties

Landowners have various rights and duties based on tort law. Generally there is a right to exclusive use and enjoyment and a duty to maintain the land and avoid activities on the land that might injure others. These are more the subject of a class on torts and are only touched on here.

- **Strict Liability**: Abnormally dangerous uses of land give rise to strict liability in tort (e.g. **mining, quarrying, building dams** and **removal of lateral support**.)
- **Premises Liability**: A landowner has certain duties to maintain the land so others will not be injured. Under the **Attractive Nuisance Doctrine** there is a duty to protect known or suspected trespassing children from known dangers. Otherwise there is a duty to **protect licensees,** people allowed onto the land for social purposes, and **known trespassers** from **known dangers**, and a duty to **inspect the land and protect invitees**, people invited onto the land for the landowner's benefit, from known dangers. Urban landowners also have a duty to **inspect trees** on the land for hidden dangers that might be caused to people nearby.
- **Nuisance:** A landowner has a right to be free from unreasonable interference with the use and enjoyment of the land and a concurrent duty not to unreasonably interfere with the rights of others to use and enjoy their land.
- **Trespass:** A landowner has a right to exclusive use of the land.

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A. Removal of Lateral Support

Landowners are **strictly liable** for damage caused by removing lateral support (e.g. from mining, quarrying and other excavation) if the neighboring land is in its **natural state** (i.e. unimproved with structures). And they are otherwise liable if they **negligently** cause damage to **improved neighboring lands** by removing lateral support. But landowners are **not generally liable for damage caused by removal of ground water** (i.e. through pumping that causes the land to recede and damage neighboring lands.)

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B. Diversion of Surface Water: Common Enemy Doctrine

Under the common law **Common Enemy Doctrine** that is still recognized by about half the States a landowner is **NOT liable** for damage caused by damming or otherwise redirecting "diffuse" surface waters, rain waters that are not in a stream with a channel or defined banks.

Some other States hold landowners **always liable** for damage caused by redirecting surface water from its natural flow pattern, and yet other states hold landowners liable for damage caused by redirected surface waters only if they were **negligent** and diverted the surface waters in an unreasonable manner.

Chapter 15: Conclusion

This outline provides a summarized explanation of the common law and broadly adopted modern rules of **REAL PROPERTY LAW** tested on most Bar Exams, including the California Bar Exam. For detailed explanation of California Community Property law and how to write Bar Exam essays on that subject see Nailing the Bar's "Simple California Community Property Outline" and "How to Write Essays for California Community Property Law School and Bar Exams" at www.PracticalStepPress.com.

To make the explanation here simple and avoid unnecessary confusion some of the details and minor splits of authority have been minimized or ignored in this outline. Nevertheless the foregoing reflects about ninety percent of everything you should know to succeed in law school, and more than enough explanation of the rules of law for you to pass any bar examination.

Among the materials that have been excluded from this outline are legal theories that have been widely abandoned, extreme minority views, rare exceptions, fact-bound cases, history of the law's development, most cases, highly unusual situations and dwelling on subtle distinctions. These issues and concepts are either unnecessary for your legal education, OR your professor will direct them to your attention.

Each professor of law, in every subject, holds a keen interest in narrow areas of the law of personal interest. Frequently this interest is based on their own legal education or their experiences in the courts. When your professor expounds on an area of law given summary treatment in this outline it will be necessary for you to consult authoritative reference materials such as hornbooks to gain a greater understanding.

If your professor is adamant about some theoretical concept note that proclivity and modify your explanation of the law as necessary to humor those proclivities. But, you will find the bar examiners far less interested in such marginal issues and much more concerned with the breadth of your knowledge of the rules of law set forth herein.

Other than those cases where a professor demands further knowledge in a narrow area, the foregoing should be entirely sufficient to impart an adequate **understanding** of **Real Property Law**. However, mere **understanding is NOT ENOUGH** for you to succeed. Law school and the bar examinations require **both understanding** and ability to **explain the application** of the **law to the facts and facts to the law**.

This outline is NOT written for the purpose of explaining to you how you should explain the law on your examinations. For that see Nailing the Bar's **"How to Write Essays for Real Property Law School and Bar Exams"**. Information about that publication is available at the back of this outline.

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Index

K

L

M

N

O

P

Q

R

S

T

U

V

W

Z

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