What is Property?

- ***In analyzing cases***:
  - **Classify:**
    - **1st inquiry**: concerning personal or real property
    - We have to classify that person who is on the land and give that person a designation as to the status that person enjoys.
      - Owner: The person holds all rights/title/interest
      - Tenant: They hold only a possessory interest as the tenant
      - Easement: Present on land to use the land, but only under a right of easement
      - Licensee: Privilege to be on the property (includes an invitee) (revocable privilege)
      - Holdover tenant: Tenant at sufferance, a tenant who has held beyond the terms of his or her lease, not truly a tenant anymore, but remains on property illegally
      - Trespasser: Took and held possession wrongfully
  - **Rights/subject matter guides the subject matter**
    - **2nd inquiry**: What is the bundle of rights/sticks that is being impacted?
  - **The parties contesting the enforcement of the particular right/who else holds an interest?**
    - **3rd inquiry**: Apply the common law to determine how it should be mitigated
- **Property**: The interest which an individual holds in a subject matter, backed up by the power of the state through laws adjudicated by the court system
  - Mostly derived from **common law**
    - A possessory interest (possession) is a legal interest
      - Possession: control and intent to control
      - Rights and interest: synonymous terms
- **Three Categories of Property**
  - (1) REAL (2) PERSONAL (3) INTELLECTUAL
  - **FIRST** determine which of the 3 categories you're dealing with: each has a different bundle of rights
  - **SECOND** determine which interest from the bundle is involved in the dispute between two or more parties who are asserting interest in the property
- **Real Property**
  - Includes everything from the center of the earth to the heavens. You own everything attached to the land (harvest), under the land (minerals).
    - In MI it is based on common law: not a code state
- **Personal Property**: Not attached to the land
  - I have a book allow another student to use my book
    - I retain title
    - Student has possession: control and intent to control the book
  - This ***separation of title and possession*** is known as BAILMENT
    - Bailor is me with the title. I have ***ownership interest***.
    - Bailee is student with the book. He has ***possessory interest***.
      - Student has obligations under the principles of bailment:

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        - (1) Do not convert it to your own use (do not use it outside the agreed use, do not deliver the book to someone else)
        - (2) Do not be negligent with it (do not return in poor condition)
    - What if the student sells the book? □ This is called conversion □ I still have title. I can sue student for full value of book **OR** I can sue the 3rd party who purchased the book.
        - 3rd party has right of possession because the only title the 3rd party could take was the one the student had. ***Transferee takes no better title then his Transferor.***
    - What if someone steals the book from student? □ Student can bring action against the thief (replevin) and so can I (I have an action of conversion against thief who took it for his own use)
        - Thief has right of possession, which is junior to the bailee, bailee has right of possession junior the bailor, who has title
        - **Statute of limitations** applies: normally 2 years. If expires then thief has ALL RIGHT, TITLE, AND INTEREST. However, the running of time does not start **until** the thief is discovered.
- **Intellectual Property**: Sticks in this bundle: (1) MANUFACTURE (2) USE (3) SELL
- **Economic function of property** (Posner): the legal protection of property rights has an important economic function: ***to create incentives to use resources efficiently***. Without property rights, there is no incentive to incur costs because there is no reasonably assured reward for incurring them.
    - Three criteria for an efficient system of property rights:
        - (1) **Universality**: all resources should be owned or ownable by someone except resources so plentiful that everybody can consume as much of them as he wants without reducing consumption by someone else (sunlight)
        - (2) **Exclusivity**: the more exclusive the property right, the greater the incentive to invest the right amount of resources in the development of the property
        - (3) **Transferability**: if a property right cannot be transferred, there is no way of shifting a resource from a less productive to a more productive use through voluntary exchange; when the costs of transferring property rights are high, the attempt to achieve exclusivity may actually reduce the efficiency of the property rights system: because we can transfer property rights, we can transfer them to a more efficient use
- **Speculation**: the purchase of a good not to use, but to hold, in the hope that it will appreciate in value.

Moore v. Regents of the University of CA

- **FACTS**: Moore (P) underwent treatment for hairy-cell leukemia over a period of 7yrs. His physician used samples of P's cells to establish a cell line, which led to a patent on the cell line. P sued physician and his employer claiming that he had an ownership interest in his own cells and that Ds' use of the cells without his authorization constituted a conversion. The court of appeal held that P stated a cause of action for conversion. Ds appeal.

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  - Steps: 1) Personal Property 2) Right of Possession
- **ISSUE**: Does an individual own property rights in his own cells, such that use of the cells for medical research without his permission would constitute conversion?
- **HELD**: No.
  - **RULE**: A conversion arises when the P establishes an actual interference with his ownership or right of possession.
    - Here, P did not expect to retain possession of his cells after their removal, so he had no ownership interest on which to base a conversion claim.
  - **RULE**: The law regulates human tissues with policy goals in mind instead of applying the general law of personal property. Qualifying this as conversion would have a negative effect on research because if you obtain possession of an object that has been converted, whether you know or not that the item is converted, you are liable for conversion.
    - Would make doctors and researchers liable for conversion and less likely to research for solutions to medical problems.
  - **RULE**: While the threat of conversion liability might help enforce patients' rights, the fiduciary-duty and informed consent theories protect the patient directly, without impairing socially beneficial research.
    - Therefore, P's cause of action for breach of fiduciary duty or lack of informed consent may proceed on **remand**.
- Note: The court finds that the cell line is factually and legally distinct from any part of materials removed from P's body, so P had no property interest in the patent. ***Title by Accession***: see below: D changed the property and character of the spleen, if P is entitled to anything, it would be only the value of the spleen, not the value of the patent.

- **Title by accession**: A person believes they have permission to enter the land, take grapes and create wine. The landowner brings an action only for the grapes. The person applies their intellectual knowhow to create wine, it's no longer the same object, and you can NOT bring about an action to recover the wine because it's no longer the same thing. When you go to recover the bottle of wine $300, grapes $15. The person using the grape had no intent, acted innocently. Person acquired title because he increased the value through his own labor. The landowner still has a cause of action for relief—even though the person acted innocently they interfered with the landowner's rights.

- 3 possible relationships:
  - (1) Bailment created: Donor, Donee
  - (2) Gift: person making the gift ***does not*** retain title
  - (3) Sale: consideration: no intention to retain title

Attributes of Property

- Property has 3 basic **attributes**:
  - (1) the right to use it
  - (2) the right to transfer it to others: *Jones v. Alfred H. Mayer Co.*
  - (3) the right to exclude others: *State v. Shack*

The Right to Exclude

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- Property regimens fall apart when people do not understand, respect, and tolerate the property claims of others
- Exclusive v. Absolute: Private property rights are generally viewed as ***exclusive*** rather than absolute. The distinction between exclusive and absolute rights, when applied to private property, lies in the concept that society may exert certain burdens or limitations on the use of private property for the benefit of society. i.e. taxation, eminent domain, etc., while still recognizing the individual's exclusive rights vis-à-vis other private individuals.

State v. Shack: Limitation on the right to exclude

- **FACTS**: Shack (D), an attorney and a representative of a nonprofit corporation providing legal services for migrant farm workers, entered upon Tedesco's property with a representative providing health services to render health care and legal aid to two migrant workers living in housing provided by Tedesco. Tedesco said Ds could only help man or give legal advice in his office with him present. Ds refused to comply and entered land anyway, so Tedesco executed formal complaints against both Ds for trespass and had them removed by a state trooper.
    - Steps: 1) Real Property 2) Right to exclude
- **ISSUE**: May an employer who provides migrant workers with housing in conjunction with their work prohibit others from coming onto the land to render governmental services to the migrant workers?
- **HELD**: No. "We see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him . . . The employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property."
    - **RULE**: Right to exclusion from real property is not absolute. Ownership alone cannot allow an individual to control the lives of those he allows on his land.
        - The ownership of real property does not include the right to bar access to government services available to migrant workers living on private land.
        - Property rights serve human values and are limited by those values.
            - Human rights outweigh landlord property rights.
        - Employer may require that visitors identify themselves and state their general purpose for visiting.
    - **RULE**: The reason the court did not adopt tenancy: If you're a tenant with the right to possession, you can invite others over and extend the license, but not transfer it. This would trigger other tenancy laws and could open a can of worms.

The Right to Transfer (Disposition): Like the right to exclude, it is not absolute.

Jones v. Alfred H. Mayer Co.: Congress may restrict private owner's rights for public good.

- **FACTS**: Jones brought an action under **42 USC §1982**, alleging that Mayer refused to sell P a home because P is black. Lower courts held for D stating that the proscription against discrimination in §1982 was only applicable to state action under the 14th amendment. P appeals.

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- Steps: 1) Real Property 2) The right to transfer
- **ISSUE 1**: Does §1982 only apply to state action?
- **HELD:** No. The plain language of the statute makes it clear that Congress intended to reach all discrimination in realty, not just state action.
- **ISSUE 2**: May Congress forbid a private person's refusal to sell or rent property because of the other person's race?
- **HELD**: Yes. The P have a right to have the contract enforced.
  - **RULE**: Congress has the power to enact a provision restricting racial discrimination in both public and private sales and rentals of land under the 13th Amendment.
    - In Hurd v. Hodge, the court had said it related to the 14th Amendment, but this court decided that it was the 13th Amendment. The intent was to abolish all racial discrimination in realty transactions. The power to do so was conferred upon Congress by the 13th Amendment. 13th amendment can cover **PRIVATE & STATE ACTION**.
    - The court does not enforce the common law right to exclude because of the statute from congress and the 13th amendment.
- Note: Fair Housing Act (adopted under the interstate Commerce Clause) does not apply in this case because it took place before the housing act was passed. If the Fair Housing Act would have been around, it would only apply if the sellers had used a broker, it does not apply for a private sale. There must be a broker and buyers must fall into protected class. The act covers sale, leasing, and other activities that go beyond the scope of §1982. FHA does not protect those not in protected class.
- Michigan Civil Rights Act would apply to private sales.

The Right to Use: Also not absolute (zoning requirements, subdivision ordinances, environmental regulations).

Objections and Classifications of Property

Edwards v. Sims: Ad Coelum Theory

- **FACTS**: Edwards (P) discovered and commercially exploited the Great Onyx Cave. Lee claimed that part of the cave ran under his land. Lee brought suit to quiet title, and the circuit court directed a survey to be taken of the land to determine if part of the cave was under Lee's land. P is suing to prevent Sims (D), the judge, from enforcing the order.
  - Steps: 1) Real Property 2) The right to what's beneath the land
- **ISSUE**: *"To whomsoever the soil belongs, he owns the sky and to the depths."* Can the court invade this right in order to determine whether someone is trespassing?
- **HELD**: Yes. The order is within the jurisdiction and power of the lower court.
  - No one will suffer a great injustice or irreparable injury by the survey.
  - The court was unable to resolve the dispute based on the evidence before it. The intrusion into P's land is necessary to determine whether P is trespassing.
- **DISSENT**: Lee cannot use the cave because the mouth of the cave is on Edwards' property. The order injures Edwards without aiding Lee. The cave should belong to the owner of the entrance. The rule should be that he who owns the surface is the owner of everything that may be taken from the earth and used for his profit or happiness.

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- Ad Coelum Theory: The common law rule that a landowner holds everything above and below the land, up to the sky and down to the earth's core, including all minerals.
- *Note*: What if the cave is running under Lee's land? Lee would then transfer a stick out of his bundle known as an "easement" to Edwards to allow people to continue viewing the cave under Lee's land.

Role of Property in Society

- **Conquest and Dominion**: when Europeans began their conquest of the new world, they generally adopted the principle that the original inhabitants could occupy and retain possession of the soil but could not dispose of it since discovery gave exclusive title to the discoverer. Thus, the European conquerors subscribed to the right of conquest whereby they assumed the power to grant the soil even though it was in the possession of the native people.

Johnson v. McIntosh: American Indian Claims; Government, not Indians issue titles

- **FACTS**: Johnson (P) claimed land through deeds given by native American Indians. The district court ruled against P and P appeals.
    - Steps: 1) Real Property 2) The right to transfer
- **ISSUE**: Can this title be recognized in the courts of the United States? **Do the Indians have the power to give, and private individuals to receive, a title which can be sustained in court?**
- HELD: ***No***. Judgment affirmed.
    - **RULE**: The transferee takes no greater title with him than the transferor. *(Rare exception to this is the doctrine of the bona fide purchaser for value: BFP)*
        - The American Indians only had the right of occupancy so all that could be taken from them was the right of occupancy. The American gov. holds title and is the only one that could transfer.
            - Right of Occupancy: Revokable at will by the government and NOT a true property right. It is not transferrable to anyone other than the federal government
    - Usually, the conquered shall not be oppressed, and their condition shall remain as eligible as is compatible with the conquest. They are usually ***incorporated with the nation*** and become citizens of the government they are connected to. However, this rule does not work for Indians because they were "savages"
        - Therefore, the Indian inhabitants must be regarded merely as occupants, and to be deemed incapable of transferring the absolute title to others
    - **RULE**: The ultimate title to the property is vested in the US by right of discovery and by right of the conqueror. The Indians are merely occupants. Their possession may be protected in peace, but they cannot transfer absolute title to others. The courts of the US cannot recognize title based on a grant by the Indians.

- **Constitutional Limitations:** Federal and State constitutions and statutes have been construed to prohibit enforcement of private agreements that condition alienation or ownership upon criteria that discriminate against certain identifiable classes, the integrity of which society-at-large deems in its best interest to protect.

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Shelley v. Kraemer: State judicial enforcement of Racially Restrictive violates the Due Process clause of the 14th amendment.

- **FACTS**: The Shelley's (Ds) who were black, purchased real estate that was subject to a restrictive racial covenant. The Kraemer's (Ps) brought an action against the McGhees (Ds) to force divestiture of real property for violation of the covenant, which precluded "occupants as owners or tenants…by people of the Negro or Mongolian Race." The trial court ruled for Ds, but the Missouri Supreme Court reversed, construing the covenant to allow divestiture in the event of its violation. D appeals.
    - Steps: 1) Real Property □ 2) Full bundle of rights: compare to *Jones,* here homeowners are willing to transfer their property but the neighbors object.
- **ISSUE**: Does the action of the state court in enforcing the restrictive covenant deprive Petitioner of rights guaranteed by the 14th Amendment and acts of Congress?
- **HELD**: ***Yes***, therefore they are unconstitutional. Reversed.
    - Prior decisions found that restrictive agreements, standing alone, could not be regarded as a violation of the 14th because there was no state action. However, this court found state action by court's decision to enforce covenant.
    - **RULE**: Enforcing private racial discrimination brought the state into it (because the neighbors approached the court, it was now state involvement).
    - **RULE**: The doctrine of Equal Protection allows ownership regardless of race. The Due Process clause would be violated if state action were allowed to frustrate this ownership. State action is found when state judicial machinery is used to enforce private restrictive covenants. To allow these covenants to be enforced would allow the state to do indirectly what it is absolutely precluded from doing directly.
    - **RULE**: Struck down restrictive covenants nationwide

The Acquisition of Personal Property

- Possession: Control of an object with intent to control.
    - One may obtain possession in a number of ways without acquiring ownership (as a finder, bailee, or thief).
    - Where a possession is in possession of a **chattel**, the law will protect such possession against the entire world except the true owner.
    - However, where the possession has been granted by the true owner (as in a lease of bailment), the possessor's right to the custody and control of the chattel will be superior to even those of the true owner.
- Ownership: A recognized relationship between the owner and the rest of society with respect to a particular piece of property.
    - The relationship involves certain rights (the right to exclude all others from use or enjoyment), and also certain burdens and responsibilities (payment of taxes).
        - In essence, ownership is the ultimate of all recognized rights a person can acquire with respect to a particular piece of property, subject to such limitations and burdens as society imposes upon it.
    - When an owner loses property, in the eyes of the law she is still the owner. Her title to the lost property is superior to that of everyone else including the finder. The finder of the lost property, as a general rule, has title to the lost property superior to all but the true owner. This rule has some exceptions:

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- **Prior Possessors**: the general rule applies to the case of the subsequent possessor. Suppose an owner (O) loses a ring as a finder (F) finds it, only to lose it himself. If someone else (G) later finds it, F has a title to the ring superior to G's. G would be obliged to give it back to F. If O came along, G would then be obliged to give it to O, rather than F, since the true owner's rights are superior to anyone else's. This rule applies even if F steals the ring from O.: *Armory v. Delamirie*

Finding

Goddard v. Winchell: Objects placed on land by nature's forces

- **FACTS**: Goddard (P) owned prairie land that he leased to Elickson. During the term of the lease a meteorite fell on the land and was dug up by Hoagland in the presence of Elickson. Hoagland sold the meteorite to Winchell (D). P sued in replevin to get the meteorite from D. Lower court held for P.
- **ISSUE**: Is a meteorite part of the private land where it falls so that a subsequent taking by a finder is wrongful?
- **HELD**: Yes. Judgment affirmed.
- **RULE**: A meteorite or any other object placed on the soil by nature's processes becomes part of the soil so that a subsequent taking by a finder is wrongful.
- *Notes:*
  - When the meteorite became embedded in the ground, Goddard acquired a **POSSESSORY RIGHT & TITLE**. Goddard **KEEPS THESE** unless he **transfers** it or **abandons** it.
  - Hoagland acquired a **POSSESSOR RIGHT JUNIOR** to Goddard's.
    - Separation of **TITLE** and **POSSESSION** creates a bailment obligation of bailee was not followed here because Hoagland converted it and Winchell converted it. Both can be sued for meteorite & for full value.
      - The Statute of Limitations is **2 years** for conversion If Goddard waits this long, he can NO LONGER claim title. **SOL does not start until the true owner FINDS where the object is.*
  - **Transferee takes no better title then transferor**
    - **EXCEPTION:** Hoagland acquired not GOOD TITLE, but ***VOIDABLE TITLE.***
      - Bonafide Purchaser Doctrine: Transfer of this VOIDABLE TITLE gives Bonafide Purchaser ***GOOD TITLE***. This is not applicable here, because Hoagland didn't have ANY title.
      - **UCC 2-403(1).**
        - B defrauds A to get them to intend to transfer title to them.
        - B has a voidable title because A could void it in court due to fraud.
        - B sells to C representing they have good title when they don't, but C relies on this and gets Good title.
        - A cannot go after C, only B, to be made whole.
        - Title would need to be voided BEFORE the sell to C.
      - **UCC 2-403(2)**

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  - Entrusting to a dealer for repairs, which is a bailment, then dealer sells to another customer.
  - Dealer committed conversion, but you really want the item back, not damages.
  - Cannot go after the customer that bought it. If you deliver the item to a merchant that deals in goods of the kind, and if it's sold in the ordinary course of business, you cannot get the item back. Customer gets to keep it.
  - Because you entrusted, the preference goes to the purchaser.

Armory v. Delamirie: Prior Possessor Rule: Finder may recover full value from one who deprives him of this possession.

- **FACTS**: P found a jewel in the course of his work as a chimney sweeper and took it to D's shop for appraisal. D's apprentice stealthily removed the stones from the socket. P refused D's offer to buy the item, and D returned the socket without the stones. P sued in trover to recover from D the full value of the jewel. From a judgment of the lower court for D, P appeals.
  - When P picks up the jewel a bailment is created.
    - Quasi-bailment: Not by agreement
      - Separation of **possession** and **title**
  - Jeweler has **converted** the objection by interfering with P's **possessory right** and the **title** of whoever has title, the true owner.
  - All P is entitled to do is **care for jewel** and **return it to true owner**.
- **ISSUE** - As a finder, does P's property right in the jewel entitle him to recover its full value from D, who received possession from P and knew that P had found it?
- **HELD**: ***Yes***. Judgment reversed.
  - **RULE**: The finder of an object does not acquire absolute legal title. However, he has a property right against all but the true owner and has superior title to subsequent finders.
- *Note:* P's suit was at law to recover the value of the jewel (TROVER**: recover the actual value of the stolen/lost item**). If he sought the stones he would need to bring an action for REPLEVIN**: recover the actual item**.

- **Prior Possessor Rule** Achieves several social goals:
  - Protects an owner who cannot prove he's the true owner
  - Protects individuals who entrust goods to others: e.g. Laundromat
  - Protects expectations of prior possessor who expect to prevail
  - Promotes peaceable possession: if prior possessors didn't prevail, people might steal hoping law would protect them.
- Many states, including Michigan, have found property statutes that require finders to turn over found property to a lost and found division of the local law enforcement. If the true owner does not come forward within a specified time, the property goes back to the finder along with all right, title and interest.
- ***Lost vs. Abandoned Property*** - The distinction between lost and abandoned property rests on the intention of the owner of the property when last in possession of it. If the

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owner has accidentally and unintentionally lost possession, the property is "**lost**." But if the owner has intentionally relinquished both ownership and possession of the property without vesting either in anyone else, the property is "**abandoned**." Abandoned property belongs to no one and the finder acquires ownership merely by taking such property into possession (control with intent to control).

- Owner's intention**:** to determine the intention of the property's owner when he gave up possession, the courts consider the location where the property was found, its value, its quality and its uses. Valuable property is usually deemed to have been lost.
- *You may abandon your title in personal property, but **NOT** real property. You may abandon an easement. You may **NOT** abandon title to a freehold estate.*

Private Interests in Land

The Historical Development of the Doctrine

- Remember that personal property **CAN** be abandoned, but title to land **CANNOT** be abandoned.
- In the olden times, **life estates** were only for life and the King held right of reversion.
  - Until king passed fee simple absolute, if there was no one to take the land after, it would ***escheat*** to the king.
- In the case below, property **escheats** to Nebraska, and the state tax does NOT cover the right of escheat.

In re O'Connor's Estate: When landowners die without heirs, their land reverts to the government: **ESCHEAT**

- **FACTS**: O'Connor died without leaving heirs. By statute, his estate escheated to the state of Nebraska. The county in which the estate was probated brought an action seeking inheritance taxes from the state. The trial court awarded the county the taxes and the state appeals.
- **ISSUE**: May a local government require the state to pay inheritance taxes when an estate escheats to the state?
- **HELD**: ***No.*** Judgment reversed.
  - **RULE**: The state is the original and ultimate proprietor of real estate. What is commonly termed ownership is really only a tenancy, which can continue only under legally recognized rights of tenure, transfer, and succession. Upon termination of this tenancy, the property reverts to the state. Thus, "*Escheat*" means a reversion to the state.
    - In this case, the inheritance tax was a transfer on succession so didn't apply to the reversion.
  - **RULE**: When landowners die without heirs, their land reverts to the government.

Freehold Estates

- **THE SYSTEM OF ESTATES**
  - **Background**
    - **Fee simple estate**= absolute
    - **Life estate**= lesser estate than a fee simple estate

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- **Freehold estate**= absolute
- **Non- freehold estate**= law of landlord/tenants
  - Could be terminated upon the wish of the landlord who was the lessor, so as long as there are not enforceable periods of time in their agreement.

- **Estate:** an interest in land measured by some period of time and that is or may become possessory
- Deed: conveyance instrument used to transfer whatever interest an individual holds in real property, to another person.- inter vivos transfer requires a deed to transfer.
  - Describe the deed, the nature of the estate, deliver the deed to the other party
  - A deed tells you the nature of the estate and description of the property
  - ***To transfer*** an estate to someone else after the deed is used to transfer land to you, a new deed needs to be created.
- **Presumption**: unless clearly expressed otherwise, when estates are transferred, it's presumed the intent is to create a fee simple estate.
- **Two things to remember about estates**:
  - Estates are or may become possessory
  - Estates are measured in terms of duration
- 3 types of **FREE ESTATES** and 3 types of **LEASEHOLD ESTATES**
- **Types of Estates**:
  - Fee Simple: An estate that has the potential of enduring forever. It is created by O, the owner granting the land "to A and his heirs." This estate resembles absolute ownership, and the holder of a fee simple is commonly called the owner of the land.
  - Fee Tail - An estate that has the potential of enduring forever but will necessarily cease if and when the first fee tail tenant has no lineal descendants to succeed him in possession. A fee tail is created by O granting the property "to A and the heirs of his body."
  - Life Estate - An estate that will end necessarily at the death of a person. It is created by granting the property "to A for life."
  - Leasehold Estate - include estates that endure:
    - For any fixed calendar period or any period of time computable by the calendar (called a "term of years" regardless of the length of the period);
    - From period to period until the landlord or tenant gives notice to terminate at the end of a period (called a "periodic tenancy"); or
    - For so long as both the landlord and tenant desire (called a "tenancy at will")
- **Freehold and Non-freehold Estates**: the fee simple, fee tail, and life estate are "freehold" estates. The important difference between freehold and non-freehold estates is that a freeholder in possession has "**SEISIN**"; whereas a leaseholder has only possession.
  - Seisin**:** a person holds seisin if he holds an estate of freehold and either has possession of the land or a tenant holds possession from him. Except

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where the land is leased and the landlord holds the seisin. "possession by a freeholder" embodies the fundamental idea of seisin.

- Someone always has seisin: stems from feudal times someone had to be responsible for feudal services
- In order to convey a freehold estate, the parties had to go on the land and perform a ceremony known as "livery of seisin." This involved the grantor handing over a piece of land or twig in front of witnesses on the land.

- **Creation of Estates**
  - Estates are created by using appropriate words in a deed or will. "**Words of limitation**" in an instrument describe what type of estate is created. "**Words of purchase**" identify the person in whom the estate is created.
    - Suppose that O conveys Blackacre by deed "to A and his heirs." The words "to A" are words of purchase. The words "and his heirs" are words of limitation, indicating a fee simple.
  - **Possessory Estates and Future Interests:** Every estate can be classified as a possessory estate or as a future interest.
    - Possessory estate**:** gives the holder the right to immediate possession.
    - Future interest**:** does not entitle the owner to present possession, but it will or may become a possessory estate in the future.

FROM MY NOTES: SEE FLOWCHART ALSO

- **(1) Fee Simple**
  - (a) Fee simple absolute
    - "A would transfer to B and her heirs"
    - Without "and her heirs," under common law, B would take only a life estate
    - However, now, "A conveys to B" is fee simple absolute
  - (b) Fee simple defeasible: If the condition is not followed, the fee simple is defeated.
    - (i) Fee Simple Determinable: "A conveys to B and his/her heirs ***so long as*** liquor is not sold on the premises." ***until*** or ***while*** also used. Words in an instrument that state the motive or purpose of the grantor do not create a determinable fee. For a determinable fee, it is necessary to use words limiting the duration of the estate.
      - Limitation with an **automatic reversion:** if liquor is sold, estate automatically reverts to grantor
      - Grantor retains a future interest: **possibility of revertor**
      - **Transferability:** a fee simple determinable may be transferred or inherited in the same manner as any other fee simple, as long as the stated event has not happened. But the fee simple remains subject to the limitation no matter who holds it.
    - (ii) Fee Simple Subject to a Condition Subsequent: "A conveys to B and his/her heirs ***on the condition that*** liquor is not sold on the premises." Or **provided that** or **but if.**
      - Limitation in which the grantor must take some affirmative action to divest the grantee of his estate. NOT AUTOMATIC.

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- Grantor retains a future interest: **power of termination/right of reentery**
  - The estate continues in the grantee until the grantor exercises her **power of reentry** and terminates the estate. The grantor has the option of exercising or not exercising the power.
- **Transferability:** this estate may be transferred or inherited in the same manner as any other fee simple until the transferor is entitled to and does exercise the right of entry.

▪ (iii) Fee Simple Subject to an Executory Interest: A fee simple that, upon the happening of a stated event, is automatically divested in favor of a THIRD PERSON.

- "A would convey to B and his heirs upon the condition (so long as, etc.) that liquor not be sold on the premises ***but if it is***, to C and her heirs."
- B's fee simple subject to an executory interest + C's executory interest **IS EQUAL TO** a fee simple absolute
- Therefore, A holds **nothing**.
- ***FS subject to an executory interest*** compared to ***FS subject to condition subsequent***:
  - (i) The person who originally has the future interest is always a grantee and never the grantor; and
  - (ii) Upon the happening of the stated event, the FS subject to an executory limitation is divested AUTOMATICALLY, not at the option of the grantor.
    - The condition is destroyed, C is not held to it.
- ***FS subject to an executory interest*** compared to ***FS determinable***:
  - (i) A determinable fee expires automatically according to the terms of the limitation, whereas a FS subject to an executory limitation is divested automatically. It is the difference between natural expiration and being cut short.
- Subject to RULE AGAINST PERPETUITIES

- (2) Life Estates
  - "A conveys to B for life"
  - A holds a **reversion**. When B dies, land goes back to A and returns to a fee simple absolute.
  - (a) Vested remainder: "A conveys to B for life with a remainder in C to take up possession after B dies"
    - C is **ready at all possible times** to take up the estate
    - Life estate + vested remainder = FEE SIMPLE ABSOLUTE
      - A has NOTHING
  - (b) Contingent remainder: "A conveys to B for life with a remainder in C to take up possession after B dies if C should graduate from X school.
    - **NOT ready at all times** because C hasn't graduated yet.
    - Therefore, A holds a REVERSION until C graduates.

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        - If B dies before C graduates, A takes the land and it becomes a fee simple absolute.

- The Fee Simple Absolute

- **The Fee Simple Absolute**
    - An absolute grant by grantor to the grantee with no limitations as to its duration.
    - A fee simple absolute is of potentially infinite duration (therefore called a "fee"). There are no limitations on its inheritability (therefore called "simple"). It cannot be divested, nor will it end upon the happening of any event (hence called absolute).
    - **Divisibility**: three characteristics associated with fee simple today:
        - (i) it is freely alienable by the owner during life
        - (ii) it can be disposed of at death by the owner's will
        - (iii) if not disposed of by will, it will pass to the owner's heirs. If none of these things happen and the owner of a fee simple dies intestate without heirs, the fee simple will escheat to the state.
    - Fee simple can be subdivided into **lesser fee simple** so it's no longer a fee simple absolute:
        - Fee Simple Determinable; Fee simple subject to a condition subsequent; fee simple subject to executory limitation.

Cole v. Steinlauf: Omission of words as title defect

- **FACTS**: Cole (P) contracted to purchase real estate from Steinlauf (D) on the condition that D convey title free and clear of any defect of title. The attorney who examined the title discovered that the deed in which D was granted ran to the grantee "and assigns forever," without mentioning heirs. P refused to accept D's deed and sued to recover the deposit paid. The trial court held for D, and P appeals.
- **ISSUE**: Is a deed not containing the words "heirs" questionable enough to provide reasonable doubt permitting the plaintiff to pull out of the agreement?
- **HELD**: Yes. Judgment reversed.
    - Under **the common law**, a deed must use the word "heirs" to create an estate of inheritance in land. Although a deed can be reformed to vest a fee in a grantee if the word is omitted, this can be done only ***if the parties clearly expressed an intent*** that a fee was intended. The parties necessary to prove such an intent were not involved in the case.
    - **o** Even if D could prove that the title he received was a fee simple, the question here is not whether the defect in fact can be removed but rather whether the defect is such that it raises a **reasonable doubt**. Since the defect requires outside proof of intent to be overcome, **D's title is not free and clear.**
    - The court later commentated that words of inheritance were not required under Connecticut law, but that the Cole case had been correctly decided because the issue there involved marketability of title and the case law was then unclear.
- **RULE**: In a common law jurisdiction, the lack of the words "and his heirs" in a deed in the chain of title is sufficient to make title unmarketable.
- **RULE**: In common law, if you don't use the exact terms "and his heirs", it's presumed to be a life estate.

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  - *Note:* D's heirs here would be **trespassers** or **adverse possessors** because D does not have a fee simple absolute so when he died, the property reverted.
  - Michigan 15 years for adverse possession and after it runs out, title transfers.
    - They can then bring a quiet title for a court to declare they have a fee simple absolute.

- Marketable title: title free and clear of incumbencies and free of suspicion that there might be incumbencies (liens, etc.). The full bundle of rights is being transferred at closing, excepting any specifically noted in the agreement (easements, etc.).
  - Buyer must search the chain of title to be sure that seller has the full bundle of rights to convey to the buyer.

- **Inheritability**: if the owner of a fee simple dies intestate (without a will), the fee simple is inherited by the owner's heirs.
  - Heirs defined: the word "heirs" means in law those persons who succeed to the real property of an intestate decedent under the intestate succession statutes of the applicable state (sometimes called the statute of descent). Thus, if O dies leaving a husband and child, and under the intestate succession law the husband and child succeed to title's O's land, O's heirs are O's husband and child.
    - The word heirs cannot be given context without looking at some statute of intestate succession. These statutes vary considerably from state to state.
    - Heirs are those who take property under the relevant statutes of descent.
    - Heirs are **devisees** if land is being ***transmitted***, or **legatees** if ***personal property*** is involved.

- The Life Estate

- A life estate is an estate that has the potential duration of one or more human lives. Life estates are very common today, particularly life estates in trust. When property is held by X in trust for A for life, A is entitled to all the rents and profits or other income accruing from the property.
- Types of life estates:
  - For life of grantee: the usual estate is measured by the grantee's life.
    - Example: O conveys property "to A for life." the grantee A gets an estate in the land for as long as A lives. Upon A's death, the land reverts to O, the grantor.
  - Pur Autre Vie: for another's life: when the estate is measured by the life of someone other than the owner of the life estate, it is classified as a life estate pur autre vie. It comes to an end when the measuring life ends.
    - Creation of life estate pur autre vie: A life estate pur autre vie can be created in one of two ways:
      - (i) first, A, a life tenant, conveys her life estate to B. B has a life estate pur autre vie. A remains the measuring life.
      - (ii) second, O conveys property to B for life of A. B is a life tenant pur autre vie. A is the measuring life. the estate will end at A's death.

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  - If tenant predeceases measuring life: suppose that B holds a life estate pur autre vie, with A as the measuring life. **What happens if B dies leaving A surviving?** The life estate does not end, of course, until A's death. **The modern rule is that the estate descends to B's heirs for the life of A**.

Lewis v. Searles: No life estate if intent is not shown

- **FACTS**: Letitia Lewis died leaving two nieces and a nephew as heirs. Letitia's will devised all of her estate to one of her nieces, Hattie Lewis (P), "so long as she remains single and unmarried." If P married, the estate was to be divided equally among the three survivors. P never married and sought a declaratory judgment quieting title to the real estate in her in fee. The trial court found that the will was intended to give P a life estate, and that upon P's death one-third was to go to each survivor. P appeals.
- **ISSUE**: Must a will be construed as devising an estate in fee if **no intent is expressed to create a life estate** and **no further devise is made to take effect after the death of the devisee**?
- **HELD**: ***Yes.*** Judgment reversed.
  - Court looks at author of will, their intent and finds this is a fee simple subject to executory interest. ***"So long as"*** language. Not automatic reversion.
  - P has a fee simple subject to executory interest. Niece and nephew could exercise their interest if P married and if P never married, it would pass to her heirs.
    - Policy arguments: Restraint on marriage typically against public policy, but here court finds it was not a restraint but rather designed to support her while she was single.
  - **RULE**: All devisees are in fee simple unless an intent is expressed to create a life estate; also, if no further devise is made to take effect after the death of the devisee, a fee simple will be implied.
  - **RULE**: Courts must construe wills as a whole in order to arrive at the intent of the testator. There was no mention of P's death. The gift to the other survivors was only to be effective upon P's marriage. The will clearly manifests an intent to give P a greater estate if P did not marry.
- *Notes:*
  - The 2 nieces and nephew each have a 1/3 interest as **joint tenants**.
  - The defeasible fee here is an **executory interest**, which is transferrable during the lifetime of the holder: nothing is left for the estate.
  - The Rule Against Perpetuities is not violated here: the executory interest will either vest during Hattie's life or end when she dies.

- **Alienability of life estate**
  - A life tenant ordinarily is free to transfer, lease, or otherwise alienate her estate. Of course, the transferee gets no more than the life tenant had (i.e. an estate that ends at the expiration of the measuring life).
- **Right to use and enjoyment of the land**
  - A legal life tenant is entitled to occupy, use, and enjoy the land, and is also entitled to the rents and profits produced from such land. But she is not entitled to consume or exploit the land is such a way as would injure the interests of the

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persons who will take the land at her death. (i.e. the owners of the remainder or reversion). Doing so would be "waste."

- **Waste**
  - The tenant is liable to his landlord for damages to the reversionary interest if waste is committed. Damage may be shown by diminished value.

Moore v. Phillips: Laches (equitable defense) as a defense against waste: Doesn't work here

- **FACTS**: Brannan had a fee simple absolute when he died. In his will, he gave his wife Ada a life estate in certain farmlands, remainder to **Dorothy Moore** and Reinhardt. Moore and Reinhardt would take a vested remainder in fee simple absolute. It came to pass that Ada did not maintain the farmhouse. She holds the freehold in possession of the life estate. There's an obligation in the common law that persons who hold a future interest have to maintain the property. She died without any action being taken by the two who held the vested remainder in the fee simple absolute. She didn't provide any additional funding from her estate for these two parties, so they brought action against her estate.
- **ISSUE**: Whether the remaindermen, by waiting 11 years until the death of the life tenant before filing any claim or demand against the life tenant for neglect of the farmhouse, are barred by ***laches*** or ***estoppel***?
  - Laches - unreasonable delay in making an assertion or claim, which may result in refusal
- **HELD**: No. Judgment affirmed.
  - Laches is a ***matter of equity*** and will not apply if there is a reasonable excuse for nonaction of the party against whom laches is asserted. In this case, there was a good reason why Ps did not assert their claim earlier: mother and daughter were estranged. No prejudice to D resulted. Laches does not bar Ps' claim.
  - **RULE**: if you are in possession of a life estate you have to preserve the property for the holder of the future interest. So you can keep all the profit/minerals/oil, but you can't damage the land. You have to protect it.

- Defeasible Estates

- See here
- ***Fee simple subject to condition subsequent*** distinguished from ***fee simple determinable***:
  - These two estates are very similar and often the language in deeds can be classified either way. If the court has a choice, the fee simple subject to condition subsequent is preferred on the ground that the forfeiture is optional at the grantor's election and not automatic. The general policy of courts is to avoid forfeiture of estates.

Oldfield v. Stoeco Homes: Construction in light of extrinsic circumstances

- FACTS - City wanted to develop some swampland it owned and sold a portion of the land to Stoeco Homes (D) by deed, which provided that D fill the land it purchased, as well as the land retained by the city, within one year from the date of the deed. Failure to do so would "**automatically cause title to revert to the city**." The city retained the right to change or modify "any restriction, condition, or other requirements hereby imposed." D was unable to fill the land within the one-year period. The city passed an extension.

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Plaintiffs, residents & taxpayers of Ocean City, objected. Ps sued to have the extension declared invalid and to have the lands D purchased forfeited and returned to the city.

- **ISSUE**: Was the grant a fee simple determinable (the grantor would have the possibility of reverter) or was it a fee simple subject to a condition subsequent (the grantor would have the power of termination)?
- **HELD**: Court finds a fee simple subject to condition subsequent.
    - P claims that the deed created a fee simple determinable rather than a fee simple subject to a condition subsequent. Accordingly, D's failure to fill the property within one year would result in forfeiture and the property would automatically revert to the city. This result appears proper since the reverter clause uses the word automatically.
        - **HOWEVER**, the parties' intent is the focus of the court's inquiry.
        - ***There are numerous provisions indicating that the one-year requirement was only a condition***. The city itself reserved the right to modify the conditions in the deed. The court need not decide whether the city would have done away with the requirement that D fill the land, but the city could legally extend the time period, since there is no indication that time was of the essence.
        - The deed contains the flexibility needed for such a large-scale project. Therefore, the deed created a fee simple subject to a condition subsequent, and ***the city would have to take some affirmative action to divest D of the estate.***
- *Notes:*
    - The requirement imposed for defeasible estates can be worded in 3 different ways:
        - (1) **CONDITION:** Developer is receiving a defeasible fee simple
            - Either subject to condition subsequent (power of termination) or determinable (possibility of revertor).
        - (2) **COVENANT PROMISE:** Fee simple absolute subject to a covenant
            - "O conveys to A and her heirs with A's promise that liquor not be sold upon the premises."
            - What A takes is a fee simple absolute subject to a promise.
            - When the promise is broken, O's recourse is to bring an action against A to enforce the promise or money damages but A will not lose the estate**.**
            - So, you can enforce this promise by seeking equitable relief or money damages.
        - (3) **WISHFUL EXPRESSION:** No legal remedy (*Robert v. Rhodes*)

Robert v. Rhodes: What makes a fee simple absolute a fee simple determinable?: Necessary words of limitation

- **FACTS** - The Smiths, a husband and wife, made a quitclaim deed for two tracts of land to a local school district. (*Quitclaim deed - The owner/grantor terminates ("quits") any right and claim to the property, thereby allowing the right or claim to transfer to the recipient/grantee*)

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    - Consideration for the deed was $1. Both deeds stated, "**it being understood this grant is made only for school and/or cemetery purposes.**" No provision for reversion in case the tract was not used for cemetery purposes. The lands were used for school purposes for over 60 years, then they were sold, eventually to Defendants Rhodes. Roberts (P) brought this action claiming title by deed from the heirs of the Smiths and by **reversion** because the land was no longer used for school purposes.
- **ISSUE**: Is the extent of a grant limited when the deed contains a statement of the purposes of the grant but no words limiting the period or term for which the grant was made?
- **HELD**: No. Affirmed.
    - Court says no enforceable right**, it's a mere wishful expression**. Smith has no possibility of reverter. They would have to use the exact language to create a FS determinable or subject to a condition subsequent.
    - To create a fee simple determinable, the deed must create an estate in fee simple and provide that the estate shall automatically expire upon the occurrence of a stated event. Unless the grantors express an intent to limit the title conveyed, they pass all the interest they own in the real estate.
    - **The law does not favor forfeitures.** The land was used by the school district for 60 years, as the original grantors wanted. The deed contains no provision for reversion. Under these circumstances, the Smiths conveyed the property in fee simple absolute.
    - The Smiths did not word the deed as a condition or a promise: this was a mere wishful expression/moral obligation. In fact, the Smiths kept nothing, and the school district obtained a fee simple absolute.
- **RULE**: The extent of a grant is not limited when the deed contains a statement of the purposes of the grant but not words limiting the period or term for which the grant was made.
- **RULE**: By itself, a provision that provides that a conveyance is made for certain purposes will not create a limited estate in the grant of land.

Johnson v. City of Wheat Ridge: Fee simple subject to a condition subsequent; power of termination must be brought within statute of limitations.

- **FACTS:** Johnson conveyed 5 acres of land to the Wheat Ridge Lion Foundation ***on condition that*** it be used for a public park. Among other things, the latter deed also required that the donees make available on the property a public water supply and lavatories within two years of the conveyance; failure to do so would give the grantor, his heirs and assigns, the right to reenter and take possession of the premises. Plaintiff, executor of the estate of Judge Johnson, argues: original conveyances made under undue influence, interest conveyed to the city had terminated by reason of the failure of the original donees and the City to satisfy certain conditions in the deeds. P appeals from a judgment of district court dismissing his quiet title action, stating it was barred by statute of limitations and laches.
- **ISSUE:** Is a grantor's suit to reenter and terminate grantee's estate for failure to perform a condition subsequent barred for failure to file within the SOL period after grantee's alleged breach?

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- **HELD**: Yes. Judgment affirmed. The suit must have been commenced within the SOL (here, 1yr of the violation) thus the action is time barred. The land is now a FS absolute.
- **RULE**: Grantor's suit to reenter and take possession of lands due to grantee's breach of a condition subsequent is barred when not filed within the statutory limitation period.
    - In common law there is no limit to "life" but statutorily, most states limit to 30-40 years.
    - States adopted statutes that placed a statutory limit on enforceable "life." In Michigan, it's 30yrs. When the enforcing interest statutorily is extinguished, the condition is extinguished because there's no reason to enforce it.
    - ***Time to exercise a right of reentry depends on state***: Washington says a "reasonable time" to exercise right; Wyoming says that the holder of a right of re-entry is not defeated by the passage of time.

Leeco Gas & Oil v. County of Nueces

- **FACTS**: Leeco gift deed 50 acres of land to Nueces County for use as a park. Leeco - Reversion interest. Nueces County - Fee simple determinable, so long as a public park is maintained. County began condemnation proceedings against Leeco's reversion interest. Trial court rewarded Leeco $10 in nominal damages. Leeco appeals.
- **ISSUE**: Whether Nueces County, as grantee in a deed, may condemn a possibility of reverter on land given to the County and pay mere nominal damages to the owner of the reversionary interest?
- **HELD**: No. Judgment reversed, held for Leeco.
- **RULE**: A governmental unit exercising its governmental powers for a proper purpose is not subject to estoppel. This applies even when a condemnation suit is brought against the grantor who retained a reversionary interest.
- **RULE**: A mere possibility of reverter has no ascertainable value when it is not probable that, within a reasonably short period of time, the event upon which the possessory estate in fee simple defeasible will occur. Several cases follow this rule when there is no evidence that the restrictive covenant would ever be broken. Such cases typically involve an entire estate, in which the possibility of reverter is speculative and therefore receives only nominal damages.
    - **IN THIS CASE, HOWEVER**, this is not condemning a "remote possibility of reverter", but rather an attempt by the County to remove the "burden" of the reversionary interest by condemning the interest and paying nominal damages. The County, as owner of the defeasible estate, indicated that it "may in the future" break restrictions (no more public park) and condemned for the possibility of reverter for nominal damages only.
- **RULE**: The Court here is converting from a gift sale. Proper amount of compensation is the amount by which the value of the land unrestricted (commercial) exceeds the value of the land restricted (park). That's how much the county had to pay to Leeco.

The Fee Tail

- "To A and the heirs of his body": An estate inheritable only by lineal descendants, none of whom could convey more than an estate for his own life.
- A fee tail has two principal characteristics: (1) it lasts as long as the grantee or any of his descendants survive, and (2) it is inheritable only by the grantee's descendants.

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- Creation of the fee tail: "to A and the heirs of his body." The fee tail descends to each succeeding generation.
- Now abolished everywhere.
    - In Michigan, there's a statute that creates a fee simple absolute in the first taker when there is fee tail language in a deed.
- **Future interests** following the fee tail: The following future interests are possible to become possessory upon the expiration of a fee tail (if A and his issue expired):
    - **Reversion**: O conveys Blackacre "to A and the heirs of his body." A has a fee tail; O has a reversion in fee simple to become possessory upon expiration of the fee tail.
    - **Remainder**: O conveys Whitacre "to A and the heirs of his body, and if A dies without issue to B and her heirs." A has a fee tail and B has a vested remainder in fee simple to become possessory upon the expiration of the fee tail. B's interest is called a remainder, rather than a reversion, because a reversion can only be created in the grantor or testator's heirs. The analogous future interest in a grantee is called a remainder.
        - Meaning of "dies without issue": when A and all A's descendants are dead.
    - Disentailing by deed: *Caccamo v. Banning*

Caccamo v. Banning: Marketable Title Issue: Docking the Tail Exception

- **FACTS**: Potter devised certain real estate to his wife for life and upon her death to Caccamo (P), providing that if P "should die without leaving lawful issue of her body begotten," the property should go to other named devisees in fee simple. P, pursuant to a local statute that allowed fee tails to be disentailed by transferring the property by a deed purporting to convey a fee simple absolute, deeded the property to a third party in fee simple and then had the property deeded back to her (STRAW MAN). She then sold the land at auction. D paid down payment but refused to pay balance arguing that P could not deliver title in fee simple. P sues to recover the balance due.
- **ISSUE**: May a grantee of a fee tail interest properly disentail the interest by transferring the property to a "straw man" in fee simple and then receiving it back again?
- HELD: Yes. Judgment for P.
    - She used a Straw Buyer to give the land to and re-conveyed it to herself so she has Fee Simple Absolute and isn't restricted by fee-tail. ***This is an EXCEPTION to the general rule that*** transferee takes no better title than transferor. Tail was docked so title is marketable and buyer has to pay balance due.: **CALLED DOCKING THE TAIL.**

Future Interests

- A conveys to B for life, then to B heirs heirs take a **contingent remainder** because they are not heirs until death of B.

 6 Future Interests

3 types grantor can keep himself	**3 types grantor can keep in 3rd party**
(1) Reversions	(1) Vested remainders

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(2) Possibility of Revertor	(2) Contingent remainders
(3) Power of Termination/Right of re-entry	(3) Executory interests

- Future interest is a non-possessory interest capable of becoming possessory in the future.
    - **Possibility of Reverter** for fee simple determinable - special event called a "limitation"
        - Once the terminating event occurs, the grantor (or successors in interest) usually **have an immediate right to possession**: at the moment of termination, the grantor or his successor is deemed to have a present possess ory estate in fee simple absolute.
    - **Power of Termination** OR **Right of Entry** for fee simple on a condition subsequent
        - If condition is breached, grantor (or heirs/devisees) usually **must make a demand upon the grantee or bring a judicial action for a declaration** that the breach has occurred and that title should be re-vested in him.
    - **Reversion** - interest remaining in the grantor if she transfers a lesser estate than she owns.
        - The likelihood that the grantor will survive the grantee is **irrelevant** in determining whether the grantor has retained a reversion.
            - Oscar is 80; Maria is 30. O conveys a life estate to M.: O's estate is theoretically of indefinite duration. M's estate is limited to her lifetime. If O dies during M's lifetime, M's life estate will continue and **O's reversion will pass by will to his devisees**, or if O dies intestate, it will pass by the applicable statute of descent and **distribution to his heirs**.
    - **Vested and Contingent Remainders**
        - **Vested Remainder:** (1) It is given to a born and ascertained person and (2) it is not subject to a condition precedent
            - Three types:
                - Indefeasibly vested: not subject to defeat, remainder is certain
                - Vested subject to open if (1) "to my grandchildren" vested to a group (2) at least ONE member of the group is born or ascertained at the time the deed becomes effective (3) class is subject to later expansion
                - Vested remainder subject to divestiture: vested remainder subject to a condition subsequent.
            - Transferrable. Person must be ascertained and ready to take, who has a present **right** of future enjoyment not dependent upon any uncertain event or contingency.
        - **Contingent Remainder:** (1) It is given to a person who is unborn or unascertained or (2) is subject to a condition precedent
            - Not transferrable
            - The **right** is uncertain.
            - **Remainders subject to condition precedent:** A condition precedent is an express condition, other than the termination of the

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preceding estate, which must occur before the remainder becomes possessory. It must be expressly stated in the instrument and must not merely refer to the termination of the preceding estate.

- Contingent remainder: Condition precedent.
- Vested remainder/executory interest: Condition subsequent.

- **TEST: VESTED OR CONTINGENT REMAINDER?**
  - A conveys to B for life, remainder to C for life, remainder to D and her heirs.
  - A: NOTHING; B- Life estate; C vested remainder for life; D: vested remainder in fee simple absolute; Ds heirs: contingent remainder
  - Not whether there a guarantee C will take up interest. Whether C is **READY** at the time of conveyance to take up Seisen, and C is.

Kost v. Foster

- **FACTS**: The Kosts conveyed land to their son with the following language "at his death to his lawful children, the lawful child or children of any deceased lawful child of Ross Kost to have and receive its or their deceased parent's share meaning…to convey to Ross Kost a life estate only…" Ross had eight children, one of whom died shortly after birth, and five of whom were born **prior** to the execution of the deed. **Before Ross died, one of his children, Oscar, died as a bankrupt**. The trustee in bankruptcy conveyed Oscar's interest to Foster (D). The other children of Ross (Ps) sued to have the trustee's deed declared void and removed as a cloud on their title. D counterclaimed for partition of the premises. The trial court found for D, Ps appeal.
- **ISSUE**: Is this remainder vested or contingent? It matters because a vested remainder could be transferred but a contingent remainder could not be.
- **HELD**: This is a vested remainder subject to open and so is transferrable. In the court's mind, conveyed to Ross and Ross' lawful children. DOESN'T say the children have to survive, just says children so if children are born at the time of conveyance, they're ready to take up seisin (no condition) so vested remainder subject to open.
  - **RULE**: The uncertainty that distinguishes a contingent remainder is **UNCERTAINTY OF RIGHT**, not of the actual enjoyment of possession. The placement of the conditional element is the determining factor.
- *Notes*:
  - Any remainder can be said to be uncertain **in terms of enjoyment** (remainderman may die without heirs before termination of the estate) therefore it is defined in **terms of the right**
    - If by the language a gift is made to a remainderman, and then a clause is added making it subject to being divested, the remainder is **vested**.
    - If the conditional element is incorporated into the description of the gift, it is **contingent**.
    - Thus, if the remaindermen have an estate unless they die, it is vested; if they must survive before they ever get the gift it is contingent. **IMPORTANT IMPORTANT!**
- At **COMMON LAW**, contingent remainder cannot be transferred.

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- Michigan has made contingent remainder indestructible and transferable by statute, acting a lot like an executory interest. Rules for this are determined by the state in which assets at issue are located.

Abo Petroleum Corporation v. Amstutz: Modern treatment of contingent remainders; doctrine of destructibility

- **FACTS**: The Turknetts conveyed one parcel of land to each of their two daughters for their respective natural lives, at the end of which title was to revert to each one's heirs, but if either should die without heirs, title should vest in her estate. When these deeds were delivered, neither daughter was married. Several years later, the parents executed additional deeds, covering the same property, which purportedly granted absolute title to one of the daughters. Both daughters then had children. The two daughters then attempted to convey fee simple interests in the property to the predecessors of Abo Petroleum (P). P brought this action to quiet title against Amstutz and other descendants (Ds) of the two daughters. The district court granted P summary judgment and Ds appeal.
- **ISSUE**: Is the doctrine of contingent remainders still viable in modern society so as to destroy a contingent remainder when **a life estate merges with the reversionary interest**?
- **HELD**: No. Reversed. The doctrine of destructibility of contingent remainders has no justification or support in modern society and should not apply.
- **RULE**: The doctrine of destructibility of contingent remainders is obsolete and often worked to defeat the intent of the grantor.
    - By the original transfer, the Turknetts divested themselves of the life estate and contingent remainder interest; **they were thereafter powerless to convey absolute title.** The subsequent conveyances did not destroy the contingent remainders in the daughters' children.
    - Since Michigan has made contingent remainder indestructible, this would be the same result.

□ DOCTRINE OF DESTRUCTABILITY OF CONTINGENT REMAINDERS

- **If a prior estate terminates before the occurrence of the contingency, the contingent remainder is destroyed for lack of a supporting freehold estate**, e.g., A's reversion interest merges with B's life estate, destroying C's contingent remainder. A contingent remainder is destroyed if it is still contingent when the prior estate ends. A contingent remainder must vest on or before the termination of the preceding estate. If it does not, it is destroyed.
- In *Abo Petroleum*, this doctrine is disregarded.

The Rule in Shelley's Case

- RULE IN SHELLEY'S CASE: Where a single document gives a person a freehold estate and a remainder to that person's heirs, then the remainder interest is shifted back to the person, rather than the heirs. ***The conveyance to the grantee's heirs is read as a conveyance to the grantee.***
- "A conveys to B for life, remainder to B's heirs."
    - Normally: A: reversion; B: life estate; B's heirs: Contingent remainder
    - Shelley: B takes up the future interest in her heirs in fee simple absolute.

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        - Rationale: B is ascertained, so B gets life estate + vested remainder = fee simple absolute
- This rule has been abolished in Michigan, very minority rule.
- A conveys to B for life, remainder to such persons as would succeed to B's estate by the law of descent if B had died seized of the property in question.
    - A: Reversion interest; **Under Shelley, A has nothing.**
    - B: Life estate; **Under Shelley, B has a fee simple absolute**
    - Succeeding persons: Contingent remainder; **Under Shelley, nothing**

Sybert v. Sybert

- **FACTS**: Mr. Sybert bequeathed a life interest in certain real estate to his wife, and after her death, a life interest in his son Fred, "and after the death of my said son, Fred Sybert, to vest in fee simple in the heirs of his body." After his mother died, Fred died childless and intestate but married. Fred's widow (P) and Fred's brothers (Ds) contested the ownership of the fee interest. The trial court found for P on grounds that the Rule in Shelly's Case applied. Ds appeal.
- **ISSUE**: May courts repeal the Rule in Shelley's Case?
- **HELD**: No. Affirmed.
    - Although the rule may be strictly construed, and other cases have refused to apply the Rule where the word "heirs" is qualified in some way, the will at issue here used the words "heirs of his body" in their usual and technical sense, and therefore the Rule must be applied. Accordingly, Fred acquired a **fee simple interest**, which passed to his wife.
    - Since it's a rule of law and not a rule of construction, the court must follow, no matter how much proof there is that it was not the grantor's intention.

Does Shelley's Rule apply? *pg. 328*

- (a) A conveys 20 shares of common stock to "B for life, then to B's heirs.: NO, the rule **only applies to real property**.

- (b) A conveys land "to B for life, then to C for life, then to B's heirs.": Yes, it applies. B holds a life estate in possession and a vested remainder in fee simple absolute and C holds a vested remainder for life. There is no merger of B's interests, because of the intervening life estate of C. A holds nothing.

- (c) A conveys land "to B for life, then to C for life, then to C heirs.": Yes, applicable to vested remainder. B takes a life estate in possession; C takes a vested remainder in fee simple absolute (C takes up interest of C's heirs).

The Doctrine of Worthier Title

- When an inter vivos conveyance (not conveyed by will or at death but conveyed during the grantor's lifetime) purports to create a future interest in the heirs of the grantor, the future interest is void and the grantor has a reversion.
    - ***Sometimes known as a rule against a remainder in the grantor's heirs.***
- "A conveys to B for life, remainder to A's heirs"
    - Normally: A: reversion; B: life estate; A's heirs: contingent remainder;

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  - Worthier Title: Better to send the title directly and abolish the contingent remainder. B: life estate in possession; A: reversion.
- Applies to personal property & land
- It is a **rule of construction**, not of law, and raises a rebuttable presumption that no remainder has been created. Its rationale is that **grantors seldom intend to create a remainder in their heirs that they cannot change**.
- The doctrine is still valid in most states.
- The doctrine of worthier title is abolished in MI.

Braswell v. Braswell

- **FACTS**: James Braswell conveyed land to one of his sons, Nathaniel Braswell, "during his natural life and to his lawful heirs at his death, and if the said Nathaniel Braswell should die **leaving no lawful heir from his body**, then the land herein conveyed shall revert back to the said James Braswell or to his lawful heirs (Nathaniel & Ds)." (trying to put a remainder in grantor's heirs). Grantor James died intestate, leaving three sons. Nathaniel later died testate and without children, leaving his real property instead to Charles Braswell (P). P brought suit for a partition against Nathaniel's two brothers (Ds). The trial court upheld P's claim to a **one-third undivided interest** in the land. Ds appeal.
- **ISSUE**: Does the doctrine of worthier title apply when the time of the ascertainment of the grantor's heirs is the date of the grantor's death?
- **HELD**: Yes. Judgment affirmed.
  - The question is whether the second aspect of limitation creates a **REVERSION** or a remainder. If it creates a **reversion**, the three sons of James would take equal interests in the land. If it creates a **remainder**, then only the sons living at the time of the life tenant's death would have an interest.
  - D's claim that the use of the word "***then***" was intended to fix the time of the ascertainment of the heirs of the grantor at the date of the life tenant's death. However, this use only fixes the time when it is determined whether the life tenant died without issue of his body. Also, the grantor used the word "revert." Therefore, the Doctrine of Worthier Title applies and P's interest is valid.
- **RULE**: A limitation contained in a deed conveying real property, which provides that the land shall revert back to the grantor, or to his lawful heirs, if the life tenant should die without heirs, is a remainder subject to the rule against a remainder to the grantor's heirs (i.e., **the Doctrine of Worthier Title**) thereby causing the grantor to retain a reversion in the land.
- *Note*:
  - Remainder - what is left of an entire grant of lands or tenements after a preceding part of the same grant or estate has been disposed of in possession, whose regular expiration the remainder must await - arises by act of parties - remnant of the whole estate disposed of, after a preceding prat of the same has been given away
  - Reversion - is the remnant of an estate continuing in the grantor undisposed of, after the grant of a part of his interest - arises by act of law - what is left in the grantor

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Executory Interests

- The Statute of Uses

- 2 recognized types of trust arrangements:
    - (i) **Active Trust:** Continued down to this day
        - a. A conveys B in trust for C
            - A begins with Fee Simple Absolute conveys to B his legal title in trust for C who is a beneficiary of the trust.
            - B is the trustee; C is the beneficiary.
                - B controls the trust: active role to manage/control the trust.
                - Benefits that flow from ownership of trust go to C.
        - b. Shareholders: Directors have possession and control of trust and assets received, assets generated from the trust go back to the shareholders.
    - (ii) **Passive Trust:** Known as a **use**
        - a. A conveys to B (and his heirs) for the use of C (and his heirs)
            - B is a straw person (no active management role, would not even take possession of the property), in effect, A is conveying ownership and control of property to C but is naming B as holder of legal title but with no responsibility or obligation whatsoever.
            - C is a beneficiary but is really true owner under use arrangement and uses property as if it's his own.
            - Was created to avoid certain obligations to the crown: ***crown abolished it***.
    - The Statute of Uses had 2 major advances: 1) Conveyance can be made by modern-day deed; 2) Shifting and springing interests can be created (executory interest)

- Destructibility of Contingent Remainders

- If upon termination of the preceding freehold, the holder of the remainder is not able to take seisin because his remainder is still contingent, the remainder is destroyed.
    - Executory Interests are indestructible**:** Executory interests are indestructible because no gap in seisin can ever precede these interests.
    - Contingent Remainders remain destructible: Contingent remainders remained destructible after **the Statute of Uses**. Suppose the O conveys Blackacre "to A for life, remainder to A's children who reach 21." A subsequently dies leaving only minor children. Under the rule of destructibility of contingent remainders, the remainder is destroyed.
        - Why not give it effect after A's death as a **springing executory interest**? The courts could have done so if they had disfavored the destructibility rule, but they ***favored*** the destructibility rule because it made land alienable.
    - Avoidance of destructibility rule: The destructibility rule could be avoided by creating a **term of years** rather than a life estate in A, or by creating **trustees** to preserve contingent remainders. It could also be avoided by creating an **executory interest** rather than a remainder after a life estate.

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- Example: O conveys "to A for life, and one day after A's death to A's children who reach 21." At A's death, seisin returns to O and after one day or more **springs out** to the children of A who thereafter reach 21.

RULE AGAINST PERPETUITIES

- No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.
- The rule against perpetuities applies to:
  - Contingent remainders and executory interests
  - Also applies to vested interests that are subject to open
  - ***It does not apply*** *to future interests in the grantor or vested interests not subject to open*
- The fact that executory interests were indestructible made it necessary to invent this rule to curb them. Otherwise by a succession of shifting interest, land could be tied up in the family indefinitely.
  - **Mogk's definition**: interest must vest under all possibilities under life of B, plus 21 years to satisfy the rule.
    - "A conveys to B for so long as liquor is never sold on the premises, and if liquor is ever sold on the land, then to C and his heirs" C has an executory interest void under the Rule
      - Could reword to not violate the rule by saying "so long as liquor is not sold on the property *during B's lifetime (plus 21 years)*"
  - How does it work in Michigan?
    - MI has replaced the common law rule with the Uniform Statutory Rule Against Perpetuities, as seen below. 90-year statutory period instead.
- Uniform Statutory Rule Against Perpetuities: A rule that modified the common law Rule Against Perpetuities by providing an alternative 90-year perpetuities period - an interest subject to the Rule is valid if it actually vests within the statutory period, even though at the time of its creation there was a possibility that vesting might occur after that period. (*Shaver v. Clanton*)
- Wait and See - **Restatement (2nd) of Property**, Section 1.3 - assumes the continued existence of the common law Rule against Perpetuities, but the determination of an interest's validity is deferred until it is **certain** whether the interest will actually vest within the period of the Rule
- Cy Pres - Future interests are recast or reformed so that they will not violate the rule (period of vesting reduced)
- Example: O conveys Blackacre "to A and his heirs, but if A dies leaving a son, to such son and his heirs, and if such son should thereafter die leaving a son, to such son's son and his heirs, etc.…"
  - **Today most states have abolished the destructibility rule, and only the Rule Against Perpetuities governs the duration of contingent future interests.**
- Look at the language and the facts that relate to the language at the time of the conveyance (who is alive at that time?)
- If the Rule against perpetuities is violated, what is the effect?
  - Example: To B, but if liquor sold on premises, to C

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        - Executory interest in C; O should be concerned about the Rule Against Perpetuities.
            - Possibility that it will not vest in life plus 21 years (B doesn't sell liquor; B dies ;B's heirs don't sell liquor; B's heirs die etc.)
            - C's enforcing interest might not vest for a long time because condition might not be broken.
                - So we say that C's interest is void ab initio = from the beginning; meaning it was never created
                - If interest was never created in C, then B has FSA right? ***Not always*** (if a gift)
                    - Either Fee Simple Determinable (timeline recognition) or Subject to Executory interest
        - Say that 2 years later, B sells liquor, but no children are born. So they're not ready to take up seisin. If not ready, it's terminated.
- **The Statute of Uses Today:** The Statute of Uses has been accepted as a common law statute in most states. But some states have not accepted it and others have repealed it. All of this matters little, however, because in all jurisdictions the two basic reforms of the statute are effective: **(i)** a conveyance can be made by deed, and **(ii)** springing and shifting interests can be created.

Grantor's conveyance of retained interest does not destroy executory interests**:** *Stoller v. Doyle*
Stoller v. Doyle: **Shifting interests**

- **FACTS**: 1st Deed: Lawrence Doyle and his wife executed a deed to their son Frank Doyle, stating that Frank does not have the power to reconvey the land unless to the grantor. If Frank should die before his wife, and any children survive, the children and his wife will have the land until his wife dies and then it goes to his children. If Frank should die with no children, the title goes to grantors. 2nd Deed: Restrictions & conditions of 1st deed **omitted** and gave Frank absolute title to premises. Frank Doyle sold the land to the plaintiff in this case, John Stoller. Stoller then sold the land to Bauman in fee simple, who refused to accept the deed because Stoller did not show merchantable title, so Stoller sued Bauman and lost. Lower courts held that the 2nd deed could not affect the **contingent interest in the real estate conveyed to the children of Frank in the 1st deed** so Stoller did not have merchantable title
    - Now, Stoller has brought a quiet title action against Frank's children arguing that the children by the first deed took a **contingent remainder** in the land; that Frank Doyle took a **life estate**; and that the second deed conveyed the **reversion to him**, so that the life estate merged in the fee, and the intervening contingent interests were extinguished
- **ISSUE**: Can the grantor (Frank's parents) who has a possibility of reverter destroy the executory interests in third persons (Frank's children) by conveying his interest to the grantee (Frank) who has a fee simple subject to divestment by the executory interests?
- **HELD**: No. Reversed.
    - The estate granted to Frank Doyle was a fee simple subject to conditional limitations (fee simply subject to a condition subsequent) - one contingency upon which it would cease to be a fee, which was upon the event that the grantee's wife should survive him. **Unless this took place, it the estate would last forever.**

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- The 1st deed operated as a conveyance of the fee, with the limitation over, which may terminate the estate granted upon the conditions specified in the deed and did not create a contingent remainder destructible by the act of the grantor in subsequently conveying the reversion to the grantee. The conclusion by the lower courts were right when they said that **the 2nd deed to Doyle did not affect the contingent interests of the children**
- This case demonstrates that the statute of uses resulted in the recognition of executory interests and specifically, shifting executory interests.
  - An executory interest is an interest held by a third person that follows an estate subject to that executory interest.
    - Shifting executory interests exist where the possessory right shifts from one grantee to another.
    - Most executory interests today are "shifting" executory interests.
      - For example, "to A but if A marries B then to B," A has a fee simple subject to limitation and B has a shifting executory interest in fee simple absolute.

- **Two Takeaways:** (1) You can't destroy an executive interest, (2) when there are contingent remainders at play, the grantor has power of reversion.
- **RULE**: Where the fee in the first taker created by a deed is made determinable, as upon the happening of a valid condition subsequent, followed by a limitation over of the fee or use to another upon the happening of the prescribed event, the fee or use shifts from the first to the second taker, whereby the deed is a conveyance under the statute of uses and is a clear case of shifting use.

Capitol Federal Savings & Loan Association v. Smith: No executory interest to enforce race restriction

- **FACTS:** A neighborhood had a racial restriction whereby each homeowner gave his neighbors an executory interest to enforce the restriction. Smith (P), a black person, purchased property from one of those who had entered the covenant.
- **RULE**: Anti-racial restrictive covenants between property owners, with forfeiture clauses if agreement is violated, is not an enforceable executory interest, but instead is a racial restriction in violation of the 14th Amendment.

COMMON LAW RULE for RULE AGAINST PERPETUITIES

The City of Klamath Falls v. Bell: Executory interest fails under Rule Against Perpetuities; Remoteness of vesting

- **FACTS:** Corporation conveyed land to the City as a gift for use as a city library - **fee simple determinable** (keep the land so long as they kept it as a library). A few decades later the city terminated the use of the land for a library. The donor corporation said that if the City stopped using the land as a library, title to the land should pass to Shallock and Daggett - corporation was eventually dissolved, and all assets (including the rights to this land) given to shareholder Shallock and Daggett. City brings suit, asking court to adjudicate the respective rights of the parties under the deed. Trial court found that title to the real property vested in the City, finding that the gift over to Shallock and Dagget was **void** under The Rule Against Perpetuities.

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- **ISSUE:** Does the title to the land remain in the city or did the termination of use as a library cause title to pass to **the descendants of the shareholders** of the donor corporation (now dissolved)?
- **ANALYSIS:**
  - Estate passed to City was a fee simple determinable, one of the features of which is that it terminates automatically upon breach of whatever condition it is limited on
  - Upon this breach, the deed provided for **gift over** to Shallock and Daggett as an attempt to grant an executory interest since only an executory interest can follow an earlier grant in fee simple
    - The rule against perpetuities applies to executory interests
    - The City could have maintained a library on the site for an indefinite time in the future, meaning that the executory interest Shallock and Daggett held ***may have never vested***, meaning that it violates the rule against perpetuities
    - Daggett and Shallock and their heirs receive the possibility of revertor for the land.
- **TAKEAWAY**: Executory interests are subject to the rule against perpetuities but possibilities of reverter are not. If Executory Interests violate the Rule they are void from the very beginning
- **IMPORTANT RULE:** When a **deed reveals an unquestionable intent to limit the interest of the first grantee** (the City) to a fee simple determinable, the courts of the US **do not create an indefeasible estate** (fee simple absolute) in the first grantee when a subsequent executory interest (Shallock and Daggett's) is **void under the Rule against Perpetuities**. Instead, the grantor (corporation) **retains a possibility of revertor**.
- *Note*: Executory interests falls under the Rule against Perpetuities, whereas possibility of reversion and power of termination do NOT.

Shaver v. Clanton: Rule Against Perpetuities inapplicable to commercial transactions.

- **FACTS:** The Clantons (Ds) leased shopping center space from Stanley with **unlimited options for renewal**. Shaver (P) is Stanley's daughter and sole heir. She sought to invalidate the 1989 amendment on the ground that it provided for option renewals into infinity in violation of the Rule Against Perpetuities. Lower courts held for Ds, P (Shaver) appeals.
- **ISSUE:** Whether a lease amendment which provides for perpetual options to renew is void because it violates the Rule against Perpetuities? ***NO***
- **ANALYSIS:**
  - Sole test for Rule against Perpetuities is whether an interest might vest beyond the maximum period permitted by the rule
  - In many jurisdictions, covenants to renew leases were deemed exempt from the Rule in part (1) because they did not affect the practical ability to alienate land and (2) in part because they were outside the Rule in the first place
  - Uniform Statutory Rule Against Perpetuities - **SUPERSEDES** the common law rule against perpetuities and applies to nonvested property interests - changed law by **explicitly excluding commercial transactions from coverage under the Rule against Perpetuities**

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        - Therefore, the 1989 Amendment is exempt from Rule against Perpetuities
    - **P claims** that the Uniform Act should not apply to this case because the transaction was donative in nature: While her father may have been a close friend of Ds and may have desired to help them out, the lease terms provided for annual cost-of-living adjustments and allowed Ds to assign the lease. These elements prevent it from being a donative transaction.
- **HELD:** The 1989 amendment is valid and gives Clantons a series of 5-year options to renew their lease on the terms stated in the lease amendment. The total term of the lease, however, is limited to 99 years from its effective date.
- **RULE:** The Uniform Statutory Rule Against Perpetuities does not apply to commercial transactions.

Concurrent Ownership

 3 Co-Tenancies under common law:

- (1) Tenancy in common
- (2) Joint tenancy
- (3) Tenancy by the entirety

Tenancy in Common

- Exists where each co-tenant is the owner of a separate and distinct share of the property. Each owner has a separate undivided interest in the whole.
- "A conveys to B and C as tenants in common,": either one of them can seek a partition, can sell the land and divide the money. Creditors can get interests of either party.
    - **Right to possession**: each tenant in common has the right to possess and enjoy the entire property.
    - ***No* right of survivorship**: When a tenant in common dies, the interest passes to the devisees or heirs, but not to the surviving tenant in common.
    - **Equal shares not required**: Equal shares are presumed, but this presumption may be overcome by evidence that unequal shares were intended. One tenant in common may hold a ¼ interest while the other holds a ¾ interest.
    - **Same estates not required**: Tenants in common may hold their respective interests in different types of estates; e.g., one may hold a life estate, the other a fee simple.
    - **Alienability**: A tenant in common can sell, give, devise, or otherwise dispose of her undivided share in the same manner as if she were the sole owner of the property.
    - **Construction Rule**: Under modern law, whenever a conveyance is made to two or more persons who are not husband and wife, they are presumed to take as tenants in common and not as joint tenants. This presumption can be overcome by evidence that a joint tenancy is intended.
    - ****Biggest difference between the joint tenancy and the tenancy in common is the right of survivorship.**

 Remember: joint tenants must have identical shares, tenants in common do NOT have to have identical shares

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Joint Tenancy

- In a joint tenancy, each co-tenant owns an undivided share of property, and the surviving tenant has the right to the whole estate. The right of survivorship is the distinctive feature of the joint tenancy. Any number of tenants may be involved, but the one who lives the longest takes the property by herself. A joint tenant cannot devise her share of the joint tenancy property.
    - **Five unities**
        - (1) Joint tenants must take their interest at the same time;
        - (2) by the same title (AKA by the same legal instrument like a deed);
        - (3) with identical shares;
        - (4) have to have rights to possess the whole; AND
        - (5) Express recitation: grantor must clearly state the right of survivorship.
            - **Equal interests:** joint tenants must have equal interests, but upon a partition sale, the proceeds may be divided unequally if the parties so intend.
            - **Sole possession:** joint tenants must have an equal right to possession, but one tenant can waive her rights to possession.
    - **Creation**: there is no presumption that a joint tenancy is intended. There must be express words of joint tenancy, including the right of survivorship.
    - **Severance**
        - Total alienation**:** One joint tenant can sever the joint tenancy and destroy the right of survivorship at any time by destroying one of the four unities; **severances creates a tenancy in common**.
            - The entire alienation of one joint tenant's share makes the grantee a tenant in common with the other tenant(s). Severance usually occurs when one joint tenant makes a contract to convey, upon divorce, or upon the simultaneous deaths of joint tenants.
        - "A conveys to B and C as Joint Tenants with Right of Survivorship": either tenant can convey to 3rd party X and they would then sever tenancy. Thereafter, X has ½ interest in land, and B retains ½ interest in land.
            - X and B are CO-TENANTS as TENANTS IN COMMON, meaning, unilateral act of C conveying to X defeated right of survivorship even if other co-tenant (B) that didn't want to lose right of survivorship.
            - MI Rule: **Does not allow** one of the two to defeat the interest of the other and thus eliminate survivorship. Will construe this as joint life estate with contingent remainder to survivor.
                - B and C have **cross-contingent remainders**. A keeps a technical reversion (just to complete the equation: it will never take up seisin)
                - Do not need to add the phrase "with right of survivorship."
                    - If B tries to convey to X then X gets ½ life estate and when B dies C takes everything
        - **Partial alienation:** A mortgage by one joint tenant may sever the tenancy in states following the title theory of mortgages (a mortgagor conveys the legal title to the mortgagee, keeping an equity of redemption), but will not

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sever the tenancy in the majority of states that follow the lien theory of mortgages (legal title remains in the mortgagor). (*People v. Nogarr*)
    - **Lease:** Depending on the jurisdiction, a lease by one joint tenant may sever the joint tenancy, may not sever it, or may temporarily sever it while the lease exists.
    - **Homicide:** If one joint tenant murders the other, this may constitute a severance or may reduce the murderer's interest to a life estate.

Tenancy by the Entirety

- Conveyance to the grantor to a married couple.
- This tenancy can be created only by husband and wife and is like a joint tenancy except that destruction of the right of survivorship by one party is impossible, and partition by only one party is not allowed. Majority of states do not recognize this but MI does.
- "A conveys to B and C, her husband, as tenancy by the entirety"
    - Even without "tenancy by the entirety," if you reference the marital relationship it is tenancy by the entirety.
    - Michigan strongly prefers to interpret a joint conveyance as a tenancy by the entirety so don't have to use specific language like what's needed at common law, just have to say, "To B and C, his wife." Still can though and it's a good idea to show the grantor's intent.
- Neither Husband nor Wife can convey to 3rd party without the consent of the other
- Neither party can seek a partition of the property by themselves
- ***How do you get out of it?*** □ Either AGREE with what to do with property, OR divorce.
- □**Rights of tenants**
    - **Common law:** the fictional unity of husband and wife, with all legal rights in the husband, prevailed. The husband could alienate his interest, including the right to possession, but could not destroy his wife's right of survivorship.
    - **Modern law:** In some states, the tenancy remains as it did at common law, but most states now give the wife equal right to possession.
    - **Alienation:** In some states, the husband and wife can each alienate their respective interests, permitting creditors to levy separately upon the respective interest without destroying the rights of the other spouse.

Marital Estates

- **Marital Estates**
    - **Dower and Curtsey:** Curtsey has been abolished. Dowry survives: 1/3 life estate in the surviving wife in all of the property in which the husband receives during the period of their marriage.
        - Whether or not wife is mentioned in the deed, common law court recognizes all of the property husband received. If husband dies, she must enter chain to release her interest.
        - MI follows old common law approach: wife will have to enter the conveyance even though it is in the husband's name.
    - Homestead rights: some states have homestead rights: property being held by husband and wife as a home: they have some protection from being seized by creditors.

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- **o** Community Property States: (NOT Michigan): Whatever a spouse owns before marriage and whatever is acquired gratuitously thereafter by gift or testate or intestate succession, is known as the spouse's **separate property**. But, during the marriage, all other property acquired during marriage is classified as **community property**.
    - If husband acquires title to property, community property aspect is superimposed so the husband AND wife acquire title to property even though husband was only one mentioned on deed.

In re Estate of Michael: Legal preference for tenancy in common

- **FACTS**: Joyce King deeded "King Farm" to Harry & Bertha and Ford Michael, H & B's son, and Ford's wife Helen. *With right of survivorship…their heirs and assigns forever.* Harry died and Bertha survived him along with Ford (one grantee) and Robert (his brother, appellant). Bertha's will said that she wanted Ford and Robert to receive an "equal share" of her estate. Soon, a dispute arose as to what, if any, interest Bertha had in King Farm Court below held that the deed created a ***joint tenancy with right of survivorship*** between the two sets of husbands and wives.
    - o Appellant, Robert, urges that the deed created a ***tenancy in common*** between the two couples, each couple holding its ***undivided 1/2 interest*** as tenants by the entireties.
    - o The appellees said that yes, the respective 1/2 interests were held by husband and wife as tenants by the entireties, however, as to each other, the couples are joint tenants with a right of survivorship.
- **ISSUE**: Are the couples joint tenants or tenants in common (and each couple are tenants in the entirety)?
    - o Argument for joint tenants: uses the words "right of survivorship."
    - o Argument for tenants in common: presumption that there is a tenancy in common unless specific words are used.
- **HELD**: Words "rights of survivorship" only refer to each of the tenancy by the entireties. Did not apply to the relationship between the two couples.
    - o The language in the deed must clearly express an intent to create a joint tenancy with right of survivorship. ***Here, the deed was ambiguous so it cannot create a joint tenancy***. This result is supported by the deed's use of the term "their heirs and assigns" instead of "his or her heirs and assigns," which would have been appropriate in the case of a joint tenancy with one survivor.
- **RULE**: To create a joint tenancy, a deed must contain unambiguous language manifesting a clear intent to create a joint tenancy.
- **RULE**: A presumption exists in favor of tenants in common, unless there is a clear intention to create a joint tenancy with the right of survivorship.

CREATION AND ATTRIBUTES OF CONCURRENT ESTATES

- **Effect of conveyance by 1 of 3 joint tenants to another of the joint tenants:** *Jackson v. O'Connell*
- **Extrinsic Evidence to Show Joint Tenancy**: *Matter of Estate of Vadney*
- **Construction of conveyancing language**: *Palmer v. Flint*
- **Mortgage by joint tenant**: *People v. Nogarr*

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- **Effect of divorce on joint tenancy by husband and wife**: *Mann v. Bradley*
- **Effect of homicide**: *Duncan v. Vassaur*

Jackson v. O'Connell

- **FACTS**: Neil Duffy conveyed realty to his three sisters, Nellie, Anna, and Katherine, as joint tenants. Nellie quitclaimed her interest to Anna before Nellie died. Anna devised her interest in the realty to Jackson (P), who sued Katherine (D) to quiet title to the land, claiming that the deed from Nellie to Anna destroyed the joint tenancy.
- **ISSUE**: Does one joint tenant's conveyance to another joint tenant destroy all of the joint tenancy?
- **HELD**: No.
    - When one joint tenant transfers her interest, the joint tenancy is only destroyed as to that interest, and the other joint tenancy interests remain undisturbed. This rule applies regardless of whether the conveyance is to another joint tenant or to a third party.
- **RULE**: Where 3 or more joint tenants exist, the conveyance by one joint tenant to another joint tenant does not sever the entire joint tenancy; the grantee remains a joint tenant as to his original interest but becomes a tenant in common as to the interest conveyed by the grantor joint tenant.
    - Effect of conveyance by one of three joint tenants to another of the joint tenants.
        - A conveys to B, C, and D. Each is holding 1/3
        - B conveys 1/3 to C, so now → C is holding 1/3 as a **tenant in common** and 1/3 as a **joint tenant** so 2/3 total interest in property.
        - When C dies, the 1/3 goes to devisees (tenant in common interest) and 1/3 (joint tenancy interest) goes to D, so now → D is now holding 2/3
        - The relationship between C's devisees (1/3) and D (2/3) is a **tenancy in common**

Matter of Estate of Vadney

- **FACTS:** Catherine Vadney executed a deed conveying her real property to herself and her son, the petition Peter Vadney. Deed did not describe the type of tenancy or any survivorship language. Petitioner proceeded on the assumption that the deed created a **joint tenancy with a right of survivorship** and that the parcel passed solely to him upon decedent's death. Decedent's three other children (respondents) argue that the deed created a **tenancy in common,** under the rule that "a disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy" meaning that decedent's children would pass to all of her surviving children
- **ISSUE:** May extrinsic evidence of a grantor's intent be used to reform a deed so as to create a joint tenancy?
- **ANALYSIS:** Petitioner argues that the absence of survivorship language was *contrary to the grantor's intent* and due solely to a scrivener's error.
- **HOLDING:** Petitioner has proven that decedent intended to create a joint tenancy rather than a tenancy in common from testimony of the attorney who said he forget to include the survivorship language in the deed.

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- **RULE:** If clear and convincing evidence exists showing that grantor intended for a deed conveying real property to contain language concerning joint tenancy with right of survivorship, but such language was absent due to the scrivener's negligence, the deed can be reformed to include the omitted language.
- *Note*: At common law, used to have to use a straw person to convey a joint tenancy to yourself and someone else. This has changed. When intent is clearly expressed, a straw person isn't required. Someone who owns all right, title and interest can set up a joint tenancy just by describing that in a deed.

!!! A conveys to B and C as joint tenants with right of survivorship.

- Michigan: Construe this as Joint life estate with contingent remainder to the survivor.
  - C conveys to D; D takes ½ of the joint estate, taking C's contingent remainder.
  - At common law contingent remainder not transferrable, it is in MI
- Common Law: Joint tenancy between B and C in fee simple absolute
  - C conveys to D; B and D become tenants in common

Palmer v. Flint

- **FACTS**: Nathan Palmer and Alice Flint (D), prior to their divorce, received a deed granting property to them "as joint tenants to them and their assigns and to the survivor, and the heirs and assigns of the survivor forever." After the divorce, D conveyed the premises to Nathan by quitclaim deed. Nathan conveyed to Frank (strawman), who reconveyed to Nathan and his sister (P) as joint tenants "and to the heirs and assigns" of the survivor. Nathan died and P sought a declaratory judgment as to her rights.
- **ISSUE**: Should the intent of the parties prevail over the technical common law rules of construction?
- **HELD**: Yes.
  - **D argues** that the joint life estate in Nathan and Alice was a joint life estate with a contingent remainder in fee to the survivor (non-transferrable). **P argues** that the deed from Alice to Nathan conveyed all her interest so she receives nothing now that he is dead. Also, the remainder over to survivor is vested and not contingent.
    - In Michigan, the contingent remainder is transferrable, so the result would be the same regardless.
  - The original conveyance does not use the words "with the right of survivorship." Therefore, using common law rules of construction, it could mean that Nathan and D were to take a co-tenancy for their joint lives with a contingent remainder to the survivor rather than a joint tenancy. **However, the intent to create a joint tenancy is clear**.
  - The intent of the parties should be enforced if possible. Since a joint tenancy was intended, the conveyance from D to Nathan disposed of her entire interest in the property. The conveyance from Frank to Nathan and P included the four unities and created a **valid joint tenancy**. Therefore, P is the owner in fee.
- **RULE**: If clear and convincing evidence exists of the parties' intent, the intent should prevail. Here, A deed from the grantor to two grantees containing the phrase, "as joint tenants, and not as tenants in common, to them and their assigns and to the survivor, and

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the heirs and assigns of the survivor forever" conveys a joint tenancy, and not a joint life estate to the grantees with a contingent remainder in fee to the survivor.

People v. Nogarr: Lien Theory of Mortgages - Because a mortgage does not pass title to the land, the joint tenancy is not disturbed.

- **ISSUE:** When a joint tenant mortgages property without the knowledge or consent of other joint tenants, does he mortgage his interest only?
- **FACTS:** Calvert and Elaine Wilson acquired property as joint tenants. They separated in 1954. Calvert, without Elaine's knowledge, mortgaged the property to his parents. Calvert died. The state of California (P) sought to condemn the land and alleged that Elaine owned the land and that the parents were the mortgagees. Elaine argued that the parents had no interest in the land because Calvert only mortgaged his interest as a joint tenant, which interest expired at his death.
- **ANALYSIS:**
    - Elaine argues that the execution of the mortgage by Calvert did not terminate the joint tenancy; it was reliant upon his interest as a joint tenant only and therefore when he died, his interest having ceased to exist, the mortgage terminated, and Elaine was entitled to the entire land.
    - For joint tenancy to exist, you need: unity of interest, unity of title, unity of time, and unity of possession - as long as these exist, right of survivorship is an incident of the tenancy, and upon the death of one joint tenant the survivor becomes the sole owner in fee and NO INTEREST passes to the heirs, devisees of the joint tenant first to die.
        - **Joint tenancy in fee simple** existed between E & C at the time of the execution of the mortgage, and all 4 unities. Elaine upon death of C became sole owner. Under doctrine of equitable conversion she is entitled to the entire award **unless** the execution by C of the mortgage destroyed one of the unities and thus severed the joint tenancy and destroyed the right of survivorship (**it did not**)
    - Mortgage did not destroy the unities. E & C did not become tenants in common. When his interest in the real property expired upon his death, the mortgage lien (his parents held) also expired.
- **HELD:** Held for Elaine. The lien of respondents' mortgage did not survive the death of the mortgagor.
- **RULE:** In lien theory states, the mortgage lender must get all joint tenants to sign the mortgage instrument or must have the mortgagor tenant expressly sever the joint tenancy and make it a tenancy in common. Otherwise, the mortgagee bears the risk that the mortgaged joint tenant will die before the other tenants, thus destroying the mortgage.
- *Notes:* Also see here.
    - The parents here received a **lien** on Calvert's ½ interest. When Calvert died, Elaine's right of survivorship operates & takes on. First in time is first in right. Elaine's right of survivorship is first in time. Parent's security interest is 2nd in time.
- Title Theory of Mortgages States
    - Court views mortgage as title: the delivery of the mortgage transferred title to the parents (title passed to the mortgagee) the mortgagor (H&W) had an equitable

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right of redemption. If lender did not re-convey title back (when money is paid), mortgagor could go to the court of equity and order that it be done: protected the borrower (mortgagor). When mortgage conveyed to parents the right of survival was extinguished by both parties and converted to a tenancy in common. (Opposite of what happened in *Nogarr*)

- Lien Theory of Mortgages States
  - MICHIGAN, CALIFORNIA
  - When mortgage is delivered, title does NOT pass. What passes is **security interest**, a different stick from the bundle. It passes from the borrowing co-tenant to the lender. Borrower keeps title & security interest is transferred. The mere delivery of mortgage does NOT sever/eliminate the right of survivorship.
  - **When is the co-tenancy severed?** Borrower stopped paying and the lender foreclosed on the half interest of the borrower through the security interest. A lien state will recognize a severance of the right of survivorship and the change to a tenancy in common.

Mann v. Bradley: Divorce

- **FACTS**: Family residence acquired in joint tenancy by Betty and Aaron during their marriage - couple decades later they divorced. In their divorce agreement, they stated the family residence should be sold and that the proceeds should be equally divided between them if: Betty remarries; their youngest child turns 21; they make a mutual agreement to sell. After Betty died, Aaron informed his children that the family residence **belonged to him** by virtue of **right of survivorship** in the joint tenancy ownership with their mother. Children filed action to quiet title to the property - their argument was that the divorce property settlement agreement had the legal effect of converting the joint tenancy tenancy in common and Betty's interest passed to the children upon her death.
- **ISSUE**: May a divorce decree change a joint tenancy between husband and wife to a tenancy in common even if none of the four unities is broken? *Severence.*
- **HELD**: Yes.
  - **MODERN RULE:** Courts no longer require the destruction of one of the four unities of time, title, possession, or interest to terminate a joint tenancy. An agreement to hold the property as tenants in common is sufficient. That agreement may be inferred from the way the parties treat the property.
  - Here, the divorce decree indicated an intent to hold as tenants in common, as it provided for the ultimate sale of the property and the division of the proceeds.

Duncan v. Vassaur: Homicide

- **FACTS:** Husband and wife are joint tenants; wife kills husband then transfers property to P. P brings action to quiet title.
- **ISSUE:** Interpretation of OK Slayer Statute: "…having taken the life of another, shall inherit from such person, or receive any interest…" (pg. 415)
  - May a joint tenant who has murdered the other joint tenant take the victim's share by right of survivorship? **NO**
  - Joint tenant can terminate the joint tenancy by **any act inconsistent with its continued existence,** like the murder here. At the time the murder was committed, the joint tenancy was terminated and separated.

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- **HELD:** By murder, joint tenancy is separated and terminated and 1/2 of the property should go to the heirs of the deceased husband (murdered person) and the other 1/2 to the murderer, wife, or to her heirs. Joint tenancy is changed to a tenancy in common. Reversed and remanded; 1/2 of the property should to the plaintiff, 1/2 to D to be distributed to the heirs of the deceased.

Rights and Duties of Concurrent Owners

Laura v. Christian: Co-tenants as fiduciaries

- **FACTS:** P and D (Christian) each owned interest in real property but failed to make timely payments. When bank instituted a foreclosure action, P paid off the bank. Although D knew of the threatened foreclosure nearly a year before P paid the mortgagee, D was unwilling to bear his portion of the costs until he realized that the value of the property had greatly enhanced. D offered to pay P his portion of the money paid to the mortgagee. P refused the money and brought a suit to quiet title.
- **ISSUE**: May a co-tenant who has redeemed property without the financial aid of other co-tenants sue to quiet title against a co-tenant who later offers to pay his share?
- **HELD**: No.
    - **GENERAL RULE OF REIMBURSEMENT**: A co-tenant who pays more than his share of a common debt is entitled to reimbursement from the other co-tenants.
    - A co-tenant who redeems property for which other co-tenants should contribute must allow the other co-tenants to contribute and hold their interest within a reasonable time. Christian's election to contribution was timely. Legal title to a ¼ interest still vests in Christian.
- *NOTE:* A co-tenant is not technically a **fiduciary**, since he does not hold his interest for the benefit of another. However, the courts often treat co-tenants as fiduciaries when necessary for equity, especially where a confidential relationship exists among the co-tenants, or where they acquire their interests by will or intestate succession.

Mercer v. Wayman: Possession by Co-Tenants

- **FACTS**: P's received conveyance of property held by heirs at law of their father. Some of those heirs were minor children, with their father signing for them in the conveyance. Thereafter, both Ps and Ds executed oil and gas leases to the property, Ds claiming title as tenants in common due to the defective conveyance of their interest. Ps brought an action to quiet title and to set aside the leases. Ps argue that their possession of the land has already ripened and Ds are barred from any claim by the statute of limitations. Ds argue that they are **tenants in common** of an undivided 1/7 of the tract and therefore are not barred by the 20-year statute of limitations; also, the deed to Fred and Hattie was not a good deed because it was in the name of **minor sons** of Laura.
- **ISSUE**: Does the SOL run against Ds as tenants in common when there is no act by the occupying tenant to give affirmative notice to Ds of adverse possession?
- **HELD**: No.
    - Exercise of control or dominion over land by a tenant in common is in contemplation of law and does not give notice of adverse possession.

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  - To begin the running of the statute of limitations against a co-tenant, it must be shown that the occupying co-tenant gave actual notice of the adverse claim or that the tenant not in possession received such notice by acts of ouster or dis-seisin.
- **RULE**: Mere use of the property does not establish adverse possession. The mere possession by one **tenant in common** who receives all the rents and profits and pays the taxes…no matter how long a period, cannot be set up as a bar against the cotenants.
- *Note*: No adverse possession here because it is permissive use. You are allowed to enjoy the property as a co-tenant, what you cannot do is prevent other co-tenants from enjoying it.

Condominiums/Time-Share Arrangements

- In a condominium, an individual has title to *his own unit*, but has concurrent ownership of the common elements.
  - Every state has STATUTES governing condominiums
  - Condo ownership is the merger of two estates in land into one: the **fee simple ownership** of an apartment or unit in a condo project and a **tenancy in common** with other co-owners in the common elements.
    - General common elements: land, walls, stairways, etc.
- Timeshare agreements are more recent
  - Some states have amended their condominium statutes to include timeshares; less common so courts must settle problems with common law
  - Timeshare agreement = Condominium ownership divided among several owners, each of whom has the exclusive right of occupancy and use for a specified time period.
  - Further split of ownership with the co-owners having a kind of fee simple (or term of years, depending on the agreement) for a specific week, month, etc.
- **Common Interest Communities:** 3 different forms of ownership/occupancy
  - Condominiums: A condominium provides ownership in fee simple absolute of one unit in a development, with common areas owned by all as tenants in common. All owners are liable for expenses of maintaining common areas and are liable in tort for these areas.
  - Cooperatives: A cooperative apartment house is owned by a corporation, whose stock is owned by the tenants. Each tenant also has a lease form the corporation for her apartment. One mortgage blankets the building; if one tenant defaults, the others must pay the defaulter's share or face foreclosure.
  - Rentals: Entire building owned in fee simple absolute by corporation, leased out.

Centex Homes Corp. v. Boag: Applicability of SPECIFIC PERFORMANCE to condominiums

- **FACTS**: Boag contracted to buy a condo from Centex and put a deposit down. Later Boag notified Centex that he could no longer buy the condo, thus he breached the contract and stopped payment on the check.
- **ISSUE**: Is the condo a "unique property" that would entitle Centex to *specific performance* for the breach, thus making Boag buy the property after all?
- **HELD**: No.
  - **RULE**: Specific performance will not lie for the sale of a condo, for there is **NO unique quality** and legal relief of damages will be adequate. Because the condo is

not unique and all the units are the same, the court won't enforce the mutuality of specific performance.
    - **Mutuality** = if the buyer is entitled to specific performance for a seller's breach, then the seller is entitled to specific performance for a buyer's breach (only works when the land is unique)

Dutcher v. Owens: Liability of Condo Co-Owner: Can you go after ALL co-tenants for the entire loss or EACH of them for their proportional loss? **The latter**.

- **FACTS**: Dutcher owns a condo which he leased to Ted and Christine Owens. The Owens suffered substantial property loss in a fire which began in an external light fixture in a **common area.** Owens filed suit against Dutcher. Jury finds homeowners' association negligent and also rendered judgment against D for a portion of the damages based upon his pro rata undivided share of ownership in the common elements of the condominium project.
- **ISSUE**: Whether a **condominium** co-owner is jointly and severally liable or is liable only for a *pro rata* (proportional) portion of the damages?
- **HELD**: Pro rata.
- **RULE**: The liability of a **condo** co-owner is limited to his pro rata interest in the association as a whole, where such liability arises from areas held in tenancy in common.
    - This is a statute that relates specifically to condo owners, not other co-tenants.

Aquarian Foundation v. Sholom House: Restraints on Alienation

- **FACTS**: Provision that required the written consent of the condo association's board of directors to any sale/lease/transfer of a unit owner's interest. If violation of the clause, the property would revert to the association and the association would pay the unit owner fair market value. Here, Bertha sold her condo to Aquarian without obtaining consent.
- **ISSUE**: May a condo agreement that prohibits sale of a unit without consent (which could be withheld for no reason) also require that any sale in violation of the provision would result in a reversion of the property to the condo upon payment of the fair appraised value to the former owner?
- **HELD**: No.
    - The clause is invalid because it is an unreasonable restraint on alienation, which violates public policy. Restrictions on conveyance of a condo are upheld **UNLESS** they violate public policy (can restrict if the restrictions are reasonable and the association will compensate for the fair market value).
    - ***The association's accountability is illusory*** □ It was unreasonable because there was **no standard for the condo to disapprove a sale**. Because no one knew what the guidelines were, in fear of being rejected, no one would make an offer. **Thus the owner would not be able to make a sale, which means the association would never have to pay fair market value**.

Landlord Tenant

- The lease transfers from the LL to the tenant a legal right to **POSSESS** and **OCCUPY** the premises.
- Enforcement of housing codes:

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- **Legislatures** give tenants the power to enforce the housing codes, thus the tenants can withhold rent and the legislature will protect them from being evicted
  - However, the tenants will have to pay something once the premises are repaired: **the rent will just be abated for that time of disrepair**.

- **Implied Promises/Covenants of a Lease:** The written lease has 3 implied obligations:
  - **(1) Implied covenant of quiet enjoyment (Landlord to Tenant)**
    - The landlord promises that he will not interfere, nor will someone on his behalf or someone in his control, with the quiet enjoyment of the property by the tenant during the tenant's lease.
      - Example: landlord changes locks
    - However, if there is a substantial interference (can't be incidental), **the tenant has 2 options**:
      - 1) The tenant can stay in possession and sue, and can try to acquire general or special damages
        - General Damages: the tenant can get the difference between what he is paying for his rent and what it would cost him to lease another building.
        - Special Damages: If he can prove what the interference has cost him, he can collect those damages
      - 2) Can treat that interference as a constructive eviction: the tenant can leave the property and is no longer bound to pay his rent.
        - Lease can be terminated by either side.
  - **(2) Implied promise to put the tenant in physical possession at the beginning of the lease**
    - Under the **English rule** (which Michigan follows) the landlord has a duty to make the premises vacant and available for possession on the first day. The tenant has the legal and actual right to possession.
    - Under the **American Rule** (followed by a minority of jurisdictions) a landlord has no duty to put the tenant in possession on the first day, thus if there is a holdover tenant, it is the responsibility of the tenant to evict the holdover tenant. The tenant has a legal right of possession but doesn't have an ***actual*** right of possession.
  - **(3) Implied warranty of habitability**
    - Premises has to be up to code when rented and the landlord must repair any defects in the property.
      - Applies to residential in all states, commercial in some states.
    - Some jurisdictions say landlord must maintain premises during the lease in a habitable condition (exception: repairs that are caused by willful/wanton conduct of the tenant)
    - Created after 1960s, when there was an issue with "slumlords" maintaining rental housing in substandard condition.
    - ***Differences between residential leases and commercial leases:***
      - Residential lease: the landlord cannot put a clause in lease that says "tenant accepts property as is"
      - Most states recognize an "as is" clause for commercial leases

- ***If landlord breaches these promises, the tenant can:***

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  - Complain to the local building code inspectors
  - Stop paying rent until repairs are made (in that case, you have to pro-rate your rent)
  - Treat as constructive eviction (most states don't recognize this in warranty for fitness of purpose and inhabitability; only applies to quiet enjoyment).
- You **can** contract around the first implied promise (possession at beginning of lease) but **NOT** the latter two (quiet enjoyment, habitability).
- **TYPES OF TENANCIES**
  - (1) **TENANCY FOR YEARS (ESTATE FOR YEARS):** Both parties know from the moment of its creation the date it ends.
    - Expires without notice.
    - Indefinite ending: when the date of termination is fixed but uncertain (e.g., until the war ends), usually a term for years is created since it is closest to the parties' intention.
    - Maximum term: unless there is a contrary statute, a term for years can be for any period, even 100 years or more
    - If longer than a year, must be in writing.
  - (2) **PERIODIC TENANCY:** Based on the period of the rent payments. If it is an oral lease, can't be for more than a year or month to month.
    - Automatically renews
    - To terminate, notice given at the beginning of the month for the end of next month.
    - Either party can terminate.
  - (3) **TENANCY AT WILL:** A tenancy terminable at the will of either the landlord or the tenant is a tenancy at will.
    - Lease for an indeterminate period: terminable at any time by either party
    - Rare and must be in writing to satisfy the SOF
    - A tenancy terminable by only one of the two parties is not a tenancy at will. A term of years, periodic tenancy, or life estate can be made terminable at the will of only one party. If the tenancy is not a term of years, or a periodic tenancy, or a life estate, and is terminable at the will of only one party, by law the other party can also terminate at will.
    - At common law, no notice was necessary to terminate this tenancy, but **statutes today usually require 30 days-notice to terminate**.
  - (4) **TENANCY AT SUFFERANCE:** A tenant who holds over when his term expires is a tenant at sufferance. If the landlord **consents** to this, the tenant becomes a tenant at will or a periodic tenant. When the tenant holds over, the landlord can **evict the tenant**, can **sue** the tenant for damages, or can **elect** to hold the tenant as a periodic tenant for another term. In some states, landlords are given other remedies by statute, such as requiring the tenant to pay double rent.
    - **Holdover tenant:** moved from tenant status to holdover tenant. Different from a trespasser because a trespasser never had rightful possession.
      - **Who has the obligation to remove holdover tenant**?
        - **English Rule**: landlord: implied promise that premises will be available
        - **American Rule**: new tenant

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- (5) **STATUTE OF FRAUDS:** Oral leases for short terms such as a year are exempt from the Statute of Frauds. Leases have to be in writing, if not the courts will only enforce the lease as long as the SOF will allow (usually about a year).

Brown v. Southall Realty: Housing Regulations

- **FACTS**: Landlord brought action against tenant Mrs. Brown for nonpayment of rent. Mrs. Brown argued that no rent was due under the lease because it was an illegal contract.
- **ISSUE**: Is the lease an illegal contract since it was entered into in violation of the housing regulations?
- **HELD**: Yes.
  - **RULE**: A rental contract is unenforceable when the property rented does not meet government safety and habitability regulations and the landlord is aware of the violations at the time the lease is executed.
  - No retaliatory evictions: landlord may not terminate the tenancy and may not collect the rent.
- ***Distinguishing a lease from a license***: A leasehold requires that the lessee's possession be exclusive against all the world, including the lessor, although the lessor may have a right to possession for purposes consistent with the tenant's privileges. A lease is a transfer of possession; a license is an entitlement to use the property subject to management and control of the licensor.

- Discrimination in the Selection of Tenants
  - Federal and state statutes now prohibit discrimination in the rental of property on grounds of race, color, religion, or national origin. Subsequent amendment added sex, family status and disability. These statutes ordinarily apply to both sale and rental of property. Two major acts:
    - **(1) Civil Rights Act of 1866 [42 USC §1982]**
    - **(2) Fair Housing Act of 1968 [42 USC §3604]** pg. 461, Note 1: permits states to enact their own fair housing laws: states sometimes omit certain exemptions or add additional protected categories
      - Protected classes: race, color, religion, sex, national origin, familial status and handicap.
      - **Does NOT cover situations where the homeowner sells the property himself**, there must be a broker involved for it to apply. If he sells himself, he can discriminate and not violate the Act.
        - **HOWEVER**, *Jones v. Mayer* does protect against discrimination when selling home by himself and not through an agent.
      - Does NOT cover situations where you live in the place and rent 4 rooms or less.
        - However, other laws, like the Civil Rights Act, may protect from discrimination.
  - **Proving discrimination**: P **need not prove** that the landlord has **discriminatory intent** to show a violation of either §1982 or the Fair Housing Act. Proof of discriminatory **impact** is sufficient to make out a prima facie case. Once the P

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makes a prima facie case for discrimination, the burden shifts to the D to prove that race was not one of the motivating factors.
    - **Testing for violations**: *Jancik v. Department of Housing and Urban Development*

Javins v. First National Bank Realty Corp.: pg. 454, Note 5

- Tenants became aware of a housing code violation but they don't want to leave (unlike in Brown)
- Court concludes that within the lease, they will imply an obligation of the landlord to bring the housing up to code standard in the lease.
    - Additionally, they recognize that the promise by the landlord is mutually dependent on the promise to pay rent □ allows tenant to withhold rent until landlord has upheld promise
- Once the tenant withholds rent, the landlord will bring an action to withhold a tenant.
    - **Retaliatory eviction** is NOT permitted.

Janick v. Department of Housing and Urban Development

- **FACTS:** Stanley Janick owns a Building in Chicago suburb of Northlake called King Arthur's court, which houses people of all ages. Janick placed an ad seeking a "mature person" which caused the Leadership Council to "test" the property with fake tenants to make sure her add wasn't violating the Fair Housing Act. They found that she had violated Section 804(c) of the FHA, 42 USC Section 3604(c) which prohibits the making or publishing of any statement or advertisement that "indicates" any preference or limitation based on…"
- **ISSUE**: Did Janick's ad indicate a preference based on family status and her interactions with fake tenant testers indicate a preference based on race as well, violating the Fair Housing Act?
- **HELD:** Yes.
    - How to do determine if an ad "indicates" a preference?
        - (1) Objective "ordinary reader" standard
        - (2) Ads do not have to jump out but discourage the ordinary reader of a particular group from answering it
        - (3) No showing of subjective intent necessary
    - Evidence clearly shows that Janick indicated an unlawful preference for "mature" tenants. Also substantial evidence that Janick had a preference because she asked the testers about their race. Also never rented to African American tenant
    - **RULE**: A given statement or ad violates the FHA if it suggests to an ORDINARY READER that a protected group is preferred or dis-preferred for the housing in question.

Tenants Right to Possession

- **At the beginning of the lease**
    - **Legal Right to Possession:** The landlord has the duty of transferring to the tenant at the beginning of the tenancy the legal right to possession. If another person has paramount title, the landlord is in default.

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- Paramount title**:** refers to any title or interest in the leased land, held by a third party at the time the lease is made, which is paramount to the interest of the landlord. EX: Before leasing, L gives M a mortgage on the property, which M records. M has paramount title.
- **Tenant's remedies prior to entry:** If on the commencement of the term, a paramount title exists or is being asserted that would justify the tenant reasonably concluding that he will be deprived of the use contemplated by the parties, the tenant prior to entry may either:
  - **Terminate** the lease and recover damages, or
  - **Affirm** the lease and recover damages or an abatement in the rent (if the paramount title affects only a portion of the premises.)
- **After the tenant enters into possession:** Once the tenant takes actual possession, he is assumed to have accepted the landlord's title as adequate for use of the property.

o **Actual Possession**

- **"English Rule" (majority view):** In most jurisdictions, the landlord has the duty to deliver actual possession, as well as the right to possession, at the beginning of the term. If the previous tenant has not moved out when the new tenant's lease begins, and the landlord does not remove the person within a reasonable period of time, the new tenant can terminate the lease or recover damages from the landlord.
- **Part possession:** If the tenant takes possession of any part of the leased premises, the tenant must pay the rent provided in the lease for the entire property. But he can offset this by a claim for damages against the landlord.
  - However, if the tenant is put into possession of the entire premises and then is evicted from a portion thereof, the tenant's rent obligation is wholly abated until possession thereof is restored to him. The lease obligation by the tenant does not end.
- **"American Rule" (minority view):** Some jurisdictions maintain that the landlord has no duty to deliver possession to the tenant at the beginning of the lease term. Thus, if a prior tenant wrongfully holds over, the new tenant has no cause of action against the landlord. The new tenant has a cause of action against the prior tenant.

o Thus, the tenant's obligation to pay rent is dependent on the landlord fulfilling his obligation to (1) provide the legal right to possession, (2) Not interfere directly or indirectly with the tenant's physical possession, and (3) In most jurisdictions, to place the tenant in actual possession.

- **During the existence of the lease:** Even in the absence of an express provision, a covenant of quiet enjoyment is implied in a lease. What constitutes breach and tenant's remedies are discussed below.

o Actual eviction**:** If a tenant is physically evicted from the entire (total) leased premises, either by the landlord or by someone with paramount title, the tenant's obligation ceases. Having been deprived of possession of the entire premises, the tenant may treat the lease as terminated, and his liability for further rent under the lease is discharged.

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        - **Means of eviction:** If the landlord is entitled to evict the tenant, he can pursue a suit in ejectment to recover possession. The L must give the tenant "notice to quit" with valid grounds for eviction.
    - Constructive eviction**:** When, through the fault of the landlord, there occurs an interference with the tenant's use and enjoyment of the leased premises that is serious enough to force the tenant, as a reasonable person, to vacate the premises, the leasehold is terminated by "constructive eviction," and the tenant is excused from further rent liability.
        - **Elements to establish constructive eviction:**
            - Substantial interference with use and enjoyment of the leased premises
            - Fault of the landlord: the interference must result from some act or failure to act by the landlord. Generally, a tenant cannot claim a constructive eviction growing out of the wrongful acts of a third party.
            - Move-out by tenant: A tenant cannot claim a constructive eviction until he vacates the premises.
            - **Condemnation:** When the entire leased property is lost due to condemnation, the lease is terminated and the tenant no longer has an obligation to pay rent.

Adrian v. Rabinowitz: lessor must deliver actual possession under **ENGLISH RULE**

- **FACTS**: Rabinowitz leased a store to Adrian, but there was a holdover tenant for a few weeks. Adrian sues for breach of contract, seeking special damages because of lost profits he suffered as a result of him not operating his shoe store in those few months.
- **HOLDING**: State has the English Rule, so seller has the responsibility to put tenant in possession on the first day. P was unable to give sufficient proof of special damages so only specific damages given.
- **RULE**: Under the English Rule, the landlord has to put the tenant in actual possession on the first day of the lease.

Provisions Governing the Tenancy

- Duration: A lease for a fixed term is referred to as a **term of years**, while a lease for a renewable period is a **periodic tenancy**.
- Holdover tenants: *Commonwealth Building Corp. v. Hirschfield*
- Lease renewals**:** A lease contract may include an express provision for a tenant who wants to remain in possession after the lease expires. Special legislation protections are also afforded senior citizens, disabled tenants, and tenants of subsidized housing.

Commonwealth Building Corp. v. Hirschfield: Holdover tenants

- **FACTS**: D leased an apartment from P. The lease contained a clause providing that if the lessee **held over**, he would be held liable for double rent for the period. D decided to move at the expiration of the lease on September 30 and so notified P. D moved out most of the goods but couldn't move some things out until the next day because the elevator didn't work. P served notice on D that because the premises were not vacated on

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September 30, P had elected to hold D as a tenant for another year and he sued to recover $3,300.

- **ISSUE**: Where P was aware of D's intentions to vacate by the end of the term and where D has substantially complied, may P hold D as a tenant for another similar term and recover rental payments for that period?
- **HELD**: No.
    - P clearly knew that D did not intend to create a second tenancy.
    - D's actions were not such that the court should hold him liable for a second lease on the theory of quasi-contract, as the lease provided only for a payment of double rent for any holdover period. **P may recover that amount only**.
- **RULE**: Most modern cases give a tenant relief where the tenant does not intend to hold over but is forced to do so by circumstances beyond the tenant's control. The landlord cannot elect to hold the tenant to another term if, in light of the circumstances, the tenant vacates as soon as possible.
- Rule against perpetuities applied to leases**:** If you have a lease (non-freehold estate), where the leasehold is renewable for future periods and those periods could run into perpetuity, does the Rule apply?
    - **NO** (majority of states), the Rule only applies to freehold estates.
    - **YES** (minority), the Rule applies to residential leases and not to commercial leases.

Richard Barton Enterprises v. Tsern: Condition of the Premises: Dependent Covenants in Commercial Lease

- *Express warranty to fix elevator. Breach was material.*
- **FACTS**: P leased the first and second floors of a building from D. The lease required D to repair the leaky roof and to get the freight elevator in good working order. P counted on the freight elevator, but D never really got it working well. P abated his rent.
- **ISSUE**: Is a lessee's covenant to pay rent dependent on the lessor's performance of covenants that were a significant inducement to the lessee in entering the lease?
- **HELD**: Yes.
- RULE: To justify a lessee's withholding of rent, the lessor must breach a covenant that is material to the purpose for which the lease was entered into or was a significant inducement to enter the lease. D's covenant to repair the elevator was clearly such a material covenant. Once D breached that covenant, P was entitled to rent abatement or reimbursement in an amount equal to the reduced value of the premises due to D's breach.

□ 3 EXAMPLES OF WHEN TENANCY MAY HAVE NO FIXED ENDING

- (1**) Affordable housing**: you cannot terminate their lease the same you do in a private apt. Can ONLY terminate for just cause (nonpayment of rent, substantial damage, criminal activity). Must DEMONSTRATE just cause before terminating.
- (2) **Mobile Home Parks**: Must show just cause.
- (3) **Condo Conversion:** Would buy a rental building, kick out tenants, sell the units as fee simple absolutes and make a ton of money. While it was happening to high-end rentals it was acceptable. Then it started happening to rent controlled buildings and such, then legislation was passed to prevent the eviction.

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- (4) **Rent Control**: Can only terminate for just cause.

Rent

- **General Rules**: Residential leases generally require payment of rent monthly. Commercial leases usually combine a monthly rent payment with additional provisions for annual adjustments, percentage of revenue add-ons, or additional charges such as for common area maintenance.
- **Public policy issues**: The Supreme Court upheld the constitutionality of rent control ordinances provided that the ordinance allows consideration of the landlord's and tenant's individual circumstances.
- Rent Control
    - Occurs when rent is set at a capped fix rate base with limited increases
    - Only have rent control in a hot housing market
    - There is a narrow scope of review as deference is given to legislature on this matter as it deals with public welfare.
        - It will only be overturned if found to be ARBITRARY and CAPRICIOUS
    - This is enforced through Local Regulation:
        - There can be a constitutional investigation, where the court will ask:
            - Is this a proper exercise of police power? Public welfare must be served.
            - Must not be overly burdensome or else it is considered a regulatory taking and invokes the 5th Amendment privilege of property rights requiring just compensation.
- In order to do this, local authorities must receive grant of authority from state: this is determined by the local legislative body who determines if this is a police power promoting public welfare.
- **Prohibition on Rent Control**: *Town of Telluride v. Lot Thirty-Four Venture*

Town of Telluride v. Lot Thirty-Four Venture: *Rent control can only be terminated for just cause

- **FACTS**: A new city ordinance gave affordable housing to local workers so they could live closer to where they were working however there was a state law prohibiting rent control.
- **ISSUE**: May a city require developers to offer housing at fixed rental rates if a state statute prohibits rent control?
- **HELD**: No.
    - Developer would argue that this constituted a taking without compensation which would unconstitutionally interfere with the property rights of the developer.
    - D's ordinance sets a base rental rate per square foot and limits the growth of the rental rate. It suppresses rental values below the market value. As such, it constitutes rent control.
    - ***It does not matter that D's ordinance applies only to new construction***. The statute does not distinguish between new and existing developments. Nor do the alternative options save the ordinance.

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- **RULE**: Local laws and ordinances which require commercial developers to generate affordable housing in conjunction with commercial developments are potentially violative of general laws prohibiting rent control.

Use of the Premises

- Tenant use of the premises can include/be limited by:
  - **THE DUTY OF CONTINUOUS OPERATIONS:** (*Piggly Wiggly v. Heard*)
    - There can be an occupancy clause which stipulates that tenant cannot leave for over 30 days.
    - If a lease contains express language to the contrary, an implied covenant of continuous operations will not be implied.
    - The only time this covenant will be enforced is if the rent is so low that the percentage covers the lost profits for the landlord and it is obvious the landlord was counting on use for income.
    - When considering an implied covenant:
      - Is there an express term contrary to the implied covenant?
      - Is there a provision of free assignability? (no requirement of continuous business)
      - Did both parties negotiate this lease?
      - Did the lease contain a non-compete provision?

Piggly Wiggly Southern v. Heard

- **FACTS:** Piggly Wiggly (D) entered into a supermarket lease with Heard (P) that required D to pay a base rent plus a percentage rent of annual gross sales exceeding $2m. A month into the 2yr. renewal, D vacated the premises to move into a nearby shopping center. D continued making the base rent but refused to sublease the vacant store. The lease provided that the property could be used by D as a supermarket or for any other lawful business. P sued, **claiming D had breached the lease by not conducting any business in the leased space.**
- **ISSUE**: If a lease agreement does not contain an express covenant of continuous operation, may the courts construe one if the lease requires the tenant to conduct a lawful business in the space?
- **HELD**: No.
  - The lease allowed D to conduct any business it desired in the space, without P's consent. It also allowed D free assignability, without P's consent, which is inconsistent with a requirement that D continuously operate its business.
  - The lease also required D to make a substantial minimum base rent, which suggests that there was no implied covenant of continuous operation.
  - Look at the intent of the parties given the language of the lease. Ambiguity should be construed against the drafting party.
- **RULE**: A commercial lease agreement which provides that the tenant's use of the premises is not limited to the purpose for which it is leased but can be assigned without consent of the landlord or used for any other lawful business **does not** create an implied covenant of continuous operation.

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- **Waste:** Like a life tenant, a lessee is liable for waste. Thus, he cannot use the premises so as to constitute waste, although he may make reasonable changes in the physical condition of the premises as necessary for him to make reasonable use of the property.
- **Illegal purposes:** A tenant has a duty not to use the premises for an illegal purpose.
    - If both the L and the T intend that the property be used for an illegal purpose, the lease is not enforceable by either of them.
    - If the T used the premises for an illegal purpose not intended by the landlord, and the L is not a party, the L cannot terminate the lease. He can only sue for damages or for an injunction to stop the illegal activity.
    - A L may rescind a lease when the lessee uses the premises for **objectionable** but not illegal purposes, if the lessee **misrepresented** to the landlord his intended use.
- **Physical alterations: rights to fixtures**: When the tenant attaches a chattel to the premises, he may want to remove it upon termination of the lease. Under the common law, it was difficult to do so because fixtures were considered part of the realty and therefore belonged to the landlord. The modern trend is toward permitting tenants to remove chattels that they install. Even under the common law, however, trade fixtures could be removed.

Handler v. Horns

- **FACTS**:D leased a building from P. D installed refrigeration equipment for carrying on a trade within the building. D left and attempted to remove the trade fixtures from the building. The lease agreement said that **improvements** belonged to the landlord but that **fixtures** could be removed.
- **ISSUE**: Do trade fixtures, removable without material damage to the leasehold premises become part of the realty?
- **HELD**: No.
- **Common Law Rule**: whatever is fixed to the realty is part of the realty
    - Has SEVERAL EXCEPTIONS, including one in the instance of fixtures put upon property by a tenant
- **RULE**: Today, generally, the tenant may remove whatever he has erected to carry on a trade, so long as it can be severed from the realty without material damage thereto, and there is no agreement to the contrary. The tenant generally must do so while still in possession. The rule operates notwithstanding the absence of such a provision in a lease because there was no contrary provision.

Injuries to Persons and Property

- Two grounds tenants have if they are injured:
    - (1) NEGLIGENCE: based on foreseeability.
    - (2) IMPLIED WARRANTY OF HABITABILITY: Strict Liability: show a causal connection between breach and injury.
- 4 ways landlords were liable: exception to the general rule that landlords would not be held liable in negligence for torts occurring on the leased premises:
    - (1) A hidden danger that the L but not the T knew about
    - (2) Premises leased for public use
    - (3) Premises retained under L control (e.g., stairway)
    - (4) Premises negligently repaired by L

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- 4 exceptions when the L is held responsible for criminal acts:
    - (a) Special relationship: innkeeper/guest
    - (b) Misconduct brought about by the D
    - (c) Overriding foreseeability that criminal activity would occur
    - (d) Voluntary assumed duty, has to act with reasonable care
- Many states still follow these, but the **MODERN VIEW** is that landlords must act as reasonable landlords under the circumstances and can be sued beyond the 4 exceptions.

Walls v. Oxford Management Co.: No duty to protect against criminal acts

- **FACTS**:Walls (P) was sexually assaulted in her vehicle while parked on the premises of a 412-unit apartment complex managed by D. Numerous property crimes had been committed in the complex in the preceding two years, but no attacks against persons had been reported. P sued claiming that D had a duty to provide reasonable security measures for the residents of the complex and that its breach of duty was a proximate cause of the sexual assault.
- **ISSUE**: Does a landlord have a duty to protect tenants from the criminal acts of third parties?
- **HELD**: No.
    - (a) Special relationship (innkeeper-guest): LL + T relationship is **not** a special relationship
    - (b) Opportunity for criminal misconduct brought about by the D requires him to take precautions against it: in the majority of cases in which LL has been held liable for criminal attack upon T, a known physical defect on premises foreseeably enhanced the risk of that attack
    - (c) Overriding foreseeability: LL have duty to protect T from foreseeable attacks, not foreseeable here.
    - (d) One who voluntarily assumes a duty has a duty to act with reasonable care: LL who provide security have been found liable for removing security, no security here.
        - The Court took a narrow view of the warranty of habitability and said the warranty only protected structural defects and not security. A landlord does not have a duty to protect tenants from criminal acts of third parties. Private persons have no general duty to protect others from criminal acts. This was not foreseeable and the L does not have a duty to the tenant in this situation.
- **RULE**: Where a L has made no affirmative attempt to provide security for her tenants and is not responsible for any physical defect that enhances the risk that a crime may be committed she cannot be held liable for a criminal attack upon a T.
    - *Other courts have held that the implied warranty of habitability does include a duty to secure the front entrance of a building, on the theory that adequate security is an element of habitability.*

Lessor's Remedies Against Defaulting Tenant

- Issues encountered can include:
    - Non-payment of Rent
    - Occupation after termination

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  - Abandonment of premises before lease ends
- **Remedies:**
  - Eviction
    - 30-days-notice required
    - Can evict if wanting to stop rent altogether as well
    - Cannot evict for retaliatory reasons
    - Burden of proof on landlord
- **Termination of Lease**
  - Landlord has right to terminate lease
    - However, this right is not unlimited due to public policy and termination cannot be due to small errors.
    - Good faith effort of tenant taken into account
  - How do we terminate the lease?
    - Mutual agreement of the parties
    - Terminate at the end of the lease date
    - Periodic will terminate at end of period
    - Will terminate if property is condemned or if eminent domain is invoked to take property for public use: government scoops up the entire bundle of rights when this happens.

Foundation Development Corp. v. Loehmann's Inc.: A landlord's right to terminate a commercial lease is not without limits.

- **FACTS**: P attempted to evict commercial lease tenant after late payment due to mail delay.
- **ISSUE**: May a landlord obtain forfeiture of a commercial lease for a trivial or immaterial breach such as making a payment a few days late?
- **HELD**: No.
  - The breach here was trivial and immaterial. P has no right to terminate the lease as D made a good faith effort to comply.
- **RULE**: A forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced.

Robinson v. Diamond Housing: Note Case

- Landlord wants Tenant gone. He says I'm going out of business therefore I will no longer be maintaining this property so tenant needs to move. Court says are you going out of business in all your rental units? You're just using this to accomplish what you couldn't accomplish otherwise. This is just further retaliation. So the Court says he can't go out of business until after he repairs the unit.
- **RULE**: the decision to go out of business must be a business decision, you can't retaliate because you have no other way to remove the tenant. Must fix the place then can go out of business.

Eviction

- Eviction**:** A tenant may be evicted if she breaches lease covenants or holds over beyond the lease term. There are two types of eviction: self-help and by judicial process.
  - **Self-help:** At common law, a landlord could not use self-help to evict a tenant, but in the United States, a landlord has traditionally been allowed to use reasonable

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self-help to remove a tenant, such as by changing the locks. The modern trend has been to hold a landlord liable for damages if he uses self-help. The ready availability of summary judicial proceedings has led many courts to disfavor self-help.

- **Judicial process:** Most states have some statutory mechanism for summary judicial proceedings to evict tenants. Commonly, the procedure, called "unlawful detainer," requires service on the tenant of a notice to quit. If the tenant does not leave, the landlord files an unlawful detainer action, which is normally heard within 5 days or less. If the judge finds the tenant in breach of the lease, he may sign an order authorizing the sheriff to evict the tenant To recover back rent or other damages, the landlord must file a separate suit. The traditional ejectment suit is an alternative judicial process but is subject to the delays of the civil calendar in most courts.
- Retaliatory eviction**:** If a tenant reports the landlord for violation of the housing code, the landlord may try to evict the tenant or may refuse to renew the lease at the end of the term. If the landlord does so, the tenant may assert retaliatory action as a defense against eviction.

Edwards v. Habib: Retaliatory Motive is a defense to an action eviction

- **FACTS**: Edwards (D) rented housing from Habib (P) on a month-to-month basis. D complained to the department of licenses and inspection for sanitary code violations; P was ordered to remedy them. P then gave D a 30-day statutory notice to vacate. The lower court held that, since a landlord could terminate a month-to-month tenancy for no reason, the termination in this case is permissible.
- **ISSUE**: May a landlord evict a month-to-month tenant as retaliation for complaining about housing code violations?
- **HELD**: No.
- **RULE**: A landlord may not evict a tenant in retaliation for the tenant's report of housing code violations to the proper authorities.
  - Tenant has a right to withhold rent because building not up to code.
  - Tenant may only be evicted **for just cause**.

Abandonment by the tenant**:** If the tenant abandons the property with no right to do so, the landlord may, depending on the jurisdiction, terminate the lease, let the premises stay empty and sue the tenant for rent, or retake possession and re-let. The modern trend favors retaking and re-letting.

- By terminating the lease, the landlord effects a surrender; the tenant is liable only for rent accrued and for damages caused by the abandonment.
- **Tenant's contractual liability:** *U.S. National Bank of Oregon v. Homeland*

US National Bank of Oregon v. Homeland: **Damages**: Landlords have a duty to attempt to mitigate damages when a tenant breaches the lease.

- **FACTS**: P leased office space to D who vacated the lease with 32 months remaining and stopped paying rent. P found another tenant and released the property for a **longer term** and at a **higher rent**. The new tenant also defaulted. P sued D to recover unpaid rent following D's abandonment of the premises.

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- **ISSUE**: Is D liable for unpaid rent for the entire term, or only the time period between D's abandonment and the commencement of the new lease?
- **HELD**: For the entire term, even for the term in which new tenant was leasing.
    - **RULE**: Following abandonment of the leased premises, the lessor has a duty to make a reasonable effort to mitigate damages by finding a suitable tenant.
    - **RULE**: The tenant, by abandoning the leased premises, forfeits his estate in the real property but remains liable for damages for breach of contract.
    - The tenant remains liable for the difference between the agreed price & the fair rental value. Tenant remains liable for the entire amount of the rent for such period of time that the lessor (with reasonable effort) is unable to relet the premises.
        - Attempting to relet for a longer or shorter term does not bar the lessor's claim for damages. Neither does reletting or attempting to relet at a higher rent price.
- So what happens if L receives more $ than he would have received under original lease? In theory, surplus should go to tenant because if circumstances were different and received less $, tenant would be liable.
- *Notes*:
    - Receiver: Appointed to take over building, collect rents from tenants, and make repairs/manage the building.
    - The Landlord has taken a **stick out of non-freehold estates**, the tenant

- **Damages:**
    - **Common Law**
        - If a tenant stopped paying rent, landlord could treat this as an implied surrender.
        - If a tenant vacates, landlord can treat this as an implied surrender by tenant.
            - Landlord can accept this and see it as **taking back full bundle of rights**.
            - Or reject it and hold them liable for up to end of lease.
                - And then mitigate damages and claim different amount
    - **Modern Approach**
        - Let landlord re-lease the premises in the name of the tenant to a third person
        - The amount of money received by the third person will **offset** the damages which the landlord can seek from the original tenant.
        - **Majority**:
            - Requires tenant to mitigate damages (including Michigan)
            - The landlord must make a reasonable effort to re-lease the premises in **own name**, not tenant.

Transfers

Estate/Relationship Aspect | **Contract Aspect**

- **Assignment:** Transfer of contract, including all rights and interest in a lease form tenant, to a third party.

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- In the absence of a prohibition in the lease, a tenant or landlord may **freely transfer** his interest in the premises.
- **Privity of contract** between LL and the original Tenant
- **Privity of estate** between LL and the assignee
  - 3rd party holds the **estate**, holding the stick out of the Landlords bundle
  - *If the **tenant assigns his leasehold**, the assignee comes into privity of estate with the landlord, which means that the landlord and the assignee are liable to each other on the covenants in the original lease that run with the land.
    - *Similarly, if **the landlord assigns the reversion**, the assignee and the tenant are in privity of estate.
- Assignee effectively steps into the shoes of the tenant
  - However, the assigning tenant is still liable for obligations to the landlord.
  - If the assignee breaches, landlord has a right to collect from either assignor or assignee.
  - Assignee must pay rent. If they do not, landlord can collect from assignor as he still has privity of contract.
  - **Assignee can assign to yet another.** Original lessor will still have privity of contract but new assignee will have privity of estate. If assignee #1 assigns to assignee #2, NO relationship between assignee #1 and LL.
    - Common Law: if not otherwise stated, a transfer of rental interest that is for the entire remainder of term will be viewed as an assignment, regardless of the parties' intentions.
    - Modern View: look to the **INTENT** of the parties also (*Jaber v. Miller*)

- Suretyship Triangle – K is between the lessee and the assignee. **OCCURS AFTER ASSIGNMENT**.
  - Tenant transfers to a 3rd party, the assignee
    - **Privity of contract** between LL and the original Tenant [Surety]
    - **Privity of estate** between LL [creditor] and the assignee [principal]
    - Tenant is secondarily liable (still in privity of contract)
    - If assignee [principal] defers payment, LL [creditor] can go ask T [surety] for rent payment.

- **Sublease:** Transfer of some or all rights and interest in a lease to a third party through a separate contract.
  - Privity of **contract** and **estate** STAYS THE SAME, between LL and the original Tenant
    - LL and original T hold privity of **contract** and **estate**
    - Sublessee and original T hold privity of **contract** and **estate**
    - 3rd party has NO RELATIONSHIP with LL. There is **neither privity of K or privity of estate** between the landlord and the sublessee.
  - In the event of breach, landlord must collect from the original tenant. Landlord does not have right to collect from subtenant as he has no contract with subtenant. Sublessee has no connection to the landlord and is not personally liable for rent.
    - Subleasor has a right to collect form subtenant.

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- ***Sublease distinguished from assignment*:** If a tenant sublets the premises, and does not assign them, the tenant becomes the landlord of the sublessee. The sublessee is **not** in privity of estate with the landlord and cannot sue or be sued by him. Since the sublessee has made no contract with the landlord, he cannot sue or be sued on a K either. At **common law**, a transfer is a sublease if the tenant retains a reversion in the property after the transfer. If the tenant does not retain a reversion, the transfer is an assignment. *This view is still retained in many states, but some states have redefined a reversionary interest broadly, and others have entirely rejected the common law view.*
- **Duty to pay rent:** The general rule is that a landlord may sue any person for rent who is either in privity of contract with the landlord as to the rent obligation, or who has come into privity of estate with the landlord so as to be bound by the rental covenants in the lease.

Jaber v. Miller: Intention of the parties

- **FACTS**: Jaber (D) leased a building. In the lease, there was a provision stating that the lease would terminate if the premises were destroyed by fire. D assigned the lease to another party (Norber & Son) for the duration of the lease period. That party later transferred to Miller (P), who paid $175/mo. The building then burned down and Miller filed suit to have his 14 promissory notes for $175 each cancelled. *He made these promissory notes because he wasn't able to pay rent as it was due so he executed the notes and D accepted them in substitution.* Miller argued that the original transfer was a **sublease** instead of an **assignment** and that the notes represented monthly rent and that the obligation to pay rent had terminated with the fire. D argued that the notes were not rent but were deferred payments for the **assignment** of the lease to the original assignee.
- **ISSUE**: May a tenant who holds leased property under an intended assignment from the original lessee avoid payment of rent when the original lease is canceled by destruction of the leased premises?
- HELD: **NO**.
    - If a tenant holds as a **sublessee** and the original lease is canceled, the sublessee's obligations are likewise canceled (the subtenant has no privity of estate or privity of K with the L). A tenant who holds property under **assignment** is not released from his payment obligations by cancellation of the original lease (privity of estate with the head landlord so liable for rent).
    - Whether an agreement between a tenant and an original lessee is an assignment or sublease is governed wholly by the intent of the parties and the form of their agreement. The common law rule results in harsh consequences when a tenant intends to make an assignment but retains some interest, such as the right to retake possession that D retained here. Since the parties clearly intended an assignment, the courts should treat the contract as an assignment.
- **RULE**: (minority view) courts should look to the intention of the parties when determining whether an instrument is an assignment or sublease. **(Rejects majority view)**: Here there was no separate signed agreement that allowed the sublease to occur.
    - **This court rejects the majority view which is**: *one must look to the duration of a transfer to determine whether it is a sublease or an assignment. A transfer of the right of possession of a leasehold for the entirety of time remaining on the lease is*

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an assignment. A similar transfer of the right of possession for a time less than the full duration of the lease (even one day less) is a sublease.

- **Covenants against assignment or sublease**
  - **Strict construction:** Many landlords insist that the lease contain a covenant against transfers by the tenant. Such a covenant is valid, but being a restraint on the transfer of land, it is strictly construed. Thus, a covenant "not to assign" does not prevent the tenant from subleasing, and a covenant "not to sublease" does not prevent an assignment.
  - **Waiver of Covenant (implied waiver):** The landlord may, by his acts, voluntarily relinquish the covenant against assignment or sublease. This usually happens when the landlord accepts rent form the assignees **with knowledge** of the assignment.
- **Waiver of covenant applied:** *Childs v. Warner Bros. Southern Theatres*

Childs v. Warner Bros. Southern Theatres: The fact that a landlord consents to the assignment of a lease does not take away her ability to determine who subsequently uses and occupies the leased premises.

- **FACTS**: P was the lessor of property whose lessee assigned it to D. Under the lease agreement, P reserved the right to approve any assignments. P approved the assignment to D, thereby releasing the original lessee from obligation. D assigned the lease without approval by P. The assignee defaulted, and P sued D for rent due.
- **ISSUE**: When a lease requires approval of assignments by the lessor, does approval of one assignment waive the right to approve subsequent assignments?
- **HELD**: No.
- **RULE**: When a lease contains a clause that prohibits assignment of the lease without the permission of the lessor, the lessor's consent to one assignment does not waive the need to obtain lessor permission for any subsequent assignments and does not waive the lessor's ability to object to a proposed second assignment.

- **Covenants running to assignees:** For the landlord to be able to **enforce a covenant in the lease against the tenant's assignee**, or for the tenant to be able to enforce a covenant in the lease against the landlord's assignee, the following requirements must be met:
  - Intention: the parties to the lease must intend that the covenant run to the assignee.
  - Privity of estate: The assignee must be in **EITHER** privity of estate or privity of contract with the person who is suing or being sued.
  - Touch and concern assigned interest: the covenant must touch and concern the interest that is assigned, be it the leasehold or the reversion. That means, basically, that the covenant directly affects the party in the use or enjoyment of the property.
- **Reasonableness of landlord's refusal to consent:** *21 Merchants Row v. Merchants Row*

21 Merchants Row Corp. v. Merchant's Row, Inc.: Clauses in lease agreements that require landlord permission prior to a transfer or sublease are not read to include a reasonableness requirement.

- **FACTS**: P entered lease agreement with D that prevented P from assigning the lease without D's express consent. P subsequently entered an agreement to sell its business,

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contingent on D consenting to an assignment of the lease. D then refused to consent to an assignment of the lease thereby prevented P from completing the sale of its business.

- **ISSUE**: Does a requirement in a commercial lease that the tenant obtain the landlord's consent before assigning the lease create an implied obligation on the landlord's part to act reasonably in withholding consent?
- **HELD**: No.
    - RULE: A landlord whose consent must be obtained to make an assignment or sublease can arbitrarily and unreasonably withhold consent to a proposed transfer.
    - Most modern cases now require the landlord to have a **good faith** or else this would be an **undue restraint on alienability.**

Use Rights

EASEMENTS, COVENANTS, SERVITUDES, AND RELATED INTERESTS

- (1) EASEMENT
- (2) LICENSE (not actual right/just a privilege)
- (3) PROMISE
    - (a) COVENANT (Enforced in law)
    - (b) SERVITUDE (Enforced in equity)

 (1) EASEMENT: Creates a non-possessory right to enter land and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by easement.

1) Expressed, 2) Implied, 3) Prescriptive (adverse use)

Created by GRANT or RESERVATION

Can be AFFIRMATIVE or NEGATIVE

 APPURTENANT or IN GROSS

- **Servient Estate:** Estate with the burden.
- **Dominant Estate:** Estate with the benefit
- To be enforceable, **it MUST be in writing** because if it is an oral agreement only, the courts will view that as a license which is revocable at any time.
- (1) Express easement
    - Created by grant or deed or conveyance document, expressly stated.
    - **Use Rights:**
        - Appurtenant/Pertinent
            - The easement will run with the land (the use rights will go from owner to owner as easement recognized as the land is conveyed).
            - To meet this, there are two requirements:
                - (1) **Touch and concern**: the use right must touch and concern the burden and benefitted property. (The right of way attaches to land)
                - (2) **Needs to intend to run**: the parties must have intended the use right to benefit the grantee, his successors, and assignees. Can't just be personal to B.
        - In Gross
            - NOT transferrable

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- The use right does not run with the land
- Instead, it only attaches to a person who has granted the right.
  - Held personally by the holder of the land.
- Example: A and B split a parcel of land, C has right of easement but DOESN'T own any land. C might be a utility company: they have the ***benefit*** of land, A has ***burden***.
  - If A sells to D, D takes fee of easement but this doesn't work because C has to go back and re-negotiate. Instead, utility company retains the benefit. If they're bought out by someone else who takes their assets, the benefit transfers and that benefit will run.

- **Uses of Property:**
  - Affirmative**:** A party CAN do something on the property
  - Negative**:** Known as covenant or servitude. This is when the use holder cannot use the land, he can only tell the burdened landowner ***how to use*** his land (EX: can't build above a certain height).
- **Grantor Keeping Some: Reserved**
  - B to A land which has a road that needs to be used, A can reserve an easement for that road for himself or a third party who may need to use it.
  - Grantor conveys land but withholds an easement to that land for himself or 3rd party = ***reservation.***

- (2) Implied Easement
  - Still a conveyance document, but there is no express terms of use rights, however in that document it seems as though there is some notion or some intent of use right.
    - Implied from the conveyancing document itself.
  - Two types:
    - Easement by strict necessity: EX: landlocked case: if you are B and you walked on the land of A, you'd be a trespasser.
    - Easement by prior/pre-existing use: known as "***reasonable necessity***" This can be boiled down to 3 essential elements:
      - 1. Common ownership of the claim dominant and servient land and that owner made a subsequent transfer severing title (one land split up into two parcels of land to different owners).
      - 2. Before conveyance or transfer, that common owner used part of the land for the benefit of the other part.
        - Requirement for use of land: must be **apparent, obvious, continuous use and permanent.**
      - 3. The claim that easement is necessary and beneficial to the enjoyment of the parcel conveyed or retained to the grantor.
- (3) Prescriptive Easement: Created by adverse use, not possession
  - This requires the land to be used **continuously, openly and hostile**
  - The courts say the moment a trespass occurs, this is when the owner's cause of action arises and the cause of action is extinguished after the statutory period runs. After this ends, the use becomes a prescriptive easement.
    - NOTE: Michigan SOL is 15 years

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    - Three ways to prevent prescriptive easements:
        - Start a lawsuit
        - Try and stop guy from using land by putting up a barrier (fence)
        - Simply give person permission to use land
            - They will not be seen as a licensee
            - Any use is no longer hostile
            - Is not express or implied
            - Note: this is typically **affirmative** and **gross**, not pertinent
- **Profits a prendre**: A profit is the right to take something off another person's land that is part of the land (minerals, crops, timber) or is a wild animal living on the land. When a profit is granted, an easement will be implied to assure its use.
- **Licenses:** a privilege to go upon land belonging to the licensor. It is permission to do acts upon another's land that otherwise would constitute trespass. Generally, a license is revocable at the will of the licensor, and therefore differs from an easement. A licensee is not entitled to protection from interference by third persons.

Express Creation of Easements

- All easements are said to "lie in grant," meaning that the easement was created by a grant. In theory, every easement owes its existence to a grant by deed, but in practice, easements can be created by long use or by implication. Also, an easement may be created by reserving an easement when conveying land.

☐*TEST FOR* Appurtenant OR In Gross:

- (1) Was it intended to attach & run?
- (2) Does it touch and concern adjoining parcels of land?
    - If it was intended to be reserved for only the lifetime, it would be **in gross**. If it was meant to attach to the land title, it would be **appurtenant.**

Mitchell v. Castellaw: Easement appurtenant where no words of inheritance used in creation
Lot 2: **Servient estate** | Lot 3: **Dominant estate**

- **FACTS**: Stapp owned three adjacent lots. She conveyed two of the lots, reserving a right in the grantor to use a driveway for access to the lot she retained. Mitchell (D) eventually obtained these two lots. Castellaw (P) obtained Stapp's lot by devise and sought to establish an easement in the driveway.
- **ISSUE**: May the courts construe an easement as appurtenant when no words of inheritance or other words of art are used to create it?
- **HELD**: Yes.
    - D claims that the terms of the reservation indicate that it is an easement in gross and therefore could not pass to P. However, the courts may consider not only the terms of the grant itself but also the nature of the right and the surrounding circumstances. **The use of the lot retained by Stapp depended on the easement.** Therefore, the easement was appurtenant, not in gross, despite the wording of the grant.
    - Other labels: **Express**, **affirmative** (gives holder of benefit a right to use the easement) and by **reservation** (she took a stick out of the bundle and kept it.)

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- **RULE**: Specific words of inheritance or words of art are not necessary to create a valid appurtenant easement, even of unlimited duration.
- **RULE**: When it is not clear whether an easement is appurtenant (attached to a specific lot) or in gross (personal to its holder), ****courts tend to hold that an easement is not in gross if it can be fairly construed to be appurtenant.**
    - Easement **appurtenant**: An easement which benefits a specific parcel of land, regardless of the owner's identity.
    - Easement **in gross**: An easement that benefits the holder without regard to whether the holder owns an adjoining or nearby parcel; it does not belong to any particular parcel of land.

Willard v. First Church of Christ, Scientist, Pacifica: Easement in favor of stranger: Grantor may reserve property interest for 3rd party

- **FACTS:** McGuigan owned lots 19 and 20: she allowed the Church to use lot 20 for parking during services. Lot 19 sold to Peterson. He wanted to resell to Willard. Willard wanted to buy both 19 and 20. Peterson did not own 20 so offered to purchase it from McGuigan. McGuigan said that she would sell the land with an appurtenant easement subject to a fee simple determinable, the **limitation** being that the property for whose benefit the easement is given is used for church purposes. Peterson sold lot 20 to Willard but did not mention the easement for parking. Willard became aware of the easement clause and commenced this action to quiet title.
    - Trial court found that M and P intended to convey an easement to the church, but the clause was invalidated by the **common law rule** that one cannot "reserve" an interest in property to a stranger (3rd party) to the title.
- **ISSUE**: May a landowner reserve an easement in favor of a party who was a stranger to the title?
    - **To decide:** Balance the injustice which would result from refusing to give effect to the grantor's intent against the injustice that might result by failing to give effect to reliance on the old rule.
- **HELD**: Yes.
    - **RULE**: (Majority) At common law, if you transfer the bundle of rights to someone else, you cannot reserve under a 3rd party an interest from the bundle. You can reserve it for yourself, but not for a 3rd party.
    - **RULE**: This California court **rejects** the common law rule and holds that a grantor may reserve an interest in property for a 3rd party.
    - Other labels: **Express**, **reservation** (to church across the street), **affirmative**

LICENSE□EASEMENT

Stoner v. Zucker: Licensor estopped from revoking license: Easement may be created by estoppel

- **FACTS:** Stoner (P) allowed Zucker (D) to enter his land and build an irrigation ditch. P revoked the license the next year after expenditure of some $7,000 in construction. D disregarded the revocation (continued to come on the land) and P brought action for trespass to enjoin D from further use.
- **ISSUE:** May a parol license become irrevocable when the licensee expends large sums of money in expectation of a continuing right?

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- **HELD:** Yes. Affirmed. In the case of irrigation, the license becomes an ***easement***, continuing for such length of time, under the indicated conditions, as the use of itself may continue.
- **RULE:** a license may become an easement when the licensee expends large sums of money with the expectation of a continuing right. The licensor, then, is estopped from revoking the license.

Creation by Implication of Easements

- An implied easement may arise (i) by necessity or (ii) from a preexisting use
  - Easement by necessity: *Finn v. Williams*
  - Easement by prior/existing use: Quasi Easement: *Granite Properties*
    - Requires 3 elements:
      - (1) common ownership, separated by conveyance;
      - (2) **apparent, obvious, continuous, and permanent use** by the common owner of the united parcel prior to the conveyance; and
      - (3) a claimed easement that is necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor.

Finn v. Williams: An easement of necessity is implied when there was once unity of title and the **dominant** estate has no access except over the **servient** estate

- **FACTS:** Williams conveyed 39 acres of his 140 acre land to Thomas Bacon. Years later, Ps acquired title to Bacon's tract. D Zilphia Williams inherited the remaining 100 acres. P owns a landlocked piece of land and does not have access to any roads (they have all been closed). P sought a declaration of easement over D's property.
- **ISSUE:** May an easement by necessity arise and pass appurtenant to the title of the dominant estate after lying dormant?
- **HELD:** Yes. The right of way easement of necessity was necessarily implied in the conveyance severing the two tracts in 1895 and passed by conveyances to Ps in 1937.
- **RULE:** When an owner of land conveys a parcel that has no outlet to a highway except over lands of grantor or strangers, an easement by necessity is implied in the conveyance.

Granite Properties v. Manns: Easement by prior/existing use

- **FACTS**: P owned a large parcel of real estate, one part of which contained a shopping center and another part of which contained apartments. P conveyed the undeveloped front portion of the property to D but continued using a portion of the conveyed property as a **driveway**. There were alternative means of access, but they presented practical and safety problems. The driveway was not described in the deed conveying the front part of the complex. P sued for an injunction against Ds' interfering with P's use of the claimed easements.
- **ISSUE**: To have an easement implied from a prior existing use, must the claimant show strict necessity?
- **HELD**: No.
  - Because of **continuous and apparent previous use**, the test of necessity becomes that of reasonable necessity, meaning reasonably convenient to the use of the land. The more pronounced a continuous and apparent use is, the less the degree of convenience of use necessary to the creation of an easement by implication.

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Because there was a pre-existing use of the roadway, the easement will be recognized.

- Must have 3 elements for an implied easement for reasonable necessity:
  - (1) Common ownership of the claimed dominant and servient parcels and then he made a subsequent conveyance/transfer separating title.
  - (2) Before conveyance/transfer, common owner used part of the land for the benefit of another part. This was **apparent, obvious, continuous, and permanent.**
  - (3) The claimed easement is necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor.

- **RULE**: An easement may be created by implication if there was a prior existing use that was apparent and continuous and if there was a unity of ownership.
- **RULE**: Where circumstances such as an apparent prior use of the land support the inference of the parties' intention, the required extent of the claimed easement's necessity will be ***less than*** when necessity is the only circumstance from which the inference of intention will be drawn. P's prior use satisfies the requirements of the prior use tests, and although not ***strictly*** necessary, the easements are ***reasonably*** necessary to P's enjoyment of the property he retained.

Creation by Prescription of Easements

- To create an easement by prescription, the usual elements of adverse possession must be shown: *open and notorious use, *under a claim of right, *continuous and uninterrupted throughout the requisite period.
  - **Continuous adverse use:** *Beebe v. DeMarco*
  - **Public easements:** *State ex rel. Thornton v. Hay*

Beebe v. DeMarco: Continuous use requirement: What does it mean?

- **FACTS:** P and her husband purchased lot 11. Ds parents owned lot 14 in the subdivision, River Crest Acres. A year later, another subdivision was built south of that subdivision, called Hidden Acres. That development included a 6-foot wide alley running east-west to 5th avenue along the rear of the lots in Ps and Ds block. As a result, P gained access to 5th avenue from rear of their property. Ps drove their boat across the rear of lot 14 nearly every weekend because the alley was not wide enough for their boat. This frequent use created easily visible tire ruts across Ds property adjacent to the alley. When Ds sold their house, they began construction of a fence that blocked Ps path. **P sued, claiming an easement by prescription**.
- **ISSUE**: To obtain a prescriptive easement, must the use be constant to satisfy the continuous use requirement?
- **HELD**: No.
  - Continuous use does not mean constant use it only requires that the alleged easement be used in a manner consistent with the user's needs.
- **RULE**: to establish a prescriptive easement, a claimant must show an open and notorious use of the D's land adverse to the D's rights for a continuous and uninterrupted period.
- ***Easement by prescription*:** An easement that is acquired through use over an extended period of time without contest by a possessor with an enforceable right to bar the use.

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State ex rel. Thornton v. Hay: Beach case

- **FACTS:** Ds, William and Georgianna Hay, own land along the Oregon beach and have ownership of the dry sand area. They want to build a fence to keep his land private, but the public has been using the beachfront property for a long time. The **trial court** found that the public had acquired an easement for recreational purposes to go upon and enjoy the dry sand area, and this easement was appurtenant to the wet-sand portion of the beach which is admittedly owned by the state
- **ISSUE:** Whether the State has the power to prevent the D landowners from enclosing the dry-sand area contained within the legal description of their ocean-front property? **YES**
- **HELD:** Held for State.
    - The disputed area is *sui generis* - foreshore is owned by State, and upland owned by D, neither can be said to own the full bundle of rights in fee simple absolute
    - The public ***can*** hold an easement by prescription. However, an easement by prescription applies only to the specific tract of land before the court. Use of this doctrine would inundate the courts with litigation on a tract-by-tract basis.
    - Therefore, the better basis is the English Doctrine of Custom. A custom is defined as a usage that, by common consent and uniform practice, has become the law of the area.
        - In order for the Law of Custom to be applied:
            - The custom must be ancient
            - The use must be exercised without interruption
            - The customary use must be peaceable and free from dispute
            - The use must be reasonable
            - Certainty must be satisfied by the visible boundaries and limits of use
            - The custom must be obligatory and
            - A custom must not be repugnant with other customs or other laws

Scope and Transferability of Easements

- **Scope**
    - **Permissible use by easement holder:** The scope of use permitted depends on the type of easement (i.e., express, implied, or prescriptive). The normal remedy for an excessive or improper use of the easement is an injunction (and perhaps damages if these can be shown). Only in rare cases will excessive or improper use of an easement result in extinguishment of the easement.
        - **(1) Express easements**
            - **(a) Interpretation of conveyance**: If language is **indefinite/general** (for right-of-way purposes) the following principles of construction will apply:
                - 1) Ambiguities are resolved in favor of the grantee, except perhaps where the conveyance was gratuitous;
                - 2) If, prior to the conveyance, there was any quasi-easement, its actual scope is relevant.
                - 3) If, subsequent to the conveyance, the easement grantee has made actual use with the acquiescence and consent of

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the grantor, the scope of such actual use is also relevant; and
- 4) The scope of use should be such as is reasonably required to serve the purposes of the grant.

- **(b) Subdivision of the dominant estate: GENERAL RULE:** if the dominant estate is subdivided, each transferee acquires a right to use easements appurtenant to the dominant estate, provided this does not increase the burden on the servient estate beyond that contemplated when the easement was created.

- **(2) Easement by implication:** In the case of easements by necessity, the extent of the necessity determines the scope.
  - With other implied easements, the quasi-easement use is the starting point, with variations permitted to the extent they are necessary for reasonably foreseeable changes in the use of the dominant parcel.
  - If it is reasonably foreseeable that a parcel will be subdivided for residences, an implied easement of right-of-way may be enlarged beyond the scope of its actual use as a quasi-easement prior to severance.
- **(3) Prescriptive easements:** when an easement has been created by prescription, courts are hesitant to enlarge the scope of use. *Easement by adverse use.*

- Interference by servient owner: The servient owner has the right to make use of her land so long as it does not unreasonably interfere with the rights of the owner of the easement. *For example, the servient owner may erect a structure projected over an easement-of-way, provided it does not interfere with the reasonable use of the easement.*

- **Transferability**
  - Easement appurtenant**:** transferred with the dominant estate and **CANNOT** be changed into an easement in gross.
  - Easement in gross: may be personal, so that it expires when its owner dies, or commercial, so that it may be transferred.
- **No expansion of original use:** *S.S. Kresge v. Winkelman Realty*
- **Rule of reason cannot compel change:** *Sakansky v. Wein*

□Does the **burden** attach to the land? □ SERVIANT ESTATE
□Does the **benefit** attach to the land? □ DOMINANT ESTATE
- Person who **keeps the promise** is **burdened**, person who **enforces it** is **benefitted**

Kresge: Holder of the DOMINANT ESTATE (easement over alleyway) attempting to **exceed** the scope of the SERVIENT ESTATE (alleyway)
Sakansky: Holder of the SERVIANT ESTATE (parcel of land) attempting to **limit** the scope of the DOMINANT ESTATE (D's easement)

S.S. Kresge v. Winkelman Realty: Expanding scope of easement by prescription: You can't: Easement may be used ONLY for estate to which it is appurtenant

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- **FACTS**: D's predecessors in title established an easement by prescription over an alleyway for which P held title. D then proceeded to use the easement **for more than** just deliveries although the easement had only ever been used for deliveries. He also used it to access other properties. P is upset and claims D expanded the scope.
- **ISSUE**: May the owner of a prescriptive easement expand its use beyond the original use?
- **HELD**: No.
- **RULE**: When D modified the use of the dominant estate and joined such use with adjacent parcels of land, this was an added burden on the servient estate and an impermissible use.
    - **o** An easement may only be used in connection with the estate to which it is appurtenant.

USE RIGHTS ARE NOT POSSESSORY (DO NOT GO TO THE HEAVENS)

Sakansky v. Wein: Once its location is specified in a deed, an easement may not be relocated

- **FACTS**: P owned a parcel of land and also owned an easement 18ft wide over land owned by D. D wished to develop the land and proposed to build a building over P's easement, leaving a passage 8 feet high as well as a new way over level ground around the west of the building. P sued for an injunction. Trial court said that the Ds could build their building because it was reasonable.
- **ISSUE**: May the rule of reason be used to require an easement holder to accept an alternate route and partial destruction of the original easement?
- **HELD**: No.
- **RULE**: If the location of an easement is specified in a deed, the easement may not be relocated, even if the relocation is reasonable.

Termination of Easements

- Easements can be terminated by several events:
    - o **(1)** upon the happening of a condition or change of conditions requiring easement by necessity,
    - o **(2)** by the holder of the benefit/benefited land, returning his right back to the grantor (unity of title),
    - o **(3)** by setting a time limit to the easement,
    - o **(4)** eminent domain.
    - o **(5)** by estoppel
    - o **(6)** by prescription
    - **o** **(7)** by nonuse or abandonment

Lindsey v. Clark: Termination requires **INTENTION**, not just non-use

- **FACTS:** Suit brought forth by the Lindseys to stop the Clarks from using a driveway along the north side of the Lindsey lots. Clarks owned 4 adjoining lots □Sixes, built a house, Clark deed to Sixes said "**there is reserved…a right-of-way 10 feet along the South side of the two lots conveyed for the benefit of the rear property**" Sixes □ McGhees □ Lindseys. The 10 feet right-of-way was reserved to the Clark along the **South Side** of the property conveyed to Sixes, now owned by Lindseys. Clark, however, proceeded to use it along the **North side**, without objection by Sixes. Lindseys argue that

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Clarks have no right of way along the North side and the one reserved on the South side has been abandoned

- **ISSUE:** Does nonuse itself extinguish an easement? **NO**
- **ANALYSIS:**
  - Abandonment is a question of intention. A mere non-user of an easement created by deed, for a period however long, will not amount to abandonment. There must be acts or circumstances clearly manifesting an intention to abandon.
  - Clark did not have an intention to abandon his right of way: he was mistaken as to where it was located, but everyone was mistaken: he could not have intended to abandon when he did not know where his easement actually was. Lindseys knew Clark was using the North side and **negligently failed** to have their title examined and are chargeable with the information
- **HELD:** Therefore Clarks will keep their right of way on the North Side.
- **RULE:** Mere non-use is not enough to constitute an abandonment. Abandonment is a question of intention, there has to be an act or circumstances clearly showing an intention to abandon the right or an express release of the right.
- *Note:* Abandonment can be by:
  - **Estoppel:** An easement may be extinguished by conduct of its owner that is relied on by the servient owner to her detriment. The conduct can be a statement to the effect that the owner of the easement does not intend to use it.
  - **Prescription:** Use by the servient owner of her land in a manner adverse to the interest of the easement owner (e.g., permanently fencing off the driveway) will **extinguish** the easement or limit its scope. The requisite elements of adverse use are the same as in the creation of an easement by prescription.

Real Covenants and Equitable Servitudes

- **Covenant**: A promise to do or refrain from doing a certain thing with the land that runs with the land and can be enforced at law.
- **Real Covenant:** A covenant that runs with the land and can be enforced at law against assignees upon property principles.
- **Distinguished from other interests**.
  - **Condition:** Land use may be controlled by a condition as well as a covenant. A condition is a provision in a conveyance that **limits** the estate conveyed to a fee simple determinable or a fee simple subject to a condition subsequent.
  - **Significance of distinction:** The remedy for breach of a covenant is damages. The remedy for breach of a condition is forfeiture of the estate: automatic forfeiture in case of a fee simple determinable, optional forfeiture in case of a fee simple subject to condition subsequent.
    - **Policy regarding interpretation:** COURTS PREFER COVENANTS IF AMBIGUOUS DEED.
  - **Easement:** A covenant is a promise respecting the use of land; an easement is a grant of an interest in land. However, under some circumstances, an interest may be treated as either a covenant or easement; it fits both categories. For example, a promise not to do something on land could possibly be characterized as a negative easement. On the other hand, a promise ***to do*** something is hard to characterize as an easement and is almost always a covenant.

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        - **Negative easement** and **negative covenant** are the same: restrict use of property
- **"Benefit" & "Burden**
    - Does the **burden** attach to the land? → SERVIANT ESTATE
    - Does the **benefit** attach to the land? → DOMINANT ESTATE
        - Person who **keeps the promise** is **burdened**; person who **enforces it** is **benefitted.**
    - If the easement does not benefit land, the benefit of the easement is said to be **in gross**.
        - The benefit side of a covenant may be in gross (i.e., not touch and concern land). Similarly, the burden side may be in gross. ***If both sides are in gross, the covenant does not affect land and the law of contracts would apply***.
- **Positive vs. negative:** Two types of covenants:
    - Positive: A promise to do something
    - Negative: A promise not to do something
- A real covenant **MUST BE IN WRITING SIGNED BY PROMISOR**
    - **Grantee bound without signing:** Most deeds are signed by the grantor. By accepting a deed signed by the grantor, the grantee becomes bound by the covenants in the deed to be performed by the grantee.

→Can those who succeed to the interests of those parties also run with the land?

Vertical Privity: Party enforcing the benefit has to be in the chain of title. (*Mitchell*) When Mrs. Stapp dies her title goes down to her daughter. This means vertical privity exists.

- **THE ONLY PRIVITY NEEDED FOR AN COVENANT TO RUN WITH LAND IS VERTICAL**

Horizontal privity: YOU DO NOT NEED THIS FOR COVENANT. A conveys ½ land to B, including an easement that B could use as an easement over A's land. That division of the land creates horizontal privity.

- **Enforceability by Third Parties:** When a successor in interest by either the burdened side of the covenant or the benefited side of the covenant sues, that person must prove that the burden and/or benefit run with the land.: SEE *Gallagher v. Bell:* Analysis very helpful.
    - **Keep burden and benefit separate.**
        - Example: O, the owner of Blackacre and Whiteacre, sells Whiteacre to A, and A promises for herself, her heirs and assigns, that the property will only be used for a single-family dwelling; the benefit is expressly stated to be for O, her heirs and assigns, as they are the owners of Blackacre, the adjoining parcel. Whiteacre is burdened; Blackacre is benefited. Subsequently:
            - A sells Whiteacre to B, who erects an apartment house. O sues B for damages. O must prove that the burden runs to B.
            - O sells Blackacre to C. A erects an apartment house. C sues A for damages. C must prove that the benefit runs to C.

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- O sells Blackacre to C. A sells Whiteacre to B, who erects an apartment house. C sues B for damages. C must prove that both the burden and the benefit run.

- **Requirements for covenants to run at law:**
  - **Burden:** For the burden of a covenant to run to assignees at law, the following requirements must be met:
    - **(1) Intent:** subjective test: intent of the original covenanting parties
    - **(2) Vertical Privity:** Person must have received the entire estate of interest in property. Current person claims that the original covenant should be applied to them.
    - **(3) Touches and Concerns the land:** objective test: does the covenant enhance the use or value of the land? The covenant must touch and concern land of the covenantor.
    - **(4) Notice:** The assignee of the covenantor must have notice of the covenant in order to be bound. If she has no notice and is a subsequent bona fide purchaser for a valuable consideration, the covenant is not enforceable against her. A covenant is treated like any other recordable interest in this respect.
  - **Benefit**: For the benefit of the covenant to run to assignees at law, the following requirements must be met:
    - **(1) Intent:** Original parties must have intended that successors in interest to the covenantee be entitled to enforce the covenant. Subjective test.
    - **(2) Vertical Privity:** Privity of estate between the original covenantee and the person now seeking to enforce the covenant and also between the original covenantor and the person being sued.
    - **(3) Touch and concern:** the covenant must touch and concern land of the covenantee.

Traditional Elements of Real Covenants

Indemnify: Secure (someone) against legal liability for their actions

Gallagher v. Bell: **Covenant in Law because P seeking $$$**

- **FACTS:** Sisters of Mercy of the Union owned a large parcel of land. They gave some of it to the Franciscans, and then sold the remainder, save only the 1/2 acre parcel on which the tenant house was on, to the Bells. Gallaghers purchased the 1/2 acre parcel and tenant house. Bells granted to Gallaghers a temporary right of way over a private road over their property. As consideration, the purchase contract provided that the subsequent purchaser of the small lot would **share the cost** of installing utilities and finishing the street. Gallaghers sold their property to Deborah Camalier and **indemnified** them from the contract with Ps Camalier refused payment when Bells began the roads, relying on the indemnity agreement. Bells made demand on Gallaghers, who rejected saying that the covenant ran with the land and their liability terminated when the conveyed the property to Camalier.
  - **Benefit is on Bells, burden is on the land Gallaghers kept**

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- **ISSUE:** If a covenant runs with the land, does the liability of the covenantor terminate when the covenanter conveys the burdened land?
- **ANALYSIS:**
    - Covenants can either be:
        - (1) Personal in nature
        - (2) Running with the land
    - The elements required for covenants to run with the land are:
        - 1. **The covenant "touch and concern" the land" Yes**
            - **A covenant touches and concerns the land if either** the covenantor's legal interest in the land is rendered less valuable by the covenant's performance, **OR** the covenantee's legal interest in the land is rendered more valuable by the covenant's performance.
            - This case involves the running of a burden because Ps are the original covenantee.
            - It is clear that Ps' interest would be more valuable if the covenant were performed; at the same time, the covenant immediately and continually rendered Ds' property interest less valuable. Covenants such as this to pay money have been found to run with the land.
            - Therefore, the covenant **DOES** touch and concern the land formerly owned by Ds.
        - 2. **The original covenanting parties intend the covenant to run Yes**
            - On the facts of this case, there can be no reasonable inference that the parties intended anything but a covenant running with the land.
            - The 3rd party recognized it as such when she negotiated an indemnity from Ds; Ps themselves recognized it as such when they first sought payment from the 3rd party. In addition, Ps included the requirement in the K with the Sisters, demonstrating their intent to bind the owner of the lot, whoever it was, and the covenant itself extends to the assigns of Ds.
        - 3. **There be some form of privity of estate Yes**
            - There are 3 types of privity possible:
                - (i) mutual privity, whereby the original parties have had a mutual interest in the same land;
                - (ii) horizontal privity, whereby the covenant was made as part of a conveyance of an estate in fee from one of the parties to the other; and
                - (iii) vertical privity, which requires only that the person presently claiming the benefit be a successor to the estate of the original person so benefited.
            - ***The modern approach requires only vertical privity, which was satisfied in this case.***
- **HELD:** Yes, the liability of the covenantor terminated because the covenant ran with the land. The third party would thus be liable for the costs of the road and utilities however they could ***later sue or implead*** the Ds for damages on account of the indemnification agreement.

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- **RULE**: A covenant runs with the land if four elements are met: (i) the covenant affects the value or use of the land (touches and concerns); (ii) the original parties intended the covenant to run; (iii) there is privity of estate; and (iv) the covenant is written.
- **RULE**: If the covenant runs with the land, the covenantor's liability ends at the time the burdened land is conveyed.

Neponsit Property Owners' Association v. Emigrant Industrial Bank: Covenant to pay property owners' association to maintain common areas runs with land: **Covenant in Law because P seeking $$$**

- **FACTS**: Ps, a homeowners' association, conveyed lots in a subdivision with a covenant establishing a yearly maintenance fee to be paid. The deed expressed the intent that the covenant was to run with the land. D, a subsequent purchaser, claims the covenant is not binding on him.
- **ISSUE**: Are subsequent purchasers bound by an affirmative covenant to pay money for use in connection with, but not upon, the land that is subject to the burden of the covenant?
- **HELD**: Yes.
    - A covenant will run with the land if: (i) the parties intend the covenant to run with the land; (ii) the covenant touches and concerns the land *[in old common law, this would not have been found, but now they look at what the money is being used for, which in this case is for the benefit of the land, so it meets it];* and (iii) there is privity of estate (vertical) between the party claiming the benefit and the party burdened with the covenant.
- **RULE**: A property owners' association has privity of estate with a property owner for the purpose of a covenant running with the land: Court says there is privity of estate because the association is the "alter ego" of the other lot owners

Equitable Servitudes

- Equitable servitude**:** a covenant that equity will enforce, even though the covenant is not enforceable at law. The basic theory is that if the purchaser of a burdened lot has notice of the covenant, equity will enforce it even if it would not run at law.
    - A negative covenant that restricts the use of a neighbor's property is usually enforced in EQUITY through **INJUNCTIVE RELIEF**. When we are enforcing it in equity, it is called an equitable servitude.
    - **Remedies:** If the P wants damages, she can get a legal remedy on a real covenant; if the P wants an injunction, she appeals to equity on an equitable servitude.
    - **Creation:** Since an equitable servitude is an interest in land, most courts require a written instrument to create it. In many states, restrictive servitudes may be implied on all lots in a subdivision if there is a scheme of restrictions shown by written instruments on a majority of the lots. Where implied, the restrictive servitude is similar to a reciprocal negative easement.
    - **Enforcement by third parties:** An equitable servitude can be enforced by 3rd parties if *the parties so intend, *if the servitude touches and concerns land, and *if the assignee is not a bona fide purchaser without notice.
        - **3 TYPES OF NOTICE: NEED AT LEAST 1**

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- Constructive Notice: Notice from chain of title of owner (your own chain of title)
- Actual Notice: Developer/seller told you
- Inquiry Notice: Your responsibility to act as a reasonably prudent person (*Sanborn v. Mclean*)

Requirements for equitable servitude:
(1) Intended to run; (2) Touch and concern adjoining parcels of land; (3) Anyone buying from first purchaser must be in vertical privity (privity of estate) (4) Must give notice

- **The English rule on the effect of notice:** *Tulk v. Moxhay*
- **Servitude with benefit in gross:** *London County Council v. Allen*
- **Writing needed to create equitable servitude:** *Sprague v. Kimball*
- **Implied reciprocal negative easement:** *Sanborn v. McLean*
- **Enforceability by prior purchasers**
- **Enforcement of subsequent restriction:** *Snow v. Van Dam*

Tulk v. Moxhay: England court of chancery holds that it would be inequitable for a covenant that is enforceable against a seller of land to be unenforceable against a person who purchases the land with notice of the covenant

- **FACTS**: P sold land with the **covenant** that a certain portion of it was to remain without buildings and to be used as a garden for use of tenants. D received the land and now threatens to build on the land. D **had notice** of the restrictive covenant even though his deed did not speak of it. P brought an action to enjoin D.
- **ISSUE**: May D, not being in privity of estate with P, disregard a previous covenant restricting use of land even though he had notice of said covenant?
- **HELD**: No.
- **RULE**: Generally, a covenant that does not run with the land will not be enforced against a subsequent vendee. However, where a vendee purchases property with notice of a covenant restricting use, it may be enforced against him.

London County Council v. Allen: To enforce covenant against subsequent covenanters, covenantee must own property that covenant benefits

- **FACTS**: Landowner makes covenant with local government promising he will not build on land without prior consent from council and that if he conveys land it will contain the covenant. Land is subsequently conveyed to Allen (D) who built over a portion marked as a roadway and claimed no notice as to the restrictive covenant.
- **ISSUE**: May a covenant running with the land restrict use of the land and be enforceable by a party who does not own land benefitted by the covenant but who enjoys only a personal benefit?
- **HELD**: No.
    - It **IS** intended to run, but it **does NOT** touch and concern, and therefore does not run with the land.
- **RULE**: A restrictive covenant does not run with the land if the covenantee does not own any land which the covenant may benefit.

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Sprague v. Kimball: Writing needed to create equitable servitude

- **FACTS**: D sold P and others several lots within a plan. The deeds for the lots contained a clause which restricted the building line and required P to use the land for residential purposes only. D later sold a lot to another purchaser without **ANY** restrictions. The deed to P did not state that other lots in the plan would be similarly restricted. P sued D and the other purchaser to stop them from using the land for commercial purposes.
- **ISSUE**: May restrictive covenants be enforced against a grantee by prior grantees on grounds that the grantor orally promised the prior grantees that he would impose the covenants upon all subsequent grantees?
- **HELD**: No.
- **RULE**: An equitable servitude is not enforceable against buyers who had no written notice of it.
    - Even though there are restrictions in previous lots sold, no contract or writing is in evidence that purports to place restrictions on future sales; therefore, no restrictions may be enforced.
- **Land Development/Subdivisions**
    - When there is a plan/scheme and a common set of deed restrictions, then when the first lot is sold, the burden and benefits transfer to all of the lots in the subdivision.
        - Must be a master deed now.
    - The scheme for sub property is called a "reciprocal negative easement" (now called equitable servitude)
    - **For the scheme to be binding:**
        - The scheme must be substantially carried out and must be uniformly enforced once it is carried out.
        - No substantial change in circumstance regarding land use within the planned area.
        - The restriction cannot violate public policy (Ex: Shelley v. Kramer)
        - Cannot have a clause for the developer to reserve the right to modify.
    - *Must be in writing to satisfy Statute of Frauds*.

Sanborn v. McLean: Implied reciprocal negative easement

- **FACTS**: Developer has a scheme and most original deeds conveyed scheme restrictions. Ds conveyance **did not contain a restriction in his chain of title** and D was planning on putting a gas station on the property. Neighbors protested.
- **ISSUE**: Will lots conveyed by a common grantor to some grantees with restrictions and to some without be impressed with restrictions against all lots?
- **HELD**: Yes.
    - D was put on inquiry notice since all lots were uniform in use, although there were no restrictions in D's chain of title. We are not saying D should have asked his neighbors about restrictions, but he could view the neighborhood, which clearly indicated that residences were built according to a strict general plan. D should have examined the other deeds granted by the same developer to see if any basis for an implied covenant existed.

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- **RULE**: An equitable servitude can be implied on a lot, even when the servitude is not created by a written instrument, if there is a scheme for development of fa residential subdivision and the purchaser of the lot has notice of it.
    - **4 TYPES OF NOTICE: NEED AT LEAST 1**
        - Constructive Notice: Notice from chain of title of owner (your own chain of title)
        - Actual Notice: Developer/seller told you
        - Inquiry Notice: Your responsibility to act as a reasonably prudent person
        - Imputed notice: It is imputed (assigned by inference) you know what is transpiring on the property

Snow v. Van Dam: Lots in the same scheme are subject to the same negative easement

- **FACTS**: Lot owners in a subdivision sued another lot owner for violating a restriction in their deeds against building commercial buildings.
- **ISSUE**: May a restriction be enforced against D's lot where, although at the time Ps' lots were created there was no restriction on D's lot, a restriction was created in the subsequent deed to D?
- **HELD**: Yes. The scheme from the beginning contemplated that no part of the tract should be used for commercial purposes. When the lot of the D was restricted, the restriction was in pursuance of the original scheme and gave rights to earlier as well as to later purchasers.
- **RULE**: If lots are part of a common scheme, restrictions in some deeds are enforceable against owners of other lots as well.

POLICY LIMITATIONS ON SERVITUDES

McMillan v. Iserman: Equitable estoppel prohibits enforcement of restrictive covenant created after purchase of property.

- **FACTS:** Ds purchased a lot subject to a restrictive covenant providing that ¾ of the property owners in the subdivision could amend the restrictions at any time. Ds bound themselves by contract to use the land for a state-licensed facility for the mentally ill. Later, the other property owners amended the deed restrictions to limit use of subdivision lots to private residential purposes and specifically exclude state-licensed facilities. Some owners then sue Ds for violating the deed restriction.
- **ISSUE**: May **amended deed restrictions** that are more restrictive than those contained in the original deed restrictions be applied **retroactively**?
- **HELD**: No.
- **RULE**: A restrictive covenant may not be imposed against persons who acquired property in reliance on the nonexistence of the covenant and who would suffer prejudice if the covenant were enforced.
    - A deed restriction may be unenforceable if it is contrary to public policy. This case was prior to the adoption of the amendment to the Fair Housing Act that protects handicapped persons. It would have failed under this amendment today.

Construction, Administration, and Termination

- **Termination of covenants and servitudes**

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- Merger: If the title to the land that is **benefited** and the title to the land that is **burdened** come into the hands of one person, real covenants and equitable servitudes merge into **the fee simple** and cease to exist.
- Equitable defenses**:** Abandonment by the owner of the right to enforce, acquiescence in prior violations of the restrictions, estoppel, relative hardship, change in conditions in the neighborhood.
- Change in adjacent area**:** *Cowling v. Colligan*

Joslin v. Pine River Development Corp.: Court looks beyond language in deed restriction to determine parties' intent and surrounding circumstances

- **FACTS**: Ps owned lakefront property with deed restrictions describing the type of cottages that may be built on their land. D sought to use his one lakefront lot as a common beach area for residents of the 161 non-shore lots from the subdivision. Ps object. D argues that in the absence of a specific restriction against using the lot as a common recreational area, Ps should not be allowed to restrict D's use of the land.
- **ISSUE**: May a court construe a restriction on the types of building permitted as a restriction on land use?
- **HELD**: Yes.
- **RULE**:Traditionally, restrictive covenants were strictly construed to permit the free use of land. However, now restrictions in a deed are not strictly construed. One must look at the parties' intent and the surrounding circumstances to interpret the restrictions more broadly.
  - Here it is obvious that the building restriction was intended to restrict land use to uses consistent with the building restriction.
- Intent is the key, and how the other properties are used is a manifestation of that intent; look at the location, character of the land, purpose of the limitation, whether it was imposed for the benefit of the grantor or for the grantee, etc.

Rhue v. Cheyenne Homes: Covenant requiring building plan approval is enforceable

- **FACTS**: D wanted to move a 30yr old Spanish style house into a new subdivision where all the homes were modern and where one of the recorded restrictive covenants placed on the area was that the plans of all homes in the subdivision were to be approved by the Architectural Control Committee**. D argued that the restrictive covenant was invalid since it did not describe the standards to be used in reviewing the plans.**
- **ISSUE**: Is a restrictive covenant valid even though it gives no specific standards for reviewing proposed architectural plans?
- **HELD**: Yes.
  - The "approval" requirement was enforceable. If the committee doesn't have any standards set forth in the scheme, then the committee must act in good faith and not be arbitrary/ capricious.
  - The clearer the standards, the more likely they will be upheld. Requirements must be reasonable.
- **RULE**: A restrictive covenant that requires building plans to be approved by a homeowner's association is enforceable, but the association must act reasonably and in good faith.

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Cowling v. Colligan: Changed conditions will terminate restrictive covenant only if entire subdivision is affected

- **FACTS**: D tried to use his land for commercial purposes even though the subdivision had a restriction that the sub was for residence only. The area nearby D's tract and surrounding the subdivision had been altered to commercial and industrial use and a church was built on these lands. D argued that the church in the area changed the conditions.
- **ISSUE**: May a change in the use of land surrounding a subdivision with use restrictions make enforcement of restrictive covenants inequitable when imposed on the border areas?
- **HELD**: No.
    - **RULE**: Most courts require that the changed circumstances affect the entire subdivision so that the interior lots, as well as the border lots, can no longer be protected. Thus, the restrictions are either enforceable against all of the lots or none of them.
- When a landowner wants to use his land for a particular purpose, he needs to be concerned with 3 bodies of law to see if there's any obstacle to accomplishing these plans:
    - 1. Consensual arrangements that current owner or prior one has entered into: easements, servitudes, etc.
    - 2. The general principles of law that govern rights and relationships of neighbors.
        - Sometimes statutorily created with regard to right of enjoyment and use of the land.
            - Ex: nuisance law
    - 3. Government regulation of private land use
        - Primarily zoning
        - Doesn't involve consensual relationship at all, or a statute. It's the government deciding, based on its police power, which land serves the public interest best.

REVIEW

- **Does it run?**
    - Must be intended to run
    - Must touch and concern neighboring parcels of land
    - Don't need horizontal privity anymore
        - HAS to have VERTICAL privity on the burdened side (the person taking the burdened property, is taking it from the predecessor)
            - The only way you wouldn't get it from a predecessor in interest is by adverse possession. So pretty much always vertical privity.
                - If it was adverse possession you are not bound.
    - Have to have notice of the burden at the time they got the property
- Reciprocal negative easement: means all landowners have the right to enforce the promise against each other in the subdivision

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Nuisance

- **Nuisance Doctrines**
  - **o** A nuisance is an invasion of a person's interest in the use and enjoyment of land. The common law notion was that one must use her property so as not to injure that of another. A nuisance is not a trespass, which is a tangible invasion of property. **Instead it is only an interference, such as noise, smells, dust, etc.**
  - o Private nuisance: conduct that causes a substantial interference and is either intentional and unreasonable or unintentional but negligent.
  - o Public nuisance: affects a number of individuals and injure the public health, safety, etc. It may be a crime punishable by criminal sanctions.

Rose v. Chaikin: Windmill

- **FACTS**: Chaikin (D) built a windmill on property to save energy and the machine made more or less constant noise at a decibel level past the relevant city ordinance. It affected P's use and enjoyment of his land so he sues to enjoin D's operation of the windmill. D counterclaims to enjoin the operation of P's heat pump which also produced noise past the decibel limit although infrequently.
- **ISSUE**: Is a continuous, loud, obtrusive noise produced by a private machine on private property a nuisance such that a court may enjoin operation of the source of the noise?
- **HELD**: Yes.
  - o Courts must apply a **balancing test** to determine what constitutes a private nuisance.
    - The essence of a private nuisance is an unreasonable interference with the use and enjoyment of land. Basically, the utility and reasonableness of the D's conduct is weighed against the quantum of harm to the P Does the annoyance or disturbance arise from an unreasonable use of the neighbor's land?
- Noise may be an actionable private nuisance.
  - o Relevant factors include the character, volume, frequency, duration, time and locality of the annoyance. The noise produced by D's windmill is highly disruptive in all these ways. Although the windmill has some social utility because it conserves energy, this utility does not outweigh the unreasonableness of the noise, or the serious health harm suffered by P.
- D complains of only minor inconvenience from P's heat pump. The pump is rarely on and then only for short periods. It is not a nuisance.

Prah v. Maretti: Access to solar energy

- **FACTS**: P has solar energy system and D builds house in a fashion that blocks the sunlight to P's system. There were no zone restrictions or deed restrictions.
- **ISSUE**: May blocking a neighbor's access to solar energy constitute a private nuisance?
- **HELD**: Yes.
  - o The P has stated a claim under which relief could be granted. Private nuisance law (**the reasonable use doctrine**) is applicable here if the D's use of his land interfered with the neighbors use and enjoyment of his land.

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- **3 ways to keep access to light:**
  - Zoning
  - Agreement between the parties
  - Private nuisance

Public Land Use Controls

Land Use Planning: Eminent Domain and Regulatory Takings

- The 5th Amendment provides in part that private property may not be "taken" for "public use" without just compensation. This clause is a restriction on both the federal and state power of eminent domain. Property rights may include tangible and intangible interests. The two most trouble-some constitutional issues here are the meanings of the terms "taking" and "public use."
  - Public Use: Condemnation of private property for a private use or purpose is forbidden; the power of eminent domain only extends to condemnation for a public use or purpose. However, the meaning of the term "public use" depends on what the legislature declares to be the public interest. For the most part, the courts defer to legislative declarations of purpose.
  - Taking: If the government uses its eminent domain powers and takes land, it must pay for the land.
    - Two types of governmental taking:
      - Physical taking: the government uses its authority to compel the transfer of a property interest from the private owner to the government. **Actually takes a stick out of the bundle**.
        - A physical taking is a taking per se. If a taking per se, then apply the *Penn Central* test.
        - Can take just 1 stick (air right to fly planes over) or the whole bundle of rights (eminent domain).
      - Regulatory Taking: Regulating land so it can no longer be put to a reasonable private use because of the regulation (no interest is transferred to the government).
        - You are entitled to just compensation for these or can try to have the court nullify this restriction.
        - Criteria for regulatory takings: **BALANCING INTEREST**, see case below.

Penn Central Transportation v. City of New York: Balancing Interests

- **FACTS:** NY adopted a Landmarks Preservation Law to protect historic landmarks and neighborhoods from decisions to destroy or fundamentally alter their character. Grand Central Station in NY was designated as a "landmark." Penn Central Transportation Co., who owns the Terminal, opposed this decision. Penn Central entered into an agreement with United General Properties to construct a multistory office building above the Terminal. The Commission denied this application. Penn filed suit claiming that the application of the Landmark Preservations Law had deprived them of their property without due process of law: "taken"
- **ISSUE:** Whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual

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historic landmarks without effecting a "taking" requiring "just compensation"? **YES THEY CAN**

- **ANALYSIS**
  - The question here revolves around two basic considerations: **(i)** the nature and extent of the impact on P, and **(ii)** the character of the governmental action
  - Has a "taking" occurred?
    - (i) Penn urge that the Landmarks Law has deprived them of any use of their "air rights" above the terminal - **No**
    - (ii) Penn argues that this effects a "taking" because the NY Law has diminished the value of the Terminal site - **No**
      - Landmark Laws are not discriminatory or "reverse spot" zoning (land use decision which arbitrarily singles out a particular parcel for different, less favorable treatment then the neighboring ones)
      - NY Law is to **PRESERVE**
    - (iii) Penn argues that the Landmarks Law is incapable of producing fair and equitable distribution of benefits and burdens of governmental action which is characteristic of zoning laws - **No** - Legislation designed to promote the general welfare (like this one) commonly burdens some more than others - that does not mean it is a "taking"
    - (iv) Penn argues that the law has appropriated part of their property for some strictly governmental purpose - **No**
  - The rejection of these arguments establishes that the NY Law is not rendered invalid by its failure to provide "just compensation" whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws.
- **RULE:** A law which does not interfere with an owner's primary expectation concerning the use of the property and allows the owners to receive a reasonable return on his or her investment, does not effect a taking which demands just compensation.
  - NOTE: The concept of "reasonable return on investment" can be problematic. The reasonableness of the return on the owner's investment must be based on the value of the property. However, the value of the property is inescapably dependent on the amount of return that is permitted or available.

Real Estate Contracts

- Real estate transactions are divided into 3 stages:
  - **Stage 1: Negotiation:** No legal relationship at this time
    - Starts with negotiations and ends with signing of binding bi-lateral agreement
    - Seller gets ready to perform (i.e., makes sure title is marketable)
    - **PROBLEMS**: have the parties reached a bargain AND has it been formalized in such a way to satisfy the statute of frauds?
    - The time you need a lawyer the most is during negotiation and signing of K, not as much at closing.
  - **Stage 2: Gap Period**
    - Begins with K date and ends with closing date/beginning performance
    - The buyer is getting ready to perform (i.e., borrowing money)

- Buyer has obligation to investigate title and raise any objection prior to closing, generally have to go back 4 years.
    - If the buyer discovers a defect in title, buyer needs to raise it with seller prior to closing.
    - If buyer doesn't raise objection and the seller is acting in good faith, the covenants in the K are extinguished
        - If the deed is not marketable, the buyer is out of luck and has to rely on the deed for any remedy (i.e., it was a warranty deed). Can avoid this by hiring a title insurance company to review history of deed before closing: they insure risk of a title that is not free and clear of all encumbrances
    - Seller has a duty to assist buyer in inspecting the chain of title (**promise to provide title assurance policy**)
- Three Types of Financing:
    - **1st party financing**: liquidated assets of the buyer: buyer delivers cash to seller, seller gives the deed.
    - **2nd party financing** (2 ways)
        - (1) Buyer asks seller to assist in financing:seller gives the money
            - Seller delivers legal title to buyer at closing and seller holds on to a **mortgage** and **equitable lien** on the property
            - Contract is executed
            - Seller takes down payment from the buyer and seller gives mortgage and deed.
            - Seller and buyer have two relations, one under deed (grantor/grantee) and one under mortgage (mortgagor/mortgagee)
        - (Minority view, MI view) Installment Land Contract
            - Parties enter into an installment agreement to buy the property
            - Buyer has equitable title and seller has legal title
            - Land contract is executory until last payment is made
            - Seller does not have to have marketable title until the LAST payment date
            - PROBLEM: Court house door is closed to the breaching party
                - Miss one payment: strict foreclosure
                - To avoid, most states don't recognize land contracts and just put them with normal sale contracts
                - MI avoids strict foreclosure by allowing a statutory 15-day cure period. If not cured by then, strict foreclosure is allowed.

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- **3rd party financing**
  - Buyer gets a loan from the bank
  - Buyer delivers the note/mortgage to the bank
- **Stage 3: Post Closing**
  - At closing, the covenants are mutually dependent
  - If neither party tenders performance, neither party can be in breach
    - To be in breach, one party has to tender performance (or shows they are ready to tender) and the other does not
  - EXCEPTION TO MUTUALLY DEPENDENT: If the seller's title can never be marketable, then buyer does not have to perform.

The Oral Contract and the Statute of Frauds

- Statute of Frauds: The K has to be in writing: must identify seller, buyer, subject matter and consideration *signed by the party to be charged.*
  - Can get around the writing requirement if there is part performance:
    - Part performance takes place when the acts done by the parties make sense only as having been done pursuant to a K.
    - If the buyer (i) has paid all or part of the purchase price (ii) has entered into possession, and (iii) has made improvements, the K is enforceable, because we assume the buyer would not have done these acts without a K.
      - **Possession and partial payment by buyer:** Michigan case *Pearson v. Gardner*: the parties entered into an oral contract to purchase a home, for which the seller gave the buyer a rudimentary receipt that did not comply with the SOF. The buyer took possession, made a partial payment, and began improvements, then he refused tender of the deed and refused to perform the agreement. The court allowed the seller specific performance because the buyer's actions were sufficient to take the case out of the SOF.
  - A few states also recognize that **detrimental reliance** satisfies the SOF.
- What would render the K unenforceable?
  - Violates the SOF: Oral K
  - Circumstances surrounding the agreement do not in fact add up to support what's necessary for a K, a binding bilateral agreement.: Oral K wouldn't satisfy
- To satisfy the SOF, writing may consist of more than one document: *Ward v. Mattuschek*

The Written Memorandum

- The "writing" can be a memorandum, rather than a formal contract. Alternatively, it can consist of several documents taken together (e.g., an agreement with a broker to sell for $30k if the broker produces a buyer, and a separate acceptance by the buyer to buy at $30k).
  - If the parties are negotiating with an understanding that the terms of the K are not fully agreed upon and a written formal agreement is contemplated, a binding K does not come into existence until the formal K is executed.

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- Writing must contain all essential terms: "essential terms" are: identification of the parties, description of the property, and terms and conditions (such as price and manner of payment, if agreed upon).
  - **Description**: the property must be described with sufficient clarity so that the court can determine which particular piece of property the parties had in mind. Parol evidence (i.e., evidence other than the written document itself) is often admissible to clear up ambiguities.
  - **Price**: the court may deem the writing incomplete if the price and payment provisions are omitted. If the price has been agreed upon, it must be set forth. Failure to put it in the memo makes the K unenforceable. However, if no price has been agreed upon, the court may imply a reasonable price, at least in an action at law (for damages). Likewise, if no financing terms are agreed upon, the court may imply that the sale is for cash.

- **Writing may consist of more than one document*:*** *Ward v. Mattuschek*
- **Agreement preliminary to formal contract***: King v. Wenger*

Ward v. Mattuschek

- **FACTS**: Ds entered into K to sell ranch under specific terms. P signed note agreeing to purchase ranch at the terms and paid $2,500 down payment. Ds refused to perform and P sues for specific performance.
- **ISSUE**: May two separate documents be combined to constitute a "writing" when neither is signed by both parties?
- **HELD**: Yes.
  - The court looks to the entire written agreement, which may span a series of related documents, to determine whether it satisfies the SOF.
- **RULE**: To satisfy the SOF: the K must name the parties, but it may consist of several writings. You can use several writings read together to meet the requirements (seller, buyer, consideration, description of the property).

King v. Wenger

- **FACTS**: Ds Loraine Wenger and Lorene Ralston each owned an undivided half interest in the property subject to a life estate in their mother. Their mother was dying and they all discussed several times with P about him purchasing the land. Eventually they agreed upon the purchase. P and Wenger called Ralston and told her about the sale on the phone. They executed an informal contract, which included a provision that payment of $1000 must be made by P and would be returned to P in case the sale never went through - **This payment was not made.** They went to Ps lawyer to execute a formal contract. Lawyer asked for time to prepare the contract. **P made out 2 checks for $1000 to Loraine, but checks were retained by Ps attorney**. Formal written contract never signed by the Wengers. The attorney revised the contract and the revised contract was rejected by Loraine and returned to Ps lawyer and Loraine said **property had been sold to other parties**. P filed this action for specific performance against the 2 sisters. Purchasers of the land also joined as D.
- **ISSUE**: Are parties bound by the terms of a written agreement used only for negotiation and in contemplation of a formal K?
- **HELD**: No.

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  - To determine whether a signed informal agreement is binding**, the court looks at the intent of the parties with respect to the instrument**. The intent of the parties here is clear that they are negotiating with an understanding that the terms of the contract are not fully agreed upon and a written formal agreement is contemplated:
    - Both parties went to Ps lawyer to further work on a formal contract
    - The discussion at Ps lawyers office involved a number of matters they never settled upon
    - Neither party began performance under the informal agreement
    - P withheld payment of the $1000
    - Loraine had no authority to sign for her sister
- **RULE**: An informal agreement contemplating the drafting and execution of a formal contract is only binding if the parties intend it to be.

Parol Modification and Recission: An executory written contract for the sale of land can be modified or revoked by oral agreement in a majority of states: The Statute of Frauds applies to the making of a contract, not to its revocation.

Niernberg v. Feld

- **FACTS**: Feld (P) entered into a K to purchase real property from Niernberg (D). The K stipulated that nonperformance on the part of P would result in forfeiture of the down payment as liquidated damages. P did not perform but orally agreed with D that if D could sell for the same price or more, D would return the money; but if the sale price were less, then P agreed to make up any insufficient amount. D sold at a higher price and refused to return the deposit.
- **ISSUE**: Can an oral K rescind a written executory K to purchase land and modify its terms?
- **HELD**: Yes.
- **RULE**: An amendment to the written real estate agreement must be in writing, but a rescission may be oral. An executory K involving an interest in land may be rescinded by an oral agreement. **The SOF only applies to the making of Ks, not to their revocation**. Executory Ks may be rescinded by the mutual consent of the parties.
  - ***SOF governs when a party may enforce a K, but not when he may release rights under it.

The Standard Written Contract

- **Terms of contracts that are important to include in Sale of Property:**
  - Must identify the parties and the property
  - Describe the conditions of the premises
    - When dealing with a preexisting home there is no implied warranty of fitness, but if you're dealing with a newly constructed home there is
  - What type of deed?
    - Normally a warranty deed
      - Grantor will warranty that he has seisin, that the title is free of any encumbrances, and that the grantee will have quiet enjoyment of the property

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- Sometimes see a quitclaim deed: Conveys all right, title, and interest grantor has but DOES NOT promise grantor has anything.
  - There is no warranty or protection after closing
- After closing, must rely on deed instead of contract when seeking any remedies

o Default provisions

- Damages/Specific Performance (i.e., liquidated damages clause)
  - Citing whether or not the contract requires time be of the essence
    - Requires that performance date identified must be strictly complied with
- A financing contingency (especially for the buyers)
  - If buyer acts in good faith to get the money, but could not, the contract is terminated and buyer is not held to be in breach/ default.

Construction and Performance

- Time of Performance

- If the K sets a specific date for performance, the K is enforceable in equity even after that date, as long as it can be carried out within a reasonable period. The time for performance is treated as **formal** rather than essential.
- However, if the contract contains a clause stating that "time is of the essence," and one party does not tender performance by the specified date, the other party is thereby excused from performance unless he has waived his right to the tender.
  - o "Time of the essence": if party cannot perform on time, they've committed a breach
  - o If time is NOT agreed to be of the essence, then it is not of the essence
- **Reasonable time**: *Kasten Construction Co. v. Maple Ridge Construction Co.*
- **Time of the essence:** *Doctorman v. Schroeder*

Kasten Construction Co. v. Maple Ridge Construction Co.

- **FACTS**: When time for performance came, P had not obtained financing and did not perform but no demands were made. P later tendered the purchase price but D refused it claiming K was void.
- **ISSUE**: Is "time of the essence" in a K if it is not expressly made so by the parties?
- **HELD**: No.
  - o The general rule is that time is not of the essence unless the parties have stipulated it to be so or the circumstances indicate it to be so. This is not the case here, so specific performance will be granted. P did make the tender within a reasonable time.

Doctorman v. Schroeder

- **FACTS**: P entered into K with D to purchase realty with a stipulation that time was of the essence. P failed by **less than one hour** to meet the deadline. D refused to perform and P sued for specific performance.

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- **ISSUE**: May a stipulation as to the essence of time in a land K specify the exact hour of performance and result in forfeiture of the right to purchase if not complied with?
- **HELD**: Yes.
    - Parties are free to contract for such a result and a forfeiture of the right to purchase property will be allowed. When the hour for performance arrived and P failed to perform, P's rights ceased at D's option.

- Financing Arrangements

- **MORTGAGES:** An owner of land will borrow money and put up her land for security of the debt: she is called the mortgagor. The person or institution who lends the money is called the mortgagee. The mortgage is the instrument that controls the parties during the pendency of the debt. The mortgage is **usually recorded**, giving notice to all subsequent purchasers that they take the property subject to the mortgage. When the mortgage is paid off, an instrument called a "satisfaction" will be recorded, indicating that the land is no longer subject to the mortgage.
    - **Common Law: Title States:** Used to view a mortgage as giving title to the bank and gave owner of property an "equitable right of redemption." **SEVERANCE OCCURS**
        - If there was a missed payment, bank had strict foreclosure.
        - Court would allow an equitable right of redemption and extend the time for payment to be due: banks would immediately race to court on default and set a date. (Courts don't like forfeitures because it is too harsh).
    - **Modern State (Lien State):** When owner transfers mortgage to the bank, they only transfer lien on the title, and not the title itself. **SEVERANCE DOES NOT OCCUR**
        - Owner retains title
        - Strict foreclosure is no longer available: if banks want to recover on default then they can obtain a sales foreclosure.
        - Owner has two rights of redemption:
            - Equitable Right to Redemption: Recognized between the date of the default and the date of the sale. Borrower has satisfied requirements of the note.
            - Statutory Right of Redemption: Varies by jurisdictions/states, but generally starts from the date of the sale and will run 6 months after (or a year after) the sale. Even if a sale on a foreclosed property has been made, the foreclosed owner can still get the property back.
    - **Assignment of the mortgage**: Both the mortgagor and the mortgagee can assign their interests in the mortgage, unless this right is controlled by some provision in the written instrument. If the mortgagor assigns her interest in the land, the grantee of the assignment can take the land subject to the outstanding mortgage or he can assume the mortgage and take over the payment of the debt.
    - **Foreclosure**: Under the terms of the mortgage, if the mortgagor or her assigns fail to make the required mortgage payments, the mortgagee has the option of declaring a foreclosure and bringing about the sale of the property to extinguish the debt.

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- **Post-foreclosure remedies**: After default, both the mortgagor and the mortgagee have particular rights that they can assert. In most states, the defaulting mortgagor has the right of redemption, granted to her either by statute or by court interpretation. The mortgagee, on the other hand, has the right to the foreclosure sale plus, if the sale of the property does not bring enough to satisfy the debt, the mortgagee has a right to a deficiency suit against the mortgagor.
  - **Mortgagor's right of redemption**: Most states recognize the mortgagor's right to redeem even after the foreclosure sale. One restriction is placed on this blanket rule, which is that state redemption statutes do not apply when the Federal Housing Authority forecloses a mortgage that it has insured.
  - **Mortgagee's right to a deficiency judgment**: If the proceeds from the foreclosure sale are not sufficient to pay the outstanding debt, the difference must be paid by the mortgagor. The mortgagee, in order to collect the difference, must bring a deficiency suit against the mortgagor.
- **Transfers of mortgaged property**: Both parties may transfer their interests in the land.
  - The main question that must be dealt with is whether the grantee takes the transfer subject to, or assuming, the outstanding mortgage.
  - The basic difference between an **assuming grantee** and a **grantee that is taking subject to the mortgage** is that, in the former, the grantee becomes personally liable for the debt, while in the *latter, he does not*.
    - But, in the case of the grantee taking subject to the mortgage, if he does not pay the debt, the mortgage can be foreclosed and the property sold. Although he will lose the land, he will not be liable for any deficiency that might exist.

- **Land sales contracts**: As an alternative to a mortgage arrangement, the seller may sell to the buyer under a conditional land sale contract, whereby the buyer makes **periodic installment payments** to the seller.
  - The seller retains legal title until the total contract price is paid by the buyer. However, **equitable title vests in the buyer at the time the K is executed**.
  - All incidents of ownership accrue to the buyer, who assumes the risk of loss and receives all appreciation.
  - Conceptually, the retention of title by the seller is the same as reserving a mortgage, and the parties' relationship is essentially that of ***mortgagee-mortgagor***. Equitable principles govern certain aspects of the relationship.
- If buyer defaults on payments, the seller keeps legal title, keeps any payments the buyer has made and the court is closed to buyer.

Gerruth Realty Co. v. Pire: Indefinite "subject to financing" clause

- **FACTS**: D enters into K to purchase property from P. A clause in the K says offer is contingent on buyer getting the "proper amount" of financing. D was unable to obtain complete financing on his own so refuses to perform. P offered to provide the remaining financing needed, but D refused. P sues for recovery on down payment.

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- **ISSUE**: Is a clause providing simply "subject to financing" a condition precedent so indefinite as to render the K void?
- **HELD**: Yes.
    - There was no meeting of the minds, thus no K: the financing clause (the most critical part of the K) was indefinite and the court was unwilling to supply a reasonable term/standard.
    - **RULE**: If a "subject to financing" clause is ambiguous or lacking as to essential details, and the surrounding circumstances do not indicate the intent of the parties as to these details, then the K must fail for indefiniteness.

Old Common Law Mortgage: The lender gets the title when you take out a mortgage, but you maintain possession. And you have an equitable right of redemption. If you default, the equitable right of redemption is terminated and this is "strict foreclosure" described in *Skendzel*.

Slum lords would sometimes use land contracts to not be liable to tenants' rights.

Skendzel v. Marshall: Liquidated damages cannot amount to forfeiture

- **FACTS:** Vendor entered into land sale contract with the Marshalls, the vendees. Property sold for $36k to be paid by a $1k down payment and $2.5k per year after that with payments due by January 15th of each year. A forfeiture/liquidated damages provision stated that if buyers were in default for **30 days**, then at seller's option, all previous payments would be forfeited and seller could terminate the K keeping payments as liquidated damages. Prepayments clause said that any prepayments will be applied in lieu of further principal payments
    - Ps here are assignees of Vendors estate. Ps filed complaint that Ds had defaulted through non-payment and attempted to enforce the **forfeiture provision**. Ds raised the **affirmative defense of waiver** - the vendor may waive strict compliance with the provisions of the contract by accepting overdue or irregular payments
- **ISSUE:** May the courts enforce a liquidated damages provision of a conditional land sale contract if to do so would result in injustice and forfeiture?
- **Analysis:**
    - Seller did NOT waive the right to enforce the provisions. However, the damages D would face are far greater than Ps damages.
    - Forfeitures are generally disfavored by the courts. The law permits "reasonable" liquidated damage provisions. ***However, if the damages are unreasonable, that is, disproportionate to the loss the seller actually suffered, then we must characterize them as penal rather than compensatory.***
    - Here, the liquidated damages provision is disproportionate and would be inconsistent with the principles of fairness and equity.
        - ***In contrast***, if a breach occurs soon after the execution of an agreement and the amount already paid is only a small percentage of the purchase price, especially when the buyer is attempting to escape an adverse turn in the market, courts tend to consider forfeiture as liquidated damages.
- **HELD:** Judicial foreclosure goes against notions of American jurisprudence. We are holding a conditional land sales contract to be the nature of a secured transaction.

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Judgment of foreclosure entered instead of forfeiture. Foreclosure by judicial sale permits a mortgagee to sell the mortgaged property and apply the proceeds to the mortgage debt.

- **RULE:** Where enforcement of forfeiture provisions of a land sale K would result in injustice, a court of equity may deny strict foreclosure and order foreclosure by judicial sale proceedings instead.
    - **Foreclosure by judicial sale**: Legal proceedings which extinguish a mortgagor's equity of redemption by selling the property to satisfy the debt, and either giving the mortgagor any excess, or giving the mortgagee a judgment against the mortgagor for any deficiency.
    - Strict foreclosure: proceeding which gives a defaulting mortgagor a period of time to pay the amount due on the property and if he fails to pay within that time, vests title in the mortgagee and extinguishes the mortgagor's equity of redemption.
    - In Michigan: They recognize land contracts, an Act gives buyers 15 days to cure a defect, not necessarily pay the whole amount, but to cure damages and the installment schedule can be reinstituted.

Union Bond & Trust Co. v. Blue Creek: No forfeiture even if default is willful.

- **FACTS**: Contract vendee agreed to purchase from vendor certain timber lands to be paid out with certain fixed minimum payments. Certain defaults of vendee occurred. P, assignee of vendee, filed action for judgment declaring the contract to be in full force by requiring performance by vendor. Ds, assignees, want damages caused by default and to quiet their title to the timber lands. Default continued 60 days after P was notified. Ds notified P that contract was cancelled. Contract also provided that time was of the essence.
    - P is entitled to relief from any forfeiture imposed by the contract for his default. The point in issue is the form such relief should take. P argues it should be conveyance of the land to him upon his immediate payment of the balance. Ds argue that Ps default was willful and they are entitled to any payments made in excess of the damages to D.
- **ISSUE**: May a buyer have the benefit of his bargain when he willfully defaults on an installment land K?
- **HELD**: Yes.
    - P is entitled to completion of the K after making substantial payments, even if he is in *willful default* of the K.
- RULE: A court may relieve a buyer in wilful default from forfeiture by giving him an opportunity to pay damages and complete the K.

- Marketable Title

Merchantable/marketable title: a title that is free from litigation, defects and serious doubts about its validity, which a reasonably prudent buyer would be willing to accept.
Quitclaim deed: A deed which conveys whatever title the grantor has, but which includes no warranties or covenants that his title is valid or free from defects or encumbrances.
Encumbrance: Also encumbrance, an interest in or claim attached to land, such as an easement, mortgage, or lease, which cannot prevent conveyance of the land, but does diminish its value.
Dower: wife's interest in her husband's land which she acquires upon his death.
To get rid of, bring quiet title action (if she's dead); or have to go to her.

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Title or deed: A seller conveys his title to property and uses a deed to make that conveyance.

- A title reasonably free from doubt: "free of encumbrances or defects or reasonable suspicion that there would be encumbrances or defects." A perfect title is not required, but there should be no reasonable probability that the purchaser will be subject to a lawsuit.
    - **Must go back through chain of custody:** marketable title statute in most states; in Michigan the statute is **MCLA 565.101**: requires you search back 40yrs. Interests that were required more than forty years ago can be **re-acquired** to put in marketable window.
- **Defects in Title**
    - **Defects in the record chain of title**: Title may be unmarketable because of a defect in some prior instrument constituting part of the chain of title. One of the weakest links in a chain is a title derived from a tax sale. The tax proceedings may not have cut off the rights of the delinquent owner because he was not given constitutionally required notice before sale of his property, or the local procedure may not have been strictly followed. Courts have traditionally been hostile to tax sales, thus making tax titles shaky and unmarketable, but this hostility may be waning.
    - **Private encumbrances**: As a general rule, marketable title means an unencumbered fee simple. Mortgages, covenants, and easements make title unmarketable, unless the expectations of the parties indicate a contrary result.
    - **Public encumbrances**:
        - Zoning: Zoning laws and subdivision restrictions generally do not make title unmarketable however there are some restrictions.
        - Maps: matters shown on official maps (e.g., designating land for the opening of future streets) may make title unmarketable.
        - **Violations of public regulations**
            - **Zoning violations**: If the property is in violation of zoning ordinance or subdivision law, and the correction of such violation can be demanded by the government, the title is usually held unmarketable because purchaser may be involved in litigation over his right to maintain the building as is.
            - **Building code violations**: If the property is merely in violation of a building code, the title is not unmarketable. These violations go to the "condition of the structure, not the quality of title."

- Implied in Contract

- Unless there is a provision in the contract to the contrary, it is implied in a K of sale that the seller must furnish the buyer with good and marketable title at closing. This implication will be made even though the contract calls for conveyance by a quitclaim deed. The reason for this is that the contract calls for a conveyance of land, and the seller cannot convey land unless he has title to it.
    - **Contrary provisions**: If the K requires the seller to provide the buyer with an insurable title, only a title insured by a title insurance company and not a marketable title is required.
    - **Implied covenant to give good title**: *Wallach v. Riverside Bank*

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- **Seller not required to cure defect:** *Bartos v. Czerwinski*
- **Good title as of K date -** *Luette v. Bank of Italy National Trust*

Wallach v. Riverside Bank

- **FACTS:** D agreed to sell to P streets in NYC. Sale was subject to existing leases expiring May 1st and to "existing restrictions of record if any." D gave P quitclaim deed and asked performance from P. P said D did not have marketable title but agreed to perform as long as a marketable title could by conveyed to P by D. D refused, and P brought this action to recover the down payment and payment to examine title
- **ISSUE:** When an agreement is made to purchase property, is there an implied covenant to produce a merchantable title to the property even if tendering a quitclaim deed?
  - *Quitclaim deed: A deed which conveys whatever title the grantor has, but which includes no warranties or covenants that his title is valid or free from defects or encumbrances.*
- **ANALYSIS:**
  - When a vendor agrees to sell a piece of land, the law imputes to him a covenant that he will convey a marketable title unless the vendee stipulates to accept something else. ***Unless grantor has title to land he cannot convey the land.***
  - The agreement of P to accept quitclaim deed was **not a waiver** of defect - quitclaim deed is as effective as any to convey all of grantor's title. If P knew of the defect when contract was signed, he had the right to presume from its terms that a good title would be made before the law day.
- **HELD:** Even though D's covenant was to convey the premises described (quitclaim) not to convey all right, title and interest, a contract to sell land ***implies*** ownership and power to give good title. P did not agree to accept defective title. He contracted to buy "all the premises" described, which, by implication of law, means good title to those premises, free and clear from encumbrances.
- **RULE:** Even if the seller uses a quitclaim deed to convey land, the law still imputes a covenant to convey marketable title to him in the contract, unless the contract expressly provides otherwise. A buyer is never bound to accept a defective title unless he expressly so stipulates, knowing the defects. Even if P knew of the defect when he signed the contract, he still had the right to presume that D would make the title good before law day.

Date of deed, date of delivery (when title transfers, but unknown), date of recording.

Bartos v. Czerwinski

- **FACTS:** P brought action to compel specific performance of a written agreement for the sale of real estate in Detroit. Ps undertook to pay $6300 with a down payment of $200 (if title found unmarketable, this amount had to be returned, and **the P would be released from K**). Ps submitted it to their attorney, who concluded that there was a flaw in the record of title - not marketable. There was a question in the title that, although not likely to be raised, could only be resolved by litigation. P sued for specific performance to compel D to clear title before completing the purchase.
- **ISSUE:** May a buyer seeking specific performance compel a seller to resort to litigation to clear title to land if the purchase contract did not provide for such a remedy? **NO**

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  - A title may be regarded as unmarketable if a reasonable man would refuse to accept the title in the ordinary course of business
  - No assurance that D can obtain marketable title. The court also cannot require D to furnish title insurance for the benefit of Ps because the contract does not have any provision containing this.
  - No provision in K required D to clear title.
- **HELD:** Ps not entitled to relief. Ps knew from the beginning of suit that D did not have marketable title. *The case is different where the seller is unquestionably able to remedy the title defect, but that is not true here. Ps can recover their down payment.*
- **RULE:** A buyer is not entitled to relief compelling a seller to clear a defect in title where it is not clear the seller would be able to do so.

Luette v. Bank of Italy National Trust & Savings: Good title as of the contract date

- **FACTS**: P contracted with D to purchase land on installment plan and made several installments before learning that the **D may not have good title** due to ongoing legislation regarding the federal homestead statute. P demanded that D show its title and offered to tender the remainder of the amount due under the contract if D did so. **D refused to show good title** and refused to repay Ps the amount already paid under the installment contract. Ps sued in equity to either: (i) enjoin D from canceling the K and to suspend their duty to pay until title is determined, or (ii) have the contract rescinded and recover the amounts already paid upon surrender of the contract for sale.
- **ISSUE**: May the vendee of an executory contract for the purchase of land demand rescission unless the vendor demonstrates good title before the time called for in the contract?
- **HELD**: No.
- **RULE**: A buyer cannot rescind a contract due to uncertainty as to the state of the seller's title before the date the seller must convey title under the contract.
  - No rescission by buyer of executory contract of sale will be recognized merely because the seller lacks full title before the date of performance is due. Seller does not have to have marketable title until the last date.
- ***EXCEPTION***: If the court can be convinced that this potential defect is incurable, then the seller will be in default, even if performance is not due at that time. An incurable defect is one which no reasonable effort by the seller would remove.

- Tender

- Payment of the purchase price and delivery of the deed are dependent promises. Neither party may place the other in default unless he himself tenders performance. Nor may one party rescind the contract until the time for tender passes.

Cohen v. Kranz: Tender may be required before default can be found.

- **FACTS**: Cohen (P) contracted to purchase a house from Kranz (D). Before the closing date, P submitted a demand to D for return of P's down payment due to an unmarketable title. D refused and neither party tendered performance. P sued for return of the deposit plus expenses. Judgment for P at trial. It was shown that the defects were minor and easily curable by D. The appellate court reversed and granted D's counterclaim for damages. P appeals.

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- **ISSUE**: Is a timely tender of payment required to put a vendor in default of a sales contract when the defect in title is minor and easily curable?
- **HELD**: Yes. Judgment affirmed
    - A tender and demand are required to put the vendor in default where his title could be cleared without difficulty in a reasonable time
    - Vendor is entitled to a reasonable amount of time. **Ps advance rejection of title and demand for return of deposit in 1 day but unjustified and breach of K.**
    - Vendor with incurable title defects is automatically in default, whereas a vendor with curable title defects must be placed in default by a tender and demand, which was not done here
    - Since the vendee's breach was prior to the time of performance, D was never in default and is therefore entitled to damages for P's breach.
    - P's rejection of title in advance precluded her from recovery of the deposit.
- **RULE**: Where title defects are curable without difficulty in a reasonable time, the buyer must make a tender and demand to put the seller in default before she can recover her deposit.
    - Because a seller's and buyer's performance are concurrent conditions in a real estate contract, **one party must generally tender performance to trigger the other party's duty to perform before he can place the other party in default**.

- Assignment

Handzel v. Bassi

- **FACTS:** Handzel (P) entered into contract with Bassi (D) to purchase land on installments. Ds consent required for assignments. P entered into K to sell with 3rd party. D claimed this violated their K and declared it null and void; kept previous payments as liquidated damages. P sued for temporary & permanent injunctions against D to maintain K. P tendered payment to D; D refused. Judgment for P granting temporary injunction. D appeals.
- **ISSUE:** May a temporary injunction be granted when the vendee in an installment purchase contract is ready and willing to perform but makes an assignment of his interest without consent of vendor?
- **HOLDING**: Yes. Judgment affirmed.
    - The provision against assignment is collateral to the sale of the property. Since vendee is ready and able to perform, vendor will receive purchase price.
    - This is the point of the provision, to safeguard Ps performance. P tendered balance so lower court was correct in granting the injunction.
    - Buyer did not assign, he created an ***independent contract*** to the 3rd party. Not an assignment but rather a contract to sell if and when he acquired the property. ***He did not assign his contract. He entered into an entirely different contract.***
- **RULE:** A buyer who violates an anti-assignment provision has the option to tender full performance in exchange for the deed. The other party then gets all he bargained for.

- Remedies for Breach of Contract

- **Relief for Non-Breaching Buyer**
    - Specific performance awarded as property is unique

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  - If the title is not marketable, or real property is not unique, can be entitled to relief at law where you are entitled to get amount paid back and difference in money damages. Recovery depends on whether the American or English rule is applied.
  - Is the buyer entitled to something more? Difference Money Damages: (General Damages). -
    - **Market Value at closing date: Contract Price = Damages**
      - If at time of closing the market value is less than the K price, there's been no damage so no extra money.
    - Must take into account down payment/ deposit and off-set price in accordance with what was already paid.
  - Is the buyer entitled to special damages beyond general damages? Have to prove special damages with certainty and they must be foreseeable. Buyer should include a liquidated damages clause in the K if he fears that special damages may be hard to prove in event of breach. ***As long as not a penalty, would be enforced.***
- **Relief for Non-Breaching Seller**
  - Can keep deposit/down payment
  - Entitled to difference money damages from buyer
    - But must mitigate and attempt to resell to another
    - You are then entitled to difference in K price: Resale Price.
- Damages Awarded:
  - For Defect: if defect in title and no fraud, damages are consideration paid, plus interest, plus expenses incurred.
  - Marketable title: difference money NOT rewarded
  - Breach: difference in money damages

Defect in Title: English Rule & American Rule

- MI follows the American Rule
- **English rule**: Buyer only entitled to loss of down payment.
  - Unless the seller acts in bad faith, the buyer is limited to recovery of any money paid to the seller, plus interest and expenses in examining title. Essentially, damages are measured as if the contract had been rescinded.
  - If a seller breaches due to unmarketable title, and the seller was acting in good faith, the buyer does not get difference money damages, **only money paid back**.
  - Not entitled to general damages, only specific damages
  - This favors **seller.**
- **American rule**: Buyer entitled to loss of bargain.
  - About one-half of the States measure damages by the rule used for sale of personal property. The buyer is entitled to the difference between the contract price and the market value of the land on the date performance is due.
  - The buyer, good faith or not, gets difference money damages.
  - Buyer entitled to general money damages at (1) the time of the breach or (2) delivery
  - This favors the **buyer**.

Kramer v. Mobley: No damages for loss of bargain **(English Rule)**

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- **FACTS:** P enters into K with D to purchase land. At time of delivery, title was unmarketable due to a lien on the land in favor of the person D bought the land from. D offered to bring action against original seller to clear the title, but P refused. P sued for damages.
- **ISSUE:** What are the rights of the purchaser of real estate under an executory contract where the sale fails by reason of a defect of title, or what is the proper measure of damages?
- **Benefit-of-the-bargain:** Where the seller under K for the sale of personal property breaches K by failing to deliver the property or failing to convey marketable title: CONTRACT PRICE: MARKET VALUE OF PROPERTY AT TIME OF BREACH or TIME FIXED FOR DELIVERY = DAMAGES
- **RULE HERE: English Rule**: If the sale fails by reason of a defect in vendor's title, and vendor is guilty of no bad faith or fraud, measure of the vendee's damage may recover any consideration but can recover nothing for the loss of his bargain. Specific damages for breach only, not general damages (benefit-of-the-bargain damages).

Smith v. Warr: Benefit-of-the-bargain damages **(American Rule)**

- **FACTS:** P contracted to purchase property from D. Within 4 months of signing, there was an adverse claim on the land by a 3rd party to quiet title against Ds. The adverse possession claim won and D could not deliver title. P had made payments while adverse claim was litigated. Court awarded him out of pocket loss rather than general damages. P sues for ***benefit of the bargain***: CONTRACT PRICE: MARKET VALUE OF PROPERTY AT TIME OF BREACH = DAMAGES
- **ISSUE:** When a seller breaches because of a claim of adverse possession against the land, is the buyer entitled to benefit-of-the-bargain damages as well as out-of-pocket losses? ***Yes, under American Rule***
- **RULE: American Rule:** Benefit-of-the-bargain damages (general damages) may be obtained by the buyer along with specific damages for breach regardless of the good faith of the seller.

Equitable Conversion

- Equitable conversion is the treating of land as personal property and personal property as land under certain circumstances. (*Shay v. Penrose*)
- The doctrine of equitable conversion holds that, since either the seller or the buyer can demand specific performance of a K for the sale of land, equity regards as done that which ought to be done.
    - When the owner of land enters into a valid and enforceable contract for its sale he continues to hold the legal title, but in trust for the buyer (as a trustee). The buyer becomes the equitable owner and holds the purchase money in trust for the seller.
- **Purpose**: The doctrine of equitable conversion may be invoked to solve problems resulting from the three step method of conveyancing: first there is negotiation and K, second, the gap period, and final, the closing. During this, **various problems may arise that turn on who has "title" to the real property**.
    - The doctrine of equitable conversion was invented to treat the buyer as having title for certain purposes prior to the date set for closing.
- **Vendor/Vendee Relationship: Gap Period Issues**

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- Gap period is the period between the making of a K and the delivery of the deed
- **Doctrine of Equitable Conversion:**
  - When two parties contract to sell a property, the risk of loss will shift to the buyer.
  - Rule relied on fact that equitable conversion occurs when the K is signed
    - This is because the buyer has right to specifically enforce the K after signing.
    - If there is simply an option to contract, no conversion will have occurred yet.
  - When there is a binding agreement and the vendor is able to convey title, the *vendor* is the trustee of **legal title** for the benefit of the *vendee*, while the *vendee* is the trustee of the **purchase money** for the benefit of the *vendor*.
  - **Who bears the risk of loss? Views:**
    - **Common Law Majority Rule**: Buyer bears loss. Begins at time the K is signed. Seller can sue for specific performance at the K price. By virtue of equitable conversion, the buyer owns the land and the seller has only a security interest.
      - **Damage by natural causes:** *Bleckley v. Langston*
    - **Minority Rule:** risk of loss on seller (***Massachusetts Rule***).: if loss is substantial, the K is not binding. Buyer can rescind and recover earnest money.
    - **Statutory**– Depends on who was in possession. Who is in possession depends on if the seller is prepared to perform. If not, equitable conversion did not occur.
      - Whoever was in possession bears the risk of loss.
      - MICHIGAN follows statutory view
    - **Destruction before conditions of sale are met:** *Sanford v. Breidenbach*
  - **If There is a Death:**
    - When land enters into an estate, it turns from real property into personal property (liquidated).
    - When a K is then breached, **the land does not revert back to real property**, it remains personal property.
      - This matters, as if a will states, "all real property to my wife and all personal property to my son," upon death the son will get the house, etc. That was considered real property when alive.
    - **Must ask:**
      - 1) What was the character of the land the seller held at time of death?
      - 2) What is the character of the land that will pass into his estate?
  - *Exceptions: Buyer will not bear the risk if (1) title not marketable at time K was signed and (2) loss caused by seller's negligence.*

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Clay v. Landreth: Equitable conversion not used to achieve inequitable result

- **FACTS:** Buyer contracts to purchase property zoned for business use but before closing, the city rezones the property for residential use so the buyer no longer wants it. Clay seller, P, filed action against Landreth buyer, D, seeking specific performance.
- **ISSUE:** Should a land sale contract be specifically enforced if the purpose of the purchase is defeated by a subsequent unanticipated zoning ordinance? ***No***
- **HOLDING:** The doctrine of equitable conversion will not be applied here since it would be inequitable as frustrating the intent of the parties. A court of equity may refuse specific performance when a subsequent change of circumstances not contemplated by parties occurs right after K is made rendering K inequitable.
- **RULE:** The doctrine of equitable conversion is limited to cases where the enforcement of a K is in accordance with the intentions of the party.
    - Here, both parties intended to use land for commercial purposes. If equitable conversion was applied, any loss of value would fall on buyer.

Shay v. Penrose: Death of seller

- **FACTS:** Shay had 6 pieces of land and sold 4. Within the properties sold, she retained a ***reversionary interest*** if buyer defaulted on payments. She died without a will (intestate) and was survived by husband, P, and her sister, D. Husband tries to partition the 2 unsold lots. D thinks that the other 4 lots should be partitioned as well, arguing that they are still ***real property*** and should be divided among assets.
- **ISSUE:** Does the doctrine of equitable conversion operate to convert the proceeds of K sales into personal property with respect to heirs of the deceased vendor? ***Yes***
- **RULE:** Equitable conversion takes place the instant the parties enter into a valid and enforceable K, regardless of the length of the K term, and the buyer acquires equitable title at that time.
    - Equitable conversion took place when the parties executed the Ks, making Shay's interest in them one of personalty (personal property). Because Shay's interest was one of personalty, not realty, upon her death her interest descended to P, (who got all her personalty but ½ her real property) and he became entitled to the entire unpaid balance of the purchase price of each K.
    - ***Here***, the buyer's interest under the contract is thus one in real property, while the seller's interest is one in personal property. If a party dies before conveyance is complete, his interest will descend as it was when he died.

Clapp v. Tower: Default of buyer: *once converted, always converted; subsequent default does not reverse equitable conversion*

- **FACTS:** Before his death, Tower sold land to Hadley on a deferred payment contract. Hadley defaulted after Tower's death, and Tower's executors foreclosed. The executors, acting on the theory that under equitable conversion the foreclosed land had become personal property, sold it to P. Tower's heirs, Ds, claim title to the land as realty that should have been distributed to them. P brought action to quiet title.
- **ISSUE:** Does equity consider land as personalty under the doctrine of equitable conversion ***if*** a decedent contracted to sell it during his lifetime, but the buyer defaulted and the land returned to the estate through foreclosure after his death? ***Yes***

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- **HOLDING:** Tower's execution and delivery of a K for sale of land during his lifetime ***converted the land*** into personalty.
    - Tower's interest = $ buyer agreed to pay
    - Buyer's interest = the land
- **RULE:** Under the doctrine of equitable conversion, once a K converts a seller's interest into one of personalty, a buyer's default ***does not*** unconvert that interest. Even after default and foreclosure, the seller's interest remains one in personalty.

Eddington v. Turner: Equitable conversion must take place for land to become personal property (*liquid*) in estate

- **FACTS:** In Turner's will, Turner devised the land to his sister Sallie for life. Turner subsequently gave P the option to purchase that land, but P did not exercise the option until Turner died. Court held that Sallie was entitled to life interest and P sues for specific performance, claiming that the proceeds of the sale received from exercise of the option = personal property.
- **ISSUE:** Does the doctrine of equitable conversion operate to alter the character of realty ***prior to*** the exercise of the option? ***No***
- **RULE:** The doctrine of equitable conversion will not operate on property held by option, at least not prior to exercise of the option.
    - An option K, unlike an installment land K, is not equally binding on both parties prior to the exercise of the option: it is an irrevocable offer to sell but is not a binding bilateral agreement until it is accepted.

Risk of Loss

- **Risk of loss**: Suppose that before the date set for closing, the property is destroyed or damaged by fire, flood, or other cause not the fault of either party. Who bears the risk of loss? The parties may cover this matter in their K, but if they do not, the court will apply a rule.

Bleckley v. Langston: **Majority Rule** (buyer has risk of loss); damage by natural causes

- **FACTS**: Parties enter into K for sale of property. Buyer gave down payment. While Ds were still in possession of property, before deed was executed, property was extensively damaged by ice storm. This damaged pecan trees upon the real estate, reducing the fair market value. Buyer sought recission of K and return of down payment.
- **ISSUE:** Should a buyer who has completed the purchase of real estate but is not yet in possession bear the burden of loss due to damage by natural causes while the seller is still in possession? ***YES***
- **HOLDING:** Court follow majority rule: if there is a binding agreement and the vendor is able to convey title, and if equity would regard the vendor as trustee of title for the vendee, the vendee will take the loss, whether or not he is in possession.

Sanford v. Breidenbach: **Minority Rule** (seller has risk of loss); destruction before sale

- **FACTS:** P (Sanford) entered into a writing agreement with D (Breidenbach) to sell their land. While the title was being examined and the final papers being prepared, a fire

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destroyed the house on the land. Both P and D were insured at the time of the fire. D refused to sign the final papers and said Ps insurance company should be responsible for the loss. P brought action for specific performance.

- **ISSUE:** Does the vendee assume the risk of destruction that occurs before all conditions of the sale are met, therefore permitting the vendor to claim specific performance? ***NO***
- **HOLDING:** Court follows minority rule: equitable conversion does not occur unless the seller has fulfilled all conditions and is entitled to specific performance.
    - Here, since seller was **not prepared to perform** at time of the fire, equitable conversion did NOT occur. Seller bears risk of loss.

Party in possession has risk of loss: Some courts have held that the party in possession bears the risk of loss. If the seller is still in possession.

Raplee v. Piper: Where vendee obtains insurance in vendor's name

- **FACTS:** P was in possession of the property as the vendee during a land K when a fire occurred before title was passed to the buyer. The vendee had insured the property in the name of vendor (D) and paid the premiums. The vendee, who is in possession of the property, wants the insurance proceeds to be credited against the purchase price owed the vendor.
- **ISSUE:** When insurance proceeds are paid to the vendor, and premiums were paid by the vendee as required by the land sales K, should the proceeds be credited to the purchase price of the land? ***YES***
- **RULE -** When a land sale K requires the vendee to keep the property insured against fire and there is a fire loss prior to full performance on the K, any such insurance proceeds received by the vendor are to be applied to the remaining balance of the purchase price.

The Deed

- **Requirements:**
    - (1) Grantor and grantee are described
    - (2) Property is described
    - (3) Instrument is signed by the grantor
    - (4) Notarized: only in some states where Register of Deeds requires notarized deed before accepting it and for recording
    - (5) Witness
    - (6) Words indicating intent to convey
        - "give," "transfer," "deed over"
    - (7) The recorded instrument doesn't list consideration: Mogk recommends it but you don't have to give exact sale price (i.e., $1 and other valuable consideration).
- **Responsibility of the Seller:**
    - To deliver marketable title
        - Depends on Deed:
            - (1) Warranty Deed: 3 warranties:
                - Warranty of Seisin
                - Warranty Against Encumbrances
                - Warranty of Quiet Enjoyment
            - (2) Quitclaim Deed:
                - No assurances after closing
                - Transfer solely of any interest that grantor has

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- **Clauses:**
  - Granting Clause: Presumed a fee simple is being transferred
  - Habendum Clause: Limits the estate being granted
    - Stipulates something other than fee simple is being conveyed
  - Reddendum Clause: Following Grantor Clause, where grantor retains a reversionary interest.
- **Determining Intent:** *First National Bank* Test
  - (1) Look at the conveyance language: is it unclear?
  - (2) Look at the 4 corners of the instrument: determine intent of grantor
  - (3) If still unclear, look at extrinsic evidence
  - *If still unclear, FORGET INTENT*
    - Use **GENERAL RULES OF CONSTRUCTION**
      - Factors:
        - Apply presumption of fee simple and not lessor estate
        - Granting clause favored over habendum clause
        - All doubts resolved against restrictions on property
        - Rules **against escheat**: if ambiguity, do not chose option that allows escheat.
        - Doubt is resolved in favor of grantee
- **Ways of Closing:**
  - Face to face, or
  - Escrow Agreement
    - Done through a third party. Essentially operates as an agent for both parties.
    - Seller and buyer deliver performances to the escrow. When both performances received, the escrow agent delivers to the others, completing the deal.
- **Types of Titles:**
  - **Void Title**
    - Means that you never had interest in that title
    - Does not protect a BFP
    - From lack of delivery, etc.
    - Recording the deed does not affect it: still illegal
  - **Voidable Title**
    - Means that you have an interest in the title, but if another comes forward claiming property, you may lose it
    - This can protect a BFP
    - Example: If title acquired pursuant to fraud, in good faith, without notice

Defective Deed

French v. French: A defective deed may still pass title to an interest in land. (***Old view***)

- **Today:** States lay out what is required in a deed and you need to meet the standards in order to have the instrument be recognized as a valid conveyancing instrument

The Modern Deed

- **Types of Deeds**

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  - Warranty: The warranty deed contains the grantor's personal covenants relating to the nature of the estate conveyed and usually covenanting that the grantor has an indefeasible estate in fee simple.
    - Warranty of Seisin: a statement that the grantor has possession
    - Right to convey: The grantor has the right to sell and convey the premises
    - Warranty against Encumbrances: The grantor covenants that there are no encumbrances of record or not of record
    - Warranty of Quiet Enjoyment: The grantor will protect the grantee against eviction by the grantor or her agent or paramount title.
    - Warranty: The grantor is obligated to compensate the grantee for a breach of quiet enjoyment.
    - Further assurances: The grantor is obliged to convey to the grantee any subsequent hostile interests in the land.
  - Quitclaim: The quitclaim deed transfers all the grantor's interests, whatever it may be, without making any covenants. No assurances after closing.
- **Parts of the deed**
  - Granting Clause: presumes a fee simple is being transferred. The initial recitals in a deed, setting forth the parties, the consideration, the operative words, the description of the land and its appurtenances. The premises.
  - The Habendum Clause: Limits the estate being granted; stipulates something other than a fee simple is being conveyed. It is often said that a granting clause will prevail over a habendum clause in case of conflict, but the courts often find a means of reconciling the conflict by looking "within the four corners of an instrument" (i.e., looking at all the terms of the document itself) to ascertain intent.
  - Reddendum Clause - Following Grantor Clause, where grantor retains a **reversionary** interest.
  - Grantor's Covenants: covenants of warranty by the grantor.
  - Signature and acknowledgment.

First National Bank of Oregon v. Townsend: When deed is ambiguous and parties' intent is unknown, ***grantee*** wins: **Inconsistency between habendum and granting clauses**

- **FACTS:** In the personal covenants of the deceased D, a deed was discovered that conveyed an interest in land to Miller, represented by the First National Bank (P). The deed was titled "warranty and mineral deed" and further provided that for the consideration "paid on all trees and minerals" D "does hereby grant and convey" the property to Miller. The property would escheat to the State if the deed grants **only mineral rights**. The lower court held that the deed granted a **fee simple.** State challenges that holding.
- **ISSUE:** Must the courts reconcile, if possible, any inconsistency between the habendum and granting clauses? ***Yes***
- **HOLDING:** Court looks at factors to determine intent.
  - (1) Interpret an instrument as if it is not ambiguous: interpret granting language first to see if parties intent can be figured out. *Not clear.*
  - (2) Look at the 4 corners of the document, meaning the whole instrument beyond the language. *Still not clear*.

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- (3) Look at extrinsic evidence. IN THIS CASE, what did this grantor mean to convey to the grantee? If STILL NOT CLEAR, throw all that out and turn to
  - (a) General Rules of Construction
    - More than 1 rule, so decide which fits best. **Here,** all 3 work.
      - 1. Doubt resolved in favor of grantee
        - ***This is what the court uses***. **RULE:** Ambiguity should be resolved in favor of granting a greater interest.
      - 2. If ambiguity, do NOT choose the option that allows escheat
      - 3. Granting clause prevails over habendum clause

Grayson v. Holloway: When granting and habendum clause are inconsistent, look at intent

- **FACTS:** D, Holloway, received land with her husband from his deceased parents. The consideration for this was that the parents were taken care of in their old age. Granting clause made the grant only to the husband, but the habendum clause exposed clear intent that the deed was to husband and wife. Grayson and other heirs of the husband (Ps) brought an action for partition.
- **ISSUE:** Does the granting clause of a deed take precedence over the habendum clause when the ***clear intent*** of the grantor is preserved in the ***habendum clause***? ***NO***
- **RULE:** The deed should be examined for the intention of the grantor and, if possible, the court will carry out that intention regardless of the technical division of clauses within the deed. *Held for Ds*.

Womack v. Stegner: If grantee's name is left blank in deed and grantor tells grantee to fill in any name, deed is valid

- **FACTS:** WB conveyed a complete deed to his brother DR Womack (P), but P forgot to fill in his name in the deed. When WB died, all of his property went to Stegner (D). D argues that since the deed did not have grantee's name, then it was not valid transfer and the property goes to D. (DR was viewed as an agent of WB)
- **ISSUE:** Did the conveyance recognize valid transfer from WB to DR? ***YES***
- **HELD:** Using the principal agent theory coupled with an interest, DR had the ***irrevocable authority*** to fill in his name, thus making the deed valid.
  - **AGENCY LAW:** Agent can only act with authority as long as the principle is capacitated/in capacity and is alive. As soon as the principle becomes incapacitated or dies, that terminates any authority the agent has to act on the behalf of the principle.
    - **HOWEVER,** if there is an interest coupled with this agent principle relationship, there becomes an irrevocable ability to act on behalf of principle (agent can still act upon his death).

Formalities and Execution of the Deed

- Writing signed by grantor: The SOF requires a writing for the transfer of an interest in land. The writing is usually in the form of a deed, but it may be an informal instrument (letter or memo).

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  - ***Signature of grantor only***: The writing must be signed by the party to be bound (the grantor). It is neither necessary nor customary that the grantee sign the deed. If the deed contains covenants by the grantee (e.g., to use the property only for residential purposes), the grantee is bound by the covenants when she accepts the deed.
- Seal ***used to*** be required.
  - Attestation: practice of having witnesses sign the deed as a means of assuring its authenticity. Not required by common law but is a statutory construction. Some states have no requirement, others only have it as a prerequisite to recording, others use it to make it easier to transfer title.
  - Acknowledgment: attestation by a public official or notary. Varies by jurisdiction. However, acknowledgment or attestation is desirable for two reasons:
    - Recordation: Acknowledgment or witnessing is usually required for recordation of the deed. In most states, an unacknowledged deed cannot be recorded.
    - Authentication: An unacknowledged or unwitnessed deed may not be sufficient proof of authenticity while an acknowledged or witnessed deed is self-authenticating.
  - Signature of spouse: the spouse may have property rights accruing from marriage, such as dower, curtesy, homestead or community property. To release these, the spouse must join the deed.
  - Operative words: any words indicating an intent to make a transfer will suffice. Technical words are not necessary to a deed.
    - Examples: Operative words may include: give, grant, bargain and sell, convey, quitclaim and assign.
- Consideration: consideration is not necessary to transfer land, a person can give her interest away.
- Delivery: A deed is not effective to transfer an interest in land until it has been delivered by the grantor.
  - Acts and intent: delivery requires that the grantor perform acts that manifest her intent to make a transfer, usually manual delivery. After delivery, title has passed to the grantee and it cannot be revoked or passed back to the grantor without delivery of a new deed.
  - Conditional delivery: If delivery is made to the grantee upon an oral condition, the delivery is good and the condition is void. However, if the oral condition shows that the grantor did not intent a delivery at all, then the delivery is invalid.
  - **The Escrow Agreement**: A delivery of a deed to a third-party custodian or escrow agent, with an oral condition, is a valid delivery and the oral condition is also valid.
    - Both parties agree to an escrow agent.
    - There is an **underlying bilateral agreement** between buyer and seller.
    - The parties then enter into an escrow agreement which is dependent on the underlying sales agreement.
    - Seller delivers deed to escrow agent and buyer delivers purchase money to the escrow agent, then the escrow agent releases both performances to the respective parties.

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        - The escrow is seen as a performance mechanism.
    - When the escrow agent has the authority to deliver the deed and the buyer receives it, title transfers.
    - **When Deed takes effect:**
        - Final delivery of the deed by the escrow agent is dependent upon the performance of a condition, the general rule is that the escrow will have no effect as a conveyance and no estate will pass until the event has happened and the 2nd delivery has been made, or at least until the grantee has become absolutely entitled to such a delivery.
    - Doctrine of Relation back:
        - Where the condition has been fully performed, and the deed needs to be delivered by the escrow agent, it will under certain circumstances be treated as relating back to and taking effect at the time of its original deposit as escrow.
        - **Example**: In the event the seller dies, the doctrine will apply and allow the escrow agent to deliver the deed to the buyer even if the seller is dead and does not give authority to escrow agent.
            - Date of delivery is seen as prior to seller's death.
    - There must be an **acceptance** by the grantee to complete a conveyance, but this will generally be **implied** if it is beneficial to the grantee, regardless of whether she knows about the conveyance.

Clevenger v. Moore: Deed wrongly delivered from escrow is void even with respect to innocent purchaser

- **FACTS:** Clevenger, P, owned a building and agreed to trade her building for an apartment house in Tulsa owned by Simmons. P executed the deed to Simmons and deposited that deed with pay to an **escrow agent**, Peay. Peay was instructed not to release the deed until P gave express authorization. Peay disregarded this and delivered the deed to Simmons who then sold it to Moore, D.
- **ISSUE:** Is a deed valid if it is placed in escrow and then delivered outside of instructions? If the deed in escrow is void, does it pass title to an innocent buyer? ***No and No.***
- **HELD:** The title is VOID as escrow agent acted outside his authority and therefore there was no valid delivery.
    - Where deed is obtained by fraud: **RULE**: deed is void and no title may pass to a purchaser.
    - Where a deed is placed in escrow with a condition upon delivery, conveyance and use of the deed without performance of the condition is fraudulent in nature and therefore NO title may pass, even to a Bonafide purchaser.
    - *Deviation from the terms of the escrow agreement without mutual consent of the parties will subject the agent to liability for damages caused by deviation*.

Subject Matter Conveyed

- The property passing under a deed can be described by metes and bounds (meaning "measurements and boundaries"); by reference to a government survey, a recorded plat, or adjacent properties; by a street and number system; or by the name of the property. If

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the description in a deed furnishes any means of identification of the property involved, the description is sufficient. *Extrinsic evidence is usually admissible to clear up any ambiguity.*

- Metes and Bounds System
  - Historically used
  - Description begins at an identifiable point and uses natural and artificial monuments as markers.
- Rectangular System: **modern system** used by federal government.
- **Ambiguous Description**: if there is ambiguity in the contrast as to what land is being conveyed, look at:
  - Granting Clause
  - 4 Corners
  - Extrinsic Evidence
    - *And if still not clear:*
      - **Special Rules of Construction**: Looks at:
        - Natural landmarks or objects
        - Artificial monuments or marks
        - Boundary lines of adjacent owners
        - Courses and distances
- Implied Intent: ***Parties intent trumps all canons of construction***
  - Ownership of Road: Ownership extends to middle of road
    - Exception: if the city previously owned the road, then the city retains fee simple in the road and lot ownership extends only to the boundary (side) of the road.

Pritchard v. Rebori: Intent of parties as to description

- **FACTS:** P purchased land from D to construct a warehouse near a railroad track. After P began building on the land, he was required to pay for infringing on a railroad right-of-way. P conveyed two pieces of realty to the railway company in return for which it quitclaimed to him that portion of the right of way. Both parties believed the right-of-way extended only to a fence bordering the property, but the records showed it differently. P brought suit for breach of covenant. Lower court held for P.
- **ISSUE:** Does the intent of the parties prevail over mistakes or inconsistencies in the description of the property conveyed? ***YES***
- **HOLDING:** The general rule in determining boundaries is that natural landmarks are referred to first, then artificial monuments, then lines of adjacent owners, and then courses and distances. This rule is used as a means of discovering ***the intention of the parties***. It is clear that the intent of the parties was to convey land to the fence. ***Therefore, D is liable for the damages incurred by P in removing the encumbrances***.
- **RULE:** In construing a legal description, the location of a monument does not necessarily control over a course or distance, the parties' intent controls.

Parr v. Worley: Conveyed property extends to center of monument

- **FACTS:** P conveyed part of his land to D. The deed described the parcel as "lying to the east of" the highway, "containing 25 acres, more or less." The actual area was 25.8 acres if measured from the eastern edge of the highway right-of-way, or 31.75 acres if

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measured from the center of the highway. P then conveyed mineral interests under the highway. P sued D to quiet title to the mineral interest. Court held for P.

- **ISSUE:** Whether the mineral interest in the eastern portion of the highway right of way was vested in D?
- **HOLDING -** The acreage as stated in the deed is the only indication that the center of the highway was not the intended border. However, ***precedence in deeds is given first to natural objects, artificial monuments, adjacent boundaries, courses and distances, and lastly to quantity.***
    - The deed did not clearly and plainly disclose an intention the exclude the east side of the highway from the description. Construe the deed to refer to the highway as a monument and therefore the deed passes title to the center line. Reversed and held for D.
    - When there are different calls for the location of boundaries, precedence is given to descriptions as follows:
        - Natural objects or landmarks
        - Artificial monuments
        - Adjacent boundaries
        - Courses and distances
        - Quantity descriptions
- **RULE:** A highway is a monument and the general rule is that a line runs through the center of the monument.

Recording System

- **Operation of the System:** Recording is vitally important since the priority of claims to property are determined under the applicable recording statute.
    - Developed to protect against the grantor conveying the same property to more than one grantee.
- **Recording acts: in general**: In many cases, allowing the first grantee to prevail encouraged fraudulent acts by a grantor, and worked real hardships on innocent subsequent grantees. Consequently, statutes were enacted in this country to require some sort of recordation to give "notice to all the world" that title to property had been conveyed, and thus to put subsequent purchasers on guard. Such statutes are known as "recording acts" and are in effect in some form in every state.
    - Basically, such statutes set up a system that permits the recordation in each county of any deed (or other instrument affecting title) to property located in that country.
        - **Systems in the U.S.:**
            - Grantor-Grantee index (Harder to do)
                - Majority of states use this (Michigan)
                - Must research current grantee and tract back conveyances, then work forward to see if there are any outstanding interests.
            - **Tract Index**
                - Conveyances compiled
    - Recordation is not essential to the validity of a deed, as between the grantor and grantee. However, if a grantee does not record his instrument, he may lose out against a subsequent BFP.
- **Mechanics of recording**

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- **Filing copy:** The grantee or his agent presents the deed to the county recorder, who makes a copy thereof and files this copy in the official records. Such filings are made chronologically, and the date and time of each filing are shown.
- **Indexing:** The recorder also indexes the deed, which is the key to subsequent title searches. The usual index system is the grantor-grantee index, although tract indexes exist in some urban localities.
  - **Grantor and grantee indices:** Separate index volumes are maintained for grantors and grantees, so that an instrument can be located by searching under either the grantor's name or the grantee's name.
    - Harder to do than tract index system because must search back through each grantee until you reach the root of the chain of title for 40 years (Michigan). Then must search each grantee in grantor index to make sure didn't convey property twice.
  - **Tract index system:** In urban areas where land has been planted and broken down into blocks and lots, the recording office may keep a tract index. Entries are made under block and lot number. All instruments are indexed on a page dealing only with the lot to which the instruments relate.

- Approach:
  - **Common Law**
    - Will prevail unless there's a statute that changes it.
    - **RULE**: Grantee takes no better title than the grantor: 2nd taker will not get anything as there's no title to convey
  - **Recording Act (Modern Statutory Approach):**
    - 2nd taker is protected if they are a BFP, which requires that they have:
      - Good Faith
      - For Value: not nominal consideration although $5 was enough in one case
      - Without Notice.
- **Effect of recordation**
  - **What recordation does:** Proper recordation gives all prospective subsequent grantees constructive notice of the existence and contents of the recorded instrument. Hence, there can be no subsequent bona fide purchaser who will prevail over the grantee in the future. Recordation also raises a rebuttable presumption that the instrument had been validly delivered and that it is authentic.
  - **What recordation does not do**
    - **Validate invalid deed:** Generally, recordation is not necessary for a valid conveyance. Nor does recordation validate an invalid conveyance, such as a forged deed or undelivered deed.
  - **Suit against double-dealing grantor**: If a person loses title to a subsequent purchaser because of failure to record, that person may sue the grantor who conveyed twice and recover, under the theory of unjust enrichment, the amount that the grantor received from the subsequent purchaser. The grantor is selling the prior purchaser's property and holds the proceeds as constructive trustee for the prior purchaser.

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- **5 Point Test: (Mogk)**

1. **Was the first conveyance required to be recorded?**
    a. Recording Act applies if the instrument is eligible to be recorded under the act. If it is eligible to be recorded, it is essentially REQUIRED to be recorded.
        i. Not required: Leases for less than 1 year, adverse possession, oral leases.
    b. If not required to be recorded (EX: arrangement between grantor and grantee is for a lease lasting less than 1 year; adverse possession), common law applies.
2. **Was it duly recorded within the chain of title?**
    a. Must be recorded within the chain of title. So if it is, then the 1st grantee is protected.
        i. Why? Because one searching the property must have constructive notice.
    b. If not recorded at all, or just not in the chain of title, grantee #2 will be preferred.
3. **Was the second taker a protected person under the act?**
    a. A protected person is a BFP, which requires:
        i. Good Faith
        ii. For Value (consideration required, not nominal)
        iii. Without Notice
    b. 1st grantee is ONLY defeated if the 2nd grantee is a protected person
4. **Was the protected person (2nd grantee) required to duly record first to win between the two?**
    a. If in **notice state** → NO
        i. "Notice" statutes: under a notice statute, a subsequent BFP prevails over a prior grantee who has failed to record. The important fact under a notice statute is that the subsequent purchaser had no actual or constructive notice at the time of the conveyance. B must have notice at the time of conveyance from O.
    b. If in **race-notice state** → YES
        i. "Race-notice" statute: Under a race-notice statute, in order for a subsequent purchaser to win, he must both win the race to record and be without notice. Hence, a subsequent BFP is protected against a prior grantee only if he records before the prior grantee.
            1. Ex: "A conveyance of an estate in land shall not be valid against any subsequent purchaser for value, without notice thereof, whose conveyance is first recorded." - Whoever records first wins.
5. **Did the protected person (2nd grantee) duly record within the chain of title first (if required to do it first)?**
    a. Yes→ then 2nd taker/ grantee preferred
    b. No → then default to common law and 1st taker preferred

- **Recording Statutes**
    - **Notice Statutes**
        - A conveys to B. B does not record. Then A conveys to C. If C takes without notice, C is protected.
        - If 2nd taker is a BFP, he defeats the 1st taker that failed to record
    - **Race-Notice Statutes**

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    - A conveys to B. B does not record. Then A conveys to C. If C takes without notice, C must record before B to be protected.
    - The 2nd taker is protected if they are a BFP and they record first
    - Michigan follows this
- **Notice:**
    - Actual notice: actually knew grantee received title
    - Constructive Notice: Reasonably prudent person should have done due diligence and researched chain of title
    - Inquiry Notice: Knew or should have known: Reasonably prudent person would have inspected further.
    - Imputed Notice: Duty to go and investigate what is physically transpiring on land.

- **Applications:**
    - **Scope of constructive notice:** *Mountain States Telephone v. Kelton*
    - **Recording an undelivered deed:** *Stone v. French*
    - **Deed executed prior to death but unrecorded at death:** *Earle v. Fiske*
    - **Recording does not protect against interest arising by operation of law:** *Muggas v. Smith*
    - **Failure to index the deed:** The grantee of a deed that has not been indexed properly by the recorder's office may or may not be protected against a subsequent BFP. Some courts hold that grantee is protected because, by delivering the deed for recording, he did all he could to give notice. Other courts protect the BFP on grounds that there was insufficient notice. The latter view is considered the better one because until a deed has been filed and indexed, there is no way to locate it.
        - **Improper indexing:** *Mortensen v. Lingo*
    - **Priority of lien recorded before deed:** *Simmons v. Stum*

Mountain States Telephone v. Kelton*:* Recorded Deed is Constructive notice only to those who are obligated to search for it.

- **FACTS**: Mountain States Telephone sued contractor and landowner for damage to a buried cable that contractor cut through. P alleged that Ds had dug up a buried cable of which they had constructive notice.
- **ISSUE**: Does a contractor have a duty to examine the easement records to discover an easement for underground cable before digging?
- **HELD**: No.
    - **RULE**: The purpose of enacting the recording act was to make sure that there was not 2 grantees so the court will only charge notice to the grantees. The contractor had no interest in the land and so was not bound to make the search.

Stone v. French: Recording an invalid deed does not make it valid, even against a BFP; Delivery issue

- **FACTS**: French signed a warranty deed as a gift to Dudley. The deed was never delivered, French died and a friend of his found the deed and gave it to Dudley. The friend did not have the authority to make this delivery. Dudley then conveyed to Stone who was a BFP.
- **ISSUE**: May an undelivered deed become valid by being recorded?

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- **HELD**: No.
    - The deed was delivered until after the death of French and therefore could not pass title. If the heir had no title, he could pass no title even to a BFP. This is a void title, and the subsequent recording could not make it valid.

Earle v. Fiske: Unrecorded deed has no force or effect against a BFP

- **FACTS**: N owned the land and then conveyed it to B and E for life, remainder to M. The deed was never recorded, however, and later when N died, B inherited all of Ns estate. B then conveyed the land to E, who was a BFP.
- **ISSUE**: May the sole heir at law (B) convey good title to a BFP (E) where the land was previously conveyed to others (B and E) prior to the death of the decedent (N) but the deed was unrecorded?
- **HELD**: Yes.
    - A deed that complies with the statutory requirements is effective between the original parties to it, even if the instrument of conveyance is not recorded. Title passes by deed, not by registration.
    - When 3rd persons are involved, however, the law requires either actual notice or constructive notice through registration. Even though the unrecorded deed is binding on the grantor, it is not valid against others without notice; to them, the unrecorded deed is a nullity, and the owner of record may be taken as the true and actual owner.
    - As a purchaser without notice, P is in a position to claim that the prior deed is null and void as to himself and that he, therefore, obtained good title.
    - **RULE**: An unrecorded deed has no force or effect against a BFP, even if the BFP bought the land from the record owner's heir, rather than from the record owner.

Muggas v. Smith: Title claimed by adverse possession need not be recorded to have priority over BFP

- **FACTS**: P obtained title to land by adverse possession and never recorded it. D purchased adjoining land which, by deed, included the strip adversely possessed by P. D built a building encroaching on the strip owned by P and P brought action to quiet title.
- **ISSUE**: Must a claim of title by adverse possession be recorded to stand against a purchase by a BFP?
- **HELD**: No.
    - Titles maturing under the SOL are not within the recording acts generally.
    - Once title is vested by adverse possession, it cannot be divested short of those acts necessary to divest a title obtained by deed. Since P did not act to divest title, she still had claim to title and D, a BFP could not divest the title.
    - **RULE**: If you gain land by adverse possession, it is not required to be recorded because it is not recordable: no eligible instrument to be recorded.

Mortensen v. Lingo: Indexing is essential part of recording process

- **FACTS**: MC conveyed to A, who recorded with the registrar, but the deed was not indexed. MC then conveyed the same property to L who in turn conveyed the land to MO. A is now threatening to evict MO. MO (Grantee #2) is suing the grantor, claiming that quiet enjoyment is being interfered with.

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  - **2 innocent parties: the recording office is at fault.**
- **ISSUE**: Is proper indexing required before a constructive notice of ownership will arise?
- **HELD**: Yes.
  - **RULE**: If the registrar fails to index the deed at recording, the fault lies with the party whose deed was not indexed.
  - Recording of a deed without proper indexing is not sufficient to give constructive notice of ownership to a subsequent BFP.

Simmons v. Stum: In **pure race** jurisdiction, instrument recorded first has priority

- **FACTS**: P brought an action to foreclose a mortgage against D. D alleges she had no notice of the mortgage. P had recorded the mortgage 2 days after D had received the conveyance, but D offered no proof as to when she recorded.
- **ISSUE**: Is a grantee liable for a mortgage that is recorded after the receipt of the deed but before the deed is recorded?
- **HELD**: Yes.
  - **RULE**: In a pure race jurisdiction, the instrument recorded first has priority.

- **Persons Protected**
  - ***Who is protected by the recording acts?*** Only a BFP is entitled to protection under "notice" and "race-notice" statutes. To attain this status, a person must satisfy 3 requirements:
    - He must be a purchaser
    - He must take without notice of the prior instrument (including actual, constructive, inquiry or imputed notice); and
    - He must give valuable consideration.

- If a person does not meet these requirements, he is not protected by the recording acts; the common law rule of first in time prevails. In a "race" jurisdiction, notice is irrelevant. Nonetheless, a race statute protects only subsequent purchasers for valuable consideration who win the race to record.
  - **Donee:** *Eastwood v. Shedd*
  - **Sufficiency of consideration:** *Strong v. Whybark*
  - ***Antecedent debts as consideration:*** *Gabel v. Drewrys Limited, U.S.A.*
  - ***Creditors:*** *Osin v. Johnson*
  - **Possession as notice:** *Wineberg v. Moore*

Eastwood v. Shedd: Recording Statute protects **donees**, not just bona fide purchasers for value

- **FACTS**: P received conveyance of real property by deed as a gift and recorded the deed. Previous to this and without notice to P, D had received a conveyance by deed of the same property but did not record.
- **ISSUE**: Is a Donee of real property who has duly recorded entitled to the same protection as a BFP?
- **HELD**: Yes.
  - The Colorado statute protected a gift recipient (Donee) like a BFP even though no value given. So, E was protected as a 2nd taker because the first taker did not record and there was no indication of bad faith. This is the **MINORITY rule**: the

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general rule is that a Donee is not protected as against a BFP who gives value for the property.

Strong v. Whybark: Court holds providing love and affection makes one a BFP for value

- **FACTS**: Hayden conveys land to Moore for $650. Moore did not record this conveyance. Hayden then conveyed the same land by quitclaim deed to Josephine (with consideration of $5 and "natural love and affection"). Josephine then recorded this title first.
- **ISSUE**: Was the consideration paid by Josephine of sufficient value?
- **HELD**: Yes.
    - The value of consideration was substantial enough to not be nominal and was sufficient. Josephine is a BFP as she took with (a) no notice, (b) for value [here] and (c) in good faith

Gabel v. Drewrys Limited: Mortgagee is purchaser for value **ONLY IF** mortgage secures a pre-existing debt and mortgagee gives new consideration

- **FACTS**: P obtained a mortgage on property as security for debts already owed. The mortgagor accepted because the record did not show any liens on the property. There was no set date when the mortgagor would collect, but P did not pay so mortgagor brought action to satisfy the note. D held a previous mortgage on the same property and subsequently recorded after P. P brought action to foreclose.
- **ISSUE**: Was mortgagor a protected person?
- **HELD**: No.
    - Mortgagor was not covered under BFP as no value (consideration) was provided. Court states that pre-existing debt converted to new debt was not adequate consideration for BFP status.

Osin v. Johnson: Add this case.

Wineberg v. Moore: BFP is required to inspect the property to determine any interests in it

- **FACTS**: P acquired title to real property but never recorded his deed. P possessed the land and dwelling thereon for occasional recreational purposes and posted "No Trespassing" signs on the roads and on part of the land. The road leading to P's property was obstructed by a locked gate that bore the words "No Trespassing," P's name and his out of state address. D obtained title to the land subsequent to P's purchase and duly recorded his title. P brought action to quiet title.
- **ISSUE**: Are grantees put on notice of a prior claim to title when the prior claimant posted signs and possessed the tract only occasionally?
- **HELD**: ***Yes***.
    - The race to record is irrelevant if they are not protected persons. They are not protected persons because they had **imputed notice**: you're charged with knowing what's transpiring on the land.
    - D had **imputed** notice as he should have investigated the land and **inquiry** notice, that he should have went to the property and prompted to further inquire. Therefore, D is not a BFP as he had notice which defeats a BFP claim.

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- **Chain of Title Problems:** Even though an instrument has actually been recorded and indexed in the recording office, the instrument might not be recorded and indexed in such a way as to give notice to subsequent purchasers. The deed may be absent from the "chain of title." To give notice to subsequent purchasers, a deed must be in the "chain of title," as that term is defined in the jurisdiction.
    - **Chain of title defined:** In all jurisdictions using a **grantor-grantee index system**, a purchaser is charged with notice of those conveyances of the subject property by her grantor recorded ***after*** the grantor acquired the property from his predecessor in title, and ***before*** the grantor conveys title to another. Likewise, the purchaser is charged with notice of conveyances made by the various predecessors in title during the periods they held the property. This is what might be called narrow or limited chain of title.
        - **Extensions of chain:** In some jurisdictions "chain of title" is defined to include, in addition to the above conveyances, other conveyances that can be picked up by a more extensive record search.
        - **Wild deeds:** A "wild deed" is a recorded deed that is not recorded in the chain of title. Sometimes the term refers to a recorded deed from a grantor who is not in the chain of title.
    - **Deeds recorded before grantor obtained title: estoppel by deed:** There is a split of authority on whether a recorded deed by one who has no title, but who afterwards obtains title, is constructive notice to a subsequent purchaser from the same grantor. The majority rule protects the subsequent purchaser by requiring only a limited search. The minority rule requires an extended search by applying the doctrine of estoppel by deed; i.e., the grantor had nothing to convey to the subsequent purchaser after obtaining title.
        - **Sale before government patent granted:** *Sabo v. Horvath*

Sabo v. Horvath: Deed recorded outside chain of title does not give constructive notice

- **FACTS**: ***Before*** Lowery received the government patent for the land in question, he sold it by quitclaim deed to Horvath (P), who recorded the deed. After receiving the patent, Lowery sold the land again by quitclaim deed to Sabo (D), who recorded his interest. P brought suit to quiet title.
- **ISSUE**: Does the recording of a deed given before the grantor has title, and which is therefore outside the chain of title, give constructive notice to a subsequent purchaser?
- **HELD**: No.
    - Since it was outside of the chain of title, P's recorded interest gave no notice to D; therefore, D should prevail.
    - **RULE**: A deed recorded outside the chain of title does not give constructive notice to subsequent purchasers.

- **Reference to unrecorded instrument:** If a recorded instrument refers specifically to an unrecorded instrument, the purchaser usually has an obligation to make inquiry into the contents of the unrecorded instrument. Because of the burden this places on the title searcher, some states have statutes providing that no burden of inquiry is placed upon a purchaser by "***indefinite reference***." An indefinite reference generally is a reference to interests not created by a properly recorded instrument.

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Title Assurance

- After closing assurances
- This occurs after performance by both parties and subsequent to the closing on land sale
- Applies to the condition of the TITLE
- **Before performed:**
    - There was an **implied warranty of marketability** (relates to the quality of title and not condition of property or improvement on the land. Deals with encumbrance or defect on the title.
        - This doesn't survive closing unless there is an express provision in the K stating otherwise.

After performed/ closing

3 bodies of law provide *after* closing protection:

- **(1) Warranties in a Warranty Deed** (That survive closing)
    - Implied Warranty of Habitability
        - Applies only to new construction, not existing houses
        - The notion of buyer beware still applies to existing housing
        - Survives closing
    - Implied Warranty of Fitness for Purpose
        - In purchase agreement
        - Applies to residential housing, new and pre-existing
        - Survives closing
    - Waiver of Implied Warranties (disclaimers)
        - Disclaimer is signed to waive implied warranty
        - Must be clear and conspicuous
        - Cannot be contradictory to public policy
        - Must be free and clear from any doubt
- Notes:
    - Express Provisions
        - Seller warrants that house is free from any and all defects
        - Provisions cannot be contrary to public policy
    - 3rd Party Insurance
        - Bought to protect the home against any issues which may arise
    - 3 Warranties of a Warranty Deed Which Survive Closing:
        - Must be breached *at closing* or they are never breached: (10 years SOL)
            - As there is only a stator proscribed period of time to bring this cause of action, or else it is extinguished (close to closing)
                - Seisin.
                - Against all encumbrances.
            - Future covenant/warranty:
                - Quiet Enjoyment: Not breached at the time deed is accepted, only breach when grantees quiet enjoyment interfered with
- **(2) Insurance Law (Title)**
- **(3) Statutory provisions that extinguish outstanding claims/Statutory Assurances**
    - Running of a Statute of Limitations

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- Primarily adverse possession, but can also be enforcement of possibility of reverter, power of termination or executory interest.

Petersen v. Hubschman: Implied Covenant of Habitability expanded

- **FACTS**: Ps contracted to purchase a new home, which was to be built by D with some help from P. Ps paid $19k in earnest money, labor and materials but became dissatisfied with D's performance because of numerous defects in construction. These defects did not render the house dangerously unsafe or uninhabitable, but repair of the defects would involve major work.
- **ISSUE**: Does the warranty of habitability for a new home extend beyond the mere assurance that a home is habitable?
- **HELD**: Yes.
  - D asserts that the implied warranty of habitability can be asserted by vendees such as Ps only if the defects in a new house render it unfit for habitation. Such a rule would not satisfy the purpose of the warranty. Instead, by analogy with the U.C.C.'s warranty of fitness for a particular purpose, the implied warranty of habitability shall be a warranty by the builder-vendor that **the house, when completed and conveyed to the vendees, is reasonably suited for its intended use.**
  - **RULE**: Implied warranty of habitability, in which a builder-vendor warrants that a new home is of fair-average quality, would pass without objection in the building trade and is fit for the ordinary purpose of living in it, applies in the context of the purchase of a new home.

G-W-L, Inc. v. Robichaux: Waiver of warranty of habitability

- **FACTS**: Ps contracted to buy a house to be built by D. Ps signed a promissory note that included a provision that the note and its attachments were the entire agreement and that there were no warranties, express or implied. When the house was completed, the roof had a substantial sag in it. Ps sued for breach of express and implied warranties. The jury found that no express warranties had been breached, but that the house was not merchantable
- **ISSUE**: When a K states that there are "no warranties, express or implied, in addition to said written instruments," do the parties waive the implied warranties of fitness?
- **HELD**: Yes.
  - The language in the note that Ps signed is clear and free from doubt. The parties to a K are obliged to protect themselves by reading what they sign.
  - **RULE**: The implied warranty of habitability may be waived if the language waiving the warranty is clear and free from doubt.
- **Covenants for Title:** Normally, the extent of the seller's liability for some defect in title is governed by the covenants in the deed, if the deed contains no covenants, the seller is not liable.
  - **In general**
    - **Types of deeds:** Various types of deeds are used to convey interests in property. Some warrant title, some do not. Deeds can be classified into three types, depending on the warranties included. These types are general warranty deeds, special warranty deeds and quitclaim deeds.

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- **General warranty deed:** A general warranty deed warrants 3 things: warranty of seisin, warranty against encumbrances and warranty of quiet enjoyment. It warrants title against defects arising before as well as during the time the grantor had title.
- **Special warranty deed:** A special warranty deeds warrants the same things however the warranties only cover defects arising during the grantor's tenure, not any time before that. Hence, the **grantor guarantees only that he has done nothing to make title defective.**
- **Quitclaim deed:** A quitclaim deed **warrants nothing**. The grantor merely transfers whatever right, title, or interest he has, if any.

▪ **Covenants for title in warranty deeds:** A warranty deed contains present covenants (seisin, encumbrances) and future covenants (quiet enjoyment).

- **Present Covenants:** one where the described situation either exists or does not exist when the covenant is made. For example, the grantor either has seisin or does not have seisin when he makes the covenant. The present covenants are:
  - **o** Covenant of seisin**:** the grantor covenants that he owns the estate or interest that he purports to convey.
    - The covenant is breached if the grantor does not own the interest he purports to convey. No eviction or disturbance of the grantee's possession is required to establish a breach.
  - **o** Covenant against encumbrances**:** The grantor covenant that there are no easements, covenants, mortgages, or liens on the property.
  - o Breach **-** Present covenants are breached, if at all, when made. If it is breached, it becomes a chosen cause of action and at common law this is un-assignable or un-transferrable, meaning the original grantee could sue the original grantor for these covenants; but when grantee #1 sells to grantee #2, grantee #2's action is against grantee #1, not against original grantor
    - State statutes supersede common law and depending on the statute, some say that grantee #1 can give grantee #2 a cause of action, but not the actual covenant itself.
- **Future Covenants:** A future covenant is a continuing one. It is not breached until the grantee is disturbed in possession. Note that "disturbed" includes being subject to an injunction or damages for breach of a restrictive covenant or paying off a mortgage to prevent foreclosure.
  - **o** Covenant of Quiet Enjoyment**:** The grantor covenants that the grantee will not be disturbed in her possession or enjoyment of the property by a 3rd party's lawful claim of title.

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        - **Future covenants** attach to the land and run to subsequent grantees. **Present covenants** do not.
        - If grantee 1 □ to grantee 2 with warranty deed, grantee 2 has 3 warranties from grantee 1 (warranty of Seisen, against encumbrances, and quiet enjoyment) and 1 warranty from original grantor (quiet enjoyment): can bring action against either party, but can only bring it against once
    - **If a party asserts paramount title over yours, you have 3 options:**
        - (1) Try to avoid eviction
            - Argue you have better title by virtue of the record or you took it by adverse possession.
        - (2) If you made improvements, avoid complete loss by asking
            - For cost of improvements OR increased value of the land because of improvement (whichever is less).
        - (3) Try to recoup the rest of your loss
            - Rely on warranty of quiet enjoyment in warranty deed.
                - Entitled to purchase price plus interest (amount grantor received) OR
                - If value of land was appreciating over time, then go after your grantor and not the original grantor.
    - **Constructive eviction requires disturbance:** *Brown v. Lober*

Brown v. Lober: Breach of covenant of quiet enjoyment requires ouster

- **FACTS**: P bought land from Bost through a warranty deed. P took possession and recorded the deed, then granted coal option to Consolidated Coal. 2 years later, P discovered they only owned 1/3 interest in the coal and not the full rights, thus P has to renegotiate with coal company and lost money.
- **ISSUE**: Was there a breach of quiet enjoyment?
- **HELD**: No.
    - The warranty of seisin was breached at time of delivery but P failed to bring the cause of action within the **SOL** so he cannot recover.
    - There was no breach of quiet enjoyment because P was not quasi-evicted from the land (no one tried to come and evict him or assert their paramount title). In order for there to be a breach of quiet enjoyment, there has to be a physical act, in the sense that the paramount title owner is asserting his rights; the mere existence of a paramount title is not sufficient.
    - *There was a breach of seisin since the coal interest is treated as being in fee. If the coal interest was treated as an easement, it would be a breach of the warranty against encumbrances.*

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- **RULE**: To succeed on a claim for breach of the covenant of quiet enjoyment, one must show not only paramount title in another, but also actual or constructive ouster.

- **Covenant against encumbrances:** The covenant is breached by the existence of an encumbrance. **No eviction or disturbance in possession is necessary**. (unlike for quiet enjoyment)
  - As with other **present covenants**, a covenant against encumbrances is breached when made, if at all. The grantee has an immediate cause of action.
  - ***Readily apparent encumbrance:*** *Leach v. Gunnarson*

Leach v. Gunnarson: Covenant breached despite open, visible encumbrance

- **FACTS**: D bought land with a spring on it. Ps were using the spring but the vendor assured D that Ps had no right to use the spring and D received a warranty deed that was "free and clear of all encumbrances." Ps sued for a decree that they owned in fee simple an easement for using the spring and a trial court found that they did. D filed a complaint against the vendor claiming that if Ps has a right to use the spring, the vendor breached the covenant against encumbrances.
- **ISSUE**: Is a 3rd party's irrevocable license to use a spring on a grantee's land a breach of the grantor's covenant against encumbrances if the license is an open, notorious and visible physical encumbrance?
- **HELD**: Yes.
  - If the grantor desires to exclude any encumbrances from the scope of his covenants, the exclusions must be expressly set forth in the deed.
  - Two prior cases held that an open, notorious, and visible physical encumbrance was NOT a breach of the covenant against encumbrances because it was inconceivable that the purchaser could have contemplated that the vendor would remove the encumbrance before tendering an abstract. These cases involved a railroad and a power line. This exception is limited to such permanent, obvious encumbrances as utilities and highways. The spring used by Ps was not this type of encumbrance so the exception does not protect the vendor here.
  - **RULE**: If the encumbrance is a privately held one, not a public entity or utility, the warranty is still enforceable and thus the Ds have to pay the difference between the value of the property without encumbrance and the value with encumbrance.

Damages

Davis v. Smith: Measure of damages = interest (value of title at time of purchase plus interest)

- FACTS: Party bringing an action against a remote grantor on the covenant of quiet enjoyment. 3 possible measures of damages, the court finds that #1 (what the grantor received plus interest) is the proper amount because the other two would be unfair against the grantor.
- **Successor grantee is entitled to recover against remote grantor the amount the remote grantor received plus interest (most prevalent)**

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Madrid v. Spears: Measure of damages = cost of improvements (cost of improvements/ enhanced value)

- **RULE**: When one in possession makes improvements to property that is subsequently returned to the rightful owner, possessor is entitled to recover the cost of the improvements or the amount said improvements enhanced the value of the property, whichever is less.

Estoppel by Deed: When a grantor purports to convey an estate in property that he does not own but later acquires, his **subsequently acquired title works to the benefit of the grantee under the deed**. By executing a deed without title, he is deemed to have covenanted that he will immediately convey title to the grantee when he obtains it.

Application to mineral rights

- *Robben v. Obering*: Doctrine of after-acquired title
    - **FACTS**: Grantor executed a lease with a warranty (acts like a warranty deed) to Obering of the entire land. Grantor actually only had ¼ interest in the land. Grantor obtained a quitclaim deed from his brother of the ¼ interest but when he wasn't able to get the last ½ interest, he gave the ¼ interest back to his brother. The brother then conveyed to Robben (P). P brought a declaratory action to determine the respective interests in the land.
    - **ISSUE**: Does the doctrine of after-acquired title apply to an interest in a lease for mineral rights acquired by quitclaim?
    - **HELD**: Yes.
        - **RULE**:If a lease is made by one who has no present interest in the property, but acquires an interest during the term, the lease operates on the interest as if vested at the time of execution. Oil and gas leases are treated in a similar manner.
            - Here, grantor never conveyed back to his brother because he had already conveyed that interest to Ds. So brother didn't have it to transfer to Ps.

Examination of Records or of an Abstract Title: Although the purchaser has constructive notice of the public records, she must actually examine them to know what they contain. Abstract companies create abstracts of the actual records as an alternative to searching out the records, which can be a difficult, time-consuming task.

First American Title Insurance v. First Title Service Company: Abstractor held liable to 3rd party

- **FACTS**: Seller buys an abstract (collection of legal documents that affect the property so one does not have to search them out herself) and buyer buys the title insurance policy. The buyer takes the abstract from the seller and gives it to the title insurance company which it relied on to issue its policy to the buyer. The abstract given did not disclose a defect and later that defect arose. The title insurance company paid the buyer for the damage and now brings a negligence suit against the title service company that prepared the bad abstract on which it relied.
- **ISSUE**: May an abstractor be held liable for negligent preparation of an abstract to a 3rd party beneficiary of the contract of employment of the abstractor?

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- **HELD**: Yes.
    - **RULE**: It is appropriate to hold an abstractor responsible when an abstract is prepared in the knowledge that the employer will provide it to 3rd persons to induce them to rely on the abstract as evidence of title. In such situations, when the abstractor knows or should know that its customer wants the abstract for the use of a prospective purchaser who relies on the abstract in buying the property, the abstracter's duty of care runs to the purchaser, as well as others involved in the transaction through their relationship to the purchaser, such as lenders and title insurers. However, the duty does not extend beyond the intended transaction.

Title Insurance/After Closing Insurance

- Background: When buying a title policy there are 2 distinct aspects:
    - (1) Paying for title company to conduct your due diligence search of the record and prepare a preliminary report for you
        - This will only describe what rights are outstanding
        - An abstract tells you everything, even the rights which have been extinguished
    - (2) Buying the after-closing title insurances
        - In the absence of exceptions, the policy will cover any and all encumbrances that may surface later.
            - Hidden defects not disclosed by the record that are insured against:
                - Disability of the grantor in the chain of title (grantor is a minor or incompetent)
                - Forgery of a deed
                - Fraudulent representation about a marriage: said he is single and dowry is riding along with title
                - Mistaken identity of a record titleholder and a grantor due to similar or identical names
                - Errors in the record
                - Errors in the examination of the record
                - Undisclosed heirs
                - Exercise of a power of attorney after death of the creator of the power
                - Defects in conveyances in the chain of title due to lack of delivery

- **Construction of title insurance contract:** *White v. Western Title Insurance Co.*
- **Nonparty claimants:** *Transamerica Title Co. v. Johnson*

White v. Western Title Insurance Co.: Court finds title policies cover all things of record, even natural resource easements

- **FACTS**: Longhurst executed an easement for water rights to a water company and this deed was recorded. 3 years later, P bought the land from Longhurst and P wanted a preliminary report from the title insurance co. None of the reports listed the recorded easement. Later, the owner of the easement asserted its rights against the property. Ds admitted its responsibility for not listing the easement but pointed to an exception in the

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insurance policy for water rights, claims or title to water. Ps sue for breach of K and negligence.

- **ISSUE**: Must a title insurance be broadly construed to give the greatest possible protection to the insured?
- **HELD**: Yes.
    - In construing disputes regarding the title insurance policy, ambiguities must be resolved against the insurer and the language should be construed to give the greatest possible protection to the insured.
    - Failure to note an encumbrance of record is prima facie negligent. Ps had no duty to investigate but were justified in relying on D's preliminary title report.

Transamerica Title Co. v. Johnson: Abstractor's liability not extended to title insurers

- **FACTS**: Title insurance is suing the seller who was a developer of the land. The seller had info about the assessment of the sewer and did not disclose it. The assessments required the owner of the lots to pay for the construction of the sewers. The assessments were made permanent and were in the record. Title insurance company makes a report and does NOT include the assessments. Buyer takes a warranty deed and is later required to pay for the assessments. The insurance company pays for the assessments because it was a defect on the title. Now insurance company is suing the seller on the warranty deed.
- **ISSUE**: May a title insurance company that fails to disclose a defect in title recover from the vendor who knew of the defect?
- **HELD**: Yes
    - As a matter of contract, the contractor has assumed to pay the costs of assessments and the contract did not say the buyer assumes the costs of assessments. To allow the contractor to get out of paying would end in a windfall for contractor and forfeiture for insurance company. P is allowed to bring suit, even though the negligent report was part their fault.
    - RULE: Title insurance companies do not have the same liabilities as abstractors.

- **Statutes as Aids to Title Assurance:** The principal role of statutes of limitation, adverse possession and prescriptive rights is to help assure the title of the possessor of land. Protection of possession in fact protects ownership because title may be difficult to prove.
    - **Termination of reverter:** Some states have statutes that expressly limit the period during which a possibility of reverter or right of entry can exist.
    - **Mineral lapse statute:** *Short v. Texaco*
    - ***Otherwise valid common law claim extinguished:*** *H&F Land, Inc. v. Panama City Airport*
    - **Taking by successive adverse possessors:** *Howard v. Kunto*
    - **Marketable Title acts:** The purchaser is protects against any defects in title arising prior to the statutory period (Michigan 40 years).

Short v. Texaco: Mineral Lapse Act Ruled Constitutional

- **FACTS**: An act of the legislature of Indiana, called the Mineral Lapse Act (the Act), was to put an end to interests in minerals that have not been used for 20 years. Under the act

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the unused mineral rights would return to the surface rights owner. The lower court found the Act to be contrary to due process, equal protection and the guarantee of just compensation for property taken for the state.

- **ISSUE**: May a state terminate all mineral interests that are not used within a specified time period?
- **HELD**: Yes.
    - The act promotes the economic development of the land by returning mineral rights to parties that are likely to develop the surface of the land instead of holding onto empty land for the purpose of maybe one day mining it. The act is constitutional.

Failoni v. Chicago & North Western Railway Co.

- **FACTS**: P bought the land with outstanding mineral right being held by D. P never used the mineral rights and is trying to claim by adverse possession. Adverse possession requirements have vacant land, color of title and paid taxes for 7 years. Holder of surface right (P): outstanding mineral right has been extinguished
- **RULE**: Adverse possession of the surface is not sufficient to adversely possess the underlying minerals.

H&F Land, Inc. v. Panama City Airport: Marketable record title act applies to easements by necessity

- **FACTS**: Appellant landowner of a land-locked estate argued that his right to use an easement had not been extinguished, and the lower court's grant of summary judgment in favor of appellee city was in error. The trial court granted summary judgment on the basis that the Marketable Record Title Act operated to extinguish his claim of necessity to an easement because it had not been asserted within the required 30 years. On appeal, appellant conceded that he never filed notice of his claim
- **ISSUE**: Does the Marketable Record Title Act extinguish an otherwise valid claim of a common law way of necessity when such claim was not asserted within 30 years?
- **HELD**: Yes.
    - The parties agree that the 1940 conveyance created an implied common law way of necessity from P's parcel over D's property. The problem is that no notice of a claim to the way of necessity was ever filed in the public records or asserted by use.
    - **MRTA** was adopted to simplify and facilitate land title transactions by giving certainty to land ownership. It provides that any person vested with any estate in land of record for 30 years or more shall have a marketable record title free and clear of all claims of an interest in land, with certain exceptions.

Howard v. Kunto

- **FACTS**: D purchased property for which the deed description did not match the location possessed. The mistake occurred many years prior, sufficient to establish the 10yr adverse possession requirement. D's predecessors had all perpetuated the mistake. The property was occupied during summer months only.
- **ISSUE:**
    - If property is occupied during short periods of the year only, may adverse possession be established by continuous possession?

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  - If predecessors in title who occupy the land not described in the deed (although claimed by them) convey and perpetuate the mistake, may they take their occupancy periods for purposes of adverse possession?
- **HELD**: (1) Yes. (2) Yes.
  - Possession must only be such as marks the property for an open and notorious claim of ownership. Continuity of possession may be established although the land is used regularly for only a certain period each year, depending on the accepted use of that type of land.
  - Separate periods of actual possession by those holding land hostile to the owner can be tacked together, provided there is privity of estate between the adverse possessors.

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