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REAL PROPERTY

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I. ESTATES IN LAND

A. IN GENERAL

"Estates in land" are ***possessory interests*** in land. These interests may be ***presently*** possessory (present estates), or they may become possessory in the ***future*** (future interests). They may be "freeholds," which give possession under some legal title or right to hold (e.g., fees or life estates), or they may be "nonfreeholds," which give mere possession (i.e., leases). Estates in land may be of potentially infinite duration, as in the case of a fee simple, or they may be of limited duration, as in the case of an estate for years. But whatever their characteristics, "estates in land" must be distinguished from ***nonpossessory*** interests such as easements, profits, covenants, and servitudes.

This section of the outline will examine various estates in land. It divides the interests into two classes: present interests and future interests. However, some future interests (those following defeasible fees) will be considered with the present interests to which they are attached.

B. PRESENT POSSESSORY ESTATES

1. Fee Simple Absolute

An estate in fee simple absolute is the largest estate permitted by law. It invests the holder of the fee with full possessory rights, now and in the future. The holder can sell it, divide it, or devise it; and if she dies intestate, her heirs will inherit it. The fee simple has an indefinite and potentially infinite duration. The common law rule requiring technical words of inheritance ("and his heirs") has been abolished by statute in nearly all jurisdictions. Typically, such statutes provide: "A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended."

Example: A conveyance from "O to A" is presumed to pass a fee simple interest if O owned one. At common law, absent the words of inheritance, even a conveyance "to A in fee simple" would convey only a life estate to A.

2. Defeasible Fees

Defeasible fees are fee simple estates of ***potentially*** infinite duration that can be terminated by the happening of a specified event. Because defeasible fees can result in forfeitures, courts will construe, where possible, a purported limitation as a mere declaration of the grantor's purpose or motive for making the grant (i.e., as precatory language). (*See* b.1)a), *infra*.)

a. Fee Simple Determinable (and Possibility of Reverter)

A fee simple determinable, also called a determinable fee, is an estate that ***automatically terminates*** on the happening of a stated event and goes back to the grantor. (It must be distinguished from the fee simple subject to a condition subsequent, where the grantor must take affirmative steps to terminate the estate of the grantee if the stated event occurs.) It is created by the use of durational, adverbial language, such as "for so long as," "while," "during," or "until." A fee simple determinable can be conveyed by the owner thereof, but his grantee takes the land subject to the termination of the estate by the happening of the event.

Example: O conveys land "to A for so long as no alcoholic beverages are consumed on the premises." This gives A a fee simple because the estate

may last forever if no one ever quaffs a brew. If A conveys his fee simple determinable estate to B, B will own the "for so long as" estate. If A does not convey his estate, on A's death it will pass by will or intestacy to his successors, and so on. If, however, someone ever consumes an alcoholic beverage on the premises, the estate will automatically come to an end according to its own terms; and O will immediately and automatically become the owner of the fee simple, without taking any steps to terminate A's interest.

1) Correlative Future Interest in Grantor—Possibility of Reverter
Because the grantee's estate may end upon the happening of the stated event, there is a possibility that the land may revert back to the grantor. The interest that is left in a grantor who conveys an estate in fee simple determinable is called a "possibility of reverter." It is a future interest because it becomes possessory only upon the occurrence of the stated event.

a) Possibility of Reverter Need Not Be Expressly Retained
At common law and in nearly all states today, the grantor does not have to expressly retain a possibility of reverter. It arises ***automatically*** in the grantor as a consequence of his conveying a fee simple determinable estate, with its built-in time limitation.

b) Transferability of Possibility of Reverter
At early common law, the possibility of reverter could not be transferred inter vivos or devised by will. An attempted transfer of the interest was invalid; but the possibility of reverter was not extinguished by the attempted transfer and would still descend to the heirs of the owner. Today, in most jurisdictions, the possibility of reverter can be transferred inter vivos or devised by will, and descends to the owner's heirs if she dies intestate.

2) Correlative Future Interest in Third Party—Executory Interest
A possibility of reverter arises only in the grantor, not in a third party. If a comparable interest is created in a third party, it is an executory interest. (*See* C.3., *infra*.)

b. Fee Simple Subject to Condition Subsequent (and Right of Entry)
A fee simple subject to a condition subsequent is created when the grantor retains the power to terminate the estate of the grantee upon the happening of a specified event. Upon the happening of the event stated in the conveyance, the estate of the grantee ***continues until the grantor exercises her power of termination*** (right of entry) by bringing suit or making reentry. The following words are usually held to create conditions subsequent: "upon condition that," "provided that," "but if," and "if it happens that."

Example: O, owning Blackacre in fee simple, conveys it "to A and his heirs, on the express condition that the premises are never to be used by A for the sale of liquor, and in the event that they are so used, then O or her heirs may enter and terminate the estate hereby conveyed." A has a fee simple subject to a condition subsequent. O has a right of entry. If the condition is broken, O has a power to terminate the estate of A by asserting her ***right of entry***.

1) Correlative Future Interest in Grantor—Right of Entry
A right of entry (also known as "right of reentry" or "power of termination") is the future interest retained by the transferor who conveys an estate on condition subsequent. It is necessary to ***expressly*** reserve the right of entry in the grantor; this retained interest does not automatically arise as in the case of a fee simple determinable and possibility of reverter.

a) Failure to Reserve Right of Entry
Courts often hold that words of condition, standing alone, create only covenants, easements, or trusts, or are mere precatory terms.

Example: O conveys land "to A and his heirs, provided that liquor is not sold on the premises." O has not used words indicating the estate will terminate if liquor is sold on the premises. Nor has O retained a right to reenter. Because a statement of the grantor's wishes as to how the property should be used does not ordinarily imply a right retained by the grantor to enforce the purpose, a court may construe the deed as giving A a fee simple absolute. [Wood v. Board of County Commissioners, 759 P.2d 1250 (Wyo. 1988)]

b) Waiver of Right of Entry
Because the grantor can elect whether or not to terminate the grantee's estate, she may waive her right or power to enforce a forfeiture by express agreement or by her conduct. (Such is not the case with a fee simple determinable, where the forfeiture is automatic.)

(1) Inaction by Itself Not a Waiver
The general rule is that when there is a breach of the condition and the grantor simply does nothing about it, the power of termination is not waived. (*See also* V.D.2., *infra*.) However, where there is any element of ***detrimental reliance*** by the fee holder, many courts treat inaction as a waiver on an estoppel or laches theory.

c) Transferability of Right of Entry
At common law, a right of entry was ***not devisable or transferable inter vivos*** to a third person. The right of entry did, however, descend to the heirs of the grantor on her death. Today, in most jurisdictions, a right of entry is still ***not*** alienable inter vivos. (Indeed, in a handful of states, an attempted transfer destroys it.) But in most states, rights of entry are devisable; and in all states, they descend to the owner's heirs.

2) Correlative Future Interest in Third Party—Executory Interest
A right of entry can be created only in favor of the grantor and her heirs. If a similar interest is created in favor of a third party, the interest is called an executory interest (e.g., "if the property is ever used for other than church purposes, then to B and his heirs"). Unlike a right of entry, an executory interest is subject to the ***Rule Against Perpetuities***. (*See* E., *infra*.)

3) Compare—Fee Simple Determinable
This estate is distinguished from a determinable fee in that the breach of the condition does ***not*** itself terminate the estate and immediately revest the fee in the grantor or her successor. The estate continues in the grantee or his successor unless or until the grantor or her successor affirmatively elects to terminate it.

a) Construction of Ambiguous Language
The general policy of courts is to avoid forfeiture of estates. Thus, a conveyance that contains both durational language and a power of termination may be construed as creating a ***fee simple subject to a condition subsequent***, because the forfeiture is ***optional*** at the grantor's election rather than automatic.

Example: O conveys land "to A so long as liquor is not sold on the premises, and if liquor is sold, O has a right to reenter." The words "so long as" point to a fee simple determinable. The retained right of entry points to a fee simple subject to a condition subsequent. The court can classify the language to create either estate, but the fee simple subject to a condition subsequent is preferred.

c. Fee Simple Subject to an Executory Interest
A fee simple subject to an executory interest is an estate that, upon the happening of a stated event, is ***automatically divested in favor of a third person*** rather than the grantor.

Examples: 1) O conveys land "to Church; provided, however, that if the premises shall ever cease to be used for church purposes, title shall pass to the American Heart Association." Church has a fee simple subject to an executory interest in favor of the Heart Association. O does not have a right of entry because no such interest was reserved in the conveyance. The Heart Association's interest is not a right of entry because that future interest can be reserved only in favor of a grantor. The Heart Association's future interest is not a remainder because it divests a fee simple. Therefore, it is an executory interest.

Note: Executory interests are subject to the Rule Against Perpetuities, but the Heart Association's interest is valid because of the "charity-to-charity" exception to the Rule. (*See* E.1.e.1), *infra*.)

2) O conveys land "to Church for so long as the premises are used for church purposes, and if they shall ever cease to be so used, then and in that event to the American Red Cross." Church has a fee simple determinable subject to an executory interest in favor of the Red Cross. O has no possibility of reverter because he has not retained any interest; he has conveyed away his entire estate in the property. The future interest in the Red Cross cannot be a possibility of reverter because that interest arises only in a grantor, and the Red Cross is a grantee. It is an executory interest and not a remainder because it divests a fee simple. (Further discussion of these points will come later.)

Note: Were it not for the "charity-to-charity" exception to the Rule Against Perpetuities, the executory interest in favor of the Red Cross would violate the Rule.

d. Limitations on Possibilities of Reverter and Rights of Entry
In a few states, statutes limit the permissible duration of possibilities of reverter and rights of entry to a certain number of years (usually 30) in order to foster marketability of title. Other statutes (usually called "marketable title acts") require the rerecording of various future interests (including possibilities of reverter and rights of entry) every 20 to 40 years or they become unenforceable.

e. Conditions and Limitations Violating Public Policy
Conditions and limitations that are designed to prevent the acquisition or retention of an interest in land generally are struck down if they are contrary to public policy. Striking such a condition will result in an interest different from that intended by the grantor. (*See also* F., *infra*.)

1) Restraints on Marriage
If the purpose of the condition or limitation is to ***penalize*** marriage, it likely will be struck down. On the other hand, if the purpose is to ***give support*** until marriage, when the new spouse's obligation of support arises, the condition or limitation generally is upheld.

Example: O conveys land "to A, but if she marries, to B." Absent any evidence as to O's motive, the condition subsequent will be struck down, leaving A with a fee simple absolute.

Compare: O conveys land "to A for her support until she marries." Because O intends to give A support only until the burden of support shifts to A's spouse, A's fee simple determinable is valid.

2) Provisions Involving Separation or Divorce
Conditions and limitations meant to ***encourage*** separation or divorce are invalid. On the other hand, conditions and limitations meant to ***give support*** in the event of separation or divorce generally are valid.

Example: O conveys land "to A, provided that he divorces his current spouse within one year; if he does not, to B." Absent any evidence as to O's motive, the condition subsequent will be struck down, leaving A with a fee simple absolute.

3. Fee Tail
The fee tail, typically created by the words "to A and the heirs of his body," limited inheritance to ***lineal descendants*** of the grantee. If no lineal descendants survived at the grantee's death, the property either reverted to the grantor or her successors or passed to a designated remainderman. Today, most United States jurisdictions have abolished the fee tail and have enacted statutes under which any attempt to create a fee tail results in the creation of a fee simple.

4. Life Estate
An estate for life is an estate that is not terminable at any fixed or computable period of time,

but cannot last longer than the life or lives of one or more persons. It may arise by operation of law or may be created by an act or agreement of the parties.

a. Life Estates by Marital Right (Legal Life Estates)

Such estates arise under ***dower*** and ***curtesy***, the common law interests of wife and husband, respectively, in real property of which the other spouse was seized during marriage (including property acquired before marriage). At common law, a surviving wife's dower right entitled her to a life estate in an undivided one-third of her husband's lands. A surviving husband's right of curtesy gave him a life estate in all of his wife's lands if issue were born. For exam purposes, it is important to remember that a conveyance by a husband to a bona fide purchaser does not defeat dower unless the wife joins in the conveyance. Likewise, a husband's creditors cannot defeat a wife's dower rights. Most states have abolished both dower and curtesy and have instead given the surviving spouse a statutory right to take a portion of the deceased spouse's estate. Community property states do not recognize either dower or curtesy.

b. Conventional Life Estate

1) For Life of Grantee

The usual life estate is measured by the life of the grantee and is called simply a life estate. It may be indefeasible (so that it will end ***only*** when the life tenant dies), or it ***may be made defeasible*** in the same ways that fee estates can be defeasible (e.g., determinable, subject to a condition subsequent, subject to an executory interest). In such a case, the estate may end ***before*** the life tenant dies if the limiting condition occurs. (*See* Example 5), below.)

Examples: 1) O conveys "to A for life." In this case, A has an estate in the land for as long as he lives. On his death, the land reverts to O, the grantor.

2) "To A for life, then to B." This is a life estate because it is measured by the life of A and is not terminable at a fixed period of time.

3) "To A for life, but in no event for more than 10 years." This is an estate for years and not a life estate because the estate in A will end in 10 years (i.e., a fixed time period).

4) "To A for 10 years if he lives so long." This is also an estate for years and not a life estate because the estate in A will end in 10 years.

5) "To A for life or until she remarries." This is a life estate subject to a limitation, but nevertheless a life estate. The estate in A will not end at any fixed or computable time period. It can be termed a "life estate determinable," and is analogous to the fee simple determinable discussed above.

6) "To B and C after the life of A." A has an implied life estate.

2) Life Estate Pur Autre Vie (Life of Another)
A life estate pur autre vie is a life estate measured by the life of someone other than the life tenant. Such an estate can be created ***directly*** by the grantor, e.g., "to A for the life of B." A's estate ends when B dies. It can also be created ***indirectly***, as where the grantor conveys "to B for life," and B later conveys his interest to A. A owns an estate measured by B's life; it ends when B dies.

a) Inheritability
At common law, if A died before B, the property was regarded as without an owner until B died. Today, statutes provide that such estates are devisable and inheritable if no special occupant is named in the original grant. (A "special occupant" is a person named by the grantor to take the balance of the term, if any.)

c. Rights and Duties of Life Tenant—Doctrine of Waste
A tenant for life is entitled to all the ordinary uses and profits of the land; but he cannot lawfully do any act that would injure the interests of the person who owns the remainder or the reversion. If he does, the future interest holder may sue for ***damages and/or to enjoin*** such acts.

1) Affirmative (Voluntary) Waste—Natural Resources
As a general rule, a life tenant may not consume or exploit natural resources on the property (e.g., timber, minerals, oil). ***Exceptions*** to this rule allow exploitation in the following circumstances:

(i) In reasonable amounts where necessary ***for repair and maintenance*** of the land;

(ii) When the life tenant is ***expressly given the right to exploit*** such resources in the grant;

(iii) When ***prior to the grant, the land was used in exploitation*** of such natural resources, so that in granting the life estate the grantor most likely intended the life tenant to have the right to exploit (*but see* "open mines doctrine," below); and

(iv) In many states, where the ***land is suitable only for such exploitation*** (e.g., a mine).

Note: There is a vague "reasonableness" limit on the amount of oil or coal a life tenant can remove from the property.

a) Open Mines Doctrine
If mining (extraction of minerals) was done on the land before the life estate began, the life tenant may continue to mine the property—but is limited to the mines ***already open***. The life tenant may not open any new mines. There is a trend away from this limitation, applying instead the rule in (iii), above, to all natural resources, including minerals.

2) Permissive Waste

Absent a contrary provision in the instrument creating the life estate, a life tenant has a duty to make repairs to the property to keep it from being damaged by the weather, and to pay certain carrying charges (e.g., mortgage interest, property taxes, and special assessments for public improvements). However, this duty is limited ***to the extent of the income or profits derived from the land*** (or if there is no actual income or profit, to the extent of the reasonable rental value of the land). Failure to make required repairs or pay required carrying charges constitutes permissive waste. A future interest holder who expends funds in satisfaction of the life tenant's obligations (e.g., pays the property taxes to avoid a tax foreclosure sale) is entitled to reimbursement.

a) Obligation to Repair

A life tenant is obligated to preserve the land and structures in a ***reasonable state of repair*** (to the limited extent stated above). But the tenant is under no obligation to make permanent improvements on the land, no matter how wise it might seem to do so.

b) Obligation to Pay Interest on Encumbrances

A life tenant is obligated to pay interest on any encumbrances on the land (to the limited extent stated above). However, he does not have to pay anything on the principal of the debt; reversioners or remaindermen must pay the principal in order to protect their interests.

The foregoing applies to encumbrances on the entire fee simple estate. Of course, a life tenant could place a mortgage on the life estate alone, and would then be liable for both principal and interest payments.

c) Obligation to Pay Taxes

The life tenant is obligated to pay ***all ordinary taxes*** on the land (to the limited extent stated above).

d) Special Assessments for Public Improvements

If the life of a public improvement on the land is shorter than the expected duration of the life estate, the life tenant is obligated to pay all of the assessment (to the limited extent stated above). However, if the improvement is likely to outlast the life estate (e.g., curbing, sewers, water mains, a change in grade of a street), taxes and assessments are ***apportioned*** equitably between the life tenant and the holders of all future interests.

(1) Apportionment of Costs

Costs are usually apportioned by using the ratio produced by the market value of the life estate over the market value of the property.

e) No Obligation to Insure Premises

The life tenant is under no obligation to insure the premises for the benefit of a remainderman. However, both the life tenant and the remainderman have an insurable interest.

f) No Liability for Third Party's Torts
Under the modern view, life tenants are not responsible to remaindermen (as they were at common law) for damages caused by third-party tortfeasors. The life tenant's action against such third parties is limited to the damages to the life estate.

3) Ameliorative Waste
Ameliorative waste consists of acts that economically benefit the property. Ameliorative waste occurs when the use of the property is substantially changed, but the change increases the value of the property. At common law, any change to existing buildings or other improvements was always actionable waste, even if it improved the value of the property. Under modern authorities, however, a life tenant can substantially alter or even demolish existing buildings if:

(i) The market value of the future (or other nonpossessory) interests is not diminished; and ***either***

(ii) The remaindermen do not object; ***or***

(iii) A substantial and permanent change in the neighborhood conditions has deprived the property in its current form of reasonable productivity or usefulness.

Example: A holds a life estate in Blackacre, and B holds the remainder. The premises consist of an old and somewhat shabby apartment building that is nearly fully rented and produces a consistent income. The surrounding neighborhood includes many similar buildings. A proposes to demolish the building and construct a new shopping center on the land, which will produce much higher income. B objects to the change and brings an action to enjoin the demolition. B will prevail even though A's proposed changes would increase the value of the property. Because the existing building is economically productive and consistent with the neighborhood, A's commission of waste would not be justified.

a) Compare—Leasehold Tenant
Leasehold tenants are treated differently from life tenants. Most leasehold tenants remain liable for ameliorative waste even if the neighborhood has changed and the market value of the premises is increased. (*See* II.C.1.a.3), *infra*.)

b) Compare—Worthless Property
Under modern authority, a life tenant may ask for a judicial sale in a partition proceeding if it appears that the land is practically worthless in its present state. The proceeds are put in trust with income to the life tenant.

d. Renunciation of Life Estates
A life tenant who receives the estate by will or intestacy may renounce it, perhaps

because owning it would be burdensome. If this occurs, the courts generally ***accelerate*** the future interest that follows the life estate, allowing it to become possessory immediately.

5. Estates for Years, Periodic Estates, Estates at Will, Tenancies at Sufferance
These nonfreehold present estates in land are considered in the Landlord and Tenant section of this outline (*see* II.A., *infra*).

C. FUTURE INTERESTS

A future interest is an estate that does not entitle the owner thereof to possession immediately, but will or may give the owner possession in the future. A future interest is a ***present***, legally protected right in property; it is not an expectancy.

Examples: 1) O conveys land "to A for life, and on A's death to B in fee simple." A has a present possessory life estate. B has a future interest. (B's future interest is an indefeasibly vested remainder.) Upon the termination of A's possessory life estate, B's remainder in fee simple will become a present possessory estate in fee simple.

2) O conveys land "to A for life, and on A's death to B in fee simple if B survives A." A has a present possessory life estate. B has a future interest. (It is a contingent remainder.) Upon the termination of A's life estate, B's remainder in fee simple ***may*** become a present possessory estate in fee simple. B must survive A in order to take. (In this example, O also has a future interest. He has not conveyed away the interest represented by the contingency that B may predecease A. If B does predecease A, on the termination of A's life estate title to the land will ***revert*** to O. O's retained future interest is called a reversion.)

3) After the conveyance "to A for life, and on A's death to B," B can transfer his remainder interest to another person. Alternatively, if B dies during A's lifetime, his vested remainder will pass to the devisees under his will or (if B left no will) to his intestate heirs.

1. Reversionary Interests—Future Interests in Transferor

a. Possibilities of Reverter and Rights of Entry

These future interests are discussed above in connection with the present estates to which they are attached.

b. Reversions

A person owning an estate in real property can create and transfer a lesser estate (in the durational sense). The residue left in the grantor, which ***arises by operation of law***, is a reversion.

Examples: 1) O, owning land in fee simple, conveys it (i) "to A for life," or (ii) "to A for 99 years." In each case, O has a reversion in fee simple. She (or her successors) will be entitled to present possession of the land when the granted estate terminates.

2) O, owning a life estate in land, leases it "to A for 20 years." O has a reversion in a life estate. If O is still alive when A's lease expires, title

will revert to O for life. What happens if, 10 years after this transfer, O dies? A's lease will come to an end, for he was given a lease by one holding only a life estate. O cannot convey a greater interest than she has.

3) O, owning land in fee simple, conveys it "to A for life, and on A's death to B if B survives A." A has a life estate, B has a contingent remainder, and O has a reversion that will take in present possession at A's death if B predeceases A.

Reversions are transferable, devisable by will, and descendible by inheritance. The holder of a reversion may sue a possessory owner for waste and may recover against third-party wrongdoers for damages to the property (to the extent of the injury to the reversion).

c. All Reversionary Interests Are "Vested"

Although a reversionary interest becomes possessory in the future, it is a vested interest, not a contingent interest, because both the owner and the event upon which it will become possessory are certain. This is true even if the reversionary interest is determinable or defeasible. Because it is a vested interest, a reversionary interest is ***not subject to the Rule Against Perpetuities***.

2. Remainders

A remainder is a future interest created in a transferee that is ***capable of taking*** in present possession and enjoyment (i.e., capable of becoming a present interest) ***upon the natural termination of the preceding estates*** created in the same disposition. Unlike a reversion, which arises by operation of law from the fact that the transferor has not made a complete disposition of his interest, a remainder ***must be expressly created in the instrument creating the intermediate possessory estate***. At common law, the only preceding estates that could support a remainder were life estates and fee tails. Because nearly all American jurisdictions have abolished the fee tail estate, a safe rule of thumb is that remainders ***always follow life estates***. (*Note:* According to the Restatement of Property, under modern law, a remainder can also follow a term of years. However, there is very little case law on the point, and it is so rare that it is extremely unlikely to be tested.)

Examples: 1) "To A for life, and on A's death to B and his heirs." A has a present possessory life estate. B has a remainder in fee simple. It is a remainder because upon the expiration of A's life estate (natural termination of the preceding estate), B will be entitled to present possession and enjoyment of the property. The term "remainder" derives from the consequence that when A's life estate comes to an end, title "remains away" from the transferor instead of reverting back to him.

2) On Monday, O conveys Blackacre "to A for life." On Wednesday, O conveys "all of my right, title, and interest in Blackacre" to B. B holds a reversion, not a remainder. B's future interest was not created in the same disposition that gave A a life estate. The Monday conveyance gave A a life estate and raised a reversion in O. The Wednesday conveyance transferred O's reversion to B. "Once a reversion, always a reversion."

A remainder cannot "cut short" or divest a preceding estate prior to its normal expiration. Therefore, a remainder can ***never follow a fee simple***, which has a potentially infinite duration. Future interests that cut short a preceding estate or follow a gap after it are called executory interests. (*See* 3., *infra*.)

a. Indefeasibly Vested Remainder
An indefeasibly vested remainder is a remainder that:

(i) Can be created in and held only by an ***ascertained person or persons*** in being;

(ii) ***Must be certain to become possessory on termination of the prior estates*** (i.e., there is no condition that may operate to prevent the remainder from someday becoming a present interest);

(iii) ***Must not be subject to being defeated or divested*** (compare the vested remainder subject to total divestment, c., *infra*); and

(iv) ***Must not be subject to being diminished in size*** (compare the vested remainder subject to open, b., *infra*).

Examples: 1) "To A for life, and on A's death to B." A has a life estate; B has an indefeasibly vested remainder which is certain to take in possession on the termination of A's life estate.

What if B dies in A's lifetime? There is no stated condition that B survive A in order to take, and the courts do not imply such a condition. B's indefeasibly vested remainder passes by will or intestacy to his successors, who own an indefeasibly vested remainder.

2) "To A for life, then to A's first-born son in fee." At the time of this disposition, A has no children. The state of title: life estate in A, contingent remainder in the first son to be born to A, reversion in fee simple in the transferor. (The reversion will take in present possession if A never has a son.) The remainder is not vested because it is not created in an ascertained person in being. Also, it is subject to the condition that A have a child.

Two years later A has a son, John. The state of title: life estate in A, indefeasibly vested remainder in fee simple in John.

b. Vested Remainder Subject to Open
This is a vested remainder created in a class of persons (e.g., "children," "brothers and sisters") that is certain to take on the termination of the preceding estates, but is ***subject to diminution*** by reason of other persons becoming entitled to share in the remainder. It is also called a "vested remainder subject to partial divestment."

Examples: 1) "To A for life, and on A's death to her children in equal shares." If at the time of this disposition A has no children, the state of title is: life estate in A; contingent remainder in the unborn children of A; reversion

in fee in the transferor, which will take in possession if A never has any children.

Suppose two years later a child, Bob, is born to A. The state of title is: life estate in A, vested remainder subject to open in Bob. Bob's remainder is vested because he is in existence and ascertained and his taking is not subject to any contingency. But it is vested subject to open because A may have more children.

Two years later another child, Ray, is born to A. Bob's remainder has been partially divested in favor of Ray, who also meets the description "children of A." Bob and Ray now hold the vested remainder as tenants in common (each with an undivided one-half share) ***subject to open***—i.e., their vested remainders will be partially divested if more children are born to A.

Two years later Bob dies; shortly thereafter, A dies. Bob's successors (by will or intestacy) and Ray are entitled to present possession and enjoyment of the property. Bob's share of the remainder was subject to partial divestment, but it was not subject to being totally defeated. No condition of survival was attached to Bob's interest. Bob (or his successors) was certain to take; the only question was the size of his share.

2) Gift by will "to my wife, Rowena, for life, and on her death to ***my*** children in equal shares." T is survived by Rowena and by three children. At first blush this looks like a vested remainder subject to open because it is a remainder to someone's children. In reality, though, it is ***indefeasibly vested***. T, being dead, can have no more children. (Slight qualification of answer: If Rowena is pregnant with T's child at T's death, the posthumous child, if born alive, will share in the gift.)

1) Divesting Interests Are Executory Interests
Once the remainder vests in one existing member of the class, the divesting interest in the unborn members of the class is called an executory interest.

2) Effect on Marketability of Title
Note that where there are outstanding interests in the unborn children, the vested remainderman and the life tenant cannot jointly convey good title.

Example: O "to A for life, remainder to B's children." C wants to buy the land, and desires to know if he can get good title if he purchases from A and all of B's living children. The answer is no, as long as B is alive, because it is possible for B to have more children (no matter what B's age). Thus, there would be outstanding interests in the unborn children of B, and C would not get good title.

c. Vested Remainder Subject to Total Divestment
A vested remainder subject to total divestment arises when the remainderman is in existence and ascertained and his interest is not subject to any condition precedent, but

his right to possession and enjoyment is subject to being defeated by the happening of some ***condition subsequent***.

Examples: 1) "To A for life, remainder to B and his heirs, but if at B's death he is not survived by issue, to C and his heirs." Here, B has a vested remainder in fee simple, but his fee simple interest is subject to being divested if at his death he is not survived by issue. (C has a shifting executory interest.)

2) "To A for life, then to B for life." A has a life estate. B has a vested remainder in a life estate subject to total divestment. The transferor has a reversion in fee. B's remainder is vested even though (as a practical matter) he must survive A in order to take. But this practical requirement does not make B's remainder contingent. The only condition to B's taking is the natural termination of A's life estate, and this "condition" is inherent in any remainder life estate. There is no other condition precedent. However, B's remainder life estate is not indefeasibly vested, for it will be ***defeated if he dies in A's lifetime***. Therefore, it is a vested remainder subject to total divestment.

3) "To A for life, and on A's death to B; but if B predeceases A, on A's death to C." A has a life estate. B has a vested remainder subject to total divestment. Although B's taking is ***contingent on his surviving A***, that contingency is expressed as a condition subsequent—meaning that B's remainder is vested subject to total divestment. (C has a shifting executory interest.)

d. Contingent Remainder

There are two ways to create a contingent remainder.

1) Subject to Condition Precedent

A remainder will be classified as contingent if its taking in possession is subject to a condition precedent ("contingent as to ***event***").

Examples: 1) "To A for life, and on A's death to B if B survives A." A has a life estate; B has a contingent remainder in fee simple. The transferor has a reversion, which will become a possessory estate on the termination of A's life estate if B predeceases A. Here, B's taking is subject to a contingency, stated as a condition precedent, that he must survive A in order to take.

Compare this with Example 3) in the preceding section. In that example, B's taking is also subject to a contingency: he must survive A in order to take. Thus in substance, this example and Example 3) are quite similar. But in classifying future interests, the general rule is that ***it is form and not substance that counts***. In Example 3), the contingency of survival is expressed as a ***condition subsequent***; therefore, B's remainder is vested subject to total divestment. But in this example, the contingency of survival is expressed as a ***condition precedent***; therefore, B's remainder is a contingent remainder.

2) "To A for life, and on A's death to B if B marries C." Here, B is an ascertained person, but there is a condition precedent to B's taking: he must marry C. If B marries C in A's lifetime, his remainder will become indefeasibly vested.

3) O conveys "to A for life, then to B and his heirs if B survives A; if B does not survive A, then to C and his heirs." Each remainder is contingent because each is subject to a condition precedent. They are mutually exclusive and exhaustive; i.e., only one can come into possession, and when it does the other can never do so. These are called ***alternative contingent remainders***.

Compare: O conveys "to A for life, then to B and his heirs, but if B marries C, then to D and his heirs." Here B, an ascertained person, takes a vested remainder because it is not limited on a condition precedent. B's remainder is ready to come into possession whenever A dies. But the marriage condition is subsequent—B's marriage to C will forfeit his estate. D's interest is called an executory interest.

2) Unborn or Unascertained Persons

A remainder is contingent if it is created in favor of unborn or unascertained persons ("contingent as to ***person***"), because until the remainderman is ascertained, there is no one ready to take possession should the preceding estate come to an end.

Examples: 1) "To A for life, and on A's death, per stirpes to such of A's descendants as survive her." At the time of this disposition, A is in poor health and she has two adult children (B and C) who are very healthy. State of title: A has a life estate; there is a contingent remainder in such of A's descendants as survive A; the transferor has a reversion (for A may not be survived by any descendants).

While the odds are in B and C's favor that they will take the remainder upon A's death, they are not named as the remaindermen. The remainder is in such of A's descendants as survive A, and we will not be able to identify the remaindermen until A dies and we can see which of A's descendants survived her.

2) O transfers securities in trust "to pay the income to A for life, and on A's death to distribute the trust corpus to A's heirs." There is a contingent remainder in A's heirs. It is true that A's heirs will be determined the moment A dies and A's life estate terminates. But at the time O makes the transfer, the remaindermen are not ascertained, for "*nemo est haeres viventis*" (no one is heir of the living). The persons who turn out to be A's heirs will not be ascertained until A dies.

3) Destructibility of Contingent Remainders

At common law, a contingent remainder had to vest prior to or upon termination of the preceding freehold estate or it was destroyed.

Examples: 1) O conveyed "to A for life, then to the heirs of B." If A predeceased B, there were no heirs of B to take possession so the remainder was destroyed and O or his estate retook possession.

2) O conveyed "to A for life, then to B if she reaches age 21." If A died before B reached 21, the remainder was destroyed. (Note that whenever a grantor created a contingent remainder, he retained a reversion, which was normally defeasible.)

Analysis: Why are the interests in the above examples remainders and not executory interests? In each instance it is possible that the future interest will take effect at the natural expiration of A's life estate (as remainders do), or that it will take effect following a gap after A's estate (as executory interests do). The rule is that if an interest may operate as either a remainder or an executory interest (depending on the circumstances at A's death), it is a remainder. Thus, at common law, if such a remainder was then called upon to act as an executory interest, it could not do so and was destroyed.

a) Rule Abolished

Today, the rule of destructibility has been abolished in all but a few states. Thus, in the two examples given above, on A's death, O's ***reversion*** would take over, and would then give way to a springing executory interest on B's death in the first example, and on B's attaining age 21 in the second. (Note that the contingent remainders are not destroyed when the preceding estate ends, but instead become executory interests because they will divest the transferor's estate.)

b) Related Doctrine of Merger

Whenever the same person acquires all of the existing interests in land, present and future, a merger occurs. That person then holds a fee simple absolute. For example, suppose O conveys by deed "to A for life." O now has a reversion. Subsequently, by a later deed, O conveys his reversion interest to A. A will have a fee simple absolute by merger. (A similar result would follow if A conveyed her life estate to O.) Moreover, the common law held (as an aspect of the destructibility doctrine) that if a person acquired all of the interests in land ***except*** a contingent remainder, the merger would occur anyway, and the contingent remainder would be destroyed! Contingent remainders were considered to be such flimsy, ephemeral interests that they would not keep the merger from occurring. Note that this is still the rule in those few states retaining the common law rule of destructibility.

Example: In Example 1), above (O "to A for life, then to the heirs of B"), title stands as a life estate in A, a contingent remainder in the as yet unascertained heirs of B, and a reversion (if B is still alive at the death of A) in O. If O then purchased A's interest, O would hold a life estate pur autre vie (for the life of A) and a reversion. At common law, O's two interests on either side of the contingent remainder ***merged***, wiping out the contingent remainder and giving O a fee simple.

(1) Compare—Interests Created Simultaneously
If a life estate and the next vested interest were created simultaneously (by the same instrument), there would be no merger at that time because that would defeat the grantor's obvious intent to create a contingent remainder. However, if the life tenant subsequently conveyed his interest to the holder of the next vested estate, the contingent remainder would then be destroyed.

e. Rule in Shelley's Case (Rule Against Remainders in Grantee's Heirs)
At common law, where a freehold estate (usually a life estate) was given to A (by will or inter vivos transfer), and in the same instrument a ***remainder was limited to the "heirs" or to the "heirs of the body" of A***, and the freehold estate and the remainder were both legal or both equitable, the purported remainder in the heirs was not recognized, and A took both the freehold estate and the remainder. The Rule operated (regardless of the grantor's intent) to convert what would otherwise have been a contingent remainder in the heirs into a remainder in the ancestor.

Examples: 1) O grants or devises land "to A for life, and then to the heirs of A." Apart from the Rule in Shelley's Case, the title would be: life estate in A, contingent remainder in fee simple in A's heirs. But by virtue of the Rule, the title is: life estate in A, vested remainder in A in fee simple. (Here, the law of merger causes A's life estate to merge with his remainder so that A gets a present estate in fee simple.)

2) O "to A for life, then to B for life, then to the heirs of A." A has a life estate, and the Rule in Shelley's Case transforms the contingent remainder in the heirs of A into a vested remainder in fee simple in A. But merger does not occur because of the intervening ***vested*** remainder limited to B.

3) O "to A for life, then to B for life, then to the heirs of B." The Rule in Shelley's Case operates, as does merger, and B has a vested remainder in fee simple.

4) O "to A for life, then one day after A's death to the heirs of A." The Rule in Shelley's Case does not operate because the interest limited to the heirs of A is not a remainder (it can never take over immediately at the termination of the prior freehold estate), but rather is an executory interest.

Compare: O conveys land "to A and his heirs." A takes a fee simple—not by operation of the Rule in Shelley's Case, but because the words "and his heirs" are words of limitation denoting that a fee simple estate has been conveyed. (*See* I.B.1., *supra*.) (It is a common student error to conclude, in this case, that "A takes a fee simple because of the Rule in Shelley's Case." This rule is triggered ***only*** by the attempted creation of a remainder in the grantee's heirs.)

Note: This Rule has been ***abolished in most states today***, but arises occasionally where a conveyance was executed prior to abolition of the Rule.

f. Doctrine of Worthier Title (Rule Against Remainders in Grantor's Heirs)
Under the Doctrine of Worthier Title ("DOWT"), a remainder limited to the grantor's heirs is invalid, and the grantor retains a reversion in the property. This doctrine is still applied to inter vivos transfers in a majority of states, but most states treat it only as a ***rule of construction*** (i.e., it does not apply if the grantor has clearly manifested an intent to create a future interest in his heirs).

Example: O deeds property "to A for life, and on A's death to my heirs at law," or ". . . and on A's death to my next of kin." In most states, the disposition gives A a life estate and presumptively leaves a reversion in fee simple in O. The burden of establishing that O really intended to create a remainder in his heirs (or next of kin) would be on the parties so contending. The litigation would arise after O's death, and would be between (i) the persons designated as O's heirs under the state's intestacy laws, claiming that they take on A's death by remainder; and (ii) the devisees under O's will, contending that O died owning a reversion.

In a state that has abolished the doctrine, the state of title is: life estate in A; contingent remainder in O's heirs; reversion in O.

Compare: 1) O deeds property "to A for life, and on A's death to my children in equal shares." On O's death, his children, X and Y, are O's sole heirs. DOWT does not apply. The doctrine applies only when there is a disposition, following a life estate, to the transferor's ***"heirs"*** or ***"next of kin,"*** or words of like effect.

2) O deeds property "to A for life, and on A's death to the heirs born to my wife Martha and me." DOWT does not apply; the disposition creates a life estate in A and a vested remainder subject to open in the children of O and Martha. Although O used the term "heirs," it is clear from the context that he was not using the term in its technical sense, but was referring to his children by his wife Martha.

3. Executory Interests
Here is a good shorthand rule for classifying executory interests. Remember that there are two and only two future interests that can be created in a transferee: remainders and executory interests. ***If it is not a remainder because the preceding estate is not a life estate, then it must be an executory interest.*** Thus, an executory interest is any future interest in a transferee that does not have the characteristics of a remainder, i.e., it is not capable of taking on the natural termination of the preceding life estate. More specifically, an executory interest is an interest that ***divests*** the interest of another.

a. Shifting Executory Interest—Divests a Transferee
A shifting executory interest is one that divests the interest of another transferee; i.e., it cuts short a prior estate created by the same conveyance.

Examples: 1) "To A and her heirs; but if B returns from Canada, then and in that event to B and his heirs." A has a fee simple subject to an executory interest. Because the future interest is created in a transferee, it has to be either a remainder or an executory interest. B's future interest is not a remainder because it does not follow the natural termination of the

preceding estate (here, A's fee simple estate). If B's interest does take in present possession, it will divest A's fee simple, and title will ***shift*** to B.

2) O conveys "to A for life, remainder to B and his heirs, ***but if B predeceases A***, to C and his heirs." C's interest does not await the expiration of B's vested remainder, but instead may cut it short.

b. Springing Executory Interest—"Follows a Gap" or Divests a Transferor

A springing executory interest is an interest that follows a gap in possession or divests the estate of the transferor.

Examples: 1) O conveys property "to A when and if A marries B." State of title: fee simple subject to an executory interest in O; springing executory interest in fee simple in A. A's interest is not a remainder because if A's future interest becomes a present interest (if A marries B), it will divest O's fee simple. Because it ***divests the estate of a transferor***, it is a springing executory interest.

2) O conveys property "to A for life, and one year after A's death to B." A has a life estate. O has a reversion. B has a springing executory interest in fee simple. B's interest cannot be a remainder because of the one-year gap; it is not capable of taking on the natural termination of the preceding estate (A's life estate). It is therefore an executory interest. It is a springing executory interest because it ***springs out of the transferor's reversion***.

c. Executory Interest Follows a Fee

A ***remainder cannot follow a fee simple interest*** of any kind. Therefore, any interest that follows a fee and is held by a third person is an executory interest.

Examples: 1) O conveys land "to Church for so long as the premises are used for church purposes, and if they shall ever cease to be so used, then and in that event to the American Red Cross." Church has a fee simple determinable subject to an executory interest; the Red Cross has an executory interest that is valid under the charity-to-charity exception to the Rule Against Perpetuities.

2) O conveys "to Church; provided, however, that if the premises shall ever cease to be used for church purposes, then and in that event to the American Red Cross." Church has a fee simple subject to an executory interest; the Red Cross has an executory interest that is valid under the charity-to-charity exception to the Rule Against Perpetuities.

d. Differences Between Executory Interests and Remainders

It is important to be able to distinguish between executory interests and remainders for the following reasons: (i) executory interests are not destructible, while contingent remainders are still destructible in a few jurisdictions; (ii) executory interests are not considered vested, whereas contingent remainders can become vested; and (iii) the Rule in Shelley's Case does not apply to executory interests, but it does apply to remainders limited to the heirs of the grantee.

4. Importance of Classifying Interests "In Order"

Future interests are classified clause by clause—which will often mean that the label appended to the first future interest created in a disposition will determine the label to be appended to a second future interest created in the same disposition. For instance, if the first future interest is a contingent remainder, subsequent future interests must also be contingent remainders. Similarly, if the first future interest is a vested remainder subject to divestment, the following future interests will be executory interests.

Examples: 1) O conveys land "to A for life, and on A's death to B if B survives A; but if B does not survive A, on A's death to C." A has a life estate. B has a contingent remainder because B's taking is subject to a contingency (expressed in condition precedent form) that B must survive A in order to take. C has an alternative contingent remainder.

Because the contingency of B's survival is expressed both as a condition precedent and (in the next clause) as a condition subsequent, why is B's remainder classified as contingent rather than as vested subject to total divestment? The explanation is that interests are classified "in order." Looking first at the clause giving an interest to B, here the contingency is expressed as a condition precedent; therefore, B's remainder is contingent. Then, having classified B's interest, we turn to C's interest. But because B's interest has already been determined to be a contingent remainder, C's interest is necessarily an alternative contingent remainder.

2) O conveys land "to A for life, and on A's death to B. But if B predeceases A, on A's death to C." Watch this one carefully, for the answer turns on the principle that we classify interests "in order." First of all, A has a life estate. Next we classify B's interest. It is a remainder, for it is capable of taking on the natural termination of the preceding estate (A's life estate). It is a vested remainder in fee simple because B is an ascertained person and there is ***no condition precedent*** to B's taking other than the termination of A's life estate. Having classified it as a vested remainder, we read on ("but if") and see that B's estate will be defeated if he predeceases A. Therefore, it is a vested remainder subject to total divestment upon the happening of this condition, which is expressed in ***condition subsequent*** form.

Having classified B's remainder as vested subject to total divestment, we turn to C's interest. It cannot be a remainder, for a remainder follows the natural termination of the preceding estate—B's estate, which is a vested remainder in fee simple. But ***no remainder can follow a fee simple***, for a fee simple is an estate of potentially infinite duration. If C does take, it will cut short B's vested remainder in fee simple some time short of infinity. Therefore, C's interest is an executory interest—a ***shifting executory interest***, because it divests a transferee.

But isn't C's interest capable of taking on the natural termination of A's life estate (if B predeceases A)? Yes, but that does not affect our classification. A remainder is a future interest capable of taking on the termination of the ***preceding*** estate, and here the preceding estate is B's.

Suppose, some years after this disposition, B dies during A's lifetime. What is the state of title? The answer: life estate in A, indefeasibly vested ***remainder*** in C. Now that B's estate is out of the way, the preceding estate is A's life estate, and so now we can change the label and call C's interest a remainder.

5. Transferability of Remainders and Executory Interests

a. Vested Remainders Are Transferable, Devisable, and Descendible
At common law and in all jurisdictions today, vested remainders are fully transferable during life, devisable by will, and descendible by inheritance. This is true of all types of vested remainders: indefeasibly vested, vested subject to open, and vested subject to total divestment.

b. Contingent Remainders and Executory Interests Are Transferable Inter Vivos
At common law, contingent remainders and executory interests were not assignable. While this is still the rule in a few states, most American courts hold that these interests are freely transferable.

c. Contingent Remainders and Executory Interests Are Usually Devisable and Descendible
Whereas the rule at common law was that contingent remainders and executory interests were not transferable inter vivos, it has always been held that these interests are devisable and descendible—***unless***, of course, the holder's ***survival is a condition*** to the interest's taking.

Example: "To A for life, and on A's death to B; but if B does not survive A, on A's death to C." State of title: life estate in A, vested remainder subject to total divestment in B, and shifting executory interest in C. Suppose B dies in A's lifetime, leaving a will that devises "all my property" to Mrs. B. B's remainder interest does not pass under his will because, by the terms of the disposition, that interest failed when B died in A's lifetime.

d. Any Transferable Future Interest Is Reachable by Creditors
The rule followed in nearly all states is this: If a future interest can, under the laws of the state, be transferred voluntarily by its owner, it is also subject to involuntary transfer; i.e., it can be reached by the owner's creditors by appropriate process.

e. Practical Ability to Transfer Marketable Title
Technically, most states consider all types of future interests transferable, but in practice those interests held by unborn or unascertained persons are not transferable because courts will not appoint a guardian for purposes of conveying land. (*See* VI.A.3.a.1)b), *infra*.)

6. Class Gifts
A "class" is a group of persons having a common characteristic. Typically, they stand in the same relation to each other or to some other person (e.g., children, grandchildren, descendants, nephews and nieces). In a gift to a class, the share of each member of the class is determined by the number of persons in the class.

a. Definitional Problems

1) Dispositions to "Children"

A gift to a person's "children" generally includes that person's children from all marriages as well as adopted and nonmarital children. That person's stepchildren and grandchildren are generally not included in the class.

2) Dispositions to "Heirs"

A disposition to the "heirs" of someone presumptively includes those persons who would take the named person's estate according to the laws of descent and distribution if she were to die without a will.

3) Dispositions to "Issue" or "Descendants"

The terms "issue" and "descendants" refer to the lineal offspring of the designated person, whatever the degree of relationship (children, grandchildren, great-grandchildren, etc.). As a general principle, the issue or descendants take per stirpes.

4) Class Members in Gestation

Persons in gestation at the time set for distribution are included in a class. The common law presumption is that a child born within 10 lunar months or 280 calendar days after the necessary point in time was in gestation at that time.

b. When the Class Closes—The Rule of Convenience

When a gift is made to a group of persons generically described as a class, such as to someone's "children," there is the possibility that other persons may be born who meet the class description. This raises the question, when does the class "close"; i.e., when is the maximum membership of the class determined, such that persons born thereafter are excluded from sharing in the gift? In resolving this problem, the common law courts developed the rule of convenience. This is a rule of construction, not a rule of law. It is applicable in the absence of an expression of intent to include all persons who meet the class description regardless of when they are born. Under the rule, a ***class closes when some member of the class can call for a distribution of her share of the class gift***. It is presumed that the ordinary transferor intends to include all members of the class, whenever born, ***provided*** that this would ***not cause any undue inconvenience***. Thus, the rule of convenience is based on a policy of including as many persons in the class as possible, consistent with permitting a distribution of the property at the first opportunity without the necessity of a future rebate.

1) Outright Gift—Class Closes at Time Gift Is Made

When a ***will*** makes an outright gift to a class, if any class members are alive at the testator's death, the class closes as of the ***date of the testator's death***.

Example: T's will devises property "to the children of my good friend, John Brown." John has three children (A, B, and C) at the time of T's death; another child (D) is born two years later. The class closes at T's death; A, B, and C share the gift. D is excluded by the rule of convenience.

Here, additional members of the class are included up to the time of T's death because there is no inconvenience in doing so. But we

close the class at T's death because it is assumed that T would want an immediate distribution, rather than postponing distribution until John Brown's death, which is the only time we will be sure that John Brown will have no more children. If we were to include D, we would also have to include E, F, and G, who might be born later. Moreover, if we distributed one-third shares to A, B, and C at T's death, but required them to make rebates if more children should be born later to their father, John, all sorts of practical problems would arise. To avoid these problems, there is a strong constructional preference to close the class at T's death.

a) No Class Members Alive at Testator's Death—Class Stays Open
If there are no members of the class living at the testator's death, all afterborn persons who come within the class designation are included. Thus, if T had bequeathed $100,000 "to the children of John," and John had no children living at T's death or born within the period of gestation thereafter, then all of John's children, whenever born, are included, regardless of any possible inconvenience in keeping the class open this long.

2) Postponed Gift—Class Closes at Time Fixed for Distribution
When possession and enjoyment of a gift are postponed, as where the gift follows a life estate, the class remains open until the time fixed for distribution (e.g., death of the life tenant).

Example: T's will creates a trust to pay the income to W for life, and on W's death to pay the principal to the children of John. At the time T executes his will, John has two children (A and B). After the will is executed but before T dies, another child (C) is born to John. After T's death but during W's lifetime, another child (D) is born to John. W dies; two years later John has another child (E).

The class closes at W's death; A, B, C, and D each take a one-fourth share. E is excluded by the rule of convenience. There was no inconvenience in leaving the class open until W's death, for the time had not yet come to distribute the corpus. But when W dies, it is time to make a distribution; the class is closed in order to determine the minimum shares going to each class member.

3) Dispositions Subject to Condition of Reaching Given Age
When there is a gift to a class conditioned upon the members attaining a certain age, the class closes when (i) the preceding estate, if any, terminates, and (ii) the first class member reaches the specified age. That class member's minimum share should be determined and distributed to her when she reaches the specified age.

Examples: 1) T's will devises his residuary estate "to the children of John who live to attain the age of 21." At T's death, John has three children: A (age 22), B (age 16), and C (age 10). The class closes at T's death. A is entitled to immediate distribution of her share, and the minimum size of that share must be fixed as of T's death, at

one-third. If B lives to attain age 21, but C dies before attaining that age, on C's death, A and B's shares will be increased to one-half.

Two years after T's death, another child (D) is born to John. D is excluded by the rule of convenience. The class was closed at T's death in order to determine the minimum size of A's share so that this share could be distributed to her.

Suppose none of John's children is 21 at T's death. The class remains open until a child of John reaches the designated age, at which time the class closes.

2) T's will devises his residuary estate "to Wanda for life, and on Wanda's death to such of John's children as live to attain the age of 21." Here, the class will close, and the remaindermen who share in the disposition will be determined, when two things occur: (i) Wanda dies; ***and*** (ii) a child of John reaches age 21. If at T's death one of John's children is over age 21, it does not matter; the class remains open until Wanda's life estate terminates. Likewise, if at Wanda's death no child of John has attained age 21, the class remains open until one of John's children reaches that age. If at Wanda's death a child has attained age 21, the class will close at that time.

4) Rule of Convenience Is a Rule of Construction Only

The rule of convenience is a rule of construction only. If the transferor explicitly sets forth the time when membership of the class is to be determined, or if he provides that all members of the class, whenever born, are to share in the gift, then his directions will govern. However, courts have a strong preference for application of the rule of convenience unless there is a fairly clear indication that it is not to govern.

7. Survival

As a general rule, all future interests can pass at death by will or inheritance; i.e., they are descendible and devisable. This is true ***unless*** the interest's taking is subject to an expressed or implied contingency of survival.

Examples: 1) T's will devises his residuary estate "to my sister Sue for life, and on Sue's death to her children in equal shares." At the time of T's death, Sue has three children: A, B, and C. C dies, then Sue dies survived by A and B. The remainder is shared by A, B, and the estate of C (i.e., the estate takes under C's will or by intestacy), each with one-third shares. *Analysis:* A, B, and C had vested remainders subject to open, but their interests were not in terms conditioned on surviving the life beneficiary—and the law does not imply such a condition of survival. On C's death, his vested remainder subject to open passes via his will or by intestacy. (*Note:* This example does ***not*** invoke the lapsed gift doctrine of Wills law, for C was alive at the testator's death.)

2) "To A for life, and on A's death to B if B is then living; but if B is not then living, to C." C dies, then B dies, then A dies. Who takes? Answer: The

takers under C's will or by intestacy. B and C were given alternative contingent remainders. B's remainder was contingent on his surviving A, and B did not meet the condition; his estate was defeated. C's remainder was contingent on B's not surviving A; it was not in terms contingent on C's surviving A, and the law does not imply such a condition.

a. Express Words of Survival

In each of the following examples, the italicized language imposes a condition precedent that the remaindermen must survive the life tenant in order to take.

Examples: 1) "To A for life, remainder to his ***surviving children***."

2) "To A for life, and should he ***die leaving children***, to such children."

3) "To A for life, and after the death of A, remainder to the children of A ***then living***."

b. Implied Contingency of Survival—Gifts to "Issue," "Descendants," or "Heirs"

Gifts to a person's "issue," "descendants," or "heirs" imply a condition of surviving the named ancestor.

D. TRUSTS

An express trust involves the holding of title to property by a trustee, who has an equitable fiduciary duty to deal with it for the benefit of other persons (the beneficiaries).

1. Private Trust Concepts and Parties

a. Settlor

The settlor is the person who ***creates the trust*** by manifesting an intent to do so. While a trust of personal property may be expressed orally, the Statute of Frauds requires a writing to create a trust of real property. The settlor must own the property at the time the trust is created and must intend to make the trust effective immediately.

b. Trustee

The trustee ***holds legal title to the property***, but must act under the instructions of the settlor who created the trust. The trustee has a fiduciary duty to use the highest care and skill for the beneficiaries. If the trustee has no duties at all, the trust will fail, and legal title will vest immediately in the beneficiaries. However, if the trustee dies, resigns, or refuses to serve, the trust will not fail; a court of equity will appoint a substitute trustee.

c. Beneficiaries

The beneficiaries are the ***persons for whose benefit the trust is created and held***; they hold ***equitable title*** to the property. Every private trust must have at least one beneficiary, and the beneficiaries must be definitely identifiable by the time their interest comes into enjoyment and, in all events, within the period of the Rule Against Perpetuities. Acceptance of the benefits of the trust is normally presumed, but a beneficiary may renounce his rights under the trust within a reasonable time after learning of its creation. A trust may be for a class of beneficiaries (e.g., "all the living descendants of Mary Jones"), provided that the class is small enough to be "reasonably definite."

d. Res

The res is ***the property that is the subject of the trust***. If there is no res, the trust fails. The res may be real property or personal property (tangible or intangible), and it may be either a present interest or a future interest (vested or contingent). The trust res must be segregated from other property of the settlor, but this does not preclude a trust of a fractional share interest, such as a trust of "an undivided one-half interest in Blackacre," where the settlor owns all of Blackacre.

e. Application of Rule Against Perpetuities

The Rule Against Perpetuities (*see* E., *infra*) applies to the equitable future interests of the beneficiaries in a private trust just as it does to "legal" future interests.

Example: O conveys land to T "in trust for the benefit of A so long as the existing house on the land remains standing, and then for the benefit of the then living descendants of A." The equitable interest of the descendants of A is void because it is not certain to vest or fail within 21 years after the life of any person living at the time the trust is created.

2. Creation of Trusts

a. Inter Vivos Conveyance

An inter vivos trust can be created by the settlor's conveyance of the trust res to the trustee while the settlor is alive. For real property, this must be done by a writing to satisfy the Statute of Frauds; this is usually accomplished by delivery of a deed.

b. Inter Vivos Declaration

The settlor may declare that he is now holding certain property (previously held outright by the settlor) in trust for certain beneficiaries. No deed or delivery is necessary, but if the res is real property, the declaration must be in writing and signed by the settlor.

c. Testamentary Conveyance

The settlor may create the trust by language in his will, and may also transfer the res to the trustee by a devise in the will. The trust will come into existence only upon the death of the settlor.

d. Pour-Over into Existing Trust

The settlor may create an inter vivos trust before death. The settlor's will may then bequeath property to the trust—"pouring it over" into the trust.

3. Charitable Trusts

a. Beneficiaries

A charitable trust, unlike the private trusts described above, must have an ***indefinite*** group of beneficiaries. The beneficiaries must be reasonably numerous and not individually identified. The trust may be for the benefit of an established charity (e.g., the American Red Cross) or for a group of persons (e.g., the victims of Hurricane Sandy).

b. Application of Rule Against Perpetuities

The Rule Against Perpetuities does not apply to trusts that are ***entirely charitable***. Such trusts may have infinite life. This is true even if the trust benefits two charities, one with a present interest and the other with a future interest that would normally violate

the Rule Against Perpetuities. Note, however, that if either the first or second interest is noncharitable, the exemption from the Rule Against Perpetuities does not apply and the second gift is void.

Examples: 1) O conveys land to T in trust "for the benefit of the victims of Hurricane Sandy, and when all houses destroyed by the hurricane have been rebuilt, then for the benefit of the American Red Cross." The interest of the Red Cross may not vest until more than 21 years after the death of any person living when the trust is created, but it is still a valid interest.

2) O conveys land to T in trust "for the benefit of my son John, whose house was destroyed by Hurricane Sandy, and when his house has been rebuilt, then for the benefit of the American Red Cross." The interest of the Red Cross may not vest until more than 21 years after the death of any person living when the trust is created, and it is void.

c. Cy Pres Doctrine

If the purposes of a charitable trust are impossible to fulfill, are illegal, or have been completely fulfilled, a court may redirect the trust to a different purpose that is "as near as may be" (a translation of the Latin "cy pres") to the settlor's original intent.

d. Enforcement of Charitable Trusts

Charitable trusts may be enforced by an action of the attorney general of the state. Under the Uniform Trust Code ("UTC"), enacted by the majority of states, the settlor and qualified beneficiaries also have standing to enforce a charitable trust. [UTC §§110, 405(c)]

E. THE RULE AGAINST PERPETUITIES

The Rule Against Perpetuities may be stated as follows: "No interest in property is valid unless it must vest, if at all, not later than 21 years after one or more lives in being at the creation of the interest." The Rule might be more easily understood if it had been expressed as an affirmative proposition: "An interest is void if there is any possibility, however remote, that the interest may vest more than 21 years after some life in being at the creation of the interest." This paraphrase of the Rule properly places the emphasis on the ***possibility*** of remote vesting, the test by which the invalidity of an interest is shown. If a situation can be imagined in which the interest might not vest within the perpetuities period, the interest is void. This is the result even though the circumstances that might bring about the remote vesting are unlikely to occur or are unrealistic. (All kinds of unlikely things are considered capable of happening under the Rule.) The Rule applies to the following legal and equitable future interests in personal or real property:

(i) Contingent remainders;

(ii) Executory interests;

(iii) Class gifts (even if vested remainders);

(iv) Options and rights of first refusal; and

(v) Powers of appointment.

1. Analysis of the Rule

a. When the Perpetuities Period Begins to Run

The validity of interests under the Rule is determined ***at the time the interests are created***, taking into account the facts then existing. The "lives in being plus 21 years" period begins to run, and the measuring lives used to show the validity of an interest must be in existence, at that time.

1) Wills—Date of Testator's Death

The perpetuities period in the case of a will begins to run on the date of the testator's death.

2) Revocable Trusts—Date Trust Becomes Irrevocable

In the case of revocable trusts, the perpetuities period begins to run on the date the trust becomes irrevocable. This will be at the settlor's death unless the settlor amends the trust, making it irrevocable, during his lifetime.

3) Irrevocable Trusts—Date Trust Is Created

The perpetuities period for irrevocable trusts begins to run on the date the trust is created.

4) Deeds—Date Deed Is Delivered with Intent to Pass Title

In the case of a deed, the perpetuities period begins to run on the date the deed is delivered with the intent to pass title.

b. "Must Vest"

To be valid under the Rule, it must be shown that the interest created in the transferee must vest, regardless of what might happen, within lives in being plus 21 years. An interest becomes "vested" for purposes of the Rule when: (i) it becomes a present possessory estate, or (ii) it becomes an indefeasibly vested remainder or a vested remainder subject to total divestment. Remember that the Rule is applicable only to future interests created in third persons; consequently, the Rule generally applies only to contingent remainders, executory interests, and vested remainders subject to open.

Examples: 1) "To A for life, then to A's children for their lives, and on the death of the last survivor of A's children, to B in fee simple." At the time of this disposition, A has two very young children and is quite capable of having more children in the future. (i) A has a present possessory life estate. A's present children have vested remainders in life estates that are subject to open in favor of any future children born to A. There is a contingent remainder in a life estate in A's unborn children—but this interest is valid under the Rule because the children's life estates will vest at their birth, which will be in A's lifetime. B has an indefeasibly vested remainder in fee simple. (ii) B's interest is valid under the Rule even though it may be years before B (or her successors) is entitled to present possession and enjoyment of the property, and even though B (or her successors) may not succeed to present possession and enjoyment until the death of some person not now in being (i.e., a future-born child of A may be the last survivor of A's children). Despite all this,

B's interest is valid under the Rule because it is an ***indefeasibly vested remainder from the time of its creation***.

2) "To A for life, then to B; but if at B's death she is not survived by children, then in that event to C." (i) A has a present possessory life estate. B has a vested remainder subject to total divestment in fee simple. C has a shifting executory interest in fee simple. (ii) C's interest is valid under the Rule. B's is the relevant life that can be used to show that C's interest will vest within the perpetuities period. If B dies in A's lifetime not survived by children, C's interest will become an indefeasibly vested remainder. If B survives A and thereafter dies not survived by children, C's executory interest will become a present possessory estate. Of course, B may die in A's lifetime (or after A's death) leaving children surviving her, in which case C's interest is extinguished. But that does not matter; the Rule requires that an interest must vest, ***if it does vest*** ("if at all"), within lives in being plus 21 years.

3) "To A for life, and on her death to such of her children as attain the age of 35." At the time this disposition takes effect, A is a 60-year-old woman who has had a hysterectomy. She has two children, ages 30 and 25. Under the common law Rule, here is what might happen: A ***might*** give birth to a child (defying medical science in the process). (*See also* V.D.2., *infra*.) Then A's other two children might die before attaining age 35; then A might die before the afterborn attained his 14th birthday. (Key: 35 minus 21 is 14.) The afterborn child lives on to attain age 35. If these events were to occur, the remainder to such of A's children as attain age 35 would vest remotely. Because these events ***might*** occur, the remainder violates the Rule; it is stricken.

1) "Wait and See" Rule

A majority of states have modified the "must vest, if at all" rule above. Under the modified approach, these states suspend judgment as to whether the interest in question is good or void. Potentially, they wait until the end of the perpetuities period. If the interest in question ***actually*** vests during the period, it is good; if it does not vest or fail during that period, it is void. Until the end of the perpetuities period, it is impossible to know for sure whether the interest is good or not.

Example: Consider Example 3), above: "To A for life, and on her death to such of her children as attain the age of 35." Under the "wait and see" approach, the courts would inquire as to whether ***in fact*** any child of A reaches the age of 35 within 21 years after A's death. If one or more of A's children does so, the remainder is valid; if none does so, the remainder is void.

c. "If at All"

This simply means that the interest does not have to vest within the perpetuities period in order to be valid; after all, many contingent remainders never vest because the condition precedent to their taking is not satisfied.

Examples: 1) "To A for life, and on A's death to B if B is then living." A has a life

estate, B has a contingent remainder, and the transferor has a reversion. B may never take, for she may predecease A. But if B does take ("if at all"), her interest will vest—here, will become a possessory estate—on A's death, when we will know whether B has survived A. In this case, B is "her own life in being," for the condition precedent to B's taking must occur, if it does occur, within B's lifetime. B's interest is valid under the Rule.

2) "To A in fee, but on the express condition that if marijuana is ever smoked on the premises during B's lifetime or within 21 years after B's death, then and in that event to B in fee." A has a fee simple subject to an executory interest; B has an executory interest in fee simple. B's interest might not take, for marijuana might not be smoked on the premises during B's lifetime or within 21 years thereafter. But if B's interest does take, by the terms of the disposition it must take during B's lifetime or within 21 years thereafter. B's interest is valid under the Rule.

d. "Lives in Being"

The law allows any lives to be used to show the validity or invalidity of an interest, but no lives are of any help unless they are somehow ***connected with the vesting of an interest***. The measuring lives need not be given a beneficial interest in the property, and they need not even be expressly referred to in the instrument, but there must be some connection that insures vesting or failure of the interest within the perpetuities period.

Examples: 1) "To A for life, then to such of A's children as attain the age of 21." Here, the relevant measuring life is A. All of A's children are going to attain age 21, ***if at all***, within 21 years after A's death. (This includes a child in the mother's womb at A's death, for the perpetuities period includes any period of gestation actually involved.)

2) T's will devises her residuary estate "to such of my nephews and nieces as attain the age of 21." At the time of T's death, she has two brothers and six nephews and nieces, all of whom are under age 21. Is the gift valid under the Rule? The answer: It depends. Specifically, it depends on whether T's parents are living. The ***relevant measuring lives*** are T's brothers and sisters, because all of T's nephews and nieces will attain age 21, if at all, within 21 years after their parents' deaths. If T's parents are dead, her two brothers are all the brothers she is ever going to have; and T's nephews and nieces will be the children of these brothers. The disposition is valid.

But if T's parents are alive, they ***might*** have another child (call him Excelsior), a brother or sister of T not alive at T's death. Then T's two brothers and six nephews and nieces who were alive at T's death might die. Then Excelsior might have a child who lives to attain age 21—more than 21 years after any life in being. Because this might happen, the disposition is invalid under the Rule.

1) Who Can Be Used as Measuring Lives

In all the examples in this chapter, the measuring lives used to show the validity

or invalidity of interests are referred to or are indirectly involved in the disposition itself. It is a common drafting practice to use a ***"perpetuities saving clause"*** (i) to make sure that the Rule has not been accidentally violated, for the Rule is difficult to master; and (ii) sometimes to extend the duration of trusts to the maximum extent permitted under the Rule. The clause reads something like this: "Notwithstanding anything herein to the contrary, any trust created hereunder shall terminate, if it has not previously terminated, 21 years after the death of the survivor of the following named persons: _____; and the remaining principal and undistributed income of such trusts shall be distributed to . . . ."

In the blanks are inserted the names of the persons to be used as "artificial" measuring lives. Most commonly, the descendants then living of the transferor are specifically named. Alternatively, the clause might provide: "after the death of the survivor of all my descendants who shall be living at the time of my death"—this clause works in a will but does not work in an irrevocable trust. A few more aggressive draftsmen will name 10 healthy babies born in some local hospital on the day the instrument is executed—the probability is that this will permit the trust to run for 100 years.

2) Reasonable Number of Human Lives Can Be Used

Animals and organizations cannot be used as measuring lives; only humans can be used as measuring lives. Also, the number of measuring lives must be reasonable.

Examples: 1) "The trust will terminate 21 years after the death of the survivor of all persons listed in the Manhattan telephone directory." Clearly impermissible.

2) "The trust will terminate 21 years after the death of the survivor of all the descendants of Queen Victoria who are alive at the time of my death." This "royal lives" clause was widely used in England shortly after the turn of the century, and the English courts grudgingly sustained it. If the name of some currently famous person were used in this fashion, it is highly questionable whether American courts would sustain the disposition.

e. Interests Exempt from Rule

1) Gift Over to Second Charity

A charitable trust may last forever (i.e., neither the Rule Against Perpetuities nor any analogous rule applies). However, like any other gift, a gift for charitable purposes is void for remoteness if it is contingent upon the happening of an event that may not occur within the perpetuity period. The only exception to this rule is that if there is a gift to Charity A, followed by a gift over to Charity B upon a possibly remote event, the gift over is valid. Remember, this is the charity-to-charity exception. The Rule Against Perpetuities applies to dispositions over from a ***charity to an individual*** on a remote condition, ***and*** to dispositions over from an ***individual to a charity*** on a remote condition.

Examples: 1) "To the Georgetown YMCA for so long as the premises are used for YMCA purposes; and when they shall cease to be so used, then

and in that event to the American Cancer Society." The YMCA has a fee simple subject to an executory interest; the Cancer Society has a shifting executory interest. The gift over to the Cancer Society is valid under the charity-to-charity exception to the Rule.

2) "To the Georgetown YMCA for so long as the premises are used for YMCA purposes; and when they shall cease to be so used, then and in that event to John Hancock, his heirs, successors, and assigns." Classifying the interests without regard to the Rule, the YMCA would have a fee simple subject to an executory interest; Hancock would have a shifting executory interest—which is stricken because it violates the Rule. The YMCA has a fee simple determinable, and the transferor has a possibility of reverter.

3) "To John Hancock, his heirs, successors, and assigns, provided that no marijuana is ever smoked on the premises; and if marijuana is ever smoked on the premises, to the Georgetown YMCA." Classifying interests without regard to the Rule, Hancock would have a fee simple subject to an executory interest; the YMCA would have a shifting executory interest—which is stricken because it violates the Rule. Thus, Hancock has a fee simple absolute.

2) Vested Interests

A vested remainder in an individual is not subject to the Rule. Thus, a devise "to A for life, then to A's children for life, then to B in fee simple" is wholly valid. B has a presently vested remainder. It may vest in ***possession*** long after lives in being if A leaves some surviving children born after the testator's death, but the remainder to B is presently vested in interest, and that is what counts.

a) Compare—Class Gifts Are Subject to Rule

Vested remainders in a class, however, are subject to the Rule ***so long as the class remains open***.

3) Reversionary Interests

Reversions, possibilities of reverter, and rights of entry are all vested in interest and hence are ***not subject to the Rule Against Perpetuities***. (Even so, in many states, there are statutes expressly limiting the duration of possibilities of reverter or rights of entry.)

a) Compare—Executory Interests Are Subject to Rule

Possibilities of reverter and rights of entry, which are exempt from the Rule, must be carefully distinguished from executory interests, which are subject to the Rule. Remember that executory interests are created in ***transferees***; possibilities of reverter and rights of entry are created only in the ***grantor*** (or the ***testator's heirs*** if a will is involved). An understanding of this distinction has frequently been tested by the bar examiners.

Example: O conveys Blackacre "to School so long as it is used for educational purposes, and when it is no longer so used, to A."

A has an executory interest that violates the Rule because it may vest in possession many years after all lives in being are dead. Because any interest that violates the Rule is void and is stricken from the instrument, this leaves a determinable fee in the school and a possibility of reverter in O. O can now, by a second deed, transfer her possibility of reverter to A (if possibilities of reverter have been made transferable by statute in the jurisdiction). To get a possibility of reverter in A, two pieces of paper are required: one creating the possibility of reverter in O; the second transferring it to A.

f. Consequence of Violating the Rule—Interest Is Stricken
An interest that violates the Rule is void and is stricken (subject to the possible application of a perpetuities reform statute). However, all other interests created in the instrument of transfer that are valid under the Rule are given effect.

1) Exception—"Infectious Invalidity"
There is an important exception to the preceding statement. Under the principle of "infectious invalidity," if the invalid gift is an essential part of the transferor's dispositive scheme, such that to strike this interest and give effect to the remaining interests would be to subvert the transferor's intent—if it is determined that the transferor would prefer that the entire disposition fail—then the entire disposition is void.

Example: Irrevocable Trust A directs the trustee "to pay the income to my brother's children for life, and on the death of my brother's last surviving child, to pay the principal to the issue of my brother's children." The gift to "the issue of my brother's children" is void because the brother might have a child born ***after the creation of the trust*** (who would thus not be a life in being). That child might not die within 21 years after the death of the last child living at the time the trust was created. After the invalid interest is stricken, the brother's children have a life estate in the income, and the settlor has a reversion in the principal. However, Trust B provides that if any provision of Trust A is invalid, any income and principal from Trust A should be held in trust for the benefit of the brother's children and their issue. By striking out all the gifts in Trust A, valid and invalid, and by giving effect to Trust B, the settlor's presumed intent to benefit his brother's children and their issue may be substantially carried out. [New England Trust Co. v. Sanger, 149 N.E.2d 598 (Mass. 1958)]

2. The Rule in Operation—Common Pitfall Cases

a. Executory Interest Following Defeasible Fee Violates the Rule
An executory interest that follows a defeasible fee, with no limit on the time within which it must vest, violates the Rule Against Perpetuities and is stricken. The effect on the remaining fee estate depends on whether the estate is determinable or subject to a condition subsequent. If the defeasible fee is phrased in durational terms (e.g., "for so

long as," "until"), the estate will still terminate upon the happening of the stated event and the grantor will have a possibility of reverter. In contrast, if the fee is subject to a condition subsequent, the condition is also stricken and the estate becomes a fee simple absolute.

Examples: 1) "To John Brown for so long as no marijuana is smoked on the premises; and if marijuana is ever smoked on the premises, then to Candy Barr." (i) John Brown has a fee simple subject to an executory interest; Candy Barr has an executory interest in fee simple. (ii) Candy's interest violates the Rule. Things may stay quiet for generations, long beyond 21 years after the deaths of John and Candy (the only relevant lives in this case). Then someone might light up, triggering the executory interest. Because this ***might*** happen, the executory interest might vest (i.e., might become a possessory estate) long after lives in being plus 21 years. Candy's interest violates the Rule, and it is stricken. This leaves a fee simple determinable in John Brown, and a possibility of reverter in the transferor. The possibility of reverter is valid; retained interests in the transferor are not subject to the Rule.

What if marijuana is smoked on the premises within five years after the transfer, well within lives in being plus 21 years, meaning that in actuality there was no remote vesting? It does not matter. Under the Rule we do not "wait and see." (*But see* 1.b.1), *supra*.) It is ***what might happen*** that counts, viewing the facts as they exist ***at the time the interest is created***. What actually happens is irrelevant.

2) "To John Brown; provided, however, that if marijuana is ever smoked on the premises, then to Candy Barr." (i) John Brown has a fee simple subject to an executory interest; Candy Barr has an executory interest in fee simple. (ii) Candy's interest violates the Rule, under the analysis given in Example 1). Again we strike Candy's interest—leaving John Brown with a fee simple absolute. (Contrast this with the result in Example 1), where the transferor had a possibility of reverter. This is the result of two different forms of expressing the gift to John Brown. Whenever a fee simple determinable is created ("so long as"), the transferor automatically has a possibility of reverter. But when a fee on a condition subsequent is created, the transferor does not have a right of entry unless the right of entry is expressly raised.)

b. Age Contingency Beyond Age Twenty-One in Open Class

A gift to an open class conditioned upon the members surviving to an age beyond 21 violates the Rule Against Perpetuities.

Example: "To A for life, then to such of A's children as live to attain the age of 25." At the time of this disposition, A has two children: X (age 12) and Y (age nine). (i) A has a life estate; there is a contingent remainder in A's children who live to attain age 25, and a reversion in the transferor (for none of A's children may ever reach age 25). (ii) The remainder to A's children violates the Rule. After this transfer, A ***might have another child*** (Z); before this afterborn child (who cannot be used as a life in

being) attains age four, A, X, and Y might die; then Z might live on to age 25, at which time the remainder to A's children would vest in Z. But if this were to happen (and it might), the remainder would vest beyond lives in being plus 21 years. Because the interest might vest remotely, it is stricken.

c. The Fertile Octogenarian

A woman is ***conclusively presumed*** to be capable of bearing children regardless of her age or medical condition.

Example: Suppose, in the preceding example, X and Y were age 24 and 22, respectively, and A was a 60-year-old woman who has undergone a hysterectomy. Under the "remote possibilities" test, it is ***possible*** for a woman, of whatever age and medical condition, to bear children. Thus, A might have another child, Z. The remainder to A's children violates the Rule.

d. The Unborn Widow or Widower

The problem is that the term "widow" (and "widower"), like "heir," is a technical word with a technical meaning: You do not know who a person's widow (or widower) is until he dies and you can determine to whom he was married at his death.

Example: "To A for life, then to his widow for life; and on the death of A's widow, to such of A's descendants as are then living." (i) A has a life estate; there is a contingent remainder in a life estate in his widow; there is a contingent remainder in fee simple in A's descendants; and the transferor has a reversion. (ii) The remainder in the descendants violates the Rule. Although A is now happily married, he might divorce his wife (or she might die), and A might marry someone who was not alive at the time the interest was created. A might have a child by this widow; then everyone now on the scene might die; the ***widow might live for more than 21 years after the death of all lives in being***, then die—leaving the afterborn child or children as "A's descendants then living."

Compare: "To A for life, then to his widow for life; and on the death of A's widow, to A's children." (i) A has a life estate; there is a contingent remainder in a life estate in his widow; A's present children have vested remainders in fee simple that are subject to open in favor of any future children born to A, and A's unborn children have a contingent remainder in fee simple. (ii) The remainder in A's children is valid under the Rule because their interests will vest (and the class will close) within A's lifetime. The difference here is that the children's interest was not contingent on their surviving A's widow, and the law does not imply such a condition.

e. The Administrative Contingency

A gift that is conditioned on an administrative contingency (e.g., admission of will to probate) violates the Rule. The key question is "under the facts as they existed at the time of the gift, what might happen?"

Example: Disposition of residuary estate "per stirpes to such of my descendants as are living at the time my will is admitted to probate." Alternatively, a will of a German national written during World War II: "to such of my

relations in Germany as are living at the time World War II is officially declared at an end." Under the "what might happen" approach of the common law Rule, wills are not probated, wars do not come to an end, decrees of distribution are never entered, etc. Moreover, because no person's lifetime is connected to the condition attached to this type of gift, we cannot use a life in being; we must use the "period in gross" of 21 years. And because the will "might not" be probated within 21 years, the gift is void.

The fact that the testator's will is in fact probated three weeks after her death does not matter. We do not wait and see. (*But see* 1.b.1), *supra*.) Rather, looking from the time of the testator's death, and taking into account facts as they existed at that time, the question is what might happen.

f. Options and Rights of First Refusal

1) Options

An option creates in the optionee a right to purchase the property on terms provided in the option. Options are typically considered to be ***assignable*** unless the parties provide otherwise and thus are subject to the Rule Against Perpetuities (*but see* b), *infra*). If an option is structured so that it ***might*** be exercised later than the end of the Rule's period, it is usually held void.

Examples: 1) A is a subdivision developer and gives B an option to purchase a lot in the subdivision "to be exercised within 60 days after the City Council grants approval for the filing of a subdivision plat." While the parties may expect this to occur soon, it is ***possible*** that it will not occur within 21 years after any life in being at the creation of the option. Hence, the option may be held void.

2) O conveys "to A and her heirs an option to purchase Blackacre for $25,000." This option is not limited to A's life, but can be exercised by A's heirs and their heirs long after A's death. Thus, the option is void.

a) Reasonable Time Limit May Be Inferred

A significant minority of courts, in applying the Rule to these interests, will construe the option as lasting only for a reasonable time, which is invariably less than 21 years, and thus will uphold it. Under this view, the option in Example 1), above, would be sustained on the ground that the parties intended it to expire if the City Council failed to act within a reasonable time, less than 21 years. Similarly, if the parties to the option are natural persons, some courts construe the option as lasting only for their lifetimes; hence, it is valid under the Rule. Furthermore, the Uniform Statutory Rule Against Perpetuities (4.d., *infra*) excludes options in commercial transactions from the Rule's application.

b) Options Connected to Leaseholds

If a tenant under a lease has an option to purchase the leased premises during

the lease term, the Rule is not applied, no matter how long the term. If a tenant assigns the leasehold, the option generally is considered a running covenant, exercisable by the assignee in the absence of contrary intent. However, a tenant may attempt to transfer the option to some other party, thereby separating it from the leasehold estate. While some courts do not permit the option to be transferred separately, most courts hold that the transferability of the option depends on the original parties' intent when they entered into the lease and option agreement. If the court finds that the option has been separated from the leasehold estate, so that it is no longer exercisable by the tenant, the option becomes subject to the Rule Against Perpetuities.

2) Rights of First Refusal

A right of first refusal (or "preemptive right") gives the holder the right to purchase the property if the seller receives a third party's offer to purchase, usually on the same terms as that offer. In contrast to options, rights of first refusal in many states are presumed to be personal to the holder and thus ***not assignable*** unless the instrument indicates otherwise. [Malone v. Flattery, 797 N.W.2d 624 (Iowa 2011)] Nonassignable rights of first refusal are ***usually not subject to the Rule Against Perpetuities***, but rather are governed by the Rule Against Restraints on Alienation (*see* F.5.b., *infra*). In some states, however, rights of first refusal are subject to the Rule Against Perpetuities in the same manner as options.

3. Application of the Rule to Class Gifts

a. "Bad-as-to-One, Bad-as-to-All" Rule

The general principle that the Rule does not invalidate interests that "vest" within the perpetuities period ***does not apply to vested remainders subject to open***. The class gift rule, sometimes called the "all-or-nothing" rule, requires that:

(i) The ***class must close*** within the perpetuities period; and

(ii) All conditions precedent for ***every*** member of the class must be satisfied, if at all, within the perpetuities period.

If it is possible that a disposition might vest remotely with respect to any member of the class, the ***entire class gift is invalid***.

Examples: 1) "To A for life, then to such of A's children as live to attain the age of 35." At the time of this disposition, A has two children: X (age 38) and Y (age 33). (i) A has a life estate. X has a vested remainder subject to open. There is a contingent remainder in such of A's other children as live to attain the age of 35. (ii) The remainder to A's children violates the Rule; the transferor has a reversion in fee. While X's remainder is vested subject to open, it is not vested for purposes of the Rule. Here is what might happen: A might have another child (Z); before Z attains age 14, A, X, and Y might die, etc. The ***gift with respect to any afterborn child of A clearly violates the Rule***; under the "bad-as-to-one, bad-as-to-all" class gift rule, ***the entire class gift is void***.

Why does the "class closing" rule not save the gift? Because X is already age 35, doesn't this mean that the class will close on the life tenant's death? The answer is: yes it does, but this does not help. Although we will close the class at that point, the class as closed might include the afterborn Z, who might be under age 14 at that time; and it still might be more than lives in being plus 21 years before Z's interest might vest.

2) "To A for life, then to A's children for their lives, and on the death of the last survivor of A's children, to A's grandchildren in fee." At the time this disposition takes effect, A is alive and has two children and three grandchildren. A has a life estate, the two children have vested remainders subject to open in a life estate, and the three grandchildren have vested remainders subject to open in fee. The remainder to A's grandchildren is void because every member of the class will not be ascertained until the death of the survivor of A's children; and that surviving child might be born to A after the date of this disposition. Then all of A's children and grandchildren who are lives in being might die and 21 years after their deaths, this afterborn child might give birth to a child (GC-4); although GC-4's interest would vest at birth, under the hypothesized facts it would vest remotely.

b. Class Closing Rules May Save Disposition

In some cases, the "rule of convenience" applicable to class gifts can be relied on to save a gift from the Rule.

Example: "To A for life, and on her death to A's grandchildren in fee." At the time of this disposition, A has two children and three grandchildren. A has a life estate and the grandchildren have vested remainders subject to open. As in the preceding example, A might have an afterborn child who might produce afterborn grandchildren—but there is one difference. Under the "rule of convenience" the ***class will be closed at the time any member of the class can demand a distribution***—here the death of A, a life in being. Consequently, all members of the class who will be permitted to share in the remainder will be determined on A's death.

c. "Gift to Subclass" Exception

Separate gifts vest at different times. Each gift to a subclass may be treated as a separate gift under the Rule.

Example: "To pay the income to A for life, then to A's children for their lives, and as each child of A dies, to distribute the corpus to such child's issue then living, per stirpes." A has two children at the time of this disposition. In this case, the remainder to issue has been made by a gift to subclasses; as each child dies his issue are to take the share on which he was receiving income. With respect to A's two children now alive, the class of "issue then living" will be determined on their deaths; the gift is good. If A should have another child after the date of this disposition, the ***remainder to such afterborn child's issue is void*** because it might vest beyond the lives in being plus 21 years.

d. Per Capita Gift Exception
When there is a separate gift of a fixed sum to each class member, each gift is tested separately under the Rule.

Example: T's will bequeaths "$1,000 each to such of A's grandchildren as live to attain the age of 21, whether alive at my death or born thereafter." At T's death, A has two children and five grandchildren. Here, we have a per capita gift to each member of the class; there is no problem of knowing within the perpetuities period the number of class members who share in an aggregate gift, and thus the size of each share. Here, the amount to be received by each member is ascertainable without reference to the number of persons in the class. The bequest is valid for all grandchildren by A's two children who were alive at T's death. (This includes all future-born grandchildren as well as the five now on the scene, for all such grandchildren will reach 21, if at all, within 21 years after their parent's death.)

However, the ***bequest is void for any grandchildren by a child born to A after T's death***. Such an afterborn child cannot be used as a life in being.

4. Perpetuities Reform Legislation
Most states have enacted one of the following types of statutes designed to eliminate some of the harsh results of the common law Rule Against Perpetuities:

a. A ***"wait and see"*** statute, under which the validity of an interest following one or more life estates is determined on the basis of facts existing at the end of the life estate rather than at the creation of the interest (*see* 1.b.1), *supra*);

b. A ***cy pres*** approach, borrowed from Trusts law, under which an invalid interest is reformed to comply with the Rule and carry out the grantor's intent as nearly as possible;

c. A statute dealing with ***specific perpetuities problems*** (e.g., age contingencies reduced to age 21, women over age 55 presumed incapable of childbearing, gift to widow presumed to mean the person who was the spouse on the date the gift was created); or

d. The ***Uniform Statutory Rule Against Perpetuities***, which provides an alternative 90-year vesting period. The Uniform Rule takes a "wait and see" approach in determining whether an interest actually vests within 90 years.

5. Technique for Analysis of Perpetuities Problems
In applying the Rule Against Perpetuities, these three steps should be followed:

a. Determine What Interests Are Created
First, determine what interests are created, applying the proper future interests labels, as though there were no Rule Against Perpetuities.

b. Apply the Rule
Determine the measuring life or lives that can be used to show either that the interest

must vest within lives in being plus 21 years ***or*** that the interest might not vest within that period. At this step, assume that there is no such thing as a perpetuities reform statute, for the statute is not brought into play unless there is a perpetuities problem.

c. Apply Reform Statute
If the particular jurisdiction has a perpetuities reform statute that is triggered by the perpetuities violation, apply the statute to reform or save the gift.

F. THE RULE AGAINST RESTRAINTS ON ALIENATION

As a general rule, any restriction on the transferability of a legal (as distinguished from an equitable) interest in property is void: The restriction violates the common law Rule Against Restraints on Alienation. "Restraint on alienation" means an express restriction on the transferability of property. Like the Rule Against Perpetuities, this is a rule of public policy that is designed to prevent property from being tied up and taken out of commerce.

1. Types of Restraints on Alienation

There are three types of restraints on alienation: (i) ***disabling*** restraints, under which any attempted transfer is ineffective; (ii) ***forfeiture*** restraints, under which an attempted transfer results in a forfeiture of the interest; and (iii) ***promissory*** restraints, under which an attempted transfer breaches a covenant. A disabling restraint on ***any*** legal interest is ***void***.

Examples: 1) Property is transferred to A in fee simple, with the added proviso that "neither A nor any of her children shall have the right to transfer the land or any interest therein." Under this restriction, if given effect (***it is not***), any attempted transfer would simply be ineffective. This is a ***disabling restraint***.

2) Property is transferred to A in fee simple, with the added proviso that "if A shall attempt to transfer the land or any interest therein during her lifetime, her estate shall cease, and title therein shall vest in B." This is a ***forfeiture restraint***.

3) Property is transferred to A in fee simple, with the added proviso that "A hereby covenants that she will not transfer the land or any interest therein without [the transferor's] prior written consent." Under this ***promissory restraint***, if given effect, the remedy is injunction or damages for breach of contract.

2. Restraints on a Fee Simple

a. Total Restraints
Any total restraint on a fee simple—either forfeiture, disabling, or promissory—is ***void***. The grantee may ignore the restraint and freely transfer the property.

b. Partial Restraints
A partial restraint is one that purports to restrict the power to transfer to specific persons, or by a specific method, or until a specific time.

1) Reasonable Restraints Doctrine
Although absolute restraints on fee simple estates are void, a forfeiture or

promissory restraint ***for a limited time*** and ***for a reasonable purpose*** may be upheld.

Example: A owns and resides in a house. He conveys a one-half interest in the house to his brother, B, including in the deed a covenant that "during their joint lifetimes, each party promises not to convey his interest to any other person without the consent of the other party." This promissory restraint is limited to the joint lifetimes of the parties and is a reasonable way to ensure that neither party will be faced with the prospect of residing with a stranger. The restraint would probably be upheld.

2) Discriminatory Restraints

Restraints prohibiting the transfer or use of property to or by a person of a specified racial, religious, or ethnic group are ***not enforceable***.

a) Fourteenth Amendment

Judicial enforcement of a covenant forbidding use of property by persons of a particular race is ***discriminatory state action*** forbidden by the Fourteenth Amendment to the United States Constitution. [Shelley v. Kraemer, 334 U.S. 1 (1948)]

Example: O conveys Blackacre "to A and his heirs, and A promises that Blackacre will never be used or occupied by nonwhite persons." Thereafter A sells to B, a black man, who moves onto Blackacre. O sues for an injunction prohibiting B from using Blackacre, and sues A for damages for having sold to B. Injunction and damages are judicial remedies ordinarily available for breach of a covenant. The court cannot grant O either an injunction or damages, because such judicial action would be state action interfering with B's right to enjoy property free of racial discrimination. [Barrows v. Jackson, 346 U.S. 249 (1953)]

b) Fair Housing Act

Discriminatory restrictions may also violate the Fair Housing Act of 1968. Recording a deed with a racial restriction is prohibited by the Act. [42 U.S.C. §3604(c)]

3. Restraints on a Life Estate

a. Legal Life Estate

Forfeiture and promissory restraints on life estates are ***valid***. A life estate is inalienable as a practical matter because few would be willing to pay full value for an estate of uncertain duration; thus, little is lost by giving effect to the transferor's intention to restrict the estate's transferability. (However, ***disabling*** restraints on legal life estates are ***void***.)

b. Equitable Life Estate

The rule applicable to restrictions on equitable interests (i.e., those held in trust) is the

exact opposite of the rule applicable to legal interests. Spendthrift clauses, which are true disabling restraints, are given effect in the great majority of American jurisdictions. (*See* Trusts outline.)

4. Restraints on Future Interests

Restraints on ***vested*** future interests generally are valid only to the extent that restraints on present interests of the same type are valid. ***Disabling*** restraints on all future interests are ***void***.

a. Vested Remainders in Fee Simple

Any ***total*** restraint on a vested remainder in fee simple—either forfeiture, disabling, or promissory—is ***void*** (*see* 2.a., *supra*). ***Partial forfeiture and promissory*** restraints on vested remainders in fee simple ***may be upheld*** if reasonable (*see* 2.b.1), *supra*).

b. Vested Remainders for Life

Forfeiture and promissory restraints on vested remainders for life are ***valid*** (*see* 3.a., *supra*).

c. Contingent Remainders

The law is unsettled as to the validity of forfeiture and promissory restraints on contingent remainders. Thus, this issue is not likely to be tested.

5. Other Valid Restraints on Alienation

a. Reasonable Restrictions in Commercial Transactions

The courts tend to uphold restrictions on transferability that arise in the context of a commercial transaction on the theory that the restriction appears in an agreement entered into by the parties, it is a product of their bargaining, and presumably serves a useful purpose in facilitating the parties' objectives. Thus, restrictions on transferability that are part of a bargained-for agreement, as distinguished from a donative transaction, are valid.

Examples: 1) O borrows money from M Bank and gives the bank a mortgage on land. The mortgage provides that the land shall not be transferable by O without M's consent, and that if the land is transferred without consent, the entire indebtedness shall be accelerated and shall become immediately due and payable. This "due on sale" restriction on transferability is reasonable because M has an interest in approving who shall be the transferee of the land in which it has a security interest.

2) A, B, C, and D each own 25% of the stock in a closely held corporation. The articles of incorporation provide that no shareholder shall transfer her stock without the consent of a majority of the other shareholders. This restriction on transferability is valid because, due to the closely held nature of the business, the shareholders have a legitimate concern over the identity of their associates.

b. Options and Rights of First Refusal

The right to have the first opportunity to purchase real estate when it becomes available,

or the right to meet any offer, is valid if ***reasonable*** (e.g., by specifying fair market value or other reasonable price). [Restatement (Third) of Property: Servitudes §3.4]

c. Restrictions on Transferability of Leaseholds
A provision in a lease prohibiting the lessee's assignment or subletting of her leasehold interest without the consent of the landlord is given effect in all jurisdictions. (*See* II.E.3., *infra*.)

G. CONCURRENT ESTATES

Any of the estates in land previously discussed can be held concurrently by several persons. These persons all have the right to the enjoyment and possession of the land at the same time. Three of the chief forms of concurrent ownership in land are discussed here: joint tenancy, tenancy by the entirety, and tenancy in common.

1. Joint Tenancy

A joint tenancy can be created between two or more co-tenants. Its distinguishing feature is the ***right of survivorship***. Conceptually, when one joint tenant dies, the property is freed from his concurrent interest; the survivor or survivors retain an undivided right in the property, which is no longer subject to the interest of the deceased co-tenant. The survivors do not succeed to the decedent's interest; they hold free of it.

a. Creation

1) Four Unities Required
At common law, four unities are required to create a joint tenancy:

a) Unity of ***time*** (interests vested at the same time);

b) Unity of ***title*** (interests acquired by the same instrument);

c) Unity of ***interest*** (interests of the same ***type*** and ***duration***); and

d) Unity of ***possession*** (interests give identical rights to enjoyment).

2) Modern Law
The above requirements have been eroded in some jurisdictions; e.g., by statute in some states, an owner can create a joint tenancy in herself and another by a single deed (she need not use a "strawman" conveyance), even though the unities of "time" and "title" are not satisfied. Similarly, as indicated below, a number of transactions are no longer found to sever a joint tenancy despite the seeming absence of continued unities.

3) Express Language Required
Under modern law, ***joint tenancies are disfavored***. Hence, there must be a clear expression of intent to create this estate, or it will not be recognized. The usual language required is "to A and B as ***joint tenants with right of survivorship***." Today, when two or more persons take property by a single conveyance, a tenancy in common, not a joint tenancy, is presumed. A joint tenancy results only when an intention to create a right of survivorship is clearly expressed.

b. Severance

A joint tenancy can be terminated by a suit for ***partition***, which can be brought by any joint tenant. It may also be terminated by various acts by any joint tenant.

1) Inter Vivos Conveyance by One Joint Tenant

An inter vivos conveyance by one joint tenant of her undivided interest destroys the joint tenancy so that the transferee takes the interest as a tenant in common and not as a joint tenant. This rule applies to both ***voluntary and involuntary*** conveyances (even secret conveyances).

a) When More than Two Joint Tenants

When property is held in joint tenancy by three or more joint tenants, a conveyance by one of them destroys the joint tenancy ***only as to the conveyor's interest***. The other joint tenants continue to hold in joint tenancy as between themselves, while the grantee holds her interest as a tenant in common with them.

b) Transactions that May Not Result in Severance

(1) Judgment Liens

In most jurisdictions, when a plaintiff obtains a money judgment against a defendant, that judgment becomes a lien on the defendant's real estate in the county where the judgment is docketed. (This is automatic in some states; in others, the lien must be recorded in the real estate records.) The lien then "runs with the land," burdening it until the judgment is paid or until the lien expires under a statute of limitations (e.g., 10 years). Suppose such a lien is obtained against one of several joint tenants but not against the others. Does it sever the joint tenancy, converting it into a tenancy in common? The majority view is that it does not; a lien is not considered a sufficiently substantial "conveyance" to destroy the unities of time and title. However, if the plaintiff who obtained the judgment then proceeds to enforce it by ***foreclosure*** (often termed a "judgment sale"), the sheriff's deed issued to the buyer at that sale ***will sever*** the joint tenancy. That follows from the fact that the sheriff's deed conveys the defendant's full title.

Example: A and B own land as joint tenants with right of survivorship. P sues A on a tort claim, and obtains and records a judgment. If A dies at that point, B owns the entire land (by virtue of the right of survivorship), and P has a lien on nothing. However, assume that P has a judgment sale, and a sheriff's deed is issued to X, who buys at the sale. Then A dies. B and X each own a one-half interest in the land as tenants in common.

(2) Mortgages

In the majority of states, a mortgage is regarded as a lien on title, and one joint tenant's execution of a mortgage on her interest does not by itself cause a severance. (Rather, the severance occurs only if the mortgage is foreclosed and the property sold.) But in the minority of

states, which regard a mortgage as a transfer of title, the transfer destroys the unity of title and severs the joint tenancy.

Example: A, B, and C are joint tenants. A mortgages her interest to Lender, who records. Thereafter, A dies and Lender seeks to enforce her mortgage on an undivided one-third interest in the property. In a state following the "lien theory" of mortgages, Lender loses. A's mortgage did not sever the joint tenancy. Lender's rights were lost when A died prior to foreclosure. A's interest evaporated, and with it Lender's security interest.

(3) Leases

Theoretically, when one joint tenant leases her interest in jointly held property, the lease destroys the unities of interest and possession and thereby should effect a severance (which is the view taken by some states). But other states hold that the joint tenancy is not destroyed, and is merely temporarily suspended (for the length of the lease).

(a) Death of Lessor

There is a split among the states following the latter view, on what happens if the lessor/joint tenant dies before the end of the lease. Some courts hold that because the lessor's own right to possession would cease on her death, so must the right of any lessee (i.e., the lessor could not convey more than she had). Others hold that the lease operates as a "temporary severance," and the remaining joint tenant's survivorship rights are therefore postponed until the end of the lease.

2) Contract to Convey by One Joint Tenant

In most states, a severance also results where one joint tenant executes a valid contract to convey her interest to another, even though no actual transfer of title has yet been made. The contract to convey is enforceable in equity, and hence is treated as an effective transfer of an equitable interest. Thus, if the vendor dies before the title is transferred, the purchaser is entitled to a deed from the vendor's estate and becomes a tenant in common with the original joint tenant or tenants.

a) Compare—Executory Contract by All Joint Tenants

There is a split as to whether an executory contract to sell, entered into by all the joint tenants, will terminate the joint tenancy. Suppose that on January 1, A and B, joint tenants, contract with X to sell and deliver title to Blackacre to X on February 1. A dies on January 15. Two questions arise: (i) On February 1, is B entitled to the full sales proceeds as surviving joint tenant, or is A's estate entitled to one-half (on the theory that the January 1 contract worked an equitable conversion, which created in the vendors a contract right to receive money that was held in tenancy in common)? And, (ii) will X have to obtain a deed not only from B but also from A's administrator on the theory that the retained legal title (for security purposes) was held in tenancy in common?

(1) Common Law View—Joint Tenancy Continues
The common law view, still followed by many courts, is that a joint tenancy continues in both the right to the proceeds and the retained legal title, meaning that B gets the full sales proceeds and can give good title.

(2) Other Courts—Tenancy in Common
Other jurisdictions, however, proceed on the doctrine of equitable conversion and hold that the executory contract converts A and B's land ownership rights to a mere contract right to receive the purchase price (which they hold as tenants in common because of the statutory presumption favoring such tenancies). Further, the legal title to the land, retained for security purposes, is also held to be in tenancy in common.

3) Testamentary Disposition by One Joint Tenant Has No Effect
A joint tenancy is not terminated where a joint tenant executes a will devising her interest to another or dies with such a will in effect. The reason is that a will is ambulatory (effective only at death) and hence is inoperative as to joint tenancy property, because at the instant of death the decedent's rights in the property evaporate. (The result would be contra if all joint tenants had agreed that the decedent could devise her interest; but in such a case, the agreement itself would cause the severance.)

a) Compare—"Secret" Deeds
As indicated above, an inter vivos conveyance severs a joint tenancy. This is true even though the deed is kept "secret" and the interest transferred is to take effect only upon the death of the grantor. However, if the grantee does not know about the deed, the grantee's acceptance ***after*** the death of the grantor does not relate back to defeat the right of survivorship. (*See* VI.C.4.b., *infra*.)

4) Effect of One Joint Tenant's Murdering Another
Some states have passed statutes under which the felonious and intentional killing of one joint tenant by another joint tenant operates as a severance. In other states, the surviving joint tenant holds the ill-gained portion on a constructive trust for the decedent's estate. Thus, the homicidal survivor keeps her original share but does not profit from her felony.

2. Tenancy by the Entirety
A tenancy by the entirety is a marital estate akin to a joint tenancy between husband and wife. It is not recognized in community property states, but in some common law jurisdictions, it arises presumptively in any conveyance made to husband and wife.

a. Right of Survivorship
The estate carries a right of survivorship, which operates in the same manner as the right of survivorship incident to a joint tenancy.

b. Severance Limited
The major distinction between a joint tenancy and a tenancy by the entirety concerns

severance. A tenancy by the entirety cannot be terminated by involuntary partition. It can be terminated only by: (i) the death of either spouse (leaving the survivor sole owner of the fee); (ii) divorce (in most states leaving the parties as tenants in common with no right of survivorship); (iii) mutual agreement; or (iv) execution by a joint creditor of ***both*** husband and wife (a creditor of one or the other cannot execute).

c. Individual Spouse Cannot Convey or Encumber
In most states, an individual spouse may not convey or encumber tenancy by the entirety property. A deed or mortgage executed by only one spouse is ineffective.

3. Tenancy in Common
A tenancy in common is a concurrent estate with no right of survivorship. Each owner has a distinct, undivided interest in the property. This interest is freely alienable by inter vivos and testamentary transfer, is inheritable, and is subject to claims of the tenant's creditors. The only "unity" involved is possession: Each tenant is entitled to possession of the whole estate. Today, by statute, multiple grantees are presumed to take as tenants in common. The same is true where multiple transferees take by descent.

4. Incidents of Co-Ownership

a. Possession
Each co-tenant has the right to possess all portions of the property; no co-tenant has the right to exclusive possession of any part. A co-tenant out of possession cannot bring a possessory action unless there has been an "ouster" by the tenant in possession. A claim of right to exclusive possession can constitute an ouster.

b. Rents and Profits
In most jurisdictions (but not all), a co-tenant in possession has the right to retain profits gained by her use of the property. A co-tenant in possession need not share such profits with co-tenants out of possession, nor reimburse them for the rental value of her use of the land, unless there has been an ouster or an agreement to the contrary. However, a co-tenant out of possession has a right to share in ***rents from third parties*** and in ***profits*** derived from a use of the land that reduces its value (e.g., removal of minerals, etc.).

c. Effect of One Concurrent Owner's Encumbering the Property
A joint tenant or tenant in common may place a mortgage on her interest, but may not, of course, encumber the other co-tenant's interest. If a tenancy in common is involved, the mortgagee can foreclose only on the mortgaging co-tenant's interest. Likewise, if a joint tenancy is involved and the mortgage itself does not sever the joint tenancy (*see* 1.b.1)b)(2), *supra*), the mortgagee can foreclose on the mortgagor/co-tenant's interest and the foreclosure sale itself will cause a severance. But in the case of a joint tenancy, the mortgagee runs the risk that the mortgaging co-tenant will die before foreclosure, extinguishing the mortgagee's interest. The same principles apply to judgment liens obtained against an individual co-tenant.

Example: A and B are joint tenants with right of survivorship. A injures P in an accident, and P sues A, obtaining a personal injury judgment against A for $1,000. This judgment is, by statute, a lien on A's one-half interest

in the land, but it does not cause a severance. If A dies before the lien is foreclosed and is survived by B, B owns the land free and clear of the lien. But if P forecloses the lien before A's death, the foreclosure sale will cause a severance, and the buyer at the sale will own a one-half interest in the land as a tenant in common with B.

d. Ouster

Under the unity of possession, each co-tenant is entitled to possess and enjoy the whole of the property subject to the equal right of her co-tenant. If one tenant ***wrongfully excludes*** another co-tenant from possession of the whole or any part of the whole of the premises, there is an ouster. The ousted co-tenant is entitled to receive his share of the fair rental value of the property for the time he was wrongfully deprived of possession.

e. Remedy of Partition

A joint tenant or tenant in common has a right to judicial partition, either ***in kind*** (division of the tract into parcels) or ***by sale and division of the proceeds*** (in accordance with the ownership interests as modified by permitted recoupments for improvements, repairs, taxes, and the like). Although partition in kind is generally preferred, partition by sale and division of the proceeds is permitted when a fair and equitable physical division of the property cannot be made. [Nordhausen v. Christner, 338 N.W.2d 754 (Neb. 1983)]

Examples: 1) A and B own a single-family home as joint tenants. A brings an appropriate action to partition the land. Because physical division of the home is not feasible, the court will order a sale of the home and division of the proceeds equally between A and B.

2) A owns a three-fourths interest and B owns a one-fourth interest in a four-acre undeveloped parcel of land as tenants in common. The applicable zoning ordinance requires that a buildable lot contain at least two acres. A seeks to partition the land into a three-acre lot for himself and a one-acre lot for B. B argues that the land should be sold and the proceeds divided between A and B according to their respective shares. B will prevail, because the zoning ordinance makes it impossible to divide the land fairly.

1) Restraint on Partition by Co-Tenants

Although in general, a co-tenant has the right to demand a partition by judicial sale at any time, courts give effect to a provision prohibiting partition by any one co-tenant, provided that the restriction is to ***last for only a reasonable time***. The restriction is not considered to be an invalid restraint on alienation because (i) any co-tenant can transfer her interest to a third person at any time, and (ii) the restraint can be eliminated if the co-tenants join in a deed to a third person, thereby terminating the co-tenancy relationship.

f. Expenses for Preservation of Property—Contribution

Under certain circumstances, equity courts will compel contribution between concurrent owners.

1) Repairs—Contribution May Be Compelled for Necessary Repairs
A co-tenant who pays more than her pro rata share of the cost of necessary repairs is entitled to contribution from the other co-tenants in actions for accounting or partition. Although the courts are split on whether a co-tenant who makes necessary repairs can maintain an independent action for contribution against the other co-tenants, the majority view is that she can compel contribution, provided she has notified the other co-tenants of the need for repairs. Moreover, several decisions authorize contribution even without such notice.

The common law view was that because no co-tenant has a duty to make necessary repairs, a co-tenant who makes such repairs cannot bring an action to compel contribution from the other co-tenants. This is now the minority view.

2) Improvements—No Contribution or Setoff
Generally, there is no right of contribution for the cost of improvements, nor can they be set off in an action for accounting. Only in an action for partition can the value of improvements be recouped.

3) Taxes and Mortgages—Contribution Can Be Compelled
Each co-tenant has a duty to pay her share of taxes and payments due on mortgages on the entire property. A tenant who is not in sole possession can pay the taxes and mortgage payments and then compel contribution from the other co-tenants. However, a co-tenant in sole possession will receive reimbursement only for the amount that exceeds the rental value of the property.

g. Duty of Fair Dealing Among Co-Tenants
A confidential relationship exists among co-tenants. Accordingly, the acquisition by one co-tenant of any outstanding title or lien that might affect the estate held by all the co-tenants is deemed to be an acquisition on behalf of all the other co-tenants as well. Thus, when one co-tenant purchases or otherwise acquires a lienholder's (mortgagee's) claim against the co-tenancy property, she must give the other co-tenants a reasonable time to pay their share and acquire a proportionate interest. Courts carefully scrutinize the fairness of transactions between co-tenants. Lastly, it is difficult for one co-tenant to ***adversely possess*** against other co-tenants. (*See* V.B.4.b., *infra*.)

Example: A and B own land as co-tenants. Neither pays the annual property taxes. The county conducts a tax sale and A buys the property for $10,000. If B is willing to pay A $5,000, many courts will compel A to put the property in co-tenancy again.

II. LANDLORD AND TENANT

A. NATURE OF LEASEHOLD

A leasehold is an estate in land. The tenant has a present possessory interest in the leased premises, and the landlord has a future interest (reversion). Certain rights and liabilities flow from this property relationship between landlord and tenant. The three major types of leasehold estates are ***tenancies for years***, ***periodic tenancies***, and ***tenancies at will***. There is a fourth category called ***tenancies at sufferance***.

1. Tenancies for Years

a. Fixed Period of Time

A tenancy for years is one that is to continue for a fixed period of time. It may be for ***more or less*** than a year (e.g., 10 days or 10 years); it may be determinable (similar to a fee simple determinable) or on condition subsequent. The termination date of a tenancy for years is usually certain. As a result, the tenancy expires at the end of the stated period ***without either party giving notice to the other***. Even if the date of termination is uncertain (e.g., L leases the premises to T "until the end of the war"), ***most courts*** hold that if the parties have attempted to state some period of duration, the lease creates a tenancy for years.

b. Creation

Tenancies for years are normally created by written leases. In most states, the Statute of Frauds requires that a lease creating a tenancy for more than one year be memorialized in writing. In addition, most states have statutes that restrict the number of years for which a leasehold estate may be created (e.g., 51 years for farm property and 99 years for urban property). When the lease term exceeds the statutory maximum, most courts hold that the lease is ***entirely*** void. Likewise, where the lease contains an ***option to renew*** for a period beyond the permitted maximum, most courts hold the entire lease void.

c. Termination

A tenancy for years ends ***automatically*** on its termination date.

1) Breach of Covenants

In most tenancy for years leases, the landlord reserves the right to terminate if the tenant breaches any of the leasehold covenants. This reserved power is called the landlord's ***right of entry***.

a) Failure to Pay Rent

In many jurisdictions, if the tenant fails to pay the promised rent, the landlord has the right to terminate the lease ***even in the absence of a reserved right of entry***.

2) Surrender

A tenancy for years also terminates upon surrender. Surrender consists of the tenant giving up his leasehold interest to the landlord and the landlord accepting. Usually the same ***formalities*** are required for the surrender of a leasehold as are necessary for its creation. Thus, a writing is necessary for the surrender of a leasehold if the unexpired term is more than one year.

2. Periodic Tenancies

A periodic tenancy is a tenancy that continues from year to year or for successive fractions of a year (e.g., weekly or monthly) until terminated by proper notice by either party. The beginning date must be certain, but the ***termination date is always uncertain*** until notice is given.

All conditions and terms of the tenancy are carried over from one period to the next unless there is a lease provision to the contrary. Periodic tenancies do not violate the rules limiting

the length of leaseholds because each party retains the power to terminate upon giving notice.

a. Creation
Periodic tenancies can be created in three ways:

1) By Express Agreement
Periodic tenancies can be created by express agreement (e.g., "Landlord leases to Tenant from month to month").

2) By Implication
A periodic tenancy will be implied if the lease has no set termination but does provide for the payment of rent at specific periods.
Example: "Landlord leases to Tenant at a rent of $1,000 ***payable monthly*** in advance." The reservation of monthly rent will give rise to a periodic tenancy from ***month to month***.

Note: If the lease reserves an annual rent, payable monthly (e.g., "$12,000 per annum, payable $1,000 on the first day of every month commencing January 1"), the majority view is that the periodic tenancy is from ***year to year***.

3) By Operation of Law
A periodic tenancy may arise even without an express or implied agreement between the parties.

a) Tenant Holds Over
If a tenant for years remains in possession after the termination of his tenancy period, the landlord may elect to treat the tenant as a periodic tenant on the same terms as the original lease. (*See* 5.b., *infra*.)

b) Lease Invalid
If a lease is invalid (e.g., because of failure to satisfy the Statute of Frauds) and the tenant nonetheless goes into possession, the tenant's periodic payment of rent will convert what would otherwise be a tenancy at will into a periodic tenancy. The period of the tenancy coincides with the period for which the rent is paid.

b. Termination—Notice Required
A periodic tenancy is ***automatically renewed***, from period to period, until proper notice of termination is given by either party. Many jurisdictions have statutorily prescribed the notice required to terminate a periodic tenancy. In general, the guidelines are as follows:

(i) The tenancy must end at the ***end of a "natural" lease period***.

(ii) For a tenancy from year to year, ***six months' notice*** is required.

(iii) For tenancies less than one year in duration, a ***full period in advance*** of the period in question is required by way of notice (e.g., for a month-to-month periodic tenancy, one full month's notice is required).

In general, the notice required to terminate a periodic tenancy must be in ***writing*** and must actually be ***delivered*** to the party in question or deposited at his residence in a manner similar to that required for service of process.

3. Tenancies at Will

A tenancy at will is an estate in land that is terminable at the will of either the landlord or the tenant. To be a tenancy at will, both the landlord and the tenant must have the right to terminate the lease at will.

(i) If the lease gives ***only the landlord*** the right to terminate at will, a ***similar right*** will generally be ***implied in favor of the tenant*** so that the lease creates a tenancy at will.

(ii) If the lease is only at the will of the ***tenant*** (e.g., "for so long as the tenant wishes"), courts usually ***do not imply a right to terminate in favor of the landlord***. Rather, most courts interpret the conveyance as creating a life estate or fee simple, either of which is terminable by the tenant. (If the Statute of Frauds is not satisfied, the conveyance is a tenancy at will.)

a. Creation

A tenancy at will generally arises from a specific understanding between the parties that ***either party may terminate*** the tenancy at any time. Note that unless the parties ***expressly agree*** to a tenancy at will, the payment of regular rent (e.g., monthly, quarterly, etc.) will cause a court to treat the tenancy as a periodic tenancy. Thus, tenancies at will are quite rare. Although a tenancy at will can also arise when the lease is for an indefinite period (one that does not satisfy the requirements for creating a tenancy for years), or when a tenant goes into possession under a lease that does not satisfy the requisite formalities (usually the Statute of Frauds), rent payments will usually convert it to a periodic tenancy.

b. Termination

A tenancy at will may be terminated by ***either party***. At common law, no notice was required to terminate a tenancy at will. But the majority of states now require that a party give the other notice of termination and a reasonable time to quit the premises. A tenancy at will also terminates by ***operation of law*** if:

1) Either party ***dies***;

2) The tenant commits ***waste***;

3) The tenant attempts to ***assign*** his tenancy;

4) The ***landlord transfers his interest*** in the property; or

5) The ***landlord executes a term lease*** to a third person.

4. Tenancies at Sufferance

A tenancy at sufferance (sometimes called "occupancy at sufferance") arises when a tenant

wrongfully remains in possession after the expiration of a lawful tenancy (e.g., after the stipulated date for the termination of a tenancy for years; or after the landlord has exercised a power of termination). Such a tenant is a wrongdoer and is ***liable for rent***. The tenancy at sufferance lasts only until the landlord takes steps to evict the tenant. No notice is required to end the tenancy, and authorities are divided as to whether this is even an estate in land.

5. The Hold-Over Doctrine

When a tenant continues in possession after the termination of his right to possession, the landlord has two choices of action:

a. Eviction

The landlord may treat the hold-over tenant as a trespasser and evict him under an unlawful detainer statute.

b. Creation of Periodic Tenancy

The landlord may, in his sole discretion, bind the tenant to a new periodic tenancy.

1) Terms

The terms and conditions of the expired tenancy (e.g., rent, covenants, etc.) apply to the new tenancy. In ***commercial leases***, if the original lease term was for ***one year or more***, a year-to-year tenancy results from holding over. If the original term was for ***less than one year***, the periodic term is determined by the manner in which the rent was due and payable under the prior tenancy. In ***residential*** leases, however, most courts would rule the tenant a month-to-month tenant (or a week-to-week tenant if the tenant was a roomer paying weekly rent), irrespective of the term of the original lease.

Example: A nonresidential tenant was holding under a six-month term tenancy with rent payable monthly. The tenant holds over and the landlord binds him to a new tenancy. The new periodic tenancy is a month-to-month tenancy.

2) Altered Terms

If the landlord notifies the tenant before termination of the tenancy that occupancy after termination will be at an increased rent, the tenant will be held to have acquiesced to the new terms if he does not surrender. The tenant will be held to the new terms ***even if he objects*** to the increased rent, provided that the rent increase is reasonable.

c. What Does Not Constitute Holding Over

The landlord cannot bind the tenant to a new tenancy under the hold-over doctrine if: (i) the tenant remains in possession for only a ***few hours*** after termination of the lease, or leaves a few articles of personal property on the premises; (ii) the delay is ***not the tenant's fault*** (e.g., because of severe illness); or (iii) it is a ***seasonal lease*** (e.g., summer cottage).

d. Double Rent Jeopardy

Many state statutes provide that if a tenant ***willfully*** remains in possession after his term expires and after the landlord makes a ***written demand for possession***, the landlord may collect double rent for the time the tenant in fact remains in possession.

e. Forcible Entry Statutes

Most states by statute prohibit forcible entry, i.e., entry against the will of the possessor. Under such statutes, a landlord must not use force or self-help to remove a hold-over tenant. Some states also bar the landlord from more subtle methods of regaining possession, e.g., changing the locks and locking out the tenant.

The statutes allow the landlord to ***evict*** a tenant who has remained in possession after his right to possession has terminated. The sole issue is "who has the right to possession"; questions of title must be litigated in ejectment actions rather than in eviction actions.

B. LEASES

A lease is a contract containing the promises of the parties. It governs the relationship between the landlord and tenant over the term of the lease.

1. Common Law—Lease Covenants Independent

At common law, covenants in a lease were independent of each other; i.e., one party's performance of his promise did not depend on the other party's performance of his promise. Thus, if one party breached a covenant, the other party could recover ***damages***, but still had to perform his promises and ***could not terminate*** the landlord-tenant relationship.

Example: L leases an office space to T for five years. T covenants to pay $1,250 per month, and L covenants to paint the office once each year. At the beginning of the second year, L refuses to paint the office. At common law, T could recover damages from L (the decrease in fair rental value or the cost of painting), but T could not terminate the lease or refuse to pay his rent because of L's breach.

2. Modern Trend—Lease Covenants Dependent

Exceptions to the common law rule developed over time. For example, a tenant may be excused from his covenant to pay rent if the landlord actually or constructively ***evicts*** the tenant (*see* D.2., *infra*) or breaches the ***implied warranty of habitability*** (*see* D.3., *infra*). Similarly, in nearly all states a landlord may terminate the lease if the tenant breaches his covenant to ***pay rent*** (*see* C.4.a., *infra*). Modern courts are also likely to construe other covenants as dependent and excuse one party's performance (after proper notice and time to cure) when the other party's breach relates to a ***material*** part of the lease (e.g., the Uniform Residential Landlord and Tenant Act, which has been adopted in nearly half the states, codifies this rule for residential tenancies [URLTA §§4.101, 4.201]).

Example: L leases a retail space to T for four years to be used as a furniture store. T covenants to pay $350 per month, and L covenants not to lease any other space in the building "for use as a furniture store." During the third year, L leases the adjoining retail space to a rug store. If T sells rugs and would suffer financial loss as a result of the competition, L's breach would be considered material, allowing T to terminate the lease. [Kulawitz v. Pacific Woodenware & Paper Co., 155 P.2d 24 (Cal. 1944)]

Compare: In the example in 1., above, L's breach of a covenant to paint likely would not be considered material.

C. TENANT DUTIES AND LANDLORD REMEDIES

1. Tenant's Duty to Repair (Doctrine of Waste)

A tenant cannot damage—commit waste on—the leased premises. The rules governing waste in the leasehold context are very much like those governing waste in the context of the life estate.

a. Types of Waste

1) Voluntary (Affirmative) Waste

A tenant is liable to the landlord for voluntary waste. Voluntary waste results when the tenant intentionally or negligently damages the premises. It also includes exploiting minerals on the property unless the property was previously so used, or unless the lease provides that the tenant may do so.

2) Permissive Waste

Unless the lease provides otherwise, the tenant has no duty to the landlord to make any ***substantial*** repairs (i.e., to keep the premises in good repair). However, the tenant has a duty to make ***ordinary*** repairs to keep the property in the same condition as at the commencement of the lease term, excluding ordinary wear and tear (unless the tenant ***covenanted*** to repair ordinary wear and tear; *see* c.2), *infra*). For example, it is the tenant's duty to repair broken windows or a leaking roof and to take such other steps as are needed to prevent damage from the elements (i.e., keep the premises "wind and water tight"). If the tenant fails to do so, he is liable to the landlord for any resulting damage, but not for the cost of repair. Under the URLTA, residential tenants have additional duties: (i) not to cause housing code violations; (ii) to keep the premises clean and free of vermin; and (iii) to use plumbing, appliances, etc., in a reasonable manner. Note that even when the burden of repair is on the landlord, the tenant does have a duty to report deficiencies promptly to the landlord.

3) Ameliorative Waste

A tenant is under an obligation to return the premises in the same nature and character as received. Therefore, a tenant is not permitted to make substantial alterations to leased structures even if the alteration increases the value of the property.

a) Liability—Cost of Restoration

The tenant is liable for the cost of restoration should he commit ameliorative waste.

b) Modern Exception—Value of Premises Decreasing

When, through the passage of time, the demised premises have been significantly reduced in value, courts will permit a change in the character of the premises as long as:

(1) The change ***increases the value*** of the premises;

(2) The change ***is performed by a long-term tenant*** (e.g., 25 years); and

(3) The change ***reflects a change*** in the nature and character of the neighborhood.

b. Destruction of the Premises Without Fault

If the leased premises are destroyed (e.g., by fire) without the fault of either the landlord or the tenant, no waste is involved. In this situation, the common law held that the lease continues in effect. In the absence of lease language, neither party has a duty to restore the premises, but the tenant has a duty to continue paying the rent.

1) Majority View—Tenant Can Terminate Lease

In most states, statutes or case law now give the tenant an option to terminate the lease if the premises are destroyed without the tenant's fault, even in the presence of an explicit covenant to repair (*see* below).

c. Tenant's Liability for Covenants to Repair

In ***residential*** leases, even if the tenant covenants to repair, the landlord will usually be obligated to repair (except for damages caused by the tenant) under the "implied warranty of habitability" (*see* D.3., *infra*), because the landlord's obligations under that warranty are usually held not to be waivable. However, in ***nonresidential*** leases, the tenant's covenant to repair is enforceable, and a landlord's claim that the tenant breached the covenant will be assessed by comparing the property's condition when the lease terminates with its condition when the lease commenced.

1) Rebuilding After Structural Damage or Casualty Destruction

A covenant requiring the tenant to repair is ***not*** usually construed by the modern cases to include rebuilding of structural damage or destruction due to a casualty, structural defects, or a third party's acts, unless the covenant ***expressly includes*** these types of repairs.

Example: L leases greenhouses to T, and the lease contains a covenant by T to "maintain said (greenhouses); and, upon expiration of the term hereof surrender in as good a condition as it shall be when lessee takes possession thereof." The greenhouses are destroyed by fire, and L sues T for the cost of rebuilding them. *Held:* "Maintain" or "repair" does not include an obligation to rebuild after destruction by fire. [Washington Hydroculture, Inc. v. Payne, 635 P.2d 138 (Wash. 1981)]

2) Repairing Ordinary Wear and Tear

A covenant requiring the tenant to repair is usually construed to ***include*** even repair of ordinary wear and tear ***if*** the covenant in the lease makes no specific mention of ordinary wear and tear. However, repair covenants frequently ***exclude*** repair of ordinary wear and tear, and such an exclusion is enforceable.

Example: L leases a restaurant to T. T covenants to "maintain, repair and keep in good order the interior of the building." The covenant does not contain the usual exclusion for ordinary wear and tear. Thus, T is held liable for all needed repairs, including tears in booths and chairs, worn flooring, and a damaged ceiling. [Santillanes v. Property Management Services, Inc., 716 P.2d 1360 (Idaho 1986)]

2. Duty to Not Use Premises for Illegal Purpose
If the tenant uses the premises for an illegal purpose, and the landlord is not a party to the illegal use, the landlord may terminate the lease or obtain damages and injunctive relief.

a. Occasional Unlawful Conduct Does Not Breach Duty
Occasional unlawful conduct of the tenant does not breach this duty. The duty is breached only when the illegal conduct is continuous (e.g., if the tenant operates a gambling ring out of the leased premises).

b. Landlord Remedies—Terminate Lease, Recover Damages
If the conduct is continuous, the landlord may terminate the lease and recover the damages. If the conduct has first been stopped by a public authority, the landlord may terminate and recover damages, but only if she acts within a reasonable time after the use has been stopped. Alternatively, the landlord faced with unlawful tenant conduct may keep the lease in force and seek injunctive or monetary relief.

3. Duty to Pay Rent
At common law, rent is due at the end of the leasehold term. However, leases usually contain a provision making the rent payable at some other time (e.g., "monthly in advance").

a. When Rent Accrues
At common law, rent is not apportionable; i.e., it does not accrue from day to day, but rather accrues all at once at the end of the term. However, most states today have statutes that provide that if a leasehold terminates before the term originally agreed on, the tenant must pay a ***proportionate amount*** of the agreed rent.

b. Rent Deposits
Landlords often require a deposit by the tenant at the outset of the lease. If the money is considered a ***security deposit***, the landlord will not be permitted to retain it beyond the extent of his recoverable damages. But if the deposit is denominated a ***"bonus"*** or a future rent payment (e.g., the last month's rent), then most courts permit the landlord to retain it after the tenant has been evicted.

c. Termination of Rent Liability—Surrender
If a tenant effectively conveys back (surrenders) his leasehold to the landlord, the tenant's liability for future rent ends. Normally, this occurs when there is an agreement between the landlord and tenant that the tenant's interest in the demised premises will end. If the unexpired term of the lease is more than one year, the surrender must be memorialized in writing to satisfy the Statute of Frauds.

4. Landlord Remedies

a. Tenant on Premises But Fails to Pay Rent—Evict or Sue for Rent
At common law, a breach, such as failure to pay rent, resulted only in a cause of action for money damages; a breach by either party did not give rise to a right to terminate the lease. Most leases, however, grant the nonbreaching party the right to terminate. Furthermore, nearly all states have enacted an ***unlawful detainer statute***, which permits the landlord to evict a defaulting tenant. These statutes provide for a quick hearing, but

severely limit the issues that may be raised. Under most statutes, the only issue properly before the court is the landlord's right to rent and possession. The tenant cannot raise counterclaims.

1) Distress—Landlord's Lien
In some states (especially in nonresidential leases), a landlord who does not receive rent when due can assert a lien on the personal property found on the leased premises. This applies to property owned by sublessees as well as by the original tenant.

b. Tenant Abandons—Do Nothing or Repossess
If the tenant ***unjustifiably*** abandons the property, the landlord has two options: she may do nothing, or she may repossess.

1) Landlord Does Nothing—Tenant Remains Liable
Traditionally, a landlord had no duty to mitigate and could let the premises lie idle if the abandoning tenant did not tender an acceptable substituting tenant. However, the landlord could not sue for rent due in the future because the tenant still might pay rent when it became due. Now, the majority view requires the landlord to make reasonable efforts to ***mitigate*** her damages by reletting to a new tenant. Under this view, the landlord may sue a tenant who has wrongfully terminated the lease for damages equal to the difference between the unpaid rent under the lease and the property's fair market rental value. If the landlord could have done so but does not attempt to relet, her recovery against the tenant will be reduced accordingly.

2) Landlord Repossesses—Tenant's Liability Depends on Surrender
If the landlord repossesses and/or relets the premises, the tenant's liability will depend on whether the landlord has accepted a surrender of the premises. If surrender is not found, the tenant remains liable for the difference between the promised rent and the fair rental value of the property (or, in the case of reletting, between the promised rent and the rent received from the reletting). However, if the landlord's reletting or use of the premises for her own profit constitutes acceptance of surrender, the abandoning tenant is free from any rent liability accruing after abandonment.

a) Acts that Constitute Acceptance of Surrender
If the landlord resumes possession of the demised premises for herself, this conduct usually constitutes acceptance of the surrender, and the tenant will be relieved of any further liability.

b) Acts that Do Not Constitute Acceptance of Surrender
The fact that the landlord enters the premises after abandonment to make repairs, receives back the keys, or offers to attempt to relet the premises on behalf of the tenant, does not by itself constitute an acceptance of the offered surrender. Note that if the landlord has a duty to mitigate damages, she must repossess the premises; thus, doing so does not constitute acceptance of the tenant's surrender so as to relieve the tenant of liability for future rent. In that case, the tenant would be liable for past due rent as well as the difference

between the future rent under the lease and the fair market or relet rental value.

D. LANDLORD DUTIES AND TENANT REMEDIES

At common law, a landlord had ***no duty to repair or maintain*** the premises. This rule has been modified for residential tenancies in most states by statute (e.g., the URLTA) and the implied warranty of habitability. Moreover, the lease itself commonly prescribes landlord liability to the tenant in several areas. If a lease does not expressly prescribe landlord duties, some duties will be implied.

1. Duty to Deliver Possession of Premises

a. Landlord Duty—Must Deliver Actual Possession

Statutes in most states require the landlord to put the tenant in actual possession of the premises at the beginning of the leasehold term. In a minority of states, the landlord's obligation is merely to give the tenant the legal right to possession. The difference can be important if the leased premises are occupied by a prior, hold-over tenant who has not moved out. Under the majority view, the landlord is in breach if she has not evicted the hold-over tenant by the beginning of the new tenant's term. Under the minority view, it is up to the new tenant to bring eviction proceedings against the hold-over tenant.

b. Tenant Remedy—Damages

In states following the majority rule, a tenant is entitled to damages against a landlord in breach of the duty to deliver possession. If, e.g., the tenant had to find more expensive housing during the interim or suffered business losses as a consequence of the landlord's breach, he may recover for these items.

2. Quiet Enjoyment

There is implied in every lease a covenant that neither the landlord nor someone with paramount title (e.g., a prior mortgagee of the landlord who forecloses) will interfere with the tenant's quiet enjoyment and possession of the premises. The covenant of quiet enjoyment may be breached in any one of three ways: actual eviction, partial actual eviction, or constructive eviction.

a. Actual Eviction

Actual eviction occurs when the landlord, a paramount title holder, or a hold-over tenant excludes the tenant from the ***entire*** leased premises. Actual eviction ***terminates*** the tenant's obligation to pay rent.

b. Partial Actual Eviction

Partial actual eviction occurs when the tenant is physically excluded from only ***part*** of the leased premises. (The part from which the tenant is excluded need not be a substantial part of the premises for breach to occur.) The tenant's remedies for breach will differ depending on whether the partial eviction was caused by the landlord or by one with paramount title.

1) Partial Eviction by Landlord—Entire Rent Obligation Relieved

Partial eviction by the landlord relieves the tenant of the obligation to pay rent

for the ***entire*** premises, even though the tenant continues in possession of the remainder of the premises.

2) Partial Eviction by Third Person—Rent Apportioned
Partial eviction by a third person with paramount title results in an apportionment of rent; i.e., the tenant is liable for the reasonable rental value of the portion that he continues to possess.

c. Constructive Eviction
Constructive eviction occurs when a landlord's breach of duty renders the premises untenantable (i.e., unsuitable for occupancy). To establish a claim for constructive eviction, the tenant must prove:

(i) The ***landlord***, or persons acting for him, breached a duty to the tenant (acts of neighbors or strangers will not suffice);

(ii) The breach ***substantially and materially deprived*** the tenant of her use and enjoyment of the premises (e.g., flooding, absence of heat in winter, loss of elevator service in a warehouse);

(iii) The tenant gave the landlord ***notice and a reasonable time to repair***; and

(iv) After such reasonable time, the tenant ***vacated the premises***.

A tenant who has been constructively evicted may ***terminate the lease*** (i.e., is relieved of her duty to pay rent from the date of abandonment) and may also seek ***damages***. Constructive eviction is often raised as a defense in a landlord's suit for damages or rent.

3. Implied Warranty of Habitability
More than half the states have now adopted by court decision or statute the implied warranty of habitability for residential tenancies; it is clearly a growing trend. (It is rarely applied to nonresidential cases, unlike constructive eviction.) The standards are more favorable to tenants than in constructive eviction, and the range of remedies is much broader.

a. Standard—Reasonably Suitable for Human Residence
The standard usually applied is the local housing code if one exists; if there is none, the court asks whether the conditions are reasonably suitable for human residence.

b. Remedies
The following remedies have been adopted by various courts for violation of the implied warranty (although few courts have adopted all):

1) Tenant may move out and ***terminate lease*** (as in a constructive eviction).

2) Tenant may ***make repairs*** directly, and ***offset the cost*** against future rent obligations. (Some states limit this remedy by statute to a fixed amount, such as one month's rent, or to only one occasion each year.)

3) Tenant may reduce or ***abate rent*** to an amount equal to the fair rental value in view of the defects in the property. (In many jurisdictions, the tenant may withhold

all rent until the court determines the amount of this fair rental value, and may then pay it without risk of the landlord's terminating the lease for rent delinquency.)

4) Tenant may remain in possession, pay full rent, and seek ***damages*** against the landlord.

4. Retaliatory Eviction

If a tenant exercises the legal right to report housing or building code violations or other rights provided by statute (e.g., a residential landlord-tenant act), the landlord is not permitted to terminate the tenant's lease in retaliation. The landlord is also barred from penalizing the tenant in other ways, such as raising the rent or reducing tenant services. This protection is recognized by residential landlord-tenant acts in nearly half the states. These statutes usually ***presume*** a retaliatory motive if the landlord acts within, say, 90 to 180 days after the tenant exercises his rights. In other states, the same conclusion is reached by judicial construction of the eviction and code statutes. The protection generally applies to tenants under both periodic leases when the landlord gives notice to terminate and fixed-term leases when the landlord refuses to renew. To overcome the presumption, the landlord must show a valid, nonretaliatory reason for his actions.

5. Discrimination

The ***Civil Rights Act*** of 1866 bars racial or ethnic discrimination in the sale or rental of all property. The ***Fair Housing Act*** bars discrimination based on race, ethnicity, religion, national origin, gender, and disability in the sale or rental of a dwelling. Discrimination against families with children is also barred except in senior citizen housing. The Act does not apply to religious organizations, private clubs, and owners who have no more than three single-family dwellings or who have an owner-occupied apartment with no more than four units. [42 U.S.C. §§3603(b), 3607]

E. ASSIGNMENTS AND SUBLEASES

Absent an express restriction in the lease, a tenant may freely transfer his leasehold interest, in whole or in part. If he makes a ***complete transfer of the entire remaining term***, he has made an ***assignment***. If he ***retains any part*** of the remaining term, the transfer is a ***sublease***.

Example: L leases property to T for a 10-year term. One month later, T transfers his interest to T1 for nine years, retaining the right to retake the premises (reversion) after nine years. The effect of his transfer is to create a sublease between T (sublessor) and T1 (sublessee).

If, on the other hand, T had transferred to T1 for the remaining period of the lease, reserving no rights, the transfer would constitute an assignment of the lease from T (assignor) to T1 (assignee). (*Note:* It is not controlling that the parties denominate the transfer an "assignment" or "sublease." The court still examines what interest, if any, is retained by T to determine the nature of the transaction.)

1. Consequences of Assignment

The label given to a transfer—an assignment or sublease—determines whether the landlord can proceed directly against the transferee or only against the transferor. To be an assignment, the transfer must be on the same terms as the original lease ***except that the tenant***

may reserve a right of termination (reentry) for breach of the terms of the original lease that has been assigned; e.g., "to A for the balance of the leasehold term. However, should A fail to make the rental payments to the landlord, the right to reenter and reclaim the premises is reserved." If the transfer is an assignment, the assignee stands in the shoes of the original tenant in a direct relationship with the landlord. The assignee and the landlord are in ***"privity of estate,"*** and each is liable to the other on all covenants in the lease that "run with the land."

a. Covenants that Run with the Land

A covenant "runs" if the original parties to the lease so intend, and if the covenant ***"touches and concerns"*** the leased land; i.e., it benefits the landlord and burdens the tenant (or vice versa) with respect to their interests in the property. (These requirements are discussed in detail at IV.D., *infra*.) Covenants held to run with the land (unless the parties specify otherwise) include: covenants to ***do or not do a physical act*** (e.g., to repair, to conduct a business on the land in a specified manner, to supply heat); covenants to ***pay money*** (e.g., rent, taxes, etc.); and covenants regarding the ***duration*** of the lease (e.g., termination clauses).

b. Rent Covenant Runs with the Land

Because the covenant to pay rent runs with the land, an assignee owes the rent ***directly*** to the landlord. He does not owe rent for the period before the assignment, but only for the time that he is in "privity of estate," i.e., from the time of assignment until the end of the lease or until the assignee himself reassigns.

1) Reassignment by Assignee—Privity of Estate with Landlord Ends

If the assignee reassigns the leasehold interest, his privity of estate with the landlord ends, and he is not liable for the subsequent assignee's failure to pay rent. However, if the first assignee specifically promised the landlord that he would be liable for the rent for the remainder of the lease term, he may be obligated to pay based on ***privity of contract***, even though his reassignment ended the privity of estate.

a) Effect of Assignee Assuming Rent Obligation

If the assignee made no promise to the landlord but did promise the original tenant that he would pay all future rent, the landlord may be able to sue the assignee as a ***third-party beneficiary*** of the contract between the original tenant and the assignee.

2) Original Tenant Remains Liable

After assignment, the original tenant is no longer in privity of estate with the landlord. However, if (as is likely) the tenant promised to pay rent in his lease with the landlord, he can still be held liable on his original contractual obligation to pay, i.e., on privity of contract. This allows the landlord to sue the original tenant where the assignee has disappeared, is judgment-proof, etc.

Example: L rents to T for three years at $9,400 per year. After one year, T assigns to T1. T1 pays the rent for one year, and then assigns to T2. T2 fails to pay rent. L can collect from T or T2 but not from T1 (unless T1 made some ***promise*** on the basis of which L can sue him).

2. Consequences of Sublease

In a sublease, the sublessee is considered the tenant of the original lessee, and usually pays rent directly to the original lessee, who in turn pays rent to the landlord under the main lease.

a. Liability of Sublessee for Rent and Other Covenants

The sublessee is liable to the original lessee for whatever rent the two of them agreed to in the sublease. However, the sublessee is ***not personally liable to the landlord*** for rent or for the performance of any other covenants made by the original lessee in the main lease. The reason is that the sublessee has no contractual relationship with the landlord (no privity of contract), and does not hold the tenant's full estate in the land (no privity of estate); therefore, the covenants in the main lease do not "run with the land" to bind the sublessee.

1) Termination for Breach of Covenants

Even though the sublessee is not personally liable to the landlord, the landlord can still terminate the main lease for nonpayment of rent or, if so stated in the lease, breach of other tenant covenants. If this occurs, the sublease will automatically terminate at the same time.

b. Assumption by Sublessee

It is possible for the sublessee to assume the rent covenant and other covenants in the main lease. An assumption is not implied, but must be expressed. If this occurs, the sublessee is bound by the assumption agreement and becomes personally liable to the landlord on the covenants assumed. The landlord is considered a third-party beneficiary of the assumption agreement.

c. Rights of Sublessee

The sublessee can enforce all covenants made by the original lessee in the sublease, but has no direct right to enforce any covenants made by the landlord in the main lease. However, it is likely (although there is very little case law on point) that a sublessee in a residential lease would be permitted to enforce the implied warranty of habitability against the landlord.

3. Covenants Against Assignment or Sublease

a. Strictly Construed Against Landlord

Many leases contain covenants on the part of the tenant not to assign or sublease without the consent of the landlord. These are strictly construed against the landlord. Thus, a covenant prohibiting assignment does not prohibit subleasing and vice versa.

b. Waiver of Covenant

Even if the lease has a valid covenant against assignment, the covenant may be held waived if the landlord knows of the assignment and does not object. This often occurs when the landlord knowingly accepts rent from the assignee.

c. Continuing Waiver

If the landlord grants consent to one transfer, the Rule in *Dumpor's Case* provides that he waives his right to avoid future transfers unless he expressly reserves the right to do so. Reservation of right must take place at the time of granting consent.

d. Transfer in Violation of Lease Not Void
If a tenant transfers (assigns or sublets) in violation of a prohibition in the lease against transfers, the transfer is not void. However, the landlord usually may terminate the lease under either the lease terms or a statute. Alternatively, he may sue for damages if he can prove any.

e. Reasonableness
In a minority of states, the landlord may not unreasonably withhold consent to transfers by the tenant. The majority imposes no such limitation.

4. Assignments by Landlords

a. Right to Assign
A landlord may assign the rents and reversion interest that he owns. This is usually done by an ordinary deed from the landlord to the new owner of the building. Unless required by the lease (which is very unlikely), the consent of the tenants is not required.

b. Rights of Assignee Against Tenants
Once the tenants are given reasonable evidence that the assignment has occurred, they are legally obligated to recognize and pay rent to the new owner as their landlord. This is called ***attornment***. The benefits of all other tenant covenants (e.g., to repair, to pay taxes) also run with the landlord's estate and benefit the new landlord, provided that they touch and concern the land.

c. Liabilities of Assignee to Tenants
The assignee is liable to the tenants for performance of all covenants made by the original landlord in the lease, provided that those covenants touch and concern the land. The burdens of those covenants run with the landlord's estate and become the burdens of the new landlord. The ***original landlord also remains liable*** on all of the covenants he made in the lease.

Example: L leases to T, and in the lease covenants to repair and maintain the premises. L then sells the building to L2, subject to the lease. Because a covenant to repair and maintain touches and concerns the land, L2 is personally liable to T if L2 fails to perform the covenant. L also remains liable.

F. CONDEMNATION OF LEASEHOLDS

1. Entire Leasehold Taken by Eminent Domain—Rent Liability Extinguished
If all of the leased land is condemned for the full balance of the lease term, the tenant's liability for rent is extinguished because both the leasehold and the reversion have merged in the condemnor and there is no longer a leasehold estate. Absent a lease provision to the contrary, the lessee is entitled to compensation for the taking of the leasehold estate.

2. Temporary or Partial Taking—Tenant Entitled to Compensation Only
If the taking is temporary (i.e., for a period less than the remaining term), or if only a portion of the leased property is condemned, the tenant is ***not*** discharged from the rent obligation but is entitled to compensation (i.e., a share of the condemnation award) for the taking.

G. TORT LIABILITY OF LANDLORD AND TENANT

1. Landlord's Liability

At common law, subject to a few exceptions, a landlord had ***no duty*** to make the premises safe. Today there are six exceptions to this rule:

a. Concealed Dangerous Condition (Latent Defect)

If, at the time the lease is entered into, the landlord knows (or should know) of a dangerous condition that the tenant could not discover upon reasonable inspection, the landlord has a ***duty to disclose*** the dangerous condition. Failure to disclose results in liability for any injury resulting from the condition.

Once disclosure is made, if the tenant accepts the premises, she is considered to have assumed the risk of injuries to herself or her guests (e.g., family members, invitees, licensees); the landlord is no longer liable.

b. Common Areas

The landlord has a duty to exercise ***reasonable care*** over common areas, such as halls, walks, elevators, etc., that remain under his control. The landlord is liable for any injury resulting from a dangerous condition that could reasonably have been discovered and made safe. This duty is the same as the duty an owner-occupier owes his guests (*see* Multistate Torts outline).

c. Public Use

A landlord is liable for injuries to members of the public if, at the time of the lease, he: (i) knows or should know of a dangerous condition, (ii) has reason to believe that the tenant may admit the public before repairing the condition (e.g., because of short lease term), and (iii) fails to repair the condition. The landlord's liability extends only to people who enter the premises for the purpose for which the public is invited. Note that the tenant's promise to repair does not relieve the landlord of liability if the landlord has reason to suspect that the tenant will admit the public before making the repair.

d. Furnished Short-Term Residence

When a furnished house or apartment is leased for a short term (i.e., three months or less) for immediate occupancy, many jurisdictions hold that the landlord is liable if the premises are defective and cause injury to a tenant.

e. Negligent Repairs by Landlord

Even if a landlord has no duty to make repairs, a landlord who actually attempts to repair is liable if an injury results because the repairs are done ***negligently***, or because they give a ***deceptive appearance of safety***. [Restatement (Second) of Property: Landlord & Tenant §17.7]

Example: L leases an apartment to T. Without obligation, L agrees to repair sagging, rotted boards in the kitchen floor. The work appears to be done correctly, but in fact is structurally unsound. T relies on the deceptive appearance of safety thereby created and walks on the floor. L is subject to liability for injuries to T when the floor collapses.

f. Landlord Contracts to Repair
If a landlord covenants to repair, most courts hold that he is liable in tort for an injury to the tenant or the tenant's guests resulting from his failure to repair or negligent repair.

2. Modern Trend—General Duty of Reasonable Care
Increasingly, the courts are simply holding that landlords have a ***general duty of reasonable care*** with respect to residential tenants, and that they will be held liable for personal injuries of tenants and their guests resulting from the landlord's ***ordinary negligence***, without regard to the exceptions discussed above. This duty is ordinarily not imposed until the landlord has ***notice*** of a particular defect and a reasonable opportunity to repair it.

a. Defects Arising After Tenant Takes Possession
A landlord will generally be held to have notice of defects that existed before the tenant took possession. However, the landlord will ***not be liable*** for defects arising after the tenant takes possession ***unless*** there is evidence that the landlord actually knew or should have known of them.

b. Legal Duty to Repair
If the landlord has a statutory duty to repair (e.g., under the housing code), he may be liable to the tenant or the tenant's guests for injuries resulting from his failure to repair. Some courts hold that violation of the housing code (or similar statute) is negligence per se, but most courts hold that it is merely ***evidence of negligence***, which the jury may or may not find conclusive. The same analysis probably applies to a violation of the implied warranty of habitability, but there are very few cases on point.

c. Security
Some cases have held landlords liable for injuries inflicted on tenants by third-party criminals, where the landlord failed to comply with ***housing code*** provisions dealing with security, or failed to maintain ***ordinary security*** measures (e.g., working locks on apartment doors), or where he ***advertised extraordinary security*** measures (e.g., television surveillance, doormen, security patrols) and then failed to provide them.

3. Tenant's Liability
The tenant, as occupier of the premises, may be liable in tort to third persons for dangerous conditions or activities on the leased property. The duty of care owed by the tenant as an occupier of land is discussed in the Multistate Torts outline.

III. FIXTURES

A. IN GENERAL
A "fixture" is a chattel that has been so affixed to land that it has ceased being personal property and has become part of the realty. For example, S and B contract to sell and buy a house. Before vacating, S removes a "built-in" refrigerator. B claims that the item was "part of the house." Is the refrigerator a "fixture"? If so, B is entitled to its return or appropriate compensation.

It is important in dealing with "fixture" problems to distinguish between ***common ownership*** cases and ***divided ownership*** cases. Courts treat them differently even though they often purport

to apply the same tests. "Common ownership" cases are those in which the person who brings the chattel onto the land owns both the chattel and the realty (e.g., X installs a furnace in her own home). "Divided ownership" cases are either ones where the person who owns and installs the chattel does not own the land (e.g., T installs a furnace in her rented home, which belongs to L); or the person owns the land but does not own the chattel (e.g., it is subject to a security interest held by the seller). In addition, there are cases involving more than two persons (e.g., conflicting claims are made by the person having a security interest in the chattel and the mortgagee of the land).

B. CHATTELS INCORPORATED INTO STRUCTURE ALWAYS BECOME FIXTURES

In both common ownership and divided ownership cases, where the items become incorporated into the realty so that they lose their identity, they become part of the realty. Examples include bricks built into a building or concrete poured into a foundation. Similarly, where identification is possible, but removal would occasion considerable loss or destruction, the items are considered fixtures, e.g., heating pipes embedded in the wall or floor of a house.

C. COMMON OWNERSHIP CASES

1. Annexor's Intent Controls in Common Ownership Cases

In all common ownership cases where a chattel is not incorporated into a structure, whether an item is a "fixture" (i.e., part of the realty) depends upon the ***objective intention*** of the party who made the "annexation." This intention is determined by considering:

(i) The ***nature of the article*** (i.e., how essential the item is to normal use of the premises);

(ii) The ***manner in which it is attached*** to the realty (the more substantially attached, the more likely it was intended to be permanent);

(iii) The ***amount of damage*** that would be caused by its removal; and

(iv) The ***adaptation*** of the item to the use of the realty (e.g., custom window treatments, wall-to-wall carpet).

a. Constructive Annexation

In some cases, an article of personal property is considered a fixture even though it is not physically annexed to the real estate at all. This is because it is so ***uniquely adapted*** to the real estate that it makes no sense to separate it. Examples include the keys to the doors of a house; curtain rods that have been cut and sized to the brackets on the walls of a house, even if the rods themselves are not presently installed; and a carpet that has been cut to fit an unusually shaped room, even if the carpet is not nailed or glued in place.

b. Vendor-Purchaser Cases

The typical situation is where the owner of land affixes chattels to the land and subsequently conveys the land without expressly providing whether the chattels are to pass with the realty. The intention test works fairly well. The question boils down to whether an owner bringing the disputed chattel to the realty would intend that it become part of the realty. Or to put it another way, ***whether a reasonable purchaser would expect*** that the disputed item was part of the realty.

c. Mortgagor-Mortgagee Cases
The intention test is universally applied to determine whether the owner (mortgagor) intended the chattels to become "part of the realty." Where the mortgagor has made the annexation ***prior*** to the giving of the mortgage, the question is what the "reasonably objective" lender expects to come within the security of her lien. However, where the annexation is made ***after*** the giving of the mortgage, the same considerations arguably should ***not*** apply because each item that is "added" to the lien of the mortgage represents a ***windfall*** to the mortgagee should foreclosure occur. Nevertheless, courts universally apply the same intention test regardless of when the annexation was made. (Courts also usually apply the intention test where items are annexed by one in possession of land under an ***executory contract*** to purchase.)

2. Effect of Fixture Classification

a. Conveyance
If a chattel has been categorized as a fixture, it is part of the real estate. A conveyance of the real estate, in the absence of any specific agreement to the contrary, passes the fixture with it. The fixture, as part of the realty, passes to the new owner of the real estate.

b. Mortgage
To the extent that the owner of the real estate mortgages the realty, in the absence of an agreement to the contrary, the mortgage attaches to all fixtures on the real estate.

c. Agreement to Contrary
Even though the concept of fixtures may apply and a chattel becomes a fixture, an agreement between a buyer and seller (similarly, between a mortgagor and mortgagee) can cause a severance of title. For example, a buyer and seller may agree that the seller will retain the right to remove fixtures. Similarly, a mortgagor and mortgagee can agree that the mortgage lien shall not attach to specified fixtures. The effect of such an agreement is to de-annex, so far as relevant, the chattel from the realty and reconvert the fixture into a chattel.

D. DIVIDED OWNERSHIP CASES

In divided ownership cases, unlike the ones just discussed, the chattel is owned and brought to the realty by someone who is not the landowner (e.g., by a tenant, a licensee, or a trespasser). The question is whether the ownership of the chattel has passed to the landowner. ***Accession*** is the term used to describe the intent of the annexor to make the chattels a permanent part of the real estate, and courts often say that the intention test (C.1., *supra*) is to be applied in these cases too. But the exceptions disprove the rule.

1. Landlord-Tenant
Early English law favored the landlord. However, American law created a ***trade fixtures*** exception under which tradesmen-tenants could remove an item used in their trade or business, that otherwise would have been a "fixture," unless its removal would cause substantial damage to the premises. Later, this exception was expanded to include ***all tenants generally***. Some courts have treated the trade fixtures exception as consistent with the annexor's-intention test; i.e., a tenant's annexations are removable because "it was not the intention

of the tenant to make them permanent annexations to the freehold and thereby donations to the owner of it."

a. Agreement
An agreement between the landlord and tenant is controlling on whether the chattel annexed to the premises was intended to become a fixture. To the extent that the landlord and tenant specifically agree that such annexation is not to be deemed a fixture, the agreement controls.

b. No Intent If Removal Does Not Cause Damage
In the absence of an express agreement to the contrary, a tenant may remove a chattel that he has attached to the demised premises as long as the removal does not leave unrepaired damage to the premises or cause the virtual destruction of the chattel. In other words, the tenant will ***not*** have manifested an intention to permanently improve the freehold (and the concept of fixtures will be inapplicable) as long as the removal of the chattel does not substantially damage the premises or destroy the chattel.

c. Removal Must Occur Before End of Lease Term
Generally, a tenant must remove his annexed chattels before the termination of his tenancy or they become the property of the landlord. If the duration of the tenancy is indefinite (e.g., tenancy at will), the removal must occur within a reasonable time after the tenancy terminates. Similarly, a tenant has a reasonable time for removal if he holds over during unsuccessful negotiations for a new lease.

d. Tenant Has Duty to Repair Damages Resulting from Removal
Tenants are responsible for repairing damages caused by removal of "fixtures."

2. Life Tenant and Remainderman
Generally, the same rules apply here as in the landlord-tenant cases—with one key distinction. The personal representative of a life tenant may remove the annexed chattel within a reasonable time ***after*** the life tenant's death.

3. Licensee and Landowner
Licenses to bring items onto land usually contain agreements respecting removal. In the absence of an agreement, licensees are permitted to remove the items subject to a duty to repair damages caused thereby.

4. Trespasser and Landowner
Trespassers (e.g., adverse possessors before the running of the statute of limitations) normally lose their annexations whether installed in good faith or not. Moreover, the trespasser can be held liable for the reasonable rental value of the property on which she annexed the item for the period that she illegally occupied the land.

a. Trespasser's Recovery Limited to Value Added to Land
Some courts allow a good faith trespasser to recover for the improvement, but the recovery is measured by the value added to the land, not the cost to construct the improvement.

E. THIRD-PARTY CASES

Any of the foregoing cases is complicated by the addition of third-person claimants.

1. Third Person Claims Lien on Chattel Affixed to Land

Suppose Landowner purchases a furnace from Seller and installs it in her house. She owes a balance on the purchase price of the furnace, and therefore grants Seller a ***security interest*** in the furnace (in accordance with Article 9 of the Uniform Commercial Code ("UCC")). Suppose further that Landowner also executes a ***mortgage*** on her house, to Mortgagee. If Landowner subsequently defaults on her payments, both on the furnace and the house, is Seller or Mortgagee entitled to priority? (Same issue where Landowner ***sells*** the house without mentioning the security interest.)

a. UCC Rules

Normally, the rule is that whichever interest is ***first recorded*** in the local ***real estate records*** wins. (Thus, if the chattel security interest was recorded first, it constitutes "constructive notice" to all subsequent lenders or purchasers.) However, an ***exception*** allows a ***"purchase money security interest"*** in an affixed chattel (here, the interest given Seller to secure payment on the furnace) to prevail even over a ***prior recorded*** mortgage on the land, as long as the chattel interest is recorded ***within 20 days*** after the chattel is affixed to the land. [UCC §9-334]

The document used to record the chattel security interest is known as a ***"fixture filing."*** (This is a separate instrument from the "financing statement," which is required to be filed to perfect the chattel security interest in the first place.)

b. Liability for Damages Caused by Removal

In the above example, if Seller were entitled to priority, she would be entitled to remove the furnace. However, she would have to reimburse Mortgagee for any ***damages or repair*** necessitated by the removal (but ***not*** for diminution in value of the property due to the lack of a furnace).

IV. RIGHTS IN THE LAND OF ANOTHER— EASEMENTS, PROFITS, COVENANTS, AND SERVITUDES

A. IN GENERAL

Easements, profits, covenants, and servitudes are ***nonpossessory*** interests in land. They create a right to ***use land possessed by someone else***. For example, A, the owner of Blackacre, grants to B, the owner of an adjacent parcel, Whiteacre, the right to use a path over Blackacre connecting Whiteacre to a public road. An easement has been created, giving B the right to use—but ***not*** to possess—the pathway over Blackacre. Easements, profits, covenants, and servitudes have many similarities in operation, coverage, creation, and termination. They also have important differences, mainly in the requirements that must be met for their enforcement.

B. EASEMENTS

1. Introduction

The holder of an easement has the ***right to use*** a tract of land (called the servient tenement)

for a special purpose, but has ***no right to possess and enjoy*** the tract of land. The owner of the servient tenement continues to have the right of full possession and enjoyment subject only to the limitation that he cannot interfere with the right of special use created in the easement holder. Typically, easements are created in order to give their holder the right of access across a tract of land, e.g., the privilege of laying utility lines, or installing sewer pipes and the like. Easements are either affirmative or negative, appurtenant or in gross.

a. Types of Easements

1) Affirmative Easements
Affirmative easements entitle the holder ***to enter upon the servient tenement and make an affirmative use of it*** for such purposes as laying and maintaining utility lines, draining waters, and polluting the air over the servient estate. The ***right-of-way*** easement is another instance of an affirmative easement. Thus, an affirmative easement privileges the holder of the benefit to make a use of the servient estate that, absent the easement, would be an unlawful trespass or nuisance.

2) Negative Easements
A negative easement does not grant to its owner the right to enter upon the servient tenement. It does, however, entitle the privilege holder to compel the possessor of the servient tenement to ***refrain from engaging in activity*** upon the servient tenement that, were it not for the existence of the easement, he would be privileged to do. Courts historically recognized negative easements only for light, air, subjacent or lateral support, and for the flow of an artificial stream. Today, a negative easement is simply a restrictive covenant. (*See* D.1.e.1), *infra*.)

Example: A owns Lot 6. By written instrument, he stipulates to B that he will not build any structure upon Lot 6 within 35 feet of the lot line. B has acquired a negative easement in Lot 6.

b. Easement Appurtenant
An easement is deemed appurtenant when the right of special use benefits the holder of the easement in his physical use or enjoyment of another tract of land. For an easement appurtenant to exist, there must be ***two tracts*** of land. One is called the ***dominant tenement***, which has the benefit of the easement. The second tract is the ***servient tenement***, which is subject to the easement right. One consequence of appurtenance is that the benefit passes with transfers of the benefited land, regardless of whether the easement is mentioned in the conveyance.

Example: A owns Lot 6 and B owns Lot 7, which are adjoining tracts of land. By a written instrument, B grants to A the right to cross B's tract (Lot 7). A's use and enjoyment of Lot 6 is benefited by virtue of the acquisition of the right to use Lot 7 for this special purpose. The right is an easement appurtenant. B remains the owner of Lot 7. A has only a right to use Lot 7 for a special purpose, i.e., the right to cross the tract.

1) Use and Enjoyment
In an easement appurtenant, the benefits to be realized by the easement must be directly beneficial to the possessor of the ***dominant tenement*** in his physical use and enjoyment of that tract of land. It is not sufficient that the easement makes use of the land more profitable.

Example: A owns Lot 6 and B owns adjacent Lot 7. A grants to B the right to use part of Lot 6 to mine coal. The right is not an easement appurtenant because the benefit granted is not related to B's physical use and enjoyment of Lot 7.

2) Benefit Attached to Possession

The benefit of an easement appurtenant becomes an incident of the possession of the dominant tenement. All who possess or subsequently succeed to title to the dominant tenement become, by virtue of the fact of possession, entitled to the benefit of the easement. There can be no conveyance of the easement right apart from possession of the dominant tenement, except that the easement holder may convey the easement to the owner of the servient tenement in order to extinguish the easement (*see* 4.b., *infra*).

3) Transfer of Dominant and Servient Estates

Both the dominant and servient parcels can be transferred. As discussed above, if the dominant parcel is transferred, the benefit of the easement goes with it automatically—even if it is not mentioned in the deed—and becomes the property of the new owner. If the servient parcel is transferred, its new owner takes it ***subject to*** the burden of the easement, ***unless*** she is a bona fide purchaser (*see* VI.E.3., *infra*) with no notice of the easement. There are three ways the person who acquires the servient land might have notice of the easement: (i) actual knowledge, (ii) notice from the visible appearance of the easement on the land, and (iii) notice from the fact that the document creating the easement is recorded in the public records. Everyone who buys land is expected to inspect the land physically and to examine the public records.

Example: A owns Lot 6 and grants B (the owner of Lot 7) an easement for a driveway across Lot 6 to benefit adjacent Lot 7. The easement is not recorded. Then A sells Lot 6 to X. The tire tracks of the driveway are plainly visible at the time of the sale. X is therefore not a bona fide purchaser, and takes Lot 6 subject to the easement.

c. Easement in Gross

An easement in gross is created where the holder of the easement interest acquires a right of special use in the servient tenement independent of his ownership or possession of another tract of land. In an easement in gross, the easement holder is not benefited in his use and enjoyment of a possessory estate by virtue of the acquisition of that privilege. There is no dominant tenement. An easement in gross passes entirely apart from any transfer of land.

Example: A owns Lot 6. By a written instrument, she grants to B the right to build a pipeline across Lot 6. B receives the privilege independent of his ownership or possession of a separate tract of land. B has acquired an easement in gross.

Easements in gross can be either personal (e.g., O gives friend right to swim and boat on lake) or commercial (e.g., utility or railroad track easements). Generally, an easement in gross is transferable only if the easement is for a commercial or economic purpose.

d. Judicial Preference for Easements Appurtenant

If an easement interest is created and its owner holds a corporeal (possessory) estate that is or could be benefited in physical use or enjoyment by the acquisition of the privilege, the easement will be deemed appurtenant. This is true even though the deed creating the easement makes no reference to a dominant tenement.

Example: A conveys to "B, her heirs, successors, and assigns, the right to use a strip 20 feet wide on the north edge of Blackacre for ingress and egress to Whiteacre." Because there is ambiguity as to whether the benefit was intended to attach to B's land, Whiteacre, or to B personally, a court will apply the constructional preference and hold that the benefit was intended to be appurtenant, with the consequence that any conveyance of Whiteacre by B will carry with it the right to use the strip across Blackacre.

2. Creation of Easements

The basic methods of creating an easement are: express grant or reservation, implication, and prescription.

a. Express Grant

Because an easement is an interest in land, the Statute of Frauds applies. Therefore, any easement must be memorialized ***in a writing*** that is signed by the grantor (the holder of the servient tenement) unless its duration is brief enough (commonly one year or less) to be outside the coverage of a particular state's Statute of Frauds. An easement can be created by conveyance. A grant of an easement must comply with all the formal requisites of a deed. An easement is presumed to be of perpetual duration unless the grant specifically limits the interest (e.g., for life, for 10 years).

b. Express Reservation

An easement by reservation arises when the owner (of a present possessory interest) of a tract of land conveys title but reserves the right to continue to use the tract for a special purpose after the conveyance. In effect, the grantor passes title to the land but reserves unto himself an easement interest. Note that, under the majority view, the easement can be reserved ***only for the grantor***; an attempt by the grantor to reserve an easement for anyone else is void. (There is a growing trend to permit reservations in third parties, but it remains a minority view.)

Example: G owns Lot 6 and Lot 7, which are adjacent. G sells Lot 7 to B. Later, when G is about to sell Lot 6 to A, B asks G to reserve an easement over Lot 6 in favor of B. G agrees to do so, and executes a deed of Lot 6 to A that contains the following language: "Reserving an easement for a driveway in favor of Lot 7, which is owned by B." The reservation clause is void and no easement is created.

c. Implication

An easement by implication is created by ***operation of law*** rather than by written instrument. It is an exception to the Statute of Frauds. There are only three types of implied easements: (i) an intended easement based on a use that existed when the dominant and servient estates were severed, (ii) an easement implied from a recorded subdivision plat or profit a prendre, and (iii) an easement by necessity.

1) Easement Implied from Existing Use ("Quasi-Easement")
An easement may be implied if, prior to the time the tract is divided, a use exists on the "servient part" that is reasonably necessary for the enjoyment of the "dominant part" and a court determines that the parties intended the use to continue after division of the property. It is sometimes called a "quasi-easement" before the tract is divided because an owner cannot hold an easement on his own land.

a) Existing Use at Time Tract Divided
For a use to give rise to an easement, it must be apparent and continuous at the time the tract is divided. "Apparent" means that a grantee could discover the existence of the use upon reasonable inspection. A nonvisible use may still be "apparent" if surface connections or the like would put a reasonable person on notice of its existence.

b) Reasonable Necessity
Whether a use is reasonably necessary to the enjoyment of the dominant parcel depends on many factors, including the cost and difficulty of the alternatives and whether the price paid reflects the expected continued use of the servient portion of the tract.

c) Grant or Reservation
An easement implied in favor of the grantee is said to be created by implied grant, while an easement implied in favor of the grantor is said to be created by implied reservation.

2) Easements Implied Without Any Existing Use
In two limited situations, easements are implied in a conveyance even though there is no preexisting use.

a) Subdivision Plat
When lots are sold in a subdivision with reference to a recorded plat or map that also shows streets leading to the lots, buyers of the lots have implied easements to use the streets in order to gain access to their lots. These easements continue to exist even if the ***public*** easements held by the city or county in the streets are later vacated.

b) Profit a Prendre
When a landowner grants a profit a prendre to a person to remove a valuable product of the soil (e.g., grass, asphalt, ore, etc.), the holder of the profit also has an implied easement to pass over the surface of the land and to use it as reasonably necessary to extract the product.

3) Easement by Necessity
When the owner of a tract of land sells a part of the tract and by this division deprives one lot of access to a public road or utility line, a right-of-way by absolute necessity is created by implied grant or reservation over the lot with access to the public road or utility line. The owner of the servient parcel has the right to locate

the easement, provided the location is reasonably convenient. An easement by necessity terminates when the necessity ceases.

d. Prescription

Acquiring an easement by prescription is analogous to acquiring property by adverse possession. (*See* V., *infra*.) Many of the requirements are the same: To acquire a prescriptive easement, the use must be ***open and notorious***, ***adverse***, ***and continuous and uninterrupted for the statutory period***. Note that the public at large can acquire an easement in private land if members of the public use the land in a way that meets the requirements for prescription.

1) Open and Notorious

The user must not attempt to conceal his use. Underground or other nonvisible uses, such as pipes and electric lines, are considered open and notorious if the use could be discovered (e.g., through surface connections) upon inspection.

2) Adverse

The use must not be with the owner's permission. Unlike adverse possession, the use ***need not be exclusive***. The user of a common driveway, e.g., may acquire a prescriptive easement even though the owner uses it too.

3) Continuous Use

Continuous adverse use does not mean constant use. A continuous claim of right with periodic acts that put the owner on notice of the claimed easement fulfills the requirement. Note that tacking is permitted for prescriptive easements, just as for adverse possession (*see* V.B.5.b., *infra*).

4) When Prescriptive Easements Cannot Be Acquired

Negative easements cannot arise by prescription, nor generally may easements in public lands. An easement by necessity cannot give rise to an easement by prescription. However, if the necessity ends, so does the easement, and the use is adverse from that point forward.

3. Scope

Courts enforcing easements are often called upon to interpret the arrangement in order to determine the ***scope*** and ***intended beneficiaries*** of the interest. The key to interpretation employed in all these cases is the ***reasonable intent of the original parties***. What would the parties reasonably have provided had they contemplated the situation now before the court? What result would reasonably serve the purposes of the arrangement?

a. General Rules of Construction

If, as typically happens, the language used is general (e.g., "a right-of-way over Blackacre"), the following rules of construction usually apply: (i) ambiguities are resolved in favor of the grantee (unless the conveyance is gratuitous); (ii) subsequent conduct of the parties respecting the arrangement is relevant; (iii) the parties are assumed to have intended a scope that would reasonably serve the purposes of the grant and to have foreseen reasonable changes in the use of the dominant estate. The rule of reasonableness will be applied only to the extent that the governing language is general.

If the location or scope of the permitted use is spelled out in detail, the specifics will govern, and reasonable interpretation will be excluded.

Examples: 1) In 1890, A, the owner of Blackacre, granted to B, the owner of Whiteacre, a "right-of-way" over Blackacre for purposes of ingress and egress to Whiteacre from the public highway running along the western boundary of Blackacre. At the time of the grant, there were only horses and buggies, no automobiles. Applying a "rule of reasonableness" to the general language creating the right-of-way, a court would probably find that the right-of-way could today be used for cars. If, however, the use of cars would impose a ***substantially*** greater burden on Blackacre, the court would probably find against this use on grounds that it was outside the scope reasonably contemplated by A and B.

2) If, in the example just given, the right-of-way was specifically dedicated ("only to the use of horses and carriages"), automobile use would be excluded. Similarly, if the right-of-way was specifically located (e.g., "over the southern 10 feet of Blackacre"), the rule of reasonableness could not be invoked to change or enlarge the location.

b. Absence of Location

If an easement is created but not specifically located on the servient tenement, an easement of sufficient width, height, and direction to make the intended use reasonably convenient will be implied. The owner of the servient tenement may select the location of the easement so long as her selection is reasonable.

c. Changes in Use

In the absence of specific limitations in the deed creating an easement, the courts will assume that the easement is intended by the parties to meet both present and future reasonable needs of the dominant tenement.

Examples: 1) A roadway easement of unspecified width was created in 1920, when cars were only six feet wide. Today, however, cars are considerably wider. Because the original roadway easement was not specifically limited in width, the easement will expand in size to accommodate the changing and expanding needs of the owner of the dominant tenement.

2) But a basic change in the nature of the use is not allowed. Thus, a telephone or power line may not be added on the roadway. (Many courts are more liberal in allowing such additions if the roadway easement is public rather than private.)

d. Easements by Necessity or Implication

In the case of easements by necessity, the ***extent of the necessity determines the scope*** of the easement. Because there is no underlying written instrument to interpret, courts will look instead to the circumstances giving rise to the easement. Similarly, with other implied easements, the ***quasi-easement*** will provide the starting point for the court's construction of the scope of the easement. Modifications in the easement will be enforced to the extent that they are necessary for reasonably foreseeable changes in the use of the dominant parcel.

e. Use of Servient Estate

Absent an express restriction in the original agreement, the owner of the servient estate may use her land in any way she wishes so long as her conduct does not interfere with performance of the easement, profit, covenant, or servitude.

Example: A grants to B Water Company the right to lay water pipes in a specified five-foot right-of-way. A is not by this grant necessarily precluded from granting similar rights in the same right-of-way to a competing company, so long as the second grant does not interfere with the use made by B, the original grantee. A may also build over the right-of-way so long as the structure does not unreasonably interfere with B's use.

1) Duty to Repair

If the holder of the benefit is the only party making use of the easement, that party has the duty to make repairs (e.g., fill in potholes on a right-of-way) and, absent a special agreement, the servient owner has no duty to do so. If the easement is nonexclusive and ***both*** the holder of the benefit and the servient owner are making use of the easement, the court will ***apportion*** the repair costs between them on the basis of their relative use.

f. Intended Beneficiaries—Subdivision of Dominant Parcel

When an easement is created for the benefit of a landowner, and the landowner later subdivides the parcel, there is a question whether each subdivision grantee will succeed to the original benefit. The answer will turn on whether the extension of the benefit to each of the subdivided parcels will burden the servient estate to a greater extent than was contemplated by the original parties. Absent any other evidence on intent, a court will not find an intent to allow an extension if extending the benefit to each parcel in the subdivision will unreasonably overburden the servient estate. Weighing all the circumstances, a court could find subdivision into four lots reasonable, but subdivision into 50 lots unreasonable; it is determined on a case-by-case basis.

Example: A, the owner of Blackacre, grants to B, the owner of Whiteacre, a right-of-way easement of ingress and egress over Blackacre. B then subdivides Whiteacre into 150 lots. If A and B had not contemplated the subdivision of Whiteacre, and if use of the right-of-way by all 150 lot owners would substantially interfere with A's use of Blackacre (in a way that B's use alone would not), a court would probably not find an intent that the benefit of the right-of-way easement attach to each of the 150 parcels.

g. Effect of Use Outside Scope of Easement

When the owner of an easement uses it in a way that exceeds its legal scope, the easement is said to be ***surcharged***. The remedy of the servient landowner is an ***injunction*** of the excess use, and possibly damages if the servient land has been harmed. However, the excess use ***does not terminate*** the easement or give the servient landowner a power of termination.

4. Termination of Easements

An easement, like any other property interest, may be created to last in perpetuity or for a limited period of time. To the extent the parties to its original creation provide for the natural termination of the interest, such limitations will control.

a. Stated Conditions

If the parties to the original creation of an easement set forth specific conditions upon the happening of which the easement right will terminate, the conditions will be recognized. On this basis, the following conditions are valid: an easement granted "so long as repairs are maintained," an easement granted "so long as X is the holder of the dominant tenement," an easement granted "until the dominant tenement is used for commercial purposes," etc.

b. Unity of Ownership

By definition, an easement is the right to use the lands of another for a special purpose. On this basis, the ownership of the easement and of the servient tenement must be in different persons. If ownership of the two comes together in one person, the easement is extinguished.

1) Complete Unity Required

For an easement to be extinguished by merger of dominant and servient tenements, the duration of the servient tenement must be ***equal to or longer than*** the duration of the dominant tenement (and therefore the easement) with which it is combined.

Examples: 1) A owns the servient tenement in fee simple. B owns the dominant tenement in fee simple, and B's dominant tenement has, appurtenant to it, an access easement across the servient tenement. A conveys a 10-year term tenancy in the servient tenement to B. The duration of the conveyed interest in the servient estate is ***shorter*** than the duration of the dominant estate (and therefore the easement) with which it is combined. Thus, the easement is not extinguished by merger.

2) A owns the servient tenement in fee simple. B holds a 10-year term tenancy in the dominant tenement, and B's fixed-term tenancy estate has, appurtenant to it, an access easement across the servient tenement. A conveys the fee simple servient tenement to B (or B conveys the 10-year term tenancy in the dominant tenement to A; it doesn't matter). The duration of the servient estate is ***longer*** than the duration of the dominant estate (and therefore the easement) with which it is combined. Thus, the easement is extinguished by merger.

2) No Revival

If complete unity of title is acquired, the easement is extinguished. Even though there may be later separation, the easement will not be automatically revived.

Example: A owns Lot 6, the servient tenement. B owns adjacent Lot 7. A grants to B the privilege of crossing Lot 6, i.e., grants an easement appurtenant to B. Assume A conveys Lot 6 to B in fee simple. The easement would be extinguished because B then holds both the easement and title to the servient tenement. If, thereafter, B conveys Lot 6 to C, the easement is not revived. Of course, it could be created anew.

c. Release

An easement may be terminated by a release given by the owner of the easement interest to the owner of the servient tenement. A release requires the ***concurrence of both owners*** and is, in effect, a conveyance. The release must be executed with all the formalities that are required for the valid creation of an easement.

1) Easement Appurtenant

The basic characteristic of an easement appurtenant is that it becomes, for the purpose of succession, an incident of possession of the dominant tenement. This basic characteristic requires that the easement interest not be conveyed independently of a conveyance of the dominant tenement. However, an easement appurtenant may be conveyed to the owner of the servient tenement without a conveyance (to the same grantee) of the dominant tenement. This is an exception to the general alienability characteristics of an easement appurtenant (*see* 1.b., *supra*).

2) Easement in Gross

The basic characteristic of an easement in gross is that unless it is for a commercial purpose, it is inalienable. However, an easement in gross can be released; i.e., can be conveyed to the owner of the servient tenement. This is an exception to the general characteristics of an easement in gross.

3) Statute of Frauds

The Statute of Frauds requires that every conveyance of an interest in land that has a duration long enough to bring into play a particular state's Statute of Frauds (typically one year) must be evidenced by a writing. This writing requirement is also applicable to a release of an easement interest. If the easement interest that is being conveyed has a duration of greater than one year, a writing is required in order to satisfy the Statute of Frauds. An oral release is ineffective, although it may become effective by estoppel.

d. Abandonment

It has become an established rule that an easement can be extinguished without conveyance where the owner of the privilege demonstrates by physical action an intention to ***permanently*** abandon the easement. To work as an abandonment, the owner must have manifested an intention never to make use of the easement again.

Example: A owns Lot 6 and B owns Lot 7, which are immediately adjacent. A grants to B an easement across Lot 6. This easement is specifically located on the servient tenement and is a walkway. Subsequently, B constructs a house on Lot 7 that completely blocks his access to the walkway. By the physical action of constructing the house in such a way that access to the walkway (i.e., the easement) is denied, B has physically indicated an intent not to use the easement again. The easement is extinguished by abandonment.

1) Physical Act Required

An abandonment of an easement occurs when the easement holder physically manifests an intention to permanently abandon the easement. Such physical action brings about a termination of the easement by operation of law and therefore no writing is required; i.e., the Statute of Frauds need not be complied with.

2) Mere Words Insufficient
The oral expressions of the owner of the easement that he does not intend to use the easement again (i.e., he wishes to abandon it), by themselves, are insufficient to constitute an abandonment of the easement. For words alone to operate as a termination, such expression will only be effective if it qualifies as a release; i.e., the Statute of Frauds must be complied with. Note, however, that oral expressions may be sufficient if ***accompanied by a long period of nonuse*** (*see* 3), *infra*).

3) Mere Nonuse Insufficient
An easement is not terminated merely because it is not used for a long period by its owner. To terminate the easement, the nonuse must be combined with other evidence of intent to abandon it. Nonuse itself is not considered sufficient evidence of that intent.

e. Estoppel
While the assertions of the holder of the easement are insufficient to work a termination unless there is valid compliance with the requirements of a release, an easement may be extinguished by virtue of the reasonable reliance and change of position of the owner of the servient tenement, based on assertions or conduct of the easement holder.

Example: The owner of a right-of-way tells the owner of the servient tenement that the owner of the servient tenement may build a building on the servient tenement in such a way as to make the right-of-way no longer usable, and the servient owner does in fact build the building. There will be an extinguishment of the easement by estoppel.

For an easement to be extinguished by estoppel, three requirements must be satisfied. Namely, there must be (i) some ***conduct or assertion*** by the owner of the easement, (ii) a ***reasonable reliance*** by the owner of the servient tenement, (iii) coupled with a ***change of position***. Even though there is an assertion by the easement holder, if the owner of the servient tenement does not change her position based upon the assertion, the easement will not be terminated.

f. Prescription
An easement may be extinguished, as well as created, by prescription. Long continued possession and enjoyment of the servient tenement in a way that would indicate to the public that no easement right existed will end the easement right. Such long continued use works as a statute of limitations precluding the whole world, including the easement holder, from asserting that his privilege exists.

The termination of an easement by prescription is fixed by analogy to the creation of an easement by prescription. The owner of the servient tenement must so ***interfere with the easement*** as to create a cause of action in favor of the easement holder. The interference must be open, notorious, continuous, and nonpermissive for the statutory period (e.g., 20 years).

g. Necessity
Easements created by necessity ***expire as soon as the necessity ends***.

Example: A, the owner of a tract of land, sells a portion of it that has no access to a highway except over the remaining lands of A. B, the purchaser, acquires

by necessity a right-of-way over the remaining lands of A. Some years later, a highway is built so that B no longer needs the right-of-way across A's property. The easement ends because the necessity has disappeared.

h. Condemnation
Condemnation of the servient estate will extinguish the nonpossessory interest. Courts are split, however, on whether the holder of the benefit is entitled to compensation for the value lost.

i. Destruction of Servient Estate
If the easement is in a structure (e.g., a staircase), involuntary destruction of the structure (e.g., by fire or flood) will extinguish the easement. Voluntary destruction (e.g., tearing down a building to erect a new one) will not, however, terminate the easement.

5. Compare—Licenses
Licenses, like affirmative easements, privilege their holder to go upon the land of another (the licensor). Unlike an affirmative easement, the license is ***not an interest in land***. It is merely a ***privilege***, revocable at the will of the licensor. (Although licenses may acquire some of the characteristics of easements through estoppel or by being coupled with an interest.) The Statute of Frauds does not apply to licenses, and licensees are not entitled to compensation if the land is taken by eminent domain. Licenses are quite common; examples of licensees include delivery persons, plumbers, party guests, etc.

a. Assignability
An essential characteristic of a license is that it is ***personal to the licensee*** and therefore ***not alienable***. The holder of a license privilege cannot convey such right. In fact, most courts have held that the license privilege is so closely tied to the individual parties that it is revoked, by operation of law, upon an attempted transfer by the licensee.

b. Revocation and Termination
Another essential characteristic of a license is that it is revocable by nature. It may be revoked at any time by a manifestation of the licensor's intent to end it. This manifestation may be by a formal notice of revocation or it may consist of conduct that obstructs the licensee's continued use. Similarly, the licensee can surrender the privilege whenever he desires to do so. A license ends by operation of law upon the death of the licensor. In addition, a conveyance of the servient tenement by the licensor terminates the licensee's privilege.

1) Public Amusement Cases
Tickets issued by theaters, race courses, and other places of amusement have given rise to some controversy. The traditional rule is that such tickets create a license. Once describing the tickets as granting a license, the essential characteristic of a license applies; i.e., it is revocable by nature. On this basis, the licensor may terminate the licensee's privilege at will.

2) Breach of Contract
A license may be granted pursuant to an express or implied contract between the licensor and licensee. On this basis, the termination of the licensee's privilege may

constitute a breach of contract. While many courts may grant a cause of action for money damages for a revocation of a license in breach of contract, they continue to sustain the licensor's right to terminate the licensee's privilege to continue to remain on the servient tenement.

Example: A pays a $70 greens fee to play 18 holes of golf on B's property. After A has played only nine holes, B terminates A's right to be on B's property. Because A acquired a license and it is revocable by its very nature, B's action is not, in property terms, wrongful. However, A may have a cause of action against B to recoup part or all of A's $70.

c. Failure to Create an Easement

The Statute of Frauds requires that any conveyance of an interest in land (including an easement interest) of duration greater than one year must be memorialized in writing to be enforceable. If a party attempts to create an easement orally, the result is the creation of a license, i.e., a revocable privilege. Note, however, that if an oral attempt to create an easement is subsequently "executed," to the extent that it would be inequitable to permit its revocation (e.g., the licensee has expended substantial funds in reliance on the license), the licensor may be estopped to revoke the license.

d. Irrevocable Licenses

1) Estoppel Theory

If a licensee invests substantial amounts of money or labor in reliance on a license, the licensor may be estopped to revoke the license, and the license will thus become the equivalent of an affirmative easement.

Example: A orally licenses B to come onto Blackacre to excavate a drainage ditch connected to B's parcel, Whiteacre. B does so at substantial expense. A will probably be estopped to revoke the license and prevent B from using the ditch.

Under the majority view, such irrevocable licenses or easements by estoppel last until the owner receives sufficient benefit to reimburse himself for the expenditures made in reliance on the license. A minority of courts treat easements by estoppel like any other affirmative easements and give them a potentially infinite duration.

2) License Coupled with an Interest

If a license is coupled with an interest, it will be irrevocable as long as the interest lasts.

a) Vendee of a Chattel

The purchaser of a chattel located upon the seller's land is, in the absence of an express stipulation to the contrary, given the privilege to enter upon the seller's land for the purpose of removing the chattel. The purchaser's right is irrevocable. He must, however, enter at reasonable times and in a reasonable manner.

Example: A, the owner of Blackacre, sells 100 crates of oranges stored in a shed on Blackacre and at the same time licenses B to

come onto Blackacre to remove the crates of oranges. B has an irrevocable license to enter Blackacre and remove the crates within a reasonable time.

b) Termination of Tenancy
If a tenant's right to possess land has been lawfully terminated, the tenant may still reenter the land at reasonable times and in a reasonable manner for the purpose of removing his chattels. This is an irrevocable privilege.

c) Inspection for Waste
The owner of a future interest in land (e.g., a landlord, holder of a reversionary interest, or remainderman) is privileged to enter upon the land, at reasonable times and in a reasonable manner, for the purpose of determining whether waste is being committed by the holder of the present possessory estate.

C. PROFITS

Like an easement, a profit (profit a prendre) is a ***nonpossessory*** interest in land. The holder of the profit is entitled to enter upon the servient tenement and take the soil or a substance of the soil (e.g., minerals, timber, oil, or game). Also, like an easement, a profit may be appurtenant or in gross. In contrast to easements, however, there is a constructional preference for profits in gross rather than appurtenant.

1. Creation

Profits are created in the same way as easements.

2. Alienability

A profit appurtenant follows the ownership of the dominant tenement. A profit in gross may be assigned or transferred by the holder.

3. Exclusive and Nonexclusive Profits Distinguished

When an owner grants the ***sole right*** to take a resource from her land, the grantee takes an exclusive profit and is solely entitled to the resources, even to the exclusion of the owner of the servient estate. By contrast, when a profit is nonexclusive, the owner of the servient estate may grant similar rights to others or may take the resources herself. Ordinarily, profits (like easements) are construed as nonexclusive.

4. Scope

The extent and nature of the profit is determined by the words of the ***express grant*** (if there was a grant), or by ***the nature of the use*** (if the profit was acquired by prescription). Note that implied in every profit is an easement entitling the profit holder to enter the servient estate to remove the resource.

Example: A, the owner of Blackacre, grants B the right to come onto Blackacre to carry off gravel from a pit on Blackacre. B has a profit with respect to the gravel and also the benefit of an implied affirmative easement to go onto Blackacre by reasonable means to remove the gravel.

a. Apportionment of Profits Appurtenant
Courts treat the subdivision of land with a profit appurtenant just as they treat the

subdivision of land with an easement appurtenant. The ***benefit of the profit*** will attach to each parcel in a subdivision ***only*** if the burden on the servient estate is not as a result ***overly increased***.

Example: A, the owner of Blackacre, grants B, the owner of adjacent Whiteacre, the right to remove rock from Blackacre. If the profit was to take the rock for purposes of maintaining a boat launch on Whiteacre, then an increase in use from one to 50 boat launches when Whiteacre is subdivided will probably be viewed as overburdensome to Blackacre.

If, however, the profit was to take rock for purposes of reinforcing Whiteacre's coastline to prevent erosion, apportionment would likely be allowed because subdivision would not increase the number of acres to be reinforced and consequently would not impose a greater burden on Blackacre.

b. Apportionment of Profits in Gross

Because profits are freely alienable, a question frequently arises as to whether the holder of a profit can convey it to several people. If a profit is ***exclusive***, the holder may transfer the profit to as many transferees as he likes. Likewise, if the grant of the profit specifies a limit on the profit (less than all), the right can be transferred to multiple transferees. If, however, the profit is ***nonexclusive*** and not limited as to amount, it is generally not divisible. Undue burden to the servient estate is again the benchmark, however, and a nonexclusive profit may be assigned to a single person or to several persons jointly if the multiple assignees work together and take no more resources than would have been taken by the original benefit holder.

5. Termination

Profits are terminated in the same way as easements. In addition, ***misuse*** of a profit, unduly increasing the burden (typically through an improper apportionment), will be held to ***surcharge*** the servient estate. The result of surcharge in this case is to extinguish the profit. (Contrast this with the result when the benefit of an ***affirmative easement*** is misused: Improper or excessive use increasing the burden on the servient estate is ***enjoinable*** but, in most jurisdictions, does not extinguish the easement; *see* B.3.g., *supra*.)

D. COVENANTS RUNNING WITH THE LAND AT LAW (REAL COVENANTS)

A real covenant, normally found in deeds, is a ***written promise*** to do something on the land (e.g., maintain a fence) or a promise not to do something on the land (e.g., conduct commercial business). Real covenants run with the land at law, which means that subsequent owners of the land may enforce or be burdened by the covenant. To run with the land, however, the benefit and burden of the covenant must be analyzed separately to determine whether they meet the requirements for running.

1. Requirements for Burden to Run

If all requirements are met for the burden to run, the successor in interest to the burdened estate will be bound by the arrangement entered into by her predecessor as effectively as if she had herself expressly agreed to be bound.

a. Intent

The covenanting parties must have intended that successors in interest to the covenantor

be bound by the terms of the covenant. The requisite intent may be inferred from circumstances surrounding creation of the covenant, or it may be evidenced by language in the conveyance creating the covenant (e.g., "this covenant runs with the land," or "grantee covenants for herself, her heirs, successors, and assigns").

b. Notice

Under the common law, a subsequent purchaser of land that was subject to a covenant took the land burdened by the covenant, whether or not she had notice. However, under American recording statutes (*see* VI.E., *infra*), if the covenant is not recorded, a bona fide purchaser who has no notice of the covenant and who records her own deed ***will take free*** of the covenant. Hence, as a practical matter, if the subsequent purchaser pays value and records (as will nearly always be true), she is not bound by covenants of which she has no actual or constructive notice.

c. Horizontal Privity

This requirement rests on the relationship between the ***original covenanting parties***. Specifically, horizontal privity requires that, at the time the promisor entered into the covenant with the promisee, the two shared ***some interest in the land independent of the covenant*** (e.g., grantor-grantee, landlord-tenant, mortgagor-mortgagee).

Examples: 1) A and B are neighboring landowners, neither having any rights in the other's land. For good consideration, A promises B, "for herself, her heirs, successors, and assigns," that A's parcel "will never be used for other than residential purposes." The horizontal privity requirement is ***not*** met, and successors in interest to A will ***not*** be bound because at the time A made this covenant, she and B shared no interest in land independent of the covenant.

2) A, the owner of Blackacre in fee, promised B, the holder of a right-of-way easement over Blackacre, "always to keep the right-of-way free of snow or other impediment to B's use of the right-of-way." Horizontal privity is met because, at the time the covenant was made, A owned the parcel in fee and B held the benefit of an easement in it.

3) A, the owner of Blackacre and Whiteacre, deeds Whiteacre to B, promising "not to use Blackacre for other than residential purposes." Horizontal privity exists here by virtue of the grantor-grantee relationship between A and B.

d. Vertical Privity

To be bound, the successor in interest to the covenanting party must hold the ***entire durational interest*** held by the covenantor at the time she made the covenant.

Example: A, who owns Blackacre and Whiteacre in fee simple absolute, sells Whiteacre to B and, in the deed, covenants for herself, her heirs, successors, and assigns to contribute one-half the expense of maintaining a common driveway between Blackacre and Whiteacre. A then transfers Blackacre to C "for life," retaining a reversionary interest for herself. B ***cannot*** enforce the covenant against C because C does not possess the entire interest (fee simple absolute) held by her predecessor in interest, A, at the time A made the promise.

e. Touch and Concern

The covenant must be of the type that "touches and concerns" the land. The phrase "touch and concern the land" is not susceptible to easy definition. It generally means that the effect of the covenant is to make the land itself more useful or valuable to the benefited party. The covenant must affect the legal relationship of the parties as landowners and not merely as members of the community at large. Therefore, as a general matter, for the burden of a covenant to run, performance of the burden must diminish the landowner's rights, privileges, and powers in connection with her enjoyment of the land.

1) Negative Covenants

For the burden of a negative covenant to touch and concern the land, the covenant must restrict the holder of the servient estate in his ***use of that parcel*** of land.

Examples: 1) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, that she would not erect a building of over two stories on Blackacre. The burden of the covenant touches and concerns Blackacre because it diminishes A's rights in connection with her enjoyment of Blackacre.

2) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, that she would never operate a shoe store within a radius of one mile of Whiteacre. The covenant does not touch and concern Blackacre because its performance is unconnected to the enjoyment of Blackacre.

2) Affirmative Covenants

For the burden of an affirmative covenant to touch and concern the land, the covenant must require the holder of the servient estate ***to do something***, increasing her obligations in connection with enjoyment of the land.

Examples: 1) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, to keep the building on Blackacre in good repair. The covenant touches and concerns Blackacre because it increases A's obligations in connection with her enjoyment of Blackacre.

2) A owned Blackacre and Whiteacre, which were several miles apart. A covenanted with B, the grantee of Whiteacre, to keep the building on Whiteacre in good repair. The covenant does not touch and concern Blackacre because its performance is unconnected to the use and enjoyment of Blackacre.

3) A, the grantee of a parcel in a residential subdivision, covenants to pay an annual fee to a homeowners' association for the maintenance of common ways, parks, and other facilities in the subdivision. At one time, it was thought that such covenants, because physically unconnected to the land, did not touch and concern. The prevailing view today is that the burden will run because the fees are a charge on the land, increasing A's obligations in connection with the use and enjoyment of it. (*See* 4.a., *infra*.)

2. Requirements for Benefit to Run

If all requirements for the benefit to run are met, the successor in interest to the promisee will be allowed to enjoy the benefit (i.e., enforce the covenant).

a. Intent

The covenanting parties must have intended that the successors in interest to the covenantee be able to enforce the covenant. Surrounding evidence of intent, as well as language in the instrument of conveyance, is admissible.

b. Vertical Privity

The benefit of a covenant runs to the assignees of the original estate or of any lesser estate (e.g., a life estate). The owner of ***any*** succeeding possessory estate can enforce the benefit at law. In the majority of states today, horizontal privity is not required for the benefit to run. As a consequence, if horizontal privity is missing, the benefit may run to the successor in interest to the covenantee even though the burden is not enforceable against the successor in interest of the covenantor.

Example: A, who owns Blackacre, covenants with her neighbor, B, who owns Whiteacre, that "A, her successors, and assigns will keep the building on Blackacre in good repair." Horizontal privity is missing. B then conveys Whiteacre, the dominant estate, to C. C can enforce the benefit of the affirmative covenant against A because horizontal privity is not needed for the benefit to run. If, however, A conveys Blackacre to D, neither B nor C could enforce the covenant against D, for horizontal privity is required for the burden to run.

c. Touch and Concern

For the benefit of a covenant to touch and concern the land, the promised performance must benefit the covenantee and her successors ***in their use and enjoyment of the benefited land***.

Examples: 1) A, who owns Blackacre and Whiteacre, covenants with B, the grantee of Whiteacre, not to erect a building over two stories on Blackacre. The benefit of the covenant touches and concerns Whiteacre because, by securing B's view, it increases his enjoyment of Whiteacre.

2) A, who owns Blackacre and Whiteacre, covenants with B, the grantee of Whiteacre, to keep the building on Blackacre freshly painted and in good repair. The benefit of the covenant touches and concerns Whiteacre because, by assuring the view of an attractive house, it increases the value of Whiteacre.

Compare: A, who owns Blackacre, covenants with B, a supermarket operator owning no adjacent land, to erect and maintain on Blackacre a billboard advertising B's supermarkets. The benefit of the covenant does ***not*** touch and concern because it is not connected to and does not operate to increase B's enjoyment of any piece of land.

3. Modern Status of Running of Burden and Benefit

a. Horizontal and Vertical Privity

The Restatement of Property provides that horizontal privity is not required for running

of the burden, and further discards the requirement of vertical privity for running of both the burden and the benefit. Instead, the Restatement draws a distinction between ***affirmative*** and ***negative*** covenants. Negative covenants are treated like easements, which run to successors because they are interests in land. The burdens and benefits of affirmative covenants run to persons who succeed to an ***estate of the same duration*** as owned by the original parties, including in most cases an adverse possessor. But affirmative covenants do not run to persons who hold lesser estates than those held by the original parties to the covenant. Special rules are set forth for when affirmative burdens run to lessees and life tenants, and when they can enforce the benefits. [Restatement (Third) of Property: Servitudes §§5.2 - 5.5]

b. Touch and Concern

The Restatement of Property also supersedes the touch and concern requirement by providing that real covenants are ***presumed valid*** unless they are illegal, unconstitutional, or violate public policy. [Restatement (Third) of Property: Servitudes §§3.1, 3.2]

4. Specific Situations Involving Real Covenants

a. Promises to Pay Money

The majority rule is that if the money is to be used in a way connected with the land, the burden will run with the land. The most common example is a covenant to pay a homeowners' association an annual fee for maintenance of common ways, parks, etc., in a subdivision.

b. Covenants Not to Compete

Covenants not to compete have created several problems. Clearly, the burden of the covenant—restricting the use to which the land may be put—"touches and concerns" the land. However, the benefited land, while "commercially enhanced," is not affected in its physical use. Thus, some courts have refused to permit the benefit of such covenants to run with the land.

c. Racially Restrictive Covenants

If a covenant purports to prohibit an owner from transferring land to persons of a given race, no court (state or federal) is permitted to enforce the covenant. To do so would involve the court in a violation of the Equal Protection Clause of the Fourteenth Amendment (*see* I.F.2.b.2), *supra*).

5. Remedies—Damages

A breach of a real covenant generally is remedied by an award of money damages. If equitable relief, such as an injunction, is sought, the promise may be enforced as an equitable servitude (*see* E., *infra*). Note that a real covenant gives rise to personal liability only. The damages are collectible out of the defendant's general assets.

6. Termination

As with all other nonpossessory interests in land, a real covenant may be terminated by: (i) the holder of the benefit executing a ***release in writing***; (ii) ***merger*** (fee simple title to both the benefited and burdened land comes into the hands of a single owner); and (iii) ***condemnation*** of the burdened property. (*See* B.4.b., c., h., *supra*.)

E. EQUITABLE SERVITUDES

If a plaintiff wants an injunction or specific performance, he may show that the covenant qualifies as an equitable servitude. An equitable servitude is a covenant that, ***regardless*** of whether it runs with the land at law, equity will enforce against the assignees of the burdened land who have ***notice*** of the covenant. The usual remedy is an injunction against violation of the covenant.

1. Creation

Generally, equitable servitudes are created by covenants contained ***in a writing*** that satisfies the Statute of Frauds. As with real covenants, acceptance of a deed signed only by the grantor is sufficient to bind the grantee as promisor. There is ***one exception*** to the writing requirement: Negative equitable servitudes may be implied from a common scheme for development of a residential subdivision.

a. Servitudes Implied from Common Scheme

When a developer subdivides land into several parcels and some of the deeds contain negative covenants but some do not, negative covenants or equitable servitudes binding ***all*** the parcels in the subdivision may be implied under the doctrine of "reciprocal negative servitudes." The doctrine applies only to negative covenants and equitable servitudes and not to affirmative covenants. Two requirements must be met before reciprocal negative covenants and servitudes will be implied: (i) a common scheme for development, and (ii) notice of the covenants.

Example: A subdivides her parcel into lots 1 through 50. She conveys lots 1 through 45 by deeds containing express covenants by the respective grantees that they will use their lots only for residential purposes. A orally assures the 45 grantees that ***all*** 50 lots will be used for residential purposes. Some time later, after the 45 lots have been developed as residences, A conveys lot 46 to an oil company, which plans to operate a service station on it. The deed to lot 46 contains no express residential restriction. A court will nonetheless imply a negative covenant, prohibiting use for other than residential purposes on lot 46 because both requirements have been met for an implied reciprocal negative servitude. First, there was a ***common scheme***, here evidenced by A's statements to the first 45 buyers. Second, the oil company was on ***inquiry notice*** of the negative covenant because of the uniform residential character of the other lots in the subdivision development.

1) Common Scheme

Reciprocal negative covenants will be implied only if at the time that sales of parcels in the subdivision began, the developer had a plan that all parcels in the subdivision be developed within the terms of the negative covenant. If the scheme arises after some lots are sold, it cannot impose burdens on the lots previously sold without the express covenants. The developer's common scheme may be evidenced by a ***recorded plat***, by a ***general pattern*** of prior restrictions, or by ***oral representations***, typically in the form of statements to early buyers that all parcels in the development will be restricted by the same covenants that appear in their deeds. On the basis of this scheme, it is inferred that purchasers bought their lots relying on the fact that they would be able to enforce subsequently created equitable servitudes similar to the restrictions imposed in their deeds.

2) Notice
To be bound by the terms of a covenant that does not appear in his deed, a grantee must, at the time he acquired his parcel, have had notice of the covenants contained in the deeds of other buyers in the subdivision. The requisite notice may be acquired through ***actual notice*** (direct knowledge of the covenants in the prior deeds); ***inquiry notice*** (the neighborhood appears to conform to common restrictions); or ***record notice*** (if the prior deeds are in the grantee's chain of title he will, under the recording acts, have constructive notice of their contents).

2. Enforcement
For successors of the original promisee and promisor to enforce an equitable servitude, certain requirements must be met.

a. Requirements for Burden to Run

1) Intent
The covenanting parties must have intended that the servitude be enforceable by and against assignees. No technical words are required to express this intent. In fact, the intent may be ascertained from the purpose of the covenant and the surrounding circumstances.

2) Notice
A subsequent purchaser of land burdened by a covenant is not bound by it in equity unless she had actual or constructive notice of it when she acquired the land. This rule is part of the law of equitable servitudes, and exists apart from the recording acts.

3) Touch and Concern
This is the same requirement as applies to real covenants (*see* D.1.e., *supra*).

b. Requirements for Benefit to Run
The benefit of the equitable servitude will run with the land (and thus to successors in interest of the original parties) if the original parties so ***intended*** and the servitude ***touches and concerns*** the benefited property.

c. Privity Not Required
The majority of courts enforce the servitude not as an in personam right against the owner of the servient tenement, but as an equitable property interest in the land itself. There is, therefore, no need for privity of estate.

Examples: 1) A acquires title to Blackacre by adverse possession. Even though he is not in privity of estate with the original owner, he is subject to the equitable servitude because the servitude is an interest in the land.

2) A and B are neighboring landowners, neither having any rights in the other's land. A promises B, "for herself, her heirs, successors, and assigns," that A's parcel "will never be used for other than residential purposes." B records the agreement. A sells Blackacre to C. The burden created by this promise would ***not run at law*** as a negative covenant

because horizontal privity is missing. However, under an equitable servitude theory, the burden ***will run***, and an injunction will issue against other than residential uses.

3) Same as above, but A transfers only a life estate to C. Again, the burden would not run at law because of the absence of vertical privity. The burden would, however, be enforceable as an equitable servitude.

d. Implied Beneficiaries of Covenants—General Scheme

If a covenant in a subdivision deed is silent as to who holds its benefit, any neighbor in the subdivision will be entitled to enforce the covenant if a general scheme or plan is found to have existed at the time he purchased his lot.

Example: A subdivides her parcel into Lots 1 through 10. She conveys Lot 1 to B, who covenants to use the lot for residential purposes only. A then conveys Lot 2 to C, who makes a similar covenant. Thereafter, A conveys the balance of the lots to other grantees by deeds containing the residential restriction. Can C enforce the restrictions against B? Can B enforce against C?

Subsequent purchaser versus prior purchaser (C v. B): In most jurisdictions, C (the later grantee) can enforce the restriction against B if the court finds a common plan of residential restrictions at the very outset of A's sales. (Evidence would be the similar covenant restrictions in all the deeds.) The rationale is that B's promise was made for the benefit of the land at that time retained by A, the grantor. Such land, Lots 2 through 10, became the dominant estate. When A thereafter conveyed Lot 2 to C, the benefit of B's promise passed to C with the land.

Prior purchaser versus subsequent purchaser (B v. C): In most jurisdictions, B could likewise enforce the restriction against C, even though A made no covenant in her deed to B that A's retained land would be subject to the residential restrictions.

There are two theories on which a prior purchaser can enforce a restriction in a subsequent deed from a common grantor. One theory is that B is a third-party beneficiary of C's promise to A. The other theory is that an implied reciprocal servitude attached to A's retained land at the moment she deeded Lot 1 to B. Under this theory, B is enforcing an ***implied*** servitude on Lot 2 and ***not*** the express covenant later made by C.

3. Equitable Defenses to Enforcement

A court in equity is not bound to enforce a servitude if it cannot in good conscience do so.

a. Unclean Hands

A court will not enforce a servitude if the person seeking enforcement is violating a similar restriction on his own land. This defense will apply as long as the plaintiff's violation is of the same general nature.

b. Acquiescence

If a benefited party acquiesces in a violation of the servitude by one burdened party, he may be deemed to have abandoned the servitude as to other burdened parties. (Equitable servitudes, like easements, may be abandoned.) Note that this defense will not apply if the prior violation occurred in a location so distant from the complainant that it did not really affect his property.

c. Estoppel

If the benefited party has acted in such a way that a reasonable person would believe that the covenant was abandoned or waived, and the burdened party acts in reliance thereon, the benefited party will be estopped to enforce the covenant. Similarly, if the benefited party fails to bring suit against a violator within a reasonable time, the action may be barred by ***laches***.

d. Changed Neighborhood Conditions

Changed neighborhood conditions may also operate to end an equitable servitude. If the neighborhood has changed significantly since the time the servitude was created, with the result that it would be inequitable to enforce the restriction, injunctive relief will be withheld. (Many courts, however, will allow the holder of the benefit to bring an action at law for damages.)

Example: A, the owner of Blackacre and Whiteacre, adjacent parcels in an undeveloped area, sells Blackacre to B, extracting a promise that Blackacre "will always be used only for residential purposes." Fifteen years later, the neighborhood has developed as a commercial and industrial center. If B or her successors in interest to Blackacre now wish to use the parcel for a store, an injunction will probably ***not*** issue. A may, however, recover from B or her successors any damages that she may suffer from termination of the residential restriction.

1) Zoning

Zoning plays an important role in determining whether changed conditions will be allowed as a defense to enforcement of an equitable servitude. Zoning that is inconsistent with the private restriction imposed by the equitable servitude will not of itself bar the injunction, but it will provide good evidence that neighborhood conditions have changed sufficiently to make the injunction unjust. Thus, in the example above, the position of B or her successors would be fortified by a showing that the area in which Blackacre is situated is presently zoned for commercial uses.

2) Concept of the "Entering Wedge"

The concept of the "entering wedge" also plays an important role in changed condition cases. If the equitable servitude is part of a general plan of restrictions in a subdivision, and if the parcel in question is located somewhere at the ***outer edge*** of the subdivision, changed conditions outside of the subdivision will not bar the injunction if it is shown that lifting the restriction on one parcel will produce changed conditions for surrounding parcels, requiring that their restrictions also be lifted, and so on (the "domino effect"). Thus, in the example above, if removing the restriction and allowing commercial development of Blackacre would produce changed conditions for the neighboring, similarly restricted

parcel—Whiteacre—with the consequence that its servitude could not be equitably enforced, the injunction against commercial use on Blackacre will probably be allowed, notwithstanding the changed conditions.

4. Termination
Like other nonpossessory interests in land, an equitable servitude may be terminated by a ***written release*** from the benefit holder(s), ***merger*** of the benefited and burdened estates, or ***condemnation*** of the burdened property. (*See* B.4.b., c., h., *supra*.)

F. RELATIONSHIP OF COVENANTS TO ZONING ORDINANCES

Both restrictive covenants and zoning ordinances (*see* IX.C., *infra*) may affect legally permissible uses of land. Both must be complied with, and neither provides any excuse for violating the other. For example, if the zoning permits both residential and commercial use but an applicable covenant allows only residential use, the covenant will control.

These two forms of land use restrictions are enforced differently. As discussed above, covenants (if they meet the relevant requirements) can be enforced by nearby property owners at law or in equity. Zoning, on the other hand, is not subject to enforcement by private suit, but can be enforced only by local governmental officials.

G. PARTY WALLS AND COMMON DRIVEWAYS

Often, a single wall or driveway will be built partly on the property of each of two adjoining landowners. Absent an agreement between the owners to the contrary, courts will treat the wall as belonging to each owner to the extent that it rests upon her land. Courts will also imply mutual cross-easements of support, with the result that each party has the right to use the wall or driveway, and neither party can unilaterally destroy it.

1. Creation
While a ***written agreement*** is required by the Statute of Frauds for the express creation of a party wall or common driveway agreement, an "irrevocable license" can arise if there has been detrimental reliance on a parol agreement. Party walls and common driveways can also result from ***implication*** or ***prescription***.

2. Running of Covenants
If party wall or common driveway owners agree to be mutually responsible for maintaining the wall or driveway, the burdens and benefits of these covenants will run to successive owners of each parcel. The ***cross-easements for support*** satisfy the requirement of horizontal privity because they are mutual interests in the same property. Each promise touches and concerns the adjoining parcels, and the grantee will be charged with notice of the covenant because of the visibility of the common wall or driveway.

V. ADVERSE POSSESSION

A. IN GENERAL

Title to real property may be acquired by adverse possession. (Easements may also be acquired by prescription.) Gaining title by adverse possession results from the operation of the statute of

limitations for ejectment, or recovery of real property. If an owner does not, within the statutory period, take legal action to eject a possessor who claims adversely to the owner, the owner is thereafter barred from bringing suit for ejectment. Moreover, title to the property vests in the possessor.

B. REQUIREMENTS

To establish title by adverse possession, the possessor must show (i) an ***actual entry*** giving ***exclusive possession*** that is (ii) ***open and notorious***, (iii) ***adverse*** (hostile), and (iv) ***continuous*** throughout the statutory period.

1. Running of Statute

The statute of limitations begins to run when the claimant goes adversely into possession of the true owner's land (i.e., the point at which the true owner could first bring suit). The filing of suit by the true owner is not sufficient to stop the period from running; the suit must be pursued to judgment. However, if the true owner files suit before the statutory period (e.g., 20 years) runs out and the judgment is rendered after the statutory period, the judgment will relate back to the time that the complaint was filed.

2. Actual and Exclusive Possession

a. Actual Possession Gives Notice

The requirement of actual possession is designed to give the true owner notice that a trespass is occurring. It is also designed to give her notice of the ***extent*** of the adverse possessor's claim. As a general rule, the adverse possessor will gain title only to the land that she actually occupies.

1) Constructive Possession of Part

Actual possession of a portion of a unitary tract of land is sufficient adverse possession as to give title to the whole of the tract of land after the statutory period, as long as there is a ***reasonable proportion*** between the portion actually possessed and the whole of the unitary tract, and the possessor has color of title to the whole tract. Color of title is a document that purports to give title, but for reasons not apparent from its face does not. Usually, the proportion will be held reasonable if possession of the portion was sufficient to put the owner or community on notice of the fact of possession.

b. Exclusive Possession—No Sharing with Owner

"Exclusive" merely means that the possessor is not sharing with the true owner or the public at large. This requirement does not prevent two or more individuals from working ***together*** to obtain title by adverse possession. If they do so, they will obtain the title as tenants in common.

Example: A and B are next door neighbors. They decide to plant a vegetable garden on the vacant lot behind both of their homes. A and B share expenses and profits from the garden. If all other elements for adverse possession are present, at the end of the statutory period, A and B will own the lot as tenants in common.

3. Open and Notorious Possession

Possession is open and notorious when it is the kind of use the usual owner would make of

the land. The adverse possessor's occupation must be ***sufficiently apparent*** to put the true owner on ***notice*** that a trespass is occurring.

Examples: 1) Water Company runs a pipe under Owner's land, and there is no indication of the pipe's existence from the surface of the land. Water Company cannot gain title by adverse possession because there is nothing to put Owner on notice of the trespass.

2) A's use of B's farmland for an occasional family picnic will not satisfy the open and notorious requirement because picnicking is not necessarily an act consistent with the ownership of farmland.

4. Hostile

The possessor's occupation of the property must be hostile (adverse). This means merely that the possessor does ***not have the true owner's permission*** to be on the land. It does not mean anger or animosity. The state of mind of the adverse possessor is irrelevant. By the large majority view, it does not matter whether the possessor believes she is on her own land, knows she is trespassing on someone else's land, or has no idea who owns the land.

a. If Possession Starts Permissively—Must Communicate Hostility

If the possessor enters with permission of the true owner (e.g., under a lease or license), the possession does not become adverse until the possessor makes clear to the true owner the fact that she is claiming "hostilely." This can be done by explicit notification, by refusing to permit the true owner to come onto the land, or by other acts inconsistent with the original permission.

b. Co-Tenants—Ouster Required

Possession by one co-tenant is not ordinarily adverse to her co-tenants because each co-tenant has a right to the possession of all the property. Thus, sole possession or use by one co-tenant is not adverse, unless there is a clear repudiation of the co-tenancy; e.g., one co-tenant ousts the others or makes an explicit declaration that he is claiming exclusive dominion over the property.

c. If Grantor Stays in Possession—Permission Presumed

If a grantor remains in possession of land after her conveyance, she is presumed to be there with the permission of her grantee. Only the grantor's open repudiation of the conveyance will start the limitation period running against the grantee. Likewise, if the tenant remains in possession after the expiration of her lease, she is presumed to have the permission of the landlord.

d. Compare—Boundary Line Agreements

There is a separate but related doctrine that may be helpful here. It operates where a boundary line (usually a fence) is fixed by agreement of the adjoining landowners, but later turns out not to be the "true" line. Most courts will fix ownership ***as per the agreed line***, provided it is shown that: (i) there was original ***uncertainty*** as to the true line; (ii) the agreed line was ***established*** (i.e., agreed upon); and (iii) there has been ***lengthy acquiescence*** in the agreed line by the adjoining owners and/or their successors.

1) Establishment Requirement
The establishment requirement can be implied by acquiescence. A past dispute is not necessary to show uncertainty, although it can be good evidence of it. But a showing of original uncertainty is required; otherwise, in a court's view, a parol transfer of land would result.

5. Continuous Possession
The adverse claimant's possession must be continuous throughout the statutory period. Continuous possession requires only the degree of occupancy and use that the average owner would make of the property.

a. Intermittent Periods of Occupancy Not Sufficient
Intermittent periods of occupancy generally are not sufficient. However, constant use by the claimant is not required so long as the possession is of the type that the usual owner would make of the property. For example, the fact that the adverse possessor is using the land for the intermittent grazing of cattle will probably not defeat continuity if the land is ***normally*** used in this manner.

b. Tacking Permitted
There need not be continuous possession by the same person. Ordinarily, an adverse possessor can take advantage of the periods of adverse possession by her predecessor. Separate periods of adverse possession may be "tacked" together to make up the full statutory period with the result that the final adverse possessor gets title, provided there is privity between the successive adverse holders.

1) "Privity"
Privity is satisfied if the subsequent possessor takes by descent, by devise, or by deed purporting to convey title. Tacking is not permitted where one adverse claimant ousts a preceding adverse claimant or where one adverse claimant abandons and a new adverse claimant then goes into possession.

2) Formalities on Transfer
Even an oral transfer of possession is sufficient to satisfy the privity requirement.
Example: A received a deed describing Blackacre, but by mistake built a house on an adjacent parcel, Whiteacre. A, after pointing the house out to B and orally agreeing to sell the house and land to her, conveyed to B, by a deed copied from her own deed, describing the property as Blackacre. The true owner of Whiteacre argues that there was no privity between A and B because the deed made no reference to Whiteacre, the land actually possessed. Nonetheless, the agreed oral transfer of actual possession is sufficient to permit tacking.

6. Payment of Property Taxes Generally Not Required
Only a minority of states require the adverse possessor to pay taxes on the property. However, in all states, payment of property taxes is good evidence of a claim of right.

C. DISABILITY

1. Effect of Disabilities—Statute Does Not Begin to Run

The statute of limitations does not begin to run for adverse possession (or easements by prescription) if the true owner was under some disability to sue ***when the cause of action first accrued*** (i.e., the inception of the adverse possession). Typical disabilities are: minority, imprisonment, and insanity.

Example: O, the true owner, is five years old when A goes into adverse possession. The statute will not begin to run until O reaches the age of majority.

Compare: O, the true owner, is declared insane six months after A begins using a pathway adversely. The statute ***has*** begun to run because O's disability arose ***after*** A's adverse use began.

2. No Tacking of Disabilities

Only a disability of the ***owner*** existing at the time the cause of action arose is considered. Thus, disabilities of successors in interest or subsequent additional disabilities of the owner have no effect on the statute.

Examples: 1) O is a minor at the time A goes into adverse possession of O's land. One year before O reaches the age of majority, O is declared insane (a subsequent disability). The statute begins to run from the date O reaches the age of majority, whether she is then sane or insane.

2) O, the true owner, is insane when A begins an adverse use. Ten years later, O dies intestate and the land goes to her heir, H, who is then 10 years old. The statute of limitations begins to run upon O's death despite H's minority. H's minority is a "supervening" disability and cannot be tacked to O's.

3. Maximum Tolling Periods

In some states, the maximum tolling period is 20 years; thus, the maximum period of the statute of limitations would be the regular statute of limitations period plus the maximum 20-year tolling period.

D. ADVERSE POSSESSION AND FUTURE INTERESTS

The statute of limitations does not run against the holder of a future interest (e.g., a remainder) until that interest becomes possessory. Until the prior present estate terminates, the holder of the future interest has no right to possession, and thus no cause of action against a wrongful possessor.

Examples: 1) O devises Blackacre to A for life and then to B. Thereafter, X goes into possession and possesses adversely for the statutory period. X has acquired A's life estate by adverse possession, but has not acquired any interests against B. Of course, if following A's death, X or her successor stays in possession for the statutory period, X will have acquired B's rights also.

2) X enters into adverse possession of Blackacre. Four years later, O devises Blackacre to A for life and then to B. X continues her adverse possession for seven more years. The statute of limitations is 10 years. In this case, X has acquired the whole title by adverse possession. An adverse possession begun against the owner

of the fee simple absolute cannot be interrupted by a subsequent division of the estate.

1. Possibility of Reverter—Statute of Limitations Runs on Happening of Event
In a conveyance "to A for so long as" some event occurs or fails to occur, on the happening of the event the fee simple determinable automatically comes to an end and the grantor (or his successors) is entitled to present possession. At that point, the grantor has a cause of action to recover possession of the property. If he does not bring the action within the period specified by the applicable statute of limitations (and if A or her successors have the requisite open, notorious, continuous, and adverse possession), his action will be barred.

2. Right of Entry—Happening of Event *Does Not* Trigger Statute of Limitations
In the case of a right of entry, on the happening of the stated event the grantor (or his successors) has only a right to reenter the property, a power to terminate the grantee's estate. Until the grantor asserts his right of entry, no cause of action arises because the grantee's continued possession of the land is proper: her fee simple estate has not been terminated. Thus (in most states), the statute of limitations does not operate to bar assertion of a right of entry even though the condition triggering the right of entry has been breached.

a. Grantor Must Act Within Reasonable Time to Avoid Laches
However, to avoid the title problems that might otherwise be presented, most courts hold that the holder of the right of entry must bring his action within a reasonable time after the event occurs. If he fails to do so, his action is barred by laches. As for what constitutes a reasonable time, many courts look to the statute of limitations governing actions for possession of real property.

E. EFFECT OF COVENANTS IN TRUE OWNER'S DEED

The exact nature of the title obtained depends on the possessor's activities on the land. For example, assume there is a recorded restrictive covenant limiting use of the land to a single-family residence. If the possessor uses the land in violation of that covenant for the limitations period, she takes title free of the covenant. But if she complies with the covenant, she takes title subject to it, and it remains enforceable against her (at least in an equitable action).

F. LAND THAT CANNOT BE ADVERSELY POSSESSED

The statute of limitations does not run against government-owned land (federal, state, or local) or land registered under a Torrens system.

VI. CONVEYANCING

A. LAND SALE CONTRACTS

Most transfers of land are preceded by contracts of sale. These normally contemplate escrows (delivery of deed to a third person to be held until purchase price paid) before closing (exchange of purchase price and deed).

1. Statute of Frauds Applicable
To be enforceable, a land contract must be memorialized in a writing that is signed by the

party to be charged. The writing need not be a formal contract; a memorandum suffices—e.g., escrow instructions or e-mails can be contracts of sale. The Statute of Frauds requires that the writing contain all "essential terms" of the contract. These are: (i) a ***description*** of the property (*see* B.3., *infra*), (ii) identification of ***the parties*** to the contract, and (iii) the ***price*** and manner of payment (if agreed upon). Incidental matters (e.g., prorating of taxes, furnishing of deeds, title insurance, etc.) can be determined by custom; they need not appear in the writing nor even have been agreed upon.

a. Doctrine of Part Performance

A court may give specific performance of a contract (though not damages) despite the absence of a writing if additional facts are present.

1) Theories to Support the Doctrine

a) Evidentiary Theory

Courts state that if acts done by a party can be explained only by reference to an agreement, these acts unequivocally establish the existence of an oral contract.

b) Hardship or Estoppel Theory

If acts done by a party in reliance on the contract would result in hardship to such an extent that it would be a fraud on that party were the contract not specifically enforced, the other party will be estopped from asserting the Statute of Frauds as a defense.

2) Acts of Part Performance

In most states, two of the following are required:

(i) ***Possession*** of the land by the purchaser;

(ii) Making of substantial ***improvements***; and/or

(iii) ***Payment*** of all or part of the purchase price by the purchaser.

Some state courts will go beyond this list and will accept as "part performance" other types of detrimental reliance by the purchaser, such as performance of services or sale of other land.

3) Can Seller Obtain Specific Performance Based on Buyer's Acts?

a) Evidentiary Theory

Under the evidentiary theory, it is immaterial who performed the acts constituting the part performance. Because they refer unequivocally to a contract, the seller may obtain specific performance based on the buyer's acts.

b) Hardship or Estoppel Theory

Under the hardship or estoppel theory, however, the ***plaintiff*** must be the one whose action would result in hardship if the Statute of Frauds were invoked. Consequently, the seller normally ***cannot*** rely on the buyer's acts. Even so,

make sure that you ascertain whether the ***seller*** has done anything that would cause him a hardship if the Statute of Frauds were successfully asserted by the buyer.

2. Doctrine of Equitable Conversion

Under the doctrine of equitable conversion, once a contract is signed and each party is entitled to specific performance, equity regards the purchaser as the owner of the ***real property***. The seller's interest, which consists of the right to the proceeds of sale, is considered to be ***personal property***. The bare legal title that remains in the seller is considered to be held in trust for the purchaser as security for the debt owed the seller. But note that possession follows the legal title; so even though the buyer is regarded as owning the property, the seller is entitled to possession until the closing.

a. Risk of Loss

If the property is destroyed (without fault of either party) before the date set for closing, the majority rule is that, because the buyer is deemed the owner of the property, the ***risk of loss is on the buyer***. Thus, the buyer must pay the contract price despite a loss due to fire or other casualty, unless the contract provides otherwise. Some states, however, have adopted the Uniform Vendor and Purchaser Risk Act, which places the risk on the ***seller*** unless the buyer has either legal title or possession of the property at the time of the loss.

1) Casualty Insurance

Suppose the buyer has the risk of loss, as is true under the majority view, but the seller has fire or casualty insurance that covers the loss. In the event of loss, allowing the seller to recover the full purchase price on the contract and to collect the insurance proceeds would be unjust enrichment. Hence, the courts require the seller to give the buyer credit, against the purchase price, in the amount of the insurance proceeds.

b. Passage of Title on Death

The doctrine of equitable conversion also affects the passage of title when a party to a contract of sale dies before the contract has been completed. In general, it holds that a deceased seller's interest passes as personal property and a deceased buyer's interest as real property.

1) Death of Seller

If the seller dies, the "bare" legal title passes to the takers of his real property, but they must give up the title to the buyer when the contract closes. When the purchase price is paid, the money passes as personal property to those who take the seller's personal property. Note that if the property is ***specifically*** devised, the specific devisee may take the proceeds of the sale. (*See* F.1.b., *infra*.)

2) Death of Buyer

If the buyer dies, the takers of his real property can demand a conveyance of the land at the closing of the contract. Moreover, under the traditional common law rule, they are entitled to exoneration out of the personal property estate (*see* F.2., *infra*). Thus, the takers of his personal property will have to pay the purchase price

out of their share of the buyer's estate. However, a majority of states have enacted statutes abolishing the doctrine of exoneration, and in those states the takers of the real property will take it subject to the vendor's lien for the purchase price. In these states, as a practical matter, the takers of the real property will have to pay the price unless the testator specifically provided to the contrary.

3. Marketable Title

There is an implied covenant in ***every*** land sale contract that at closing the seller will provide the buyer with a title that is "marketable."

a. "Marketability" Defined—Title Reasonably Free from Doubt

Marketable title is title reasonably free from doubt, i.e., title that a reasonably prudent buyer would be willing to accept. It need not be a "perfect" title, but the title must be free from questions that might present an unreasonable risk of litigation. Generally, this means an unencumbered fee simple with good record title.

1) Defects in Record Chain of Title

Title may be unmarketable because of a defect in the chain of title. Examples include: a significant ***variation in the description*** of the land from one deed to the next, a deed in the chain that was ***defectively executed*** and thus fails to meet the requirements for recordation, and evidence that a prior grantor ***lacked capacity*** to convey the property. Many courts hold that an ancient lien or mortgage on the record will not render title unmarketable if the seller has proof of its satisfaction or the statute of limitations on the claim would have run under any possible circumstance, including tolling for disabilities.

a) Adverse Possession

Historically, a title acquired by adverse possession was not considered marketable because the purchaser might be later forced to defend in court the facts that gave rise to the adverse possession against the record owner. On the bar exam, ***title acquired by adverse possession is unmarketable***, despite the fact that most modern cases are contra. Most of the modern cases hold adverse possession titles to be marketable if: (i) the possession has been for a very lengthy period; (ii) the risk that the record owner will sue appears to be very remote; and (iii) the probability of the record owner's success in such a suit appears to be minimal. Because the bar examiners have yet to recognize this line of cases, the modern view should be considered only as a fallback position on the bar exam.

b) Future Interest Held by Unborn or Unascertained Parties

Even though most states consider all types of future interests to be transferable, it is often impossible for the owners of the present and future interests, acting together, to transfer a marketable fee simple absolute title. This is because the future interests are often held by persons who are unborn or unascertainable.

Example: "To A for life, and upon A's death to A's eldest surviving daughter." Assume that at the time of this conveyance A has one daughter, B. State of title: A has a life estate, and B has a

contingent remainder. A and B together can transfer the land to a purchaser, such as C, but the title is not marketable. It may turn out that, upon A's death, B will have predeceased A, and some other daughter (perhaps not even yet born when A and B transferred to C) will be "A's eldest surviving daughter." Because that daughter did not join in the conveyance to C, she is not bound by it, and she owns the land. On the other hand, if B does turn out to be A's eldest surviving daughter (which cannot be determined until A's death), then C's title will become a marketable fee simple at that time.

While most courts will appoint a guardian ad litem to represent unborn or unascertained persons in ***litigation***, the majority will not appoint such a guardian for purposes of ***conveying*** the land.

2) Encumbrances
Generally, mortgages, liens, easements, and covenants render title unmarketable unless the buyer waives them.

a) Mortgages and Liens
A seller has the right to satisfy a mortgage or lien ***at the closing*** with the proceeds from the sale. Therefore, as long as the purchase price is sufficient and this is accomplished simultaneously with the transfer of title (usually through the use of escrows), the buyer cannot claim that the title is unmarketable; the closing will result in a marketable title.

b) Easements
An easement that reduces the value of the property (e.g., an easement of way for the benefit of a neighbor) renders title unmarketable. The majority of courts, however, have held that a beneficial easement (e.g., utility easement to service property) or one that was visible or known to the buyer does not constitute an encumbrance. Some courts go so far as to hold that the buyer is deemed to have agreed to take subject to any easement that was notorious or known to the buyer when she entered into the contract.

c) Covenants
Restrictive covenants render title unmarketable.

d) Encroachments
A significant encroachment constitutes a title defect, regardless of whether an adjacent landowner is encroaching on the seller's land or vice versa. However, the encroachment will not render title unmarketable if: (i) it is very slight (only a few inches) and does not inconvenience the owner on whose land it encroaches; (ii) the owner encroached upon has indicated that he will not sue on it; or (iii) it has existed for so long (many decades) that it has become legal by adverse possession, provided that the state recognizes adverse possession titles as being marketable (*see* 1)a), *supra*).

3) Zoning Restrictions
Generally, zoning restrictions do not affect the marketability of title; they are not considered encumbrances. An ***existing violation*** of a zoning ordinance, however, does render title unmarketable.

4) Waiver
Any of the above-mentioned title defects can be waived in the contract of sale.

b. Quitclaim Deed—No Effect
The fact that a contract calls for a quitclaim deed, which does not contain any covenants for title, does not affect the implied covenant to provide marketable title (unless so provided in the contract).

c. Time of Marketability
If, as is usual, the seller has agreed to furnish title "at date of closing," the buyer cannot rescind prior to that date on grounds that the seller's title is not marketable.

1) Installment Land Contract
Similarly, where an installment land contract is used, the seller's obligation is to furnish marketable title ***when delivery is to occur***, e.g., when the buyer has made his final payment. Therefore, a buyer cannot withhold payments or seek other remedies (e.g., rescission) on grounds that the seller's title is unmarketable prior to the date of promised delivery. The buyer might get rescissionary relief before the date of delivery by showing that the seller cannot possibly cure the defects in time. Or, under compelling circumstances, a court might require the seller to quiet title during the contract period.

d. Remedy If Title Not Marketable
If the buyer determines that the seller's title is unmarketable, he must notify the seller and give a reasonable time to cure the defects, even if this requires extension of the closing date. The notice must specify the nature of the defects. If the seller fails to cure the defects, the buyer may pursue several remedies.

1) Rescission, Damages, Specific Performance
In the absence of a contractual stipulation to the contrary, if title is not marketable, the buyer can rescind, sue for damages for breach, get specific performance with an abatement of the purchase price, or, in some jurisdictions, require the seller to quiet title. The seller cannot sue successfully for damages or specific performance.

2) Merger
If the buyer permits the closing to occur, the contract is said to merge with the deed (i.e., it disappears) and, in the absence of fraud, the seller is ***no longer liable*** on the implied covenant of marketable title. However, the buyer may have an action for violation of promises made in the deed, if any (*see* D., *infra*). *Note:* The merger rule does not apply to most nontitle matters, such as covenants regarding the physical condition of the property. [Campbell v. Rawls, 381 So. 2d 744 (Fla. 1980)]

4. Time of Performance

a. Presumption—Time Not of the Essence
In general, the courts assume that time is not "of the essence" in real estate contracts. This means that the closing date stated in the contract is not absolutely binding in equity, and that a party, even though late in tendering her own performance, can still enforce the contract if she tenders within a reasonable time after the date. (A month or two is typically considered a reasonable time.)

b. When Presumption Overcome
Time will be considered "of the essence" if:

1) The ***contract*** so states; or

2) The ***circumstances*** indicate it was the parties' intention; e.g., the land is rapidly fluctuating in value or a party must move from out of town and has no other place to go; or

3) One party gives the other ***notice*** that she desires to make time of the essence, and does so within a reasonable time prior to the date designated for closing.

c. Effect of Time of the Essence Construction
If time is of the essence, a party who fails to tender performance on the date set for closing is in total breach and loses her right to enforce the contract.

d. Liability When Time Not of the Essence
Even if time is not of the essence, a party who is late in tendering performance is liable in damages for the incidental losses she has caused, such as additional mortgage interest, taxes, etc.

5. Tender of Performance
In general, the buyer's obligation to pay the purchase price and the seller's obligation to convey the title are deemed to be ***concurrent conditions***. This means that neither party is in breach of the contract until the other party tenders her performance, even if the date designated for the closing has passed.

a. When Party's Tender Excused
A party's tender is unnecessary and is excused if the party has repudiated the contract, or if it is impossible for the other party to perform (e.g., if the seller does not have marketable title and cannot get it).

b. Neither Party Tenders Performance
If neither party tenders performance, the closing date is automatically extended indefinitely until one of them does so.

c. Buyer Finds Seller's Title Unmarketable
If the buyer determines that the seller's title is unmarketable, the buyer must give the seller a reasonable time to cure title defects.

6. Remedies for Breach of the Sales Contract

a. Damages

The usual measure of damages is the difference between the contract price and the market value of the land on the date of the breach. Incidental damages, such as title examination and moving or storage costs, can also be recovered.

1) Liquidated Damages

Sales contracts usually require the buyer to deposit "earnest money" with the seller, and provide that if the buyer defaults in performance, the seller may retain this money as liquidated damages. The courts routinely uphold the seller's retention of the deposit if the amount appears to be reasonable in light of the seller's anticipated and actual damages. Many courts will uphold a retention of a deposit of up to 10% of the sales price without further inquiry into its reasonableness. Even without a liquidated damages clause, courts may uphold retention of the deposit, on the ground that giving restitution of the funds to the buyer would unjustly reward a party in breach.

b. Specific Performance

1) Buyer's Remedy

A court of equity will order a seller to convey the title if the buyer tenders the purchase price. The remedy at law (damages) is deemed inadequate because the buyer is getting land and land is unique.

If the seller cannot give marketable title, but the buyer wishes to proceed with the transaction, she can usually get specific performance with an ***abatement of the purchase price*** in an amount reflecting the title defect.

2) Seller's Remedy

Somewhat illogically, the courts also generally will give a specific performance decree for the seller if the buyer is in breach. This is sometimes explained as necessary to have "mutuality of remedy." A few courts in recent years have refused to award specific performance to sellers if the property is not unique (e.g., if a developer is selling a house in a large subdivision of similar houses).

c. Special Rules for Unmarketable Title

If the seller's title is unmarketable for reasons that do not indicate the seller's bad faith (i.e., he did not realize that his title was defective when he signed the contract), about half of the courts limit the buyer's recovery of damages to incidental out-of-pocket costs (title examination, etc.) and return of the buyer's earnest money deposit. The other half of the courts give the buyer the standard measure of contract damages mentioned above.

7. Seller's Liability for Defects on Property

a. Warranty of Fitness or Quality—New Construction Only

The common law rule is that contracts of sale and deeds of real property, unlike conveyances of personal property, carry no implied warranties of quality or fitness for

the purpose intended. One exception is a contract for the sale of a residential building under construction or to be constructed, on the ground that the buyer has no opportunity to inspect. Most courts extend the implied warranty of fitness or quality to the sale of any ***new house by the builder***. The warranty implied is that the new house is designed and constructed in a reasonably workmanlike manner and suitable for human habitation. Courts are split, however, on whether a subsequent purchaser can recover from the original builder because of the lack of privity. [*See* Speight v. Walters, 744 N.W.2d 108 (Iowa 2008); Conway v. Cutler Group, Inc., 2014 WL 4064261 (Pa. 2014)]

b. Negligence of Builder

A person who contracts for construction may always sue a builder for negligence in performing a building contract. Moreover, many courts now permit the ultimate vendee (e.g., a subdivision buyer) to sue the builder despite the fact that the seller hired the builder and the buyer thus lacks "privity."

c. Liability for Sale of Existing Land and Buildings

A seller of existing land and buildings (not new construction) may be liable to the purchaser for defects in the improvements (e.g., a leaky roof or basement, termite infestation, a nonfunctioning septic system) on any of several different theories.

1) Misrepresentation (Fraud)

This theory requires proof that the seller made a ***false statement of fact*** (oral or written) to the buyer, that the buyer ***relied*** on the statement, and that it ***materially affected*** the value of the property. The seller must either have known that the statement was false, or have made it negligently (without taking reasonable care to determine its truth).

2) Active Concealment

The seller is liable as above, even without making any statement, if the seller took steps to conceal a defect in the property (e.g., paneling over a wall to conceal cracks).

3) Failure to Disclose

A majority of states now hold sellers liable for failure to disclose defects if the following factors are present:

(i) The seller ***knows or has reason to know*** of the defect;

(ii) The defect is ***not obvious*** or apparent, and the seller realizes that the buyer is unlikely to discover it by ordinary inspection; ***and***

(iii) The defect is ***serious*** and would probably cause the buyer to reconsider the purchase if it were known.

These decisions are more likely to impose liability on the seller if the property is a personal residence, if the defect is dangerous, and if the seller personally created the defect or previously attempted to repair it and failed to do so.

d. Disclaimers of Liability
Sellers sometimes attempt to avoid liability for property defects by inserting clauses in sales contracts exculpating the seller.

1) "As Is" Clauses
A general clause, such as "property sold as is" or "with all defects," is ***not*** sufficient to overcome a seller's liability for fraud, concealment, or (in the states that recognize it) failure to disclose.

2) Specific Disclaimers
If the exculpatory clause identifies and disclaims liability for specific types of defects (e.g., "seller is not liable for leaks in the roof"), it is likely to be upheld.

8. Real Estate Brokers
Most real estate sales contracts are negotiated by real estate brokers. The broker who obtains the "listing" from the seller is the ***seller's agent***. Other agents who participate in the sale (e.g., through a multiple listing service) are also the seller's agents, unless they specifically agree to serve as the buyer's agent. While these agents owe a fiduciary duty to the seller, they also have a duty to the buyer to disclose material information about the property if they have actual knowledge of it. Traditionally, the agent's commission was earned when she found a buyer who was "ready, willing, and able" to purchase the property, even if the buyer later backed out of the contract. But the growing trend of the cases is to award the commission only if the sale actually closes, or if it fails to close because of the seller's fault.

9. Title Insurance
A title insurance policy insures that a good record title of the property exists as of the policy's date and agrees to defend the record title if litigated. The insurance can be taken out by either the owner of the property or the mortgage lender. An ***owner's policy*** protects only the person who owns the policy (i.e., the property owner ***or*** the mortgage lender) and does not run with the land to subsequent purchasers. In contrast, a ***lender's policy*** follows any assignment of the mortgage loan.

B. DEEDS—FORM AND CONTENT
Transfer of title to an interest in real property occasionally occurs through operation of law; but in most circumstances, transfer can be accomplished only by a deed that satisfies various formalities required by statute.

1. Formalities

a. Statute of Frauds
The Statute of Frauds requires that a deed be in ***writing*** and signed by the grantor.

b. Description of Land and Parties
A deed must identify the land. The description need not be formal, and it may incorporate extrinsic information, but it ***must be unambiguous***. The parties (grantor and grantee) must also be identified. This may be done by name, or by describing them in some other way (e.g., "I grant this land to my eldest daughter," or "I convey this land to the present members of the law review at State University"). If the deed is delivered

with the identity of the grantee left blank, the courts will presume that the person taking delivery has authority to fill in the name of the grantee, and if she does so, the deed is valid. But if the land description is left blank, no such authority is presumed, and the deed is void unless the grantee was explicitly given authority to fill in the description, and did so.

c. Words of Intent
The deed must evidence an intention to transfer realty, but technical words are unnecessary. The word "grant" by itself is sufficient in many states.

d. Consideration Not Required
The deed need not recite any consideration, nor must any consideration pass in order to make a deed valid. A deed may validly convey real property by ***inter vivos gift*** so long as the following requirements are met: (i) donative intent, (ii) delivery, and (iii) acceptance (*see* C., *infra*).

e. Seal Is Unnecessary
A seal is unnecessary.

f. Attestation and Acknowledgment Generally Unnecessary
Attestation by witnesses is generally unnecessary, as is an acknowledgment. *But note:* Either or both might be required for the deed to be recorded.

g. Signature
A deed must be signed by the grantor. The grantor may designate an agent to sign on the grantor's behalf, but if the signing is not done in the grantor's presence, the Statute of Frauds generally requires that the agent's authority be written. In the case of deeds by corporations, statutes usually provide for execution by two officers of the corporation and the affixing of the corporation's seal. If the deed represents a conveyance of all or a substantial part of the corporation's assets, a resolution of the board of directors approving the transfer may be necessary. The ***grantee's signature is not necessary*** even if the deed contains covenants on her part. Her acceptance of the deed (called a "deed poll" when signed only by the grantor) is sufficient to make the covenants enforceable.

2. Defective Deeds and Fraudulent Conveyances

a. Void and Voidable Deeds
A deed that is defective may be either void or voidable. "Void" implies that the deed will be set aside by the court even if the property has passed to a bona fide purchaser. "Voidable" implies that the deed will be set aside only if the property has ***not*** passed to a bona fide purchaser.

1) Void Deeds
Deeds considered void include those that are forged, were never delivered, were issued to a nonexistent grantee (e.g., a grantee who is in fact dead at the time of delivery, or a corporation that has not yet been legally formed), or were obtained by fraud in the factum (i.e., the grantor was deceived and did not realize that he was executing a deed).

2) Voidable Deeds
Deeds considered voidable include those executed by persons younger than the age of majority or who otherwise lack capacity (e.g., because of insanity), and deeds obtained through fraud in the inducement, duress, undue influence, mistake, and breach of fiduciary duty.

b. Fraudulent Conveyances
Even when a deed complies with the required formalities mentioned above, it may be set aside by the grantor's creditors if it is a fraudulent conveyance. Under the Uniform Fraudulent Transfer Act, which nearly all states have adopted, a conveyance is fraudulent if it was made: (i) with actual intent to hinder, delay, or defraud any creditor of the grantor; or (ii) without receiving a reasonably equivalent value in exchange for the transfer, and the debtor was insolvent or became insolvent as a result of the transfer. However, the deed will not be set aside as against any grantee who took in good faith and paid reasonably equivalent value.

3. Description of Land Conveyed
In ***land contracts and deeds***, property may be described in various ways; i.e., by reference to a government survey, by metes and bounds, by courses and angles, by references to a recorded plat, by reference to adjacent properties, by the name of the property, or by a street and number system.

a. Sufficient Description Provides a Good Lead
A description is sufficient if it provides a good lead as to the identity of the property sought to be conveyed.
Example: A conveyance of "all my land," or "all my land in Alameda County," provides a sufficient lead. The intention of the grantor is clear and the meaning of this intention can be proved without difficulty (by checking the land records of Alameda County).

b. Insufficient Description—Title Remains in Grantor
If the description is too indefinite, title remains in the grantor, subject to the possibility of a suit for reformation of the deed.
Example: A conveyance of "one acre off the western end of my 30-acre tract" (the 30-acre tract being adequately described) would probably fail for uncertainty. "Off the western end" is too vague to ascertain ***which*** acre, and the admission of parol evidence here would be considered a violation of the Statute of Frauds.

c. Parol Evidence Admissible to Clear Up Ambiguity
The general rule is that parol evidence is admissible to explain or supplement a written description or to clear up an ambiguity. If there is a ***patent ambiguity***—one appearing on the face of the deed—parol evidence is normally admissible to ascertain the parties' intent. For example, one part of the deed states that it is conveying "Blackacre" but later it purports to convey an interest in "Whiteacre." Parol evidence is admissible to show which property the grantor intended to convey. Where the ambiguity is ***latent***—not apparent on the face of the deed—parol evidence is generally admissible. For example, if A grants to B "my house in San Francisco," parol evidence is admissible to show which house A owns.

1) Compare—Inadequate Description
If, however, A grants to B "my house in San Francisco," and it turns out that A owns ***three*** houses in that city, the conveyance would probably fail for lack of adequate description. (*But note:* If there is an underlying original agreement in which there was no mistake or ambiguity, and the only mistake was in the ***writing*** of the instrument, relief might be available by way of ***reformation*** of the deed.)

d. Rules of Construction
Where there is a mistake or inconsistency in the description (as where the deed leaves in doubt the exact location of a property line, or measurements give two different locations for the line), the following rules of construction are applied to carry out the parties' probable intent. (These are not "rules of law" and will not be applied where there is clear evidence showing a contrary intent.)

1) Natural monuments prevail over other methods of description; i.e., artificial monuments, courses and distances, surfaces, acreage, or general descriptions (e.g., a call from "Point X to the old oak tree," prevails over a call from "Point X south 100 feet").

2) Artificial monuments (e.g., stakes, buildings, etc.) prevail over all but natural monuments.

3) Courses (e.g., angles) prevail over distances (e.g., "west 90 degrees to Main St." prevails over "west 100 feet to Main St.").

4) All of the foregoing prevail over general descriptions such as name (e.g., "Walker's Island") or quantity (e.g., "being 300 acres").

e. Land Bounded by Right-of-Way

1) Title Presumed to Extend to Center of Right-of-Way
If land is described as being bounded by a street, highway, or other right-of-way, or if the land conveyed is otherwise described but actually is bounded by such, there is a rebuttable presumption that the title of the grantee extends to the center of the right-of-way (assuming that the grantor owns to the center), or to the full width of it if the grantor retains no adjoining land. This presumption accords with (i) the presumed intention of the parties, and (ii) the public policy that disfavors a grantor's retention of thin strips of land.

a) Evidence to Rebut Presumption
In many jurisdictions, a description such as "running ***along*** the street" has been held sufficient to rebut the presumption that the grantee took title to the center. (This is to be distinguished from the language "***bounded*** on the west by the highway" to which the presumption applies.)

But when the monument involved is a ***body of water***, more definite language is necessary to rebut the presumption that the grantee takes title to the center. This is because, unlike streets, there are no public rights in most bodies of

water abutting on land (except possible navigation easements), and because a grantee of land adjoining water normally expects a right of access to the water.

b) Measuring from Monument
Notwithstanding the general rule, and unless a contrary intention is expressed, measurements ***"from"*** a right-of-way are presumed to start from the ***side*** and not the center. Again, this is based on the parties' presumed intent.

2) Variable Boundary Line Cases

a) Slow Change in Course Changes Property Rights
The ***slow and imperceptible*** change in course of a river or stream serving as a boundary operates to change the legal boundary. Where land is described as abutting upon a body of water, any slow and imperceptible deposit of soil ("accretion") belongs to the owner of the abutting land (the riparian owner). Where accretion builds up in an irregular pattern over the lands of several adjacent property owners, courts determine title to it in a "just and equitable manner," either by (i) merely extending the property lines out into the water with each landowner getting the property that falls within the lines as extended; or (ii) dividing up the newly formed land in proportion to the owners' interests in the adjoining lands. Similarly, slow erosion of a stream's bank results in the owner losing title to the affected area.

b) Avulsion Does Not Change Property Rights
A ***sudden***, perceptible change of a watercourse ("avulsion") does not change property rights. Thus, if a river changes course suddenly, boundaries remain where they were, even if someone who formerly had river access now finds himself landlocked.

c) Encroachment of Water Does Not Change Fixed Boundary Lines
According to the majority view, where property is encroached upon by a body of water (e.g., lake enlarges), previously fixed boundary lines do not change and ownership rights are not affected. Indeed, the boundary lines can still be proven even though the land is completely under water.

f. Reformation of Deeds
Reformation is an equitable action in which the court rewrites the deed to make it conform to the intention of the parties. It will be granted if the deed does not express what the parties agreed to, either because of their ***mutual mistake*** or a ***scrivener's*** (drafter's) ***error***. It will also be granted for ***unilateral mistake***, but only if the party who is not mistaken induced the mistake by ***misrepresentation*** or some other inequitable conduct. If the property has passed to a bona fide purchaser who relied on the original language of the deed, the court will not reform it.

C. DELIVERY AND ACCEPTANCE

1. Delivery—In General
A deed is not effective to transfer an interest in realty unless it has been delivered. Physical

transfer of a deed is not necessary for a valid delivery. Nor does physical transfer alone establish delivery (although it might raise a presumption thereof). Rather, "delivery" refers to the ***grantor's intent***; it is satisfied by ***words or conduct*** evidencing the grantor's intention that the deed have ***some present operative effect***; i.e., that ***title*** pass immediately and irrevocably, even though the right of possession may be postponed until some future time.

Examples: 1) O drafts an instrument conveying Blackacre to A and hands the instrument to A "for safekeeping." Although handed to the named grantee, this is not a valid delivery. There is no evidence that O intended the instrument to have any ***present*** operative effect.

2) O drafts an instrument conveying Blackacre to A. O attempts to give the instrument to A personally but is unable to find A; nevertheless, O quits possession of Blackacre and thereafter treats A as the owner thereof. Nearly all courts would hold that there has been a sufficient delivery.

Under some circumstances (i.e., when a third party is involved), conditional delivery is permissible. This type of delivery becomes effective only upon the occurrence of a condition, but the transfer then ***relates back*** to the time of the conditional delivery. The grantor has only limited rights to revoke prior to the occurrence of the condition. (*See* further discussion of conditional deliveries, 3., *infra*.)

a. Manual Delivery

The delivery requirement will be satisfied where the grantor physically or manually delivers the deed to the grantee. Manual delivery may be accomplished by means of the mails, by the grantor's agent or messenger, or by physical transfer by the grantor's attorney in the grantor's presence.

b. Presumptions Relating to Delivery

As a matter of theory, a deed may be delivered by words without an act of physical transfer. Delivery is presumed if the deed is: (i) ***handed*** to the grantee, or (ii) ***acknowledged*** by the grantor before a notary and ***recorded***. Unless there is some clear expression of intent that the grantor envisioned the passage of title to the grantee without physical delivery, the continued possession of the deed by the grantor raises a presumption of nondelivery and therefore no passage of title. Conversely, possession by a grantee of a properly executed deed raises a presumption that the delivery requirement has been satisfied. Note, however, that the presumptions involved are rebuttable.

c. Delivery Cannot Be Canceled

Title passes to the grantee upon effective delivery. Therefore, returning the deed to the grantor has no effect; it constitutes neither a cancellation nor a reconveyance.

d. Parol Evidence

1) Admissible to Prove Grantor's Intent

The ***majority rule*** is that any type of parol evidence, including conduct or statements made by the grantor ***before or after*** the alleged delivery, is admissible to prove her intent.

2) Not Admissible to Show Delivery to Grantee Was Conditional
If a deed is ***unconditional on its face*** and is given ***directly to the grantee***, in most jurisdictions parol evidence is not admissible to show that the delivery was subject to a condition.

Example: O delivers an absolute deed of Blackacre to A, but ***tells*** A that the deed is effective only if A pays off the encumbrance on the property, or only if O does not return from the hospital. Under the above rule, even if A never pays off the encumbrance or if O returns from the hospital, A is the owner of Blackacre and O cannot claim that there was no valid delivery. *Rationale:* The rule is designed to avoid unsettling of land titles which appear to be in the grantee's name, and to protect both innocent third parties and grantees from testimony fabricated by grantors.

3) Admissible to Show No Delivery Intended
But while parol evidence is not admitted to prove that a delivery was subject to an oral condition, parol evidence ***is*** admissible to prove that the grantor did not intend the deed to have any present effect at all.

Example: O tells A, "I want you to have Blackacre when I die, and I'm giving you this deed to Blackacre so that you can have it ***at that time***." Most courts would hold that O's statements are admissible, and that despite the unconditional nature of the deed itself, they show that O did not intend the deed to have any present effect.

a) Deed Intended as Mortgage
Parol evidence is ***always*** admissible to show that a deed absolute on its face was intended by the parties to be a mortgage; i.e., there was no intent to convey title outright. (*See* VII.A.4., *infra*.)

b) Transfer of Deed to Bona Fide Purchaser
Suppose O gives A a deed for examination by A's attorney (deed not intended to be effective at this point). A wrongfully records it and sells to B, a bona fide purchaser ("BFP"). On these facts, O would prevail against B unless estopped to assert lack of delivery (*see* below). In other words, absent estoppel, a subsequent BFP is not protected; if there was no delivery, the BFP's grantor had no power to convey.

(1) Estoppel in Favor of Innocent Purchaser
Even though the grantor is allowed to show that no delivery at all was intended as against the grantee, he often is estopped to assert lack of delivery against an innocent purchaser.

Example: O gives A a deed but does not intend the deed to be presently effective. A shows the deed to an innocent purchaser, B, who buys the land in reliance thereon. B will prevail in litigation with O, the original grantor, if it appears that O ***negligently permitted*** A to have possession of the deed. *Rationale:* As between two innocent parties, the one who contributed most directly to the loss

must bear the burden of it, and in many cases O must be deemed responsible for entrusting A with a deed absolute on its face. The same result occurs where the grantee records the deed and an innocent purchaser relies on the recordation.

4) Comment
Obviously, the above rules give the courts flexibility to find either delivery or nondelivery in many situations. It is also evident that there exists a theoretical inconsistency in admitting parol evidence to show that no delivery was intended, but not to show that delivery was "conditional." This inconsistency has been criticized by numerous commentators.

2. Retention of Interest by Grantor or Conditional Delivery
Problems arise when the grantor attempts to retain an interest in the property (e.g., a life estate) or when he attempts to make the passage of title dependent upon the happening of a condition or event other than delivery.

a. No Delivery—Title Does Not Pass
If the grantor executes a deed but fails to deliver it during his lifetime, no conveyance of title takes place. Without adequate delivery, the title does not pass to the intended grantee.

b. No Recording—Title Passes
If the grantor executes and delivers a deed but fails to have it recorded, title passes. Therefore, an agreement between the grantor and grantee to the effect that the deed will not be recorded until some event takes place in the future does not affect the passage of title.

c. Express Condition of Death of Grantor Creates Future Interest
When a deed, otherwise properly executed and delivered, contains an express provision that the title will not pass until the grantor's death, the effect is to create a present possessory life estate in the grantor and a future estate in the grantee. Note, however, that this result follows only when the deed expressly contains such a provision.

d. Conditions Not Contained in Deed
If a deed is absolute on its face, but is delivered to the grantee with an ***oral*** condition (e.g., "title is not to pass until I return from the Orient"), the traditional view was that the condition dropped out and the delivery became absolute. A growing minority of cases enforces the condition. Where the condition is the grantor's death, the deed is usually held "testamentary" and therefore void (unless executed with testamentary formalities).

e. Test—Relinquishment of Control
To make an effective delivery, the grantor must relinquish absolute and unconditional control.

3. Where Grantor Gives Deed to Third Party
In this situation, the rules are quite different; ***conditional delivery is permissible***. Three

situations should be distinguished: (i) where the grantor gives the deed to a third party, there being ***no conditions*** appended; (ii) where the grantor in a ***commercial*** context gives such a deed to a third party, there being conditions appended; and (iii) where the situation is the same as in (ii), but the transaction is ***donative***.

a. Transfer to Third Party with No Conditions

If O (the grantor) gives B a deed naming A as grantee and instructs B to give the deed to A, has a delivery occurred? Most courts say yes. Because O indicated an intent to make the deed presently operative, A has a right to the deed and O should not be able to get it back. However, if O told B to retain the deed and give it to A upon O's later instructions, no delivery would have occurred.

When there are no specific instructions regarding delivery, the question is one of O's intent. If B is A's attorney, delivery seems clear. But if B is O's attorney, a court might infer that B was merely O's ***agent*** and that O thus retained the power to recall the deed. (A few courts hold that B is to be treated as O's agent ***in all circumstances***, even if O manifests a clear intention of present effectiveness, and consequently no delivery occurs.)

b. Transfer to Third Party with Conditions (Commercial Transaction)

Suppose that O gives B a deed naming A as grantee and tells B to transfer the deed to A when A has paid $5,000 on O's account on or before September 1. This is the ***true escrow*** situation—the true conditional delivery. Under the circumstances outlined below, a valid conditional delivery has occurred. The deed has a present operative effect in that title will transfer automatically upon the occurrence of the condition. O will retain title only if the condition does not occur.

1) Parol Evidence Admissible to Show Conditions

Even though a deed is unconditional, the general rule is that parol evidence is admissible to show the conditions and terms upon which a deed was deposited with the escrow. (This is contrary to the rule excluding parol evidence where transfer is directly to the grantee.) If the escrow custodian has violated parol conditions, there will be no valid delivery. Once the condition occurs, whether parol or not, title automatically vests in the grantee and the escrow holds the deed as the grantee's agent.

2) Grantor's Right to Recover Deed

a) Majority View—Can Recover Only If No Written Contract

Under the majority view, if the grantor seeks to recover the deed prior to the occurrence of the condition, the grantee can object only if there is an enforceable written contract to convey. (On the other hand, once the condition occurs, title passes even in the absence of an enforceable contract.)

(1) The requirement of a written contract is based on the Statute of Frauds consideration that oral contracts to convey realty should not become enforceable simply because the deed has been deposited with a third party.

(2) Ordinarily, the contract to convey will be a buy-sell land contract. However, written escrow instructions are often a sufficient memorandum of the contract to satisfy the Statute of Frauds.

b) Minority View—No Right to Recover
A strong minority prohibits revocation even in the absence of an enforceable underlying contract. Deposit of the deed with a third party on stated conditions is seen to obviate most possibilities of fraud.

3) Breach of Escrow Conditions—Title Does Not Pass
When the grantee wrongfully acquires the deed from the escrow holder prior to performance of the conditions of the escrow, title does not pass. Therefore, even though the grantee is in possession of the deed, she cannot convey any interest in the land to a subsequent transferee, even a BFP.

a) Estoppel Cases
A ***few*** cases have held that where the escrow holder was chosen by the grantor, the grantor is bound by the escrow holder's acts and is estopped to deny a valid delivery and passage of title to the grantee. Thus, an innocent purchaser (BFP) from the grantee may acquire good title. An important factor is whether the grantor has allowed the grantee to take possession of the property prior to completion of the conditions of the escrow. If the grantor has remained in possession, the purchaser may be held to have notice of the grantor's interest and cannot be a BFP.

4) Relation-Back Doctrine
In an escrow transaction, title does not pass to the grantee until performance of the named conditions. However, where justice requires, the title of the grantee will "relate back" to the ***time of the deposit of the deed in escrow***. Generally, the relation-back doctrine will be applied if:

(i) The ***grantor dies*** (doctrine applied to avoid the rule that title must pass before death if instrument is not a will);

(ii) The grantor ***becomes incompetent*** (doctrine applied to avoid the rule that an incompetent cannot convey title); or

(iii) A ***creditor*** of the grantor (who is not a BFP or mortgagee) ***attaches the grantor's title*** (doctrine applied to cut off the creditor's claim).

a) Not Applied If Intervening Party Is BFP or Mortgagee
The relation-back doctrine is not applied where the intervening third party is a BFP or mortgagee. However, if the sales contract is recorded, there can be no intervening BFPs because its recordation gives constructive notice.

b) Not Applied in Favor of Escrow Grantee with Knowledge
The relation-back doctrine will not be applied in favor of an escrow grantee who, at the time she performs the terms and conditions of the escrow, has

actual or constructive knowledge of prior equities of other persons (e.g., that the grantor conveyed to another). But if the escrow grantee has performed part of the conditions when she acquires such knowledge, she will be protected against all but BFPs or mortgagees.

c. Transfer to Third Party with Conditions (Donative Transactions)
If the grantor gives a deed to a third party with instructions to turn it over to the named donee only when certain conditions occur, is there a valid delivery or can the grantor change her mind and demand the deed back before the conditions occur?

1) Condition Unrelated to Grantor's Death
When O gives to B a deed naming A as grantee, and instructs B to give it to A "when A marries," etc., no "true" escrow will exist unless there is an underlying contract of sale (which is extremely unlikely in a donative transaction such as this). Hence, O can retrieve the deed from B upon request. Nevertheless, if O does not do so, and B actually delivers the deed to A after the condition is satisfied, the delivery will be effective to convey title to A as of that date.

2) Where Condition Is Grantor's Death
When O executes a deed to A and hands the deed to B with instructions to give it to A upon the death of O, most courts hold that the grantor ***cannot*** get her deed back because her intent was to presently convey a future interest to the grantee (either a remainder, with a life estate reserved in the grantor, or an executory interest). Note that this analysis also makes the gift inter vivos, not testamentary, and thus not in conflict with the Statute of Wills. *Caution:* In dealing with death cases, make sure that it was the grantor's intent that the deed be operative immediately to convey a future interest.

a) Limitation—No Delivery If Conditioned on Survival
When O's instructions to B are to deliver the deed to A only if A survives O, it is generally held that there is no valid delivery because it was O's intent to retain title and possession until her death.

4. Acceptance

a. Usually Presumed
There must be an acceptance by the grantee in order to complete a conveyance. In most states, acceptance is presumed if the conveyance is beneficial to the grantee (whether or not the grantee knows of it). In other states, acceptance is presumed only where the grantee is shown to have knowledge of the grant and fails to indicate rejection of it. Acceptance is presumed in all states if the grantee is an infant or an incompetent.

b. Usually "Relates Back"
Acceptance (presumed or otherwise) usually "relates back" to the date of "delivery" of the deed in escrow. However, many courts refuse to "relate back" an acceptance where it would defeat the rights of ***intervening third parties*** such as BFPs, attaching creditors of the grantor, or surviving joint tenants. A few states will not even "relate back" an acceptance if doing so defeats the devisees of the grantor.

5. Dedication

Land may be transferred to a public body (e.g., a city or county) by dedication. An ***offer*** of dedication may be made by written or oral statement, submission of a map or plat showing the dedication, or opening the land to public use. An ***acceptance*** by the public agency is necessary. This may be accomplished by a formal resolution, approval of the map or plat, or actual assumption of maintenance or construction of improvements by the agency.

D. COVENANTS FOR TITLE AND ESTOPPEL BY DEED

There are three types of deeds characteristically used to convey property interests other than leaseholds: the ***general warranty*** deed (also known as "covenant warranty deed"), the ***special warranty*** deed (usually statutory), and the ***quitclaim*** deed. The major difference between these deeds is the scope of assurances (covenants for title) they give to the grantee and the grantee's successors regarding the title being conveyed. The general warranty deed normally contains six covenants for title (*see* 1.a.1) - 6), *infra*). The special warranty deed contains fewer and more limited assurances. The quitclaim deed contains no assurances; it releases to the grantee whatever interest the grantor happens to own. Covenants for title must be distinguished from covenants for other than title (i.e., covenants running with the land used for private land regulation).

1. Covenants for Title in a General Warranty Deed

In this day of recording acts and title insurance, covenants for title are not much relied upon for title assurance. A general warranty deed is one in which the grantor covenants against title defects created both by himself and by ***all prior titleholders***. In a special warranty deed, however, the grantor covenants only that he himself did not create title defects; he represents nothing about what prior owners might have done. General warranty deeds are a rarity in a number of states where many conveyances are made with statutory form special warranty deeds.

a. Usual Covenants

A grantor may give any or all of the following covenants, which are classified as the "usual covenants for title." A deed containing such covenants is called a "general warranty deed."

1) Covenant of Seisin

The covenant of seisin is a covenant that the grantor has the estate or interest that she purports to convey. Both title and possession at the time of the grant are necessary to satisfy the covenant.

2) Covenant of Right to Convey

The covenant of the right to convey is a covenant that the grantor has the power and authority to make the grant. Title alone will ordinarily satisfy this covenant, as will proof that the grantor was acting as the authorized agent of the titleholder.

3) Covenant Against Encumbrances

The covenant against encumbrances is a covenant assuring that there are neither visible encumbrances (easements, profits, etc.) nor invisible encumbrances (mortgages, etc.) against the title or interest conveyed.

4) Covenant for Quiet Enjoyment

The covenant for quiet enjoyment is a covenant that the grantee will not be

disturbed in her possession or enjoyment of the property by a third party's ***lawful*** claim of title.

5) Covenant of Warranty
The covenant of warranty is a covenant wherein the grantor agrees to defend on behalf of the grantee any lawful or reasonable claims of title by a third party, and to compensate the grantee for any loss sustained by the claim of superior title. This covenant is generally considered to be similar to the covenant for quiet enjoyment.

6) Covenant for Further Assurances
The covenant for further assurances is a covenant to perform whatever acts are reasonably necessary to perfect the title conveyed if it turns out to be imperfect.

7) No Implied Warranties or Covenants
In the absence of a statute, no covenants of title are implied in deeds. Moreover, the implied (or express) covenant of marketable title found in contracts of sale of real estate is no longer assertable once a deed has been delivered, unless fraud or mistake is shown.

b. Breach of Covenants
Three of the covenants (seisin, right to convey, against encumbrances) are ***present covenants*** and are breached, if at all, ***at the time of conveyance***. Quiet enjoyment, warranty, and further assurances are ***future covenants*** and are breached ***only upon interference with the possession*** of the grantee or her successors. This distinction is important in that it determines when the statute of limitations begins running and whether a remote grantee of the covenantor can sue.

1) Covenants of Seisin and Right to Convey
The covenants of seisin and right to convey are breached at the time of conveyance ***if the grantor is not the owner*** of the interest she purports to convey (or has not been authorized to so convey). If there is a breach, the grantee has a cause of action against which the statute of limitations begins to run at the time of conveyance. If the grantee reconveys, the general rule is that the subsequent grantee has ***no right of action*** against the covenantor. In a few jurisdictions, it is implied that the original grantee assigned the cause of action to the subsequent grantee, thus permitting suit against the original grantor-covenantor. (The latter is probably the better rule because the subsequent grantee most likely paid the original grantee the market value.)

Example: O conveys Blackacre to A by a deed containing a covenant of seisin. O purports to convey a fee simple, but in fact X was the owner of Blackacre. Soon thereafter, A conveys to B. Under the usual view, A, but not B, may recover from O. In a few jurisdictions, it is implied that A assigned her cause of action to B.

2) Covenant Against Encumbrances
The covenant against encumbrances is breached and a cause of action arises at the time of conveyance if the property is encumbered. Most jurisdictions hold that the covenant is breached even if the grantee knew of the encumbrance, whether it

be an encumbrance on title (e.g., a mortgage) or a physical encumbrance (e.g., an easement or servitude), but others hold there is no breach if the grantee knew of a physical encumbrance.

These jurisdictions charge grantees with constructive notice of visible physical encumbrances (e.g., right-of-way). Several cases go so far as to hold that a covenant against encumbrances is not breached where the encumbrance ("visible" or not) is a benefit to the land involved (e.g., an easement for a sewer or for an adjacent street). As with the covenants of seisin and right to convey, this covenant ***cannot*** be enforced by a remote grantee in the majority of states.

3) Covenants for Quiet Enjoyment, Warranty, and Further Assurances
Covenants for quiet enjoyment, warranty, and further assurances are not breached until a ***third party interferes with the possession*** of the grantee or her successors. (*But note:* A covenant for quiet enjoyment or of warranty is not breached by the covenantor's refusal to defend title against a ***wrongful*** claim or eviction by a third party.)

a) Covenant Runs to Successive Grantees
These covenants are viewed as "continuous"; i.e., they can be breached a number of times. Their benefit "runs" with the grantee's estate (***unlike*** the present covenants discussed above).

Example: O conveys to A by a deed containing a covenant of warranty. A thereafter conveys to B and B to C, and then C is evicted by a third party with title that was paramount when O conveyed to A. C can successfully sue O.

b) Requirement of Notice
The covenantor is not liable on her covenant of warranty or of further assurances unless the party seeking to hold her liable gives her notice of the claim against the title she conveyed.

c) Any Disturbance of Possession
Most courts hold that any disturbance of possession suffices to constitute a breach. Thus, if the covenantee cannot obtain complete possession or pays off an adverse, paramount claim in order to retain possession, this is a sufficient disturbance of possession. *Compare:* A disturbance of the covenantee's possession is not required as a prerequisite to recovery for breach of covenants of seisin, right to convey, or against encumbrances.

c. Damages and Remote Grantees
Suppose successive conveyances from O to A to B to C, each conveyance containing full covenants. C is evicted by X, who was the true owner when O conveyed to A. C may sue O, A, or B because each gave a covenant of warranty the benefit of which "ran" with the land. But what is the measure of C's recovery? Is it the consideration the defendant (i.e., O, A, or B) received? Is it the consideration C paid (an indemnity theory) so that if C was a donee, she gets nothing?

Many states permit C to recover to the extent of the ***consideration received*** by the defendant-covenantor (even though it exceeds the consideration paid by C). Under this view, defendant-shopping is advisable (to sue whomever received most). The defendant who is held liable then has a cause of action against any prior covenantor, until ultimately O is held liable. In other states, C can recover only the ***actual consideration she paid*** (but not to exceed the amount received by the defendant-covenantor).

2. Statutory Special Warranty Deed

Statutes in many states provide that (unless expressly negated) the use of the word "grant" in a conveyance creates ***by implication*** the following two limited assurances against ***acts of the grantor*** (not her predecessors): (i) that prior to the time of the execution of such conveyance, the ***grantor has not conveyed the same estate*** or any interest therein to any person other than the grantee; and (ii) that the estate conveyed is free from encumbrances made ***by the grantor***.

3. Quitclaim Deeds

A quitclaim deed is basically a ***release of whatever interest***, if any, the grantor has in the property. Hence, the use of covenants warranting the grantor's title is basically inconsistent with this type of deed; i.e., if the deed contains warranties, it is not a quitclaim deed.

4. Estoppel by Deed

If a grantor purports to convey an estate in property that she does not then own, her ***subsequent acquisition of title to the property will automatically inure to the benefit of the grantee***. In other words, the grantor impliedly covenants that she will convey title immediately upon its acquisition.

Example: On Day 1, A, who does not own Blackacre, purports to convey Blackacre to B by general warranty deed. On Day 1, B has no interest in Blackacre. On Day 3, A acquires Blackacre from O. That interest automatically passes to B, so that on Day 3 B owns Blackacre. A's warranties will prevent her from denying ownership when she executed the deed on Day 1.

a. Applies to Warranty Deeds

The doctrine is most frequently applied where the conveyance is by warranty deed. Regardless of covenants for title, many courts hold that if the deed expressly purports to convey a fee simple or other ***particular estate***, the grantee is entitled to that estate if later acquired by the grantor. In most states, however, the doctrine will not be applied when the conveyance is by a quitclaim deed.

b. Rights of Subsequent Purchasers

The majority of courts hold that title inures to the benefit of the grantee only ***as against the grantor*** (who is estopped to deny that she acquired title on behalf of the grantee). This is a personal estoppel only. Consequently, if the grantor transfers her after-acquired title to an innocent purchaser for value, the BFP gets good title. (There is no basis for invoking an estoppel against an innocent purchaser without notice.)

1) Effect of Recordation by Original Grantee

If the original grantee records the deed she receives from the grantor, the question arises as to whether this recordation imparts sufficient notice of the grantee's

interest, so as to prevent a subsequent purchaser from being a BFP. This depends on the subsequent grantee's ***burden of searching the title***. (*See* E.4., *infra*.)

c. Remedies of Grantee

In jurisdictions following the estoppel rationale, the original grantee, at her election, may ***accept title*** to the land ***or sue for damages for breach of covenants*** for title. However, if an innocent purchaser of the after-acquired title is involved, the grantee has no rights against the BFP.

E. RECORDING

At common law, in nearly all cases priority was given to the grantee ***first in time***. Thus, if O conveyed Blackacre to A and then made an identical conveyance to B, A prevailed over B on the theory that after the first conveyance O had no interest left to convey.

1. Recording Acts—In General

Statutes known as "recording acts" require a grantee to make some sort of recordation so as to give "notice to the world" that title to certain property has already been conveyed, and thus to put subsequent purchasers on guard. These statutes are in effect in some form in every state. Basically, recording acts set up a system by which any instrument affecting title to property located in a certain county can be recorded in that county. These acts seek to protect all subsequent BFPs from secret, unrecorded interests of others.

a. Purpose of Recordation—Notice

Recordation is not essential to the validity of a deed, as between the grantor and grantee. However, if a grantee does not record her instrument, she may lose out against a subsequent BFP. By recording, the grantee gives constructive (or "record") ***notice to everyone***. Hence, as stated earlier, proper recording prevents anyone from becoming a subsequent BFP.

b. Requirements for Recordation

1) What Can Be Recorded—Instrument Affecting an Interest in Land

Practically every kind of ***deed, mortgage, contract to convey***, or other instrument creating or affecting an interest in land can be recorded. *Note:* A judgment or decree affecting title to property can also be recorded. And, even before judgment, where a ***lawsuit is pending that may affect title*** to property, any party to the action can record a ***lis pendens*** (notice of pending action), which will effectively put third parties on notice of all claims pending in the lawsuit.

2) Grantor Must Acknowledge Deed

Most recording statutes provide that, in order to be recorded, a deed must be acknowledged by the grantor before a notary public. This requirement offers some protection against forgery. Problems may arise if the recorder records a deed that has not been acknowledged or has been improperly acknowledged.

c. Mechanics of Recording

1) Filing Copy

The grantee or her agent normally presents the deed to the county recorder, who

photographs it and files the copy in the official records. These records are kept chronologically.

2) Indexing
The recorder also indexes the deed to permit title searches. The usual indexes are the grantor-grantee and grantee-grantor indexes, which are arranged by reference to the parties to the conveyance. Tract indexes, which index the property by location, exist in some urban localities.

2. Types of Recording Acts
There are three major types of recording acts, classified as "notice," "race-notice," and "race" statutes. Note that the burden is on the subsequent taker to prove that he qualifies for protection under the statute.

a. Notice Statutes
Under a notice statute, a subsequent BFP (i.e., a person who gives valuable consideration and has no notice of the prior instrument) prevails over a prior grantee who 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. Constructive notice includes both record notice and inquiry notice (*see* 3.b.3), *infra*). A typical notice statute provides:

> A conveyance of an interest in land, other than a lease for less than one year, shall not be valid against any subsequent purchaser for value, ***without notice thereof***, unless the conveyance is recorded.

Note also that the subsequent BFP is protected, regardless of whether she records at all.

Example: On January 1, O conveys Blackacre to A. A does not record. On January 15, O conveys Blackacre to B, who gives valuable consideration and has no notice of the deed from O to A. B prevails over A.

What if A records before B? Suppose in the example above that A recorded on January 18, and B never recorded. This is ***irrelevant*** under a "notice" statute, because B had no notice ***at the time of her conveyance*** from O. B is protected against a ***prior*** purchaser even though B does not record her deed (this is the difference between "notice" and "race-notice" statutes). Of course, if B does not record, she runs the risk that a subsequent purchaser will prevail over her, just as she prevailed over A.

b. Race-Notice Statutes
Under a race-notice statute, a subsequent BFP is protected only if she records ***before*** the prior grantee. *Rationale:* The best evidence of which deed was ***delivered*** first is to determine who recorded first. To obviate questions about the time of delivery and to add an inducement to record promptly, race-notice statutes impose on the BFP the additional requirement that she record first. A typical race-notice statute provides:

> Any conveyance of an interest in land, other than a lease for less than one year, shall not be valid against any subsequent purchaser for value, ***without notice thereof***, whose conveyance is ***first recorded***.

Example: On January 1, O conveys Blackacre to A. A does not record. On January 15, O conveys Blackacre to B. On January 18, A records. On January 20, B records. A prevails over B because B did not record first.

c. Race Statutes

Under a pure race statute, whoever records first wins. Actual notice is irrelevant. The rationale is that actual notice depends upon extrinsic evidence, which may be unreliable. ***Very few states*** have race statutes.

Example: On January 1, O conveys Blackacre to A. A does not record. On January 15, O conveys Blackacre to B. B ***knows*** of the deed to A. B records. Then A records. B prevails over A because she recorded first. It is immaterial that she had actual notice of A's interest.

3. Who Is Protected by Recording Acts

Only ***bona fide purchasers*** ("BFPs") are entitled to prevail against a prior transferee under "notice" and "race-notice" statutes. To attain this status, a person must satisfy three requirements (each of which is discussed in detail below). The person must:

(i) Be a ***purchaser*** (or mortgagee or creditor if the statute so allows; *see* below);

(ii) Take ***without notice*** (actual, constructive, or inquiry) of the prior instrument; and

(iii) Pay ***valuable consideration***.

Note: If these requirements are not met, the person is not protected by the recording acts, so that the common law rule of first in time prevails.

Example: O, the owner of Blackacre, executes a contract of sale of the land to A on Monday. A immediately ***records the contract***. On Tuesday, O deeds the land to B. B pays valuable consideration for the land, but is not a BFP because B is held to have constructive notice of A's rights. *Result:* A is entitled to enforce the contract against B, paying B the rest of the price and compelling B to deliver a deed to A. (If A had failed to record the contract, and B had no other notice of it, B would have taken free of A's contract rights. A would have an action in damages against O for breach of contract, but would not have a claim for specific performance against B.)

a. Purchasers

All recording acts protect purchasers (of the fee or any lesser estate).

1) Donees, Heirs, and Devisees Not Protected

Donees, heirs, and devisees are not protected because they do not give value for their interests.

Example: O, the owner of Blackacre, conveys it to A on Monday. A fails to record. O dies on Tuesday and his heirs/devisees succeed to his property interests. Even though O's heirs/devisees may be unaware of the prior conveyance of Blackacre to A, A prevails.

2) Purchaser from Donee, Heir, or Devisee

A person who buys land from the donee, heir, or devisee of the record owner is protected against a prior unrecorded conveyance from the record owner.

Example: O conveys Blackacre to A, who does not record. O dies, leaving H as her heir. (H does not prevail over A because he is not a purchaser.) H conveys to B, a BFP, who records. B prevails over A in nearly all jurisdictions.

An heir who purchases the interests of her co-heirs, without notice of the prior unrecorded conveyance, is entitled to the same protection as any other purchaser to the extent of her purchase.

3) Mortgagees

Mortgagees for value are treated as "purchasers," either expressly by the recording act or by judicial classification.

Example: O, the owner of a parcel in State X known as Blackacre, deeds the parcel to A on Monday, but A fails to record the deed. On Tuesday, O executes a mortgage to Bank. State X has a race-notice recording statute. Bank is a good faith purchaser for value, and immediately records its mortgage. *Result:* Bank has a valid mortgage on the land, while the title to the land is held by A. (If Bank had not been a BFP, or had failed to record, A would hold the title free of Bank's mortgage.)

4) Judgment Creditors

In nearly all states, a plaintiff who obtains a money judgment can obtain, by statute, a judgment lien on the defendant's real estate. A typical statute reads as follows:

> Any judgment properly filed shall, for 10 years from filing, be a lien on the real property then owned or subsequently acquired by any person against whom the judgment is rendered.

Is a plaintiff who obtains a judgment lien under such a statute protected by the recording acts from a prior unrecorded conveyance made by the defendant? The cases are split, but the majority holds that the judgment lienor is ***not*** protected. These courts usually reason either (i) the plaintiff is not a BFP because he did not pay value for the judgment, or (ii) the judgment attaches only to property "owned" by the defendant, and not to property the defendant has previously conveyed away, even if that conveyance was not recorded.

Example: On January 1, O grants a mortgage on Blackacre to A. A does not record the mortgage. On January 15, B, who had previously sued O on a tort claim, obtains and properly files a judgment against O. B has no knowledge of the mortgage from O to A. Which lien has priority, A's mortgage or B's judgment lien? By the majority view, A has priority despite A's failure to record the mortgage. B is not protected by the recording act.

5) Transferees from Bona Fide Purchaser—Shelter Rule

A person who takes from a BFP will prevail against any interest that the transferor-BFP would have prevailed against. This is true even where the transferee had ***actual knowledge*** of the prior unrecorded interest.

Example: O conveys to A, who fails to record. O then conveys to B, a BFP, who records. B then conveys to C, who has actual knowledge of the O to A deed. C prevails over A. (And this is true whether C is a donee or purchaser.)

a) Rationale
If the rule were otherwise, a BFP might not be able to convey an interest in the land. The transferee is not protected for her own sake, but rather for the sake of the BFP from whom she received title.

b) Exception—No "Shipping Through"
This rule will not help someone who ***previously*** held title and had notice of the unrecorded interest. In the example above, if O repurchased from B, O would have notice of A's interest and could not claim the benefit of the "shelter rule."

6) Purchaser Under Installment Land Contract
In most states, a purchaser who has paid only part of the purchase price under an installment land contract (*see* VII.A.3., *infra*) is protected by the recording acts only to the extent of payment made. In a dispute between the contract purchaser and a prior claimant, the court may:

(i) Award the contract purchaser a share of the property as a tenant in common equal to the proportion of ***payments made***;

(ii) Award the land to the prior claimant, but give the contract purchaser a lien on the property to the extent of the ***amount paid*** [Westpark, Inc. v. Seaton Land Co., 171 A.2d 736 (Md. 1961)]; or

(iii) Award the land to the contract purchaser, but give the prior claimant a lien on the property to the extent of the ***balance still owed*** [Sparks v. Taylor, 90 S.W. 485 (Tex. 1906)].

Example: O conveys Blackacre to A, who does not record. O then conveys Blackacre to B as a gift. B, knowing nothing of the O-A conveyance, records her deed. B then sells Blackacre to C for $100,000 via an installment land contract. C is to make four payments of $25,000. C makes the first payment and records his deed. A learns of the B-C conveyance and files suit against C to quiet title. *Result:* The court may (i) award C a one-fourth interest in Blackacre as a tenant in common; (ii) award Blackacre to A, but order A to pay C $25,000; or (iii) award Blackacre to C, but order C to pay the remaining $75,000 to A.

a) Exception—Shelter Rule
If B in the example above were a BFP, the shelter rule would apply and C would be fully protected even though C had notice of the O-A conveyance partway through C's payments.

b. Without Notice

"Without notice" means that the purchaser had no actual, record, or inquiry notice of the prior conveyance at the time she paid the consideration and received her interest in the land. While ***no one has a legal duty to perform a title search***, a subsequent purchaser will be charged with the notice that such a search ***would*** provide, whether or not she actually searches. However, the fact that the purchaser obtains knowledge of the adverse claim after the conveyance but before she records it is immaterial; she only has to be "without notice" ***at the time of the conveyance***.

1) Actual Notice

The subsequent purchaser must show that she did not actually know of any prior unrecorded conveyance. Actual notice includes knowledge obtained from any source (e.g., newspaper, word-of-mouth, etc.).

2) Record Notice—Chain of Title

The fact that a deed has been recorded does not always mean that a purchaser will be charged with notice of it. A subsequent purchaser will be held to have record notice only if the deed in question is recorded "in the chain of title," which means that it is recorded in a fashion that a searcher could reasonably find it. There are several situations in which a deed might be recorded, but very difficult or impossible for a search to locate.

a) "Wild Deeds"

A "wild deed" is a recorded deed that is not connected to the chain of title. It does not give constructive notice because the subsequent BFP cannot feasibly find it.

Example: O owns Blackacre, which she contracts to sell to A. The contract is not recorded, and O remains in possession. A thereupon conveys Blackacre by deed to B, and B records. O then conveys Blackacre by deed to C. Did B's recordation charge C with constructive notice of B's claim to equitable title to Blackacre derived through A? ***No.*** C is not charged with notice because there was no way for him to find the A-B deed. Nothing related it to O. It was not in O's chain of title; it was a "wild deed."

Compare: If the jurisdiction maintained a tract index, it would not be hard to find that A-B deed. It would be indexed under Blackacre's block and lot number. But it is impossible to find in a grantor-grantee index without looking at the descriptions of all the recorded properties.

b) Deeds Recorded Late

A deed recorded after the grantor therein is shown by the record to have parted with title through another (subsequent) instrument is not constructive notice in most states.

Example: O conveys to A on May 1. O conveys to B, a donee, on May 15. B records on June 1. A records on June 15. B conveys to C on July 1. C has no actual notice of the O-A deed.

B v. A: As between A and B, A would win because B (a donee) was not a BFP.

C v. A: In ***notice*** statute jurisdictions, most courts hold that C will prevail over A because the O-A deed was recorded "late" and is not in C's chain of title; i.e., the search burden is too great if C is required to search "down" the grantor index to the present time for each grantor in the chain.

In several ***race-notice*** jurisdictions, however, A's recordation is treated as giving constructive notice to any purchaser ***subsequent to*** such recordation. In these states, the title searcher must search to the present date under the name of each person who ever owned the property in order to pick up deeds recorded late.

(1) Exception—Shelter Rule
If B in the example above were a BFP, C would win in any event, for she would "shelter" under B. This result would be the same even if C had actual knowledge of the O-A deed; otherwise B's power to transfer would be restricted.

(2) Lis Pendens Protection
What can A do to protect herself when she records her deed and finds the O-B deed on record? She can bring suit against B to expunge B's deed and file a lis pendens (litigation pending) notice under B's name, so any purchaser from B will have notice of A's claim.

c) Deeds Recorded Before Grantor Obtained Title
There is a split of authority on whether a recorded deed, obtained from a grantor who had no title at that time but who afterwards obtains title, is constructive notice to a subsequent purchaser from the same grantor.

Example: Suppose that on June 1, O owns Blackacre, but on that same day, A conveys Blackacre by warranty deed to B who promptly records. On July 2, O conveys Blackacre to A, and this deed is also promptly recorded. On August 3, A conveys Blackacre to C, a BFP who has no actual notice of the prior A-B deed.

Majority view: Most courts protect C over B on the theory that a deed from A that was recorded prior to the time title came to A is not in the chain of title and so does not give C constructive notice of B's claim to Blackacre. *Rationale:* It would put an excessive burden on the title searcher to have to search the index under each grantor's name ***prior*** to the date the grantor acquired title.

Minority view: However, a minority of courts protect B over C on the basis that as soon as A acquired title from O, it

transferred automatically to B by virtue of A's earlier deed to B. Therefore, A had nothing to transfer to C. (*Criticism:* The minority view sharply increases the costs of title search.)

d) Deed in Chain Referring to Instrument Outside Chain

If a recorded document in the chain of title refers to another instrument, such reference may be sufficient to impart constructive notice of the other instrument, even if it is unrecorded or is not itself in the chain of title.

Example: O mortgages Blackacre to A, who does not record. Later, O sells Blackacre to B by deed which recites that title is subject to A's mortgage. This deed is recorded. B then sells to C. C takes subject to A's mortgage, even though it was never recorded, because of the reference to it in the OB deed.

e) Restrictive Covenants—Deeds from Common Grantor

(1) Subdivision Restrictions

Suppose that O, a subdivider, is developing a residential subdivision. She sells lot #1 to A, and the deed provides that lot #1 is restricted to residential use. The deed also provides that "O on behalf of herself, her heirs, and assigns promises to use her remaining lots (#2, #3, etc.) for residential purposes only." A records the deed. O then sells lot #2 to B. The deed to B contains no restrictions. B wishes to erect a gas station. Is B bound by the restrictions in the OA deed of which he had no actual notice? The courts are split.

(a) Some charge B with reading ***all*** deeds given by a common grantor, not just the deeds to his particular tract. Hence, B has constructive notice and is bound by the restriction.

(b) However, the ***better view*** is contra; i.e., because the burden of title search would be excessive, deeds to other lots given by a common grantor are not in B's chain of title. (But if B has actual or inquiry notice of the restriction, it may be enforced as an equitable servitude; *see* IV.E., *supra*.)

(2) Adjacent Lots

Suppose that O owns lot #1 and lot #2. She grants lot #2 to A with an easement of way over lot #1. The deed to A is indexed as a deed to lot #2; no mention is made of lot #1. Subsequently, O conveys lot #1 to B without mentioning the easement. As with subdivision restrictions, the courts are split as to whether B is required to read O's deeds of adjoining lots.

f) Marketable Title Acts

In some states, a ***search cut-off date*** is established by statute; e.g., defects of title reaching back farther than 40 years are barred (a title searcher need only check the chain of title back 40 years). The exact cut-off point varies from state to state.

3) Inquiry Notice

Inquiry notice means that if the subsequent grantee is bound to make reasonable inquiry, she will be held to have knowledge of any facts that such inquiry ***would have revealed*** (even though she made none).

a) Generally No Inquiry from Quitclaim Deed

In a ***majority*** of states, quitclaim grantees are treated the same as warranty deed grantees under the recording system; i.e., they are not charged with inquiry notice from the mere fact that a quitclaim deed was used.

b) Inquiry from References in Recorded Instruments

If a recorded instrument makes reference to an unrecorded transaction, the grantee is bound to make inquiry to discover the nature and character of the unrecorded transaction.

Example: O grants an easement in Blackacre to A, who does not record. O thereafter conveys the fee to B and in the deed states that the property is "subject to an easement." B records. C purchases Blackacre from B without any knowledge of the easement. The reference to the easement in the OB deed creates a ***duty to inquire*** concerning the easement. If a reasonable inquiry would have informed C of the easement, she has notice of it even though the deed of the easement was never recorded. (Remember the grantee is charged with constructive knowledge of the fruits of a reasonable inquiry even though she made no inquiry.) Thus, C will take subject to A's unrecorded interest in Blackacre.

c) Inquiry from Unrecorded Instruments in Chain of Title

Suppose O, the record owner, conveys a life estate to A by a deed that is not recorded. Thereafter, A purports to convey a fee simple to B, a purchaser for valuable consideration, without actual notice that A merely has a life estate. O would prevail over B with respect to the remainder interest because when a grantor's deed is unrecorded, the grantee is expected—at her peril—to demand a viewing of her grantor's title documents at the time of the purchase and insist that they be recorded.

d) Inquiry from Possession

A title search is not complete without an examination of possession. If the possession is unexplained by the record, the subsequent purchaser is obligated to make inquiry. The subsequent purchaser is charged with knowledge of whatever an inspection of the property would have disclosed ***and*** anything that would have been disclosed by inquiring of the possessor.

Example: O, the owner of Blackacre, conveys it to A, who fails to record. However, A goes into possession of Blackacre. Thereafter, O executes an identical conveyance of Blackacre to B, who purchases for valuable consideration and without actual notice of the prior unrecorded conveyance to A. A majority of states hold that B is placed on constructive notice of A's interest. An

examination of possession would have revealed A's presence, and A's possession is inconsistent with O's ownership.

Similarly, the physical appearance of the land may give notice of an adverse interest. For example, tire tracks passing over the land to an adjacent parcel may give notice of an easement.

c. Valuable Consideration

A person is protected by the recording statute only from the time that valuable consideration was given. Thus, if a deed was delivered before the consideration was paid, the purchaser will not prevail over deeds recorded before the consideration was given. Valuable consideration must be more than merely nominal. A person who claims to be a BFP must prove that ***real*** consideration was paid.

1) Test—Substantial Pecuniary Value

The test is different from that of contract law, where any consideration suffices to support a contract. Here, the claimant must show that he is not a donee but a purchaser. The consideration need not be adequate, nor the market value of the property, but it must be of substantial pecuniary value. ("Love and affection" is not valuable consideration.)

2) Property Received as Security for Antecedent Debts Is Insufficient

One who receives a deed or mortgage only as security for a preexisting debt has not given valuable consideration.

Example: O becomes indebted to A. O conveys Blackacre to B, who does not record. O then gives A a mortgage on Blackacre to secure the indebtedness, and A records. A did not give valuable consideration, and B prevails over A.

4. Title Search

Suppose O has contracted to sell Blackacre to A. Prior to closing, A, the buyer, will have a title search performed to assure herself that O really owns Blackacre and to determine if there are any encumbrances on O's title. How will A's title searcher(s) proceed?

a. Tract Index Search

In a tract index jurisdiction, the job is comparatively easy. The searcher looks at the page indexed by block and/or lot describing Blackacre and at a glance can see prior recorded instruments conveying, mortgaging, or otherwise dealing with Blackacre.

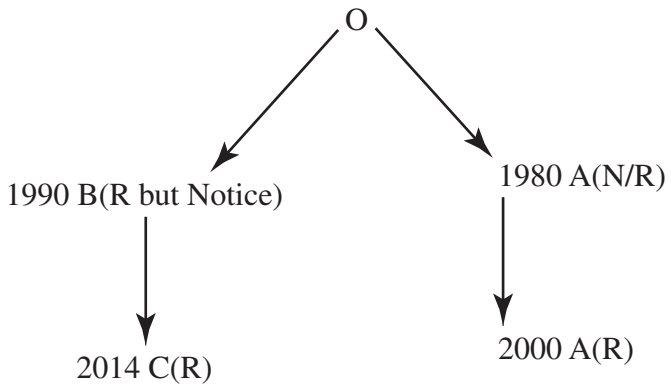
b. Grantor and Grantee Index Search

The search is much more complicated in a grantor and grantee index jurisdiction.

Examples: 1) V owned Blackacre in 1935. In 1965, V conveyed Blackacre to W. In 1990, W conveyed Blackacre to X. In 1995, X gave B Bank a mortgage on the property. In 2005, X conveyed Blackacre to O. O contracts to sell the land to A. A's title searcher will look in the ***grantee*** index under O's name from the present back to 2005, when she finds the deed from X, then under X's name from 2005 to 1990, when she finds the deed from W to X, then under W's name from 1990 to 1965, then under V's name

from 1965 backward. The searcher will then look in the ***grantor*** index under V's name from 1935 to 1965, under W's name from 1965 to 1990, under X's name from 1990 to 2005, and under O's name from 2005 to the present. In this manner, she will pick up the mortgage to B Bank, which was recorded in 1995 in the grantor index under X's name.

2)



1980 O conveys to A.

1990 O executes an identical conveyance of Blackacre to B. B pays valuable consideration, but B has actual knowledge of the prior unrecorded conveyance to A. B records.

2000 A records.

2014 B conveys his interest in Blackacre to C, who purchases without notice of the conveyance to A and who pays valuable consideration.

In searching the title, C will first look in the grantee index under B's name to discover if his seller, B, ever acquired title. He will find that B acquired title in 1990 from O. Next, he will look in the grantor index under B's name to discover if B made any prior conveyances, and then will look in the grantee index once again, this time under O's name, to discover if O ever acquired title. C will find that O acquired title in 1970. Then he will look in the grantor index under O's name to discover if O made a conveyance prior to his conveyance to B. Under the majority rule, C is required to look under O's name in the grantor index only through 1990. C will find no conveyances. In 1990, C will find the recorded conveyance to B and he need look no further. On this basis, C will not find the recorded conveyance to A because A recorded after 1990. A's recording is "out of the chain of title," and therefore C is not charged with notice.

Under a ***pure notice or race-notice statute***, as between A and B, A will prevail because B, having knowledge of A's unrecorded conveyance, is not a protected party. However, as between A and C, many courts hold

that C should prevail because A's recording is out of the chain of title. The cases are split. Because notice is irrelevant under ***pure race*** statutes, B would prevail over A because B recorded first. Once it is established that B prevails over A, C obviously takes good title.

c. Other Instruments and Events Affecting Title
The title searcher's job may be complicated by marriages and divorces (e.g., a woman's name may have changed between her appearance as grantee and her reappearance as grantor) and by the fact that a number of interests in the land may be filed and indexed elsewhere than in the recording office (e.g., judgment liens may appear in the trial court's judgment docket, and tax liens may be filed only in the tax assessor's office). Similarly, discovering whether land has passed by will or intestacy rather than by conveyance may require a search of probate records.

5. Effect of Recordation
Proper recordation gives all prospective subsequent grantees constructive notice of the existence and contents of the recorded instruments; i.e., there can be no subsequent BFPs. Recordation also raises ***presumptions*** that the instrument has been validly delivered and that it is authentic. These presumptions are rebuttable, not conclusive.

a. Does Not Validate Invalid Deed
As stated earlier, recordation is not necessary for a valid conveyance. Nor does recordation validate an invalid conveyance, such as a forged or undelivered deed.

b. Does Not Protect Against Interests Arising by Operation of Law
Furthermore, recordation does not protect a subsequent purchaser against interests that arise by operation of law, rather than from a recordable document (e.g., dower rights; prescriptive and implied easements; title by adverse possession). Because there is no instrument to record in order to perfect such interests, the recording acts do not apply, and subsequent purchasers take subject to the interests. (*Remember:* If the recording act is inapplicable, the common law priority rules apply.)

Example: O is the record owner of Blackacre. X adversely possesses Blackacre for the period of the statute of limitations. O then conveys Blackacre to A, a BFP. Even though X's interest has never been recorded, X prevails against A.

1) Exception
A court ***may*** protect a subsequent BFP from an unrecorded ***implied easement*** that is ***not visible*** upon inspection of the premises (e.g., an underground sewer).

c. Recorder's Mistakes
An instrument is considered recorded from and after the time it is filed at the recorder's office, irrespective of whether it is actually listed on the indexes. If the recorder's office has made an error in recording, the subsequent purchaser has an action against the recorder's office. There is a strong minority view that protects the searcher.

d. Effect of Recording Unacknowledged Instrument
As discussed above, the recording acts require that before an instrument can be recorded, it must be acknowledged by the grantor before a notary. What happens if

the recorder, by oversight, records a deed that has not been acknowledged or has been defectively acknowledged?

1) No Acknowledgment—No Constructive Notice
Because an unacknowledged deed does not qualify for recordation, it does not give constructive notice to subsequent purchasers. Hence, unless the subsequent purchaser has other notice of the earlier deed, the subsequent purchaser will prevail.

Example: O conveys Blackacre to A by a deed that is not acknowledged, but the recorder nevertheless records it. Later, O conveys to B by an acknowledged deed, which B records. B prevails over A unless B had ***actual*** notice of the deed from O to A (which she might have if she searched the title records) or ***inquiry*** notice (as she would have if A was in possession of Blackacre).

2) Compare—Defective Acknowledgment
When a recorded instrument has been acknowledged, but the acknowledgment is defective for some reason ***not apparent on the face*** of the instrument, the better view is that the recordation does impart constructive notice. *Rationale:* A hidden defect in the acknowledgment should not be allowed to destroy the constructive notice that the document otherwise clearly imparts. Purchasers should be entitled to rely on what ***appears*** to be a perfectly recorded document.

Example: A deed bears what appears to be a valid acknowledgment but is in fact invalid because the notary was disqualified to act or because the grantor did not appear personally in front of the notary to acknowledge her signature, as required by law.

F. CONVEYANCE BY WILL

A will is a conveyance that is prepared and executed by the property owner during life, but which does not "speak" or operate until the date of the owner's death. Thus, a will is "ambulatory," meaning that it can be revoked or modified so long as the testator is alive. Some special situations arise when there is a change in the status of the property or beneficiaries between the time the will is executed and the testator's death.

1. Ademption

If property is specifically devised or bequeathed in the testator's will, but the testator no longer owns that property at the time of death, the gift is adeemed. This means that the gift ***fails*** and is not replaced by other property. The reason that the property is no longer owned by the testator generally does not matter; i.e., it does not matter whether the testator sold the property or it was accidentally destroyed.

Example: T owns Blackacre and executes a will devising "Blackacre to my daughter Mary." Prior to his death, T sells Blackacre to A and deposits the proceeds of the sale in a bank account. Upon T's death, Mary is not entitled to Blackacre or to its proceeds. Note that if the will had provided for T's executor to sell Blackacre and distribute the proceeds to Mary, she would be entitled to the proceeds even though the sale occurred before T's death.

a. Not Applicable to General Devises

Ademption does not apply unless the gift mentioned specific property. A specific devise

or legacy is one that can be satisfied only by the delivery of a particular item; it cannot be satisfied by money. Thus, a bequest of "$10,000," or even of "$10,000 to be paid out of the sale of my IBM stock" cannot be adeemed.

b. Not Applicable to Land Under Executory Contract

If the testator enters into an enforceable contract of sale of property after making a specific devise of it by will, the doctrine of ***equitable conversion*** holds that the testator's interest is converted into personal property. Logically, an ademption has occurred, and the proceeds of sale when the closing occurs should not pass to the specific devisee of the property. The traditional case law agrees, but the Uniform Probate Code and statutes in many states have reversed this result. Then, when property subject to a specific devise is placed under contract of sale before the decedent's death, the proceeds of the sale will pass to the specific devisee. [*See* UPC §2-606]

Example: T owns Blackacre and executes a will devising "Blackacre to my daughter Mary." Prior to his death, T enters into a contract to sell Blackacre to A. After T's death the contract is completed, and A pays the purchase price for the land. Mary is entitled to the purchase price in substitution of the land itself.

1) No Ademption If Decedent Incompetent When Contract Formed

If the decedent is unable to enter into the contract, and instead it is entered into by a guardian, attorney in fact, or other representative, courts usually do not apply the equitable doctrine, and they allow the proceeds of the sale to pass to the specific devisee.

c. Other Proceeds Not Subject to Ademption

When property is damaged or destroyed before the testator's death but the casualty insurance proceeds are not paid until after the testator's death, ademption does not usually apply. The beneficiary of the specific bequest takes the insurance proceeds. Similarly, ademption usually does not apply to property condemned by the government when the taking was before death but the condemnation award was paid after death.

d. Partial Ademption

If the testator specifically devises property and then sells or gives away a part of that property, only that portion is adeemed; the remainder passes to the devisee.

2. Exoneration

At common law and in some states today, if a testator makes a specific devise of real estate that is subject to a mortgage or other lien, the devisee is entitled to have the land "exonerated" by the payment of the lien from the testator's residuary estate. Thus, the property will pass to the devisee free of encumbrances. However, a majority of states have, by statute, abolished the exoneration doctrine. In these states, the property will pass to the devisee subject to a preexisting mortgage or other lien unless the will expressly provides for a payoff of the lien. [*See* UPC §2-607]

3. Lapse and Anti-Lapse Statutes

A lapse occurs when the beneficiary of a gift in a will ***dies before the testator***. Under the common law, if a lapse occurred, the gift was ***void***. However, nearly all states now have

statutes that prevent lapse by permitting the gift to pass to the predeceasing beneficiary's living descendants under certain circumstances. These statutes vary as to the scope of beneficiaries covered.

a. Degree of Relationship to Testator
Many of the anti-lapse statutes apply only when the named beneficiary is a descendant of the testator. Others apply if the beneficiary is more remotely related, such as a descendant of the testator's grandparent. Others apply to any relative, and still others apply to any beneficiary at all.

1) Descendants Are Substituted
The anti-lapse statute does not save the gift for the predeceasing beneficiary's estate; rather it substitutes the beneficiary's descendants for the beneficiary. Thus, property will never pass under the anti-lapse statute to a predeceasing beneficiary's spouse. The property passes to the beneficiary's descendants under the method of distribution (e.g., per stirpes, per capita) used by the state's intestate succession (inheritance) statute.

b. Application to Class Gifts
Ordinarily, if a gift is made by will to a class (e.g., "to my children," or "to the descendants of my brother Bob"), and some members of the class die before the testator, the gift is simply given to the surviving members of the class. However, if class members within the coverage of an anti-lapse statute predecease the testator leaving surviving issue, the statute will apply, and the issue will take the deceased class member's share of the gift.

c. Anti-Lapse Statute Does Not Apply If Contrary Will Provision
The anti-lapse statute does not apply if there is a contrary will provision—e.g., if the gift is contingent on the beneficiary's surviving the testator.

4. Abatement
If the estate assets are not sufficient to pay all claims against the estate and satisfy all devises and bequests, the gifts are abated (i.e., reduced). Absent a contrary will provision, estates in most jurisdictions abate in the following order: (i) property passing by intestacy; (ii) the residuary estate; (iii) general legacies, which abate pro rata; and (iv) specific devises and bequests. Some states provide that within each category personal property abates before real property.

VII. SECURITY INTERESTS IN REAL ESTATE

A. TYPES OF SECURITY INTERESTS

A security interest in real estate operates to secure some other obligation, usually a promise to repay a loan, which is represented by a promissory note. If the loan is not paid when due, the holder of the security interest can either take title to the real estate or have it sold and use the proceeds to pay the debt with accrued interest and any legal and court costs. Of the six types of security interests, the first three are most important.

1. Mortgage

The debtor/notemaker is usually the mortgagor; he gives the mortgage (along with the note) to the lender, who is the mortgagee. But note that the debtor and mortgagor can be different people (e.g., a mother agrees to place a mortgage on her house to secure a loan to her daughter). Most states require that a lender realize on the real estate to satisfy the debt only by having a judicial (court-ordered) foreclosure sale conducted by the sheriff.

2. Deed of Trust

The debtor/notemaker is the trustor. The trustor gives the deed of trust to a third-party trustee, who is usually closely connected with the lender (e.g., the lender's lawyer, affiliated corporation, or officer). In the event of default, the lender (termed the beneficiary) instructs the trustee to proceed with foreclosing the deed of trust by sale. Many states allow the sale to be either judicial (as with a mortgage) or nonjudicial, under a "power of sale" clause that authorizes the trustee to advertise, give appropriate notices, and conduct the sale personally.

3. Installment Land Contract

In an installment land contract, the debtor is the purchaser of the land who signs a contract with the vendor, agreeing to make regular installment payments until the full contract price (including accruing interest) has been paid. Only at that time will the vendor give a deed transferring legal title to the purchaser. In case of default, the contract may contain a forfeiture clause providing that the vendor may cancel the contract, retain all money paid to date, and retake possession of the land. However, the defaulting purchaser may be entitled to restitution to the extent his payments exceed the vendor's damages. (*See* F., *infra*.)

4. Absolute Deed—Equitable Mortgage

A landowner needing to raise money may "sell" the land to a person who will pay cash and may give the "buyer" an absolute deed rather than a mortgage. This may seem to be safer than a mortgage loan to the creditor and may seem to have tax advantages. However, if the court concludes, by clear and convincing evidence, that the deed was really given for security purposes, they will treat it as an "equitable" mortgage and require that the creditor ***foreclose*** it by judicial action, like any other mortgage. This result will be indicated by the following factors: (i) the existence of a ***debt or promise of payment*** by the deed's grantor; (ii) the grantee's ***promise to return the land*** if the debt is paid; (iii) the fact that the amount advanced to the grantor/debtor was much ***lower than the value of the property***; (iv) the degree of the grantor's ***financial distress***; and (v) the parties' ***prior negotiations***.

5. Sale-Leaseback

A landowner needing to raise money may sell her land to another for cash and may then lease the land back for a long period of time. As in the case of the absolute deed, the grantor/lessee may attack such a transaction later as a disguised mortgage. Factors that will lead the court to such a result are: (i) the fact that the regular rent payments on the lease are virtually identical to payments that would be due on a mortgage loan; (ii) the existence of an option to repurchase by the grantor/lessee; and (iii) the fact that the repurchase option could be exercised for much less than the probable value of the property at that time, so that the repurchase would be very likely to occur.

6. Equitable Vendor's Lien

In addition to an installment land contract (3., *supra*) and a purchase money mortgage

(E.2.b.3), *infra*), a seller may finance the buyer's purchase of the land by an equitable vendor's lien. The lien does not result from an agreement, but rather arises by implication of law when the seller transfers title to the buyer and the purchase price or a portion of the purchase price remains unpaid.

B. TRANSFERS BY MORTGAGEE AND MORTGAGOR

All parties to a mortgage or deed of trust can transfer their interests. Ordinarily, the mortgagor transfers by deeding the property, while the mortgagee usually transfers by indorsing the note and executing a separate assignment of the mortgage. The note and mortgage must pass to ***the same person*** for the transfer to be complete.

1. Transfer by Mortgagee

a. Transfer of Mortgage Without Note

The case law is divided, with some states holding that the transfer of the mortgage automatically transfers the note as well, unless the mortgagee-transferor expressly reserves the rights to the note (which there would rarely be any reason for the mortgagee to do). In these states, the transferee of the mortgage can then file an equitable action and compel a transfer of the note as well. Other states hold that, because the note is the principal evidence of the debt, a transfer of the mortgage without the note is a nullity and is void.

b. Transfer of Note Without Mortgage

The ***note can be transferred without the mortgage***, but the mortgage will automatically follow the properly transferred note, unless the mortgagee-transferor expressly reserves the rights to the mortgage (which there would rarely be any reason for the mortgagee to do). No separate written assignment of the mortgage is necessary, although it is customary for the transferee to obtain and record an assignment of the mortgage.

1) Methods of Transferring the Note

The note may be transferred either by indorsing it and delivering it to the transferee, or by a separate document of assignment. Only if the former method is used can the transferee become a holder in due course under UCC Article 3.

a) Holder in Due Course Status

To be a holder in due course of the note, the following requirements must be met:

(1) The note must be ***negotiable in form***, which means that it must be payable "to bearer" or "to the order of" the named payee. It must contain a promise to pay a fixed amount of money (although an adjustable interest rate is permitted), and no other promises, except that it may contain an acceleration clause and an attorneys' fee clause.

(2) The original note must be ***indorsed*** (i.e., signed) by the named payee. Indorsement on a photocopy or some other document is not acceptable.

(3) The original note must be ***delivered*** to the transferee. Delivery of a photocopy is not acceptable.

(4) The transferee must take the note in ***good faith*** and must pay ***value*** for it. ("Value" implies an amount that is more than nominal, although it need not be as great as the note's fair market value.) The transferee ***must not have any notice*** that the note is overdue or has been dishonored, or that the maker has any defense to the duty to pay it.

b) Benefits of Holder in Due Course Status
A holder in due course will take the note free of any personal defenses that the maker might raise. "Personal defenses" include failure of consideration, fraud in the inducement, waiver, estoppel, and payment. The holder in due course is, however, still subject to "real" defenses that the maker might raise. These include infancy, other incapacity, duress, illegality, fraud in the execution, forgery, discharge in insolvency, and any other insolvency.

2) Effect of Payment to Original Mortgagee After Transfer of Note
Under the version of the UCC enacted in a large majority of states, if the original payee transfers possession of a negotiable instrument, a payment to the original payee will not count, and the holder of the instrument can still demand payment. [*See* UCC §3-602 (1995)] However, many notes secured by mortgages on real property are not negotiable in form (e.g., because their promise to pay is conditional or they are not payable to "bearer" or "order"). If the original mortgagee transfers possession of a ***nonnegotiable*** note, the mortgagor's payment to the original mortgagee ***is effective*** against the transferee ***until the mortgagor receives notice*** of the transfer. [Restatement (Third) of Property: Mortgages §5.5]

Example: A borrows $50,000 from B and gives B a nonnegotiable note for that amount, secured by a mortgage on Blackacre. One year later, B assigns the note and mortgage to C, transferring actual possession of the note to C. Two years thereafter, A, who does not realize that B no longer holds the note, pays $50,000 plus interest to B. This payment is effective against C. C's recourse is against B.

2. Transfer by Mortgagor—Grantee Takes Subject to Mortgage
If the mortgagor sells the property and conveys a deed, the grantee takes subject to the mortgage, which remains on the land. Unless there is a specific clause in the mortgage, the mortgagee has no power to object to the transfer.

a. Assumption
Often the grantee signs an assumption agreement, promising to pay the mortgage loan. If she does so, she becomes ***primarily*** liable to the lender (usually considered a third-party beneficiary), while the ***original*** mortgagor becomes secondarily liable as a ***surety***. Note, however, that the mortgagee may opt to sue either the grantee or the original mortgagor on the debt. If the mortgagee and grantee modify the obligation, the original mortgagor is completely discharged of liability.

b. Nonassuming Grantee
A grantee who does not sign an assumption agreement does not become personally liable on the loan. Instead, the original mortgagor remains primarily and personally liable. However, if the grantee does not pay, the mortgage may be foreclosed, thus wiping out the grantee's investment in the land.

c. Due-on-Sale Clauses

Most modern mortgages contain "due-on-sale" clauses, which purport to allow the lender to demand full payment of the loan if the mortgagor transfers any interest in the property without the lender's consent. Such clauses are designed to both: (i) protect the lender from sale by the mortgagor to a poor credit risk or to a person likely to commit waste; and (ii) allow the lender to raise the interest rate or charge an "assumption fee" when the property is sold. Federal law preempts state law and makes due-on-sale clauses enforceable for all types of institutional mortgage lenders on all types of real estate. The preemption does not apply to isolated mortgage loans made by private parties.

C. DEFENSES AND DISCHARGE OF THE MORTGAGE

1. Defenses to Underlying Obligation

Because a mortgage is granted to secure an obligation, if the obligation is unenforceable so is the mortgage. Therefore, defenses in an action on the underlying obligation are defenses against an action on the mortgage, including: (i) failure of consideration, (ii) duress, (iii) mistake, or (iv) fraud.

2. Consumer Protection Defenses to Foreclosure

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") requires residential mortgage lenders to determine a mortgagor's ability to repay before extending a loan. The terms of the loan must be understandable and not unfair, deceptive, or abusive. The Act also prohibits a lender from steering mortgagors to transactions not in their interest in an effort to increase the lender's compensation. [15 U.S.C. §§1639b, 1639c] The mortgagor can assert violations of the ability to repay or anti-steering provisions as a defense in a foreclosure proceeding. [15 U.S.C. §1640(k)]

3. Discharge of the Mortgage

A mortgagee's right to foreclose is precluded by anything amounting to a discharge of the mortgage, such as payment of the debt secured, merger of the legal and equitable interests, or the acceptance by the mortgagee of a deed in lieu of foreclosure tendered by the mortgagor.

a. Payment

Generally, full payment of the note discharges the mortgage lien. The agreement in the note, however, will normally govern whether the mortgagor may prepay the obligation. If the note or mortgage does not provide for prepayment, the mortgagor has ***no right to prepayment***. The mortgage may also provide for a prepayment fee or a total prohibition of prepayment for part or all of the mortgage term. *Note:* The Dodd-Frank Act prohibits prepayment penalties on certain loans (e.g., adjustable rate, interest-only). [15 U.S.C. §1639c(c)]

b. Merger

A mortgage lien vests the mortgagee with either an equitable interest (lien theory) or a legal interest (title theory), while the mortgagor retains the other interest (*see* D.1., *infra*). If the mortgagee subsequently acquires the mortgagor's interest, the mortgage is said to merge with the title, and the mortgagor's personal liability on the underlying debt is discharged up to the value of the land.

c. Deed in Lieu of Foreclosure

The mortgagor may also tender to the mortgagee a deed in lieu of foreclosure. In effect, the mortgagor simply turns over her equity of redemption (*see* E.1.a., *infra*) to the mortgagee. Acceptance of a deed in lieu of foreclosure permits the mortgagee to take immediate possession without the formalities of a foreclosure sale. Although it is common to negotiate a complete release from the debt, the parties also have the option to negotiate a mortgagor's agreement to remain liable on some portion of the debt. Mortgagors cannot be compelled to tender such a deed, and mortgagees have the right to refuse the deed and proceed to foreclosure.

D. POSSESSION BEFORE FORECLOSURE

When a mortgagor defaults on his debt, the mortgagee can sue on the debt or foreclose on the mortgage. A mortgagee may wish to take possession of the property, or begin receiving the rents from the property, before foreclosure. This is especially important in states where foreclosure is a lengthy process.

1. Theories of Title

The mortgagee may have a right to take possession before foreclosure, depending on the theory the state follows.

a. The Lien Theory

According to the lien theory, the mortgagee is considered the holder of a ***security interest only*** and the mortgagor is deemed the owner of the land until foreclosure. A majority of the states follow this theory, which provides that the mortgagee may not have possession before foreclosure.

b. The Title Theory

Under the title theory, legal ***title is in the mortgagee*** until the mortgage has been satisfied or foreclosed. A minority of states follow this theory, which provides that the mortgagee is entitled to possession upon demand at any time. In practice, this means that as soon as a default occurs, the mortgagee can take possession.

c. The Intermediate Theory

The intermediate theory is a compromise position in which legal ***title is in the mortgagor until default***, and upon default, legal title is in the mortgagee. Only a handful of states follow this theory, which provides that the mortgagee may demand possession when a default occurs. There is little practical difference between this theory and the title theory.

2. Mortgagor Consent and Abandonment

All states agree that the mortgagee may take possession if the mortgagor gives consent to do so, or if the mortgagor abandons the property.

3. Risks of Mortgagee in Possession

The mortgagee who takes possession prior to foreclosure can intercept the rents, prevent waste, make repairs, and lease out vacant space. However, despite these advantages, most mortgagees do not wish to take possession because of the liability risks it presents. These

risks include a very strict duty to account for all rents received, a duty to manage the property in a careful and prudent manner, and potential liability in tort to anyone injured on the property.

4. Receiverships

Instead of becoming a "mortgagee in possession," most mortgagees attempt to intercept the rents before foreclosure by getting a receiver appointed by the court to manage the property. Courts will generally appoint receivers for rental property upon a showing of some combination of three factors: (i) that waste is occurring, (ii) that the value of the property is inadequate to secure the debt, and (iii) that the mortgagor is insolvent.

E. FORECLOSURE

Foreclosure is a process by which the mortgagor's interest in the property is terminated. The property is generally sold to satisfy the debt in whole or in part (foreclosure by sale). Almost all states ***require*** foreclosure by sale. All states allow ***judicial sale***, while about one-half also allow nonjudicial sale under a ***power of sale***. The nonjudicial sale is often permitted with deeds of trust but not with mortgages. Foreclosure sales are conducted by auction, with the highest bidder taking the property. The lender may bid at the sale, and in many cases the lender is the sole bidder. (*Note:* For convenience, the discussion below speaks of mortgagors and mortgagees, but the same principles apply to deed-of-trust trustors and beneficiaries.)

1. Redemption

a. Redemption in Equity

At any time ***prior to the foreclosure sale***, the mortgagor has the right to redeem the land or free it of the mortgage by paying off the amount due, together with any accrued interest. If the mortgagor has defaulted on a mortgage or note that contains an "acceleration clause" permitting the mortgagee to declare the full balance due in the event of default, the full balance must be paid in order to redeem. A mortgagor's right to redeem her own mortgage cannot be waived in the mortgage itself; this is known as "clogging the equity of redemption" and is prohibited. However, the right can be waived later for consideration.

b. Statutory Redemption

About half the states give the mortgagor (and sometimes junior lienors) a statutory right to redeem for some fixed period after the foreclosure sale has occurred; this period is usually six months or one year. The amount to be paid is usually the foreclosure sale price, rather than the amount of the original debt. Be careful to distinguish equitable redemption, which is universally recognized (but only up to the date of the sale), from statutory redemption, which is only recognized by about half the states and applies only ***after*** foreclosure has occurred.

2. Priorities

Generally, the priority of a mortgage is determined by the time it was placed on the property. When a mortgage is foreclosed, the buyer at the sale will take title as it existed when the mortgage was placed on the property. Thus, foreclosure will terminate interests junior to the mortgage being foreclosed but will not affect senior interests.

a. Effect of Foreclosure on Various Interests

1) Junior Interests Destroyed by Foreclosure
Foreclosure destroys all interests junior to the mortgage being foreclosed. In other words, junior mortgages, liens, leases, easements, and all other types of interests will be wiped out. If a lien senior to that of the mortgagee is in default, the junior mortgagee has the right to pay it off (i.e., redeem it) in order to avoid being wiped out by its foreclosure. Thus, those with interests subordinate to those of the foreclosing party are ***necessary parties*** to the foreclosure action. Failure to include a necessary party results in the preservation of that party's interest despite foreclosure and sale.

2) Senior Interests Not Affected
Foreclosure does not affect any interest senior to the mortgage being foreclosed. ***The buyer at the sale takes subject to such interest.*** She does not become personally liable on such senior interests, but she will be forced to pay them in order to prevent their foreclosure in the future.

b. Modification of Priority
As noted above, priorities among mortgages on the same real estate are normally determined simply by ***chronology***: the earliest mortgage placed on the property is first in priority, the next mortgage is second, and so on. However, the chronological priority may be changed in the following ways:

1) Failure to Record
If the first mortgagee fails to record, and the second mortgagee records, gives value, and takes without notice of the first, the second mortgagee will have priority over the first by virtue of the normal operation of the recording acts.

2) Subordination Agreement
A first mortgagee may enter into an agreement with a junior mortgagee, subordinating its priority to the junior mortgagee. Such agreements are generally enforced. However, a broad promise to subordinate to any mortgage (or a vaguely described mortgage) to be placed on the property in the future may be considered too inequitable to enforce.

3) Purchase Money Mortgages
A purchase money mortgage ("PMM") is a mortgage given to:

(i) The vendor of the property as a part of the purchase price; or

(ii) A third-party lender who is lending the funds to allow the buyer to purchase the property.

A PMM, whether recorded or not, has priority over mortgages, liens, and other claims against the mortgagor that arise ***prior*** to the mortgagor's acquisition of title. However, PMM priority is subject to being defeated by ***subsequent*** mortgages or liens by operation of the recording acts or may be altered through a subordination

agreement. [Restatement (Third) of Property: Mortgages §7.2; Slodov v. United States, 436 U.S. 238 (1978)]

Example: A properly records a judgment lien against O (which will attach to any after-acquired property of O). O finances the purchase of Blackacre with a $250,000 loan from B. B does not record its mortgage. A few months later, O borrows $10,000 from C in exchange for a mortgage on Blackacre. C records her mortgage. B's PMM has priority over A's lien because the lien arose before O acquired title to Blackacre (i.e., the general priority rule governing PMMs), but it is junior to C's mortgage under any recording act because C had no notice of B's interest and recorded first.

a) Vendor PMM vs. Third-Party PMM
As between two PMMs, one to the vendor and one to a third-party lender, the vendor's mortgage is usually given priority over the third-party lender's. Because both PMMs arise from the same transaction, neither is treated as "subsequent" under the Restatement. Thus, the recording acts do not apply unless ***only one*** party has notice of the other. However, some jurisdictions that do not follow the Restatement allow the recording acts to determine priority between all PMMs.

b) Third-Party PMM vs. Third-Party PMM
If two PMMs are given to two third-party lenders, their priority is determined by the chronological order in which the mortgages were placed on the property, the recording act, and a subordination agreement (if any). Note that in these cases, the recording acts are often of no use because two purchase money mortgagees will almost always know of each other's existence and, thus, have notice.

4) Modification of Senior Mortgage
Suppose there are two mortgages on the land. The landowner enters into a modification agreement with the senior mortgagee, raising its interest rate or otherwise making it more burdensome. The junior mortgage will be given ***priority over the modification***. For example, if the first mortgage debt is larger because of the modification, the second mortgage gains priority over the increase in the debt.

5) Optional Future Advances
In general, a mortgage may obligate the lender to make further advances of funds after the mortgage is executed, and such advances will have the same priority as the original mortgage. However, if a junior mortgage is placed on the property and the senior lender later makes an "optional" advance while having notice of the junior lien, the advance will lose priority to the junior lien. An optional advance is one that the senior lender is not contractually bound to make. Numerous states have reversed this rule by statute, but it remains the majority view.

6) Subrogation
A mortgage taken out for the purpose of ***refinancing*** a preexisting senior mortgage takes the priority position of the senior mortgage.

Example: Bank A holds a $100,000 senior mortgage on a tract of land owned by O. Bank B holds a $50,000 second mortgage on the same land. Bank C loans O $100,000, secured by a new mortgage, which O immediately uses to pay off Bank A's mortgage. Bank C now has the senior mortgage, and Bank B still has the junior mortgage. Note that Bank B has not been harmed: Bank C's mortgage simply replaced Bank A's.

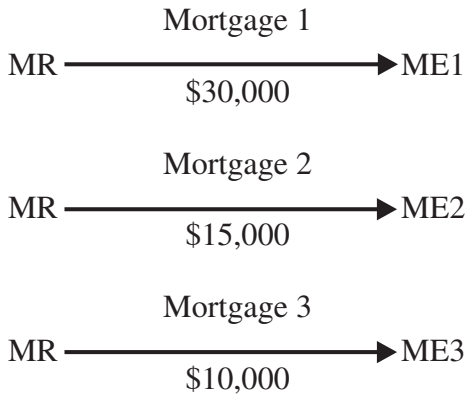
3. Proceeds of Sale

The proceeds of the foreclosure sale are used first to pay expenses of the sale, attorneys' fees, and court costs; then to pay the principal and accrued interest on the ***loan that was foreclosed***; next to pay off any ***junior liens*** or other junior interests in the order of their priority; and finally, any remaining proceeds are distributed to the ***mortgagor***. In many cases, there is no surplus remaining after the principal debt is paid off.

4. Deficiency Judgments

If the proceeds of the sale are insufficient to satisfy the mortgage debt, the mortgagee can bring a personal action against the mortgagor/debtor for the deficiency. However, a number of states limit the deficiency that can be recovered to the difference between the debt and the property's fair market value when the fair market value is higher than the foreclosure price. Other states prohibit deficiency judgments entirely on PMMs and on deeds of trust that are foreclosed by power of sale.

Examples: 1) Assume that land has a fair market value of $50,000 and is subject to three mortgages executed by its owner, whose name is MR. The mortgages have priorities and secure outstanding debts in the amounts shown below, which are owed to three different creditors, ME1, ME2, and ME3:



Assume that Mortgage 1 is foreclosed, and the bid at the sale is $50,000 (the fair value of the land). How will the funds be distributed?

In an actual case, the funds would first be used to pay any attorneys' fees and expenses of the foreclosure, and then to any accrued interest on Mortgage 1. However, we will assume that these items are zero.

The $50,000 in funds from the sale will then be used to pay off the mortgages in the order of their priority. Thus, $30,000 is applied to fully pay off

Mortgage 1. Then, $15,000 is applied to fully pay off Mortgage 2. There is a remaining balance from the foreclosure sale of $5,000, which is applied toward payment of Mortgage 3. Because this is not enough to discharge Mortgage 3 fully, ME3 is left with a deficiency of $5,000, and may sue MR for a personal judgment in this amount unless state anti-deficiency statutes prohibit it.

2) Assume the same facts as above, except that the bid at the sale is $60,000 rather than $50,000. This will allow full payment of Mortgage 1 ($30,000), Mortgage 2 ($15,000), and Mortgage 3 ($10,000), and will leave a surplus of $5,000. Assuming there are no further liens or encumbrances on the property, this $5,000 will be paid over to MR, the mortgagor.

3) Now assume the same facts as in the original problem, except that it is Mortgage 2 that is being foreclosed. Mortgage 1 exists, but it is either not in default or its holder has not yet taken action to foreclose it.

Recall from the outline above that ***foreclosure does not affect any interest senior to the mortgage being foreclosed***. Thus, foreclosure of Mortgage 2 will not affect Mortgage 1, which will continue to exist on the property in the hands of the foreclosure sale purchaser. Such a purchaser will not be personally liable to pay Mortgage 1 off, but as a practical matter, if Mortgage 1 is not paid, sooner or later ME1 will foreclose it. Hence, the buyer at the foreclosure sale of Mortgage 2 will have a strong economic incentive to pay Mortgage 1; otherwise, she will be subjected to the foreclosure action of ME1, and may well lose much or all of her investment in the property.

What will a wise bidder at the foreclosure sale on Mortgage 2 bid? The maximum is $20,000, which is the fair value of the land ($50,000) minus the amount the successful bidder will subsequently have to pay to discharge Mortgage 1 ($30,000).

If the bid at the foreclosure sale of Mortgage 2 is $20,000, how will the money be distributed? None of it will go to ME1, because he still has his mortgage on the property. $15,000 of the funds will be applied to fully pay off Mortgage 2, and $5,000 will remain to be applied against the $10,000 balance owed on Mortgage 3 (which is, of course, wiped out by the foreclosure of Mortgage 2). ME3 will still have a $5,000 deficiency, as in the first example above.

F. INSTALLMENT LAND CONTRACTS

Installment contracts may provide for forfeiture rather than foreclosure as the vendor's remedy in the event of default. However, because forfeiture is often a harsh remedy, the courts have tended to resist enforcing forfeiture clauses and in doing so have developed the following theories:

1. Equity of Redemption

Several states allow the contract purchaser who is in default to pay off the accelerated full balance of the contract and to keep the land. In other words, they grant the purchaser a grace

period. This is roughly analogous to the equity of redemption in mortgage law. A few states have statutory schedules of grace periods, which often provide for a longer time if a greater percentage of the total price has been paid.

2. Restitution
A number of decisions allow actions by the vendor for forfeiture of the land but require her to refund to the purchaser any amount by which his payments exceed the vendor's damages. The court may measure these damages by the property's fair rental value while the purchaser was in possession or by any drop in market value since the contract was executed.

3. Treat as a Mortgage
A few states, by statute or case law, now treat installment contracts like mortgages, at least for purposes of the vendor's remedies. In effect, the vendor must foreclose the contract by judicial sale in order to realize on the real estate, and she cannot simply reclaim the land.

4. Waiver
Many cases hold that where a vendor has established a pattern of accepting late payments from the purchaser, she cannot suddenly insist on strict on-time payment and declare a forfeiture if such payment is not forthcoming. Such a pattern is said to constitute a waiver of strict performance. To reinstate strict performance, the vendor must send the purchaser a notice of her intention to do so and must allow a reasonable time for the purchaser to make up any late payments and to get back "on stream."

5. Election of Remedies
It is commonly held that the vendor who elects to pursue a forfeiture cannot also bring an action for damages or for specific performance. The vendor must choose only one remedy and forgo all others.

VIII. RIGHTS INCIDENTAL TO OWNERSHIP OF LAND (NATURAL RIGHTS)

A. IN GENERAL

The owner of real property has the exclusive right to use and possess the surface, the airspace, and the soil of the property. This right is subject to restrictions in the chain of title (e.g., easements and covenants), to the law of nuisance, and to any valid laws or regulations that restrict the use of the land (e.g., zoning ordinances).

B. RIGHT TO LATERAL AND SUBJACENT SUPPORT OF LAND

1. Right to Lateral Support
Ownership of land carries with it the right to have the land supported in its ***natural state*** by adjoining land. This normally means a right to have one's land undisturbed by withdrawal of support (e.g., by excavations on adjoining land).

a. Support of Land in Natural State
A landowner is ***strictly liable*** if his excavation causes adjacent land to subside (i.e., slip or cave in). Thus, he will be liable even if he used the utmost care.

b. Support of Buildings on Land
If land is improved by buildings and an adjacent landowner's excavation causes subsidence, the adjacent landowner will be ***strictly liable*** for damages to the land and buildings caused by the excavation only if it is shown that the land would have collapsed in its natural state (i.e., that it would have collapsed in the absence of the buildings and improvements). Even if the land would not have collapsed in its natural state (i.e., the collapse would not have occurred except for the weight of the buildings), the excavating landowner is liable for loss or damage to the land and buildings if his excavation is found to have been done ***negligently***. (Tort rules apply here.)

2. Right to Subjacent Support
When a landowner conveys to a grantee the right to take minerals from beneath the land, the grantor retains the right to have the surface supported unless the conveyance expressly includes authority to destroy the surface if "reasonably necessary" to extract the mineral.

a. Support of Land and Buildings
This right of support extends not only to the land in its natural state but also to all buildings existing on the date when the subjacent estate is severed from the surface. However, the underground occupant is liable for damages to subsequently erected buildings only if he was ***negligent***.

b. Interference with Underground Waters
Note that an underground occupant is liable for negligently damaging springs and wells, whereas an adjoining landowner is not liable for interfering with underground percolating waters.

C. WATER RIGHTS

Different rules apply depending on whether the water rights claimed involve (i) water in watercourses (e.g., streams, rivers, and lakes, including underground watercourses); (ii) ground or percolating water (e.g., water normally pumped or drawn from wells); or (iii) surface water (e.g., rainfall, seepage). Exam questions normally concern who has priority to use the water from watercourses and from the ground, and to what extent a landowner may obstruct or divert the flow of surface water.

1. Watercourses
There are two major systems for allocation of water in watercourses: (i) the ***riparian doctrine*** (generally applied in the eastern states where water is or was relatively abundant), and (ii) the ***prior appropriation doctrine*** (generally used in the 17 western states where water is relatively scarce).

a. Riparian Doctrine
Under the riparian doctrine, water does not belong to the public generally or to the state (with certain exceptions) but rather to the "riparian" proprietors who own land bordering on the watercourse. All of these landowners have "riparian rights" and none can use the water so as to deprive the others of these rights.

1) What Land Is Riparian
Under the ***majority rule***, all tracts held under unity of ownership are riparian if the tracts are contiguous and ***any*** of them front on the water. Thus, if a riparian

owner purchases a parcel which is contiguous to the riparian parcel, riparian rights attach to the newly acquired parcel. The ***minority rule*** limits riparian rights to the smallest tract of land ever owned abutting the water. Under this view, if a back portion of a riparian tract is sold, it becomes nonriparian and can never regain riparian rights.

a) Riparian Owner
Riparian owners include the fee owner of the abutting land and, to the extent of their title, lessees and easement owners of such land.

b) Doctrine Applies Only to Riparian Parcel
The riparian doctrine permits use of water only in connection with activities carried out on the riparian parcel. Riparian rights cannot be conveyed for the use of nonriparian land nor can they be lost by nonuse.

2) Nature of Riparian Right

a) Natural Flow Theory
Under the "natural flow" theory, a riparian owner is entitled to the water in the bordering stream or lake subject to the limitation that ***he may not substantially or materially diminish its quantity, quality, or velocity***. Thus, a downstream owner can enjoin an upstream owner's use even though the downstream owner has plenty of water for his own use. No state appears to adhere strictly to this theory because it operates to limit beneficial upstream use and leads to "waste" of the resource.

b) Reasonable Use Theory
Under the more common theory, all riparian owners share the right of "reasonable use." The general idea is that the right of each riparian owner to use the stream (e.g., to divert for irrigation, to pollute, etc.) is subject to a like reasonable right in other riparian owners. ***Each riparian owner must submit to reasonable use*** by other riparian owners, and a downstream owner cannot enjoin such use by an upstream owner unless it substantially interferes with the needs of those who have a like right (i.e., unless actual damage is shown).

(1) Factors to Consider
In determining whether an owner's use of water is "reasonable," courts generally balance the utility of the use against the gravity of the harm. (Note the analogy to nuisance law.) Six factors are helpful in this balancing process: (i) the ***purpose*** of the questioned use; (ii) the ***destination*** to which the water is taken for use; (iii) the ***extent*** of the use; (iv) the ***pollution*** of water by use; (v) whether the use involves an ***alteration*** in the manner of flow; and (vi) ***miscellaneous*** types of conduct that may give rise to litigation. (These factors may be remembered more easily by using the acronym MAPPED.)

c) Natural vs. Artificial Use
Under either of the above theories, water use is categorized as "natural" or "artificial." Natural uses include those necessary for the daily sustenance of

human beings (e.g., household consumption, gardening, minimal number of livestock). All other uses, including irrigation and manufacturing, are artificial. ***Natural uses prevail over artificial.*** Upper riparians can take all that they need for natural uses. However, they cannot take for artificial purposes unless there is enough water for the domestic wants of all.

b. Prior Appropriation Doctrine

Under the prior appropriation doctrine, the water belongs initially to the state, but the right to divert and use it can be acquired by an individual whether or not he is a riparian owner. Initially, individual rights were established by actual use; thus, each appropriator acquired a vested property right "to divert a given quantity of water, at given times from a given place, to use at a given place for a given purpose."

1) Factors to Note for Bar Exam

Present day acquisition and governance of rights under this doctrine are largely dealt with under complex state-administered permit systems that are too detailed for coverage here. However, it is sufficient for bar examination purposes to note that: (i) appropriative rights were originally determined simply by priority of beneficial use; (ii) if there is a decrease in stream flow, priority is accorded in terms of time of appropriation (i.e., the junior appropriators in descending order of priority must suffer); (iii) in many states, an appropriative right can be severed from the land it serviced when acquired and transferred (i.e., can be sold to another for use on other land), provided no injury is caused to existing uses; and (iv) an appropriative right (unlike a riparian one) can be lost by abandonment (intent and nonuse).

c. Accretion and Avulsion

A watercourse may affect a property's boundary line through accretion or avulsion. (*See* VI.B.3.e.2), *supra*.)

2. Groundwater

If water comes from an underground watercourse (e.g., a defined stream or river), the riparian or prior appropriation doctrines apply. However, the presumption is that underground water is percolating (i.e., the water moves through the ground diffusely and is usually withdrawn by wells from the underground water table). There are four different rules for determining rights in underground water.

a. Absolute Ownership Doctrine

The absolute ownership doctrine is followed by only a few states. The owner of the land overlying the source basin may extract as much water as she wishes and use it for whatever purpose she desires (including export). There is no firmly established system for allocation among overlying owners.

b. Reasonable Use Doctrine

The reasonable use doctrine, followed by many eastern states, allows the surface owner to make "reasonable use" of the groundwater. This rule differs from the absolute ownership rule mainly with respect to exporting water off site: Exporting is allowed only to the extent that it does not harm other owners who have rights in the same aquifer. On

the other hand, virtually all beneficial uses of water ***on the land*** are considered reasonable and are allowed.

c. Correlative Rights Doctrine
In some states, the owners of overlying land own the underground water basin as joint tenants, and each is allowed a reasonable amount for her own use.

d. Appropriative Rights Doctrine
In many western states, the prior appropriation doctrine applies to groundwater as well as watercourses. Priority of use determines appropriative rights. In most western states, rights to percolating water are now determined by a state water board which controls annual yield, prohibits water waste, etc.

e. Restatement Approach
A few states follow the Restatement approach, which is based on principles of nuisance law. This approach allows the surface owner to pump groundwater for a beneficial purpose unless the withdrawal: (i) unreasonably causes harm to neighboring landowners through lowering of the water table; (ii) exceeds the pumper's reasonable share of the annual supply or total store of groundwater; or (iii) directly and substantially affects surface waters and unreasonably causes harm to a surface water user. [Restatement (Second) of Torts §858]

3. Surface Waters
Diffused surface waters are those that have no channel but pass over the surface of the land. The source may be rainfall, melting snow, seepage, etc. A landowner can use surface waters within her boundaries for any purpose she desires. Problems concern the right of a lower owner to restrict a flow that would naturally cross his land (e.g., by dikes) and the right of an upper owner to alter or divert a natural flow onto other lands (e.g., by drains, channels, or sloughs). The acting landowner's liability to other landowners depends upon which doctrine the state follows.

a. Natural Flow Theory
Under the natural flow theory, followed by many states, a landowner cannot refuse to take natural drainage, cannot divert surface water onto the land of another, and cannot alter the rate or manner of natural flow where such actions would injure others above or below him. Because this theory imposes substantial impediments on development (e.g., no paving, large roofs, culverts, etc.), most states have "softened" the rule to permit ***reasonable*** changes in natural flow. And a few states have held the doctrine inapplicable to urban property (because development would otherwise be hindered).

b. Common Enemy Theory
Under the common enemy theory, followed by many states, surface water is a common enemy and any owner can build dikes or change drainage to get rid of it. However, many courts have modified the doctrine and have held landowners to a standard of ordinary care to avoid unnecessary and negligent injury to the land of others.

c. Reasonable Use Theory
The growing trend is to apply the reasonable use doctrine which, as in nuisance and

watercourse cases, requires balancing the utility of the use against the gravity of the harm. Judicial mitigation of both the natural flow and common enemy doctrines often results in an approximation of the reasonable use theory.

d. Compare—Capture of Surface Water
A landowner can capture (e.g., by dam, rain barrels) as much surface water as he wishes. It can be diverted to any purpose on or off the land. Owners below have no cause of action unless the diversion is malicious.

D. RIGHTS IN AIRSPACE

The right to the airspace above a parcel is not exclusive, but the owner is entitled to freedom from excessive noise and transit by aircraft. If flights are so low as to be unreasonably disturbing, they constitute a trespass or (if the airport is government-owned) a taking by inverse condemnation.

E. RIGHT TO EXCLUDE—REMEDIES OF POSSESSOR

1. Trespass

If the land is invaded by a ***tangible*** physical object that interferes with the right of exclusive possession, there is a trespass.

2. Private Nuisance

If the land is invaded by ***intangibles*** (e.g., odors or noises) that substantially and unreasonably interfere with a private individual's use or enjoyment of her property, the possessor may bring an action for private nuisance.

a. Compare—Public Nuisance
Public nuisance is an invasion by intangibles that unreasonably interfere with the health, safety, or property rights of the ***public***—i.e., a broad segment of the community, rather than one or a few individuals.

3. Continuing Trespass

If the land is repeatedly invaded by a trespasser (e.g., the invader repeatedly swings a crane over the property), the possessor may sue for either trespass or nuisance.

4. Law or Equity

If the possessor wants to force the invader to stop the invasion of the property, the remedy is an injunction in equity. If the possessor wants damages, the remedy is an action at law.

a. Ejectment
The remedy at common law to remove a trespasser from the property is ejectment.

b. Unlawful Detainer
In the landlord-tenant situation, the landlord may force the tenant to vacate the premises by the statutory remedy of unlawful detainer. (In some states, the term used to describe this action is forcible detainer or summary ejectment.) The action may be joined with a demand for money damages in rent due.

IX. COOPERATIVES, CONDOMINIUMS, AND ZONING

A. COOPERATIVES

In the most common form of housing cooperative, title to the land and buildings is held by a corporation that leases the individual apartments to its shareholders. Thus, the residents in a cooperative are both tenants of the cooperative (by virtue of their occupancy leases) and owners of the cooperative (by virtue of their stock interests). Stock interests in the cooperative are not transferable apart from the occupancy lease to which they are attached.

1. Restriction on Transfer of Interests

Because the members of a cooperative are tenants, the cooperative may retain the same controls over assignment and sublease of the apartments as may be exercised by any other landlord.

2. Mortgages

Permanent financing is provided through a blanket mortgage on the entire property owned by the cooperative corporation (land and buildings). This mortgage has priority over the occupancy leases. Failure to meet the payments on the blanket mortgage may result in the termination of the leases through foreclosure of the mortgage. Thus, each cooperative tenant is vitally concerned that the other tenants pay their shares of the blanket mortgage.

3. Maintenance Expenses

Ordinarily, cooperative tenants are not personally liable on the note or bond of the blanket mortgage. However, under their occupancy leases, each tenant is liable for her proportionate share of all of the expenses of the cooperative (including payments on the mortgage as well as other operating expenses).

B. CONDOMINIUMS

In a condominium, each owner owns the interior of her individual unit plus an undivided interest in the exterior and common elements.

1. Restriction on Transfer of Interests

Because condominium unit ownership is treated as fee ownership, the ordinary rules against restraints on alienation apply. A few jurisdictions (e.g., New York) by statute allow reasonable restraints on transfer of condominium units.

2. Mortgages

Each unit owner finances the purchase of her unit by a separate mortgage on her unit. Consequently, unit owners need not be as concerned about defaults by others as they must be in a cooperative.

3. Maintenance Expenses

Each unit owner is personally liable on her own mortgage and each pays her own taxes (unlike the cooperative situation, but like any other homeowner). In addition, each unit owner is liable to contribute her proportionate share to the common expenses of maintaining the common elements, including insurance thereon.

C. ZONING

The state may enact statutes to reasonably control the use of land for the protection of the ***health,***

safety, morals, and welfare of its citizens. Zoning is the division of a jurisdiction into districts in which certain uses and developments are permitted or prohibited. The zoning power is based on the state's police power and is limited by the Due Process Clause of the Fourteenth Amendment. Other limitations are imposed by the Equal Protection Clause of the Fourteenth Amendment and the "no taking without just compensation" clause of the Fifth Amendment. (*See* Multistate Constitutional Law outline.) Cities and counties can exercise zoning power only if authorized to do so by state enabling acts. Ordinances that do not conform to such acts are "ultra vires" (beyond the authority of the local body) and void.

1. Nonconforming Use

A use that exists at the time of passage of a zoning act and that does not conform to the statute cannot be eliminated at once. Some statutes provide for ***amortization***—i.e., the gradual elimination of such nonconforming uses (e.g., the use must end in 10 years).

2. Special Use Permits

Some unusual uses (e.g., hospitals, funeral homes, etc.) require issuance of a special permit even though the zoning of the particular district (e.g., commercial) allows that type of use.

3. Variance

A variance from the literal restrictions of a zoning ordinance may be granted by administrative action. The property owner must show that the ordinance imposes a unique hardship on him and that the variance will not be contrary to the public welfare.

4. Unconstitutional Takings and Exactions

A zoning ordinance may so reduce the value of real property that it constitutes a taking under the Fifth and Fourteenth Amendments. If an ordinance constitutes a taking, the local government must pay damages to the landowner equal to the value reduction. If the ordinance regulates activity that would be considered a nuisance under common law principles, it will not be a taking even if it leaves the land with no economic value.

a. Denial of *All* Economic Value of Land—Taking

If a government regulation denies a landowner ***all*** economic use of his land, the regulation is equivalent to a physical appropriation and is thus a taking (unless the use was prohibited by nuisance or property law when the owner acquired the land). [Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)—state's zoning ordinance, adopted after owner purchased lots, was a taking because it prohibited owner from erecting any permanent structures on the lots]

b. Denial of *Nearly All* Economic Value—Balancing Test

If a regulation so decreases the value of the property that there is very little economic value, the court will balance the following factors to determine whether there has been a taking:

(i) The ***social goals*** sought to be promoted;

(ii) The ***diminution*** in value to the owner; and

(iii) Whether the regulation ***substantially interferes with distinct, investment-backed expectations*** of the owner.

Generally, the regulation will be found to be a taking only if it ***unjustly*** reduces the economic value of the property (e.g., greatly reduces the property value and only slightly promotes the public welfare). [Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987)]

c. Unconstitutional Exactions

Local governments often demand, in exchange for zoning approval for a new project, that the landowner give up some land for a public purpose, such as street widening. However, such demands are unconstitutional under the Fifth and Fourteenth Amendments unless they meet the tests set out below. [Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)]

1) Essential Nexus

The local government's demand must be ***rationally connected*** to some additional burden that the proposed project will place on public facilities or rights. Thus, a city could demand land for a street widening upon a showing that the proposed project would otherwise increase traffic congestion and pollution along the street in question.

2) Rough Proportionality

Even if the "essential nexus" test above is met, the local government must not demand too much. The required dedication must be ***reasonably related***, both in ***nature*** (the essential nexus) and extent (the amount of the exaction), to the impact of the proposed development.

3) Burden of Proof

The local government has the burden of showing that both the essential nexus and rough proportionality tests are met.

d. Remedy

If a property owner challenges a regulation and the court determines that there was a taking, the government will be required to either: (i) compensate the owner for the taking, or (ii) terminate the regulation and pay the owner for any damages that occurred while the regulation was in effect. [First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)]

CMR COMPARISON CHART

CONCURRENT OWNERSHIP

Type of Tenancy	Definition	Creation	Termination
Joint Tenancy	Each tenant has an undivided interest in the whole estate, and the surviving co-tenant has a right to the whole estate (***right of survivorship***).	"To A and B as joint tenants with the right of survivorship." (Without survivorship language, it may be construed as a tenancy in common.) Joint tenants must take: (i) identical interests; (ii) from the same instrument; (iii) at the same time; (iv) with an equal right to possess (the four unities).	The right of survivorship may be severed, and the estate converted to a tenancy in common, by: a conveyance by one joint tenant, agreement of joint tenants, murder of one co-tenant by another, or simultaneous deaths of co-tenants. A joint tenancy can be terminated by partition (voluntary or involuntary).
Tenancy by the Entirety	Husband and wife each has an undivided interest in the whole estate and a ***right of survivorship***.	"To H and W." Some states presume a tenancy by the entirety in any joint conveyance to husband and wife where the four unities (above) are present.	The right of survivorship may be severed by death, divorce, mutual agreement, or execution by a joint creditor. Tenancy by the entirety cannot be terminated by involuntary partition.
Tenancy in Common	Each tenant has a distinct, proportionate, undivided interest in the property. There is ***no right of survivorship***.	"To A and B" or, sometimes, "To A and B as joint tenants." Only unity required is possession.	May be terminated by partition.

CMR COMPARISON CHART

ASSIGNMENT VS. SUBLEASE

	Assignment by Landlord	Assignment by Tenant	Sublease by Tenant
Consent	Tenant's consent not required.	Landlord's consent may be required by lease.	Landlord's consent may be required by lease.
Privity of Estate	Assignee and tenant are in privity of estate.	Assignee and landlord are in privity of estate.	Sublessee and landlord are not in privity of estate. Original tenant remains in privity of estate with landlord.
Privity of Contract	Assignee and tenant are not in privity of contract. Original landlord and tenant remain in privity of contract.	Assignee and landlord are not in privity of contract. Original tenant and landlord remain in privity of contract.	Sublessee and landlord are not in privity of contract. Original tenant and landlord remain in privity of contract.
Liability for Covenants in Lease	Assignee liable to tenant on all covenants that run with the land.	Assignee liable to landlord on all covenants that run with the land.	Sublessee is not personally liable on any covenants in the original lease and cannot enforce the landlord's covenants.
	Original landlord remains liable on ***all*** covenants in the lease.	Original tenant remains liable for rent and ***all*** other covenants in the lease.	Original tenant remains liable for rent and ***all*** other covenants in the lease and can enforce the landlord's covenants.

CMR COMPARISON CHART

LEASEHOLD ESTATES

Type of Leasehold	Definition	Creation	Termination
Tenancy for Years	Tenancy that lasts for some fixed period of time.	"To T for 10 years."	Terminates at the end of the stated period without either party giving notice.
Periodic Tenancy	Tenancy for some fixed period that continues for succeeding periods until either party gives notice of termination.	"To T from month to month." ***or*** "To T, with rent payable on the first day of every month." ***or*** L elects to bind hold-over T for an additional term.	Terminates by notice from one party at least equal to the length of the time period (*e.g.,* one full month for a month-to-month tenancy). *Exception:* Only six months' notice is required to terminate a year-to-year tenancy.
Tenancy at Will	Tenancy of no stated duration that lasts as long as both parties desire.	"To T for and during the pleasure of L." (Even though the language gives only L the right to terminate, L or T may terminate at any time.) ***or*** "To T for as many years as T desires." (Only T may terminate.)	Usually terminates after one party displays an intention that the tenancy should come to an end. May also end by operation of law (*e.g.,* death of a party, attempt to transfer interest).
Tenancy at Sufferance	Tenant wrongfully holds over after termination of the tenancy.	T's lease expires, but T continues to occupy the premises.	Terminates when landlord evicts tenant or elects to hold tenant to another term.

CMR COMPARISON CHART

NONPOSSESSORY INTERESTS

	Easement	License	Profit	Real Covenant/ Equitable Servitude
Definition	A grant of an interest in land that allows someone to use another's land	Permission to go onto another's land	Right to take resources from another's land	Promise to do or not to do something on the land
Example	Owner of parcel A grants owner of parcel B the right to drive across parcel A	O allows the electrician to come onto O's land to fix an outlet	O allows A to come onto O's land to cut and remove timber	O conveys an adjoining parcel to A. A promises not to build a swimming pool on the property
Writing	Generally required. *Exceptions:* • Less than one year • Implication • Necessity • Prescription	Not required. *Note:* An invalid oral easement is a license	Required	Required. *Exception:* Equitable servitude may be implied from common scheme of development of residential subdivision
Termination	• Stated conditions • Release • Merger • Abandonment • Estoppel • Prescription • End of necessity	Usually revocable at will. May be irrevocable if coupled with an interest or if licensor estopped by licensee's expenditures	Same as easement	• Release • Merger • Condemnation • Also equitable defenses may apply to enforcement of servitude

REAL PROPERTY MULTIPLE CHOICE QUESTIONS

INTRODUCTORY NOTE

You can use the sample multiple-choice questions below to review the law and practice your understanding of important concepts that you will likely see on your law school exam. To do more questions, access StudySmart Law School software from the BARBRI website.

Question 1

A landowner conveyed his farm "to my daughter for life, and on her death to her children in equal shares." At the time of the conveyance the daughter had one child, the landowner's grandson. A few years later, the grandson struck a pedestrian with his vehicle. The pedestrian obtained a judgment against the grandson for damages. The jurisdiction has no applicable statute on the matter.

Is the grandson's interest in the farm subject to sale to satisfy the pedestrian's judgment?

(A) Yes, because the grandson's after-acquired title inures to the benefit of the pedestrian.

(B) Yes, because the grandson's interest is subject to involuntary transfer.

(C) No, because the daughter may have more children.

(D) No, because contingent remainders are not transferable inter vivos.

Question 2

An owner devised his property by will to a friend "so long as one or more dogs are kept on the property; if dogs are no longer kept on the property, then to the American Society for the Prevention of Cruelty to Animals (ASPCA)." The will also provided that the residuary estate would go to the owner's niece.

In a jurisdiction that has not modified the common law Rule Against Perpetuities, what are the respective interests in the property on the owner's death?

(A) The friend has a fee simple subject to a condition subsequent and the niece has a right of entry.

(B) The friend has a fee simple determinable and the niece has a possibility of reverter.

(C) The friend has a fee simple determinable and the ASPCA has a remainder.

(D) The friend has a fee simple determinable subject to an executory interest and the ASPCA has a shifting executory interest.

Question 3

A tenant had been leasing an apartment from a landlord for more than 10 years. There was no written lease; however, the parties had agreed orally, at the beginning of the rental, what the rent would be per month. The tenant left a check for each month's rent in the landlord's mailbox on the first day of that month, without fail. On September 10, the landlord handed the tenant a handwritten note stating that the lease was to be terminated effective that October 1. On October 1, the tenant placed a check for the rent in the landlord's mailbox, and the landlord brought an action for unlawful detainer against the tenant.

Who is likely to prevail?

(A) The tenant, because in the absence of a statute, six months' notice of termination is required.

(B) The tenant, because a full month's notice is required.

(C) The landlord, because there is no written lease, and therefore this is a tenancy at will and only reasonable notice is required.

(D) The landlord, because this is a tenancy at sufferance, and therefore no notice is required to end the tenancy.

Question 4

A landowner owned two adjoining parcels of land containing a number of lakes. She conveyed the eastern parcel, which contained a campground, to a fisherman. The deed transferring the parcel granted to the fisherman "and to invited guests of the campground all hunting and fishing rights and use of the lakes on the western parcel for the benefit of the campground." Subsequently, the fisherman assigned his hunting and fishing rights to a hunter. When the landowner discovered the hunter hunting and fishing on her land, she brought an appropriate action to declare his rights void.

If the court rules for the landowner, it will be because the fisherman's right to hunt and fish on the western parcel is:

(A) A profit appurtenant.

(B) A profit in gross.

(C) An easement in gross.

(D) A license.

Question 5

A developer owned several acres zoned for mixed use development. The developer prepared a subdivision of his various parcels, filed a subdivision map showing residential lots, obtained all the necessary approvals, and began selling the lots. Each of the deeds conveying lots sold by the developer contained the following:

It is hereby covenanted by the seller that the property conveyed shall be used for residential purposes only, that no industrial, commercial, or manufacturing operations shall be maintained thereon, and that this covenant shall bind the buyer, his heirs and assigns, and their successors.

Two years later, after all but two of the lots had been developed as residences, the developer sold his remaining two lots to a real estate speculation firm. The deed to the firm did not contain any language restricting the use of the property. The firm then sold the property to a supermarket chain, which intended to construct a supermarket thereon. A homeowner who had purchased a lot from the developer located next to the proposed supermarket brings suit against the supermarket chain seeking to enjoin construction. Her attorney argues that the lots sold by the developer to the firm and then to the supermarket chain are bound by the same restrictions on use that are contained in the deed by which the homeowner took her property.

Is the homeowner likely to win?

(A) Yes, because the developer established a common development scheme for his entire subdivision and the subdivision appeared to conform to the scheme.

(B) No, because the firm and the supermarket were not aware of the restrictions when they purchased the property.

(C) No, because the restrictions in the homeowner's deed bind only the purchaser of the land.

(D) No, because the deed by which the firm took the property from the developer did not contain any restrictions on use.

Question 6

A seller entered into an enforceable written agreement to sell her house to a buyer for $425,000. The agreement provided that closing would take place on September 18, and on that date the seller would provide marketable title, free and clear of all encumbrances. The agreement was silent as to risk of loss if the house was damaged prior to closing and as to any duty to carry insurance. On August 31, the seller cancelled her homeowners' insurance when she moved out of the house. Consequently, when the house was destroyed by wildfires on September 15, it was uninsured. The buyer refused to close on September 18 and the seller immediately brought an action against him for specific performance. The buyer countersued for the cancellation of the contract and return of his earnest money. Both parties stipulate that the value of the property without the house is $225,000.

In this jurisdiction, which has no applicable statute, is the seller likely to prevail?

(A) Yes, but the price will be abated to $225,000.

(B) Yes, for the full contract price.

(C) No, because the seller had a duty to carry insurance until the closing date.

(D) No, because the seller could not convey marketable title.

Question 7

An owner purchased a parcel of property adjoining a five-foot-wide strip, which was a private right-of-way. Unsure where the exact boundaries of her property were located, the owner planted a garden on the five-foot right-of-way strip and enclosed it with a wire fence two weeks after taking up occupancy. The owner maintained the fence and garden for 20 years, at which time she removed the fence and smoothed out the ground where the garden had been located. Five years later, the owner entered into a written contract to sell the property to a buyer. The description in the contract included the five-foot strip. After research in the county recorder's office, the buyer discovered that the strip was a private right-of-way when the owner purchased the property. After properly notifying the owner of the problem prior to closing, the buyer refused to tender the purchase money to the owner when the closing day arrived. The owner sued the buyer for specific performance of the real estate sales contract. The jurisdiction's statutory adverse possession period is 15 years.

Who will prevail?

(A) The buyer, because the owner failed to provide a marketable title.

(B) The buyer, because the owner surrendered her adverse possession rights when she removed the fence, as her possession was no longer open, notorious, and continuous.

(C) The buyer, because one may not adversely possess a right-of-way.

(D) The owner, because she held the right-of-way for a longer time than the minimum required by the state adverse possession statute.

Question 8

An elderly aunt devised her land to a charity "because my nephew has been stealing from me." When the nephew, who had been caring for the aunt, discovered the will, he threatened to withdraw his care unless she conveyed the land to him. The nephew obtained a blank deed and filled in the description of the land and the parties' names. Under "consideration" he wrote, "past and future care." The aunt signed the deed and the nephew recorded it. Subsequently, the nephew sold the land for market value to a buyer who was unaware of the nephew's threat to the aunt. The buyer recorded her deed. Last month, the aunt died.

If the charity brings suit to impose a constructive trust on the land, will it prevail?

(A) Yes, because "past and future care" is not adequate consideration.

(B) Yes, because the deed to the nephew was void.

(C) No, because the land has been adeemed.

(D) No, because the buyer is a bona fide purchaser.

Question 9

An uncle validly executed and notarized a deed conveying his beach house to his nephew, and then validly recorded the deed. When the nephew, who was experiencing financial difficulties, learned of the recordation of the deed, he immediately told his uncle that he did not want the beach house and could not accept such an expensive gift anyway. Later, the nephew filed for bankruptcy and the trustee in bankruptcy asserted an ownership interest in the beach house on behalf of the debtor's estate. The bankruptcy court ruled that the property belonged to the uncle and not to the nephew, and thus was not part of the debtor's estate subject to distribution.

Which of the following is the strongest reason in support of the bankruptcy court's ruling?

(A) There was no presumption of delivery created by recordation of the deed because the nephew did not know of the recordation.

(B) The nephew's statements to the uncle were a constructive reconveyance of the property.

(C) There was never an effective acceptance of delivery of the deed by the nephew.

(D) The recordation of the deed was invalid because it was done without the nephew's permission.

Question 10

A buyer entered into a contract with a seller to purchase the seller's farm. The contract of sale referred to the farm as containing 250 acres. The agreed-on price was $1 million. Before the date on which escrow was to close, the buyer learned from a surveyor he had hired that the farm actually contained 248 acres. On the date the sale was to close, the buyer instructed the escrow agent to release all but $8,000 of the purchase money because he was not getting what he bargained for. The seller refused to proceed with the sale. The buyer brings an action for specific performance and also seeks an $8,000 reduction of the agreed-upon contract price.

What will be the probable outcome of the litigation?

(A) The seller will win, because the buyer refused to tender the contract price when the seller tendered substantially what the contract called for her to perform.

(B) The seller will win, because both parties had seen the farm before the contract was formed.

(C) The buyer will win, because he is not receiving what he bargained for under the contract.

(D) The buyer will win, if the court finds that the $8,000 reduction in price is a fair reflection of the title defect.

Question 11

A retiree contracted to purchase her hometown diner, which was struggling. She borrowed the $80,000 purchase price from a local bank, granting the bank a mortgage on the diner. Due to a clerical error, the bank's mortgage was not recorded. Business remained very slow after the purchase, so the retiree decided to give the diner a makeover. To finance the renovations, she applied for a $20,000 loan from a credit union, offering to secure this debt with a mortgage on the diner as well. To encourage this opportunity, the bank executed an agreement to subordinate its interest to the credit union's mortgage. The credit union then loaned the retiree the $20,000 but never recorded its mortgage. Several months later, the bank discovered its clerical error and properly recorded its mortgage on the diner. Unfortunately, the diner's final renovations were garish and brought in few customers. The retiree now has defaulted on both mortgages. A statute in the jurisdiction provides: "No unrecorded conveyance or mortgage of real property shall be good against subsequent purchasers for value without notice, whose conveyance is first recorded."

Whose mortgage has priority?

(A) The credit union's, because the bank's mortgage was unrecorded when the credit union's mortgage was executed.

(B) The credit union's, because the bank agreed to subordinate its interest.

(C) The bank's, because the credit union never recorded its interest.

(D) The bank's, because a purchase money mortgage is senior to all competing liens.

Question 12

A buyer purchased a parcel of property from a seller for $100,000, financing the purchase with a loan from the seller secured by a mortgage on the property. The seller promptly and properly recorded his mortgage. Shortly thereafter, the buyer obtained a loan from a credit union for remodeling secured by a mortgage on the property. The credit union promptly and properly recorded its mortgage. One year later, the buyer obtained a home equity loan from a bank secured by a mortgage on the property. The bank promptly and properly recorded its mortgage. A few months later, the buyer stopped making payments on the debt owed to the credit union. With proper notice to all parties, the credit union brought an action to foreclose on its mortgage. At that time, the buyer owed $20,000 on the seller's mortgage, $25,000 on the credit union's mortgage, and $30,000 on the bank's mortgage. At the foreclosure sale, the property was sold for $45,000. The jurisdiction in which the property is located permits deficiency judgments.

After the $25,000 debt owed to the credit union is satisfied from the proceeds, which of the following statements is most correct?

(A) The seller's mortgage and the bank's mortgage are both reduced by $10,000 and remain on the property.

(B) The seller's mortgage is satisfied in full and extinguished, while the bank's mortgage remains on the property.

(C) The seller's mortgage remains on the property, while the bank's mortgage is reduced by $20,000 and extinguished, leaving the buyer personally liable to the bank for the deficiency of $10,000.

(D) The seller's mortgage is satisfied in full and extinguished, and the bank's mortgage is also extinguished, leaving the buyer personally liable to the bank for the deficiency of $30,000.

ANSWERS TO MULTIPLE CHOICE QUESTIONS

Answer to Question 1

(B) The grandson's interest in the farm is subject to involuntary transfer to satisfy the pedestrian's judgment. If a future interest can be transferred voluntarily by its owner, it is also subject to involuntary transfer; i.e., it can be reached by the owner's creditors by appropriate process. At common law and in all jurisdictions today, all types of vested remainders are fully transferable during life. Here, the grandson has a vested remainder subject to open in the land. Because the grandson could assign this interest, his creditors may also reach it. (A) is incorrect because the doctrine of estoppel by deed is inapplicable here. Under the doctrine, the subsequent acquisition of title by a debtor who had no interest in the land automatically inures to the benefit of a creditor if the creditor properly recorded her judgment. Here, however, the grandson has an interest in the farm—a vested remainder subject to open. Although his possession is postponed until the daughter's death, his interest is a ***present*** interest, reachable by creditors. (C) is incorrect because the fact that the daughter may have more children, who would partially divest the grandson's interest, does not affect the ability of the grandson's creditors to reach his interest in the farm. (D) is incorrect because, although contingent remainders are not transferable inter vivos at common law and thus not subject to involuntary transfer, the grandson's interest in the farm, as discussed above, is vested rather than contingent.

Answer to Question 2

(B) The friend will have a fee simple determinable and the niece will have a possibility of reverter on the owner's death. A fee simple determinable is an estate that automatically terminates on the happening of a stated event and goes back to the grantor. The interest that is left in a grantor who conveys a fee simple determinable is a possibility of reverter, which arises automatically in the grantor and can be devised by will in almost all jurisdictions. Here, the friend has a fee simple that is subject to automatic termination if dogs are no longer kept on the property. As discussed below, the ASPCA's interest is stricken because it violates the Rule Against Perpetuities. This leaves a possibility of reverter in the niece as the owner's residuary devisee. (A) is incorrect because the friend's interest is a fee simple determinable (because it has "so long as" as part of the conveyance) that terminates automatically when the event occurs. In contrast, a fee simple subject to a condition subsequent is created when the grantor retains the power to terminate the estate (the right of entry) on the happening of a stated event, but the estate continues until the grantor exercises the power. (C) is incorrect because the ASPCA's interest, if it were valid, would be an executory interest rather than a remainder. A remainder is a future interest that is capable of taking possession on the natural termination of the preceding estates created in the same disposition. Under modern law, this means that a remainder must always follow a life estate. If the present interest is a defeasible fee that has potentially infinite duration but can be cut short by the happening of a stated event, as in this question, the future interest created in a third party must be an executory interest. (D) is incorrect because the ASPCA's interest is void under the Rule Against Perpetuities and is stricken; the charity-to-charity exception to the Rule does not apply. The Rule Against Perpetuities provides that no interest in property is valid unless it must vest, if at all, not later than 21 years after one or more lives in being at the creation of the interest. It applies to executory interests created in third persons but not to reversionary interests of the grantor. Like any other gift, a gift for charitable purposes is void for remoteness if it is contingent on the happening of an event that may not occur within the perpetuities period. The only exception is when there is a gift to one charity followed by a gift over to another charity upon a possibly remote event (the charity-to-charity exception). Here, the first gift is to an individual and the gift

over (a shifting executory interest) is to a charity; because the triggering event that will transfer the property (no dogs kept on the property) ***may*** occur more than 21 years after lives in being at the creation of the interest, the interest is stricken under the Rule Against Perpetuities.

Answer to Question 3

(B) The tenant will prevail because a full month's notice is required. In this case, there was no written lease outlining the terms of the tenancy, but only an oral agreement regarding the payment of monthly rent. That led to the creation of a periodic—here, a monthly—tenancy. The termination date of a periodic tenancy is uncertain, until notice of termination is given. For a tenancy that is less than a year in duration, such as this, notice must be given a full period in advance of the termination. Although the landlord gave notice, because the lease was monthly, the landlord was required to provide a full month's notice of termination. (A) is incorrect because six months' notice would be required for a tenancy from year to year, but this tenancy was a month-to-month tenancy. (C) is incorrect. A tenancy at will arises from an agreement between the parties that either party may terminate the tenancy at any time. However, in the absence of a specific agreement to create a tenancy at will, regular rent payments will lead to the tenancy being treated as a periodic tenancy. (D) is incorrect. Tenancies at sufferance arise from a tenant wrongfully holding over after the termination of a tenancy. It is true that no notice is necessary in order to terminate such a tenancy. Nothing in the facts presented, however, allows the conclusion that the tenant was wrongfully holding over when the landlord gave notice.

Answer to Question 4

(A) (A) If the court rules for the landowner, it will be because the fisherman's right to hunt and fish on the western parcel is a profit appurtenant. A profit is a nonpossessory interest in land that entitles the holder of the profit to enter on the servient tenement and take the soil or a substance of the soil (*e.g.*, minerals, timber, oil, or game). Like an easement, a profit may be appurtenant or in gross. If the profit exists to serve a dominant estate, the profit is appurtenant and can only be transferred along with the dominant estate. Conversely, if the profit does not exist to serve a dominant estate, it is a profit in gross and may be transferred separate and apart from the dominant estate. Here, the fisherman has a profit with respect to the game on the western parcel. Because the profit is "for the benefit of the campground" on the eastern parcel, it is appurtenant rather than in gross because it serves the dominant estate (the eastern parcel). Thus, the fisherman's assignment of the profit to the hunter is void. (B) is incorrect because it supports the ***hunter's*** rather than the landowner's claim. As discussed above, if the profit were in gross, it could have been transferred to the hunter. (C) is incorrect because the fisherman has a profit rather than an easement. Like a profit, an easement is a nonpossessory interest in land. However, the holder of an easement only has the right to ***use*** the servient land and not to remove the soil or products of the soil therefrom (including game). (D) is incorrect because, as explained above, the fisherman's interest ***is*** alienable, whereas a license is personal to the licensee and therefore not alienable. The problem here is that the fisherman did not transfer the dominant parcel with the profit, and thus the attempted transfer of the profit appurtenant alone is void.

Answer to Question 5

(A) The homeowner will win because the developer established a common development scheme for the entire subdivision and the subdivision appeared to conform to the scheme. An injunction against breaching a covenant may be obtained by enforcing the covenant as an equitable servitude. An equitable servitude can be created by a writing complying with the Statute of Frauds

concerning a promise that touches and concerns the land and indicates that the servitude exists, as long as notice is given to the future owners of the burdened land. Here, there was a promise that touched and concerned the land and indicated that a servitude existed (the deed restrictions), but the promise was not contained in the supermarket's deed. Nevertheless, the court will imply the covenant here. A court will imply a covenant—known as a reciprocal negative servitude—where evidence shows that the developer had a scheme for development when sales began and the grantee in question had notice of the plan. The covenant protects the parties who purchased in reliance on the scheme. Evidence of the scheme can be obtained from the general pattern of other restrictions, and notice can be from actual notice, record notice, or inquiry notice. Here, the supermarket had inquiry notice of the restriction regarding commercial use because of the uniform residential character of the other lots in the development. Thus, the covenant will be implied and (A) is correct. (B) is incorrect because actual awareness of the restriction on the part of the firm and the supermarket is not essential; they have inquiry notice (which is a type of constructive notice). On the other hand, mere notice of the restriction would not be enough if the other elements for an implied negative servitude (common scheme when sales began) are not present. (C) and (D) are incorrect because an implied negative servitude would bind subsequent purchasers whether or not the restriction appeared in their deeds, and despite the fact that the restrictive language in the homeowner's deed purported to bind only the buyer and her successors. Based on the developer's representations, the homeowner was entitled to rely on the fact that similar restrictions would be imposed on all other purchasers of the lots.

Answer to Question 6

(B) The seller will most likely prevail for the full contract price. Although jurisdictions differ as to which party has the risk of loss, the majority rule is that where property subject to an enforceable contract for sale is destroyed without the fault of either party before the date set for closing, the risk of loss is on the buyer. Thus, the buyer must pay the contract price despite a loss due to fire, unless the contract provides otherwise. Here, the house was destroyed by fire after the seller and buyer entered into their contract for the sale of the house, but before the closing date. The contract was silent regarding the risk of loss. Thus, under the majority rule, the risk of loss is on the buyer. As a result, the seller is entitled to receive specific performance of the contract, meaning that the buyer must pay the full contract price. (A) is incorrect because it allows the buyer to tender less than the full contract price. With the buyer bearing the risk of loss, he must pay the $425,000 contract price despite the decrease in the property's value due to the fire. (C) and (D) are incorrect because they conclude that the seller is not entitled to specific performance. As explained above, the seller is entitled to specific performance because the risk of loss is on the buyer. (C) is also incorrect because, absent a provision to the contrary, neither the seller nor the buyer has a duty to carry insurance on the property. However, both the seller and the buyer have insurable interests once the contract is signed (i.e., either or both ***could*** obtain insurance). (D) is also incorrect because "marketable" title does not refer to whether the seller would be able to sell a destroyed house. It refers to a deed free of any possible dispute as to who is the owner of the property.

Answer to Question 7

(A) Absent a judgment in an action to quiet title or other tangible proof that title to the five-foot strip has actually been acquired, most jurisdictions would not consider the owner's title marketable. All contracts for the sale of land contain, unless the contract expressly provides otherwise, an implied covenant by the seller that she will deliver to the buyer a marketable title at the date of closing. Marketability refers to freedom from the possibility of litigation concerning the title; title is marketable if a reasonably prudent buyer, ready and able to purchase, will accept it in the exercise

of ordinary prudence. At times, sellers will rely on adverse possession to show that defects in title have been cleared. However, courts generally will not permit such reliance when proof of adverse possession rests only on oral evidence that will not be available to the buyer in the future. Here, title to the property described in the contract is unmarketable because the five-foot strip was a private right-of-way and not part of the owner's record title. The owner's adverse possession of the strip will not be sufficient by itself to establish marketable title; there is no longer any physical evidence of the owner's possession. Thus, at the least the owner must offer the buyer additional proof that the buyer can use to defend any lawsuit challenging title. (B) is wrong because the owner removed the fence after she had acquired title by adverse possession. While that makes it more difficult for her to establish marketable title in selling the property, it does not affect the ownership rights she gained by adverse possession. (C) is a misstatement of law. Although government property, including public rights-of-way, is generally exempt from the operation of statutes of limitations, the facts of this question specifically state that this is a private right-of-way. (D) is wrong because, as discussed above, the fact that the owner has title to the strip does not mean that she has marketable title.

Answer to Question 8

(D) The charity will not prevail in a suit to impose a constructive trust on the land because the buyer is a bona fide purchaser. A deed is voidable if it is executed by a minor or incapacitated person or is obtained through fraud in the inducement, duress, undue influence, mistake, or breach of fiduciary duty. Undue influence exists where (i) influence is exerted on the grantor, (ii) the effect of the influence is to overpower the mind and free will of the grantor, and (iii) the product of the influence is a deed that would not have been executed but for the influence. A voidable deed will be set aside only if the property has not passed to a bona fide purchaser (i.e., a purchaser who pays valuable consideration and takes without notice). Here, although the nephew's acts may not have risen to the level of duress, they likely constitute undue influence. His threat of cessation of care caused the aunt to convey the land to him, when her desire was to devise the land to a charity. Thus, the deed is voidable. However, because the buyer paid market value for the land without notice of the circumstances surrounding the aunt-nephew deed, the deed will not be set aside. (A) is incorrect because consideration is not required in order to make a deed valid. (B) is incorrect because the deed was voidable rather than void. Deeds considered void include those that are forged, were never delivered, or were obtained by fraud in the factum; none of those apply here. (C) is incorrect because, although specifically devised property that is no longer in the testator's estate at her death is adeemed, the charity would have prevailed in its suit to impose a constructive trust on the land if it had not been conveyed to a bona fide purchaser. A constructive trust is an equitable remedy imposed by a court to prevent an unjust enrichment of one person at the expense of another as the result of wrongful conduct, such as fraud, undue influence, or breach of fiduciary duty. Here, the nephew would have been unjustly enriched if he were allowed to retain title to land he acquired through undue influence. However, this remedy was "cut off" by the nephew's conveyance to the buyer, a bona fide purchaser.

Answer to Question 9

(C) The nephew's express rejection of the deed was sufficient to rebut any presumption of acceptance. As a general rule, delivery of the deed is the final operative act to complete a conveyance of title to the grantee, because courts will infer the grantee's acceptance if the conveyance is beneficial to him. However, all courts will consider evidence that is contrary to the presumption or inference. Hence, the nephew's express rejection of the gift is sufficient to establish that no conveyance of the property took place. (A) is an incorrect statement of law. If the grantor intends the

recording of the deed to be the final act in vesting title in the grantee, then such recording creates a presumption of delivery even where the grantee did not know of the recordation. (B) is wrong because there is no such thing as a constructive reconveyance. Had the nephew accepted the gift (completing the conveyance) and later changed his mind, the nephew would have had to execute a new deed to convey the property back to the uncle. (D) is wrong because knowledge or permission of the grantee has no effect on the validity of the recordation; rather, it determines whether there has been an effective acceptance.

Answer to Question 10

(D) This answer states the traditional rule where the amount of land in a land sale contract is less than as agreed. When a buyer has a remedy of specific performance in a land sale contract, a court of equity will order a seller to convey the title if the buyer tenders the purchase price. If the seller cannot provide marketable title under the terms of the contract, but the buyer wishes to proceed with the transaction, the buyer can usually get specific performance with an abatement of the purchase price in an amount reflecting the title defect. A defect as to the quantity of land conveyed is usually corrected by a pro rata abatement of the price. (D) states the factors that a court of equity will look for when deciding whether to grant specific performance with abatement. (A) is incorrect because the parties' contract did not merely refer to the farm as a named parcel of land; it recited that it contained 250 acres. Based on this recital, a court could readily conclude that the difference of two acres is a material change in the terms of the contract and that the seller's tender of 248 acres was not substantial performance. (B) is incorrect because viewing the property did not put the buyer on notice as to the discrepancy; the buyer is not required to visually calculate the amount of acreage a parcel of land contains. (C) is not as good an answer as (D) even though it is probably a true statement. Not only must the defect as to quantity be material, so that the buyer is not receiving what he bargained for, but the abatement amount must be appropriate and not an excessive reduction of the purchase price, as choice (D) states.

Answer to Question 11

(B) The credit union's mortgage has priority because the bank agreed to subordinate its interest. Priority among mortgages on the same real estate is normally determined by chronology. However, this may be modified by the operation of a recording act, special rules governing purchase money mortgages, or the execution of a subordination agreement. A first mortgagee may enter into an agreement with a junior mortgagee to subordinate its priority to the junior mortgagee, and such agreements generally are enforced if they are specific. (C) is incorrect because a subordination agreement will determine priority despite the existence of a recording act. This jurisdiction has a race-notice statute, under which a subsequent bona fide purchaser (i.e., a person, including a mortgagee, who gives valuable consideration and has no notice of the prior instrument) prevails over a prior grantee only if he records before the prior grantee records. Here, only the bank recorded its interest. Thus, the bank would prevail under the recording act if there were no subordination agreement. (A) would state the priority rule for a notice jurisdiction, in which a subsequent bona fide purchaser prevails over a prior grantee regardless of whether the subsequent purchaser records. However, a valid subordination agreement would govern in a notice jurisdiction as well. Furthermore, the credit union had notice of the bank's mortgage here because the bank entered into a subordination agreement with the credit union. (D) is incorrect. A purchase money mortgage, given when the mortgagor buys the property, has priority over non-purchase money mortgages that arise prior to the mortgagor's acquisition of title. However, priority can be defeated by subsequent mortgages or liens through operation of the recording acts, and it can be relinquished through a subordination agreement.

Answer to Question 12

(C) The seller's mortgage remains on the property and the bank's mortgage is extinguished, and the buyer is personally liable to the bank for the deficiency. As a general rule, the priority of a mortgage is determined by the time it was placed on the property. When a mortgage is foreclosed, the purchaser at the sale will take title as it existed when the mortgage was placed on the property. Thus, foreclosure will terminate interests junior to the mortgage being foreclosed but will not affect senior interests. The proceeds of the foreclosure sale are used first (after expenses and fees) to pay the principal and accrued interest on the loan that was foreclosed, and then to pay off any junior interests in the order of priority. Where the proceeds of the sale are insufficient to satisfy a mortgage debt, the mortgagee can bring a personal action against the mortgagor/debtor for the deficiency. Here, foreclosure by the credit union leaves the seller's senior purchase money mortgage interest intact on the property; the purchaser at the foreclosure sale takes the property subject to that mortgage. On the other hand, the bank's mortgage interest, because it was junior to the credit union's interest, was extinguished by the credit union's foreclosure action. After the credit union's loan is paid off, the $20,000 that remains is used to reduce the amount of the debt owed to the bank. The bank can recover the balance against the buyer personally in a deficiency action. (A) is wrong because the seller's mortgage and the bank's mortgage are treated differently because of their priority in relation to the credit union's mortgage. (B) states the opposite of the actual result—the seller's mortgage (the senior interest) remains on the property and the bank's mortgage (the junior interest) is extinguished. (D) is wrong because, as discussed above, the seller's mortgage remains on the land; thus, all of the remaining proceeds from the foreclosure sale after the credit union's mortgage debt is satisfied go towards reducing the debt owed to the bank.

APPROACH TO EXAMS

REAL PROPERTY

IN A NUTSHELL: The law of real property centers on a person's interest in land, which may be as great as full ownership or as small as a right to enter. It governs how the land and those interests are acquired and granted; bought and sold; rented and leased; and used as security for debts. Interests in land arise through express creation (e.g., by a deed, will, or mortgage) and operation of law (e.g., through adverse possession). Realty may be owned by one individual or several, and an interest may become possessory at once or in the future. However, when multiple parties claim conflicting interests in land, recording statutes dictate who will prevail. Real property law also governs items so affixed to land that they are considered realty (i.e., fixtures) and sets forth rights and responsibilities regarding the use of water.

I. WHAT INTEREST IS INVOLVED?

A. Freeholds—Present Possessory Interests

1. Indefeasible interests—not subject to early termination
   a. Fee simple absolute ("to A and his heirs" or "to A")
   b. Life estate ("to A for life" or "to A for the life B")
2. Defeasible interests—allows a fee simple or life estate to be terminated if a stated event occurs
   a. Determinable ("for so long as," "until," "while," "during")—automatically reverts to the grantor
   b. Subject to condition subsequent ("but if," "upon condition that," "provided that")—subject to the grantor's right of entry, which must be exercised
   c. Subject to an executory interest ("to A for so long as . . . , and if not . . . , to B," "to A, but if . . . , to B")—divests in favor of a third party

B. Freeholds—Future Possessory Interests

1. Interests retained by the grantor
   a. Reversion—grantor transfers a shorter estate than she owns (grantor with a fee simple transfers a life estate)
   b. Possibility of reverter—grantor transfers a determinable estate
   c. Right of entry (power of termination)—reserved on the grant of an estate subject to a condition subsequent
2. Interests created in a transferee (*Note:* Rule Against Perpetuities may apply)
   a. Executory interests—cut short the prior estate
   b. Remainders—possessory only on the natural termination of the prior estate (e.g., death of the life tenant)
      1) Remainders are vested if made in an ascertained person and with no conditions precedent; otherwise are contingent
   c. Class gifts—remainders in a class are contingent if no member of the class yet exists, vested if all possible members exist, and vested subject to open if more members might come to exist
      1) Under the rule of convenience, an open class closes when any member can demand possession
3. Rule Against Perpetuities

a. Any future interest that is not certain to vest or fail within a life in being plus 21 years is void
b. Applies to contingent remainders, executory interests, class gifts (even if vested remainders), options and rights of first refusal, and powers of appointment
c. Does not apply to vested interests, grantors' reversionary interests, or gifts between charities
d. Only the interest that violates the Rule is stricken (severed from the disposition)
e. Cases that always violate the common law Rule:
    1) Executory interest following a defeasible fee—executory interest is stricken
    2) Gift to an open class conditioned on members surviving to an age beyond 21—entire class gift is stricken ("bad as to one, bad as to all")
    3) Remainder to A's children living at his widow's death ("unborn widow" problem)—contingent remainder is stricken
    4) Gift conditioned on an administrative contingency is stricken
    5) Options that might be exercised (not created) later than the Rule's period are stricken
f. At common law, a woman is conclusively presumed capable of bearing children (the "fertile octogenarian")
g. Departures from common law Rule:
    1) "Wait and see" statutes—validity of interest determined by actual future events
    2) Uniform Statutory Rule Against Perpetuities—90-year vesting period, "wait and see" approach
    3) Cy pres approach—invalid interests reformed to match grantor's intent

C. Leasehold Interests (Landlord and Tenant)

1. Types of tenancies
    a. Tenancy for years—for a fixed period of time (e.g., 10 days, 10 years)
        1) Created expressly, ends automatically on its termination date (no notice)
    b. Periodic tenancy—for a fixed period that continues for succeeding periods (e.g., month to month)
        1) Created expressly or when a lease draws periodic rent payments, terminated on proper notice (appropriate time period)
    c. Tenancy at will—no stated duration, as long as parties desire
        1) Created expressly, terminated on proper notice
    d. Tenancy at sufferance (hold-over doctrine)—tenant remains in possession after tenancy expires
        1) Landlord may evict tenant or create a periodic tenancy by accepting rent
2. Rights and duties of landlord and tenant
    a. Governed largely by the lease and tort law
    b. Tenant must pay rent and may not commit waste
    c. Landlord generally must repair, must deliver habitable premises, and may not interfere with tenant's possession
3. Both parties generally may assign their interests (transferring the entire term), and tenants may also sublease (retaining part of the term)

D. Nonpossessory Interests

1. Easements
    a. Affirmative easement—right to use someone else's land

b. Negative easement—right to prevent something on another's land
2. Easement appurtenant—involves two tracts of land
    1) Dominant parcel has the benefit, which runs to grantees
    2) Servient parcel has the burden, which runs to grantees with notice
    a. Easement in gross—involves one tract of land
    b. Creation of easements
        1) Express grant or reservation (Statute of Frauds applies)
            a) An oral grant creates a license, which is not an interest in land
        2) Implication—by operation of law
            a) By use existing before a tract was divided
            b) By necessity for a landlocked parcel
        3) Prescription—acquired through adverse, open and notorious, and continuous use for the statutory period
    c. Termination of easements—can end by stated condition, unity of ownership between easement and servient estate, abandonment, estoppel, prescription, necessity, release, or condemnation
3. Profits
    a. Right to enter another's land to remove products of the soil
4. Real covenants (run with the land at law)
    a. Written promises to do or refrain from doing something on land, with a usual remedy of money damages
    b. Requirements for burden to run to later grantees: intent, notice, horizontal privity, vertical privity, touch and concern
    c. Requirements for benefit to run: intent, vertical privity, touch and concern
5. Equitable servitudes
    a. Covenants with equitable remedies (i.e., injunction, specific performance)
    b. Implied from a common scheme for development if notice exists
    c. Requirements for burden to run: intent, notice, touch and concern
    d. Requirements for benefit to run: intent, touch and concern
    e. Equitable defenses apply (i.e., unclean hands, estoppel, acquiescence, changed neighborhood conditions)

II. HOW IS THE INTEREST BEING ACQUIRED?

A. Conveyancing (Statute of Frauds Applies—Requires Writing Signed by Grantor)

1. Land sale contracts
    a. Statute of Frauds exception—no writing is required if buyer has partially performed through possession, improvement, or payment
    b. Time for performance presumed not of the essence
    c. Marketable title—contracts contain an implied covenant that seller will deliver title free from an unreasonable risk of litigation at closing (i.e., when purchase price and deed exchanged)
2. Deeds
    a. Must evidence an intent to transfer land and adequately describe the land and parties
    b. Effective on delivery (i.e., words or conduct showing the grantor's intent to immediately pass title) and acceptance (often presumed)
    c. Types of deeds

1) General warranty deed—covenants against any title defects created by the grantor or prior titleholders
2) Special warranty deed—covenants against title defects created by the grantor
3) Quitclaim deed—no covenants; transfers whatever interest grantor has

3. Wills
   a. Effective on the testator's death
   b. If, at the testator's death, she no longer owns property that was specifically devised, that gift fails (i.e., is adeemed)
   c. If, at the testator's death, the beneficiary has already died, his gift fails (i.e., lapses) or might pass to the beneficiary's descendants under an anti-lapse statute if he and the testator were related

B. Adverse Possession

1. Possessor must show: (i) actual entry giving rise to exclusive possession that is (ii) open and notorious, (iii) adverse/hostile (i.e., lacking the owner's permission), and (iv) continuous throughout the statutory period for an ejectment action (e.g., 20 years)
2. The statute does not begin to run if the owner is under a disability to sue (e.g., incapacity) when the possession begins

III. WHO WILL HOLD THE INTEREST?

A. Concurrent Interests

1. All co-tenants share the right to possession and enjoyment of the property
2. Joint tenants—two or more co-tenants with ***rights of survivorship*** (i.e., the dead co-tenant's share passes to the remaining co-tenants)
   a. Created expressly, severed by a tenant's sale or suit for partition
3. Tenants by the entirety—two ***spouses*** with rights of survivorship
   a. Created expressly or presumed in some states by a grant to spouses, severed by divorce
4. Tenants in common—two or more co-tenants, no right of survivorship
   a. Created by the severance of the above tenancies
   b. Default co-tenancy created if nothing else was specified

B. Competing Interests—Grantor Transfers Same Land More than Once

1. Recording acts protect a bona fide purchaser for value without actual, inquiry, or record notice of the prior conveyance ("BFP")
   a. Actual notice—what the grantee actually knows
   b. Inquiry notice—what a reasonable inquiry would have revealed
   c. Record notice—what a search of the real property records would have revealed
2. Types of recording acts
   a. Notice statutes—later BFP wins if earlier grant was not recorded
   b. Race-notice statutes—later BFP wins only if she records before the earlier grantee records
   c. Race statutes—first to record wins; actual notice is irrelevant

IV. IS THE LAND SUBJECT TO A SECURITY INTEREST?

A. Mortgages (Land Is Collateral for a Debt)

1. Theories of title

a. Lien theory—mortgagee holds a security interest only
b. Title theory—mortgagee holds title until mortgage is satisfied
c. Intermediate theory—mortgagee holds title only after default

2. If mortgagor transfers mortgaged land
   a. Grantee may agree to assume the mortgage and become primarily liable to pay the mortgage loan
   b. Grantee who does not assume the mortgage is not personally liable for the loan but may lose the land if the transferor defaults
3. Foreclosure—after default, property may be sold to satisfy the debt
   a. Does not affect senior interests
   b. Terminates junior interests
      1) Junior interests are entitled to any surplus remaining after the foreclosing mortgage is satisfied
   c. The mortgagor may redeem the land by paying the amount due
4. If there is a deficiency—mortgagee can sue mortgagor if foreclosure sale proceeds do not satisfy mortgage debt

B. Other Security Interests

1. Deed of trust—similar to a mortgage, but a third-party trustee forecloses
2. Installment land contract—seller retains the deed until buyer pays in full
3. Absolute deed—treated as an equitable mortgage when given for a debt
4. Sale-leaseback—court may determine this was a disguised mortgage

V. DOES THE LAND HAVE SPECIAL CHARACTERISTICS?

A. Fixtures

1. Fixtures are items so affixed to land that they become part of the realty
   a. Constructive annexation—items not physically attached to land are fixtures if they are so uniquely adapted to the real estate that it makes no sense to separate them (e.g. keys to doors)
2. Common ownership cases—landowner brings chattel onto land
   a. Annexor's objective intent determines whether items are fixtures
3. Divided ownership cases—landowner does not bring chattel onto land
   a. Item's owner can remove it only if this would not leave unrepaired damage to the premises

B. Water

1. Rules vary by state and by source of water
   a. Watercourses—rivers, streams, lakes
   b. Groundwater—percolating water from wells
   c. Surface waters—rainfall, melting snow, seepage

C. Zoning

1. Governmental regulations that restrict the use of land
   a. Existing zoning violations render title to land unmarketable
2. Variance—permission to depart from zoning restriction

ESSAY EXAM QUESTIONS

INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 60 minutes. You should spend 15 to 20 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. ***If*** you organize your thoughts well, 40 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue-spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the "CIRAC" method:

C — State your ***conclusion*** first. (In other words, you must think through your answer ***before*** you start writing.)
I — State the ***issue*** involved.
R — Give the ***rule(s)*** of law involved.
A — ***Apply*** the rule(s) of law to the facts.
C — Finally, restate your ***conclusion***.

After completing (or outlining) your own analysis of each question, compare it with the BARBRI model answer provided herein. A passing answer does ***not*** have to match the model one, but it should cover most of the issues presented and the law discussed and should ***apply the law to the facts*** of the question. Use of the CIRAC method results in the best answer you can write.

EXAM QUESTION NO. 1

Sixteen years ago, Olivia, owner of Blackacre, an 80-acre parcel, executed and delivered a deed transferring two acres of Blackacre to X County. The relevant language of this deed stated:

> Olivia hereby grants two acres of Blackacre [adequately described] to X County to be used as the site of a highway weighing station. This deed is on the condition that if said use does not commence within six months from this date, or, having commenced, ceases, the conveyance is to be null and void.

Five years ago, Olivia executed a deed to Blackacre and delivered it to David. This deed described Blackacre as it had been described in the deed by which Olivia had acquired Blackacre. It made no mention of the deed to X County. The following year, Olivia died intestate survived by Henry, her sole heir.

The two-acre parcel conveyed to X County was improved as a highway weighing station site within 60 days from the date of the Olivia-X County deed. It was continually used as such until last year, when X County removed the weighing equipment and sold its interest in the land to Paul. David learned of the county's action before Paul took possession. David removed the fences that had separated the two-acre parcel from David's land and fenced around the outside boundaries of Blackacre, including the two-acre parcel with his land.

Who is entitled to the two-acre parcel and why?

EXAM QUESTION NO. 2

Landlord rented an apartment in his building to Tenant for one year beginning June 1. On June 1, Tenant was unable to move in because the apartment was still occupied by Betty, whose lease had expired on May 31. Betty eventually moved out on June 30, and Tenant moved in on July 1.

During July, a hailstorm caused two broken windowpanes in Tenant's apartment. Tenant demanded that Landlord replace the windowpanes. Landlord replied that Tenant had to do it. Rain coming in through the broken panes caused considerable damage to the wallpaper and floors.

The apartment directly above Tenant's was occupied by Charlie, a member of the famous rock group, "The Charles River." The daily rehearsals of his group interfered with Tenant's law studies and sleep so much that she complained repeatedly to Landlord. On July 15, three of Charlie's friends were arrested in his apartment and charged with possession of narcotics. On August 31, Tenant moved out without ever having paid any rent to Landlord.

What are Landlord's rights, if any, against Tenant? His liabilities? Discuss.

EXAM QUESTION NO. 3

Adams owned Lot 1 on Azure Lake and lived in a house located on the west half. Baker owned Lot 2 behind Adams's lot, and his one-story house overlooked the east half of Lot 1.

Adams and Baker entered into a written agreement under which Baker paid Adams $2,000, and Adams covenanted not to build a house or other structure on the east half of Lot 1. The agreement recited that "Baker has derived much pleasure from the view over Adams's land" and that the parties "intend to assure an unobstructed view from Baker's house." The agreement was never recorded.

Five years later, fire swept through Lot 2 and burned down Baker's house.

Two years after the fire, Adams sold her house and lot to Down. Before committing himself to the purchase, Down had a conversation with Baker in which Baker told Down that Adams's lot is subject to a building restriction on the east side. Down asked Adams about the restriction, and Adams said, "Don't worry about it. It won't be binding on you."

Four years later, Baker sold his lot to Park, telling her of the restriction on Lot 1 and handing her the original agreement signed by Adams and Baker.

While Park was out of the state, Down started building a two-story residence on the east half of his lot. Upon her return, Park consulted you.

Advise Park as to her rights and remedies.

EXAM QUESTION NO. 4

Ollie owned Goldacre, an oil-rich ranch in the state of Lotus. Five years ago in January, Ollie summoned his foreman, Art, handed Art a deed transferring Goldacre to Art, and said, "I want you to have Goldacre if I die before you."

In July that same year, Ollie's accountant, Christy, reported that Art had been embezzling. Ollie immediately discharged Art and, while Christy looked on, called in his bookkeeper, Bill, showed Bill a deed to Goldacre and said: "I am now giving Goldacre to you. You have the combination to my safe. When I die, get this deed out of my safe and record it."

A month later, Ollie discharged Bill for incompetence. Before leaving, Bill removed his deed to Goldacre from the safe and took it with him.

The following January, Ollie told Christy he had revoked his deeds to Art and Bill and that he wanted to retire. On January 15, Ollie conveyed Goldacre to Christy for a valuable consideration. Christy recorded the deed immediately.

Ollie died on February 22 of this year. Art recorded his deed on February 23. Bill recorded his deed on February 24. At Ollie's funeral, on February 25, Bill and Art informed Christy of their respective recordations.

Christy mortgaged Goldacre on May 4 to Elk Mortgage Co., which recorded the same day. Lotus has a recording act of the race-notice type.

Elk Mortgage Co. has brought an action in declaratory relief to determine the rights of Art, Bill, Christy, and Elk Mortgage Co. in the property. What are their rights? Discuss.

EXAM QUESTION NO. 5

Buyer and Seller entered into a written contract by which Seller agreed to sell, and Buyer agreed to buy, a parcel of land improved with a dwelling for a stipulated price, 10% of which was paid on signing the agreement. The agreement stipulated that Seller would convey by quitclaim deed. Buyer intended to raze the house and build a public garage on the land, but this may not have been known to Seller and was not mentioned in the written contract.

In the process of examining title, Buyer learned that the area was restricted to residential uses both by a municipal zoning ordinance and by covenants in the chain of title. Buyer also learned that, until three weeks before the signing of the agreement, the land had been in possession of Possessor, who had held possession for at least five years and had made some improvements. Possessor had originally taken possession under a contract with Seller to purchase the land for a price to be paid in monthly installments over a period of 10 years. Title was to be conveyed when the final payment was made. The contract with Possessor was not recorded, but Seller has offered to certify a copy of the contract, which provided that Seller was entitled to take possession after any default in any installment of the purchase price continuing for more than 60 days, to terminate the rights of Possessor, and to retain all payments received in compensation for the use and occupancy of the land. Seller has also shown Buyer a letter that he received two days previously from Possessor in which Possessor admitted that he was in arrears on his payments for six months and that he would not make any further payments for another six months.

Would Buyer be entitled to terminate her contract with Seller, secure the return of the earnest money, and recover the reasonable value of her title examination? Discuss.

ANSWERS TO ESSAY EXAM QUESTIONS

ANSWER TO EXAM QUESTION NO. 1

David, Henry, and Paul each have plausible claims, which will be explored separately. At issue is whether Olivia retained an interest in the two-acre parcel and, if so, whether she effectively conveyed that interest to David.

David's Claim: Olivia conveyed to X County either a fee simple determinable or a fee simple subject to a condition subsequent. The conveyance is ambiguous because it uses both the phrase "on the condition that" (indicating a condition subsequent) and the phrase "conveyance is to be null and void" (indicating the automatic termination characteristic of a fee simple determinable). In cases of ambiguity, courts will usually hold the interest to be a fee simple subject to a condition subsequent because it does not involve an automatic forfeiture and also permits greater judicial control of the result. However, a court might not do so here because no right of entry was expressly reserved to the grantor by the terms of the grant. Generally, a right of entry must be raised expressly. There is a strong constructional preference against finding a fee simple subject to a condition subsequent and a right of entry if the right of entry is not explicitly provided for.

The conditions in the conveyance were (i) that the site be used for a weighing station within six months of the conveyance (which was fulfilled), and (ii) that the land continue to be so used (which was not fulfilled). The interest retained by Olivia was either a right of entry (if the conveyance is construed to create a fee simple subject to a condition subsequent) or a possibility of reverter (if it is construed as a fee simple determinable). In either case, Olivia's retained interest was not subject to the Rule Against Perpetuities because future interests retained by the grantor are considered to be vested and thus exempt from the Rule.

When Olivia later conveyed Blackacre to David, she evidently intended to convey her reversionary interest in the two-acre parcel to David. Under the majority rules in force today, the possibility of reverter is transferable inter vivos, but the right of entry is not. Thus, David received Olivia's future interest only if (i) Olivia's transfer to X County is held to be a fee simple determinable, or (ii) in the event the court holds it to be a fee simple subject to a condition subsequent, the jurisdiction follows the modern, but still minority, rule that rights of entry are transferable inter vivos.

If David's interest is characterized as a possibility of reverter, title reverted immediately to David when X County violated the condition of continued use. Alternatively, if David took a right of entry (as he could in only a minority of jurisdictions), he properly exercised that right by removing the fences around the two-acre parcel.

David has no "recording act" argument because the county's possession of the two acres was sufficiently obvious to put him on notice of its interest. And David has no claim to the two acres through adverse possession, even though he held color of title to the parcel for more than five years, because he did not actually occupy any part of the two acres.

Henry's Claim: Henry has two arguments. First, he would claim that David's deed did not include Olivia's reversionary interest in the two-acre parcel and that the interest descended to Henry as Olivia's sole heir when Olivia died intestate. Henry would argue that Olivia did not show an intent to convey the reversionary interest merely by repeating the old description, and that David did not expect to receive an interest in view of the obvious presence of the weighing station at the time of the conveyance.

Henry's best argument, however, is that Olivia's conveyance to X County created a fee simple subject to a condition subsequent (because of the "on condition that" language) and that, under the majority rule, the right of entry retained by Olivia could not be transferred inter vivos to David. As a result, the interest still arguably belonged to Olivia at her death and then passed by descent to Henry.

Paul's Claim: Paul also has two possible arguments. His first would be that Olivia's conveyance to X County created neither a fee simple determinable nor a fee simple subject to a condition subsequent, but rather a fee simple absolute with an affirmative covenant to use the two acres for a weighing station. As a consequence, he would argue that X County's transfer to Paul would not result in forfeiture of the land, but only in an action for damages against Paul for breach of covenant. While courts will, in cases of substantial ambiguity, find a covenant rather than a forfeitable interest, Paul will probably lose on this argument because the "condition" and "null and void" language indicates that forfeiture was clearly intended.

Alternatively, Paul would argue that Olivia's conveyance created a fee simple subject to condition subsequent, but failed to reserve a right of entry, resulting in a fee simple absolute in X County and, consequently, a valid fee simple absolute in Paul. If, however, the court chooses to imply a right of entry, Paul could then argue that the court should apply the common law rule, now in force in a small number of states, that any attempt to transfer a right of entry inter vivos destroys the interest. As a result, X County's interest would be enlarged to a fee simple absolute because of the removal of the condition subsequent, and Paul would now be the owner of a fee simple absolute.

Conclusions

David is entitled to the parcel if rights of entry and/or possibilities of reverter are transferable ***inter vivos*** in the jurisdiction.

Henry wins if Olivia's deed to David is construed not to transfer the reversionary interest (which is a doubtful interpretation), or if the retained interest was a right of entry which, although descendible, is not transferable inter vivos in a majority of states.

Paul wins if the condition in Olivia's conveyance to X County is held to be a covenant (unlikely) or if the retained interest was a right of entry and the common law rule barring transfer destroyed it (not likely), thereby enlarging X County's fee.

ANSWER TO EXAM QUESTION NO. 2

Landlord's rights and liabilities with respect to Tenant can be analyzed in terms of three relevant periods:

June 1 (When Tenant's Term Began) to July 1 (When Tenant's Occupancy Began)

Landlord has no right to receive rent from Tenant for this month. At issue is whether a tenant's duty to pay rent is suspended by the landlord's failure to deliver actual possession of the premises to the tenant at the beginning of the leasehold term. Under the majority rule, Landlord must deliver actual possession of the premises to Tenant. Because Landlord failed to remove the hold-over tenant to make room for Tenant, Landlord is subject to liability for any damages Tenant may have suffered. Tenant may have waived her right to damages by failing to request reimbursement for any expenses incurred during the month; but, because she did not pay rent to Landlord for June, she has not waived her defense to Landlord's action for rent for this month.

July 1 (When Tenant Went into Possession) to August 31 (When Tenant Moved Out)

Hailstorm: Landlord's rights and liabilities as to the broken windowpane and subsequent damages will be governed by the lease and/or statute. At issue is who has the duty to make ordinary repairs to the leased premises. If common law governs, Tenant's failure to repair the windows constitutes permissive waste, making her liable to Landlord for the value of the windows and any consequential damages. If, however, Tenant's duty has been shifted to Landlord by the lease or by a "repair and deduct" statute, Landlord will be liable to Tenant for the damages flowing from the broken windowpanes. Tenant has

met the requirement of giving Landlord timely notice of damage. Unless the lease provides otherwise, Landlord's only liability to Tenant will be for damages, and Tenant will not be excused from paying rent because the covenant to repair is independent of the covenant to pay rent.

Tenant will fail in an argument that the broken window constitutes constructive eviction, because Landlord was not responsible for the damage. Tenant will also fail in an argument that the covenant of habitability has been breached, because the broken window did not represent a substantial threat to her health or safety.

Rehearsals: Landlord will not be liable to Tenant for Charlie's rehearsals, and Tenant will have no defense to an action for rent during this period. At issue is whether a landlord breaches the implied covenant of quiet enjoyment or warranty of habitability by permitting another tenant to conduct daily rehearsals in his apartment.

(1) **Constructive Eviction:** If the landlord does an act or fails to provide some service that he has a legal duty to provide, and thereby makes the premises uninhabitable, the tenant may terminate the lease and seek damages if she gives the landlord notice and a reasonable time to repair and then vacates within a reasonable time. While the rehearsals probably constituted a substantial interference with Tenant's use and enjoyment of her apartment, they were not caused by Landlord. Although a small handful of courts have taken the position that, by ***permitting*** one tenant to interfere with another's enjoyment, the landlord is himself responsible for that interference, this is not the majority rule. And, even if the requirement of landlord conduct were met, Tenant did not vacate the premises quickly enough to take advantage of the constructive eviction defense.

(2) **Warranty of Habitability:** If the premises become unsuitable for human residence, the tenant may: (i) move out and terminate the lease, (ii) make repairs and offset the cost against future rent, (iii) abate rent, or (iv) seek damages. The rehearsals probably did not represent a sufficient threat to Tenant's health for a breach of this warranty to be found. If, however, a court finds that loss of sleep constitutes a sufficient injury to health, Tenant may collect damages from Landlord, or possibly have a defense to an action for nonpayment of rent.

Narcotics Arrests: Landlord will not be liable to Tenant for Charlie's friends' possession of narcotics on the premises. At issue is whether a landlord has a duty to prevent unlawful conduct on the premises. As with the rehearsals, Tenant will encounter difficulties in pursuing constructive eviction and warranty of habitability claims. She might, in arguing constructive eviction, claim that the unlawful conduct in Charlie's apartment gave Landlord the right to terminate Charlie's lease and thus causally connected Landlord to the narcotics arrests. The two problems with this argument are that a landlord cannot terminate a lease when the unlawful conduct is only occasional, as it was here, and the conduct was not that of his tenant, Charlie, but rather of Charlie's friends.

August 31 (When Tenant Moved Out) to May 31 (When Tenant's Lease Expires)

Landlord has a right to recover rent from Tenant. At issue are a landlord's rights and liabilities when a tenant abandons the premises. Because no defenses are available to Tenant, Landlord can recover rent for two months, July 1 to August 31. For the remainder of the lease term, Landlord can:

(1) Relet the premises on Tenant's account, holding Tenant liable for any difference between the rental payment under her lease and the rental paid by the new tenant; or

(2) If the jurisdiction follows the traditional rule, let the premises remain vacant, recovering rent from Tenant as it becomes due.

ANSWER TO EXAM QUESTION NO. 3

Park will probably be held to have the right to an unimpaired view over the east half of Lot 1. At issue is whether the benefit of the agreement runs to Park as successor to the original promisee, and

whether the burden runs against Down as a successor to the promisor. The requirements for benefit and burden to run will be met for purposes of enforcing the agreement as an equitable servitude but not as a negative covenant.

Intent that Lot 2 Enjoy the Benefit of an Unimpaired View: The Adams-Baker agreement raises a threshold issue of who is to enjoy the benefit of the view. The recital's statement that "Baker has derived much pleasure from the view" might suggest that the benefit was to be held by Baker personally, in which case Park would not succeed to it and would be unable to enforce it. Similarly, the recital's statement that the parties intended "to assure an unobstructed view from Baker's house" might suggest an intent that the benefit attach to the house rather than to the land, with the consequence that, because the house has been destroyed, the benefit cannot be enforced by Park.

However, the general constructional preference is for ***appurtenant*** benefits, rather than benefits in gross. Because either of the above two interpretations would create a benefit in gross, they will give way to the third possible interpretation, under which the benefit would be appurtenant: that Adams and Baker intended that the benefit attach neither to Baker nor to his house, but to Lot 2. Under this interpretation, the successor in interest to Lot 2 (Park) is in a position to enforce the benefit.

The Adams-Baker Agreement Is Enforceable as an Equitable Servitude: In order for the benefit and burden of an equitable servitude to run, the covenant must ***touch and concern*** the land. This requirement is met because the agreement increases the value and enjoyment of Lot 2. The one other requirement for the benefit to run—that Adams and Baker ***intended*** that Baker's successor enjoy the benefit in connection with Lot 2—is met on the basis of the assumption made above, that the parties intended that the benefit attach to Lot 2.

The two other requirements for the burden to run have also been met. ***Intent*** is met—even though the traditional formula, "heirs, successors, and assigns," is missing—because successors to Adams would have to be bound if the purpose of the agreement, assuring an "unobstructed view," is to be met. Further, Baker's subsequent statement to Down about the building restriction provides some evidence of an original intent to bind Adams's successors. The ***notice*** requirement is met by Baker's statement to Down, putting Down at least on inquiry notice, and possibly on actual notice, of the existence of the restriction.

Three possible ***equitable defenses*** may be asserted by Down—abandonment, acquiescence, and estoppel—all premised on Park's absence from the state at the time Down started building the two-story residence. However, because Park was unaware of Down's investment of labor, none of these defenses is likely to be upheld.

The Adams-Baker Agreement Is Not Enforceable as a Negative Covenant: All requirements are met for the benefit of a negative covenant to run: ***intent*** (as in the equitable servitude); ***vertical privity*** (because Park holds the complete interest in land held by Baker at the time the covenant was made); and ***touch and concern*** (because the covenant increases the value and enjoyment of Lot 2). However, the ***burden*** of the covenant ***does not run*** against Down. Although ***intent***, ***notice*** (as in the equitable servitude), ***vertical privity***, and ***touch and concern*** are all met, the ***horizontal privity*** requirement is not met. At the time Adams and Baker entered into the agreement, no independent interest in the land passed between them—e.g., there was no grantor-grantee or landlord-tenant relationship.

This Agreement Would Not Be Enforced as a Negative Easement: Under the analysis already pursued, the easement would be appurtenant and, because the ***intent*** and ***notice*** requirements are met, Park would be entitled to enforce the easement against Down. However, a court is not likely to characterize this as a negative easement. First, promissory language was used in the agreement ("Adams covenanted")—suggesting a covenant rather than an easement, which would have been created by grant or reservation. Second, while negative easements historically were limited to only four types of

arrangements (for light, air, subjacent or lateral support, or flow of an artificial stream), none of which is exactly like the one in dispute, today a negative easement is simply a restrictive covenant.

Thus, Park can probably obtain an injunction against Down on an equitable servitude theory. She is less likely to recover damages, on either a negative covenant or negative easement theory, because there appear to be no provable damages as of yet and, more important, the burden of the negative covenant will be held not to run against Down, and the arrangement will not be construed as creating a negative easement.

ANSWER TO EXAM QUESTION NO. 4

Bill owns Goldacre subject to Elk Mortgage Co.'s ("Elk's") mortgage. At issue are (i) whether Ollie ***delivered*** the deed to Art and/or Bill, and (ii) the effect of the ***recording act***.

Delivery: A deed is not effective unless it has been delivered. Delivery is satisfied by words or conduct evidencing the grantor's intention that the deed have some present operative effect; *i.e.*, that title pass immediately and irrevocably, although the right to possession may be postponed until some future time. Ollie did not deliver the deed to Art and, as a result, Art has no interest in Goldacre. While Ollie's physical transfer of the deed to Art creates a presumption of delivery, the presumption is rebutted by Ollie's statement at the time. Although the statement, being parol, is not admissible to prove that the delivery was conditional, it is admissible to show that no delivery (i.e., no present effect) was intended. Ollie's transfer to Art may also be ineffective because it is an invalid testamentary transfer, possessing none of the formalities required for a testamentary instrument under the Statute of Wills.

Ollie did deliver the deed to Bill, giving Bill a valid interest in Goldacre. There is, to be sure, a presumption against delivery arising from the fact that Ollie retained the deed in his possession. However, this presumption is rebutted by two facts. First, Ollie's statement, "I am now giving Goldacre to you," clearly reflects an intent to transfer an interest at once (and, because it bears on intent, the statement is provable by parol). Second, while Ollie retained possession of the deed, it was kept in a place to which Bill had ready access; as a result, the presumption arising from lack of physical transfer is not particularly strong.

Bill was privileged to remove the deed from the safe, for the language restricting him was merely precatory. Even if the statement is viewed as a condition, it is of no effect because conditions cannot be proved by parol. Thus, Ollie could not revoke his transfer to Bill.

Recording Act: Because Art has no interest as a result of the ineffective transfer to him, the conflict here is between Bill, Christy, and Elk.

As between Bill and Christy, Bill will prevail under the recording act. Under a race-notice statute, a subsequent bona fide purchaser (i.e., a person who gives valuable consideration and has no notice of the prior instrument) prevails over a prior grantee only if she records first. Although Christy was a purchaser for value (having paid consideration) and recorded before Bill, she was not a ***bona fide*** purchaser because, at the time she purchased, she had actual notice of Bill's interest. Christy obtained this actual notice by being present when Ollie conveyed Goldacre to Bill. She might try to argue that the deed to Bill was invalid because it was not supported by consideration. This argument would fail because a deed does not require consideration and because, under a race-notice statute, it is only the ***subsequent*** purchaser's status as a purchaser for value that matters.

As between Bill and Elk, Elk will prevail under the recording act. Presumably Elk gave value for its mortgage interest (although the facts do not state this); if no value was given, Elk will lose to Bill. Also, although Elk took its interest after Bill recorded, it will not lose out to Bill under a race-notice

statute, because Bill's recorded instrument appeared outside the chain of title and thus would not have shown up in the course of a reasonable title search by Elk. Thus, under the majority "chain-of-title" doctrine, Elk would prevail over Bill.

Thus, Elk has first rights to Goldacre, Bill is second in priority, Christy is third, and Art has no interest at all.

ANSWER TO EXAM QUESTION NO. 5

Buyer would be entitled to terminate her contract with Possessor and secure the return of the earnest money and expenses of the title examination. At issue are (i) whether Seller's title is ***unmarketable***, and (ii) whether the contract can be rescinded based on ***mutual mistake***.

Marketability of Title: There is generally implied in all land sale contracts a covenant that the seller will deliver marketable title at closing. Although in some states this condition is not implied where the conveyance is to be by quitclaim deed, the majority rule is to the contrary.

Zoning regulations such as the one involved here do ***not*** affect marketability unless a violation of the zoning ordinance exists at the time the land sale contract is first entered into. No such violation is indicated by the facts.

Enforceable restrictive covenants affect marketability. Restrictive covenants, such as the one in this case, limiting use of the land to residential purposes, if enforceable, constitute encumbrances that render title unmarketable.

The ***installment land contract*** does seriously impair marketability. Although the contract was not recorded, Buyer had actual notice of it and so would take subject to any rights possessed by Possessor.

In many states, Seller could not enforce a forfeiture pursuant to his contract with Possessor, and would have to "foreclose" Possessor's equitable interest by a quiet title action and by paying restitution. Moreover, because Possessor has apparently paid more than 50% of the purchase price and has erected improvements on the property, ***most*** courts today would permit foreclosure of Possessor's equitable interest only by judicial decree and would condition relief upon restitution by Seller of the payments received in excess of the reasonable value of Possessor's use of the land and the cost of resale. Therefore, until Seller obtained such a decree, Possessor's outstanding equitable interest would make Seller's title unmarketable.

Marketable title will also be impaired by the ***possibility*** of litigation, even in those states in which Seller could enforce the forfeiture without the necessity of judicial action. Such a possibility exists here. Possessor's letter would be good, but not conclusive, evidence upon which Buyer could rely in any future litigation. Further, the possibility of litigation exists with respect to other defenses that may be available to Possessor.

Buyer's Intended Use: The facts are ambiguous as to whether Seller was aware of Buyer's purposes in purchasing the land. If Seller was or should have been aware of Buyer's plan to erect a public garage, Buyer would for this reason be entitled to equitable relief—rescission and restitution. On the other hand, if Seller was not aware of Buyer's plans in purchasing the land, Buyer's unilateral mistake by itself would not be a sufficient basis for such relief.

Remedies: If Seller's title is not marketable, or if Seller was aware of Buyer's purpose for purchasing the land, Buyer can get restitution of her earnest money and out-of-pocket costs.