

## REAL PROPERTY (33 QS)

### I. Estates in Land

#### A. Present Estates

- *Devisable*: pass by will
- *Descendible*: pass by the statutes of intestacy (without a will)
- *Alienable*: transferable inter vivos (during holders lifetime)
- *Defeasible*: capable of being annulled or avoided

<i>Estate</i>	<i>Language to create</i>	<i>Duration</i>	<i>Transferability</i>	<i>Future Interest (Grantor)</i>	<i>Future Interest (3<sup>rd</sup> Party)</i>
<i>Fee Simple Absolute</i>	“to A” OR “to A & his heirs”	Infinite	DDA (Devisable, Descendible and Alienable)	NONE	NONE
<i>Fee Tail</i>	“to A and the heirs of his body”	Lasts as long as lineal blood descendants	Automatically to lineal descendants	<i>Reversion</i>	<i>Remainder</i>
<i>Fee Simple Determinable</i>	“to A so long as” / “to A during” “to A while” / “to A until”	As long as condition met	DDA but subject to the condition	Possibility of <i>Reverter</i>	-
<i>Fee Simple Subject to Condition Subsequent</i>	“to A, but if X event happens, grantor reserves that right to re-enter and retake”	Until happening of X event & reentry by grantor	Same as above	Right of <i>Entry</i>	-
<i>Fee Simple Subject to Executory Limitation</i>	“to A, but if X event occurs, then to B”	As long as condition met	Same as above	-	<i>Executory Interest</i>
<i>Life Estate (may be defeasible)</i>	“to A, for life” OR, “to A for the life of B”	Until the end of the measuring life	DDA If measuring life still alive	<i>Reversion</i>	NONE
	“to A for life, then to B”			-	<i>Remainder</i>
	“to A for life, but if X event happens, to B”	Until the end of the measuring life OR until happening of named event		<i>Reversion</i>	<i>Executory Interest</i>

1. **Fee Simple Absolute**
  - a. A living person has NO heirs (only prospective heirs).
2. **Fee Tail**
  - a. Past – pass directly to lineal blood descendants
  - b. Today – would create *fee simple absolute* (because abolished in US & NY)
3. **Defeasible Fees**
  - a. Fee simple estates (i.e., of uncertain or potentially infinite duration) that can be terminated upon the happening of a stated event
  - b. Important rules of construction:
    - (i) Need **duration language** – words of mere desire, hope, or intention are insufficient  
HYPOS: In each of these instances, A is vested with a fee simple absolute, and NOT a defeasible fee: “To A for the purpose of constructing a day care center”; “To A with the hope that he becomes a lawyer”; “To A with the expectation that the premises will be used as a Blockbuster video store.”
    - (ii) **Absolute restraints on alienation are void** – restraint need to be reasonable, time limited purpose  
HYPO: Absolute restraint on alienation (thus void): O conveys: “To A so long as she never attempts to sell.” A has: Fee Simple Absolute O has: Nothing  
COUNTER-HYPO: O conveys: “To A so long as she does not attempt to sell until the year 2008, when clouds on the title will be resolved.” (Note: Here the restraint is linked to a reasonable, time-limited purpose.) A has: Fee Simple Determinable O has: Possibility of Reverter
  - c. Types
    - (i) **Fee Simple Determinable** (In NY, it is called a *Fee on Limitation*) – **automatic reverter**
      - (a) Must use clear *durational language* (e.g. To A so long as, during, while, until)
      - (b) Condition violated – forfeiture *automatic*, & there’s a *possibility of reverter* in the grantor
      - (c) RAP not applicable.  
Frank Sinatra conveys Sinatra Palace “to Orville Redenbacher, so long as popcorn is never made on the premises.”  
Classify the interests. Orville has: Fee Simple Determinable - Frank has: Possibility of Reverter.  
FSDPOR – Fee Simple Determinable Possibility of Reverter – Frank Sinatra Doesn’t Prefer Orville Reden.

- (ii) **Fee Simple Subject to Condition Subsequent** (NY – *Fee on Condition*) – **optional reentry**
  - (a) Must use clear *durational language* AND must carve out the *right to re-enter* (NY – *right of reacquisition*)
  - (b) Condition violate – grantor *reserves the right to reentry*
  - (c) This estate is NOT automatically terminated, but it can be cut short at the grantor’s option, if the stated condition occurs.
  - (d) RAP not applicable  
Ross conveys “To Rachel, but if coffee is ever consumed on the premises grantor reserves the right to re-enter and re-take.” Rachel has: Fee Simple Subject to Condition Subsequent Ross has: Right of Entry (Power of Termination).  
Bobby Brown: Its my prerogative as to whether to choose to terminate or not.
- (iii) **Fee Simple Subject to Executory Limitation – automatic executive interest**
  - (a) Must use clear *durational language* (e.g. so long as, during, while, until)
  - (b) Condition violated – forfeiture *automatic*, then passes to 3<sup>rd</sup> party (*shifting executory interest*)
  - (c) RAP applies  
HYPO: To Barry Manilow, but if Manilow ever performs music on the premises, then to Mandy. Barry has: Fee Simple subject to Mandy’s shifting executory interest. - Mandy has: Shifting Executory Interest

#### 4. **Life Estate**

- a. Creation – must be measured in explicit *lifetime terms* (never measured in terms of years)
  - (i) **Life Estate Pur Autre Vie**- measured by the life other than grantees (to A for the life of B)  
O conveys: “To Madonna, for the life of David Letterman.” Madonna has: Life Estate pur autre vie. O has: reversion.  
At the end of David Letterman’s life, the estate reverts back to O or O’s heirs.
  - (ii) Alienable, devisable & descendible if measuring life is still alive
  - (iii) NOTE: although a life estate is usually inalienable, can make a life estate
    - (a) determinable (“to A for life so long as alcohol isn’t used on the premises”),
    - (b) subject to a condition subsequent (“to A for life, but if A is divorced, grantor reserves right to reenter”), or
    - (c) subject to an executory interest (“to A for life, but if A is divorced, to B”)
- b. Distinguishing Characteristics
  - (i) Entitled to all ordinary uses & profits from the land
  - (ii) Must not commit *waste* (anything that will harm the future interest holders) – 3 kinds of waste (for which a future interest holder may sue for damages or injunction):
    - (a) **Voluntary/affirmative waste** – actual, overt conduct causing decrease in value; can not consume or exploit natural resources on property (e.g. timber, oil, or minerals), EXCEPT for *PURGE*
      - *Prior Use*: prior to the grant, land was used for exploitation (but no right to open new mine)
      - *Reasonable repairs*: life tenant may consume natural resources for reasonable repairs & maintenance of the premises.
      - *Grant*: life tenant expressly granted right to it.
      - *Exploitation*: the land is suitable only for exploitation (e.g., the land is a quarry)
    - (b) **Permissive waste/neglect** – land is allowed to fall into disrepair, or the life tenant fails to reasonably protect the land
      - Property Law says Life tenant must simply maintain the premises in reasonably good repair
      - Must pay all ordinary taxes, to the extent of the value of rents & profits. If no income or profits, must pay taxes up to the fair rental value.
    - (c) **Ameliorative waste** – life tenant must not engage in acts that will enhance property’s value, UNLESS:
      - All future interest holders are known, & consent, OR
      - A substantial & permanent change in the neighborhood conditions

### B. **Future Interests**

#### 1. **Future Interests in Transferor (O)**

- a. *Possibility of reverter* – accompanies only the *fee simple determinable* (remember FSDPDR)
- b. *Right of entry/power of termination* – accompanies only the *fee simple subject to condition subsequent*. “It’s my prerogative.”
- c. *Reversion* – future interest that arises in a grantor who transfers an estate of lesser quantum than he started with (*fee tail OR life estate*); reversionary interests are vested & NOT subject to RAP  
HYPOS: O, the holder of a fee simple absolute, conveys: “To A for life.” O has conveyed less than what she started with. She has a reversion. “To A for 99 years.” O has conveyed less than what she started with. She has a reversion. “To A for life, then to B for 99 years.” O has still conveyed less than that with which she started. (Remember that the fee simple absolute can endure forever.) O has a reversion.

#### 2. **Future Interests in Transferees**

- a. **Remainders** (contingent & vested) ⇒ a future interest created in a grantee that become possessory upon the expiration of a prior possessory estate (created in same conveyance in which the remainder is created)

Remember that remainderman (Forrest Gump) is sociable, patient and polite: (1) Remainderman is sociable. He never travels alone. In other words, remainderman always accompanies a preceding estate of known fixed duration. That preceding estate is usually a life estate or a term of years. For example: “To A for life, then to B,” or “To A for ten years, then to B.” (2) Remainderman is patient and polite, meaning: Remainderman never follows a defeasible fee. Remainderman waits patiently for the preceding estate to run its course. Remainderman cannot cut short or divest a prior transferee. In other words, if your present estate is a defeasible fee, your future interest is NOT a remainder. Instead, it will be executory interest.

- (i) Always accompanies a preceding estate of known, fixed duration (usually a *life estate* or a *term of years*) – cannot cut short or divest a prior transferee (that’s what executory interests do in defeasible fee); either vested or contingent:
- (ii) **Vested Remainder** – created in *ascertained person* AND is *NOT subject to any condition precedent*
  - (a) **Indefeasibly vested remainder** – NO conditions attached (“to A for life, remainder to B”); NOT subject to RAP
  - (b) **Vested remainder subject to complete defeasance** (NY – **remainder vested subject to total divestment**) – subject to a condition subsequent (“to A for life, remainder to B, provided, however, that if B dies under the age of 25, to C”; B has the vested remainder subject to complete defeasance, C has a shifting executory interest); NOT subject to RAP
    - If conditional language **follows and set off by commas** (condition subsequent)– vested remainder subject to complete defeasance (Comma Rule)
    - If conditional language **appears before** (condition precedent) – contingent remainder
  - (c) **Vested remainder subject to open** – vested remainder created in a class of persons (e.g. “children”) that is certain to become possessory, but is subject to diminution by additional persons not yet ascertain can still classify as class members (“to A for life, then to B’s children”; B’s children C, D’s share might be decreased if B has another child); subject to RAP
    - Open – it is possible for other to enter
    - Closed – (i) maximum membership has been set, or (ii) whenever any member can demand possession (under *rule of convenience*, a class closes when some member of the class can call for distribution – e.g. when A dies, regardless of B’s death)
- (iii) **Contingent Remainder** – created in an *unascertained person* OR is subject to *condition precedent*, or both; subject to RAP. TIP: Condition precedent=prerequisite  
 HYPO: “To A for life, then, if B graduates from college, to B.” A is alive. B is now in high school. Before B can take, he must graduate from college. He has not yet satisfied this condition precedent. B therefore has: contingent remainder. O has reversion (If B never graduates, O or O’s heirs take.) If B graduates from college during A’s lifetime: B’s contingent remainder is transformed automatically into an indefeasibly vested remainder
  - (a) Unborn or unascertained person – “to A for life, then to those children of B who survive A”
  - (b) Subject to a condition precedent – “to A for life, then if B graduates from college, to B” – if B graduates, during A’s lifetime, his contingent remainder automatically transforms into an *indefeasibly vested remainder*

	<u><i>Destruction of Contingent Remainders:</i></u>	<u><i>Rule in Shelley’s Case (Rule Against Remainders in Grantee’s Heirs):</i></u>	<u><i>Doctrine of Worthier Title (Rule Against a Remainder in Grantor’s Heirs):</i></u>
<i>Rule:</i>	Contingent remainders destroyed, if not vested at time of termination of preceding estate	If same instrument created a life estate in A & gave the remainder only to A’s heirs, the remainder was not recognized	Remainder in the grantor’s heirs is invalid, so grantor has a reversion
<i>Modern Status:</i>	Abolished in most jurisdictions	Abolished in most jurisdictions	Treated as a rule of construction only, not a rule of law.
<i>Example:</i>	“to A for life, and if B has reached age 21, to B” (A dies before B reaches 21)	“to A for life, then, on A’s death, to A’s heirs” (A is alive)	“to A for life, then to my heirs at law(O)”
<i>Historic Result (at common law):</i>	- B’s contingent remainder destroyed - O or O’s heirs take in fee simple absolute	A has fee simple absolute (because present & future interests would merge)	- A has life estate - O has a reversion
<i>Modern Result:</i>	- O or O’s heirs hold estate subject to B’s springing executory interest - B takes, once reaches 21	- A has life estate - A’s unknown heirs have contingent remainder - O has a reversion	- A has life estate - O’s heirs have contingent remainder

- (c) **Rule of Destructibility of Contingent Remainders** – abolished in the US/NY
  - Doctrine of Merger (related to destructibility of contingent remainders)
    - When one person acquires all of the present & future interests in land except a contingent remainder, under common law, the contingent remainder is destroyed

example: X conveys “to Y for life, then to Z’s children”; if, before Z has any children, X purchases Y’s life estate, X will have a life estate *pur autre vie* AND a reversion – these interests merge, & the contingent remainder in Z’s unborn children is destroyed

- (d) *Rule in Shelley’s Case (Rule Against Remainders in Grantee’s Heirs)* – abolished in US/NY
- (e) *Doctrine of Worthier Title, a/k/a Rule Against a Remainder in Grantor’s Heirs* –
  - Doctrine tries to promote the free transfer of land
  - It’s a rule of construction, & not a rule of law – so, if grantor *intends* to create a contingent remainder in his heirs, *that intent is binding*
  - Applies only to *inter vivos* transfers (not wills) & only if the words “heirs” is use

\* **NY Distinctions**

1. *Rule of Destructibility of Contingent Remainders* – abolished
2. *Rule in Shelly’s case (Rule against remainders in grantee’s heirs)* – abolished
3. *Doctrine of Worthier Title (Rule against remainders in grantor’s heirs)* – abolished in NY with respect to transfers taking effect after September 1, 1967

**b. Executory Interest (Executioner Dr Evil)**

- (i) Future interests in 3<sup>rd</sup> parties that either *divest* a transferee’s preceding freehold estate (“*shifting interests*”) or *follow a gap* in possession or *cut short* a grantor’s estate (“*springing interests*”)
- (ii) Unlike remainders, cut short prior transferee’s interests:
  - (a) **Shifting** – always follows a *defeasible fee* & cuts short someone other than the grantor (“to A & his heirs, but if B returns from Canada sometime next year, to B & his heirs” or “to A, but if A uses the land for nonresidential purposes at any time during the next 20 years, then to B)
  - (b) **Springing** – cuts short the grantor (“to A, if & when he marries,” or “to A, if & when he becomes a lawyer”)
- (iii) Subject to RAP

\* **NY Distinctions – Executory Interests**  
Abolished the distinction b/w executory interests & contingent remainders – instead, contingent remainders AND executory interests are called: **remainders subject to a condition precedent**

**C. Rule Against Perpetuities**

- 1. Rule – certain kinds of future interests are void if there is any possibility, however remote, that the given interest may vest (i.e. become (i) possessory, (ii) an indefeasibly vested remainder, or (iii) a vested remainder subject to total divestment) more than 21 years after the death of a measuring life

<i>RAP applies to:</i>	<i>RAP does NOT apply to:</i>
(1) contingent remainders	(1) reversions (any future interest in O, the grantor)
(2) executory interests	(2) indefeasibly vested remainder
(3) certain vested remainders subject to open	(3) vested remainders subject to complete defeasance
(4) options to purchase land	(4) charities
(5) powers of appointment	

- 2. 4-step technique for assessing RAP problems
  - a. *Determine which future interests* have been created by the conveyance
  - b. *Identify the conditions precedent to the vesting of the suspect future interest* – what must happen before a future interest holder can take?
  - c. *Find a measuring life* – look for a person alive at the date of the conveyance, & ask whether that person’s life or death is relevant to the condition’s occurrence
  - d. *Ask whether we’ll know, within 21 years of the death of our measuring life, if our future interest holder can or cannot take – if so, the conveyance is good*

“to A for life, then to the first of her children to reach the age of 30” A is 70; only child, B is 29 years old	
(1) Classify future interest	Contingent remainder
(2) Conditions precedent	A must die; must have a child to reach 30
(3) Measuring life	A
(4) Certainty within 21 years	RAP applies – B might die; A could have another child ( <i>Fertile Octogenarian Rule</i> – presumes that a person is fertile his/her age)
Result	A has life estate O has revision

**3. 2-Bright-Line Rules of common law RAP (memorize this)**

- a. *A gift to an open class that is conditioned on the members surviving to an age beyond 21 violates the common law RAP*

(“bad as to one, bad as to all”)

- b. **Many shifting executory interests violate** the RAP – an executory interest with no limit on the time within which it must vest violates the RAP (ex.: “to A & his heirs so long as the land is used for farm purposes, & if the land ceases to be so used, to B & his heirs” – we won’t know with certainty within 21 years of the death of our measuring life if a future interest holder can take)
- NOTE: **Charity-to-Charity Exception** – a gift from one charity to another does not violate the RAP

#### 4. Reform of the RAP

- a. “*Wait & see*” or “*Second look*” doctrine – the validity of any suspect future interest is determined on the basis of the facts, as they now exist, at the conclusion of the measuring life. This eliminates the “what if” or “anything is possible” line of inquiry (parade of horrors).
- b. **USRAP** (Uniform Statutory Rule Against Perpetuities) – codifies that common law RAP & in addition provides for an alternative 90 year vesting period
- c. Both the “wait & see” and USRAP adopt
  - (i) *Cy pres doctrine* (“as near as possible”) – if a given disposition violates the rule, a court may reform it in a way that most closely matches the grantor’s intent, while still complying with the RAP
  - (ii) Reduction of any offensive age contingency to 21 years

\* **NY Perpetuities Reform Statute**

*Applies the common law RAP, & has rejected “wait & see” & “cy pres,” except for charitable trusts & powers of appointment*

1. Where an interest would be invalid because it’s made to depend on any person’s having to attain an age in excess of 21 years, the age contingency is reduced to 21 years
2. ‘*Fertile Octogenarian*’ principle is modified – a woman over the age of 55 is presumed infertile, & the possibility that the person may have a child by adoption is disregarded
3. **Rule against suspension of the absolute power of alienation** applies common law RAP to restrictions on the power to sell or transfer – so, an interest is void if it suspends the power to sell or transfer for a period longer than lives in being, plus 21 years (for a conveyance to be valid under the suspension rule, there must be persons who could join together in a conveyance of the full fee simple title within lives in being plus 21 years).

#### 5. Common RAP cases

- a. *Executory interest following defeasible fee*: “to A for so long as no liquor is consumed on the premises, then to B” violates RAP
- b. *Age contingency beyond age 21 in open class*: “to X for life, then to those of X’s children who attain the age of 25” – **NY** will reduce such age contingency to 21
- c. *Fertile octogenarian*: “to A for life, then to A’s children, then to A’s grandchildren in fee” is invalid as to A’s grandchildren despite that A is 80 years old – **NY** presumes that women over 55 can’t bear children
- d. *Unborn widow/er*: “to A for life, then to A’s widow for life, then to A’s surviving issue in fee” – the gift to A’s issue is invalid, because A’s widow might be a spouse who was not in being when the interest was created (notice that a remainder to A’s children would be valid, since, unlike issue, they would be determined at A’s death)
- e. *Administrative contingency*: “to my issue surviving at the distribution of my estate” is invalid since the estate might be administered beyond the period of RAP
- f. *Options & rights of first refusal*: when A conveys Blackacre to B, he includes a clause in the deed that states: “B, his heirs, & assigns promise that upon finding a ready, willing & able buyer for Blackacre, Blackacre will be offered to A, his heirs, or assigns, on the same terms” – this is invalid because the right of first refusal can be exercised well beyond a life in being plus 21 years
- g. NOTE: when a void interest is stricken, the interests are classified as if the void interest were never there

#### D. Concurrent Estates – (i) joint tenancy; (ii) tenancy by the entirety; & (iii) tenancy in common

##### 1. Joint Tenancy (disfavored because they allow takers to avoid probate)

- a. Definition – each tenant has an undivided interest in whole estate (each enjoys a share with the right to use the whole), with right of survivorship
- b. Characteristics
  - (i) **Right of survivorship** – if 1 joint tenant dies, his share passes automatically to surviving joint tenants
  - (ii) **Alienable** – but NOT, *divisible* or *descendible* (because of the right of survivorship)
- c. **Creation** – requires 4 unities + **grantor must clearly express** right of survivorship
  - (i) 4 unities: (T-TIP):
    - (a) *at the same Time*
    - (b) *by the same Title* (i.e., same instrument)
    - (c) *Identical, equal interests*
    - (d) *identical rights to Possess the whole*

- (ii) Use of a 'straw' (middle man/conduit) – to satisfy the 4 unities, grantor conveys land to *strawman*, who then conveys back to himself and another person as joint tenants with the right of survivorship  
 EG: Dave holds Blackacre in fee simple absolute. He wishes to hold it as a joint tenant with his best friend Paul. How must Dave proceed? To satisfy the four unities, Dave must use a strawman. Step One: Dave conveys Blackacre to strawman. Step Two: Strawman conveys back to Dave and Paul as joint tenants with right of survivorship.

\* *NY Distinctions – Joint Tenancy*  
*Dispenses with the need for straw – permissible to convey directly using single deed even though the unities of “time” and “title” are not satisfied. Dave can convey directly to himself and Paul as joint tenants.*

d. **Severance of a joint tenancy (SPaM):**

(i) **Sale:**

- (a) *Sale or transfer* interest during her lifetime (can do so secretly, without the others' knowledge or consent); this severs the joint tenancy because disrupts 4 unities & buyer is '*tenant in common*'; BUT joint tenancy remains intact as between the other, non-transferring joint tenants
- (b) In equity, a joint tenant's *mere act of entering into a contract* (severed on this date) for the sale of share will sever the joint tenancy as to that contracting party's interest – because of doctrine of *equitable conversion* provides that “equity regards as done that which ought to be done”  
 HYPO: O conveys Blackacre to “Ringo, Paul, and John as joint tenants with the right of survivorship.” This form of concurrent estate is: a joint tenancy. On January 1, Ringo enters into a contract for sale of his interest in the joint tenancy to George, with the closing to take place on April 1. When does the severance as to Ringo's interest occur, and why? On January 1, under equitable conversion.

(ii) **Partition** – 3 methods:

- (a) *Voluntary agreement* – allowable, peaceful way to end the relationship
- (b) *Partition in kind* – judicial action for physical division of property, for best interests of all parties
- (c) *Forced sale* – judicial action for best interests of all, the land is sold & proceeds are divided proportionately (this is an *equitable action*, & therefore the court may credit for the value of improvements erected, repairs made, & taxes paid) – And

(iii) **Mortgage**

- (a) **Title theory of mortgage** (minority) – one joint tenant's execution of a mortgage or lien on his or her share *will sever* the joint tenancy as to that now encumbered share
- (b) **Lien theory of mortgage** (MAJORITY / including NY) – a joint tenant's execution of a mortgage on his or her interests will *not sever* the joint tenancy; severance only occurs if the mortgage is foreclosed and the property is closed

2. **Tenancy by the Entirety** (21 states recognized, including NY)

a. Definition – a protected marital interest between husband (H) & wife (W) with the right of survivorship

b. **Creation**

- (i) Only be created by husband & wife (fictitious 1 person) with rights of survivorship
- (ii) Presumption that any conveyance to H & W, *UNLESS clearly stated otherwise*

c. **Protected form of co-ownership (Can't touch this)**

- (i) Creditors of only one spouse cannot touch the tenancy

\* *NY Distinctions – Tenancy by the Entirety*  
*1 spouse may mortgage his interest & his creditors may enforce against that interests, BUT only as to the debtor spouse's share*  
*Non-debtor spouse's rights, including the right of survivorship, must not be compromised*

- (ii) Unilateral conveyance to 3<sup>rd</sup> party can NOT defeat the right of survivorship

HYPO: Tony and Carmella, married to each other, own Blackacre as tenants by the entirety. Tony then secretly transfers his interest to Uncle Junior. What does Uncle Junior have? Nothing.

d. Severance – by (i) *death*, (ii) *divorce*, (iii) *mutual agreement*, or (iv) *execution by a joint creditor*

3. **Tenancy in Common**

- a. Definition – each co-tenant owns an individual part, & each has a right to possess the whole
- b. Characteristic – each interest is *descendible, divisible & alienable*; BUT NO survivorship rights
- c. In multiple grantees – presumption favors tenancy in common

4. **Rights & duties of Co-Tenants:**

- a. *Possession* – each co-tenant can possess & enjoy the whole; if one co-tenant excludes another, he's committed *wrongful ouster*
- b. *Rent from co-tenant in exclusive possession* – absent ouster, a co-tenant in exclusive possession isn't liable to the others for rent

- c. *Rent from 3<sup>rd</sup> parties* – A co-tenant who leases all or part of the premises to a third party must account to his co-tenants, providing them their fair share of their rental income
- d. *Adverse possession* – absent ouster, one co-tenant in exclusive possession for the statutory adverse possession period cannot acquire title to the exclusion of the others (b/c no hostility because there is no ouster).

\* *NY Distinctions – Theory of Implied Ouster*  
*A co-tenant may acquire full title by adverse possession, if he is in exclusive possession for 20 continuous years*

- e. *Carrying costs* – each co-tenant is responsible for his fair share of carrying costs (taxes, mortgage interest payments, etc.) based on the undivided share that he holds (based on % of ownership).
- f. *Repairs* – repairing co-tenant enjoys right to pro-rate contribution for **necessary** repairs (*notice* required to the others of the need of the repair)
- g. *Improvements* – no right to contribution for “improvements”; BUT, at partition, improving co-tenant is entitled to credit equal to any increase in value or fully liable for any decrease in value
- h. *Waste* – co-tenant must not commit waste (voluntary, permissive & ameliorative). Co-tenant can bring an action for waste during the life of the co-tenancy.
- i. *Partition* – joint tenant or tenant in common has a right to bring an action for partition

## II. Landlord/Tenant Law

**A. Four Leasehold** (estate in land, under which the tenant has a present possessory interest in the leased premises and the landlord has a future interest)

1. **Tenancy for Years** (a.k.a. **Estate for Years** or **Term of Years**) – could be months or weeks or 50 years.
  - a. Definition – lease for a *fixed, determined* period of time
  - b. Creation – greater than 1 year must be in writing to be enforceable, because of Statute of Frauds
  - c. Termination – *NO notice* necessary, because the term of years states from the outset when it’ll terminate  
 HYPO: L leases Blackacre to T “from January 1, 2003 to July 1, 2003.” Which form of tenancy exists here? Term of Years. Why? It is a leasehold for a fixed known period of time. How much notice is needed to terminate the tenancy? None

### 2. Periodic tenancy

- a. Definition – lease continues for successive periods, until terminated by proper notice by either party
- b. Creation:
  - (i) **Express Agreement** – to “T from month to month or year to year or week to week,” or
  - (ii) **Implication** in one of 3 ways – measured by the way rent is tendered:
    - (a) Leased with **NO** mention of duration, but provision is made for rent payment at set intervals
    - (b) *Oral term of years in violation of the statute of frauds, creating an implied periodic tenancy*
    - (c) *Holdover – in a residential lease*, if landlord elects to holdover a tenant who has wrongfully stayed on past conclusion of the original lease, measured by the way rent is now tendered.  
 HYPO: T rents an apartment from L, beginning June 1. Nothing is said about duration. T pays rent each month. What tenancy exists here? T is an implied month to month periodic tenant.

\* *NY Distinctions – Landlord who elects to holdover a tenant creates an implied **month-to-month** periodic tenancy, unless otherwise agreed.*

- c. *Termination* – automatically renewed until proper *notice* of termination, *usually written*, is given
  - (i) At common law, **Notice** must be given **at least equal to the length of the period itself**, UNLESS otherwise agreed
  - (ii) E.g. in month-to-month – need at least 1 month’s notice, but there’s an exception for year-to-year tenancy, where only 6 months’ notice is required (may be shortened or lengthened by the parties)
  - (iii) NOTE: By private agreement, the parties may lengthen or shorten these common-law prescribed notice provisions.  
Freedom of Contract
  - (iv) NOTE: periodic tenancy must end at the conclusion of a **natural lease period** (last day of the period)  
 HYPO: L leased Blackacre to T on January 1, 2003, for a periodic tenancy of month-to-month. On May 15, 2003, T sends written notice of termination. T is bound until June 30, 2003

### 3. Tenancy at Will

- a. Definition – no fixed period of duration (“to T for as long as landlord or tenant desires”)
- b. Creation – unless the parties *expressly agree* to a tenancy at will, the payment of regular rent will cause a court to treat the tenancy as an *implied periodic tenancy*
- c. Termination – may be *terminated by either party* at any time, but a reasonable demand to quit the premises is typically required

\* *NY Distinctions – Landlord terminating a tenancy at will must give at least 30 days written notice of termination*

#### 4. Tenancy at Sufferance

- a. Creation – created when tenant has wrongfully held over past the expiration of the lease
  - (i) Created to permit landlord to recover rent
- b. Termination – lasts only until either landlord evicts the tenant or elects to hold the tenant to a new term

\* *NY Distinctions – Landlord's acceptance of rent subsequent to the expiration of the term will create an implied **month-to-month periodic tenancy**, unless otherwise agreed*

#### B. Tenant's Duties

1. **Tenant's liabilities to 3<sup>rd</sup> parties (Tort Law)** – must keep premises in *reasonably good repair*, & is liable for injuries sustained by 3<sup>rd</sup> parties he invited, even where landlord has expressly promised to make all repairs  
HYPO: L leases a building to T, expressly promising to maintain the premises in a state of good repair. T's invitee trips over a loose floorboard and sues T. If invitee sues T, what result? T always loses. (It does not matter that T may seek indemnification from L. Vis-a-vis the plaintiff, who is a guest, T loses.)

#### 2. Tenant's duty to repair

- a. *When the lease is silent*
  - (i) Standard – tenant must **maintain** the premises and make ordinary repairs
  - (ii) Tenant must not commit waste – *voluntary, permissive, or ameliorative*
  - (iii) **Law of Fixture (walks hand in hand with waste doctrine)**
    - (a) Definition – a once movable chattel that has been so affixed to land that it has ceased being personal property and it objectively shows the intent to improve the realty. (heating systems, custom made storm windows, certain lighting installations). (**fixtures pass with ownership of the land**)
    - (b) Tenant must NOT remove a fixture, no matter that tenant installed it (removing a fixture commits a *voluntary waste*)
    - (c) Determining a tenant installation that qualifies as a fixture
      - Express agreement controls (agreement between L and T is binding)
      - Absence of agreement – tenant may remove tenant installed chattel so long as removal does not cause substantial harm to the premises (if cause substantial harm, then in objective judgment tenant has shown intent to install a fixture and fixture must stay).
- b. *When expressed covenanted to maintain the property in good condition for the duration of the lease*
  - (i) Common law – tenant was responsible for any loss to the property, *regardless of the cause*, including loss attributable to force of nature (*act of god*)
  - (ii) Today – *tenant may terminate lease if the premises are destroyed without his fault (followed in NY)*

#### 3. Tenant's duty to pay rent

- a. *Tenant breaches this duty & in possession of the premises*
  - (i) Landlord's ONLY options are:
    - (a) Evict through the courts; OR
    - (b) Continue the relationship (now a tenant at sufferance) & sue for the rent due
  - (ii) NO SELF HELP – e.g. changing locks, forcibly removing the tenant; removing any of his possessions (self-help flatly prohibited and punishable civilly & criminally – **treble damages in NY**)
- b. *Tenant breaches this duty BUT is out of possession of the premises – remember SIR:*
  - (i) Surrender – tenant demonstrates, by words or actions, that he wishes to give up the leasehold (landlord could choose to treat tenant's abandonment as an implicit offer of surrender, and accepts). If unexpired term is greater than one year, surrender must be in writing to satisfy SOF.
  - (ii) Ignore the abandonment & hold the tenant responsible for the unpaid rent, just as if the tenant were still there (this option is available only in a minority of states)
  - (iii) Re-let the premises on the wrongdoer tenant's behalf, & hold him liable for any deficiency
    - Majority Rule (mitigation principle) – landlord must make reasonably good-faith effort to re-let
    -

\* *NY Distinctions – NY does NOT require landlords to mitigate damages when tenants abandon the premises*

#### C. Landlord's Duties

##### 1. Duty to deliver possession

- a. *Majority view (English Rule)* – landlord must put tenant in actual physical possession of the premises (if a prior holdover tenant is still in possession at the start of the new tenant's lease, the new tenant is entitled to damages)
- b. *Minority view (American Rule)* – landlord has NO duty to deliver actual possession at the commencement of the term, & hence is not in default when previous tenant continues wrongfully to occupy the premises. L only required to give legal possession.

**Implied covenant of quiet enjoyment** (fundamental right applies to BOTH residential & commercial leases)

- a. Tenant has the right to quiet use & enjoyment of the Premises without interference from landlord:
  - (i) **Breach by actual wrongful eviction**; or
  - (ii) **Breach by constructive eviction** (e.g. every time it rains, apartment floods) – three elements must be met (**SiNG**):
    - (a) **Substantial Interference** – attributable to landlord’s actions or failures to act (chronic problem)
    - (b) **Notice** – tenant must give notice of problem & landlord must fail to respond meaningfully
    - (c) **Goodbye (get out)** – tenant must vacate within a reasonable time after landlord fails to correct
- b. Landlord is NOT liable for the acts of other tenants, EXCEPT:
  - (i) Landlord has a duty *not to permit a nuisance on the premises*, &
  - (ii) Landlord must *control common areas*

**3. Implied warranty of habitability** (ONLY residential, NOT commercial leases)

- a. **Non-waivable** – bare living requirements must be met (e.g., heat in winter, plumbing or running water); standard is supplied by local housing code or independent judicial conclusion
- b. If warranty breached, the tenant is entitled to one of 4 options (**MR**<sup>3</sup>):
  - (i) **Move out & terminate the lease**
  - (ii) **Repair & deduct** – tenant may make reasonable repairs & deduct their cost from future rent
  - (iii) **Reduced rent** or withhold all the rent until the court determines fair rental value – place rent in escrow account
  - (iv) **Remain in possession** – pay rent & affirmatively sue money damages
- c. **NOTE:** (i) Constructive eviction – tenant must vacate; BUT (ii) Implied warranty of habitability – tenant has different options, including vacate

**4. Retaliatory eviction**

- If tenant lawfully reports landlord for housing code violations, landlord is barred from penalizing tenant, by raising rent, ending the lease, harassing tenant, other retaliatory measures, etc.

**D. Assignment v. Sublease**

- 1. General – absent some prohibition in the lease, a tenant may freely **transfer** his interest in whole (*assignment*) or in part (*sublease*).
  - a. **Landlord’s prior written approval** – lease may prohibit the tenant from assigning or subletting without the landlord’s prior written approval
  - b. BUT, *once the landlord consents to one transfer by the tenant, he waives the right to object to future transfers by that tenant, unless the landlord expressly reserves the right* (Rule of Dumpor’s Case)

* NY – Covenants against Assignment or Subleases		
	Assignment (residential tenant)	Subleases (tenant in residential building having 4 or more units)
Right	May NOT assign without L’s written consent (unless lease provides otherwise)	Right to sublease subject to L’s written consent
Consent (Result)	CAN unconditionally be withheld (T’s sole remedy is to seek release from lease)	Can NOT be unreasonably withheld (unreasonable withheld consent is deemed consent)

**2. Assignment**

- a. Landlord & Tenant2 (assignee)
  - (i) **Privity of estate** (i.e. liable to each other for all of the covenants in the original lease that “run with the land,” such as the promise to pay rent, repair or paint the premises, & pay taxes)
  - (ii) NOT *privity of contract* – **unless** T2 expressly **assumed** performance of all promises of the original lease
- b. Landlord & Tenant1 (assignor)
  - (i) NO longer in *privity of estate*,
  - (ii) Remain in *privity of contract* (AND are *secondarily liable* to each other)
- c. If Landlord – Tenant1 – Tenant2 – Tenant3
  - (i) Landlord & Tenant1 – *privity of contract* & *secondarily liable* to L (if T3 can’t pay)
  - (ii) Landlord & Tenant3 – *privity of estate*
  - (iii) Landlord & Tenant2 – NO *privity of estate* once T2 assigned to T3; NO *privity of contract* (unless T2 expressly assumed all promised in the original lease)
- d. NOTE: when landlord assigns, although no longer in *privity of estate*, the original landlord & tenant remain in *privity of contract* unless there is a *novation* – so, both the old & new landlords are liable

**3. Sublease**

- a. Landlord & sublessee are in NEITHER *privity of estate* NOR *privity of contract* – they share no nexus
- b. BUT, primary tenant & the subtenant are in *privity of estate* AND *privity of contract* (T2 responsible to T1 not L)

	Assignee:	Sublessor:
<i>privity of estate:</i>	YES	no

<i>privity of contract:</i>	no (unless he assumes contract duties)	no
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### E. Landlord's Tort Liability (caveat emptor)

1. Common Law of caveat lessee ('let the tenant beware') – landlord has no duty to make the premises safe
2. **Exceptions (CLAPS):**
  - a. **Common areas** – hallways, stairwells, etc.
  - b. **Latent defects rule** – landlord must **warn** tenant of hidden defects of *which landlord has, or should have, knowledge* (Duty to warn but NOT duty to repair)
  - c. **Assumption of repairs – once undertaken**, a landlord must complete repairs with reasonable care (if repairs done negligently, L is liable)
  - d. **Public use rule** – when landlord leases public spaces (e.g. convention centers, museums or auditoriums), & who should know, because of the nature of the defect & the length of the lease, that tenant won't repair, landlord is liable for any defects on the premises.
  - e. **Short term lease of furnished dwelling** – landlord is responsible for any defective condition which proximately injure tenant

### III. Servitudes ⇒ nonpossessory interests in land, creating a right to use land possessed by someone else

#### A. Easements (strongest form)

1. Definition – a grant of nonpossessory property interest that entitled its holder to some form of use or enjoyment of another's land (i.e. *servient tenement*)
2. Scope of easement – set by the terms of the grant or conditions that created the easement - unilateral expansion of easement NOT allowed
3. NOTE: *overuse* or *misuse* of an easement does NOT terminate the easement – the appropriate remedy for the servient owner is an injunction against the misuse
4. **Affirmative v. Negative easements**
  - a. **Positive easements** – the right to go onto & do something on the servient land
  - b. **Negative easements** – can only be created *expressly, by writing signed by the grantor*; no natural or automatic right to **LASS: (i) Light; (ii) Air; (iii) Support; (iv) Streamwater** from an artificial flow (and (v) *scenic view* in a minority of states)
5. **Easements appurtenant to land** ('it takes two')
  - a. Definition – the when easement benefits its holder in **his physical use or enjoyment of his property**
  - b. "It takes 2" parcels of land – (i) a **dominant tenement**, which derives the benefit, & (ii) a **servient tenement**, which bears the burden of the easement
  - c. Transferred **automatically** with dominant tenement, regardless whether mentioned in the conveyance
  - d. Passes automatically with servient tenement, unless the new owner is a bona fide purchaser, without notice
6. **Easements held in gross**
  - a. Definition – confers upon its holder **only some personal or pecuniary advantage** (e.g. right to place a billboard on another's lot; right to swim in another's pond; utility co's right to lay power lines on another's land) that's not related to the use or enjoyment of his land (benefits holder & NO benefited or dominant tenement). So here, only one parcel of land is involved – servient tenement, which is burdened by this easement (i.e A has an easement to swim in B's lake)
  - b. Transferable ONLY if it is for **commercial purposes** (i.e., not a *personal easement in gross* like swimming in a lake where it is personal to the holder).
7. **Creation** – can be created by **PING**:
  - a. **Prescription** – satisfying the elements of adverse possession (**COAH**)
    - (i) **Continuous use for the given statutory period (10 years in NY)**;
    - (ii) **Open & notorious use**; (iii) **Actual use**; & (iv) **Hostile use**
 – NOTE: permission defeats the acquisition of an easement by prescription, because it's no longer hostile
  - b. **Implication** – an easement ("quasi-easement") can be implied from existing use if:
    - (i) **prior to the division of a single tract**,
    - (ii) an *apparent & continuous* use exists on the "servient" part,
    - (iii) that is *reasonable necessary* for the enjoyment of the "dominant", &
    - (iv) Court determines that the parties *intended* the use to continue after division of the land
 HYPO: A owns two lots. Lot 1 is hooked up to a sewer drain located on lot 2. A sells lot 1 to B, with no mention of B's right to continue to use the drain on A's remaining lot 2. The court may nonetheless imply an easement on B's behalf if: 1) the previous use had been apparent and 2) the parties expected that the use would survive division because it is reasonably necessary to the dominant lands use and enjoyment
  - c. **Necessity** – An easement of right of way will be implied by necessity if grantor conveys a portion of his land where this division of a tract deprives one lot of means of access out (**landlocked** lot)
  - d. **Grant** – if easement **for more than 1 year must be in writing** signed by grantor (statute of fraud requires writing – 'deed of easement')

8. **Termination – END CRAMP:**

- a. **Estoppel** – the servient owner materially changes his position in *reasonable reliance* on the easement holder's assurances that the easement will no longer be enforced  
HYPO: A tells B that A will no longer be using her right of way across B's parcel. In reasonable reliance, B builds a swimming pool on B's parcel, thereby depriving A of the easement. In equity: A is estopped from enforcing the easement.
- b. **Necessity** – easements created by necessity expire as soon the necessity ends; but, if the easement was created by express grant, it doesn't end automatically once the necessity ends (look for writing)  
HYPO: O conveys a portion of his ten-acre tract to A, with no means of access out except over a portion of O's remaining land. **The parties reduce their understanding to express writing.** Thereafter, the city builds a public roadway affording A access out. The easement persists.
- c. **Destruction** of the servient land, other than through willful conduct of the servient owner
- d. **Condemnation of the servient estate** by government eminent domain power
- e. **Release** – a written release, given by the easement holder to the servient land owner
- f. **Abandonment** – easement holder demonstrates by *physical action* the intention to never make use of the easement again (*mere nonuse*, or *words*, is insufficient to terminate by abandonment)
- g. **Merger doctrine** (also known as *unity of ownership*) – title to the easement & title to the servient land becomes vested in the same person (A, the easement holder, buys B's parcel, the servient tenement). Easement not re-instated when land sold.
- h. **Prescription** – adverse possession (remember COAH). We need interference (continuous, open & notorious, actual, and hostile to the easement holder).

**B. License** (weakest form of servitude)

1. Definition – a mere privilege to enter another's land for some delineated purpose (e.g. tickets to something)
  - a. Do not need a writing because not subject to statute of frauds  
HYPO: Neighbor A, talking by the fence with neighbor B, says, "B, you can have that right of way across my land." This oral easement is unenforceable because it violates the SOF. An oral easement creates instead a freely revocable license.
  - b. *Freely revocable* – unless (i) *estoppel* bars revocation (e.g., licensee has invested substantial money, labor or both in reasonable reliance on the license) or (ii) the license is *coupled with an interest in the land*
2. NOTE: a failed attempt to create an easement results in a license;
  - a. If a grantor orally grants an easement for more than a year, it is unenforceable because it's not in writing
  - b. Thus grantee doesn't have a valid easement, but *does* have a license

**C. Profit** (profit-a-pendre)

- Definition – entitles its holder to enter the servient land & take from it the soil, or some substance from the soil (e.g., minerals, timber, oil, game); the Profit shares all the rules of easements; can be appurtenant or in gross

**D. Covenant** (running with the land)

1. Definition – a real covenant is a **written** promise to *do* or *not do* something related to land
  - a. Remedy – damages ONLY. If P seeks only money damages, you must construe as a covenant.
  - b. UNLIKE easements, covenants are not the grant of a property interest, but rather a *contractual limitation* or promise regarding the land – one tract is *burdened*, while the other is *benefited*
    - (i) *Negative (restrictive covenants)* – a promise to refrain from doing something related to the land (e.g. not build for commercial purposes; not to paint my shutters brown; not to maintain a petting zoo)
    - (ii) *Affirmative* – a promise to do something related to land (e.g. maintain a common fence; paint our adjoining wall)
  - c. NOTE: covenants to *pay money* to be used in connection with the land (e.g. homeowners' association fees) and covenants *not to compete* run with the land
2. **Requirements for Burden to run – WITHIN** must be satisfied. Always analyze burdened side first (harder to prove)
  - a. **Writing** – original promise must be in writing
  - b. **Intent** – original parties must have intended for the burden to run
  - c. **Touch & concern** – negative covenants touch & concern by restricting the holder of the servient estate in his use of that parcel, while affirmative easements require the servient estate to do something. Promise must be of or pertaining to the land
  - d. **Horizontal AND vertical privity:**
    - (i) *Horizontal Privity* – refers to nexus between the *originally promising parties* (A & B); requires that they be in "succession of estate" meaning that they were in a grantor-grantee, landlord-tenant, or mortgagee-mortgagor relationship – this is difficult to establish - most common reason why burdens won't run.
    - (ii) *Vertical Privity* – refers to non-hostile nexus (e.g. contract, devise, or descent) between the *a party and its successor* (A1 & A2); the only time vertical privity is lacking is if the successor acquired interest through adverse possession

*otice* – subsequent purchaser for value must have had (i) actual, (ii) inquiry, or (iii) record notice

3. *Requirements for Benefits to run* – WITV must be satisfied:
  - a. Writing – original promise was in writing
  - b. Intent – original parties must have intended the benefit to run
  - c. Touch & concern – the promise affects the parties as landowners
  - d. Vertical privity – some non-hostile nexus between A1 & A2 (easier for benefits to run because no need for horizontal privity)

#### E. Equitable Servitudes

1. Definition – a promise that *equity* will enforce against successors (covenant that, regardless of whether it runs with the land of law, *equity* will enforce against assignees of the burdened land who have *notice* of the covenant)
    - a. Remedy – accompanied by *injunctive relief*. If P seeks an injunction, you must construe as an equitable servitude.
    - b. **Difference between Covenants & Equitable Servitudes** – difference on the basis of relief P is seeking:
      - (i) If seeking *monetary damages*, you must construe the promise as a *covenant*
      - (ii) If seeking an *injunction*, then it's an *equitable servitude*
  2. **Creation** – WITN must be satisfied
    - a. Writing – generally, but not always, the original purpose must be in writing
    - b. Intent – original parties intended that the promise would be enforceable by & against assignees
    - c. Touch & concern – promise affects the parties as landowners
    - d. Notice – assignees of the burdened land had notice of the promise– NOTE: **privity is NOT required to bind successors**
  3. **Implied equitable servitude** (reciprocal negative servitude) – exception to the *writing* requirement
    - a. **General/common scheme doctrine** – if developer subdivides land, and some deed contain negative covenants, while others do not, the negative covenants will be binding on all parcels provided:
      - (i) At time of sale of subdivisions, developer had a *general scheme of residential development* which included D's lot
      - (ii) D had notice of the promise contained in the prior deeds – 3 forms of notice imputed to D (**AIR**):
        - (a) Actual notice – direct knowledge of the promises contained in those prior deeds
        - (b) Inquiry notice – neighborhood seems to conform to common restrictions (e.g., residential). The lay of the land.
        - (c) Record notice – form of notice *imputed to buyers* on basis of publicly recorded documents
- \* *NY Rule* – subsequent buyer does NOT have record notice of the contents of those prior deeds transferred to others by the common grantor (less burdensome for D)
- b. NOTE: if the scheme arises *after* some lots are sold, no implied servitude can arise with respect to the lots already sold without express covenants
4. **Equitable defense to enforcement of an equitable servitude**
  - a. *Changed conditions* – alleged by the party seeking release from the terms of an equitable servitude must be **so pervasive that the entire area or subdivision has changed** (*extinguishes* an equitable servitude)
  - b. Limited or piecemeal change is never good enough

#### IV. Adverse Possession

- A. Definition – possession, for a statutorily prescribed period of time can, if certain elements are met, *ripen into title*
- B. **Elements of adverse possession (COAH):**
  1. Continuous – uninterrupted for the given statutory period (**10 years in NY**)
  2. Open & notorious – the sort of possession that the usual owner would make under the circumstances
  3. Actual & exclusive possession – entry can't be hypothetical or fictitious
  4. Hostile – possessor does not have the true owner's permission/consent to be there
    - a. Objective test applicable
    - b. *Possessor's subjective state of mind is irrelevant* (i.e. *does not matter whether adverse possessor believes that land is his own or knows he is trespassing*)
- C. **Statute of limitations**
  1. Statute of limitations begins to run when the true owner can first bring suit
  2. **Tacking** – allows one adverse possessor to tack on to his time with the land his predecessor's time, so long as there is privity, which is satisfied by any non-hostile nexus such as (i) blood, (ii) contract, (iii) deed, or (iv) will (no tacking is allowed when there's been an *ouster*)
  3. **Disability** – statute of limitations do NOT run against the true owner who's *afflicted by a disability* (e.g. insanity, infancy, imprisonment) at the **inception of the adverse possession** (ONLY if he was under the disability **at the time his cause of action accrued**)

HYPO: O owned Blackacre in 1980 when A entered adversely. In 1990, O went insane. In 2000, O recovered. Our jurisdiction has a 20-year statute of limitations. In 2000, who owns Blackacre? A, assuming that she has met the COAH

elements. O cannot claim the benefit of the disability because he wasn't suffering from it at the inception of the adverse possession.

## V. Land Conveyancing: The Purchase & Sale of Real Estate

- Two-step process: (i) the *land contract*, & (ii) the *closing*, where the deed becomes the operative document
  1. *Executory period* (between contract & closing) – the buyer must properly inspect the property, which includes title searches & an examination of possession (to make sure nobody else possesses it)
  2. *Merger* – where the contract terms (of the land sale agreement) are merged into the deed; BUT, ancillary agreements are not merged, & still enforceable even though not included in the deed

### A. The Land Contract

#### 1. The land contract & the statute of frauds

- a. Standard – land contract must be (i) *in writing*, (ii) *signed by party* against whom enforcement is sought, (iii) must *describe the land*, & (iv) state *some consideration*.
  - NOTE: when the amount of land recited in the land contract is more than the actual size of the parcel, the remedy is specific performance with a pro rata reduction in purchase price
- b. EXCEPTION to statute of frauds (*doctrine of part performance*) – equity will decree specific performance of an oral contract for the sale of land if **2 of the following 3** circumstances are met:
  - (i) Buyer takes physical possession of the land,
  - (ii) Buyer pays all or part of the purchase price, AND/OR
  - (iii) Buyer makes substantial improvements

#### 2. Doctrine of equitable conversion & risk of loss

- a. *Doctrine of equitable conversion* – equity regards as done, that which ought to be done (once the contract is signed, buyer is the owner of the land, subject to the condition that he pay the purchase price at closing)
- b. *Risk of Loss* – if property is destroyed before closing (during the executory period) through no fault of either party, the *Buyer* bears the risk of loss, unless the contract says otherwise

\* *NY Distinction – Risk of Loss*

So long as the buyer is without fault, the risk of loss remains with the **seller** until buyer has title or takes possession (*Uniform Vendor and Purchaser and Risk Act*)

#### 3. Two implied promises in every land contract

- a. *Marketable Title* – *seller promises to provide marketable title* (title must be free from reasonable doubt – free from lawsuits & the threat of litigation)
  - (i) 3 circumstances will render the title unmarketable:
    - (a) *Adverse possession* – title (or *even part* of it) acquired by adverse possession is unmarketable. Seller must provide good record title.
    - (b) *Encumbrances* – marketable title means an unencumbered fee simple; servitudes & mortgages render title unmarketable, unless the buyer has waived them
    - (c) *Zoning violations* – the property must not violate a zoning ordinance or title is unmarketable
  - (ii) NOTE: seller has the right to satisfy a mortgage or lien at closing, with the proceeds of the sale. Thus the buyer cannot claim title is unmarketable because it is subject to a mortgage prior to closing, if the closing will result in marketable title
- b. *Seller promises not to make any false statements of material fact*
  - (i) Majority of states – sellers liable for material lies or failing to disclose latent material defects
  - (ii) General disclaimer of liability won't excuse seller from liability for fraud or failure to disclose

\* *NY Distinction – Property Condition Disclosure Act*

*Requires sellers of 1-4 family residential dwellings to complete a statutory disclosure form, & provide it to the prospective buyer before the contract is signed*

#### 4. Implied warranty of fitness & workmanlike construction (for new construction)

- a. Land contract contains no implied warranties of fitness or habitability → *caveat emptor* (“buyer beware”),
- b. **EXCEPTION** – the *implied warranty of fitness & workmanlike construction* applies to the sale of a new home by a builder-vendor

### B. The Closing

1. General – the *deed* (transfer of legal title to an interest in real property) is now controlling
  - a. Acceptance of the deed, seller is *no longer liable* on this contractual liability – the seller is then liable only for promises made *in the deed*
  - b. Deed passes legal title from seller to buyer by “**LEAD**”: Lawfully Executed And Delivered

### awful execution of the deed

- a. Standard – must be in writing, signed by the grantor (deed need not recite consideration, nor must consideration pass to make a deed valid)
- b. Description of the land need not be perfect, as long as it's unambiguous & a good "LEAD"  
HYPO: The deed recites that O conveys "all of O's land," or "all of O's land in Essex County." Would such descriptions suffice? Yes. We can research and discern what all means. If the deed said "some of my land" this deed is no good – too imprecise.

### 3. Delivery requirement

- a. Delivery is a **legal standard & is a test solely of present intent** – **did grantor have the present intent to be immediately bound** irrespective of whether or not the deed itself has been literally/physically handed over.
  - (i) Physical or manual transfer of the deed to the grantee – mail, messenger or agent are sufficient
  - (ii) Delivery by escrow is permissible (through an escrow agent)
    - (a) With instructions that deed be delivered to grantee once certain conditions are met – once conditions are met, title passes automatically to grantee
    - (b) Advantage of escrow is that if the grantor dies, becomes incompetent or is otherwise unavailable before the express conditions are met, title will still pass from escrow agent to grantee, once the conditions are met
- b. *Grantee's express rejection* of the deed – defeats delivery
- c. *Conditions not contained in deed* – If a deed is absolute on its face, but delivered with an oral condition, the condition is disregarded (b/c it is not provable) and the delivery is absolute and deemed accomplished.  
HYPO: O conveys a deed to Blackacre that is absolute on its face, but says to grantee, "Blackacre is yours only if you survive me." This oral condition is void and delivery has been accomplished.
- d. *Deed to a dead person* – void & conveys no title
- e. *Title passes upon delivery* & cannot be canceled or taken back – so, if grantee returns a deed to the grantor, this has no effect (grantee must draw up new deed & deliver it to grantor)
- f. If a grantor executes a deed *but fails to deliver it during his lifetime* – no conveyance of title has occurred, UNLESS there's a *future interest* contained in the language of the deed itself

### 4. Covenants for title & the three types of deed

- a. **Quitclaim** (worst deed) – contains no covenants; grantor is not even promising that he has title to convey (However, grantor implicitly promises in the land contract to provide marketable title at closing)
- b. **General warranty deed** (best deed) – warrants against all defects in title, including those attributable to grantor's predecessors
  - (i) *Present Covenants – breached, if ever, at time of conveyance (S/L run from delivery)*
    - (a) **Covenant of seisin** – grantor warrants that he owns the estate he now claims to convey
    - (b) **Covenant of right to convey** – grantor promises he has the power to make the conveyance (in other words, there are no temporary restraints on his power to sell) (\*\*\*)most tested\*\*\*)
    - (c) **Covenant against encumbrances** – grantor promises that there are no servitudes or mortgages on the land
  - (ii) *Future Covenants – breached only upon disturbance of the grantee's possession (S/L begins to run until that future date)*
    - (a) **Covenant for quiet enjoyment** – grantor promises that grantee won't be disturbed in possession by a 3<sup>rd</sup> party's lawful claim of title (this is identical to the *covenant of warranty*)
    - (b) **Covenant of warranty** – grantor promises to defend grantee should there be any lawful claims of title asserted by others (this is identical to the *covenant of quiet enjoyment*)
    - (c) **Covenant for further assurances** – grantor promises to perform whatever future acts are reasonably necessary to perfect grantee's title if it later turns out to be imperfect
- c. **Statutory special warranty deed** (called **bargain & sale deed** in NY) – contains 2 promises that grantor **makes only on behalf of himself (NOT on behalf of any predecessor in interest)**:
  - (i) Grantor promises that he hasn't conveyed the estate to anyone other than the grantee, AND
  - (ii) Estate is free from encumbrances made by the grantor

### 5. Defective deeds

- a. **Void** deed – will be set aside by the court even if the property has passed to a bona fide purchaser – those that are (i) forged, (ii) were never delivered, (iii) were obtained by *fraud in the factum* (i.e., the grantor was deceived & did not realize that he was executing a deed)
- b. **Voidable** deed – will be set aside ONLY if the property has *not* passed to a bona fide purchaser, & includes those deeds that are (i) executed by minors or incapacitated persons, (ii) those obtained through fraud in the inducement, (iii) undue influence, (iv) mistake, & (v) breach of fiduciary duty
- NOTE: if a joint owner attempts to convey property by forging the signature(s) of the other owner(s), such a conveyance would be *valid* as to the interest of the owner whose signature is valid, BUT *void* as to the other owner(s); buyer would hold as tenant in common with joint tenant whose signature was forged

- A. Model Case** – O conveys Blackacre to A; later, O conveys Blackacre, the same parcel, to B; O, the dirty double dealer, has skipped down, leaving a battle between A & B
- In common law, if grantor conveyed the same property twice, the grantee first in time generally prevailed
  - Bright-Line Rules**
    - If B is a Bona Fide Purchaser, and we are in a **NOTICE jurisdiction** – B wins, regardless of whether or not B records before A does
    - If B is a Bona Fide Purchaser, and we are in a **RACE-NOTICE jurisdiction** – B wins if B records properly before A does (*NY is a race-notice jurisdiction*)
- B. Types of Recording Statutes – designed to protect BFP and legitimate MORTGAGEES**
- Notice statute** – “a conveyance of an interest in land (O to A) shall not be valid against any subsequent purchaser for value (B), without notice thereof, unless the conveyance is recorded (A)”
    - Subsequent BFP wins if – (i) *grantee NOT recorded*, AND (ii) *BFP takes without notice* (protected *regardless of whether he records* at all)
  - Race-notice statute** – “any conveyance of an interest in land (O to A) shall not be valid against any subsequent purchaser (B) for value, without notice thereof, **whose conveyance is first recorded (B)**”
    - Subsequent BFP wins if – (i) *grantee NOT recorded*, (ii) *BFP takes without notice* AND (ii) *records before the prior grantee*

HYPO: On March 1, O conveys to A, a bona fide purchaser who does not record. On April 1, O conveys the same parcel to B, a bona fide purchaser, who does not record. On May 1, A records. Who takes Blackacre in a notice jurisdiction? B Who takes in a race-notice jurisdiction? A
  - Pure race statute** – whoever records first wins, & notice is irrelevant (only 2 states have such statutes)
- C. Forms of Notice** that a buyer may potentially be charged with – **AIR**
- Actual notice** – prior to B’s closing, B gets literal knowledge of A’s existence
  - Inquiry notice** (form of constructive notice)
    - Whether B bothers to look or not, B is on inquiry notice of whatever an examination of the land *would* reveal
    - B has a duty to inspect the land regarding prior interests – e.g. A had taken possession so B is on inquiry notice
  - Record notice** (form of constructive notice)
    - Record notice of A’s deed if at the time B takes, A’s deed was **properly recorded** within ‘*chain of title*’
    - B has a duty in searching the records
- D. Bona Fide Purchasers**
- Recording statutes are generally protect ONLY BFP – from *secret* interests previously created & places subsequent buyers on record notice, so that there can be no subsequent BFP
  - BFP requirements – (i) must be a **purchaser**, (ii) **without notice**, & (iii) pay **valuable consideration**
    - Purchaser** – all statutes purchasers (of the fee or lesser estate) including *mortgagees for value*, BUT NOT donees, heirs & devisees since they don’t give value (unless Shelter Rule applies):
      - Judgment creditors* IS NOT protected
      - Purchaser from heir* or devisee of the record owner IS protected
    - Without notice** – purchaser had no actual, constructive (record) or inquiry notice of a prior conveyance at the time he paid consideration & received the interest
    - Valuable consideration** – must be of some pecuniary value (not ‘love & affection’); purchaser is protected by the recording statute **only after consideration is paid**

HYPO: B paid \$50,000 cash for Blackacre, when its fair market value is estimated at \$100,000. Is B a purchaser for value? Yes, so long as B remits substantial pecuniary consideration
- E. Chain of Title Problems** (for Record Notice)
- Chain of Title – sequence of recorded documents capable of giving record notice to subsequent takers (established though a title search of the grantor/grantee index)
  - The Shelter Rule** (transferees from BFP)
    - A person who takes *from* a BFP will prevail against any interest that the transferor/BFP would have prevailed against, even if the person taking the property has actual or record notice of the prior interest

HYPO: O conveys to A, who does not record. Later, O conveys to B, a BFP, who records. B then conveys to C, who is a mere donee or who has actual knowledge of the O to A transfer. In the contest of A vs. C, who prevails? C wins, in both a notice and race-notice state, because of the Shelter Rule. C steps into the shoes of B, who was a BFP who recorded first.
  - Shelter Rule not designed to protect C – it exists to protect B’s capacity to transfer his land – transferee steps into the shoes of recorded BFP
- 3. Problem of “wild deeds”**
- A deed, entered on the records, has a *grantor unconnected* to the chain of title – it is *incapable of giving record notice* of its existence

example: O conveys Blackacre to A, **who does not record**. Then A sells to B (the wild deed), and B records. If O conveys to C, he does NOT have notice of B's claim – C wins if he records because B's recording is a wild deed and thus a nullity.

4. **Estoppel by deeds** (the “after-acquired title” doctrine)

- a. Original grantor's subsequently acquired estate will, by estoppel, pass to the grantee – if the grantor purports to convey an estate in property that he doesn't then own, his subsequent acquisition of the estate will inure to the benefit of the grantee
- b. Example: In 1950, O thinks about selling Blackacre to X but does not sell. In 1950, X, who does not own Blackacre, sells it anyway, to A, A records. In 1960, O finally sells Blackacre to X, X records in 1960. In 1970, double dealer X sells Blackacre to B, B records
  - (i) 1960-1969 – A owns because of *estoppel by deed*
  - (ii) 1970-after – B owns, as long as B is a BFP because A's record is a variation of *wild deed* and would be a nullity.

## VII. Mortgages

### A. Overview of real estate financing & foreclosure:

1. *Financing* – buyer finances purchase of land using the land as collateral, usually done by giving the lender a mortgage on the property (a.k.a.: deed of trust, installment land contract, & sale-leaseback)
2. *Default* –
  - a. Creditor-mortgagee has right to foreclose, up until the foreclosure sale;
  - b. Debtor-mortgagor may redeem by paying off mortgage & accrued interest
3. *Foreclosure* – by sale, usually judicial sale
  - a. Proceeds distributed according to priorities of security interests
  - b. Mortgagee can also sue the mortgagor personally on the debt)
4. *Post-foreclosure* – if proceeds of sale are insufficient to satisfy debt, mortgagee can bring personal action against borrower for deficiency (about 1/2 of states allow borrower to redeem for a fixed period after foreclosure by paying sale price)

### B. Creation of Mortgage

1. **Mortgages** ⇒ conveyance of a security interest in land, intended by the parties to be collateral for the repayment of monetary obligation (Debtor is the *mortgagor* – Creditor is the *mortgagee* (*G I hope she pays me back*))
  - a. Elements – (i) *debt*, & (ii) *voluntary transfer of a security interest in debtor's land to secure the debt*
  - b. Writing Requirement – must be in writing to satisfy the Statute of Frauds
  - c. Functional equivalents – (i) *mortgage deed*; (ii) *the note*; (iii) *security interest in land*; (iv) *deed of trust in land*; (v) *sale lease-back* (v) *installment land contract*
2. *Equitable Mortgage*
  - a. Definition – owner of land (O) borrows money from Creditor, & the 2 parties understand that land is the collateral for the debt; however, instead of executing a note or mortgage deed, O hands Creditor a deed land that's absolute on its face
  - b. Parole evidence is freely admissible to show the parties' true intent
  - c. If Creditor proceeds to sell land to a **BFP**, BFP owns the land – O's only recourse is to proceed against Creditor for fraud, to recover the proceeds of the sale

### C. Parties' Rights (unless & until foreclose):

1. *Debtor-mortgagor* – has **title** & the right to possession
2. *Creditor-mortgagee* – has a **lien** (the right to look to the land if there's a default)

### D. Transferring Interests

– All parties may transfer their interests – mortgage automatically follows a properly transferred note

#### 1. Transfer by Creditor-Mortgagee

- a. By *executing a separate document* of assignment; OR
- b. By **endorsing the original note & delivering** it to the transferee
  - (i) Transferee is eligible to become a *holder in due course* (HDC)
    - (a) HDC BENEFIT – takes the note free of any *personal defenses* (e.g., lack of consideration, fraud in the inducement, unconscionability, waiver, & estoppel) that could've been raised against the original mortgagee (may foreclose the mortgage despite such defenses)
    - (b) HDC criteria:
      - Note must be *negotiable* – made payable to the named mortgagee
      - Original note must be *endorsed* – signed by the named mortgagee
      - Original note must be *delivered* to the transferee – photocopy is unacceptable
      - Transferee must take the note in *good faith* – without notice of any illegality
      - Transferee must *pay value* for the note (some amount that's more than nominal)
    - (c) BUT, HDC is still subject to “*real defenses*” that the maker might raise (**MaD FiF I<sup>4</sup>**)
      - Material alteration; Duress; Fraud in the Factum (misrepresentation/lie about the instrument); Incapacity; Illegality; Infancy; Insolvency

#### 2. Transfer by Debtor-Mortgagor

- a. Lien remains on the land, so long as the mortgage instrument has been properly recorded – **recording statutes apply to mortgages as well as deeds**
  - (i) If creditor-mortgagee (bank) properly records – not matter which recording statute
    - (a) *Notice state* – Buyer is on record notice of the lien at the time he takes
    - (b) *Race-notice* – Buyer takes subject to the lien because he’s on record notice, AND the bank won the race to record  
 HYPO: On January 10, Madge took out a \$50,000 mortgage on Blackacre with First Bank. First Bank promptly and properly recorded its interest on January 10. Thereafter, on January 15, Madge sold Blackacre to Buyer. Buyer had no actual knowledge of the lien. Buyer promptly and properly recorded its deed. Does Buyer hold subject to First Bank’s mortgage? YES. All recording statutes apply to mortgages as well as deeds. Thus, a subsequent buyer takes subject to a properly recorded lien. Does it matter which recording statute this jurisdiction has enacted? NO. In a notice state, Buyer takes subject to the lien because buyer is on record notice of the lien at the time buyer takes. In a race-notice state, Buyer takes subject to the lien because buyer is on record notice and First bank won the race to record
  - (ii) If creditor-mortgagee (bank) does not record before the transfer
    - (a) *Notice state* – Buyer wins, so long as a BFP (not matter who wins the race to record)
    - (b) *Race-notice* – depends on race to record – whoever records first wins
- b. **Personally liable on the debt** – when debtor-mortgagee sells?
  - (i) If Buyer takes “**assumed the mortgage**” – both O & B are personally liable on the debt, or any deficiency judgment after a foreclosure sale (B is primary liable, O is secondarily liable).
  - (ii) If Buyer takes “**subject to the mortgage**” – B assumes NO personal liability on the debt, & only O is personally liable (BUT, if recorded, the mortgage remains on the land, thus is O does not pay, the mortgage may be foreclosed)
- c. **Due-on-sale clauses** – allows the creditor to demand full payment of the loan if the mortgagor transfers any interest in the property without the lender’s consent (enforceable & allows the *creditor to foreclose*)

**E. Foreclosure**

- 1. Definition – property is sold to satisfy the debt in whole or part
  - a. Mortgagee must foreclose by proper *judicial proceeding* (NO SELF HELP)
  - b. NOTE: foreclosure can be avoided if the mortgagor can show *fraud or gross irregularity in the conduct of the sale*, BUT, *inadequacy of the sale price*, standing alone, is *not* a basis for avoiding it
- 2. **Proceeds of Sale of Mortgaged Property**
  - a. Proceeds amount
    - (i) *Less* – if the proceeds from the sale are less than the amount owed, the mortgagee can bring a personal action against the debtor for a *deficiency judgment*

\* *NY – deficiency judgment*  
*Demand must be made with 90 days of sale – if not proceeds are deemed to be in full satisfaction of the mortgage debt*

- (ii) *Surplus* – junior liens (i.e., creditor with lesser priority) are paid off in order of their priority; any remaining surplus goes to the debtor
- b. Proceeds payout (each claimant is entitled to satisfaction **in full** – if not, can seek *deficiency judgment*)
  - (i) first to the expenses of the sale, attorneys’ fees, & court costs
  - (ii) then to pay the principal & accrued interest on the foreclosed loan
  - (iii) then to any other junior lien-holders in the order of their priority
  - (iv) finally to the mortgagor  
 HYPO: Assume that Blackacre has a fair market value of \$50,000 and is subject to three mortgages executed by its owner, Madge. First Bank, with first priority, is owed \$30,000. Second Bank, with second priority, is owed \$15,000, and Third Bank, with third priority, is owed \$10,000. Assume that First Bank’s mortgage is foreclosed, and that Blackacre is sold for \$50,000. How will the funds be distributed? Off the top, attorneys fees. Then expenses for the foreclosure. Next, any accrued interest on First Bank’s mortgage. The sale proceeds are then used to pay off the mortgages in the order of their priority. Each claimant is entitled to satisfaction in full before a subordinated lienholder may take. Thus, First Bank takes: 30k. Then, Second Bank takes 15k. The remaining balance is applied toward Third Bank which takes 5k. Third Bank should be able to go for a deficiency judgment.
- 3. **Effect of Foreclosure on various interests**
  - a. BASICALLY, when a mortgage is foreclosed, Buyer at the foreclosure sale will take title as it existed when the mortgage was placed on the property
    - (i) *Foreclosure* destroys all *interests junior* to the mortgage being foreclosed – junior interests are paid from funds leftover after satisfaction of superior claims; can seek deficiency judgment if not satisfied
      - Junior interests are necessary parties and must be joined in a foreclosure action.
      - BUT failure to include junior interest holder in a foreclosure action results in *preservation of that party’s interests*

– his mortgage will remain on the land.

- (ii) **Foreclosure Does NOT affect any interests senior to the mortgage** being foreclosed – buyer at the sale takes *subject to such senior interests* (buyer not personally liable on the senior debt)
- b. Since, senior lien continues to exist at the hands of the foreclosure sale – Buyer has a strong incentive to pay off the senior mortgage (because Buyer is subject to a later foreclosure action by senior interest, even though he’s not personally liabilities)
- c. Buyer in foreclosure – should bid up to *FMV of property, minus amount for discharging senior interests*

- \* *NY – Methods of foreclosing*
  - 1. *Foreclosure by an action in equity and sale;*
  - 2. *Strict foreclosure (compel exercise right of redemption within reasonable time or forever barred redemption); and*
  - 3. *Foreclosure by Advertisement (extinguish redemption by sale of land without judicial proceeding or a court decree)*

#### 4. Priorities

- a. Generally, *priority among mortgages follows the chronological order* in which they were placed on the property (*‘first-in-time, first-in-right’*)
- b. BUT, this priority may be changed by:
  - (i) *Operation of the recording statute if a prior mortgage fails to record*
  - (ii) **Purchase money mortgage (“superpriority”)** – a mortgage given in exchange for funds used to purchase the property (**defies the ‘first-in-time, first-in-right’**); in other words, the *PMMs have priority over non-PPMs, even if non-PPM recorded first.*

HYPO: C1 lends \$200,000 to O, taking a security interest in all of O’s real estate holdings, “whether now owned or hereafter acquired.” (This clause is called an after-acquired collateral clause. It is permissible and commonplace.) C1 records the mortgage note. Six months later, C2 lends O \$50,000 to enable O to acquire a parcel known as Blueacre, taking back a security interest in Blueacre and recording that interest. Subsequently, O defaults on all outstanding obligations. All that he has left is Blueacre. Who has first priority in Blueacre, C1 or C2? C2, because it has superpriority – it has priority over the property that it financed.
  - (iii) **Subordination agreement** – private agreement between a senior & junior mortgagee where senior creditor agrees to subordinate its priority to a junior creditor – this is permissible
  - (iv) *Modification of senior mortgage* – junior mortgage has priority over the modification
  - (v) *Granting of optional future advance* – junior mortgage has priority over advances

#### 5. Redemption

- a. **Redemption in equity** – at any time prior to the foreclosure sale, the debtor has the right to redeem the land & free property of the mortgage (once the sale has taken place, the right to equitable redemption is cut off)
  - (i) Debtor must pay off the amount due (missed payments) + interest + costs
  - (ii) If note or mortgage contains *acceleration clause* – the full balance must be paid to redeem, plus accrued interest and costs.
  - (iii) Debtor may not waive the right to redeem in the mortgage – called *clogging the equity of redemption*, and it is prohibited as a matter of public policy.
- b. **Statutory redemption** (recognized in 1/2 of states, but **NOT recognized in NY**) – gives the debtor-mortgagor a statutory right to redeem for some fixed period (e.g. 6 months) **after** the foreclosure sale has occurred
  - (i) Amount to be paid is usually the *foreclosure sale price*, rather than the amount of the original debt
  - (ii) During the statutory period, the debtor-mortgagor has the *right to possession*
  - (iii) If mortgagor redeems, it has the effect of nullifying the foreclosure sale, restoring the debtor to title

### VIII. Rights Incidental to Ownership of Land (Natural Rights)

#### A. Lateral and Subjacent Support

- 1. *Lateral Support* – ownership of land includes the right to have the land supported in its *natural* state by adjoining land
- 2. Adjacent landowner excavation causing damage to buildings:
  - a. Strict Liability – ONLY IF it is shown that the land would have collapsed in its natural state. Harsh burden to sustain for the plaintiff b/c plaintiff must show that its improvements did not contribute to the collapse.
  - b. Negligent – otherwise liable if acted negligently (this is the usual COA)

#### B. Water Rights

- 1. **Water-courses** – 2 major system of allocation of water in water courses (e.g., streams, rivers, & lakes):
  - a. **Riparian doctrine** – water belongs to those who own the land bordering the water course
    - (i) *Riparians* (owners of such water) – share the *right of reasonable use of the water*
    - (ii) Liability attaches if use unreasonably interferes with others’ use (*natural* use prevail over *commercial* use)
  - b. **Prior appropriation doctrine** – water belongs initially to the state, but the right to divert it & use it can be acquired by an individual, regardless of whether he’s a riparian owner

- (i) Rights are determined by *priority of beneficial use* ('first-in-time, first-in-right').
- (ii) Any productive/beneficial use is sufficient to create appropriation right, including use for *agriculture*
- 2. **Groundwater (percolating water)** – water beneath the surface of the earth not confined to a known channel
  - a. Surface owner is entitled to make reasonable use, BUT must not be wasteful
- 3. **Surface waters** – rain, springs, or melting snow, & which hasn't yet reached a natural watercourse or basin
  - a. *Common Enemy Rule* – landowner may change drainage or make any other changes/improvements on his land to combat the flow of surface water
  - b. But, many states have modified the common enemy rule to prohibit unnecessary harm to others' land
- C. **Possessor's Rights** – possessor of land has right to be free from trespass & nuisance:
  - 1. *Trespass* – invasion of land by a tangible physical object (to remove, bring an action for *ejectment*)
  - 2. *Private nuisance* – substantial & unreasonable interference with another's use & enjoyment of the land
    - a. Unlike trespass, doesn't require tangible physical invasion, & therefore *includes odors & noise*
    - b. NO *hypersensitive* plaintiff's claims are allowed though

## IX. Government Restrictions

### A. Eminent Domain

- 1. Definition – government has a 5<sup>th</sup> Amendment power to take private property for public use in exchange for just compensation:
  - a. *Explicit takings* – act of governmental condemnation (e.g., government condemns land for highway)
  - b. *Implicit or regulatory takings* – government regulation that, although not intended to be a taking, has the same effect (e.g., regulation has worked an *economic wipeout of your investment*)
- 2. Remedy – government must either:
  - a. Compensate the owner for the taking, OR
  - b. Terminate the regulation & pay the owner damages that occurred while the regulation was in effect

### B. Zoning

- 1. Definition – pursuant to its police powers, government may enact statutes to reasonably control land use
- 2. **Variance** – permits landowners to depart from requirements of a zoning ordinance
  - a. *Administrative action* typically granted/denied by a zoning board
  - b. Proponent must show – (i) undue hardship & (ii) variance won't work detriment to other property values
- 3. **Non-conforming use** – once lawful, existing use which no longer conforms to a new zoning ordinance
  - a. Cannot be eliminated all at once unless just compensation is paid
  - b. Otherwise, could be deemed an *unconstitutional taking*
- 4. **Unconstitutional exactions** – amenities government might seek *in exchange for granting permission* to build
  - a. E.g. landowner must provide new streetlights, a small park, and wider roads (these are called exactions) in exchange for permission to build a residential building.
  - b. To pass constitutional scrutiny, these exactions must be reasonably related, both in nature & in scope, to the impact of the proposed development.