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Table of Contents

CHAPTER 1. WHAT IS PROPERTY?

Property is anything that a person has legal title to. In other words, the term property describes the legal relationship of a person to a thing.

A. There are 2 types of property that can be owned:

1. **Personal property** — tangible and intangible things:

a. *Tangible property* — items that are movable, like merchandise and animals.

b. *Intangible property* — includes rights, like stock, bonds, patents, and copyrights.

2. **Real property** — consists of land and anything erected on, growing on, or affixed to the land — including buildings, light fixtures and crops.

a. *** Note that land also refers to the air above and the ground below the earth's surface.

B. There are many different **rights** that can be **associated with property**. Since property consists of many rights, it is useful to imagine every piece of property (real or personal) as a **bundle of rights** that can be divided up and held by different parties.

Example — The utility company has an easement to have a telephone pole on someone's land.

→ In this case, the landowner holds the largest bundle of rights, which include the right to occupy the land, the right to exclude others, and the right to transfer the property. At the same time, the utility company has a smaller bundle of rights associated with the land, which includes the right to have a telephone pole on the property as well as the right to enter the property to make necessary repairs.

C. In order for an item to be considered property, the **legal system must enforce ownership rights** in the item. In regards to personal property, essentially everything in existence is considered property; however, there are rare exceptions.

Example — A California court has held that surgically removed body parts are not property. In this case, researchers had removed tissue from patients and subsequently profited off the tissue. The patients sued for the money that was made off their own tissue, claiming that they had an ownership interest in the tissue. (*See Moore v. Regents of the University of California* (1990))

→ In this case, the patients did not recover because the court held that no one legally owns body parts or tissue once removed from the human body. The court's decision was based upon several public policy considerations, including the desire to further technical innovation in the field of medicine and preventing the selling of human body parts or tissue on the black market.

D. While certain tangible items (body parts) may be considered items that are NOT property, keep in mind that certain intangible things—like **intellectual property**—CAN be considered property.

1. **Intellectual property** consists of patents, copyrights, trademarks, trade secrets, and the right in one's identity.

► In this outline, we will discuss how someone becomes the owner of property. We will look at what happens when personal property is lost and found. We will discuss the estate system and the different types of interests people can have in real property. We will then cover landlord tenant law. After that we will look at nonpossessory interests in real estate, such as easements and covenants. Then we will discuss the real estate buying and selling process. Lastly we will discuss deeds and mortgages.

CHAPTER 2. OWNERSHIP AND ACQUISITION — WILD ANIMALS

A. Generally, one gains title to real and personal property by *acquiring* it from another. However, in certain circumstances, like for **property that has no owner**, one can gain title to property simply by *possessing* the property.

1. *Examples* of **unowned property** include wild animals, resources (like oil and natural gas), and abandoned property.

B. The most basic rule for determining ownership of property is the **first in time rule** (also known as the rule of capture).

1. Under the first in time rule, the first person who takes hold of property becomes the owner.

C. In order to hold title to **real property**, such rights arise only through government.

a. Each state in the United States has exclusive jurisdiction over the land within its borders, and therefore States have the power to determine the laws for transferring ownership of land.

1) Usually land is transferred by a deed, but there are other ways, including by will or by contract.

2) Note that when an individual purchases real property, he buys the bundle of rights previously held by the seller. The transferring of real estate will be discussed later in this outline.

D. **Personal property** can be transferred from its owner to another by sale, contract, or gift.

a. However, for property that does NOT have a true owner, one gains title to the property based on the first in time rule.

1) This means that the first person to exercise dominion and control over an unowned item gains rights in the item that are superior to everyone else.

E. A **WILD ANIMAL** (that is not on private property) is an example of unowned property.

1. Based on the first in time rule, a person will become the owner of a wild animal:

(i) By *capturing* the animal,
(ii) by *mortally wounding* the animal, or
(iii) By obtaining *constructive possession* of the animal.

2. One can become the owner of a wild animal by **CAPTURING** the animal.

a. If someone is **in pursuit** of the wild animal, that does not give the pursuer any rights to the animal.

Example — In the landmark case, ***Pierson versus Post*** (1805), a hunter was in pursuit of a fox on vacant land, but before he could catch the fox, someone else came along and killed the fox and took it away. The hunter sued.

→ In this case, the Court held that hunter was not entitled to fox because although he was in pursuit of the animal, he never actually captured it.

b. In some jurisdictions, a person who is in pursuit of unowned property may have what's called a **pre-possessory interest** in the property once his effort to possess is interrupted by another's unlawful act.

Example — A home run is hit at a baseball game and Tom goes after the ball. Jerry pushes Tom out of the way and Jerry ends up with the ball.

→ In this case, because Jerry committed a battery against Tom to get the baseball, the court may award Tom a pre-possessory interest in the ball, and order that Tom and Jerry both own the ball

3. Besides capture, one can become the owner of a wild animal by **MORTALLY WOUNDING** the animal.

Example — Let's assume that the hunter had shot and mortally wounded the fox. But before the fox died, someone else came along and captured the animal.

→ In this case, the hunter would be entitled to the fox because he mortally wounded the animal before anyone else captured the animal.

a. *** Note that once a wild animal has been captured and is under the control of the owner, the owner's right of ownership can be stripped away if the animal **escapes** or is **released** back into the wild.

1) The animal will then once again be unowned and the next person to capture it will become the new owner.

4. Besides capturing and mortally wounding a wild animal, one can also become the owner if he exercises **CONSTRUCTIVE POSSESSION** over the animal.

a. Constructive possession is a legal theory used to extend possession to situations where a person has *no hands-on custody of the property*.

1) An example of constructive possession of wild animals occurs when the animal has been **trapped**.

a) If someone lawfully traps a wild animal, they will become the owner of the animal through constructive possession.

2) Constructive possession of wild animals also occurs when an animal is **on private property**.

a) While a wild animal is on private property, the landowner is said to have constructive possession over the animal.

b) Therefore, if someone were to *trespass* on another's property in order to capture a wild animal, the trespasser would not have any rights in the animal because the landowner already had constructive possession.

c) Note that once a wild animal *leaves* someone's property, that property owner no longer has constructive possession over the animal.

► In this chapter, we discussed how one gains rights to unowned property like wild animals by the first in time rule.

CHAPTER 3. OWNERSHIP AND ACQUISITION — NATURAL RESOURCES AND WATER

Another type of *unowned property* (besides wild animals) is **natural resources** — like oil, natural gas, and minerals.

A. Generally, **natural resources** that are embedded in the ground beneath a property belong to the owner of the surface property above.

1. However, if natural resources are in a *pool* that lies beneath several parcels of property, the first in time rule (the rule of capture) applies.

B. Natural resources that move freely among properties are known as **fugitive resources**.

1. When a landowner extracts a fugitive resource (like oil) from the ground, and captures and stores the oil, the landowner becomes the owner of the oil.

a. Note that if the oil then leaks away, the landowner will lose ownership of the oil, just as a person will lose ownership of a wild animal that escapes.

2. Note that landowners have the exclusive right to use and possess not only the *surface* of the land, but also the *airspace* above, and anything *underneath* the property.

a. This means that landowners may not drill diagonally to capture underground resources that are underneath another's property.

3. Note that landowners also have *the right to have their land supported in its natural state by neighboring properties and by any underground occupants*, like a mining company.

4. Note that **surface water** (like rainfall) is considered a fugitive resource. Therefore, a landowner can capture and use as much surface water as desired.

C. However, different rules apply to water from rivers, streams, and lakes. These sources of water are referred to as **watercourses**. The rules of ownership in regard to watercourses are determined by either the riparian doctrine or the prior appropriation doctrine.

1. The **riparian doctrine**, which is common in the eastern part of the United States, provides that the rights to the water belong equally to all the owners of land that border the water. Generally, each riparian landowner must use the water in a reasonable manner and cannot deprive the other riparian owners of the water.

2. The **prior appropriation doctrine**, which is more common in dry areas of the United States, provides that the first person to use the water for a beneficial use gains priority to the water. Note that in some jurisdictions, the state is considered the owner of the water and therefore the state may decide how to appropriate the water rights.

► In this chapter, we discussed how one gains rights to unowned property like natural resources; and we learned about the rules of ownership in regard to water.

CHAPTER 4. LOST PROPERTY AND FINDERS

We have learned that the fundamental rule for determining ownership of *unowned property* is the **first in time rule**, which states that the first person to take hold of the property owns it.

Wild animals and natural resources are common types of unowned property. Another type of unowned property is property that has been **abandoned**.

A. Property becomes **ABANDONED** when its owner has intentionally given it up.

1. Once property has been abandoned, any finder of the abandoned property will become the true owner.

2. However, when someone finds property that is owned by another, different rules apply.

a. When someone finds property that has a true owner, the general ***rule*** is that the finder has rights to the property that are superior to everyone else except the true owner.

B. Jurisdictions may distinguish between found property that is **lost** or found property that is **mislaid**.

1. In jurisdictions that make this distinction, the *finder of lost property* is entitled to possession against everyone else except the true owner and any prior possessors.

2. On the other hand, the *finder of mislaid property* has no rights in the property; instead, mislaid property goes to the owner of the place where the property was found.

C. Personal property is considered to be **LOST** if the owner has unintentionally parted with it and does not know its location.

Example of lost property — a wallet found on a sidewalk.

→ The wallet unintentionally fell out of a man's' pocket and would be considered lost property. If someone were to find the wallet on the sidewalk, the finder would be entitled to possession against everyone but the true owner and any prior possessors.

D. On the other hand, **MISLAID** property is an item that was intentionally put somewhere, and then forgotten about.

Example of mislaid property — a laptop found near a seat in a classroom.

→ The owner intentionally put the laptop next to his seat during class, but left class and forgot about the laptop, which would be considered mislaid property. If a student were to find the laptop, he would not be entitled to the property. Instead, the school has rights to the laptop against everyone but the true owner.

E. The rules for lost and mislaid property **strive to return property to its rightful owner**.

1. Since mislaid property was intentionally placed somewhere, the original owner would most likely return to that location to recover the property. Therefore, mislaid property goes to the owner of the site where it was found, and not to the finder.

F. Note that the finder of lost or mislaid property does not actually have a right to keep the property, they just have **rights in the property over everyone else but the rightful owner and prior possessors**.

1. Many states actually make it a crime to keep found property without making a reasonable attempt to locate the true owner and return the property.

G. Note that if a person finds lost property while **trespassing**, the finder does not have any rights in the found property.

H. Note also that when an **employee** finds lost property during and within the **scope of employment**, the property will usually be awarded to the employer rather than to the employee who found it.

I. Besides lost, mislaid, and abandoned property, personal property can also be classified as a **TREASURE TROVE**.

1. Treasure troves are basically gold or silver, or ancient treasures that have been hidden by an unknown owner in the earth or other private place for an extended period of time.

a. In the absence of contrary state law, the title to treasure trove belongs to the finder against all others with the exception of the true owner. And if the finder is trespassing, the treasure trove will go to the landowner.

► In this chapter, we discussed the rules of ownership for finders. We learned the distinction between lost and mislaid property, and briefly discussed abandoned property and treasure troves.

CHAPTER 5. BAILMENTS

A. **Bailment** — when someone releases possession of their property to another, with the intention that the property will be returned.

1. Unlike a sale or gift (which is a transfer of ownership), a bailment is just a *temporary transfer of possession*.

2. *Examples* — Letting your friend borrow your car or dropping off clothes at dry cleaners.

3. When a bailment occurs, the owner of the property is called the **bailor**, and the person who holds the property is called the **bailee**.

B. In order to **form a bailment**, the bailee must actually *accept possession of the property*, and must have *intended to take possession*.

1. *** Note that *possession* is different than *custody*.

Example — When you valet park your car, you give up possession, and this would be a bailment. However, if you merely park your car in a commercial parking lot, you only give up custody and this would not be a bailment.

C. Once a bailment has been established, a **duty of care** attaches to the bailee.

1. Failure to act within the duty of care can cause the bailee to be liable for any damage or loss to the property.

2. However, the **standard of care** owed by the bailee will depend on who benefits from the bailment relationship. There are 3 types of bailment relationships:

a. One where **only the bailee benefits** from the relationship.

Example — Your friend borrows your car. → For this type of bailment, the bailee's duty of care is at its highest, and the bailee will be liable for harm to the property through slight negligence.

b. One where the **bailor is the sole beneficiary** (this may be known as a gratuitous bailment).

Example — A friend stores your couch in his basement as a favor. → For this type of bailment, the bailee has the lowest duty of care and will be liable only if the property gets damaged through gross negligence.

c. One that **mutually benefits both parties**. This is known as a bailment for hire.

Example — You drop off your clothes at a dry cleaner. → In this case, both you and the dry cleaner benefit, because you get your clothes cleaned, and the dry cleaner gets paid. For this type of bailment, the bailee will be liable if the property gets damaged through ordinary negligence.

► In this chapter, we discussed bailments. We learned that a **bailment** is the temporary possession of goods by someone other than the true owner.

CHAPTER 6. ADVERSE POSSESSION

A. If a trespasser comes onto your land and occupies it for a specific period of time, the trespasser may become the owner of the property. This is known as **adverse possession**.

1. The *time of possession* that is required for adverse possession to occur is the statutory period that a property owner has to bring an action for trespass. The statutory period varies among jurisdictions, it can range from 5 to 20 years, but is most commonly 10 years.

B. Real property as well as personal property can be adversely possessed.

1. With regard to *personal property*, if a person holds an object without being sued by the true owner within the statute of limitations, the owner can no longer sue to recover the item, and the wrongful possessor becomes the owner.

2. In order to adversely possess *real property*, **5 elements** must be met:

(i) Actual possession,
(ii) Exclusive possession,
(iii) Open and notorious possession,
(iv) Hostile possession, and
(v) Continuous possession.

C. **ACTUAL POSSESSION**

1. Actual possession means there has to be a *physical trespass* on the property.

a. The adverse possessor has to actually enter the land and use the land for the entire duration of the statutory period.

D. **EXCLUSIVE POSSESSION**

1. Exclusive possession means the adverse possessor is the only one occupying the land and does not share possession with the owner or anyone else.

2. However, note that that an adverse possessor may possess the property *together with other persons*, in which case all the possessors would adversely possess the property together.

E. **OPEN AND NOTORIOUS POSSESSION**

1. Open and notorious means that the possession is visible and the land is being used in a way that is obvious enough to put the owner on notice of the adverse use.

a. *Examples* of open and notorious possession include erecting a fence, changing the locks to a house or apartment, and planting and harvesting crops.

2. Open and notorious means that the possession cannot be done in a *secret manner*.

a. For instance, if an adverse possessor were to leave the land every time the owner comes to check on the land, this would not be open and notorious possession.

F. **HOSTILE POSSESSION**

1. Hostile possession means the adverse possessor is possessing the property without permission.

2. Therefore, if the owner at any time gives an adverse possessor *permission* to be on the property, the possession is not hostile and the property cannot be adversely possessed.

G. **CONTINUOUS POSSESSION**

1. This means the possessor has uninterrupted possession of the property continuously for the entire statutory period.

2. When a possessor begins a trespass, the adverse possession continues to run even if the owner **transfers** the property.

a. Selling property that is being adversely possessed does not cause the statute of limitations clock to start over.

3. Successive trespassers may be able to "**tack**" their possessions upon one another to complete an adverse possession. This is known as **tacking**.

a. In order to tack periods of adverse possession, the transfer of possession must be *continuous* and made *voluntarily*.

Example — Andrew moves into a vacant farmhouse in Colorado, which has a statute of limitations of 10 years. Three years after the beginning of Andrew's trespass, he gives the farmhouse to Bert. Bert adversely possess it for 3 more years and then sells it to Carl. Carl lives there for 4 years.

→ At this point, since the farm was transferred voluntarily from Andrew to Bert to Carl, their periods of possession are tacked onto each other, totaling the statutory period of 10 years. Therefore, Carl has acquired title to the farmhouse by adverse possession.

4. An adverse possessor need only occupy property as an **average owner** would.

Example — For a vacation home on the beach, an adverse possessor need only live in the home during the summers to satisfy the continuous element.

5. When the continuity of adverse possession is **interrupted by an act of god**, this will usually have no effect on the continuous element.

Example — In a state that has a 10-year statute of limitations, if a trespasser has been planting and harvesting crops on another's property for 8 years, and then the property floods and the trespasser is unable to grow crops for 2 years, the trespasser may still be able to adversely possess that area of land.

H. **EMINENT DOMAIN**

1. Another way that private property may be taken away from an owner.

2. **Eminent domain** is governmental power to appropriate land within their own borders for whatever use that they see fit.

a. Under the Takings Clause in the 5th Amendment of the Constitution, the govt may take private property for public use if just compensation is paid to the landowner.

1) Common examples include taking property to build highways or parks.

► In this chapter, we discussed the doctrine of **adverse possession**, which occurs when someone gains title to another's property by wrongfully possessing the property for the length of time under the statute of limitations. We learned that 5 elements must be met for adverse possession to be effective: actual possession, exclusive possession, open and notorious possession, hostile possession, and continuous possession.

CHAPTER 7. THE ESTATE SYSTEM — FREEHOLD ESTATES

There are several types of estates that can be held for real property: freehold estates, nonfreehold estates, concurrent estates, future interests, and incorporeal interests.

A. **FREEHOLD ESTATE** — a present interest in real property that is of uncertain duration.

B. There are 3 kinds of **freehold estates**:

(i) Fee simple,
(ii) Fee tail, and
(iii) Life estate.

C. **FEE SIMPLE**

1. Fee simple estates are the most common, and grant a complete interest in land. The holder of fee simple may use the property without conditions or limitations.

2. There are 2 kinds of fee simple: **absolute** and **defeasible**.

a. The **absolute fee simple** is the highest level of ownership a person can have in real property. One who owns an estate in fee simple absolute essentially owns the largest bundle of rights. An owner in fee simple is entitled to use, possess, lease, or dispose of the real property however he chooses during his lifetime and in perpetuity for a potentially infinite duration.

Example — The Owner of Greenacre grants the property to Adam in a written conveyance.

→ Adam now owns Greenacre in fee simple absolute. Adam has the right to do whatever he likes with the property, and he may leave it to whom he prefers after he dies. And if Adam were to die **intestate** (which means dying without a will), the estate will be divided among his heirs according to state laws.

b. Traditionally, in order for a grantor to convey property in fee simple absolute, the grantor must use the language "to Adam and his heirs" in a written conveyance. However, today in the majority of jurisdictions, the phrase is no longer necessary, as *fee simple absolute is presumed*.

D. **FEE TAIL**

1. The fee tail is an archaic system that was designed to establish family dynasties, and it requires that land be passed to blood heirs. The fee tail has essentially been abolished.

E. **LIFE ESTATE**

1. The holder of a life estate has the right to possess the property for the duration of his life. Once a life tenant dies, the property reverts back to the owner or goes to a third party.

Example — Grantor conveys Greenacre to Adam for life.

→ In this conveyance, Adam has a life estate and Grantor has a future interest in fee simple absolute. Therefore, Adam has the right to possess Greenacre during his lifetime, and upon Adam's death, the property will revert back to Grantor.

2. A life estate does not have to be measured by the life of the holder, but can also be measured by the life of another person. This is called a **life estate pur autre vie**.

Example — Grantor conveys Greenacre to Adam for the life of Emily.

→ In this conveyance, Adam has the right to possess Greenacre until Emily dies, at which time the property will revert back to Grantor in fee simple absolute.

► In this chapter, we discussed **freehold estates**. We learned about the **fee simple absolute**, which is an interest in property that allows the holder to own and possess the property in perpetuity. And we also learned about the **life estate**, which is an interest in land that lasts only as long as the life of a specific person.

CHAPTER 8. THE DOCTRINE OF WASTE

The holder of a life estate is permitted to use property in the same manner as an owner of a fee simple. However, a life tenant must leave the property in reasonably good condition for the future interest holders.

Therefore, life tenants have a duty to refrain from damaging the property or doing anything to lower its value. In other words, the holder of a life estate may not commit **waste** on the property.

A. There are 3 different types of **waste**:

(i) Voluntary waste,
(ii) Permissive waste, and
(iii) Ameliorative waste.

B. **VOLUNTARY WASTE** (also called affirmative waste) — any act that harms the value of property.

1. Voluntary waste includes destroying structures on the property and exploiting natural resources from the land.

2. However, there are a few *exceptions* that allow life tenants to exploit resources:

a. If they are given permission to, either by the conveyance or by future interest holders.
b. If the land is only suitable for exploitation, like a mine.
c. If it is necessary for repair or maintenance.
d. If exploitation of resources was happening before the land was conveyed to the life tenant (known as the *open mines doctrine* or the *prior use exception*).

C. **PERMISSIVE WASTE** — Permissive waste occurs when the life tenant fails to take reasonable steps to protect the property.

1. *Examples* of permissive waste include failure to make normal repairs to maintain the property and failing to pay the property taxes.

D. **AMELIORATIVE WASTE** — Ameliorative waste is actually an improvement to property that changes the physical character of the property, and may increase the value of the property.

1. An *example* would be tearing down an old barn and building a bigger barn in its place without getting permission from the future interest holders.

► In this chapter, we learned that the holder of a life estate may do what he wants with the property for the duration of his life, but may not commit voluntary waste, permissive waste, or ameliorative waste on the property.

CHAPTER 9. DEFEASIBLE FEES

A. **Defeasible fee** — an estate of potentially infinite duration but it can be taken away from the holder in the future by a specific event stated in the conveyance.

1. A defeasible fee is like a fee simple absolute, except it can be terminated at some point in the future.

a. *** Since defeasible fees may be terminated, they are always followed by a future interest.

B. There are 3 types of **defeasible fee simple estates**:

(i) The fee simple determinable,
(ii) The fee simple subject to condition subsequent,
(iii) The fee simple subject to an executory interest.

C. **FEE SIMPLE DETERMINABLE**

1. A fee simple that ends automatically if a certain event happens.

2. The fee simple determinable estate is followed by a future estate known as a **possibility of reverter**.

3. A fee simple determinable is established by durational language in the conveyance, which includes words like “while, during, until, and so long as.”

Example — Grantor conveys Blackacre to Henry so long as it's used for a library.

→ In this conveyance, Henry has a fee simple determinable and Grantor has a possibility of reverter. If Blackacre ceases to be used for a library, Henry's ownership would automatically end and the property would revert to Grantor.

D. **FEE SIMPLE SUBJECT TO CONDITION SUBSEQUENT**

1. A fee simple subject to condition subsequent is like the fee simple determinable, except it does not automatically terminate when a specific event occurs. Instead, if the triggering event occurs, the grantor has the option to recover the property and must take steps to do so.

2. The fee simple subject to condition subsequent estate is followed by a future estate known as a **right of entry** or **right of re-entry**.

3. A fee simple subject to condition subsequent is established by words like "provided that, but if, and upon the condition that."

Example — Grantor conveys Whiteacre to Pam, but if Pam does not use the land to grow melons, then grantor has a right of entry.

→ In this conveyance, Pam has a fee simple estate subject to condition subsequent, and Grantor has a future interest right of entry. If Pam ever stops growing melons on Whiteacre, Grantor can enter the land or file a lawsuit to repossess the property. If Grantor does nothing, Pam continues to own Whiteacre until Grantor takes action.

E. **FEE SIMPLE SUBJECT TO EXECUTORY LIMITATION**

1. A fee simple subject to executory limitation is like the fee simple determinable except, if the event happens, the property automatically goes to a third party, not back to the grantor.

2. The fee simple subject to executory limitation is followed by a future estate known as an **executory interest**.

Example — Grantor conveys Orangeacre to Philip so long as it has a museum, and if the land stops being used for a museum, then the property goes to the Red Cross.

→ In this conveyance, Philip holds a defeasible fee simple subject to executory limitation and Red Cross has an executory interest. If Orangeacre is ever used for something other than a museum, it automatically goes to the Red Cross.

► In this chapter, we discussed the **defeasible fees**, which are present fee simple interests in real property that can be terminated by the occurrence of an event.

(i) **Fee simple determinable** is followed by a *possibility of reverter* (the property automatically goes back to the Grantor).
(ii) **Fee simple subject to condition subsequent** is followed by a *right of entry* (the grantor must take action to acquire the property).
(iii) **Fee simple subject to executory interest** is followed by an *executory interest* (the property automatically goes to a third party).

CHAPTER 10. FUTURE INTERESTS

A. A **Future Interest** in real property is the right to possess the land in the future.

1. A future interest may be *conditioned* upon the occurrence of an event, or it may be *unconditional*.

a. In the previous chapter, we discussed **conditional** future interests in connection with defeasible fees.

1) Recall that a *possibility of reverter*, *right of entry*, and *executory interests* are all future interests that may cut short a prior defeasible fee simple estate if a certain event happens.

b. In this chapter, we will discuss **unconditional** future interests that follow after the natural termination of an estate. These future interests are called *reversions* and *remainders*.

B. A **REVERSION** is a future interest that returns to the *original grantor*.

Example — Grantor conveys Blueacre to Paul for life.

→ In this conveyance Paul has a life estate and since nothing else is stated Grantor has a *reversion* in fee simple absolute. Once Paul dies Blueacre will revert back to Grantor

C. A **REMAINDER** is a future interest that passes to any *3rd party* other than the original grantor.

Example — Grantor conveys Blueacre to Paul for life, then to Betty and her heirs.

→ In this conveyance Paul has life estate, Betty has *remainder* in fee simple absolute.

D. There are 2 types of **remainders** — *contingent remainders* and *vested remainders*:

1. **CONTINGENT REMAINDER**

a. Exists when it is uncertain who will take possession of the property or when it is uncertain if the holder will be able to take possession.

b. In other words, a contingent remainder is a *remainder that is owned by an unascertained party* or a *remainder that is subject to a condition*.

Example — Grantor conveys Yellow Acre to Julia for life, then to Julia's heirs.

→ In this conveyance, Julia has a life estate, Julia's heirs have a contingent remainder, and Grantor has a reversion. Note that Julia's heirs have a contingent remainder because a living person has no heirs and it is uncertain who Julia's heirs will be until Julia dies.

Example — Grantor instead conveys Yellow Acre to Julia for life, then to David if David survives Julia.

→ In this conveyance, Julia has a life estate, David has a contingent remainder, and Grantor has a reversion. Note that David has a contingent remainder because it is uncertain whether or not David will be alive to take the property when Julia dies.

2. A **VESTED REMAINDER**

a. Exists when it is clear who is getting the future interest.

b. <u>There are 3 types of vested remainders</u>:

1) A **typical vested remainder** cannot be taken away from the holder of the future interest.

<u>Example</u> — Grantor conveys Red Acre to George for life, then to Brook and her heirs.

→ In this conveyance, George has a life estate and Brook has a vested remainder in fee simple absolute. Brook has a vested remainder because it is certain that she will obtain Red Acre upon George's death. Note that if Brook were to die before George, then Brook's heirs would inherit the future interest.

2) A **vested remainder subject to open** is created in a class of persons and is an interest that may diminish in value if more persons become members of the class

<u>Example</u> — Grantor conveys Redacre to Barry for life, then to Barry's children and their heirs.

→ Note that if Barry has no children, then Barry's children have a contingent remainder because it is uncertain whether Barry will ever have children. However, once Barry has a child, or if Barry has a child at the time of the conveyance, then the child has a vested remainder subject to open.

3) A **vested remainder subject to divestment** arises when it is certain who will take the future interest, but something could happen that will take away their interest.

<u>Example</u> — Grantor conveys Redacre to Barbie for life, then to Ken for life.

→ In this conveyance, Barbie has a life estate, Ken has a vested life estate remainder subject to divestment, and Grantor has a reversion in fee simple absolute. Ken's future interest is a vested remainder subject to divestment because Ken is certain to get the life estate if he outlives Barbie; however, if Ken dies before Barbie dies, then his interest will be taken away, or divested.

a) *** Note that vested remainders subject to divestment are very similar to *contingent remainders*, and the only difference between the two is in the phrasing of the conveyance.

► In this chapter, we discussed **future interests** in real property, which are interests in land that become possessory at some point in the future. The future interests include possibility of reverter, right of entry, executory interests, reversions, and remainders. **Possibility of reverter**, **right of entry**, and **executory interests** are future interests that follow from the defeasible fees. **Reversions** are future interests that revert back to the original owner. **Remainders** are a future interests that go to a third party.

CHAPTER 11. RULES FURTHERING MARKETABILITY

Certain conveyances have the effect of causing property to become **inalienable**. This means that no one has the right to possess the property, and it is incapable of being transferred.

To prevent this from happening, there are several rules that further marketability (also known as rules that promote alienability):

(i) The destruction of contingent remainders,
(ii) The rule in Shelley's Case,
(iii) The doctrine of worthier title, and
(iv) The rule against perpetuities.

*** Note that in most jurisdictions today these rules have become obsolete.

A. DESTRUCTIBILITY OF CONTINGENT REMAINDERS

1. Requires that contingent remainders must vest before or upon termination of the prior estate, or else they are destroyed.

Example — Grantor conveys Purpleacre to Ricky for life, then to the heirs of Lucy.

→ In this conveyance, Ricky has a life estate, the heirs of Lucy have a contingent remainder, and Grantor has a reversion.

When Ricky dies, Purpleacre goes to the heirs of Lucy. However, if Lucy is still alive, she has no heirs. As a result, the property would be in limbo until Lucy dies and her heirs, if she has any, inherit the property. This space in time where no one has the right to possess Purpleacre restricts marketability.

Therefore, under the rule of destructibility, the contingent remainder held by Lucy's heirs will be destroyed if it fails to vest upon Ricky's death. And instead Purpleacre would revert back to Grantor.

2. Today, the rule of destructibility has been abolished in most states. Instead of destroying the contingent remainder, the holder receives an executory interest.

a. So in our *example*, if Ricky dies and Lucy is still alive, Purpleacre would revert back to Grantor, but Lucy's heirs would have an executory interest.

B. RULE IN SHELLEY'S CASE

1. The rule in Shelley's case applies when one instrument conveys property to a person for life and then to that person's heirs. Under the rule, a remainder interest held by heirs of a holder of a present interest will not be recognized.

Example — Grantor conveys Purpleacre to Barney for life, then to Barney's heirs. In this conveyance, Barney has a life estate, his heirs have a contingent remainder, and Grantor has a reversion.

→ Since Barney's heirs have a remainder that follows Barney's life estate, this conveyance violates the rule in Shelley's case. As a result, Barney would own Purpleacre in fee simple absolute and he may dispose of the property as he likes. Note that today most states have abolished the rule in Shelley's case.

C. **DOCTRINE OF WORTHIER TITLE**

1. The doctrine of worthier title destroys remainders and executory interests in the heirs of a grantor. In other words, the doctrine prevents a grantor from creating a remainder interest in his own heirs.

Example — Grantor conveys Purpleacre to Sam for life, then to Grantor's heirs.

→ In this conveyance, Sam has a life estate, the Grantor's heirs have a contingent remainder, and Grantor has a reversion. Since the grantor's heirs have a remainder interest, this conveyance violates the doctrine of worthier title. As a result, the remainder would be destroyed, and once Sam dies, Purpleacre would revert back to Grantor. Today this doctrine is abolished in most states.

D. **RULE AGAINST PERPETUITIES**

1. The rule against perpetuities destroys executory interests, contingent remainders, and vested remainders subject to open—when any one of them is not certain to vest or fail within the perpetuities period.

a. The **perpetuities period** ends 21 years after a life in being.

1) A **life in being** is the life of someone mentioned in the conveyance who is also alive at the time of the conveyance.

Example — Grantor conveys Purpleacre to Tucker so long as the land is used to grow corn, and if it stops growing corn, then the property goes to Ned and his heirs.

→ In this conveyance, Tucker has a fee simple subject to executory limitation and Ned has an executory interest. The problem here is that no one knows when Ned's executory interest will vest, or when Purpleacre will stop growing corn. It could be hundreds of years from now.

Since it is not certain that Ned's executory interest will vest or fail within 21 years of a life in being, which would be Tucker's or Ned's life, the rule against perpetuities applies and destroys Ned's executory interest. Therefore, under the rule, Tucker owns Purpleacre in fee simple absolute.

► In this chapter, we discussed the rules that further marketability of real property. We learned about destructibility of contingent remainders, the rule in Shelley's Case, the doctrine of worthier title, and the rule against perpetuities. While these concepts are important to be aware of, they are not of practical significance because they have generally become obsolete.

CHAPTER 12. CONCURRENT ESTATES

A. **Concurrent estate** — an interest in real property that can be held simultaneously by 2 or more parties.

B. There are 3 basic types of **concurrent estates**:

(i) Tenancy in common,
(ii) Joint tenancy, and
(iii) Tenancy by the entirety.

C. **TENANCY IN COMMON** (the most common)

1. Tenancy in common is a form of concurrent ownership in which 2 or more parties have the right to possess and use property simultaneously, and each co-tenant may freely sell or transfer their share.

2. A concurrent estate is presumed to be a tenancy in common, unless it states otherwise.

Example — Grantor conveys Grayacre to Larry, Mo, and Curly and their heirs.

→ In this conveyance, Larry, Mo, and Curly own Grayacre in fee simple absolute as tenants in common, and each takes a 1/3 interest in the property.

3. In a tenancy in common, one of the tenants may have a larger share of the property than the others.

4. A tenant is not allowed to change or alter the property unless he is given consent by all the other tenants.

D. **JOINT TENANCY** — A joint tenancy is a type of concurrent ownership with the right of survivorship.

1. A **right of survivorship** means that if one joint tenant dies, his share automatically goes to the other joint tenants.

2. In order to create a joint tenancy, 4 elements (or 4 unities) must be met:

(i) *Unity of time* - each joint tenant must receive his interest in the property at the same time.
(ii) *Unity of title* - each joint tenant must gain title from the same instrument.
(iii) *Unity of interest* - each joint tenant must take an equal share of the property.
(iv) *Unity of possession* - that each joint tenant must have an equal right to possess the entire property.

Example — Grantor conveys Grayacre to Sherlock and Watson as joint tenants with rights of survivorship.

→ In this conveyance, the 4 unities are satisfied: Sherlock and Watson received their interests at the same time, they gained title in the same conveyance, they took equal shares (each holds a ½ interest), and each has the right to possess the property. Since Sherlock and Watson own Grayacre as joint tenants with rights of survivorship, if either one dies, the other will automatically become the sole owner of Grayacre.

3. A joint tenancy can be **severed**.

a. This will occur when a joint tenant *conveys his interest during his lifetime*.

1) When this happens—and there are only 2 parties who own property as joint tenants with right of survivorship—the joint tenancy will be severed, and the new tenants automatically become tenants in common.

2) However, if more than 2 parties own property as joint tenants with rights of survivorship, and one of the parties conveys his interest to a third party, then the third party will own the property as a tenant in common, but the original tenants will remain joint tenants with right of survivorship.

4. Note that a **conveyance by will** does not sever a joint tenancy.

a. If a joint tenant attempts to convey his interest in a will, the joint tenancy will not be severed because the instant the joint tenant dies, his interest will immediately transfer to the other joint tenants.

E. **TENANCY BY THE ENTIRETY** — (abolished in most states)

1. A tenancy by the entirety is similar to a joint tenancy in that all four unities must be met; but in addition, the *tenants have to be married*.

2. Note that a tenancy by the entirety is only *severable* when both tenants mutually agree to the severance, when there is a divorce, or when one of the tenants die.

F. Lastly in this chapter, let's discuss some **ISSUES** that arise with concurrent estates.

1. In any type of concurrent estate, **every tenant has the right to possess and enjoy the entire property**, regardless of his share.

a. Each tenant is entitled to proportional shares of any profits that come from the property, including income from rent and from exploitation of natural resources.

2. A co-tenant's right to possession also means that each tenant has the right not be **ousted** by other tenants. **Ouster** occurs when a tenant wrongfully prevents another tenant from using the property (like changing the locks). When this occurs, the ousted tenant can sue for wrongful ejectment and recover damages.

3. Note that co-tenants are obligated to pay for certain **expenditures** related to the property, which includes taxes, mortgage payments, and repairs. However co-tenants DO NOT have a duty to *improve the property*; and therefore co-tenants are not responsible for the cost of any improvements made by other co-tenants.

4. Note also that a co-tenant has the right to bring an action for **partition** of the property.

a. This allows the co-tenant to *get out* of the co-tenancy and obtain his share of the interest. Partition can be accomplished by physical division of the property, or by sale of the property (with the proceeds split among the tenants depending on their share).

► In this chapter, we discussed the **concurrent estates**, which include *tenancy in common*, *joint tenancy*, and *tenancy by the entirety*.

CHAPTER 13. NONFREEHOLD ESTATES AND LANDLORD-TENANT LAW

A. **Nonfreehold estates** (also known as *leasehold estates*) — interests in real property that are of limited duration.

1. The holder of a nonfreehold estate is usually referred to as the **tenant**, and the holder of the future interest is referred to as the **landlord**.

B. There are 4 types of **nonfreehold** (or leasehold) **estates**:

(i) Term for years,
(ii) Periodic tenancy,
(iii) Tenancy at will,
(iv) Tenancy at sufferance.

C. **TERM OF YEARS**

1. Also known as tenancy for years, it's the most common type of lease between landlord and tenant.

2. A term of years *lasts for a certain period of time* and *contains a termination date*.

a. A term of years tenancy can be for any amount of time—it can be for 20 seconds, for 1 year, or for a million years.

3. In a term of years lease, the *tenancy will expire automatically* at the end of the term, which means that *notice is not required* to terminate the lease.

Example — Donna conveys an apartment to Victor for 6 months. → In this case, Victor has a terms of years tenancy that will automatically terminate in 6 months.

D. **PERIODIC TENANCY**

1. A periodic tenancy is one that automatically continues from one period to the next, until the landlord or tenant gives proper notice of termination.

2. In order *to terminate a periodic lease*, the notice must be given at least one full period before termination. So a month's notice is typically required for a month-to-month periodic lease. However, note that only 6 months' notice will be required for a year-to-year periodic lease.

Example — Donna conveys an apartment to Ben, from year to year. → In this case, Ben has a periodic tenancy, and each period is one year.

3. Note that a *period* of a periodic lease will be established at the beginning of the tenancy. However, if no period is identified, then the period of the tenancy will be presumed to be the same as the rent payment intervals. And if there is no payment schedule set, the tenancy will be presumed to be month to month.

E. **TENANCY AT WILL**

1. A tenancy with no express duration.

2. Can terminated by either party without notice at any time.

3. However, many modern statutes require a landlord to give the tenant reasonable notice before evicting the tenant at will.

F. **TENANCY AT SUFFERANCE**

1. Arises when a tenant wrongfully remains in possession after the expiration of a lawful tenancy.

a. If the tenant overstays his term, the tenant becomes a trespasser and the landlord has the legal right to evict the tenant.

2. Note that if a landlord ever *accepts rent* from a tenant at sufferance, that will result in a periodic tenancy being established between the parties.

► In this chapter, we discussed the 4 **nonfreehold** (or leasehold) **estates**:

(i) The **tenancy for years** is a lease that ends on a certain date.

(ii) The **periodic tenancy** is a lease that automatically continues from one period to the next until landlord or tenant gives proper notice.

(iii) The **tenancy at will** is a rental relationship between two parties that is of no express duration and that can be terminated by either party at any time.

(iv) The **tenancy at sufferance** occurs when a tenant holds over and remains on the property after the end of a lawful tenancy.

CHAPTER 14. DUTIES AND RIGHTS OF LANDLORDS

A. Landlords owe the following **duties** to their tenants:

(i) Duty to keep the property fit for human habitation,
(ii) Duty to not interfere with the tenant's quiet enjoyment,
(iii) Duty to deliver possession of the property to the tenant, and
(iv) Duty to keep the premises safe.

B. **WARRANTY OF HABITABILITY**

1. There is a **warranty of habitability** implied in every residential lease.

2. Under the implied warranty of habitability, **landlords have a duty to make the property fit for human habitation**.

a. Typically, this requires the property to have plumbing, water, heat, electricity, and no infestation of insects or rodents.

3. Note that the implied warranty of habitability applies only to **residential leases** and it **cannot be waived** by either party.

4. If a landlord **breaches** the implied warranty of habitability, the tenant must notify the landlord and allow reasonable time for the landlord to fix the problem.

a. If the landlord fails to do so, the tenant has several options:

(i) The tenant can move out and terminate the lease.
(ii) The tenant can stay in possession and withhold rent until a court determines what the reduced rent should be.
(iii) The tenant can repair the condition and offset the rent.
(iv) The tenant can stay in possession, pay the rent and sue for damages.

5. Note that if a tenant ever reports housing code violations to state officials, the landlord cannot terminate the lease in retaliation. This is referred to as **retaliatory eviction**.

C. **IMPLIED COVENANT OF QUIET ENJOYMENT**

1. The **implied covenant of quiet enjoyment** is implicit in every residential and commercial lease.

2. Under the implied covenant of quiet enjoyment, **landlords cannot interfere with the tenant's right to possess the property and right to reasonably use the property**.

3. The implied covenant of quiet enjoyment can be **breached** in 3 ways:

a. **Actual eviction** occurs when the landlord prevents the tenant from possessing, or otherwise evicts the tenant from the entire property. In this case, the tenant is no longer obligated to pay rent

b. **Partial eviction** occurs when the tenant has been evicted from only part of the property. In this case also, the tenant is no longer obligated to pay rent.

c. **Constructive eviction** occurs when the landlord causes a substantial interference with the tenant's enjoyment of the property, the tenant notifies the landlord, the landlord fails to remedy the situation, and the tenant moves out.

*Example*s of substantial interference may include lack of heating or air conditioning in a high rise office building, lack of a functioning elevator for tenants on a high floor, and noise pollution in some cases.

1) *** Note that tenants must vacate the premises entirely to claim constructive eviction, and only then may the tenant terminate the lease and pursue damages.

a) The tenant must be careful here because if the tenant moves out and it is later determined that there was no constructive eviction, the tenant may be liable for the rent while he was not living on the property.

D. **DELIVER POSSESSION**

1. The third duty of landlords is to **deliver possession of the property to the tenant**.

2. There are 2 different views on the landlord's duty to deliver possession:

a. The **American view** (minority view) requires the landlord to deliver legal right of possession, but not actual possession.

1) In other words, the tenant would be responsible for kicking out any previous tenants.

b. The **English view** (majority view) requires the landlord to deliver legal right of possession AND actual possession.

2) This means the landlord must evict a holdover tenant before the beginning of the new tenant's term. If the landlord fails to do so, and as a result the new tenant is unable to move in, the landlord will be liable for damages.

E. **DUTY TO KEEP PREMISES SAFE**

1. Landlords may have a **duty to keep premises safe**. Under modern tort law, landlords are liable for injuries that occur on the property that result from the landlord's negligence.

a. Therefore, landlords have a duty to *maintain and keep safe common areas* that are shared by all the tenants of a building.

b. Landlords have a duty to *make repairs in a competent manner*.

c. And landlords have a duty to *disclose any non-obvious conditions* that may make the property dangerous or unsuitable for the tenant's use.

1) Note that if the landlord discloses defects and the tenant chooses to move in anyway, then the tenant is deemed to have assumed the risk, and the landlord will not be liable.

► In this chapter, we discussed the general responsibilities of a landlord.

(i) We learned that in residential lease agreements, the **implied warranty of habitability** obligates landlords to keep the premises in good enough shape to live in.

(ii) We learned that for residential and commercial properties, the **implied covenant of quiet enjoyment** prevents a landlord from interfering with the tenant's possession and use of the property.

(iii) We learned that in the majority of states, a landlord has the **duty deliver legal and actual possession of the property** to the tenant at the start of the lease term.

(iv) And also, we learned that landlords have a general **duty to keep their premises safe**.

CHAPTER 15. DUTIES AND RIGHTS OF TENANTS

A. In a lease agreement for real property, the basic **duties of the tenant** include:

(i) Duty to pay rent,
(ii) Duty to avoid waste on the property, and
(iii) Duty to avoid using the property for illegal purposes.

B. The tenant's primary duty is to **PAY RENT**.

1. If a tenant fails to pay rent, landlord may bring an *eviction* action and *sue* for unpaid rent.

a. Note that a landlord cannot physically throw the tenant off the property or do anything to prevent the tenant from possessing the property (like changing the locks).

1) This is known as **self-help repossession**, and it's outlawed in most states. The only way to evict a tenant who is not paying rent is to get a court order.

2. If, in addition to withholding rent, the tenant also *abandons* the property, the landlord may sue to recover unpaid rent; however, the landlord has a *duty to mitigate damages* by using reasonable efforts to find a new tenant to lease the property.

3. A tenant's duty to pay rent will be discharged in several situations:

a. A tenant will not have to pay rent when the landlord *breaches the implied warranty of habitability* or the *implied covenant of quiet enjoyment*. A tenant will also not have to pay rent if the property is *destroyed*.

C. The second duty of a tenant is to **AVOID COMMITTING WASTE**.

1. Like the duty owed by a life estate holder to future interest holders, a tenant cannot commit *voluntary waste* by damaging the property, cannot commit *permissive waste* by allowing the property to disintegrate, and cannot commit *ameliorative waste* by making any significant changes in the property without permission.

a. In other words—besides ordinary wear and tear—a tenant must return the property to the landlord in the same condition that it was in originally.

D. The third duty of a tenant is to **AVOID USING THE PROPERTY FOR AN ILLEGAL PURPOSE**.

1. If the tenant uses the property for an illegal purpose (like to operate a gambling ring), the landlord may terminate the lease and sue for any damages caused by the illegal activities.

E. Note that in certain leases, the tenant may have a **duty to occupy the premises**.

1. The duty to occupy is common in commercial leases, particularly where rent is a % of the tenant's income from the business, or where the property is next to other businesses (like in a mall) and the success of each store depends on the other surrounding stores.

► In this chapter, we discussed the general duties of a tenant. We learned that a tenant's primary duty is to pay rent. Also, a tenant has a duty to not commit waste on the property, and a duty to use the property only for legal purposes.

CHAPTER 16. ASSIGNMENTS AND SUBLEASES

A. **Assignments** and **subleases** are formed when a tenant transfers his right to possess the property to a third party.

B. The **difference** between an assignment and sublease depends on whether or not the tenant transfers all his interest in the property:

1. If the tenant transfers his entire remaining interest to a third party, that is known as an **assignment**.

2. If the tenant transfers only part of his interest, that is a **sublease**.

a. *** Note that the third party in an assignment is referred to as the **assignee**, and the third party in a sublease is referred to as the **sublessee**.

Example — If a tenant has 6 months remaining in his lease of an apartment, and he leases the apartment to a third party for only three months, the tenant has transferred less than the full remainder of the lease and this is a sublease. If instead the tenant leased the apartment to a third party for the remaining 6 months, this would be an assignment.

C. Tenants are always **allowed** to assign or sublease their interests, unless the lease agreement contains a clause that expressly prohibits assignments or subleases (which most leases do).

1. However, a tenant may be able to assign or sublease the property even when they are prohibited, if the landlord knows about the assignment or sublease and does not object.

D. The **distinction** between an assignment and a sublease is important because it will determine certain **rights** among landlord, tenant, and assignee or sublessee.

1. Particularly, there are 2 forms of relationship that may exist among these parties:

a. **Privity of estate** — exists when two parties have successive ownerships in the same property.

b. **Privity of contract** — exists when there is an effective contractual relationship between two parties.

E. ***Rule*** — A party collecting rent may **COLLECT RENT** from another party if they are in privity of estate OR privity of contract.

1. Initially, when a **landlord and tenant** enter into a lease agreement, they are in **privity of estate AND privity of contract**.

a. *Privity of estate* exists because the landlord's future interest in the property will follow immediately after the tenant's interest ends.

b. And *privity of contract* exists because both parties entered into the lease agreement.

c. Therefore, the landlord may collect rent from the tenant.

2. Note that if the tenant ever assigns or subleases the property to a third party, the landlord STILL can **collect rent from the tenant** because they will always be in privity of contract — based on the original lease agreement.

3. The landlord's right to **collect rent from third parties**, however, will depend on whether there was an assignment or a sublease:

a. If the original tenant **assigns** his interest to a third party, the landlord can collect rent from the third party.

1) Since an assignment is a full transfer of interest, the third party assignee owns the original tenant's interest in the property, which is followed by the landlord's future interest. Therefore, the third party assignee is in privity of estate with the landlord, and the landlord can sue and collect rent from an assignee.

b. On the other hand, if the original tenant **subleases** the property to a third party, the landlord cannot collect rent from the third party.

1) The reason being, there no privity of estate, nor privity of contract between landlord and sublessee.

2) Although the landlord cannot collect rent from a sublessee, he can always collect rent from the original tenant because they are in privity of contract.

a) *** Note that the *tenant can then sue the third party sublessee* to recover any rent because they will be in privity of estate.

F. ***Rule*** — If a party wants to **enforce obligations against the landlord**, there must be *privity of estate*.

1. This means that in an **assignment**, if the assignee wants the heating to be fixed, the assignee can only enforce this against the landlord and not against the original tenant because an assignee is in privity of estate with the landlord and not the tenant.

2. However, if a person who is **subleasing** property wants the heating to be fixed, he can only obtain relief from the tenant and not from the landlord because a sublessee is in privity of estate with the tenant and not the landlord.

G. ***Rule*** — Note that **contractual terms** of a lease can only be enforced by and against parties who are in *privity of contract*.

Example — If a lease contains a "no pet" clause and an assignee or a sublessee moves onto the property with a dog, the landlord can sue only the original tenant because the landlord is only in privity of contract with him.

► In this chapter, we discussed **assignments** and **subleases** in landlord tenant law.

We learned that an **assignment** is a transfer of the entire interest, and a **sublease** is a transfer of less than the entire estate.

We learned that once there has been an assignment or sublease, *the landlord may always collect rent from the original tenant* because they will always be in privity of contract.

We also learned that a *landlord may collect rent from an assignee* because they are in privity of estate, but *cannot collect rent from a sublessee*.

CHAPTER 17. INCORPOREAL INTERESTS — EASEMENTS

An **incorporeal interest** in real property is a *nonpossessory interest in land*. Such an interest usually gives someone the right to use land that is in the possession of another, but it may also give someone the right to restrict how another landowner uses their property.

There are 5 major types of incorporeal interests: easements, licenses, profits, real covenants, and equitable servitudes.

A. **EASEMENT** — an interest in real property that gives someone the right to use another's property for a particular purpose.

1. Easements are commonly used for paths, utility lines, driveways, parking, and pipelines.

B. An easement can be classified as **affirmative** or **negative**:

1. An **affirmative easement** give the holder the right to use another's property for a specific purpose.

Example — When a homeowner has the right to use a path through a neighbor's property to get to the beach, or when the utility company uses a telephone pole and lines on one's property.

2. A **negative easement** is the right to prevent another from using their property in a certain way.

Example — A negative easement exists when a homeowner has the right to prevent his neighbor from doing anything to block the homeowner's view of a mountain range.

C. There are 2 other categories of easements, which are based on the **holder** of the easement. An easement can be either an *easement appurtenant* or an *easement in gross*:

1. An **easement appurtenant** — exists when one parcel of real property benefits from the easement.

Example — Assume that you own a home and pursuant to an easement, you have the right to cross a path on your neighbor's land to get to the beach.

→ In this case, your property is known as the *dominant parcel*, because your land benefits from the easement. Your neighbor's property is called the *servient parcel*, because it is subject to the easement. Since the holder of the dominant parcel of land benefits from the easement, this is an easement appurtenant.

a. The benefits and burdens of an easement appurtenant are said to "run with the land" — this means that they are transferred to any successive owners of the land.

→ Therefore, if you sell your home, the new owner will be able to use the neighbor's land to get to the beach. And if the neighbor sells his property, the new owner must allow the holders of the dominant parcel to cross the land to get to the beach.

2. An **easement in gross** — does not benefit any particular piece of property. Instead, an easement in gross benefits an individual or a business.

Example — the utility company's right to have a telephone pole on your property is an easement in gross.

a. For an easement in gross, the *burden* will always run with the servient estate.

→ Therefore, if you sold your property, the new owner must allow the utility company to keep the telephone pole on the property.

b. However, the *benefit* of an easement in gross will not transfer to a new owner unless the easement is for a *commercial purpose*.

→ Therefore, if the utility company was purchased by a new company, the benefit of the easement would transfer because the nature of the easement is commercial, and new company would have the right to keep the telephone pole on your property.

► In this chapter, we began our discussion of the **incorporeal interests** in real property, beginning with easements.

We learned that **easements** give holders the right to use another's property in a certain way.

We also learned that an *easement appurtenant* benefits a dominant parcel of land, while an *easement in gross* is personal to the easement holder.

CHAPTER 18. CREATION OF EASEMENTS

A. An **easement** can be created in several ways:

(i) Expressly by a writing.
(ii) Implied by prior use.
(iii) Implied by necessity.
(iv) By prescription.

B. An easement can be **EXPRESSLY CREATED** — by grant or reservation — in a written deed or other legal document.

1. An **express easement by grant** arises when a property owner grants an easement to someone else to use his land.

2. An **express easement by reservation** arises when the property owner sells land, but reserves an easement for himself.

Example — Billy owns a parking lot and decides to sell it. In the deed, Billy includes a provision whereby Billy personally reserves the right to park in the parking lot for his lifetime.

→ In this case, Billy has created an express easement by reservation. Note that since Billy personally benefits from this easement, it is an easement in gross.

C. **IMPLICATION BASED ON PRIOR USE**

1. This happens when one parcel of property is split up into smaller parcels.

2. In order to create an implied easement from prior use, 3 elements must be met:

a. There must be *unity of title*, meaning that the dominant and servient parcels must have originally been one parcel.

b. At the time of severance, the use of the easement must have been *apparent*, and it must have been apparent that it was going to continue.

c. The prior use must be *reasonably necessary* for the proper enjoyment of the property.

Example — Max owns a large piece of land with a mansion on the far east side of the property, and a long driveway that connects the mansion to a road on the west side of the property. Max divides the property in half, so the mansion is on the east parcel and most of the driveway is on the west parcel. He keeps the parcel with the mansion and sells the west parcel to Douglas.

→ In this case, even if there is no easement stated in the deed, an implied easement based on prior use may be created. The implied easement would give Max, the owner of the dominant parcel containing the Mansion, the right to use the driveway on Douglas's servient parcel.

D. **NECESSITY**

1. An easement will be implied from necessity when property is split up into smaller parcels in a manner that deprives one of the parcels access to something that is necessary for the use and enjoyment of the property.

2. In order to create an implied easement by necessity, 2 elements must be met:

a. The dominant and servient parcels must have originally been *one parcel*.

b. The *necessity must be present at the time the land is severed*.

1) *** Note that if the necessity ever ends, then the easement by necessity will terminate.

Example — Carol owns a large square piece of land that is bordered by forests on each side except the south side, which is bordered by a public road. Carol divides the property in half. She keeps the south parcel which borders the road, and sells the north side to Judith.

→ In this case, even if there is no easement stated in the deed, Judith will have an implied easement by necessity because it is necessary to cross over Carol's property to get to a public road. Note that if a new public road is ever built bordering Judith's parcel, then Judith's easement by necessity will be terminated because the necessity to get to and from her property has ended.

E. **PRESCRIPTION**

1. Similar to *adverse possession*.

a. As such, the elements necessary to create an easement by prescription are the same as those required for adverse possession, except the exclusive use element.

1) Therefore, in order to create an easement by prescription, there must be *actual use*, *open and notorious use*, *hostile use*, and *continuous use*.

b. *** Note that, like adverse possession, periods of use may be *tacked* onto each other by different users in order to obtain a prescriptive easement.

► In this chapter, we discussed **how easements can be created**. Besides *expressly* granting and reserving easements in written documents, easements can be *implied based on prior use*, they can be *implied from necessity*, and they can be created by *prescription*.

CHAPTER 19. SCOPE OF EASEMENTS

A. Once an easement has been created, the holder of the easement may use the easement for its **intended purpose**.

1. This will usually be evident by the written easement, by the prior use, by the necessity, or by the prescription that created the easement. The scope of usage of the easement cannot be expanded beyond the original intended use.

2. However, issues may arise that concern the location, dimensions, and scope of the easement. Specifically, there may be changes in circumstances over time that affect the nature and use of an easement.

B. ***Rule*** — If circumstances change in a manner that was unforeseeable at the time the easement was created, then the scope of the easement can change and expand as long as the change is not an excessive burden to the owner of the servient parcel.

Example — Assume the phone company holds an easement on private property which allows them to use a telephone pole and cables for telephone calls. Years later, the internet is invented and a cable company piggybacks onto the easement and uses the cables for internet, in addition to the telephone service.

→ In this case, this would be a *reasonable expansion of the scope of the easement* because there is *no burden on the owner of the servient land*.

Example — In 1890, an easement was created that allows the owner of the dominant parcel to ride a horse and buggy across a driveway on the servient parcel. 50 years later, cars have been invented and no one rides horses any more.

→ In this case, the *unforeseeable change in circumstances* would probably be enough to *expand the scope of this easement* to allow motor vehicles to use the driveway.

Example — Oliver owns land and has an easement to use a path on Vicky's property to get to a park. Oliver sells his land to a new owner, who develops the property into a subdivision with 10 lots. Soon enough, 10 families start crossing over the path on Vicky's property.

→ In this case, since the original easement called for only a single person or family to use the path, a court would probably *not expand the scope of the easement* to allow 10 families to now use the path because it would *excessively burden* Vicky.

C. Note that when an easement is used in a way that *exceeds its scope*, it constitutes a **nuisance** and the servient owner can seek an injunction to prevent the excessive use and sue for damages. However, the servient owner may never terminate the easement.

D. Likewise, if an easement is disturbed by the servient owner in such a way that it *substantially interferes with the holder's use of the easement*, this also constitutes a **nuisance** and the dominant owner may seek an injunction to prevent the interference and sue for damages.

► In this chapter, we discussed **scope of easements**. We learned that the scope of an easements can be expanded in unforeseen changed circumstances, but not if it unreasonably burdens the servient estate.

CHAPTER 20. TERMINATION OF EASEMENTS

All easements are presumed to be perpetual and last forever unless expressly stated differently. Regardless, there are 7 ways that an easement can be terminated (or extinguished):

(i) By terms stated in the easement.
(ii) When released by the holder.
(iii) When abandoned by the holder.
(iv) When there is merger of title.
(v) By destruction of the servient estate.
(vi) When a necessity ends.
(vii) By prescription.

A. An easement can terminate **BY ITS OWN TERMS** if a condition in the easement is satisfied.

Example — You grant an easement to your friend to use your swimming pool for life. Once your friend dies, the easement will terminate automatically.

B. An easement will be terminated when the holder **RELEASES** the easement.

Example — If the owner of the dominant parcel gives up the easement to the owner of the servient estate in a contractual agreement, the easement has been terminated.

C. An easement will be terminated when **ABANDONED** by the holder of the easement.

1. An easement is abandoned when the holder does something that shows a clear *intent* to stop using the easement *permanently*.

a. *** Note that an easement will not be abandoned just because it's not used for a long period of time; instead, the holder must *physically manifest an intention* to permanently abandon the easement.

D. An easement will be terminated is there is **MERGER OF TITLE**.

1. Merger of title occurs when the dominant and servient parcels become owned by the same party. Once this happens, the easement is automatically terminated.

E. An easement may be terminated when the servient estate is **DESTROYED** through no fault of its owner.

Example — When govt condemns property, easements on the property will be terminated.

F. An easement that is created by necessity will be terminated if the **NECESSITY ENDS**.

G. Just as an easement can be created by prescription, an easement can also be terminated by **PRESCRIPTION** if the owner of the servient land excludes the easement holder from using the easement for the duration of the statute of limitations.

► In this chapter, we discussed **termination of easements**. We learned that an easement can be terminated based on its terms, by release, by abandonment, by merger of title, by destruction of servient estate, by the end of a necessity, and by prescription.

CHAPTER 21. LICENSES AND PROFITS

A. A **LICENSE** gives someone the right to enter and use another's property for a particular purpose.

1. Essentially, the holder of a license has permission to *trespass* on someone else's property.

2. Licenses can be **express** and **implied**.

Example — A licenses exists when a homeowner permits a plumber to enter the house and work, when a person enters a gas station to ask for directions, and when someone buys a ticket to a movie or a sporting event.

3. Note that *licenses* differ from *easements* in that they are NOT interests in land. This means that licenses can generally be revoked at any time. This feature of licenses makes them a useful tool for landowners.

4. However, in certain situations, a license can become **irrevocable**.

a. An irrevocable license is very similar to an easement in gross; however, while easements are presumed to last forever, irrevocable licenses are only temporary.

1) In general, irrevocable licenses are deemed to last as long as necessary to prevent any injustice.

5. An **irrevocable license** can be created in several situations:

a. If the grantor **expressly** makes a license irrevocable, then the licensed cannot be revoked.

b. If someone makes substantial expenditures in **reliance** on an oral or written license, the grantor may be estopped from revoking the license. Note that this rule varies among jurisdictions.

Example — Bert and Ernie are neighbors. Bert just got a new car and asks Ernie if he can park the car on Ernie's lawn. Ernie agrees. Ernie and Bert have just formed an oral license, which can be revoked at any time. Shortly afterward, in reliance on the license, Bert spends 2,000 dollars to pave a small area for him to park on Ernie's property. During the installation, Ernie sees the pavement being installed and does nothing. As soon as the installation is complete, Ernie changes his mind and orders Bert to remove the driveway and to find somewhere else to park.

→ In this case, a court would most likely hold that the license is now irrevocable because of Bert's detrimental reliance on the license.

c. A license may become irrevocable when it is **coupled with an interest**. This occurs when a person acquires the right to take possession of property located on someone else's land.

Example — A tenant whose tenancy has ended has an irrevocable license to remove belongings from the property in a reasonable manner.

Example — The holder of a future interest in land has an irrevocable license to reasonably enter the land to inspect for waste.

B. A **PROFIT** (which is short for profit-a-prendre) is an interest in real property that enables a person to take soil, produce, or natural resources such as petroleum, minerals, timber, and wild game, from land owned by another.

1. Since **profits** are interests in land—and therefore cannot be revoked—they are not very common. Instead, landowners generally use *leases* and *licenses* to allow others to extract natural resources.

2. Note that profits are governed by the same rules as *easements*:

a. Therefore, a profit can be appurtenant or in gross.

b. A profit can be *created* expressly or by implication.

c. The *scope* of a profit may expand under certain circumstances.

d. A profit can be *terminated* based on the terms in the profit, by release, by abandonment, and by merger of title.

► In this chapter, we discussed **licenses** and **profits**.

(i) We learned that a **license** is a right to enter another's real property. Licenses are not interests in land, therefore they are freely revocable, except in certain circumstances.

(ii) We also learned about **profits**, which are interests in land that give someone the right to enter another's land to remove natural resources.

CHAPTER 22. REAL COVENANTS

A. In property law, a **real covenant** is a promise that concerns the use of land.

1. A covenant can be a promise to do something. This is known as an **affirmative covenant**.

2. In addition, a covenant can be a promise to refrain from doing something. This is known as a **negative** or a **restrictive covenant**.

B. Note that real covenants are very similar to **equitable servitudes** (which we will discuss later in this outline). Both are promises that relate to land, but what differentiates the 2 are the remedies that are available:

1. When a **real covenant** is breached — the *remedy is money damages*.

2. When an **equitable servitude** is breached — the *remedy will be an injunction or specific performance*.

C. Covenants that concern the use of land are typically used by **developers** to create **common plans** for subdivisions or housing complexes.

Example — A developer will buy vacant land, divide it up into separate lots, and sell each lot burdened with a number of covenants that are stated within the contract of sale for each lot. For instance, the developer might stipulate that the owner must pay assessments for common-area maintenance, that the lot cannot be divided into smaller lots, that only one residence may be built on the lot, and that the house must meet certain criteria.

D. Covenants can also be used in *settings other than land and housing development*.

Example — Mario and Luigi are neighbors in a rural farming town. Luigi's property has a drain, but Mario's property does not. In order to prevent his property from flooding, Mario offers Luigi $4,000 to maintain the drain so that it is always in working order. Luigi agrees and they put it in writing.

→ In this case, Mario and Luigi have formed a contract that relates to land.

E. Like all incorporeal interests, covenants consist of a **burden** and a **benefit**.

1. The burden describes the duty to perform the promise. And the benefit describes the right to enforce the promise.

2. In our *Example*, Luigi is burdened by the covenant because he has a duty to maintain the drain. And Mario benefits from the covenant because has the right to enforce Luigi's promise to maintain the drain.

F. Although covenants regulate the use of land, they are NOT interests in land. They are **promises**, and can only be created by a **contract**.

1. However, covenants are a unique type of contract. While most ordinary contracts are enforceable only by and against the people who enter into the contract, covenants CAN **attach to the land** and **bind successive owners** of the land.

G. A covenant that regulates land will bind successive owners if the covenant **runs with the land**.

1. The issue of whether a covenant runs with the land will arise when—an original party sues a successor, when a successor sues an original party, or when a successor sues another successor:

a. If an original party seeks to *enforce a covenant against a successor*, then the burden must run with the land.

Example — Assume that Luigi, who had the burden of maintaining the drain, sold his property to Luigi Jr. → If Mario wanted to sue Luigi Jr. for not maintaining the drain, Mario must show that the burden runs.

b. If a successor seeks to *enforce a covenant against an original party*, then the benefit must run with the land.

Example — Assume instead that Luigi never sells his property, but Mario sells his property to Mario Jr. → If Mario Jr. wants to sue Luigi to force him to maintain the drain, Mario Jr. must show that the benefit runs with his land.

c. If a *successor sues to enforce a covenant against another successor*, both the burden and benefit must run with the land.

Example — If both Mario and Luigi sell their property, and Mario Jr. wants to sue Luigi Jr. to force him to maintain the drain, Mario Jr. must show that the burden and the benefit runs.

H. The several ways that real covenants, as well as equitable servitudes, can be **terminated**:

1. By terms stated in the covenant.

2. By a written release.

3. By merger of the burdened estate and the benefited estate.

4. By condemnation of the burdened estate.

5. By abandonment.

6. By changed circumstances.

a. Changed circumstances occur when conditions have so radically changed that that the covenant can no longer achieve its purpose.

Example — If a neighborhood is subject to residential covenants, but many of the lots come to be used for commercial purposes, the residential use restriction will not achieve the purpose of preserving a residential neighborhood anymore, and the covenants will be terminated.

► In this chapter, we discussed **covenants**. We learned that **real covenants**, as well as equitable servitudes, are promises that impose duties or restrictions on the use of property. We learned that covenants are not interests in land, but promises that are created only by contract. Nevertheless, covenants can be enforced by and against successive owners of land if they run with the land.

CHAPTER 23. REAL COVENANTS — RUNNING WITH THE LAND

A. In order for a covenant to be enforced by or against successive owners of land, the covenant must **run with the land**.

1. To *bind* a successor of the burdened property, the **burden** must run with the land.

2. And likewise, for a successor of the benefited property to *enforce* a covenant, the **benefit** must run with his land.

B. Although the rules among jurisdictions may vary, let's discuss the general requirements for the **burden** of a real covenant to run with the land, and then we will discuss the general requirements for the **benefit** of a real covenant to run.

1. Keep in mind that we are discussing what is required to enforce a real covenant—not an equitable servitude.

C. In order for the **BURDEN** of a real covenant to run with the land, 6 elements must be met:

(i) Covenant must be in *writing*,
(ii) Parties must have *intended* the covenant to run with the land,
(iii) Covenant *touches and concerns* the land,
(iv) *Horizontal privity*,
(v) *Vertical privity*, and
(vi) Successor had *notice* of the covenant.

1. For the burden of a real covenant to run, the covenant must be in **WRITING**.

2. The original parties must have **INTENDED** for the covenant to pass down to future owners.

a. This is usually satisfied with language in the covenant that states in one way or another that the covenant applies to successors or heirs.

b. Even without such express terms, intent will usually be presumed unless evidence demonstrates otherwise.

3. The covenant must **TOUCH AND CONCERN THE LAND**.

a. This means that the covenant relates to the direct use or enjoyment of the land.

b. *Restrictions on how land can be used* and *requiring a party to do something on his land* are clear examples of covenants that touch and concern the land.

c. Note that *promises to pay money*—like rent, taxes, and homeowner's association fees—are considered to touch and concern land in most jurisdictions, even though they don't directly relate to the use of land.

4. There must be **HORIZONTAL PRIVITY** between the original parties.

    a. This is present when the original parties are in *succession of estate*, or in other words, when the estate and covenant are in the same instrument (like a deed).

    b. Horizontal privity commonly exists when the original parties are that of grantor-grantee, landlord-tenant, and mortgagor-mortgagee.

        1) Note that there is no horizontal privity between neighbors who enter into a real covenant.

5. There must be **VERTICAL PRIVITY**.

    a. Vertical privity exists when an original party voluntarily transfers his entire estate in the land to the successor.

    Example — If the original party owns the land in fee simple absolute, and he conveys merely a life estate or leases the property, there is no vertical privity, and the burden will not run.

6. Successor must have **NOTICE** of the covenant.

    a. Notice may be either actual or constructive:

        1) **Actual notice** means the successor knew about the existence of the covenant.

        2) **Constructive notice** means that the successor reasonably should have known about the covenant, even if he didn't actually know about it.

            a) A successor will have constructive notice of a covenant when it has been recorded in the public land records.

            b) Also, a successor may have constructive notice of a covenant from the character of the neighborhood.

D. In order for the **BENEFIT** of a real covenant to run with the land, 4 elements must be met:

1. Covenant must be in **WRITING**.

2. Original parties **INTENDED** for the covenant to pass down to future owners.

3. Covenant **TOUCHES AND CONCERNS THE LAND**.

4. **LOOSE VERTICAL PRIVITY**.

    a. The term loose vertical privity means that the successor has obtained some interest in the land from the original party, but not necessarily the entire interest.

    b. Loose vertical privity may exist when an owner in fee simple absolute conveys a life estate, leases the property, and even when an adverse possessor gains title to the property.

5. *** Note that **horizontal privity** and **notice** are NOT required for the benefit of a real covenant to run with the land.

a. Therefore, if original parties to a covenant were *neighbors*, a buyer of the benefited land could still sue the original owner for money damages in relation to breach of the covenant.

b. Also, if the buyer of the benefited land *did not have notice of the covenant*, he could still sue the original owner for money damages in relation to breach of the covenant.

► In this chapter, we discussed the requirements for the burdens and benefits of real covenants to run with land and bind successors.

(i) For the **burden** of a real covenant to run, the covenant must be in writing, must have been intended to run, must touch and concern the land, there must be horizontal and vertical privity, and the successor must have notice of the covenant.

(ii) For the **benefit** of a real covenant to run, it must be in writing, must have been intended to run, must touch and concern the land, and there must be loose vertical privity.

CHAPTER 24. EQUITABLE SERVITUDES

A. An **equitable servitude** (like a real covenant) is a promise concerning the use of land.

B. However, there are 3 important difference between *equitable servitudes* and *real covenants*:

(i) The only remedy available for breach of an equitable servitude is *specific performance or an injunction*.
(ii) *Privity of estate is not required* for an equitable servitude to run with the land.
(iii) Equitable servitudes may be *implied*.

C. The ONLY remedy available for breach of an equitable servitude is **SPECIFIC PERFORMANCE or AN INJUNCTION**. However, the remedy for breach of a **real covenant** includes *money damages*.

1. This distinction exists because courts were traditionally split between *courts of law* and *courts of equity*.

a. When a party sought money damages, they would go to a court of law; and when a party sought equitable relief, they would go to a court of equity.

1) Over time, each court developed their own rules in regard to land use promises. Courts of law referred to them as real covenants, while courts of equity referred to them as equitable servitudes.

2. Today, essentially all courts of equity have merged with courts of law.

a. If a party brings an action for the breach of a land covenant and wants to recover money damages, then they must prove the existence of a real covenant.

b. And if the party seeks equitable relief, they must prove the requirements of an equitable servitude.

3. Note that **equitable relief** provided by courts includes *specific performance* and *injunctions*.

a. **Specific performance** orders a party to specifically perform on a contract.

b. An **injunction** orders a party to do or refrain from doing a specific act.

D. Another difference between equitable servitudes and real covenants is that **PRIVITY OF ESTATE IS NOT REQUIRED** for the burden or the benefit of an equitable servitude to run with the land.

1. For the **burden of an equitable servitude to run with the land**, only 4 elements must be met:

(i) It must be in *writing*,
(ii) It must *intend* to bind subsequent owners,
(iii) It must *touch and concern* the land, and
(iv) Subsequent owner must have *notice*.

2. For the **benefit of an equitable servitude to run with the land**, only 3 elements are required:

(i) The equitable servitude must be in *writing*,
(ii) Must *intentionally* bind successors, and
(iii) Must *touch and concern* the land.

3. Note that **privity of estate—**both horizontal and vertical**—**is not required to enforce an equitable servitude.

a. This means that an equitable servitude entered into by *neighbors* can be enforced by or against successive owners of the land.

b. It also means that successive owners who do not obtain the original owner's *entire interest* in the land can be bound by and enforce equitable servitudes

Example — Alvin and Simon are neighbors. They enter into a valid written contract whereby Alvin promises that he will not build a mall on his property. Alvin then leases his land to Theo, and the covenant is included in the lease. Regardless, Theo begins building a mall. Simon then sues Theo to prevent him from building the mall.

→ In this case, the court will issue an injunction ordering Theo to not build a mall on the property because all 4 elements required for the burden of an equitable servitude to run are present: the promise was in writing, the intent is presumed, the restriction touches and concerns the land, and Theo had notice of the restriction. Therefore, the promise may be enforced against Theo as an **equitable servitude**.

*** Note that in this case there is no horizontal privity because Simon and Alvin are merely neighbors. And there is no vertical privity because Theo leased the property. Because there is no privity of estate, the court cannot enforce the promise as a **real covenant** and Theo will not be required to pay any money damages.

E. The last difference between equitable servitudes and real covenants is that while real covenants must be created by an express agreement, **EQUITABLE SERVITUDES MAY BE IMPLIED**.

1. Implied servitudes are known also as implied reciprocal covenants.

2. Not all jurisdictions recognize implied servitudes.

3. An **implied reciprocal servitude** is usually created from a common plan for the development of a subdivision.

a. Courts will infer an implied servitude when a developer has:

(i) *Recorded* a plat for the subdivision *in the public land records*, or
(ii) When the *first lot* in a subdivision with a common plan *has been sold*.

b. In addition, implied servitudes will be enforced only if any owners of the lots had *notice*, or should of had notice, of the common plan.

Example — A developer builds a subdivision and sells the first lot to Daisy. Daisy's deed contains a restriction that limits her lot to residential use. The developer then sells lot 2 to Violet. Violet's deed does not contain any restrictions; however, Violet knows that Lot 1 is restricted to residential use. After Violet becomes owner of Lot 2, she begins building an ice cream shop on her lot, and Daisy sues Violet for using Lot 2 for nonresidential purposes.

→ In this case, even though there was nothing in writing between the developer and Violet, the courts will infer an implied reciprocal servitude because Violet had notice that there was a common plan for the subdivision. Therefore, the court will issue an injunction preventing Violet from using Lot 2 as an ice cream shop.

*** Note that in this case, because the covenant was implied—and not written down—it cannot be enforced as a real covenant, and Violet cannot be liable for any money damages.

► In this chapter, we discussed **equitable servitudes**, which are promises attached to land.

The *remedy* for breach of an equitable servitude *is specific performance* or an *injunction*.

Because *privity is not required for an equitable servitude to run with the land*, it is easier to enforce a land use promise as an equitable servitude and get injunctive relief; rather than enforcing the same covenant as a real covenant to recover money damages.

We also learned that an equitable servitude may be *created by implication*, when there is a common plan for a subdivision and owners have or should have notice of the common plan.

CHAPTER 25. REAL PROPERTY CONTRACTS

A. The **sale of real property** generally involves 2 steps:

1. The buyer and seller enter into a **contract**.

a. The *real estate contract* is an agreement between the parties to transfer the property.

2. The **deed** is transferred at the closing.

a. The *deed* is the instrument that actually transfers title and gives the buyer ownership.

B. In order to form a **valid real estate contract**, certain requirements must be met:

1. The contract must be in *writing* (because it must satisfy the statute of frauds),

2. The contract must be *signed* by both parties, and

3. The contract must contain all *material terms*—which include the names of the parties, a description of the property, and the purchase price.

C. In rare situations, an **oral** real estate contract may be enforceable.

1. This can occur when one party has *acted in reliance* on the oral contract and has *partly performed*.

a. There is *part performance* on behalf of the seller when he's conveyed the property.

b. There is *part performance* on behalf of the buyer when he's done 2 of the following 3 actions:

(i) Taken possession of the property,
(ii) Paid some or all of the purchase price, or
(iii) Made improvements to the property.

Example — Buyer and seller orally agree that buyer will pay seller $50,000 for Pinkacre.

→ If seller then transfers the deed to the buyer, courts may enforce the oral contract and order the Buyer to pay the agreed upon price.

→ If instead the seller did nothing but the buyer paid $10,000 to the seller and moved onto Pinkacre, courts may enforce the oral contract and order the seller to deed the property to Buyer.

D. Once a valid real estate contract has been formed, the buyer does not suddenly become the owner of the property. This will occur if and when the *deed is transferred* to the buyer at the *closing*. This is usually dependent on **conditions** within the real estate contract.

1. For instance, it is common for the closing to be conditioned on an inspection of the property and whether the buyer obtains adequate financing.

2. However, the most important condition—and one that is implied in every contract for the sale of real property—is that the **TITLE must be MARKETABLE**:

a. A title to real estate is marketable when it is *readily transferable*—as it is free from any potential claims by outside parties.

1) Marketable title is crucial because if property does not have marketable title, that means that is possible for someone else to claim the property as their own.

b. There are 2 defects that make a title unmarketable:

1) The first defect is an **encumbrance** on the property.

a) An encumbrance is a right or interest in property that is owned by someone other than the owner.

b) Examples include liens, mortgages, and easements, as well as certain covenants or servitudes.

Example — Hansel contracts to buy forest land from Gretel. At the closing, Hansel finds out that the bank holds a lien on the land because Gretel is using the property as collateral for a loan.

→ In this case, Gretel has breached the contract by failing to convey marketable title.

2) The second defect that makes a title unmarketable is a **defect in the chain of title**.

a) The chain of title is a list of successive owners of the property. A defect in the chain of title means that there is a missing link in the title's history. This makes title unmarketable because a previous owner—one who is not listed as ever selling the property—may try to reclaim the property in the future.

c. Note that **marketability is assessed at the time of closing**.

1) This means that a seller can contract to sell property with unmarketable title, and not breach the contract as long as any defects are fixed by the date of the closing.

2) If the title happens to be unmarketable at the closing, the buyer has the option to cancel the real estate contract.

3) Note that if the buyer wants to, he can waive the marketability requirement and take the property subject to the defective title.

E. Once the buyer accepts the deed at the closing, the seller's contractual requirement to convey marketable title ends, because all promises in the real estate contract **merge** with the deed and are no longer effective — this is known as the **merger rule**.

1. Under this rule, once the deed has been delivered, the buyer has no more breach of contract actions, BUT he may sue the seller for breach of warranty under the deed.

F. **Risk of loss** — as it relates to the buying and selling of property

1. The risk of loss rules determine which party is responsible for damage to the property between the signing of contract and the delivery of the deed.

2. If the real estate contract has a risk of loss clause, that will determine who bears the risk of loss.

3. However, if the contract is silent on the issue, most jurisdictions hold that risk of loss passes from the seller to the buyer at the signing of the contract.

a. This means that once the contract has been formed, the buyer will be responsible for any damage to the property that occurs through no fault of either party.

b. Note that other jurisdictions feel this is unfair and hold that risk of loss stays with the party in possession of the property.

► In this chapter, we discussed **contracts for the sale of real estate**. We learned that such contracts must be in writing, contain the material terms, and be signed to be enforceable. We also learned that every seller is required to convey marketable title.

CHAPTER 26. REAL PROPERTY DEEDS

A. The transfer of real property (whether as a gift or a sale) must be done by transferring a written instrument that represents ownership of the property.

1. This instrument is known as a **deed**.

2. In the sale of real estate, the transfer of the deed from seller to buyer is known as the **closing**.

B. When real property is conveyed with a deed, the original owner is referred to as the **grantor**, and the person who receives the property is the **grantee**.

C. In order to be valid and effective, a **deed** must meet certain requirements:

(i) It must be in *writing* to comply with the statute of frauds and the writing must state that the grantor is transferring the land to the grantee,
(ii) It must *identify the parties*, that being the grantor and the grantee,
(iii) It must contain a *description* of the property, and
(iv) It must be *signed* by the grantor.

D. In order to actually transfer land from grantor to grantee by deed, the deed must be **delivered** and **accepted**.

1. **Acceptance** by the grantee is usually presumed.

2. **Delivery**, however, will only occur when there are clear actions or words by the grantor that show a present intent to transfer title to the property.

E. **Delivery of deeds**

1. Generally, when a deed has been **recorded**, this will be an effective delivery.

2. Also, **physical transfer** of the deed will be an effective delivery.

a. Physical transfer includes handing the deed over, mailing the deed, and giving the deed to an agent of the grantee.

b. Note that if the grantor *keeps the deed*, generally there is a presumption that no delivery has occurred.

Example — Mother wants to give her daughter farmland and Mother tells her daughter the good news on the phone. Mother goes to an attorney and prepares the deed and puts the deed in her desk drawer. A week later, the daughter finds the deed in the desk drawer and takes it without Mother's knowledge.

→ In this case, even though Mother wanted to give the farmland to her daughter and even though Daughter now has the deed, there has been no delivery of the deed and Mother still owns the property.

3. Even if a deed is actually delivered, it will not be effective unless the grantor had the **present intent** to transfer title.

Example — Batman and Robin enter into a contract for the sale of the bat cave. Before the closing, Batman and Robin have lunch. During lunch, Batman is holding the deed to the bat cave, but suddenly has to save Gotham. Before Batman does so, he gives the deed to Robin to hold while he saves the city.

→ In this case, although Batman has physically given the deed over to Robin, and although he is contractually bound to give the bat cave to Robin, he did not intend to transfer title. Therefore, the delivery is ineffective and Batman is still the owner of the bat cave.

4. Note that when there is a physical transfer of a deed, the delivery will be effective **at the time that it is actually delivered** into the possession of the grantee.

a. This means that delivery must be made while both the *grantor* and *grantee* are *alive*.

Example — If the grantor sends a third party to deliver the deed to the grantee, but the grantor dies before the delivery is actually made, then the transfer is ineffective.

b. Note however that if the deed is given to a third party who is an **agent** of the grantee, delivery will be effective at this moment because possession by the agent is considered to be possession by the grantee.

5. Note that delivery of a deed is **not revocable**

a. Once delivery of a deed has been made, the title passes immediately.

► In this chapter, we discussed **deeds**, which are the typical documents that represents ownership of real property. We learned that for a deed to be effective, it must be in writing, identify the parties, include a description of the land, and be signed by the grantor. We also learned that for a deed to be transferred from grantor to grantee, there must be a delivery, which occurs when there are clear actions or words by the grantor that show a present intent to transfer title to the property.

CHAPTER 27. TYPES OF DEEDS

A. There are generally 3 different types of deeds:

(i) Quitclaim deed,
(ii) Special warranty deed,
(iii) General warranty deed.

1. **QUITCLAIM DEED**

a. The **quitclaim deed** is considered to be worst type of deed because, out of all the different types of deeds, it offers the least amount of protection to the grantee.

b. The quitclaim deed *transfers only the interest that the grantor* has in the property, and *conveys no warranty that the title is good*.

1) Therefore, a buyer must be extremely cautious when agreeing to accept a quitclaim deed. If the title turns out to be faulty, the buyer will have no remedy against the seller.

c. Quitclaim deeds are often used among family members or among co-owners.

2. **SPECIAL WARRANTY DEED**

a. The **special warranty deed** is sometimes called the limited warranty deed.

b. The special warranty deed *guarantees that there are no defects in title that arose during the time that the grantor had possession of the property*.

c. However, it *makes no warranty as to title defects* that arose before the grantor owned the property, and therefore the grantor cannot be liable for such defects.

3. **GENERAL WARRANTY DEED**

a. The **general warranty deed** guarantees that the *title is completely good and clear of any defects*.

b. In particular, a general warranty deed generally makes 6 guarantees or promises that are known as **covenants**.

1) *** Note that the *special warranty deed* also includes these same six covenants but they only apply to acts or omissions on behalf of the grantor.

c. The **6 covenants** included in warranty deeds can be divided into *3 present covenants* (which apply at the moment the deed is delivered), and *3 future covenants* (which apply in the future if the grantee's possession is ever disturbed).

(i) The **3 present covenants** are the covenant of seisin, the covenant of right to convey, and the covenant against encumbrances.

(ii) The **3 future covenants** are the covenant of quiet enjoyment, the covenant of warranty, and the covenant of further assurances.

1) The **covenant of seisin** guarantees that the grantor owns the land that is being conveyed. It requires that the grantor have both title and possession at the time the deed is delivered.

2) The **covenant of right to convey** guarantees that the Grantor has the power and authority to convey the property.

3) The **covenant against encumbrances** guarantees that there are no liens, mortgages, easements, or any other encumbrances on the property.

4) Moving on to the future covenants, the **covenant of quiet enjoyment** guarantees that the grantee's possession of the property will be free from third party claims of title.

5) The **covenant of warranty** (which is similar to the covenant of quiet enjoyment) guarantees that the grantor will defend the grantee against any third party claims of title that are reasonable and the grantor will compensate the grantee for any loss if someone have superior title.

6) The **covenant of further assurances** guarantees that the grantor will remedy any defect in title if it turns out that the grantor's title was imperfect.

4. If a **deed does not specifically mention what type of deed it is**, it is presumed to be a general warranty deed.

5. **If a seller violates any of the warranties that are conveyed in the deed**, the buyer can sue the seller for damages caused by breach of any covenants.

► In this chapter, we discussed the different types of deeds: the **quitclaim deed**, the **special warranty deed**, and the **general warranty deed**. We also discussed the covenants that are included in the general and special warranty deeds.

CHAPTER 28. THE RECORDING SYSTEM

A. Every jurisdiction in the United States maintains **land record offices** that allow all real property transfers (like deeds and mortgages) to be **recorded**.

1. When a buyer is interested in acquiring land, the buyer is urged do a title search in the land record offices in order to determine who owns the property, and whether the property has any defects.

2. Note that today, most buyers purchase **title insurance** before buying real estate.

a. This guarantees that the title obtained from the seller is good title, and if the title is ever challenged or taken away from the buyer, the insurance company will usually defend the buyer against any lawsuit and compensate the buyer for any damages.

B. To make land records useful, every transfer of property must be recorded in the land records office.

1. Once a seller delivers the deed to the buyer, the buyer will want to establish ownership and protect himself by recording the deed.

2. In order to encourage the recording of deeds and prevent complications as to ownership, states have passed laws called **recording acts** that determine what happens when there is a dispute over the ownership of real estate.

C. There are 3 different types of recording acts: race statutes, notice statutes, and race-notice statutes.

1. **RACE STATUTES**

a. ***Rule*** — In a race jurisdiction, if a landowner sells his land to multiple buyers, the buyer who records his deed first will prevail over everyone else.

b. Note that even if a subsequent buyer knew about a prior conveyance, the subsequent buyer will still prevail if he records first.

c. So in a race jurisdiction, it is essentially a "race" to get to the records office and record your deed first.

1) Note that only a minority of jurisdictions adopt race statutes.

Example — Bugs bunny conveys Looneyville to Daffy Duck by deed. Daffy fails to record the deed. A month later, Bugs draws up another deed to Looneyville and conveys Looneyville to Elmer Fudd. Elmer Fudd immediately records his deed. A week later, Daffy Duck finally records his deed.

→ In this case, under a race jurisdiction, even though Daffy Duck bought the property first, Elmer Fudd will be the true owner because he recorded his deed first.

2. **NOTICE STATUTES**

a. ***Rule*** — In a notice jurisdiction, if a landowner sells his land to multiple buyers, a bona fide purchaser will prevail over all previous buyers.

1) A **bona fide purchaser** is someone who *pays* for the property and who *takes the property without notice* of any prior conveyance.

a) A buyer is deemed to have **notice** when he *actually knows* about the conveyance; and also when he doesn't know about it, but it has been *recorded* in the land record offices.

Example — Bugs bunny conveys Looneyville to Daffy Duck by deed. Daffy Duck fails to record the deed. A month later, Bugs draws up another deed to Looneyville and conveys Looneyville to Elmer Fudd, who does not know of the earlier sale to Daffy Duck. A week later, Daffy Duck finally records his deed. And then a few days after that, Elmer Fudd records his deed.

→ In this case, under a notice jurisdiction, Elmer Fudd will prevail over Daffy Duck because Elmer Fudd was a bona fide purchaser.

3. **RACE NOTICE STATUTES**

a. ***Rule*** — In race notice jurisdictions, if a landowner sells his land to multiple buyers, bona fide purchasers who record first will prevail over all previous buyers.

1) In other words, a second buyer will prevail over the first buyer only if the second buyer was a bona fide purchaser AND also recorded first.

Example — Bugs bunny conveys Looneyville to Daffy Duck by deed. Daffy Duck fails to record the deed. A month later, Bugs draws up another deed to Looneyville and conveys Looneyville to Elmer Fudd, who does not know of the earlier sale to Daffy Duck. A week later, Daffy Duck records his deed. And then a few days after that, Elmer Fudd records his deed.

→ In this case, under a race notice jurisdiction, Daffy Duck will prevail because even though Elmer Fudd was a subsequent bona fide purchaser, Daffy Duck recorded his deed first.

► In this chapter, we discussed the **recording acts**.

(i) We learned that under a **race jurisdiction**, the party who records their deed first prevails.

(ii) Under a **notice jurisdiction**, a subsequent bona fide purchaser will prevail over a previous purchaser who has not recorded the deed.

(iii) And under a **race notice jurisdiction**, a subsequent bona fide purchaser who also records first will prevail.

CHAPTER 29. MORTGAGES

A. A **mortgage** involves the transfer of an interest in land as security for a loan.

1. Mortgages are extremely common as a method to finance real estate transactions because many people cannot afford to pay the entire purchase price for a home.

B. A mortgage generally works like this: a buyer of real property borrows money from a lender, which is usually a bank, to purchase real property. In exchange, the buyer agrees to pay back the loan and agrees that the property will be collateral for the loan. If the loan is not paid back, the lender can foreclose on the mortgage and repossess and sell the property.

C. Note that in a mortgage arrangement, the party transferring the interest in land or the borrower is called the **mortgagor**. And the provider of the loan or the lender is the **mortgagee**.

D. The standard mortgage generally consists of **two documents**:

1. The first document is called a **promissory note**, which acts as proof of the debt.

2. The second document is called a **deed of trust**, which is also known as the mortgage. This document shows that the lender has a security interest in the property, and it also gives the lender the right to sell the property if the mortgagor defaults on the promissory note.

E. Since a mortgage is an **interest in real estate**,

1. A mortgage must to be in *writing* in accordance with the Statute of Frauds.

2. Also, a mortgage must be *recorded*, just like any other real property transfer.

F. Note that in a mortgage arrangement, **both parties hold a simultaneous interest in the property**.

1. The mortgagor homeowner has the right to possess and own the property.

2. The mortgagee bank holds a lien on the property and has the right to recover the property if there is a default on the loan.

G. Note that mortgagors and the mortgagees generally have the **right to transfer** their interest in mortgages.

1. Banks commonly sell mortgage interests to collection agencies, which will continue to collect on the loan and, if necessary, bring a foreclosure action against the mortgagor.

2. In addition, homeowners commonly sell their homes.

a. When this happens, the seller will usually pay off any mortgage with funds from the purchase price.

b. However, property may be sold without paying off a mortgage.

1) In this case, the buyer of mortgaged property can either purchase the property **subject to** the mortgage, or **assume** the mortgage.

a) When property is bought **subject to** a mortgage, the purchaser is not personally liable for payment of the mortgage debt. Instead, the original mortgagor remains primarily liable.

b) If a buyer **assumes** the mortgage, the buyer will become personally liable for repayment of the loan.

2) Obviously, a buyer will always prefer to buy property subject to a mortgage as opposed to buying the property and assuming the mortgage.

G. **Due on sale clauses**

1. Most mortgages contain a **due on sale clause**, which allows the lender to demand that the mortgage be paid off if the borrower transfers any interest in the property.

2. Most due on sale clauses state that if any interest in the property is transferred without the consent of the lender, the mortgage can be **accelerated**, which will make the full amount of the loan due immediately.

3. So as a homeowner, it is important to obtain consent of the lender before transferring any interest in the property.

H. **If a mortgage is not recorded**, and the property is then transferred, the party who receives the property cannot be expected to have **notice** of the mortgage.

1. Therefore, the unrecorded mortgage would be extinguished and the person who received the property will take the land completely free of the mortgage.

2. This rule forces banks to record mortgages immediately.

► In this chapter, we began discussing **mortgages**. We learned that a mortgage is essentially a loan that is secured by real property.

CHAPTER 30. PRIORITY OF MORTGAGES

A. There can be **multiple mortgages** taken out on one piece of property.

1. Homeowners commonly take out second and third mortgages on their homes to get a loan or to refinance their already existing mortgage.

2. If the homeowner cannot repay one of the mortgages, the holder of that specific mortgage can bring a foreclosure action. This will affect the other mortgages on the property based on the **priority** of each mortgage.

B. When there are multiple mortgages on 1 piece of property, they are arranged by their **priority**.

1.Priority of mortgages is important because it determines what happens and who gets paid in the event of a foreclosure.

2. Normally, priority is determined by the *order* of each mortgage.

a. So earlier mortgages have priority over subsequent mortgages.

3. However, the priority order can change in certain circumstances:

a. A **purchase money mortgage** has priority over other mortgages, even prior ones.

1) A purchase money mortgage is a loan that is used to buy the actual property.

2) So if borrower takes out a loan from a bank to buy a house, the bank will have a purchase money mortgage.

3) Note that when a borrower who already owns a home uses the home as collateral for a loan, that is not a purchase money mortgage.

b. **Failure to record** a mortgage can change the priority order.

Example — If the first lender fails to record the mortgage, the recording act may give the second mortgagee priority.

c. If two mortgagees want, they can agree to change the priority of payment. This type of agreement is known as a **subordination agreement**.

1) This occurs when a homeowner refinances the first mortgage when he has taken out other mortgages on the home.

C. What happens when a **property with multiple mortgages is foreclosed upon**.

1. When there are multiple mortgages taken out on one property and one mortgagee brings a foreclosure action, all the mortgages of **superior priority** (otherwise known as senior mortgages) will NOT be affected and they will remain intact.

a. Since senior mortgages continue to exist on foreclosed property, buyers at foreclosure sales should check for these mortgages before buying the property.

2. On the other hand, all mortgages that are **inferior** in preference to a foreclosing mortgage will automatically be *extinguished*.

a. In other words, a foreclosure destroys all the junior mortgages on the property.

D. **Who gets paid** in the event of a foreclosure.

1. When one mortgage forecloses on a property with multiple mortgages, the proceeds from the foreclosure sale will be distributed:

a. First to the mortgage that foreclosed,
b. If there's money left over, it goes to the junior mortgages in order of their priority,
c. Any money left over after that will go to the homeowner.

2. Note that if a junior mortgage is not paid back after is has been extinguished, the junior mortgage can bring a **deficiency action** against the homeowner for what is still owed.

3. And remember that superior mortgages stay intact following a foreclosure; and therefore revenue from a foreclosure sale will not be distributed to those with superior mortgages.

► In this chapter, we discussed **priority of mortgages**. We learned there can be many mortgages on one property, and the priority rules determine preference of payment in the event of a foreclosure.

CHAPTER 31. FORECLOSURE

A. Failure to make payments on a mortgage loan will result in the **foreclosure** of the mortgage.

1. Usually, when a borrower defaults on a mortgage, what happens is that the lender will get a court judgment against the borrower relating to the promissory note. If the borrower does not pay the judgment, the lender will foreclose on the property, which includes repossessing the property and selling it to recover what is owed.

B. Although the foreclosure process depends on state law and the terms of the mortgage, in general foreclosures must be **sanctioned by a court**.

1. **Judicial foreclosures** are preferred because they give the borrower time to look for another place to live, and they allow the borrower to raise any legal defenses to the foreclosure.

2. However, some jurisdictions permit **non-judicial foreclosures**, which allow lenders to foreclose on property without a court order.

a. Usually, the mortgage agreement must contain a *power-of-sale clause* in order for a non-judicial foreclosure to take place.

C. Once a mortgaged property is foreclosed upon, the property is put up for sale by a local official (like a sheriff). The **proceeds** of the sale are then used to pay off:

(i) First the costs involved in the foreclosure,
(ii) Then the debts owed to the lender,
(iii) Then to any junior mortgagees,
(iv) And lastly, any remaining proceeds go to the homeowner.

*** Note that if the proceeds of a foreclosure sale do not provide a lender the entire mortgage debt, the borrower will still owe the remaining balance. In these situations, the lender will obtain a **deficiency judgment** against the homeowner.

D. A mortgage loan may be classified as a **recourse loan** or a **non-recourse loan** (usually depending on the jurisdiction).

1. For *recourse loans*, the lender can obtain a deficiency after foreclosure.

2. In contrast, for *non-recourse loans*, the lender will not be able to obtain a deficiency.

E. **Redemption**

1. When a foreclosure occurs, the homeowner may have a chance to get their property back under the power of redemption.

2. Redemption allows a borrower to redeem the property after they have defaulted, by paying a certain amount to the lender.

3. In some states, the right of redemption only lasts up until the foreclosure sale has been completed.

a. In these states, the borrower may pay the *current amount due* to the lender and redeem the property.

b. However, if the mortgage contains an **acceleration clause**, the homeowner will have to pay the *entire debt* to redeem the property.

5. Note that in several jurisdictions, the right of redemption is statutory and homeowners are allowed to redeem property for a certain period of time after the foreclosure sale has taken place.

► In this chapter, we discussed **foreclosure** of mortgages. We learned that a foreclosure can occur once the borrower has defaulted, but the borrower may have the right to redeem the property.