

## REAL PROPERTY

## POSSESSORY INTERESTS

## - PRESENT INTERESTS

- FEE SIMPLE ABSOLUTE
  - Absolute infinite ownership
- DEFEASIBLE FEES
  - FEE SIMPLE DETERMINABLE
    - “for so long as,” “while,” “during,” “until”
    - NOT created by “for the purpose of” or “to be used for” → words of motive only
  - FEE SIMPLE SUBJECT TO CONDITION SUBSEQUENT
    - Owner retains ability to reenter and retake
    - “Upon condition that,” “provided that,” “but if,” “if it happens that”
  - FEE SIMPLE SUBJECT TO EXECUTORY LIMITATION
    - Passes to a third party on the happening of a stated event
- LIFE ESTATES
  - Dower/curtesy – life estate in favor of widow/widower
  - Duties of life tenant
    - Make ordinary repairs
    - Pay INTEREST on mortgage but not principal
    - Pay taxes
    - Don’t commit waste
      - Taking natural resources
        - Exception: Open mines doctrine
        - Can also take natural resources if land is suitable ONLY for such use OR if the grantor said so
      - Demolish/change buildings
        - Exception: OK IF:
          - Market value of future interests not harmed AND EITHER
          - The remaindermen do not object OR
          - There has been a **substantial and permanent** change in the neighborhood conditions, which deprives the property of its reasonable usefulness.

## - FUTURE INTERESTS

- IN GRANTOR
  - POSSIBILITY OF REVERTER
    - Follows fee simple determinable
  - RIGHT OF ENTRY
  - REVERSION
- IN THIRD PERSON
  - EXECUTORY INTERESTS
    - These are NOT vested for RAP purposes
    - Types
      - Springing executory interest
        - Grantor has the property until the condition happens
      - Shifting executory interest
        - A grantee has the property, and it switches to a different grantee when condition happens
  - REMAINDERS
    - Passes to a third person upon the natural expiration of the preceding estate
    - NEVER follows a time gap from preceding estate
    - Types:
      - Indefeasibly vested remainder
        - In an existing person, not subject to any condition precedent OR subject to divestment
      - Vested remainder subject to open
        - Class gifts

- Vested remainder subject to total divestment
  - Subject to a condition subsequent
- Contingent remainders
  - Unascertained or unborn people OR
  - Subject to a condition precedent
  - Destructability of contingent remainders – destroyed if it failed to vest before the preceding estate ended (now abolished most places → instead goes back to grantor, then springs up when remainderman is ready).
- Alternative contingent remainders
  - To A for life, then to B if he marries C, if not, to D.
- MERGER
  - If one person acquires all present and future interests in land EXCEPT a contingent remainder, the contingent remainder is destroyed.
  - BUT if the life estate and the next vested interest were *created by the same instrument*, there is no merger (would thwart grantor’s intent)
  - Example: X conveys “To Y for life, then to Z’s children.” Z does not yet have children. X then acquires Y’s life estate and already has a reversion. Merger → Z’s unborn children’s interests are destroyed.
- VALIDITY
  - SHELLEY’S CASE
    - If you convey to “A for life, then A’s heirs,” this just becomes a straight conveyance to A.
  - WORTHIER TITLE
    - A remainder in the grantor’s heirs is invalid, and becomes a reversion, but ONLY applies to inter vivos transfers NOT wills.
    - Example: A conveys “to B for life, then to A’s heirs” → becomes “to B for life.” A has a reversion.
  - RESTRAINTS ON MARRIAGE
    - Public policy issues
  - RESTRAINTS ON ALIENATION
    - Restraints on a fee simple interest are void UNLESS for a limited time and reasonable purpose
    - Restraints on life estates and/or future interests are VALID
  - RULE AGAINST PERPETUITIES
    - Must vest or fail within 21 years after the death of some person in being at the time the interest is created.
    - Applies only to non-vested interests – i.e. NOT vested remainders (no condition precedent), reversions.
    - Does NOT apply to charity-to-charity shifts.
- CLASS GIFTS
  - Rule of convenience – class closes when first member is eligible to take
  - Babies in gestation when the class closes, and later born alive, are considered members of the class

CONCURRENT ESTATES

- JOINT TENANCY
  - Creation
    - TTIP: Time, Title, Interest, Possession
  - Severance
    - Inter vivos conveyance of ENTIRE interest but not necessarily partial interest
    - Title theory states only – mortgage of interest
    - Lease to a third party – states are split
    - Some jurisdictions have severance if one JT murders another (to prevent killer from taking the whole)
- TENANCY BY THE ENTIRETY
  - Same as JT but JTs must be married – interest CANNOT be severed w/o other’s permission
- TENANTS IN COMMON
  - Joint devise presumed to be TIC
- RIGHTS & DUTIES OF CO-TENANTS
  - Cannot oust other JTs

- Can retain profits from her OWN use of the property absent ouster – but must share NET rents from THIRD PARTIES or natural resource exploitation (i.e. mining)
- Contributions for *necessary* repairs, but must first notify other tenants of need for the repairs.
- Cannot get contribution for improvements to the property, but may get credit for their expenditures at partition.
- Can get reimbursed for taxes or mortgage payments – UNLESS co-tenant is in sole possession. Then can only get expenditures minus rental value of her use.
- Duty of fair dealing to each other.

## LANDLORD TENANT

Leases must be in writing if for more than one year! (SOF)

### - NATURE OF LEASEHOLD

- TENANCY FOR YEARS
- PERIODIC TENANCY
  - Renews automatically if not terminated.
  - Requires one period's termination notice, or if more than one year, 6 months
- TENANCY AT WILL
- TENANCY AT SUFFERANCE
  - Landlord may move to evict OR hold T to a new periodic tenancy on the same terms as old lease (unless had previous notice of i.e. rent increase).
    - Exceptions:
      - Delay not T's fault (i.e. severe illness)
      - It is a seasonal lease
      - Lease for multiple years – then new period is max of 1 year.

### - TENANT'S DUTIES

- DUTY TO REPAIR
  - T has no duty to repair, but if the lease provides he will repair, then he must fix ordinary wear and tear but NOT complete structural failures (i.e. house burns down)
  - AFFIRMATIVE WASTE – T cannot damage property or exploit natural resources
  - PERMISSIVE WASTE – T must take reasonable steps to protect premises from damage from the elements (i.e. hole in roof)
  - DESTRUCTION OF PREMISES – T must still pay rent, but L has no duty to repair (usually changed by statute)
  - DEFENSES
  - TENANTS DUTY TO REPORT PROBLEMS
- DUTY NOT TO USE PREMISES FOR ILLEGAL PURPOSES
  - If this is breached, T can obtain injunction, damages, or terminate lease
  - Occasional unlawful conduct not grounds for termination
- DUTY TO PAY RENT
  - If T surrenders and L accepts, duty to pay rent is terminated
  - The duty to pay rent is a covenant that runs w/the land
- ABANDONMENT OF PREMISES BY TENANT
  - L must mitigate damages by trying to re-rent. If L accepts surrender, T has no more liability, but no surrender → T liable for any deficiency.
    - If L moves back in, that's accepting surrender.
  - Constructive eviction and tenant remedies
    - If T moved out b/c L did something that rendered the property uninhabitable, T can leave and seek damages. Must be L's FAULT and T must VACATE w/in a reasonable time.

### - LANDLORD'S DUTIES

- DUTY TO DELIVER POSSESSION
  - Majority: It's L's job to get holdover out, must deliver actual possession
  - Minority: It's T's problem if previous T holds over
- COVENANT OF QUIET ENJOYMENT
  - Ways this may be breached:
    - Actual eviction
    - Partial eviction by L (part of property) → T can stop paying rent on WHOLE property!
    - Partial eviction by 3d party → T must pay a proportionate amount of rent
    - Constructive eviction → must be L's fault, T must vacate promptly and sue

- IMPLIED WARRANTY OF HABITABILITY
  - Applies only to residential leases and CANNOT be waived
  - T's rights if L breaches:
    - Can terminate the lease
    - Make repairs and subtract it from future rent
    - Abate the rent to FMV w/defects
    - Keep paying full rent & sue for damages
  - Retaliatory eviction → L cannot evict for reporting housing/building code violations (w/in 3-6 months of complaint, retaliation presumed)
- SAFETY
  - At the start of lease, L must warn of latent defects he knows of and must conduct a reasonable inspection.
  - L may be liable in tort for injuries to 3d parties caused by defects of the property if:
    - L knows or should know of a dangerous condition AND
    - Has reason to believe T may admit the public before repairing the condition AND
    - Fails to repair the condition.
    - NOTE that this is the only case where L must repair and can't just warn.
  - For common areas (i.e. halls of an apartment building) L must take reasonable care to maintain.
  - For short-term, furnished rentals, L may be liable for injuries from ANY defect even if he didn't know about it
- ASSIGNMENTS AND SUBLEASES
  - Original T is in privity of contract w/L, assignor T on premises is in privity of estate w/L & can get sued by L.
    - BUT if it's only a sublease, there is no privity of estate or K – BUT L is a third party beneficiary of the T-subT contract.
  - Covenant to pay rent runs w/ the land and attaches to all sublessees/assignees
- CONDEMNATION
  - If whole property condemned by eminent domain, T's liability for rent is extinguished.
  - If condemnation is temporary or partial, T is NOT discharged from rent, but is entitled to a proportionate share of the condemnation award
- FIXTURES
  - Chattels that are incorporated into the structure (i.e. bricks in a wall) are fixtures definitely
  - T can remove other fixtures if removal would not damage the premises or destroy the chattel.
    - BUT if T leaves the fixture there after tenancy ends, it becomes L's property.
    - AND trespassers (i.e. failed adverse possession) CANNOT remove fixtures
  - Trade fixtures can always be removed, but T must put fix any damage.
- CROPS
  - Growing crops not severed by the T before he vacates become property of the L.

## EASEMENTS

- GENERAL DOCTRINE
  - An easement holder has the right to use another's land for a special purpose, but has no right to possess or enjoy the land.
  - Easement appurtenant
    - Benefits the owner of an adjacent piece of land
    - Passes with the transfer of the BENEFITED land, even w/o notice
    - Passes with the transfer of the SERVIENT land, UNLESS the new owner is a BFP for value without actual or constructive notice.
    - Cannot be conveyed apart from the land itself (unless sold to the owner of the servient land to extinguish it)
  - Easement in gross
    - Independent of another piece of land (i.e. easement to put a billboard up)
    - Easements for fun are NOT transferrable, whereas those for an economic or commercial interest (i.e. right to put up a billboard) are.
  - Grants of easements must be in writing unless they are for one year or less (SoF)
    - Must comply with all the formal requirements of a deed
  - Easements can be granted by reservation → O conveys land but reserves the right to use some part of it.
    - An easement can be reserved ONLY FOR the grantor – NOT a third party.
- AFFIRMATIVE EASEMENT

- Right to do something on the land
- NEGATIVE EASEMENT
  - Generally allowed only for:
    - Light
    - Air
    - Lateral and subjacent support
    - Flow of an artificial stream
- CREATION BY IMPLICATION
  - Implied from existing use
    - Must have been used prior to the division of a single tract,
    - Which was apparent and continuous, and
    - Is reasonably necessary for enjoyment of the dominant part, and
    - The parties intended the use continue after the land was divided.
  - Implied without any existing use
    - Available when:
      - Lots are sold in a subdivision are sold w/ reference to a recorded plat – there is an easement implied that the places marked as streets can be used by the homeowners.
      - You have a profit, and need to get on the land to use the profit.
- CREATION BY NECESSITY
  - When land is divided, and one part is sold, and there's no other way to access a ROAD or UTILITY LINE.
  - The owner of the servient land has a right to locate the easement where he wants.
- CREATION BY PRESCRIPTION
  - Elements
    - Open and notorious,
    - Adverse,
    - Hostile,
    - Continuous for the statutory period
  - CANNOT be acquired in public land.
- SCOPE
  - Easements are assumed to include increases to use that were foreseeable at the time the easement was created.
  - Overuse does NOT extinguish the easement, instead servient owner can get an injunction.
- ENFORCEMENT
- TERMINATION
  - Release
  - Merger
  - Condemnation of the servient estate
    - Courts split over whether easement holder entitled to compensation
  - Involuntary destruction of the servient estate
  - End of necessity (for easements created by necessity only)
  - Prescription
  - Abandonment → must show intent to abandon by a PHYSICAL act (i.e. building a fence across it). Mere non-use not enough
  - Estoppel → Servient landowner reasonably relies on oral promise of abandonment

#### LICENSES, PROFITS, COVENANTS & SERVITUDES

- LICENSE
  - License estoppel
    - Licenses are normally revocable at will, but if a licensee invests substantial amount of money or labor in reliance on the license, it can become an easement by estoppel, but lasts ONLY UNTIL the licensee gets sufficient benefit to recoup his investment.
    - Will be revocable as long as the interest lasts
  - License coupled w/ interest
  - Failed attempt to create an easement may create a license
- PROFITS
  - CAN be extinguished if they are overused (unlike easements)
  - Same rules for creation and extinguishment of easements apply to profits
- COVENANTS
  - Covenants get damages, equitable servitudes get an injunction.

- Affirmative covenant – maintain a fence
- Negative covenant – Don't build commercial buildings on it
- MUST BE IN WRITING
- Requirements for successors to the BURDENED land to be bound by the covenant:
  - Intent for covenant to run w/land
  - Notice (actual, inquiry, or record notice) UNLESS they took w/o giving value – then they may be bound ABSENT notice!
  - Horizontal privity (original parties shared some interest in the land independent of the covenant)
  - Vertical privity
  - Touch and concern the land
- Requirements for successors to the BENEFITED land to get the advantage of the covenant:
  - Intent for covenant to run w/land
  - Vertical privity
  - Touch and concern the land
- Covenants not to compete and covenants to pay \$\$\$ (i.e. rent) are considered to “touch and concern” the land.
- **EQUITABLE SERVITUDES**
  - Covenants get damages, equitable servitudes get an injunction.
  - Must be in writing OR implied by common scheme of development
  - Reciprocal negative servitudes will be implied IF:
    - When sales in the subdivision began,
    - The developer had a plan that all parcels would be subject to the restriction, which is evidenced by:
      - A recorded plat OR
      - A general pattern of restrictions OR
      - Oral representations to early buyers.
  - Requirements for successors to the BURDENED land to be bound by the EQ:
    - Intent that the EQ run
    - Notice (actual, inquiry, or record)
    - Touches and concerns the land
  - Requirements for successors to the BENEFITED land to get the advantage of the EQ:
    - Intent that the EQ run
    - Touches and concerns the land
  - Equitable servitudes are subject to the equity defenses:
    - Unclean hands
    - Laches
    - Estoppel
    - Holder acquiesced to violations
    - Neighborhood has changed so significantly that enforcement would be inequitable.

#### SUPPORT & WATER RIGHTS

- **LATERAL SUPPORT**
  - Support of land in natural state → Strict liability
  - Support of land with buildings → Negligence only, unless would have collapsed despite buildings
- **SUBJACENT SUPPORT**
  - Strict liability for support of land with buildings on the land when the mining rights were severed but NOT new buildings
  - Interference w/ underground waters
- **WATER RIGHTS**
  - **LAKES AND STREAMS (RIPARIAN)**
    - Natural Flow theory → Can't cause substantial or material diminution of the water's quantity, quality, or velocity
    - Reasonable use theory → All riparians have a right to “reasonable use” of the water, as long as it does not interfere with others' reasonable use (balance harms)
    - Natural use v. Artificial use theory → Natural uses (household, gardening) prevail over artificial uses (irrigation, manufacturing)
    - Prior appropriation doctrine → First in time can do whatever
  - **GROUND WATER (WELLS)**
    - Absolute ownership doctrine (12 states) → Owner of overlying land can take all the water she wants, including for export.

- Reasonable use doctrine (25 states) → Exporting is allowed only if does not harm other owners above the same aquifer.
- Correlative rights doctrine (California) → Owners of overlying land own the aquifer as joint tenants. Each is allowed a reasonable amount for his own use.
- Appropriative rights doctrine → Priority of use is determinative
- SURFACE WATERS (RUNOFF) – Anyone can *capture* as much runoff as they want. These rules apply to diversion.
  - Natural flow theory → Owners cannot alter natural drainage patterns
  - Common enemy theory → Do whatever you want
  - Reasonable use theory → Balancing of harms

## CONVEYANCING

### - LAND SALE CONTRACTS

- Statute of frauds
  - Must be IN WRITING
  - Signed by the party to be charged
  - And contain the essential terms
    - Parties
    - Price
    - Sufficiently specific description of the land
  - BUT SoF will be satisfied if there is 2 of 3:
    - Part or full payment
    - Possession
    - Valuable improvements to land
- Specific performance
  - Either S or B can get specific performance b/c land is unique
- Equitable conversion
  - Once the land sale contract is signed, B is the equitable land owner and S owns the purchase money, so risk of loss shifts to B then.
- Implied condition to convey marketable title
  - Things that will make title unmarketable:
    - Defects in chain of title (defective deeds, missing deeds)
    - Adverse possession
    - Future interests in unborn or unascertained parties
    - Significant encumbrances (mortgages or easements)
    - EXISTING violations of a zoning ordinance
    - Anything that poses an UNREASONABLE risk of litigation
  - If title is not marketable, B must notify S and give him reasonable time to cure.
  - If B still wants to buy despite unmarketable title, court can order an abatement in purchase price.
- New construction ONLY – warranty of fitness of quality is implied in sale contract from builder.
  - Not new construction → Liability for defects S fraudulently covered up (“active concealment”) and for serious, latent defects he knows of, that wouldn’t be discovered by an ordinary inspection.
    - Liability for fraud canNOT be disclaimed with an “as is” warranty unless it’s specific, such as “S disclaims any warranty on defects in roof.”

### - DEEDS

- Requirements for validity:
  - Sufficient description
    - Blank land description → deed is void
    - Good enough if it provides a good lead to the identity of the property (all my land in Stockton)
    - Order of priority for conflicting descriptive items:
      - Natural monuments
      - Artificial monuments
      - Courses (angles)
      - Distances
      - Name
      - Quantity (5 acres)

- Signed by grantor
      - If name of grantee is left blank, that's OK.
      - BUT grantee can't be a dead person → deed to a dead person is VOID
    - Delivery AND acceptance
      - Title passes on delivery, it can't be "cancelled" → NO GIVEBACKS, must reconvey with formal deed & delivery
      - Oral conditions given at delivery don't count if not in deed
      - Delivery to an third party w/instructions to give to grantee counts.
        - BUT if there are no instructions, and the 3d party is found to be an AGENT of grantee, there is no delivery.
      - Delivery as a dedication to the public (i.e. for a public park) is only effected when the city formally resolves/approves it, or starts maintaining the land.
  - Void deeds → as if they never existed
    - Obtained by fraud in the factum (O didn't realize she was signing a deed)
    - Were never delivered
    - Forged
  - Voidable deeds → Cannot be voided against a BFP!
    - By a minor/incompetent
    - Obtained through fraud in the inducement (lying)
    - Duress
    - Undue influence
    - Mistake
    - Breach of fiduciary duty
    - Fraudulent conveyances
      - To avoid creditors
      - For negligible consideration right before S went bankrupt
  - Deeds/wills problems
    - A deed that doesn't become effective until O's death, but is delivered, is valid but reserves a life estate for O, remainder to grantee.
  - Types of deeds
    - General warranty deed → has all covenants
    - Special warranty deed → Promises also that S hasn't sold the same estate to somebody else, and that S doesn't have any encumbrances on the land.
    - Quitclaim deed → Conveys whatever interest grantor has, no covenants of title are warranted.
  - Estoppel by deed
    - X does not own but sells it to Y. Later, X gets title to the property. It passes directly to Y UNLESS the X-Y deed was a quitclaim deed.
    - BUT Y will not prevail against a BFP.
- COVENANTS OF TITLE
- Covenant of seisin → owns the land
  - Covenant of right to convey → has a right to convey it
  - Covenant against encumbrances
  - Covenant of quiet enjoyment → promise that no 3d party from back in the chain of title will pop up and sue
  - Covenant of warranty → promise to defend against reasonable claims from such 3d parties
  - Covenant of further assurances → promises to perform acts necessary to perfect title
- RECORDING
- Types
    - Race → First in time always wins
    - Race-notice → Last BFP who took w/o notice wins IF he records before challenger.
    - Notice → Last BFP w/o notice always wins regardless of recordation.
  - Judgment creditors
    - Split of authority on whether a judgment creditor who records wins against a prior unrecorded conveyance. Majority says NO → prior interest will win
  - Shelter rule
    - Anyone who takes from a BFP is sheltered by their lack of notice.
    - Exception: Will not protect people who owned the property before (A → B → A)
  - A deed recorded too early (before person took title) is not in the chain of title under the MAJORITY view.
  - A deed that references an instrument outside the chain of title might put someone on notice of that instrument.

- A subsequent purchaser is charged with notice of a wrongly indexed deed, BUT has a cause of action against the recorder's office.

- MORTGAGE

- Effect of foreclosure
  - Anytime before the foreclosure sale, the mortgagor can get the property back by paying the amount due.
  - Some statutes allow redemption for a certain amount of time even AFTER the foreclosure sale.
  - Some states bar deficiency judgments after foreclosure.
- Purchase money lenders have priority even if the non-purchase money lender recorded first.
- Equitable mortgage doctrine
  - Court will treat it as a mortgage rather than a conveyance when A owned the land and conveyed it to B as a security interest.
  - A sale/leaseback arrangement may also be treated as a disguised mortgage.

ADVERSE POSSESSION

- REQUIREMENTS

- Open and notorious
  - Actual and exclusive possession
  - Continuous possession for statutory length of time
    - Filing a lawsuit does NOT stop the clock until there's a judgment!
    - Clock does not begin to run against future interest holders until their interest becomes possessory
  - Hostile
- If an adverse possessor uses the land in violation of a restrictive covenant in the owner's deed for the statutory period, she takes W/O the covenant!
- Public land can't be acquired via AP