I. First Possession
A. POSSESSION AND TITLE
   a. Possession - Dominion and Control \(\rightarrow\) physical custody and an intention to exclude others from the item.
      i. Possession is much easier to prove than ownership.
      ii. See more \(\rightarrow\) adverse possession.
   b. Title - title in its broadest sense refers to all rights that can be secured and enjoyed under the law. It is frequently synonymous with absolute ownership. Title to property ordinarily signifies an estate in fee simple.

B. ACQUISITION BY DISCOVERY
   a. First in time - one party asserts that they have a better right to title of property because they had possession first.
   b. Chain of title - the succession of title ownership to real property from the present owner back to the original owner at some distant time; a recorded transfer of a conveyance of title to real property
   c. Johnson v. M’Intosh
      i. Instant Facts: M’Intosh (D) acquired title to land under grant from the United States; Johnson (P) acquired title to the same land by purchase from the Painkeshaw Indians.
      ii. Black Letter Rule: Discovery of land in America by a European power gives absolute title subject only to the Indian right of occupancy.

C. ACQUISITION BY CAPTURE
   a. Wild Animals – Once a person has gained possession of a wild animal, he has rights in that animal superior to those of the rest of the world \(\rightarrow\) must have physical possession.
      i. Generally, to turn possession into title, one must assert \textit{dominion} and \textit{control} over the animal.
         1. Rule of Capture: the first to occupy a \textit{ferae naturae} (wild animal) has possession of the animal. Mere pursuit is not enough. \textit{Pierson v. Post}
         2. Depriving animals of their \textit{natural liberty} and bringing them within the hunter’s certain control is sufficient (e.g., mortally wounding an animal, securing animals w/ nets, toils, and other traps).
   b. Custom – occurs when customary rules transform into law, usually to protect an industry and because it is in the best interests of public policy.
      i. Title to a wild animal is acquired when a hunter apprehends the beast in accordance with custom. \textit{Ghen v. Rich}
      ii. Acquisition of title by capture may be altered by specific custom within a group. Custom reflects the values important to the court.
   c. Protection from Unfair Competition
      i. A person may not maliciously prevent another from capturing wild animals in the pursuit of his trade. \textit{Keeble v. Hickeringill}
ii. Competition to gain possession is admissible, but malicious interference is not.

iii. Ratione Soli: a landowner acquires constructive possession of wild animals who are on his land (for the purposes of protection from trespassers) until they take off. Page 32.

d. **Escape Rule** – If an animal escapes and regains its natural liberty, the owner loses possession unless the animal habitually returns to the owner.
   i. Exception: If he owner makes sufficient efforts to reclaim the animal. Possibly depends on identifying marks or likelihood the animal is domesticated.

e. **Rule of Increase** – the offspring of two animals belonging to different owners is the property of the mother’s owner. (don’t necessarily know who the dad is)

f. **Relative Title** – actual possession isn’t everything, one person’s claimed property right is almost always good (or not good) in relation to others.
   i. T trespasses on O’s land and captures a wild animal and takes it to his own land. T1 trespasses on T’s land and takes the animal.
      1. T has a claim against T1 for return of the animal.
      2. O has a claim against both T and T1 for return.
      3. The party with superior title has a claim against all who have an inferior title.

g. **Externalities** –...

D. **ACQUISITION BY CREATION**

a. When is it Protected? When it is recognized to be protected at common law or under some other statute, otherwise only the chattel that embodies the intellectual creation is protected.
   i. The law of misappropriation – the branch of unfair competition law that protects new ideas – tries to answer the question of when imitation is permissible and when it is not because it will destroy the incentive to create.
      1. Where a company has expended resources in creating news and information, the creator can exclude others from copying it until its commercial value as news has passed away. *Int’l News Service v. AP*
         a. Quasi-property
      2. No common law protection against copying - *Cheney Brothers v. Doris Silk Corp.* Compare to *Smith v. Chanel*
         a. “Unless the common law or the patent or copyright statutes give protection from appropriation, a person’s property interest is limited to the chattels which embody his creations”

b. **Intellectual Property Law**
   i. Patents/Copyrights/Trademarks

c. **Persona as Property** - Property interests include name, likeness, and other aspects of one’s identity.
   i. **Persona** – an identity or role that somebody assumes: today a celebrity’s right of publicity is widely recognized as a kind of property interest, assignable
during life, descendible at death. Difference between imitating a scarf and imitating a persona: the later is more of a misrepresentation, more tortuous

ii. The common law right of privacy prohibits the appropriation of one’s identity, regardless of the means employed. White v. Samsung.

II. Subsequent Possession
A. ACQUISITION BY FIND
   a. A property owner continues to own his property even after he loses or misplaces it, but the finder has relative title.
      i. A finder’s title is good against the whole world except the true owner, prior finders, and (sometimes) the owner of the land where the object is found (Medina, storeowner of lost wallet is the finder over customer who found it first)
      ii. If the owner of property has never occupied his land, the finder of property on his land has a superior title against the land owner. Hannah v. Peel
         1. Generally an invitee must surrender found property to the landowner.
      iii. If you don’t know if it was lost/misplaced/abandoned, wait for the SOL to run out before you truly own.
   b. Finder – A person who discovers a lost or mislaid chattel, to be a proper finder one must have:
      i. Mental element of intending to take it.
      ii. Physical element of actually taking dominion and control.
   c. Abandoned Property – Property that’s voluntarily relinquished with no intention of reclaiming by the true owner
      i. A finder may immediately take title of abandoned property, pending they are not a trespasser etc.
      ii. However, very tough to tell if the property was abandoned or not.
   d. Lost Property – Property that was accidentally left in a location and dominion and control of the object was unintentionally lost.
   e. Misplaced Property – property that was intentionally placed in a location, but then accidentally left there. Mentally it is still yours, but you’re lacking dominion and control.
      i. Time does not change the distinction between lost and misplaced property.
      ii. When goods are found in a public place, the finder gets them if they were lost or abandoned, but the landowner gets them if they were mislaid (i.e. intentionally set down by the owner who then forgot to pick them up later). The theory is that the owner of mislaid goods is more likely to return to the premises to recover them and that recovery will be facilitated if the landowner has possession.
   f. Treasure Trove
      i. In the US, general rule is to treat it like lost property - FAVRE
ii. At English CL, treasure trove (money/coin, gold, silver plate, or bullion hidden in the earth) belonged to the king. Today, however, no separate treasure trove doctrine; courts use lost/mislaid/abandoned distinction:

1. See Benjamin v. Lindner Aviation, Inc., where $18k was found in the wing of an airplane, court held it to be mislaid because no one would abandon so much money.
2. But, see In re Seizure of $82,000 More or Less, where money was found in the gas tank of a car. The car had been seized by the gov’t b/c it was used to transport drug proceeds and sold to Buyer. Ct held that money was abandoned b/c the culprits couldn’t claim it w/o risking arrest for drug dealing

g. Shipwrecks (check the difference between treasure trove, was on exam)
   i. Under common law it goes to the king.
   ii. Under traditional maritime law, a ship lost at sea and settled on the ocean floor remained the owner’s property – unless title was abandoned – but anyone subsequently reducing the ship or its cargo to possession was entitled to a salvage award.

B. BAILMENT
   a. To have a bailment, there must be an intention to transfer possession, the bailee must accept the transfer, and there must be actual transfer.
   b. Duty
      i. Under a bailment, you must take reasonable care.
      ii. The two parties can agree by contract (express or implied) to increase the standard of care where public policy would not warrant otherwise.
      iii. The bailee has a duty to redeliver the goods on demand or at the expiration of a fixed term and the (voluntary) bailee is strictly liable for conversion of the property during delivery (even by mistake).
      iv. A bailee is not an insurer but instead is liable only for negligence in the usual case.
   c. Special Value – if a piece of property has special characteristics then you have to tell the bailee or they’re not responsible for the extended value of the property, unless if upon reasonable inspection you would know that the property was valuable
   d. Receipt Bailment – The good is represented by a ticket, the bailee is required only to return the good to the possession of the ticket
   e. Involuntary Bailment – those situations where chattels are placed under the control of a person without his knowledge or consent.
   f. [See examples from class…]

C. ACQUISITION BY GIFT
   a. Gift – the voluntary intentional transfer of property to another without consideration
      i. Inter vivos: Latin for “among the living,” usually referring to the transfer of property by agreement between living persons and not by gift through a will (further requires acceptance)
ii. **Causa mortis**: a gift made in contemplation of and in expectation of immediate approaching death. A substitute for a will. If the donor lives, the gift is **revoked**. But it’s revocable any time before death.

b. **Rule** – To accomplish a gift of personal property, the donor must **intend** to make a gift, the property must be **delivered** to the donee, and the donee must **accept** the property.

   i. **Intent** – to make present transfer of title (not possession) of the chattel.
   
   1. We can only determine intention as objectively evidenced through words, acts, circumstances of the donor.
   2. E.g., “I will give you this watch” is *not* a valid gift. There must be an intent to transfer title **now**.
   3. Intent for a gift causa mortis is only because of impending death, so if the donor survives the intent is revocable.

   ii. **Delivery** – physical transfer of chattel.
   
   1. **Actual** – Donor physically transfers possession of an item to the donee
   
      a. Note some items cannot be manually delivered. But, if an object can be handed over manually, it must be.
   2. **Constructive** – Donor physically transfers to the donee the means of obtaining access to and control of the property
   
      a. Constructive delivery is allowed only when it is impractical to deliver actual possession. *Newman v. Bost*
   3. **Symbolic** – donor physically hands donee an object that represents or symbolizes the gift → usually a writing
   
      a. No symbolic delivery in causa mortis gifts

iii. **Acceptance**

   1. Usually presumed by the court and not an issue.

c. **Gifts Preferred Over Wills**

   i. When the owner/donor is not present in Court, then the courts must be weary of fraud.

   ii. Additionally, since we have very specific rules about the transfer of property at death, (wills/trusts), courts are reluctant to allow a failed attempt to transfer property at death succeed as gifts, thus denigrating the rules of wills and trusts

**D. ACQUISITION BY ADVERSE POSSESSION**
a. Adverse possession is a method of acquiring title to real property by possession for a statutory period under certain conditions:

i. **Open and Notorious**
   1. Used in a way that would reasonably inform landowner of trespasser’s presence.
   2. Reasonably inform an attentive landowner that someone is on the property.
   3. Open and notorious against the world.

ii. **Continuous for the statutory period**
    1. Requires only the degree of occupancy and use that the average owner would make of the property. Can be seasonal, like a cabin.
    2. **Tacking** – The accumulation of consecutive periods of possession by parties *in privity* with each other.

iii. **Actual entry giving exclusive possession**
    1. Exclusive of the landowner. Remember you can jointly adverse possess.
2. **Actual** – Claimant must make changes/add to the property as a true owner would (e.g., a claimant adversely possessing a neighbor’s property may not claim actual possession if they are using the neighbors’ backyard as a farm.)

**iv. Adverse and Hostile against whoever’s interests owns it**

1. **Hostile** – Possession must be without the owner’s consent.

2. Three ways of determining hostility:
   a. **Objective Standard**: state of mind is irrelevant (majority)
      i. See *Manillo v. Gorski*
   b. **Good-Faith Standard**: required states of mind is “I thought I owned it”
   c. **Aggressive Trespass Standard**: required state of mind is “I thought I did not own it and intended to take it”

b. **SOL** – begins to run when all AP elements are met.

c. **Color of Title** – A claim founded on a written instrument or a judgment or decree that is for some reason defective and invalid. **Color of** – if you occupy a certain amount but the deed gives you all of it,
   i. **Constructive Adverse Possession under Color of Title**: If a claimant goes into actual possession of some portion of the property under color of title, he is deemed to be in adverse possession of the entire property described in the instrument. Adverse possessor is in “constructive adverse possession” of the part of the tract he does not actually possess.
      1. No requirement of open and notorious possession for the entirety of the tract
      2. Generally a shorter SOL.
   ii. Remember this is **NOT** the same as claim of title.
      1. **Claim of title** – way of express the requirement of hostility or claim or right on the part of an adverse possessor.
      2. **Color of title** – claim founded on a written instrument or a judgment or decree that is for some reason defective and invalid.

d. **Boundary Disputes**
   i. Most courts apply the objective test to determine if one of the parties has acquired title to the disputed strip of land by adverse possession; i.e., by putting up a fence and using the land for the necessary number of years, the party can acquire title to the land
   ii. **Doctrine of Acquiescence** – acquiescence for a long period of time is same as an agreement because you did something and the other person didn’t object; like a silent agreement.

e. **Governmental Land** – majority says you cannot adversely possess government land.

f. **Adverse Possession of Chattels**
   i. All of the elements are required, things just get tricky with open and notorious.
1. **Discovery Rule** – The statute of limitations begins to run when the injured party discovers, or by reasonable diligence could have discovered, the wrong/basis for cause of action.
   a. **MINORITY RULE**: majority rule is still CL and focuses on what the adverse possessor did with the property (displayed it in a museum or his house).
   b. This shifts the focus and the burden of proof onto the original owner to prove that they acted with “due diligence”.

### III. Possessory Estates

#### A. ORIGIN OF POSSESSORY ESTATES – FEUDALISM

a. History lesson . . .

#### B. TERMS

a. **Heirs**: A person(s) who survives the decedent and is designed as intestate successors.
   i. You cannot know somebody’s heirs until a person is dead.

b. **Issues**: Synonymous with descendants. Distribution is made “per stirpes” meaning that if any child of the decedent dies before the decedent leaving children who survive, the child’s share will go to the grandchildren.

c. **Filius Nullius**: A child born out of wedlock could inherit from neither mother nor father at common law (Today child may inherit from both)

d. **Ancestors**: By statute parents usually take as heirs if the decedent leaves no issue

e. **Collaterals**: All persons related by blood to the decedent who are neither descendants nor ancestors are collateral kin

f. **Escheat**: If a person died intestate without any heirs, the person’s real property escheated to the overlord in feudal times. Now such property escheats to the state where the property is located.
### A. Present Possessory Estates

<table>
<thead>
<tr>
<th>Estate</th>
<th>Language to Create</th>
<th>Duration</th>
<th>Transferability</th>
<th>Future Interest</th>
<th>Notes</th>
</tr>
</thead>
</table>
| **Fee simple absolute**        | "To A and his heirs"  
"To A" | Absolute ownership, of potentially infinite duration.                   | **Devisable**  
(transferable by will), **descendible**  
(transferable by statutes of intestacy if its holder dies w/out a will), **alienable**  
(transferable during life). | None.                     | A's heirs get NOTHING.                        |
| **Fee tail**                   | "To A and the heirs of his body." | Lasts only as long as there are lineal blood descendants of grantee.   | Passes automatically to grantee's lineal descendants. | Reversion (if held by grantor); Remainder (if held by third party). |                                            |
| **Fee simple determinable**    | "To A so long as…"  
"To A until…"  
"To A while…" | Potentially infinite, so long as event does not occur.                   | **Alienable, devisable, descendible, subject to condition.** | Possibility of reverter (held by grantor). | 2 Rules re Defeasible Fees:  
Words of mere desire, hope, or intention are insufficient to create a defeasible fee.  
Absolute restraints on alienation are VOID. |
| **Fee simple subject to condition subsequent** | "To A, but if X event happens, grantor reserves right to reenter and retake."  
"To A, upon condition that"  
"To A, provided that"  
"To A, but if" | Potentially infinite, so long as the condition is not breached, and thereafter, until the holder of the right of entry timely exercises the power of termination. | **Alienable, devisable, descendible, subject to condition.** | Right if entry/power of termination (held by grantor). | "It's my prerogative” – Bobbie Brown |
| **Fee simple subject to executory limitation** | "To A, but if X event occurs, then to B." | Potentially infinite, so long as stated | **Alienable, devisable, descendible,** | Executory Interest (held by third party) |                                            |
Life estate

<table>
<thead>
<tr>
<th>Contingency does not occur.</th>
<th>Subject to condition.</th>
<th>(Shifting or springing)</th>
<th>Can't WRITE¹ on the walls.</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;To A for life.&quot;</td>
<td>Measured by life of transferee or by some other life (pur autre vie).</td>
<td>Alienable, devisable and descendible if pur autre vie and measuring life is still alive.</td>
<td>Reversion (if held by grantor); Remainder (if held by third party).</td>
</tr>
<tr>
<td>&quot;To A for the life of B.&quot;</td>
<td></td>
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</tbody>
</table>

C. FEE SIMPLE

a. The Fee Simple Absolute is the most unrestricted and longest estate, it can last forever. It is also inheritable and alienable.

b. Creating a Fee Simple

   i. Common Law – “O to A and his heirs”
      1. The words “to A” are words of purchase – words describing the person persons who are the takers of the see simple absolute.
      2. The words “and his heirs” are words of limitation – words limiting the duration of the estate.

   ii. Modern Day – “O to A”
      1. If this were used in the 1800s though, it would create a life estate.

c. Attempting to use the word “forever” is useless. Very particular in wording ^^^

D. FEE TAIL

a. “To A and the heirs of his body”

b. The fee tail descends to A’s lineal descendants generation after generation and it expires when the original tenant and all his descendants are dead.

   i. Made to assure that the estate stays in the family.

c. Most all states have eliminated the fee tail and it simply converse to a fee simple.

d. Most states, “To A and the heirs of his body” now equals a fee simple.

   i. Michigan exception – In Michigan, it is a fee simple if there is no language after the fee tail language. But if there is more language giving to a third party after the fee tail language the condition will remain in effect for one generation, and then becomes fee simple. (like “to A and

¹ No waste; must make reasonable repairs; must pay interest charges on the mortgage; must pay property taxes
E. LIFE ESTATES
a. A life estate is a right to possession for the life of some living person
   i. “O to A for Life”
   ii. Every life estate is follow by a future interest.
b. Life Estate per autre vie: measured by the life of another, generally happens when
   one person transfers his life estate to another.
c. EXAMPLE:
   i. In 1800: O → to A for life, then to B. (B has son C alive at the time of
      conveyance)
      1. A - present possessory life estate (PPLE)
      2. B - future interest life estate (vested remainder)
      3. C - HAS NOTHING
      4. O - future interest in fee simple
         a. Reversion back to O when both A and B die. Then O will have
            the fee simple
      5. What if O dies before A and B → Goes to O's heirs
         a. O's reversion was conveyable to heirs
      6. What if one year after the conveyance, A → W
         a. W has for A's life. (you cannot change the measuring life)
            b. PPLE (per autre vie)
d. Fee Simple Absolute is presumed unless language indicates otherwise.
   i. White v. Brown: The decedent created a holographic will passing title to her
      home to White, “To live in and not to be sold.” The court had to decide if the
      testator meant to convey a life estate or a fee simple.
e. Equitable Intervention – a court may intervene and order the sale of an estate in
   which there are future interests in order to preserve the estate from waste or
   deterioration or if it is in the best interest of all the parties.
   i. Baker v. Weedon: The plaintiff had a life estate granted to her by her husband.
      She was poor and the land was valuable so she sought approval from the court
      to sell the land for her support. The court held that if the parties cannot agree
      on a mortgage of the land – they should sell it to cover the plaintiff’s
      “reasonable needs”.
   ii. A trust would have been a better vehicle for to use. See Trusts below.
f. Waste – The life estate, possessor, should not be utilizing the land in such a way to
   take away value from the future interest holder.
   i. Party with a future interest can bring an injunction to stop waste (dumping)
F. DEFEASIBLE ESTATES
a. The holder of a fee simple defeasible may hold or convey the property, but he and
   those who take it from him must use the property subject to a restriction. There are
   three types, see below.
b. Any estate may be made to be defeasible, meaning it will terminate, prior to this natural end point, upon the occurrence of some specified future event.
   i. The most common defeasible freehold estates are the fee simple defeasible
      1. Favre will always use “so long as”

c. Fee Simple Determinable “so long as”
   i. A fee simple determinable is a fee simple which automatically comes to an end when a stated event occurs (or perhaps, fails to occur), it is usually used to prevent the property from being put to a certain use.
   ii. Every fee simple determinable is accompanied by a future interest.
      1. Ordinarily the transferor, or his heirs, retains the future interest called a possibility of reverter.
   iii. Example:
      1. O → to MSU Law so long as the building is used for a tax clinic
         a. “so long as” – Trigger phrase determinable (words of durational aspect)
      2. If not used as a tax clinic reverts back to O

d. Fee Simple Subject to Condition Subsequent “but if”
   i. Also geared toward the happening of a particular event, but unlike the fee simple determinable, the fee simple subject to a condition subsequent does not automatically end when the event occurs → instead, the grantor has a right of entry to take back the property, but he must exercise that right if he wants the property back.
      1. This right of entry may be either express or implied (is this correct)
   ii. SOL – fuck.
   iii. Example:
      1. O → to MSU Law, but if it is ever used for something other than a tax clinic, then O reserve the right to re-enter.
         a. Subtle difference - just have to get it into your head.
         b. If O doesn't do anything, fee simple stays in effect.
         c. When it is confusing, most jurisdictions interpret it as a fee simple with condition subsequent - not always easy to see if there has been a breach of condition.
   iv. Condition subsequent distinguished from fee simple determinable
      1. Two reasons we care. One is the case below, the other is due to the SOL. The Right of Entry favors O as against the Adverse Possessor because the clock starts running late?
      2. Mahrenholz v. County Board

e. Fee Simple Subject to Executory Limitation “but if”
   i. The estate created when a grantor transfers a defeasible fee simple, either a determinable fee or a fee simple subject to condition subsequent and in the same instrument creates a future interest in a third party
      1. Third party’s future interest is called an executory interest
   ii. Example:
1. O \(\to\) to A and his heirs, but if A dies without children surviving him, then to B and his heirs.
   a. A has a fee simple subject to an executory limitation.
   f. Subject to executory limitation vs. subject to condition subsequent
      i. ADD IN

IV. Future Interests
A. INTRODUCTION
   a. Non possessory estate which is capable of becoming possessory in the future.
   b. A future interest gives legal rights to its owner. It is a presently existing interest that may become possessory in the future.
   c. Categories of Future Interests
      i. Interests retained by the grantor:
         1. Reversion
         2. Possibility of reverter
         3. Right of entry
      ii. Interests created in a grantee:
         1. Vested remainder
         2. Contingent remainder
         3. Executory interest

B. REVERSION
   a. A reversion is the interest left in an owner when he carves out of his estate a lesser estate and does not provide who is to take the property when the lesser estate expires.
   b. All reversions are retained interests, which remain vested in the transferor.
   c. Much of the time the reversion is not expressly retained; therefore, you must look for it. When you read the grant, check to see if O has conveyed all he had. If not – if she conveyed only a lesser estate – remember that there is a reversion in O.
   d. A reversion is fully transferable/alienable.
   e. Example:
      i. O \(\to\) to A for life
         1. O – reversion in fee simple.
         2. If O dies during A’s life, O’s reversion passes to his heirs.
      ii. O \(\to\) to A for life, remainder to B if B survives A.
         1. O – reversion in FS, because if B dies before A, Blackacre will return to O at A’s death.
         2. ***So one can have a reversion even though it isn’t certain ever to become possessory

C. POSSIBILITY OF REVERTER
   a. A possibility of reverter arises when a grantor carves out of his estate a determinable estate of the same quantum.
   i. Essentially, a possibility of reverter is a future interest remaining in the transferor or his heirs when a fee simple determinable is created.

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ii. Carving a fee simple determinable out of a fee simple absolute.
   b. SOL begins to run (for purposes of adverse possession) when the condition is broken.
   c. Example:
      i. O → to Hartford School Board so long as used for school purposes
         1. O has a possibility or reverter.

D. RIGHT OF ENTRY
   a. When an owner transfers an estate subject to a condition subsequent and retains the power to cut short or terminate the estate, the transferor has a right of entry.
   b. Arises in grantor only out of fee simple on condition subsequent.
   c. Often, a transferor who holds a right of entry also holds a reversion.
   d. Example:
      i. O → to MSU Law, but if it is ever used for something other than a tax clinic, then O reserve the right to re-enter.
         1. O has a right of entry in FS

E. REMAINDERS
   a. In General . . .
      i. Future interest in a transferee which is capable of becoming possessory at the natural termination of the preceding estate and does not divest any one estate except the transferor – FAVRE.
      ii. A remainder is a future interest that is capable (not necessarily certain) of becoming possessory at the termination of the prior estate.
      iii. Remains come in two varieties: Contingent or Vested.
      iv. A remainder may never follow a fee simple defeasible.
         1. It generally follows a life estate or a leasehold estate.
      v. It must not have the capacity to cut short other estates.
         1. The subsequent possessor must take possession on the natural termination of the prior estate.
      vi. Example:
         1. O → to A for life, and on A’s death, to B and her heirs.
            a. APPLE
            b. B – remainder in FS.
               i. B’s interest is a remainder because it can become possessory on A’s death.
   b. Vested Remainder – A vested remainder is one where the transferor has decided at the outset who is to take the property upon the life tenant’s death.
      i. A remainder is vested if:
         1. It is given to an ascertained person; AND
         2. It is not subject to a condition precedent
            a. No condition precedent is deemed to exist so long as the remainder will become possessory whenever and however the prior estate terminates.
            b. A condition precedent is an express condition attached to the remainder, such as, “to B if B reaches age 30”
There are three types of vested remainders:

1. **Indefeasibly Vested** *(do we need to know this)*: Here, the remainder cannot be divested and is certain to become possessory *(To A for life, then to B and B’s heirs)*.

2. **Subject to Open**: Here at least one member of a class is known, but others could be added to that class. *(To A’s children and their heirs, A has one child, B. We already know that B will take a partial share, but if A has other children, B would share with those children)*.

3. **Subject to Divestment**: Here, at least one person is known, but something could come in and divest *(or take away)* their taking of the property. *(To A for life, then to B and her heirs, but if B does not survive A, then to C and his heirs)*.

   a. **For these conveyances, read between the commas**:

      i. “To A for life, then to B, but if . . .” Commas indicate that B’s estate can be divested.

iii. The law prefers a vested remainder

iv. Vested remainders are usually followed by an executory interest.

   1. Rule of thumb: if the taker of the first future interest has a vested remainder subject to divestment then the next taker of the second future interest will have an executory interest.

c. **Contingent Remainder** – permits the transferor to let future events determine this question. A remainder is a future interest that waits politely until the termination of the preceding possessory estate, at which time the remainder moves into possession if it is then vested.

   i. **A remainder is contingent if**:

      1. *Is given to an unascertained person; OR*

      2. *It is made contingent up on some event occurring other than the natural termination of the proceeding estate* *(i.e., subject to a condition precedent)*

ii. Contingent Remainder if **Recipient is Unascertained**

   1. E.g., O conveys “to A for life, then to the heirs of B.” B’s heirs are unascertainable until he dies.

   2. E.g., O conveys “to A for life, then to A’s children.” A has no children. If a child is born, then the remainder vests.

iii. Contingent Remainder if **Subject to Condition Precedent**

   1. E.g., O conveys “to A for life, then to B and her heirs if B survives A, and if B does not survive A, to C and his heirs”

a. Note: these are **alternative contingent remainders**.

b. Note: If there is a contingent remainder, the donor has a reversion . . .

   i. O retains a reversion, even though it seems like the future interest would either go to B or C. This is because A’s LE can end before he dies.
F. EXECUTORY INTEREST
   a. A future interest in the transferee that can take effect only by divesting another interest. In order to become possessory it must:
      i. Divest or cut short some interest in another transferee (this is shifting); OR
      ii. Divest the transferor in the future (springing)
   b. Examples:
      i. O → to A for life, then to B and his heirs, but if Tigers win the world series in 2016, then at A's death to C and her heirs
         1. A - PPLE
         2. B - VR subject to executory limitation in FS
         3. C - shifting executory interest in FS
         4. O - nothing
         5. Tigers - nothing
         6. B's heirs - nothing (why)
         7. BUT if Tigers do win
            a. C - VR in FS
      ii. O → “to A for life, then to A’s children and their heirs, but if at A’s death he is not survived by any children, then to B and her heirs.” Suppose A is alive and has no children
         1. A: PPLE
         2. A’s children: Contingent Remainder in FS
         3. B: Contingent Remainder in FS
         4. O: Reversion | FS
         5. We don't have contingent remainders 'subject to things'
         6. Alternative contingent remainders
            a. Two years after the conveyance, twins, C and D, are born to A.
               i. A: PPLE
               ii. C, D: Vested Remainder Subject to Divestment and Open in FS [no condition precedent]
               iii. B: Shifting Executory Interest in FS
               iv. Read between the commas
            b. Suppose that A’s child (C) dies during A’s lifetime and that A later dies, survived by his child (D) and B.
               i. A: LE ENDED
               ii. D: FS
               iii. C’s Heirs: FS (divesting condition never occurred)
                   (intestate - back to parents probably)
               iv. B: Nothing.
   c. DO WE HAVE TO KNOW THE STATUTE OF USES?

G. THE TRUST
   a. Trust – An entity created to hold assets for the benefit of certain persons or entities, with a trustee managing the trust (and often holding legal fee simple in the property).
b. The trustee has the power to sell trust assets and reinvest the proceeds in other assets unless it appears from the trust instrument and the surrounding circumstances that the donor intended that the particular property be retained in the trust.

c. The net income of the trust is paid to the beneficiaries, and upon termination of the trust the trust assets as they then exist are handed over to the beneficiaries entitled thereto.

d. Trustee is the legal owner, and the beneficiaries are the equitable owners in the land (equity is superior).

i. **Fiduciary Relationship**: A person (or a business like a bank or stock brokerage) who has the power and obligation to act for another (often called the beneficiary) under circumstances which require total trust, good faith and honesty.

e. **Spendthrift Trust**: A trust that prohibits the beneficiary’s interest from being assigned and also prevents a creditor from attaching that interest; a trust by the terms of which a valid restraint is imposed on the voluntary or involuntary transfer of the beneficiary’s interest.

H. RULES FURTHERING MARKETABILITY BY DESTROYING CONTINGENT FUTURE INTERESTS

a. **Destructibility of Contingent Remainders**

i. Rule: In a jurisdiction that follows this doctrine, a contingent remainder is destroyed if:

1. (1) it cannot vest when the prior possessory estate terminates or
2. (2) the same person owns the vested interests immediately preceding and succeeding the contingent remainder (“merger”).
3. ***A common law rule abolished in most states.

ii. **Doctrine of Merger** – if the LE and the next vested estate in fee simple come into the hands of one person, the lesser estate is merged into the larger one.

1. Example: O → to A for left and then to B and his heirs upon B’s marriage. A later conveyed her life estate back to O.
2. O then held both a life estate and a reversion in fee simple absolute. If these two interests were separated by a vested remainder or by an executory limitation, they would remain separate. However, an intervening contingent remainder, which is not a property interest, cannot prevent their merger. Thus, if B has not married when this happens, his contingent remainder is not ready to vest and is destroyed, and O has the fee simple absolute title again. If B has married, his remainder vested and is not destroyed by merger. He will get possession upon A’s death.

iii. Examples:

1. O → to A for life, then to B if the Lions win the superbowl in 2026.
   a. A - PPLE
   b. B - contingent remainder in fee simple
   c. O - reversion
d. Destructibility of contingent remainder rule:
   i. If A dies in 5 years, B has nothing since the
      contingency didn't vest – and it's stricken.
   ii. Reverts back to O

  e. What if we don't apply the rule:
     i. Would go back to O with a FS subject to B's contingent
        remainder. . . until 2026

  2. O \(\rightarrow\) to A for life, then to such of A's children as attain the age of 21.
     [A has child C and D]
     a. A - PPLE
     b. A's children, C and D - contingent remainder
     c. O - reversion
     d. ***A dies C and D alive (assuming they're not 21)
        i. Hanging contingent remainder
     e. C reaches 21 then dies
        i. C's interest is vested remainder subject to open
        ii. Once this happens, and C dies . . . It does not go back to
            a contingent remainder it stays vested for D to take if he
            turns 21

b. Rule in Shelley’s Case

   i. Rule: “a conveyance that attempts to give a person a life estate, with a
      remainder to that person’s heirs, will instead give both the life estate and the
      remainder to the person, thus giving that person the land in fee simple”

   1. Simplified Rule. Cannot in same instrument create a LE in a person
      and a Reminder in the heirs of that person
        a. \(\Rightarrow\)ONLY APPLIES TO REMAINDERS.
   2. The doctrine of merger may then come into play. According to this
      doctrine a life estate merges into a next vested remainder in fee (a
      larger estate).
   3. Abolished in most states. When do we use it?
   4. Example: “To A for life and then to her heirs.”
      a. The grant conveyed a freehold estate to Ann and a remainder to
         her heirs. The Rule makes Ann the owner of the remainder, as
         well as of the life estate.

   ii. Examples:

      1. O \(\rightarrow\) to A for life, then to A’s heirs
         a. NOT applying Shelley’s case rule: LE in A, contingent
            remainder in A’s heirs, reversion in O.
         b. YES applying Shelley’s case rule: LE in A, remainder in A
            (not A’s heirs). Then, by merger doctrine, A’s LE will merge
            into his remainder in FS, and A simply holds a FS.
      2. O \(\rightarrow\) to A for life, but if it is ever used as a farm then to the heirs of A.
         a. A - PPLE
b. "but if" - executory interest (rule ONLY for remainders!)
c. Remember, for the rule to work you have to be able to distinguish between remainder and executory interest.

3. Works also in this situation: “To A for life, then to B for life, then to the heirs of B” → B would have a vested remainder in fee simple.

c. **Doctrine of Worthier Title**
   i. Rule: where there is an inter vivos conveyance of land by a grantor to a person, with a limitation over to the grantor's own heirs either by way of remainder or executory interest, no future interest in the heirs is created; rather a reversion is retained by the grantor.
      1. Essentially, once cannot, either by conveyance or will, give a remainder to one’s owns heirs.
      2. Similar to rule in Shelly’s case: can’t name specific heirs?
   ii. Example:
      1. O → to A for life, then to O's heirs.
         a. In the absence of the Worthier Doctrine, there is a contingent remainder in favor of O's unascertained heirs. Under the Doctrine, no such remainder exists. Rather, O has a reversion.

V. **Concurrent Interests/Ownership**

A. **COMMON LAW CONCURRENT INTERESTS**
   a. Generally – There are three ways in which two or more people may own present possessory interest in the same property:
      i. (1) **tenancy in common** [which does not have the right of survivorship];
      ii. (2) **joint tenancy** [which includes the right of survivorship];
      iii. (3) **tenancy by the entirety** [which exists only between husband and wife, and which includes not only survivorship but “indestructibility”]

B. **TENANTS IN COMMON**
   a. Separate but undivided interest in the property; the interest of each is descendible and may be conveyed by deed or will.
      i. Each tenant in common owns an undivided share of the whole.
         1. Need not be equal shares though.
      ii. Each has the right to possess the entire property.
      iii. Magic words: “To A and B”
      iv. No right of survivorship so when a tenant in common dies, his interest passes to his devisees or heirs and NOT to the surviving tenant.
         1. Key difference between joint tenancies.
   b. Probably the best tenancy – most flexible, gives owner the most power, transferrable inter vivos, devisable, inheritable, etc.

C. **JOINT TENANCY**
   a. Unlike tenants in common, joint tenants have the right of survivorship and are together regarded as a single owner. In theory, each owns the undivided whole of the
property, therefore when on joint tenant dies, the estate simply continues without the interest of the descendent.

i. “to A and B as joint tenants with right of survivorship”
ii. Do we need to know about presumption

b. Four “Unities” must be met: (PITT)
   i. **Time**: JT's must acquire or vest title at the same time.
   ii. **Title**: JT's must acquire title by the same instrument or by joint adverse possession. Cannot arise by interstate succession or other act of law.
   iii. **Interest**: JT's must have equal interests in shares and duration.
   iv. **Possession**: JT's must have equal right to possession of the whole. After JT is created, however, one joint tenant can voluntarily give exclusive possession to the other JT.

c. Benefits of Joint Tenancies
   i. A creditor cannot touch the joint tenants’ property after they have died since the descendants interest simply ceases to exist at the moment of the debtor/joint-tenant’s death.
   ii. Popular between husband and wife because at death of one tenant probate is avoided.

d. **Severing a Joint Tenancy**
   i. At common law, if any of the unities are severed, the joint tenancy turns into a tenancy in common:
      1. Give common law rule, and note that in many jurisdictions it is no longer adhered to – FAVRE
   ii. Accordingly, one joint tenant can unilaterally break the tenancy by conveying his interest to a third party, effectively breaking one of the unity requirements.
      1. See *Riddle v. Harmon*, no longer requiring a strawman and allowing one to convey their interest to themselves breaking the interest unity.
   iii. **Action for Partition** – if JT's cannot solve their problems by mutual agreement, any one of them can bring an action for partition. The court will either physically divide the land up or sell and divide the proceeds of the land.
   iv. Murder severs joint tenancy and coverts it into a tenancy in common.
   v. *Harms v. Sprague*: A joint tenancy is not severed when one joint tenant executes a mortgage on his interest in the property since the unity of title is preserved.
      1. Also, a lease or a contract will not sever joint tenancy.
   vi. O → "to A, B, and C as joint tenants" Subsequently A conveys his interests to D. Then B dies intestate, leaving H as his heirs.
      1. A conveying interest to D destroys his joint tenancy.
         a. Only part of tenancy is severed.
         b. Does A's sale destroy the relationship between B and C? NO.
      2. Nothing passes at death so H gets nothing, since B and C are still JT's.
      3. So D and C have a tenancy in common.
4. B died and no survivorship so it goes to C - who has 2/3 and D would have 1/3.

D. TENANCY BY THE ENTIRETY
   a. Can be created only between a husband and wife. Thus, it requires the four unities, plus a fifth (marriage). Husband and wife are considered to hold as one person at common law. Neither the husband nor wife can defeat the right to survivorship by a conveyance to a third party, only a conveyance by husband and wife together can.
      i. Social rule to reinforce the wholeness of the marriage.
      ii. Divorce terminates the tenancy, because the 5th unity is terminated – divorced couple become tenants in common.
      iii. Neither party can leave it in will.
      iv. Only exists in half of the states.

E. MICHIGAN RULE
   a. If you say "to A and B jointly with right of survivorship", then in most states that would simple be a joint tenancy BUT in MI we're calling it a tenancy in entirety between non married individuals. Tenancy with the right of survivorship is technically what it is, just treat it like tenancy in entirety (but cannot call it this b/c they're not married).

F. RELATION AMONG CONCURRENT OWNERS
   a. Partition: concurrent owners may wish to terminate a co-tenancy. The action is available to any joint tenant or tenant in common (but not in the entirety). Partition is an equitable remedy where courts physically divide or sell the property. The remedy terminates the co-tenancy and divides the property.
      i. Partition by Sale: sell the property; divide proceeds (more common).
         1. *Delfino v. Vealencis* – “it is clear that a partition by sale should be ordered only when two conditions are satisfied: (1) the physical attributes of the land are such that a partition in kind is impracticable or inequitable; and (2) the interests of the owners would be better promoted by a partition by sale.”
      ii. Partition in Kind: physically split up property (preferred).

b. Sharing the benefits/burdens of co-ownership
   i. Liability of Cotenant for Rent/Occupancy (*Spiller v. Mackereth*)
      1. A tenant in possession has no liability to a cotenant not in possession for rental value, UNLESS the tenant has ousted the cotenant.
      2. Ouster – the wrongful dispossession (putting out) of a rightful owner or tenant of real property, forcing the party pushed out of the premises to bring a lawsuit to regain possession.
      3. **Ouster** – occupying cotenant refuses a demand of the other cotenants to be allowed into use and enjoyment of the land
         a. Methods of Ouster
            i. Ask cotenant for access and be denied
            ii. Set up a competing use and cotenant objects
            iii. If can’t agree on use of property, partition
VI. Landlord-Tenant Law

A. THE LEASEHOLD ESTATES
   a. The Term of Years – An estate that lasts for some fixed period of time (years, days, months) or for a period computable by a formula that results in fixing calendar dates for beginning and ending once the term is created or becomes possessory.
      i. Can be terminable earlier upon the happening of some event.
      ii. No notice of termination is necessary to bring the estate to the end, because it has already been determined – but cannot be ended unilaterally early.
   b. The Periodic Tenancy – a lease for a period of some fixed duration that continues for succeeding periods until either the landlord or tenant gives notice of termination.
      i. CL notice required for termination:
         1. Year-to-year or longer – six months notice.
         2. Period of less than a year – notice equal to the period of the lease, not to exceed six months.
         3. Lease terminates on the last day of a period.
            a. So if a month to month tenant who begins his tenancy on January 1 decides on March 20 to terminate, the earliest termination date would be April 30.
      ii. Many states have shortened this by statute to require just thirty days notice.
   c. The Tenancy at Will – no fixed period, endures so long as both LL and tenant desire. Either can terminate at any time. Ends when one of the parties terminates or dies.
      i. CL rule: If it’s terminable by only one, imply that it is also terminable by the other. This changes in the case below:
         1. Garner v. Gerish: a lease that expressly and unambiguously grants to the tenant the right to terminate, and does not reserve to the landlord a similar right, does just what it purports to do.
         2. If a lessee has the option of terminating a lease when he pleases, a determinable life tenancy is created.
      ii. Most states require a 30 day notice of termination.
   d. The Tenancy at Sufferance: Holdovers – arises when a tenant remains in possession (holds over) after termination of the tenancy. CL rules gave the landlord a choice to evict (damages) or consent (express or implied) to a new tenancy.
      i. Once the LL has chosen an option, he must stick with it.
      ii. Same terms of tenancy apply if LL chooses to consent.

B. THE LEASE
   a. Sometimes what looks like a lease is not. This matters because leases give rise to the landlord-tenant relationship, which carries with it certain incidents (rights and duties and liabilities and remedies) that do not attach to other relationships. Originally, the lease was treated purely as contract, but since the sixteenth century onward, the court treated the lease as creating a possessory interest in land:
      i. A lease is actually a conveyance and a contract, but it contains covenants: promises in a written contract or deed of real property.
      ii. Statue of Frauds: requires a written document for any lease over one year.
C. SELECTION OF TENANTS – UNLAWFUL DISCRIMINATION
   a. Fair Housing Act of 1968
      i. Protected Classes (§3604). Race, color, religion, sex, familial status, national origin, handicap (added after the original law.)
      ii. Exempt are private clubs and religious organizations.

D. DELIVERY OF POSSESSION
   a. Courts are split as to whether the LL must deliver actual possession at the start of the term. Two rules have been adopted on this issue – American and English (discuss both on exam)
      i. Note: there is no question that the landlord must provide legal right to possession, that is, at the beginning of the term there shall be no legal obstacle to the tenant’s right of possession.
   b. American Rule – The landlord has a duty to deliver only legal possession, not actual.
   c. English Rule – Requires the lessor to put the lessee in actual possession: in absence of stipulations to the contrary, there is in every lease an implied covenant so.

E. SUBLEASES AND ASSIGNMENTS
   a. Sublease – an interest granted by tenant for less than the full term of the lease, reversionary interest is to original tenant.
      i. If the transfer is a sublease (L → T1 → T2 for a specified period within the lease, but no up to the end of the lease) then no privity of contract exists between L and T2, and, therefore T2 could not be liable to L on the covenant to pay rent and other expenses.
   b. Assignment – an interest granted by the tenant that conveys the whole term of the remaining lease that has no reversionary interest to the tenant.
      i. If the relationship between L and T2 is that of assignment (L → T1 → T2 for the duration of the lease term), then there is privity of contract between L and T2. Since privity exists, assignee is liable to LL.
   c. Modern rule, Ernst v. Conditt: in determining conveyances, the intention of the instrument alone will determine the outcome, determined from the language of the instrument in light of the surrounding circumstances → intention of the parties, the language is irrelevant. . . so even if it says ‘sublet’ that doesn’t always matter.
   d. Approval Clause
      i. Majority rule: landlord can arbitrarily withhold approval. (growing minority: only when commercial reasonable objection to assignment [Kendall v. Ernest Pestana, Inc.])

F. THE TENANT WHO DEFAULTS
   a. The Tenant in Possession (Berg v. Wiley)
      i. Common law: LL may rightfully use self-help to retake leased premises from a tenant in possession w/o incurring liability for wrongful eviction provided: (1) the LL is legally entitled to possession; and (2) the LL’s means of reentry are peaceable
      ii. This is changing, as seen in Berg, which now requires LL must use judicial process to oust the tenant unless they have abandoned or surrendered.
b. The Tenant who has Abandoned Possession (*Sommer v. Kridel*)
   i. Common law required no duty to mitigate damages.
   ii. After Sommer, the modern rule is a landlord is under a duty to mitigate damages by making *reasonable efforts* to re-let an apartment wrongfully vacated by the tenant.

G. DUTIES, RIGHTS, AND REMEDIES

a. Quiet Enjoyment and Constructive Eviction
   i. Generally: a tenant has the right to “quietly enjoy” the premises. This means that the landlord cannot interfere with the tenant’s use of and enjoyment of the premises. This covenant is implied in every lease.
   ii. **Constructive Eviction**: If, through the landlord’s fault, the tenant’s quiet enjoyment of the premises is *substantially interfered* with, the tenant may treat the lease as terminated and vacate the premises. He is no longer liable for the rent. The theory behind this is that the landlord has so interfered with the tenant’s right of possession that he might as well have evicted the tenant.
      1. This is risky to exercise, since it’s up to the court to decide if the LL substantially interfered.
      2. Elements of Constructive Eviction:
         a. Substantial interference
            i. *Reste Realty* – basement flooding works.
         b. Notice to the landlord, and give a reasonable time to cure.
         c. Tenant must vacate.
         d. Fault of landlord.

b. Implied Warranty of Habitability
   i. Under common law the landlord did not have a duty to furnish habitable premises, the tenant took the premises “as is.”
   ii. But today, most states have implied warranties of habitability: therefore, the lessee can expect that the lessor will keep the premises safe, clean and fit for human habitation.
      1. Covers common areas and latent defects that the lessor knew or should have known about but the lessee didn’t.
      2. Restricted to residential uses generally, not applicable to commercial.
   iii. Some jurisdictions count this as ridding the constructive eviction?
   iv. In determining habitability, courts generally look to:
      1. Relevant or local municipal housing codes. A substantial violation of the code is a prima facie case there has been a breach. However, only one or two minor violations standing alone that do not affect the health or safety of the tenant in not a breach.
      2. If there is no code ask whether there is an impact on the health or safety of the tenant
   v. *Hilder v. St. Peter*: The court held that when a landlord breach the implied warranty the tenant was allowed to remain on the premises and receive reimbursement for rent.
VII. Concurrent Interests/Ownership

A. INTRO

B. BROKERS
   a. Broker – an agent who acts as an intermediary or negotiator, especially between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce, and navigation.
      i. A knowledgeable go between, a fiduciary with requirements of law. An agent of their employer.
   b. Buyers get confused and take a personal relationship with a broker and disclose things he shouldn’t, since the broker legally works for the seller.
   c. Licari v. Blackwelder - As fiduciaries, real estate brokers must place their clients’ interests above their own, act in good faith, and disclose all information that is or may be material to their clients’ rights and interests.

C. CONTRACT OF SALE
   a. Statute of Frauds – no interest in real property can be conveyed without a writing signed by the party to be charged (party against whom it is asserted there is a K).
      i. K for sale of land must be:
         1. Signed by party to be bound
         2. Describe the property; and
         3. State the price
      ii. Essential Terms – description of the property sufficient to make clear what property the parties have in mind, price (reasonable or market), the parties, and other terms and conditions pertinent to the transaction (manner of payment, etc.)
      iii. Exceptions to Statute of Frauds:
         1. Part Performance – a party who has taken action in reliance on the contract may be able to gain at least some limited enforcement of it at equity. This means the doctrine of partial performance allows an oral contract to be enforced specifically in equity.
         2. Estoppel – Applies where unconscionable injury would result from denying enforcement of the oral contract after one party has been induced by the other seriously to change his position in reliance on the contract.
      iv. Specific Performance – rather than award damages, the aggrieved party must ask for specific performance → Hickey v. Green
   b. Marketable Title – title that a reasonable person would have no doubts that title was valid and a person would be willing to pay FMV; free of defects; implied in every sale of real property; B can rescind if title not marketable
      i. Lohmeyer v. Bower – A marketable title to real estate is one, which is free from reasonable doubt and a title is doubtful and unmarketable if it exposes the party holding it to the hazard of litigation.
   c. Duty to Disclose Defects
i. The original common law rule was **caveat emptor**, where you just “Let the buyer beware.” A maxim that a purchaser must judge, test and examine the quality of an item for himself.
   1. This doctrine did not save the seller in *Stambovsky v. Ackley* where he brought about the materially defect by making the house haunted and not disclosing it to the buyer.
   2. The Court said that “where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care, non-disclosure constitutes a basis for recission.

ii. Most states now hold that the seller has an affirmative duty to disclose material defects that he is aware of. See *Johnson v. Davis*, where the seller knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to buyer.
   1. Note carefully, if the buyer could have reasonably discovered the defects using reasonable diligence, this logic fails to apply.

iii. Generally there is a Duty to Disclose for:
   1. Affirmative misstatements
   2. Innocent misrepresentation
   3. Active concealment
   4. Nondisclosure of material facts known to seller and not discoverable.

d. Remedies for Breach
   i. Didn’t cover the case, do we need to know this?

D. THE DEED

a. Requirements:
   i. It is customary to state that consideration was paid to raise the presumption that grantee is a bona fide purchaser entitled to protection of the recording acts
   ii. Description of the land
   iii. Seal/signature
   iv. Note, a forged deed is void, one procured by fraud is voidable

b. Note. . .
   i. You can't rescind a deed, but you can get damages for violation of warranty (which could be full purchase price). . .
   ii. MI. no covenants will be implied in any conveyance of real estates. You got to state it to get it
      1. In Michigan, the language “A conveys and warrants to B…” includes all 5 warranties. TA Sheet.

c. Warranties of Title
   i. **General Warranty Deed** – warrants title against all defects in title, whether arising before or after grantor takes title.
ii. **Special Warranty Deed** – contains warranties only against the grantor’s own acts but not the acts of others.

iii. **Quitclaim Deed** – contains no warranties of any kind; merely conveys whatever title Grantor has, if any. Concerned about title after deed has passed to ensure that if something happens, the Seller will pay the Buyer back.

d. **Common Express Warranties/Covenants**

i. **Present Covenants** – they have to be breached when deed is delivered, if breached at all; SOL begins running at delivery of the deed; (e.g., chicken lays eggs that will crack immediately or not at all → breached when deed delivered or not at all; must sue before SOL runs)

1. **Covenant of Seisin** – grantor warrants that he owns the estate that he purports to convey (pretty common, did you know what you sold?).

2. **Covenant of Right to Convey** – grantor warrants that he has the right to convey the property; in most instances this covenant serves the same purpose as the covenant of seisin, but it is possible for a person who has seisin not to have the right to convey (e.g., a trustee may have legal title but be forbidden by the trust instrument to convey it).

3. **Covenant Against Encumbrances** – grantor warrants that there are no encumbrances on the property; encumbrances include mortgages, liens, easements and covenants.

ii. **Future Covenants** – breached in the future when grantor fails to live up to promise (e.g., a broken egg = a cause of action; SOL doesn’t begin running until egg breaks; when a covenant is breached, the covenant no longer runs with the land…it’s a COA and you must sue within the SOL otherwise you’ve got a broken egg that’s going to start smelling)

1. **Covenant of General Warranty** – grantor warrants that he will defend against lawful claims and will compensate the grantee for any loss that the grantee may sustain by assertion of superior title.

2. **Covenant of Quiet Enjoyment** – grantor warrants that the grantee will not be disturbed in possession and enjoyment of the property by assertion of superior title; this covenant is identical to the covenant of general warranty and is often omitted from GWDs.

3. **Covenant of Further Assurances** – grantor promises that he will execute any other documents required to perfect the title conveyed [never comes up].

iii. **Brown v. Lober** – Until one holding a paramount title interferes with Plaintiff’s right of possession, there can be no constructive eviction and no breach of the covenant of quiet enjoyment.

iv. **Frimberger v. Anzellotti** – A latent violation of a restrictive land use statute does not constitute a violation of the warranty against encumbrances.

v. Does a covenant of seisin run with the land?

1. **General Rule (majority)** – the covenant of seisin does not run with the land and cannot be enforced by remote grantees.
2. *Rockafellor v. Gray (minority)*—the covenant seisin runs with the land and is broken the instant the conveyance is delivered and then becomes a chose in action held by the covenantee in the deed and that a deed by first covenantee operates as an assignment of such chose in action to a remote grantee who can maintain an action against the grantor in the original deed.

e. **Delivery of Deed** – effective when the grantor hands the deed to the grantee with the intent it be presently operative, or the grantor puts the deed in the hands of a third party (escrow agent) who hands over the deed at the closing of the transaction (conditional delivery).
   
i. Delivery is really only an issue in donative/familial transactions.
   
   ii. Delivery must be made with the intent to pass title, so physical possession of a duly executed deed is not conclusive proof that it was legally delivered.
   
   iii. Delivery must be made with the intent to pass title for it to be effective – *Sweeney v. Sweeney*.
   
   iv. *Rosengrant v. Rosengrant* – When a grantor delivers a deed under which he reserves a right of retrieval and attaches to that delivery the condition that the deed is operative only upon death and further continues to use the property, these actions are really the grantor attempting to make the deed a will, which is unallowable.

E. **FINANCING REAL ESTATE TRANSACTIONS - Mortgages**

   a. **Mortgages in General . . .**
   
i.

   b. **Mortgage Foreclosure**
   
i.
   
   ii. **Right of Redemption** – the right of a debtor whose real property has been foreclosed upon and sold to reclaim that property if they are able to come up with the money to repay the amount of the debt.
   
   iii. **Priorities of Mortgages**

   1. Senior mtg. paid off first; Balance (if any) pays off junior mortgages in order of priority; Balance (if any) paid to mortgagor as equity.
   
   2. Example: A →→ B for $100k.  B pays $10k cash.  B gives a mortgage to C for $75k.  B gives a second mortgage (junior mortgage) to D for $15k.  B defaults on loan from C.  C forecloses and sells for $50k.  C gets the $50k because the senior mortgage is paid off first.

   iv. *Murphy v. Financial Dev. Corp.* – A mortgagee executing a power of sale has a duty to protect the interests of the mortgagor and exercise good faith and due diligence in obtaining a fair price for a mortgagor’ property.

   c. **Subprime Mortgage Crisis**
   
i. Do we have to know this.

   d. **Installment Land Contract** – arrangement whereby the seller contract to convey title to the purchaser when the purchaser has paid the purchase price in regular installments over a fixed period of time.
i. With an instalment land sale contract, no bank is necessary; the down payment can be minimal, and the seller may be willing to sell to persons deemed poor credit risks by institutional leaders → cheap housing.

ii. The reason why sellers use the installment land contract is that it included a clause providing that the buyer forfeits the land and the payments if the buyer goes into default. Thus, sellers hope to avoid expensive and time consuming judicial foreclosure.

iii. Bean v. Walker – The buyer under an installment land sale contract acquires equitable title which must be extinguished before the seller can retake possession, and so the buyer’s payments cannot be forfeited where there would be an inequitable disposition of property and exorbitant money loss by the buyer.

VIII. Title Assurance – The Recording System

A. RECORDING SYSTEM AND INDEXES IN GENERAL

a. When you have a deed and mortgage and other evidences of title you need to record the evidence, serves several functions:

i. Establishes a system of public recordation of land titles.

ii. Preserves in a secure place important documents.

iii. Protect purchasers for value. A subsequent BFP is protected against a prior unrecorded interest.

1. Remember: the common law rule of first in time. This continues to control unless a person can qualify for protection under the applicable recording act.

b. The Indexes

i. Tract index

1. Recorded documents are filed in chronological order under tract, block and lot number.

2. Simplifies title searchers.

ii. Grantor-grantee index

1. Filed chronologically.

2. Kept in two books → one for grantors and one for grantees.

3. Listed alphabetically.

4. Laborious.

c. How to Search Title

i. GOLDEN SEARCH RULE – search the Grantor Index for each person in the chain of title, under his/her name, from the date of delivery of the deed to that person [date in] until the date of recording of the first conveyance from that person, of all of his/her interests, [date out].

ii. (1) First, you look in the grantee index under your client’s grantor’s name from the present time backward until you find a deed from some other party to him.
iii. (2) Second, You keep looking backwards from there…and so forth until you go sufficient far enough back in time (local custom…back to a sovereign…60 years. MI RULE: 40 years).

iv. (3) Third, you must switch to the grantor index and search that title forward in time under the names that you have acquired of each grantor (make sure you look in this index from the date of execution of the deed that you found in the grantee index rather than simply from the date of recording.

d. **Mother Hubbard Clause** – a provision in a deed that attempts to sweep within it other parcels not specifically described in the deed → “all other land I own”
   i. *Luthi v. Evans* – a Mother Hubbard clause is upheld as between the parties to the instrument that contains it, but is insufficient to give constructive notice to subsequent purchasers without actual notice of it.

e. **Idem Sonans** – “Having the same sound”; Latin term given to doctrine that states though a person’s name has been inaccurately written, the person’s identity will be presumed from the similarity of pronunciation between the correct and incorrect spellings of the person’s name.
   i. *Orr v. Byers* – However, held that requiring a title searcher to examine title records for other spellings of the grantor’s name would be an undue burden on the transfer of property.
   ii. Misspelling of a name is material and the doctrine won’t be applied here ^^^

B. **TYPES OF RECORDING ACTS**

a. **Race Statute** – as between successive purchasers the person who wins the race to record prevails. Whether the subsequent purchaser had knowledge is irrelevant.
   i. Example: On January 1, O covers Blackacre to A. A does not record. On February 1, O conveys Blackacre to B. B knows of the deed to A. B records. A records. B prevails over A because B recorded first and B’s knowledge of A is irrelevant → the notice statute addresses this issue though.

b. **Notice Statute** – if a subsequent purchaser has notice of a prior unrecorded instrument, then they cannot prevail over the prior grantee, otherwise, they do.
   i. Example: In the example above, under a notice statute, B would not prevail.
   ii. Note: Remember that under a notice statute, the subsequent BFP is protected regardless of whether he records at all. Thus, if O conveys a parcel to A and A does not record, and O subsequently conveys the same parcel to B and B does not record, B will prevail over A even though their conduct is similar.

iii. **Shelter Rule** – a person who takes from a bona fide purchaser will prevail over any interest over which the bona fide purchaser would have prevailed.
   1. This is true even where such person had actual knowledge of the prior unrecorded interest.
   2. Example: O → A, who fails to record. O then conveys to B, a bona fide purchaser, who records. B then conveys to C, who has actual knowledge of the O → A deed. Inasmuch as B prevails over A, B’s assignee, C, prevails over A. This is true whether C is a donee or purchaser. C is “sheltered” by the bona fide purchaser.
c. Race-Notice – protects subsequent purchasers who both: purchases without notice and record first.
   i. Under this statute, a subsequent purchaser is protected against prior unrecorded instruments only if the subsequent purchaser:
      1. Is without notice of the prior instrument and
      2. Records before the prior instrument is recorded.
   ii. Example: O conveys to A who does not record. O conveys to B who does not know of A’s deed. A records. B records. A prevails over B because, even though B had no notice of A’s deed, B did not record before A.

d. See Examples From Class

e. Messersmith v. Smith – an improperly acknowledged deed is not capable of being recorded. So even though this deed was in the courthouse, the court said when the recording of an instrument affecting title that does not meet the statutory requirements of the recording statute, the law affords no constructive notice.

f. Notes for Recording Act Problems
   i. Determine notice from the moment of the delivery of a deed
   ii. X analysis: What would a third party see as the chain of title if he looked it up at the courthouse from the grantor.
   iii. Start with the presumption that first in time and their chain wins, unless someone can take it away from them.

iv.

C. CHAIN OF TITLE PROBLEMS

a. Chain of Title: the recorded sequence of transaction by which title has passed from sovereign to the present claimant \( \rightarrow \) the period of time for which records must be searched and the documents, which must be examined within that time period.

b. Wild Deed – a deed not found in the chain of title.
   i. Board of Edu. v. Hughes – A deed from a grantor outside the chain of title, even if recorded, is treated as though it were unrecorded and gives no constructive notice.
   ii. Example: O conveys to A, who does not record. A conveys to B, who records. O conveys to C, a BFP who records. Result: C prevails over B. The A to B deed is wild, the O to A link is missing. There is no feasible way for C to discover the A to B deed, so C prevails.

c. Guillette v. Daly Dry Wall, Inc. – a purchaser of part of a restricted parcel of land takes it subject to the restrictions.
   i. Every recorded deed out from a common grantor (subdivider) gives constructive notice of its contents to the subsequent purchaser of any lot in the subdivision.

D. PERSONS PROTECTED BY THE RECORDING SYSTEM – WHO IS A BFP?

a. Only a BFP is entitled to protection under notice and race-notice statutes. To attain this status, a person must (1) be a purchaser, (2) who takes without notice, and (3) gives a valuable consideration.
i. The big question is what counts as valuable consideration and how much has to be paid to be considered a purchaser.

b. *Daniels v. Anderson* – BFP status attaches only when the full purchase price is paid.
   i. The majority rule says, however, that the pro tanto rule protects the buyer to the extent of the payments made prior to notice, but no further.

c. *Lewis v. Superior Court* – Overrules *Anderson* that you need to pay in full to be BFP.

E. INQUIRY NOTICE

a. Remember in notice and race-notice jurisdictions, the subsequent purchaser will lose if he was on notice of the early deed → either actual, record, or inquiry notice.

b. **Actual Notice** – arises when one is personally/actually aware of a conflicting interest in real property, often due to another’s possession of the property.

c. **Constructive Notice** – notice that the law deems you have regardless of actual knowledge.
   i. **Record Notice** – constructive notice based on properly recorded instruments.
   ii. **Inquiry Notice** – constructive notice based on the fact a purchaser is in possession of facts that would lead a reasonable person in his position to make an investigation which may lead to the existence of a conflicting interest.

   1. **Quitclaim Deed** – in the majority of jurisdictions, the mere fact that there is a quitclaim deed in your chain of title does not infer inquiry of notice
   2. *Harper v. Paradise* – Subsequent grantees are held to inquiry notice of the contents of prior recorded deeds in the chain of title for purposes of a race-notice recording act.
   3. *Waldorff Insurance & Bonding, Inc.* – actual possession is constructive notice to all the world.

IX. Private Land Use – Easements

A. IN GENERAL

a. **Easement** – a right afforded a person to make a limited use of another’s property; right-of-way across the land of another; may endure for years, life or in fee; it is a non-possessory interest in land; land subject to an easement is called “servient” land.

b. **Affirmative Easements** – right to go onto the land of another and use it.

c. **Negative Easement** – right to make the owner of the servient land not do something which he would otherwise be entitled to do.
   i. Common Law recognized 4 types of negative easements: Blocking of View, Interfering with air flow, removing of support to a structure, diverting flow of water.

d. **Easements Appurtenant** – gives that right to whomever owns a parcel of land that the easement benefits.
i. The land for whose benefit the appurtenant easement is created is called the dominant tenement. He land that is burdened or used is called the servient tenement.

ii. Example: A has the right to cross B’s land in order to get to A’s farm; this right-of-way is an appurtenant to the dominant tenement (A’s land); the burdened land (B’s land) is the servient tenement.

e. **Easement in Gross**— easements that are personal to their owner; the servient land is burdened but there is no benefited land.
   i. e.g., utility right of ways, billboards on private land.

f. **Access Easement**

g. **Conservation Easement**— A conservation easement is a voluntary legally binding agreement between a landowner and a qualified land trust or government entity that permanently limits uses of the land in order to protect ecological, historic, or scenic resources.

h. **License**— must be distinguished from an easement. A license is an oral or written permission given by the occupant of land allowing the licensee to do some act that otherwise would be a trespass – revocable. Things like plumbers.
   i. *Holbrook v. Taylor*— A license cannot be revoked after the licensee has erected improvements on the land at considerable expense while relying on the license → estoppel exception.

B. **CREATION OF EASEMENTS**

a. Easements may be created by express grant or reservation, by implication, or by prescription.

b. **Express Easement**— an easement over the grantor’s land may be granted to another.
   i. *Willard*— A grantor can reserve an easement in property for a person other than the grantee.

c. **Implied Easement**— An implication is created by operation of law, not by a written instrument— an exception to the SOF. Only available in very narrow circumstances where an easement was intended or is a necessity. Implied easements thus are limited to two kinds:
   i. (1) an intended easement based on an apparent existing use
      1. The existing use is often described as a quasi-easement.
         a. An apparent and continuous use which the parties would reasonably expect to continue when the land was divided (i.e., it’s where an owner makes use of one part of his land for the benefit of another).
      2. *Van Sandt v. Royster*— Van Sandt claimed he never granted an easement for a sewer drain which connected his house to two others and flooded his basement. Court ruled that the implication of an easement will depend on the circumstances under which the conveyance of land was made, including the extent to which the manner of prior use was or might have been known by the parties; each party will be assumed to know about reasonably necessary uses
which are apparent upon reasonably prudent investigation; an easement may be implied for a grantor or grantee on the basis of necessity alone.

a. So, you need necessity, prior use, and notice (except in this claim where plumbing was a reasonable expectation.)

ii. (2) an easement by necessity → ONLY FOR ROAD ACCESS

1. Othen v. Rosier – Othen used a roadway on Rosier’s property to access the public highway, but Rosier later built a levee which made the road impassable for Othen → page 768. Tried to find an easement by two methods but failed on both:

a. **Implied Easement by Necessity**
   i. Must have unity of ownership of dominant and servient estates.
   ii. Strict necessity, not a mere convenience.
   iii. Necessity must have existed at time of severance.

b. **Easement by Prescription** (not under implied easement just from this case and fit here)
   i. Acquired under the principles of adverse possession.
   ii. In this case, the adverse element was lacking since he originally had permission to use the road.

C. ASSIGNABILITY OF EASEMENTS

a. The benefits and burdens of appurtenant easements pass automatically to assignees of the land to which they are appurtenant, if the parties so intend and the burdened party has notice of the easement. Where the benefit is in gross, however, the benefit may not be assignable.

   i. *Miller v. Lutheran* – When two or more persons own an easement in gross, the easement must be used as ‘one stock,’ meaning that any actions involving the easement must be made with common consent of all the owners. (Lake case).

D. SCOPE AND TERMINATION OF EASEMENTS

a. Scope of an easement may be adjusted in the face of changing times to serve the original purpose, so long as the change is consistent with the terms of the original grant.

b. *Brown v. Voss* – An easement appurtenant is used for the benefit of a particular dominant estate. The holder of that dominant estate will normally not be allowed to extend his use of the easement so that additional property owned by him is benefited. This is true even if the use for the benefit of the additional property does not increase the burden on the servient estate.

c. Note, non-use alone does NOT end an easement.

d. *Preseault v. US* – A public recreational trail was not within the scope of an existing easement for railroad purposes. Therefore, the conversion to public recreational trail was a taking of a new easement for a new purpose, for which the landowners are entitled compensation. In addition, since the easement was abandoned, the opening of
the public recreational trails was also a physical taking of the Plaintiffs’ property rights.

X. Private Land Use – Covenants Running With the Land

A. COVENANTS ENFORCEABLE IN EQUITY: EQUITABLE SERVITUTES

a. Equitable Servitude – a covenant respecting the use of land enforceable against successor owners or possessors in equity regardless of its enforceability at law.

i. Equity requires that the parties intend the promise to run, that a subsequent purchaser have actual or constructive notice of the covenant, and that the covenant touch and concern the land \( \rightarrow \) Tulk v. Moxhay

ii. The usual equitable remedy granted is an injunction.

iii. All subsequent owners and possessors are bound by the servitude, just as they are bound by an easement.

iv. The requirements of privity are virtually non-existence with equitable servitudes \( \rightarrow \) and the benefit runs to all assignees (FAVRE)

b. Creation of Covenants

i. A real covenant must be created by a written instrument signed by the covenanter \( \rightarrow \) SOF. If the deed is signed by the grantor only, but it contains a promise by the grantee, then it is enforceable.

ii. Note: A real covenant cannot arise by estoppel, implication, or prescription, as can an easement.

iii. But, an equitable servitude \(^\text{^^^}\), unlike a real covenant, may be implied in equity under certain circumstances (just not prescription).

1. Sanborn v. McLean – an equitable servitude can be implied on a lot, even when the servitude is not created by a written instrument, if there is a scheme for development of a residential subdivision and the purchaser of the lot has notice of it.

2. A common scheme to develop a property as a residential subdivision by one grantor may lead to implication of an equitable servitude.

3. Reciprocal Negative Easement – arises when most of the lots were burdened with the same covenant when the land was originally subdivided. The theory is that the covenant was intended to be reciprocal on all lots.

c. Validity and Enforcement of Covenants

i. Tulk v. Moxhay relaxed the requirements for enforcement of covenants in equity, but it did not eliminate the three requirements:

1. Intent that the benefit and/or burden of the covenant run to successors of the original parties; and

2. Notice on the part of the purchaser of the original promisor; and

3. That the covenant touch and concern land.

ii. Property Owners’ Association – an affirmative covenant to pay money for improvements or maintenance done in connection with, but not upon the land which is to be subject to the burden of the covenant does touch and concern

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the land, and a homeowners’ association, as the agent of the actual owners of the property, can rightfully enforce the covenant.

1. Covenants restricting the use of land have almost always been held to touch and concern the land, because such negatives easements substantially affect the value of the property.

**B. TERMINATION OF COVENANTS**

a. Covenants, like easements, can be terminated in a number of ways:

   i. **Termination of Covenants**

      1. **Merger** – on the basis of unity of ownership of the benefit and burden by the same person.
      2. **Release** – a formal release is normally written and recorded.
      3. **Acquiescence** – arises when the plaintiff has failed to enforce the servitude against other breaches and then seeks to enforce the servitude against other the defendant.
      4. **Abandonment** – resembles acquiescence except that it makes the servitude unenforceable as to the entire parcel rather than only as to the plaintiff immediately involved.
      5. **Equitable Doctrine of Unclean Hands** – court will refuse to enjoy a violation of a servitude that the plaintiff previously violated.
      6. **Equitable Doctrine of Laches** – involves an unreasonable delay by the plaintiff to enforce a servitude against the defendant causing prejudice to the defendant (laches does not extinguish the servitude but only bars enforcement).
      7. **Estoppel** – if the defendant has relied upon the plaintiff’s conduct making it inequitable to allow the plaintiff to enforce the servitude.
      8. **Servitudes may also be terminated through the exercise of the government’s eminent domain power and on the basis of prescription.**

   ii. Beyond these methods, courts may modify or terminate covenants on the basis of changed conditions → *Western Land Co. v. Truskolaski*

      1. Facts: Homeowners want to prevent a shopping center from being built in their subdivision, even though the surrounding area has become more crowded and more commercialized.
      2. A restrictive covenant establishing a residential subdivision cannot be terminated as long as the residential character of the subdivision has not been adversely affected by the surrounding area, and it is of real and substantial value to the landowners within the subdivision
      3. “as long as the original purpose of the covenants can still be accomplished and substantial benefit will inure to the restricted area by their enforcement, the covenants stand even though the subject property has a greater value if used for other purposes”

**C. DIFFERENCE BETWEEN EASEMENTS AND COVENANTS**

a. Come back to this, very important though.
b. An easement gives you a right to go do something on someone else’s land, a covenant either tells you to do something on your own land or tells you that you can’t do something on your land → a covenant is a contractual right, must be in writing.

c.

XI. Legislative Land Use – Zoning

A. INTRODUCTION

a. The municipality power to zone comes from the state’s police power, the authority to regulate for the general health and welfare.
b. States delegate their power to the localities through an enabling act. All zoning ordinances must be authorized by and conform to the state’s act.
   i. The Act empowers municipalities to regulate and restrict the height, number of stories, and size of buildings and other structures, etc. To follow through with this the city must create commissions appointed by the mayor:
      1. Planning Commission – recommends a comprehensive plan and zoning ordinance to city council.
      2. Board of Adjustments – make sure there are no inequities:
         a. May grant a variance when the zoning restrictions cause the owner practical difficulty of unnecessary hardship.
         b. May grant a special exception when the specific requirements set forth in the zoning ordinance are met.

c. Act says that zoning regulations shall be in accordance with a comprehensive plan.
   i. A comprehensive land is a statement of the local government’s objective and standards for redevelopment. The idea being to anticipate change and promote harmonious development.
   ii. Not all states have this and even zoning regulation inconsistent with the plan are not necessarily invalid.
d. The usual justification for zoning is that it solves the problem of externalities in environments where bargaining (servitudes) or judicial determination (nuisance law) are insufficient.
e. The constitutionality of zoning was upheld in the test case of Euclid v. Amber Realty:
   i. To limit arbitrary and discretionary enforcements of the law, zoning ordinances will be upheld as long as they are not arbitrary and can be justified according to the police power and are not vague.
   ii. Euclidian Zoning: divided into different classes of different kinds of districts (height, use, and area).

B. THE NONCONFORMING USE

a. A nonconforming use is a use in existence when the zoning ordinance is passed that is not permitted in the district under the new zoning ordinance. Nonconforming uses are allowed to remain because requiring immediate termination would be either a violation of substantive due process or an unconstitutional taking of property (run with the land). Nonconforming uses may be limited under certain conditions:
i. **Amortization** – a zoning ordinance may provide that the nonconforming use must terminate after a specific period (no real test on how long of a period).
   1. **Majority** is that you can eliminate pre-existing uses if you give a reasonable and adequate phase out amortization period.
      a. Constitutional and valid use of police power, but landowner must be compensated.
   2. **Minority** holds that amortization ordinances are an unconstitutional taking of property without compensation \( \Rightarrow \) **PA v. Zoning Board**

ii. **Vested Rights** – a proposed use might be protected if sufficient commitments have been made in reliance on the existing zoning requirements that are subsequently changed in a way that invalidates the proposed use.
   1. Once you start real construction, then your nonconforming use is thereafter protected, but just spending money on the endeavor won’t necessarily protect you.

iii. Note, a lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless:
   1. it is a nuisance;
   2. it is abandoned; or
   3. it is extinguished by eminent domain

C. **FLEXIBILITY IN ZONING**
   a. **Variance** – board of adjustment uses variances to grant relief in case where the ordinance causes an owner practical difficulty or unnecessary hardship.
      i. Essentially, an administratively authorized departure from the terms of the zoning ordinance \( \Rightarrow \) Favre: “Escape valve in situation which would result in a taking” A way to avoid costly litigation.
      ii. Variances run with the land and should only be granted if there will be no substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.
      iii. Variance issues appear frequently, remember to mention the basics: if because of a unique circumstance compliance with the zoning ordinance would cause practical difficulty or unnecessary harm, a variance may be granted.
      iv. **Personal Hardships** – when determining if a variance should be granted, the existence of personal hardships seems to be irrelevant, except maybe in cases regarding persons with disabilities.

b. **Special Exception** – allowable where certain conditions specified in the ordinance are met \( \Rightarrow \) must be compatible with surrounds uses (harmonious).
   i. Permitted by the ordinance itself in a district in which it is not necessarily incompatible, but where it might cause harm if not watched.
      1. Common for private schools, hospitals, and churches.
   ii. Unlike variances, no showing of hardship is necessary.

c. **Spot Zoning** – an amendment not in accordance with the comprehensive plan.
   i. Essentially, the improper permission to use an ‘island’ of land for a more intensive use than permitted on adjacent properties.
ii. Courts are reluctant to allow this, since it comes with a degree of shadiness → big businesses paying off legislatures to pass these amendments.

D. AESTHETIC REGULATION

a. A majority of jurisdiction today follow and accept aesthetics as a legitimate police power, but a good number snaffle on the issue (change occurred in the 1950s).
   i. *Berman v. Parker*: US Supreme Court expanded the concept of public welfare to include spiritual as well as physical aesthetic as well as monetary.

b. Some courts, however, like *State v. Berkley* analyze aesthetic regulations in terms of property value, and therefore get around the question of zoned beauty.
   i. An architectural review board may deny a permit for a structure if it would be unsuitable in appearance with reference to the character of the surrounding neighborhood and thus adversely affect the general welfare and property values of the community.
      1. "General Welfare" is very undefinable. This is the only way the city could derive authority.
      2. Architectural Review Boards are usually upheld so long as they use reasonable standards.

c. Aesthetic Ordinances will only be upheld if the imposed aesthetic conditions provide sufficiently clear guidance to all interested parties → *Anderson v. City of Issaquah*
   i. The case demonstrates how difficult it is to effectively draft such an ordinance, which necessarily is based upon subjective evaluations.

d. **Advertising Signs** – it has long been held that commercial advertisement may be prohibited in residential areas, on the theory that they are harmful to the quiet and tranquility sought in residential areas. Problem arise with political signs though.
   i. Ordinances prohibiting political signs entirely in residential areas have usually been held void, because adequate alternative means are unavailable.
      1. *City of Ladue v. Gilleo*

XII. Eminent Domain and the Problem of Regulatory Takings

A. EMINENT DOMAIN

a. Under the 5th Amendment, government can only take property for public use; transfer of property from one private person to another satisfies Public Use Cause if it’s rationally related to a conceivable public purpose.
   i. The term means advantage or benefit to public (broad view)
   ii. The term means actual use or right to use of the condemned property by the public (narrow view)

**ISSUE STATEMENTS**
• Issue: will the active pursuit of a noxious (to be gotten rid of) wild animals with hounds give the pursuer a property interest in the animal so as to be able to file a legal action for the recovery of the animal from a subsequent party who obtains possession of the animal by killing it with or without the knowledge of the pursuer by the first party
  ○ Can the issue be researched?
  ○ Does it contain critical facts and legal terms?
  ○ Does it suggest the legal concepts that will determine the answer.

Don't use 'defendant' in issue forming, you need to find a descriptive hat for the P and D.

○ ""When lost personal property is found by a nontrespassing individual, in a private house of someone who has not yet been in actual possession of the house, should actual possession be given to the owner of the house?"" -Favre

When a person takes possession of a lost [definel not misplaced] object of no apparent value, Without the intention of keeping it, will that person be considered the finder of valuable items subsequently discovered hidden within the object?

TA
- michigan fee tail
- recoding acts for sure in an essay

Umm maybe put under contingent remainder:

1. -- RULE: If the first future interest created is a contingent remainder in fee simple, the second future interest in transferee will also be a contingent remainder. If the first future interest created is a vested remainder in fee simple, the second future interest in a transferee will be a divesting executory interest (vested subject to divestment)

QUESTIONS
-do we need ot know the restraints on alienation

NOTES
- PUT IN EASEMENTS VS COVENANTS. THE DIFFERENCE
Replevin.

What is the difference between variances and exceptions, and how do you implement it? **know for exam**

x