

# Property

Prof. Singel  
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# Chapter 1 Introduction

## I. Five theories

- The scope and extent of property rights logically turn on the underlying justification for private property.
  - Teleology: focus on the purpose property serve. E.g. utilitarianism
  - Deontology: the study of the nature of duty or obligation. E.g. natural law theory
- 1. First Occupancy**
  - Nature: abundant resource-less population --> when the population increases, it turns into permanent property rights. Applies animals and fish, oil and gas, surface water.
  - Critique: evolverment but not justify it; it will be waste of natural resource(no one wants to reserve)
  - Lukewarm Defense: original common ownership; any attempt to abandon the rule would upset the stability of private property ownership --> also tie breaker (clear cut rule to decide when in dispute)
- 2. Labor-Desert Theory**
  - Nature: when a person labors to change something in a nature for his benefit, he "mixes" his labor with the thing; by mixing process, he thereby acquires rights in thing
  - It usually combines with first possession, recognizing first labor.
  - Critique: 1) add to a thing, not title to the thing itself; 2) just first labor; 3) assume unlimited resource
- 3. Utilitarianism:**
  - Tradition (happiness)
    - Overall happiness or utility of all citizens --> property is not form morality or natural justice, but human invention --> derive personal satisfaction and pleasure fro owning and farming their land.
    - Critique: hard to assess happiness; no guidance about how property rights should be allocated and defined.
  - Economic and law
    - Nature:
      - happiness may be measured by dollars, and it could maximize the overall wealth of society.
      - Efficiency: allocation through a truly free market
      - Components: universality(all property is owned by someone), exclusivity, and transfer --> Coase Theorem: property will eventually be devoted to its highest value use, regardless of its initial location [if no transaction costs exist].
    - Critique: trickle-down economics: overall social wealth will benefit all members
- 4. Liberty or Civic Republican**
  - Nature: economic security or there could be bribe
  - Critique: property ownership is not that essential to political freedom; wages is probably more important.
- 5. Personhood Theory**
  - Nature:
    - Full development of individual --> certain thing that has emotional and psychological well-being virtually becomes part of that person.
    - They are part of the way we constitute ourselves as continuing personal entities in the world <-- people defines themselves through objects.
  - Critique:
    - A variant on utilitarian theory: it seeks to maximize utility by protecting a person's emotional or psychological happiness.

## II. Rule of capture

- Property rights in wild animals are acquired only through physical "possession"
- Pierson v. Post: "possession" of a wild animal can be established by
  - mortally wounding it OR
  - depriving it of its natural liberty and bringing it within one's certain control.
- Justification: utilitarian
  - 1) promote certainty by clear rule --> it is objective determination; 2) social order; 3) fox eradication.

## III. Right of Publicity

- Old Ruel, Eastwood:
  - D's use of P's identity;
  - Appropriation of P's name or likeness to the D's advantage; commercially or otherwise
  - Lack of consent;
  - Resulting injury.
- New rule: White v. Samsung
  - The appropriation does not require the use of name or likeness, but whether D appropriates P's identity.
  - Transformed use test (balancing free speech and publicity): whether the expressive work adds significant creative elements "so as to be transformed into something more than a mere celebrity likeness or imitation."

## IV. Bundle of Sticks

- What is Property? Governing rights and relation between people
  - Sources of rights: government (legal positivism) v. Natural law --> take it away from public domain --> social balancing act
  - Scope of rights: limited; must serve socially useful justification (reduce the scope of public domain); bundle of sticks
  - Nature of things: real property + personal property: 1) chattels, 2) intangible person property
- Property as Bundle of Sticks
  - Right to transfer: give or donate,
  - Right to use
  - Right to exclude
  - Right to destroy

### A. Right to Transfer

- The discovery doctrine: "They maintain, as all others have maintained, that discovery gave an exclusive right to **extinguish the Indian title of occupancy**, either by purchase or by conquest, and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise."
  - Indian Tribe lacks the right to transfer freely their land to others since they lack complete sovereignty.
- Sale of body part
  - The law recognizes the authority of all person to control the destiny of their body parts (e.g. can sell replenishable body parts)
  - BUT, CA held patient whose cells were removed during an operation and later cultivated into a patented cell line without his knowledge, had **no property-based claim** against his doctors.

## B. Right to Exclude (Trespass)

- **Restatement:** One is subject to liability for trespass, irrespective of whether he thereby causes any harm to any legally protected interest of the other, if he intentionally enter land in possession of the other, or causes a thing or a third person to do so.
  - **Intentional:** voluntary physical action
  - Absolutism: Good faith, knowledge, mistake does not negates "intention."
  - Instrumentality: If someone throws you into other's land, then you are not trespassing, but the someone is.
  - **Nuisance** (enjoyment of land + invisible): Invading the air or someplace underground is still trespass. Extension above or below the land.
    - Exception: airline, but mining is probably not.
  - Rule of **capture:** adjacent property, someone near you is mining the oil.
  - **Tenant** have right to all common area like hallway.
- **Privileges:** **1) Private necessity:** someone living above you has bad facility, you need to go to his apartment to fix it, or it will hurt your apartment. **2) consent**
- **Rationale:** 1) utilitarian: maximize the efficient use of land; 2) avoid risk of violence; 3) curtailed by public policy, such as migrant farmer (Rights of privacy and receiving public assistance are fundamental)

## C. Right to Use (Nuisance): relationship of owners

- Spite fence doctrine: No property owner has right to erect and maintain an otherwise useless structure for the sole purpose of injuring his neighbor.
  - It's not about an ownership, but rules governing relationship between owners.
  - Requirement of **malice intent:** "for the sole purpose of injuring his neighbor" - a certain degree of autonomy
  - **Useless** structure: measured by economic benefit minus the cost of constructing.
  - Nature law: besides right to use, there is a fundamental right to breathe
- **Private Nuisance:** a private nuisance is an 1) unintentional, 2) nontrespassory, 3) unreasonable and 4) substantial interference with 5) the use and enjoyment of land.
  - Intentional: with intent to cause harm OR know the possibility of harm.
  - Nontrespassory: interfere with light --> use of someone's property impact or intrude someone else's property --> pollution (trespass and nuisance)
  - **Unreasonable:** gravity of the harm outweighs utility of actor's conduct
  - Substantial interference: economic or reasonable expectation of property value
- Example: Prah v. Maretti
  - 1) **increased regulation of land use for the general welfare:** harmful use of land
  - 2) **new significance of access to sunlight:** new technology for sunlight into energy (not for sth like wind)
  - 3) **reduced need for unhindered development**
- **Coase Theorem:** The initial allocation of resources is irrelevant to economic efficiency - in the absence of transaction cost - because the affected parties will reach an efficient allocation through bargaining.
  - Transaction cost: e.g., one party refused to negotiate, or multiple parties involved.
- Fundamental right to build your own property: Maximize social welfare though diminishment of personal liberty.

## D. Right to Destroy (not essential) - public policy exception

- Test
  - Statutory text / contractual provision / Constitution
  - Precedent: case law

- Custom (history for parties, or the community), or history or tradition: expectation and consistency
- **Public Policy:** values, cultural norms, judicial philosophy (utilitarianism, labor theory, first possession, personhood) --> when a court refers to public policy, it usually means the first three steps do not give answers.
  - Maximize social welfare, economic efficiency. Conflicts with the morals of the time and contravenes any established interest of society
  - The more we use the later steps, it connects more with people's value.
- Note: will of a dead
  - Timing of decision: more discretion when you are alive than you died.
  - Justification: 1) presumption when alive that you are rational to make the decision; 2) self-autonomy.
- Destruction of animals: **exception**
  - Most of the time, there is legislature restricting this act.
  - If there is personal necessity, the owner is not permitted to "destroy" the animals.

## Chapter 2: Adverse Possession (Real Property)

- Real Property: rights in land and things attached to land, such as buildings, fences, and trees.
  - Fixtures: items of personal property that are physically attached to real property (such as chandeliers or smoke alarms)
  - Purpose: facilitate national development --> the need to develop land for productive use (major theme in American Property Law)
- Personal Property: rights in moveable items (such as chairs, pens, computers) and intangible things (such as patents and shares of stock).

### A. Adverse possession:

- Definition:
  - A person in possession of land owned by someone else may require valid title to it.
  - So long as certain common law or statutory requirements are met, and
  - The adverse possessor is in possession for a sufficient period of time, as defined by a statute of limitation.
- Justification: *a specialized statute of limitations to recover possession of land*
  - Preventing frivolous claims: bars lawsuit based on stale, unreliable evidence, protecting the occupant with security of title, encourage the productive use of land
  - Correcting title defects: by protecting the title of the person who actually occupies the land
  - Encouraging development: legal tool to encourage economic development, relocate title from the idle owner to the industrious squatter.
  - Protecting personhood.
    - Protecting the owners when the statute of limitation expires, and they do not have enough time to claim their title on land.

### B. **Elements of Adverse Possession (CHOATE)** --> some western states require choate + TAX

- C: continuous possession
- H: adverse and hostile possession
- O: open and notorious possession
- A: actual possession
- T: for the statutory Time period
- E: exclusive possession

1. C: as continuous - or as sporadic as - a reasonable owner, given the character, location and nature of the land.
  - It requires some certain amount of time, but depends on the contexts of properties
    - Wildland, visiting the land twice each year to cut trees and gather firewood --> satisfied
    - Summer House, used it only during summer time --> satisfied
  - End: if the rightful owner reenters the land and retakes the land in open and notorious manner
2. H: adverse and hostile possession
  - Sub-elements: 1) hostile to the claims of ownership against others; 2) (?) inconsistent with true owner's purpose of use; 3) **without permission** --> permission bars the claim of AP
  - State of Mind
    - Majority: claimant's state of mind is irrelevant
      - The occupant's conduct on the land – regardless of intent – affords **(constructive) notice** to the true owner that **triggers the running** of the statutory period for filing suit.
    - Minority: claimant needs to be in good faith belief that he or she owns the property
    - Super minority: claimant must in bad faith, i.e., he or she knew this land belongs to others and intends to take titles from the true owners
3. O: claimant's possession must be obvious and notorious, so if the owner inspected the land, he would take notice of the adverse claim.
  - Notorious: capable of providing notice
  - The nature and frequency of those activities need to be sufficient, visible and permanent on notice that their title was being challenged.
4. A: actual possession, the land is physically used in the same way as a reasonable owner would, given its character, location and nature.
  - MAJ: no need, cutting small amount is ok. But the use of land solely for recreational purposes is not in some states.
  - MIN: need continuous and persistent cutting of timber or wood from the tract.
5. T: for the statutory time period, depends on state
  - **Tacking**: successive period of time of adverse possession might be combined together to satisfy statutory duration requirement.
  - Tacking is only permissible when the successive claimants are **in privity with** each other.
    - Successive trespassers cannot claim tacking
    - Convey: an attempt to transfer of property's interest might be defective or void.
    - E.g., invalid deed will defeat title, but not the transfer, thus does not influence AP
6. E: exclusive possession, claimant acted as a reasonable owner would in granting authority of access of the land.
  - The claimant cannot share the land with owner or public in general.
  - The claimant need to allow the access to the property as the way a true owner
- Note:
  - Context of the land is very important when determining what a reasonable owner would do
  - You cannot use adverse possession to claim land owner by the federal government
  - If you fulfill all elements of only a portion of the disputed land, you can gain possession of that parcel and not the rest.

## Chapter 3 Owning Personal Property

### I. Rule of Capture (not owned)

#### A. Wild Animals:

- Pierson v. Post: common law rule of capture, property rights of wild animals are acquired through **physical possession** by mortally wounding OR depriving the animal of its natural liberty while bringing it within one's control.
- State v. Shaw: to acquire a property in wild animals, the pursuer must bring them into his own control and power, so maintains his control as to show **he does not intend to abandon them again** to the world at large. It does not require absolute security against the possibility of escape.
- Exception: the rule of capture does not apply if
  - The wild animal is caught on private property;
  - The captured wild animal is an exotic animal outside of its natural habitat.
  - The animal has a habit of returning, such as cattle, horses, pigs and sheep.
- Other application: water, oil and gas, hard rock mineral

#### B. Baseball: pre-possessory interest

- Where an actor undertakes significant yet incomplete steps to achieve the possession of a piece of abandoned personal property and the effort is interrupted by unlawful acts of others, the actor has "**pre-possessory interest**" in the property --> the pre-possessory interest is a qualified right to possession.
- The actor who successfully acquires equivocal control over the ball also has a valid claim to possession, but the claim is incomplete if other people has a pre-possessory interest.
- Where the ball is subject to one party's pre-possessory interest and the other's claim based on complete control over the ball, the equitable division is an appropriate remedy.

#### C. Tragedy of Commons:

- Encourage private ownership to maintain the sustainability of the land, not public regulation
- With concerns of scarce resource such as ocean fishing or underground water.

### II. Finders (owned property)

- Not ownership, but a relative or superior claim to the property

#### A. Four types of property:

1. **Lost** Property: property is lost when the owner unintentionally and involuntarily parts with it.
2. **Mislaid** Property: property is mislaid when the owner intentionally and knowingly places it somewhere, then unintentionally forgets it.
3. **Abandoned** Property: property is abandoned when the owner 1) knowingly relinquishes all claim, title and interest to it, but not transfer title to any particular person, 2) take action that manifests its intention.
4. **Treasure Trove**: property is treasure trove when the owner concealed it in a hidden location long ago. It usually limits to gold, silver, coins or currency.

- Factors:

- The intent of the original owner
- Identity of claimant competing for possession
- The location where the property is found

- Bailment: the rightful possession of a chattel by someone other than the owner. The bailor is the owner; the bailee is the person with possession of it.

- Bailee is obligated to care for the item and redeliver it to the owner.
- Liability: **Bailor**: gross negligence; **Bailee**: slight negligence; **Mutual Benefit**: reasonable care standard.

- Change: from a more elaborated system turned on the type of property to a modern negligent approach.

## B. Application:

### 1. *Lost Property:*

- General Rule
  - First possession (**finder**): important for both wild animals and lost personal property
  - Finders do not acquire absolute property or ownership, but he has it **against all other person but (prior possessor or) rightful owner**.
  - Justification: return a lost property for a productive use; return of item; certainty.
- Exceptions / against Landlord
  - The owner of real property has **constructive possession** of all chattels on his **property**, i.e., within his house or **embedded** in the soil of private property.
    - Exception #1: the owner never physically occupied the house + the government was in possession --> dealing with the **reasonable expectation** of LL.
    - Exception #2: the owner of a public place / business open to all public -> the finder has a superior claim to possession
      - Such as money on the floor of a business place.
  - **Employee** as the finder --> acts as an agent of his employer
  - Property **embedded in the earth** (attach to the land) --> goes to the lessor.

### 2. *Mislaid Property:*

- **Business owner** has a superior right of possession relative to the finder of an object in a public space of business.
- Justification: promote the ability of true owner to find it.
  - "it is assumed that the true owner may eventually recall where he has placed his property and return there to reclaim it."

### 3. *Abandoned Property:*

- The first person who takes possession of an abandoned property acquires title that is against the world.
- But before that, the original owner has to relinquish the title and take action that manifests its intention.
  - P left his property on the highway, and then came back to reclaim it **with 24 hr** -> not abandoned property

## III. Gifts

- Donor v. Donee, no payment or consideration, if all of elements are satisfied, this is **irrevocable**.

### A. Inter Vivo Gift

#### 1. *Elements:*

- 1) Donative intent: immediate transfer of property, not a future promise
  - The **words** matter:
  - "After my musical is produced, I'll give you 5% of my share of the profits." --> not present intent
  - "I give you 5% of my share of the future profits from the musical." --> present intent to transfer a future interest
- 2) Delivery: the property must be delivered to the donee, so the donor parts with dominion and control
  - Manual Delivery: physical transfer of possession. **Required** unless such delivery is impossible or **impractical**.
    - Too cumbersome to be handed to the donee (a marble statue);
    - Not readily available (located in long distance or pledged to a creditor);

- Less than complete title to item (1/10 interest)
  - Constructive Delivery: an object that provides **access** to the gifted item, such as key
  - Symbolic Delivery: an object that represents or symbolizes the gifted item, such a letter to the donee.
  - Justification: 1) demonstrate the donor's intent to transfer; 2) warns the donor the legal significance of act; 3) procedurally, establish a prima facie evidence that a gift was made.
- 3) Acceptance: acceptance of a valuable item is usually presumed.
  - Once elements are satisfied, the transfer is **irrevocable**.
- 2. *Gruen v. Gruen*
  - A gift will be valid when the donor retains a life estate, granting the donee retains a remainder interest.
  - Donative intent: the father immediately transfer the ownership to his son where he retains a life estate, transferring a remainder interest to his son.
  - Delivery: symbolic transfer, i.e., the letter --> the donor still retains the possessory interest.
- 3. *Exception: conditional gift, engagement ring*
  - Engagement ring is subject to an implied condition that the marriage occurs --> the gift does not become absolute until the marriage ceremony.
  - If the engagement is broken,
    - Majority: **no-fault rule**, goes to the donor
      - Justification: 1) engagement is intended to test marriage; 2) hard to assess the fault.
    - Minority: **fault rule**, look at who was at fault, the gift goes to the other person.
    - Super minority: the gift is complete upon the delivery and allows the donee keeps the ring.

## B. Gift Causa Mortis

- An emergency substitute for a will.
- Element: 1) Donative intent; 2) Delivery; 3) Acceptance; 4) **Donor's anticipation of imminent death**.
  - The donor must die in contemplation, perils, or fear of death.
  - The donor must **die of illness** he then fears or contemplates.
  - Imminent: weeks or even months away. It has to be in **near future** for the fear of a **particular illness or affliction**, not a natural apprehension of death.
- Revocability:
  - Once elements are satisfied, it is immediately **effective but revocable** before the donor's death.
  - Automatically revocable if the donor does not die.

# Chapter 4 Estate and future interest

## I. Modern Freehold Estate

### A. General Principle

- The estate system
  - A present possessory estate is legal interest that entitles its owner to the immediate possession of real or personal property.
  - A future interest is non-possessory that will or may become a present possessory interest in the future.
- Justification: tension between personal autonomy v. marketability of title
- Terms:

- Decedent: the one who passed away
- Issue: lineal children/descendant, offspring
- Collateral: some blood relation
- With Will
  - Testate is leaving a **will** at death
  - **Devise** (devisor/ devisee): title **by will** of **real** property
  - Bequest (bequestor/ bequestee): title **by will** of **personal** property
- Without Will
  - Intestate: death **without will**.
  - Heir: a **living** person does not have an heir + only exists at **intestate** situation.
  - Escheat: decedent died without will and no surviving relatives, then the property goes to the state
  - **Convey**: transfer of present estate and future interest.
- Possessory Estate:
  - Freehold estate: fee simple, life estate, fee tail --> significant sticks
  - Non-freehold estate (leasehold): term of year, periodic tenancy, tenancy at will, tenancy at sufferance.

## B. Fee simple absolute

- Largest estate, no inherent end; can continue to infinity
  - **Alienable**: could be sold or transfer during the lifetime.
  - **Devisable**: can be transferred by will
  - **Descendable**: availability of intestate succession.
- No future interest
- Interpretation: if ambiguity, to promote efficiency
- Word of purchase: "to A" + Word of limitation "and his heirs"
- Note: cannot to **pets**, for they cannot have the property.

## C. Life Estate - triggered by death

- Very limited in duration; subject to inherent restriction; cannot continue to infinity.
- Only during lifetime or measured by lifetime, i.e., *pur autre vie*.
  - Alienable: the transferred person has *pur autre vie*, measured by the life of the original grantee.
  - Not devisable + Not descendable.
- Word of limitation: "for life" + "as long as A is alive," "until A dies," "while A is alive."
- Future interest: reversion or remainder.

## D. Fee Tail -- triggered by the death of last issue.

- Subject to an important restriction inherent in its very nature.
- If A takes an estate in fee tail, A has the right of possession for the duration of her life, and the property passes to his lineal descendants until no more lineal descendants.
  - Limited alienable due to mandatory decent
  - Not devisable: cannot by will
  - Descendable: if the line ends, it can be transferred due to intestacy.
- Future Interest: reversion or remainder

## E. Fee Simple Defeasible

1. *Fee Simple Determinable - Possibility of Reverter*
  - If the trigger event happens, it will automatically pass the right of possession to grantor.
    - The grantee would be a trespasser, the clock starts to tick for the purpose of SoL.
  - Magic Word: *so long as, until, while, during*.
2. *Fee Simple Subject to a Condition Subsequent - Right to Enter / Power of Termination*
  - Grantor needs to take affirmative action to get the right of possession.
    - Magic Word: *on the condition that, but if, provided that, however*.

3. *Fee Simple subject to Executory Limitation - Executory Interest (divest, not nature expiration)*
  - A FSD while the future interest is retained by a **third party**, not the grantor.
  - The combination of magic words.

## F. Test for Estate

- Word of Purchase; Word of Limitation; Word of Added Limitation; Holder of future interest (grantor or 3d party)
- Identify the present possessory estate and future interest
- State each party's property interest.
- Such as:
  - B has a present possessory interest **in** fee simple determinable/life estate
  - O has future interest in the possibility of reverter OR O has reversion in fee simple absolute.

## II. Modern Future Interest

### A. Remainder

- Remainder is a future interest in transferee (another grantee) that is
  - Is capable of becoming possessory immediately upon the natural end of prior estate --> they wait patiently.
  - Do not divest (cut short) any interest from prior transferor --> not apply to fee simple defeasible.
- 1. ***Contingent Remainder: a remainder is contingent, if either***
  - It is given to an unascertainable person (not alive or unidentified) OR
  - It is subject to condition precedent other than the natural termination of the prior estate.
- 2. ***Vested Remainder Subject to Open: this remainder is vested as to at least one person, but it is held by a group or class that may be enlarged in the future.***
  - 1) At least one person must be vested: ascertainable and not subject to conditions precedent.
  - 2) The vested group or class may be enlarged before the conveyance.
    - Standard expression: A has a present possessory interest for a term of five year. B has a vested remainder subject to open in fee simple absolute.
- 3. ***Vested Remainder Subject to Divestment: XXX is a remainder that is***
  - 1) Vested: ascertainable (alive and identified + not subject to condition precedent)
  - 2) Subject to conditions subsequent where a remainder is immediately ready to become possessory upon the natural end of prior estate, unless a specified event occurs after the conveyance that prevents the holder from taking possession after the prior estate ends.
    - Standard Expression: D has a vested remainder subject to divestment because the remainder is vested and subject to divestment.
      - The remainder is **vested** because it is ascertainable (D is alive and identified). Furthermore, the remainder is not subject to conditions precedent other than the natural end of B's life estate.
      - The remainder is **subject to conditions subsequent** because the interest is ready to become possessory from the moment of the conveyance upon the natural end of B's life estate unless he stops studying violin. If so, the remainder is divested, causing D to lose right of possession upon B's death.
- 4. ***Indefeasible Vested Remainder: where the remainder is vested and NOT subject to either open or divestment.***

### B. Executory Interest

- An executory estate is a future interest in a transferee (another grantee) that must **divest** an estate or interest to become possessory --> not upon natural expiration due to its inherent term or limitation.
  - **Shifting**: executory interest that follows an estate in a grantee.
  - **Springing**: executory interest that divests an estate in a grantor.

### III. Rule of Perpetuities (marketability)

- It reflects the balance between unfettered landowner autonomy and free marketability of title.
- No interest is good, unless it must vest, if at all, no later than 21 years after some life in being at the time of interest.
  - i.e., a grantee's contingent future interest is valid only if you could logically prove that it will vest or fail to vest within "a life in being at the time of the conveyance plus 21 years." If there is any possibility that the interest will vest more than 21 years from the death of relevant lives in being, then the interest is void.
  - Note: if a holder's interest will **FAIL** within 21 years after the death of all relevant lives in being --> **NO violation**, the interest is **valid**.
- Summary of Steps for applying RAP
  1. Determine if there is a future interest subject to RAP.
    - Applies to: **future interest** that is executory interest, contingent remainder, and vested remainder subject to open.
    - Not applies to any **present interest**, or future interest retained by **transferor/grantor**, **vested remainder** subject to divestment or indefeasible vested remainder.
  2. List the "lives in being" at the time of the interest is created. Usually includes:
    - The holder of the interest, the person creating the interest
    - The person could affect the **identity of the holder** + affect the **condition precedent**.
  3. Create: if the holder of the interest is **unascertainable**, suppose a baby is born one year after the conveyance.
  4. Kill: Assume all "lives in being" die after the conveyance or one year after conveyance.
    - The duration of time between the creation of future interest and death of all relevant lives in being at the time of creation is **variable**.
  5. Count: add 21 years to 1 year or 0 year. Determine whether there is any possibility that the future interest will vest after the perpetuities period.
- Always assume that **a person of any age can have another child**.

## Chapter 5 Concurrent Ownership

### I. Modern Types

#### A. Tenancy in Common: default

- Each tenant in common has an undivided, fractional interest in the property (not necessarily equal)
  - Even if A and B only has 50% of property, each of them has the full right of use and possession. The property will not be divided.
- Each tenant in common has *undivided right to use and possess* the whole parcel.
- Freely alienable, devisable, and descendable
- No requirement for three unities: time, title and interest.

#### B. Joint Tenancy (with the right of survivorship)

- Each joint tenant has a right of **survivorship** (to avoid complicity):
  - If there are only two tenants, the surviving one will have the sole ownership.
  - If there are more than two tenants, then the surviving ones will take the equal portion of the right.
- Each joint tenant has *undivided right to use and possess* the whole parcel.
- Limited alienable (severance), NOT devisable and descendable, for they all ends by death.
- **Elements: four unities**
  - Time: created at the same moment and same time
  - Title: by the same instrument, e.g., deed or will.
  - Interest: have the **same shares** in estate, equal in **size and duration**.

- Possession: each tenant has the equal right of possession, use and enjoyment of the land.
- **Test:** 1) by express language "O to A and B in joint tenancy (with right of survivorship); 2) by the four elements.
- Note:
  - Not a default rule: if there is ambiguity, then tenant in common.
  - Not devisable: If one of them died, the other one got the full ownership, even the deceased has a will, that will not be effective.
  - Advantages: no need to wait or no procedure need to be taken.

### C. Tenancy by the Entirety

- Created when a married couple are deemed as one legal unit (women cannot own property)
- Elements:
  - Four unities: time, title, interest and possession
  - Fifth unities: a valid marriage
- Difference:
  - Each holder has the right of survivorship;
  - Neither of them has separate shared interest of the property.
- Termination: not severance or partition, but **death, divorce or agreement**.

## II. Duties and Rights of Cotenants

- Right to Possession: no obligation to pay fair rental value if one enjoys exclusive occupation unless ouster happens.
  - **Ouster:** when a cotenant in possession refuses to allow another cotenant to occupy the property
    - Legal consequence: If one co-owner requires shared-possession, but the other one refuses him, the occupied one owes **pro rate rental value** to the other ouster party --> as an **exception**.
  - **Adverse Possession:** If the ouster occurs, they are treated as trespasser; but if the ouster did not seek to re-enter, and the remaining cotenant satisfies the elements of AP, then they could obtain the exclusive title.
    - If the tenant did not notify the other party, then they might fail the element of "open and notorious possession."
- Right to Rents and profits shared by proportion; pro-rata.
  - Each cotenant is entitled to a **pro rata share** of rents or resulting profits received from a third party or natural resource for the use of land.
  - E.g. four co-owners, each owner has different corners; each earn dollars from their corners -> that part of profit still needs to be shared by the co-owners
- Liability to Operation and maintenance, ordinarily shared by both parties.
  - *Mortgage and tax payment:* all cotenants are obligated to pay their proportionate share of mortgage, tax, assessments and other payment that could give to a lien if unpaid.
    - Including mortgage payment, capital expense, real estate tax, sewer charge, and homeowner insurance.
  - *Repair and Improvement:*
    - Not entitled for a contribution if absent a prior agreement,
    - in the Esteves, each cotenant is required to pay his pro rata share of the operating and maintenance expenses for the property

## III. Severance of Joint Tenancy

### A. Transfer of Entire Interest

- Can be served unilaterally by one cotenant through transferring its interest to others
- Right of survivorship is **destroyed** if there is only two joint tenants.
  - to A and B as joint tenants, A transfer his interest to C, both C and B become **tenants in common**.

- The remaining holder of joint tenancy are still joint tenants.
  - O to A, B and C. A to D. D is the tenant in common, B and C are still joint tenants.

## B. Lease:

- **Majority:** A joint tenant had power to execute a valid lease, the lease did not effect a severance.
  - Thus, the lease was **subject to** the other cotenant's right of **survivorship** and **ended when the lessor cotenant died**.
  - Justification: term of year or leasehold do not transfer **title or ownership**.
- **Minority:** based on English common law, lease by a joint tenant --> severance
- **Others:** lease by joint tenant --> temporary severance during lease term that will serve TIJ.

## C. Mortgage

- Mortgage Theories:
  - **Title:** A actually transfers the title to the bank, during the period of repayment, the bank will retransfer to you once the payment is fulfilled.
  - **Lien:** Once you acquire the property from O, you grant the bank a lien on the property. "Encumbrance" --> it is not a property interest.
- Rules:
  - On the **title** theory, the bank holds the title of the property, then it is a **severance** of the joint tenancy.
  - On the **lien** theory, **no severance**.

## IV. Partition (of JT and TIC)

- Justification: central to the efficient use of land + cotenants disagree with each other.
- Means of dividing property
  - **Partition in kind:** physically divide a parcel into multiple parcels
  - **Partition by sale:** conveying the entire parcel to another party; collect and divide the sale price of the property.
- Approach:
  - Preference to partition in kind: rebuttable assumption
  - Partition in kind can be overcome if it is impractical or impossible.
    - The property cannot be conveniently partitioned in kind;
    - The **interests** of one or more of the parties will be promoted by the sale
    - The interest of the other parties will **not be prejudiced by the sale**.

## Chapter 6 Leasing Real Property

- They are all non-freehold estates in addition to term of year.
- **Increasing rights of residential tenants** --> developed from the English common law
- Residential leases v. commercial leases: more expansive right to the residential rights

### I. Creating a Tenancy

#### A. Selecting Tenants

- For the handicap, disabilities (for the definitions at p. 454, the relation is "OR")
  - (1) A **physical or mental impairment** which substantially limits one or more of the person's major life activities;
  - (2) a **record** of having such an impairment; or
  - (3) being **regarded** as having such an impairment, but does not include current, **illegal use of or addiction to a controlled substance**.
    - It does not include alcoholic.
- Procedural approach:
  - (1) the plaintiff establishes a **prima facie** case of discrimination;
    - Member of the protected class and D knew or suspected that he was a member of it.
    - P applied for and was qualified

- D rejected the application
- The property at issue remained available thereafter.
- (2) the burden then shifts to the defendant to prove a legitimate, nondiscriminatory reason for his conduct; and
- (3) if the defendant meets that burden, then the plaintiff must show that the reason is a **mere pretext**.

## B. Selecting Estate

- Non-freehold estate: term of years, periodic tenancy, tenancy at will and the tenancy at sufferance.
- 1. **The Term of Year:**
  - Created by lease agreement.
  - Fixed duration (does not have to be a year),
  - Termination: upon **end of the term; automatically** expires
  - "to T from July 1, 2013 to June 30, 2014."
- 2. **Periodic Tenancy**
  - Created by lease agreement.
  - Duration: Frequently month to month or year to year.
  - Termination:
    - This lease **automatically renewed** for successive periods
    - Termination occurs if L or T gives advance notice.
      - If month by month = 1 month
      - If year by year = 6 months
  - "to T from month to month, beginning July 1, 2015."
- 3. **Tenancy at Will**
  - Created by lease agreement or **by implication**;
  - No fixed duration
  - No fixed ending point:
    - Restatement, only as long as both the landlord and the tenant **desire**.
    - Common law rule: no advance notice required
    - Modern rule/most states:
      - 1) **notice in advance** required to terminate
        - usually = time between rent payments (equal to the period of time between rent payments),
      - 2) automatic termination if L or T **dies**, T **abandons** or L **sells** the property.
- 4. **Tenancy at Sufferance**
  - Created by a prior tenancy. T is a holdover, staying after right of possession expires.
  - Duration:
  - Termination: 1) treat T as trespasser and **evict**, or 2) [Majority] **renew T's tenancy for another term**
  - Some require double rent during holdover period; other states limit length of renewed tenancy to no more than one year.
- For the difference between lease and license,
  - License: personal **privilege** to use the land of another for specific purpose. Not a property right but a **permission**. The **permission** could be revoked at any time.
    - E.g., a ticket to a show, invitation to go to your friend's home (tort?)
  - Lease: transfers the exclusive right of possession to the tenant.
  - Problem: a dorm contract with a university? The legal assumption that students did not have the property rights, for the students are dependent on their parents.

## C. Statute of Fraud (Leasing Agreement) --> voidable

- **Statute of Fraud:** A lease for more term of more than one year cannot be enforced unless in writing --> voidable.

- Key lease terms: parties, property, duration and rent.
- Signed by the party against whom the lease is enforced.

#### D. Possession Delivery (commercial)

- English rule: duty to provide actual (physical) possession
- American rule: provide legal right of possession, does not guarantee there is empty property.
  - For the English rule:
    - the landlord is in the **better position to evict** the former tenants: the identity of the former tenants, the current condition of the premise, the condition or (economic) situation of the former tenant.
    - This is a commercial tenant, while in the residential situation, the default rule is the landlord to evict.
  - For the American rule:
    - The landlord did not have the right to possess, so it is inappropriate to do so.
    - the landlord has the risk of holdover tenant, so the landlord will prefer to keep a window period to lease the property, then it **decreases the efficiency** of the market, the available spot on the market and the price of the apartment.

## II. Conditions of the Premises

### A. Implied Warranty of Habitability --> rent, deduction, damage

- Implied warranty that landlord will deliver the premises in habitable condition and maintain them in that condition during the lease term.
- Reasoning:
  - First look at the building or housing code.
  - If no statutory requirement, then the common law, which requires "**bare living requirements**,"
    - Sufficient: housing code, violations involving health or safety, bare living requirement.
    - Insufficient: minor deficiencies, like malfunction of venetian blinds, minor water leaks or wall cracks, or a need for paint. E.g., raw sewage.
- Features: immutable
  - Gained prominence after 1970
  - Contract approach to leases
  - **Immutable** rule
  - Applies to residential lease, rarely commercial ones.
- Remedy for breach of implied warranty:
  - Withhold rent:
  - Repair and deduct:
  - Sue for damage: how to calculate damage. No fair market rental value.
    - Approach 1: rental value as warranted **minus** rental value with violation (comparable in the market or read the lease) --> sometimes, the value without violation is 0, so the T receives all rental value
    - Approach 2: percentage diminution

### B. Constructive Eviction: wrongful conduct by LL --> vacate, end.

- Actual Eviction: LL physically evicts the tenant, breaching the implied covenant of quiet enjoyment
  - Consequence: actual eviction **ends the lease**, tenant not responsible for any future lease
- Constructive Eviction: **wrongful conduct** by the landlord that **substantially interferes** with the tenant's beneficial use and enjoyment of lease premises.
  - Wrongful act: affirmative conduct + omission (if LL under **duty**) - duty to maintain **common area/repair**/provide heat + (probably) third party's conduct.
  - Substantial interference:

- The interference need not be permanent; nor need it totally prevent the tenant from occupying the premises.
  - not impossible, just more difficult to enter.
  - Did not limit the percentage of revenue that the tenant has to lose.
- If the tenant is **aware** of the landlord's wrongful conduct when taking possession, the right to assert constructive eviction in the future is waived.
- **Degree:** Factors like commercial standard or recommended standard or local code, if that comply with that, then it might be insufficient.
- Remedy: Tenant may vacate the premises and end the lease, thus avoiding liability for future rent.
- Application: both commercial and residential tenants.

### III. Ending the Tenancy

#### A. Abandonment: duty to mitigate

- Definition:
  - T 1) vacates the leased premises 2) without justification: such as constructive eviction; wrongful eviction
  - T lacks the present intent to return; and
  - T defaults in the payment of rent.
- Steps: sue for rent; terminate the lease; mitigate damage and then sue for rent.
  - Tradition: Allowing LL to sue for all remaining rent without duty to mitigate.
  - Current: required to **mitigate damages by attempting to lease** the premises to a new tenant.
- Justification:
  - Adopted with contract's **duty to mitigate.**
  - Notion of basic "**fairness**"
  - Social benefit, **marketability.**
- Application:
  - Reasonable steps could include advertising to all prospective tenants, or newspaper. (p.524)
  - LL was not obligate to show it first, just need to treat it as a general one.
  - ★ For the uncertain measure, ask "is it equivalent to other common customary practice?" "

#### B. Security Deposit

#### C. Eviction

##### 1. Retaliatory Eviction

- Scope of Doctrine: two variables
  - What tenant's conduct is protected?
    - **Complaints about housing condition** to LL or gov;
    - Rent withholding for breach of the implied warranty of habitability;
    - Use of repair-and-deduct remedy;
    - [Extension] forming or joining a **tenant's union.**
  - What landlord conduct is prohibited?
    - Eviction or raising rent or eliminating essential service.
- Procedure:
  - Presumption: T provides evidence of complaints(factual showing) six months (time limitation) prior to the eviction. [Direct motivation is hard to provide]
    - Just asserting certain objective fact, otherwise it will be hard for the T to prove such purpose.
  - Initial burden: landlord has the burden to provide **legitimate purpose**
  - Burden shifted: T then be afforded a full and fair opportunity to demonstrate **pretext.**
- Note: It does not cover all reasons, e.g., assault made by the tenant in this case; not testifying at courts.

## 2. Procedure for Eviction

- Eviction:
  - 1) [Min] Self-help: L could retake possession through self-help by **physically entering** the premises and causing T to leave, as long as L used only a **reasonable amount of force**.
  - 2) [Maj] **judicial process**. Sue the tenant: L could sue T, secure a judgment ordering T's eviction, and have the judgment enforced by a law enforcement officer.
    - L gives T a **statutory notice** describing nature of breach and offer opportunity to cure it.
    - **File** a lawsuit seeking summary eviction and **serve** tenant with process.
    - Expedited timing and simplified **procedure**: "whether T breach a lease obligation?"
    - Judgment **enforced** by a law enforcement officer.
- Holding / Majority: the LL can only evict the T by judicial process.
  - Bright-line rule: efficiency; if it is standard, it will increase the judicial and economic cost.
  - Self-help will need more social cost, reducing violence and promoting public safety.
  - Coase Theorem: Concerns for raising the rent due to the cost of the LL.
  - Accelerated eviction proceeding is required by some jurisdictions.

# Chapter 7 Selling Real Property

## I. Purchase Contract

### A. Statute of Fraud --> voidable

- Application:
  - For the lease, it only applies to more than one-year lease
  - In general, the sale of an interest in real property is NOT enforceable, unless it satisfies SoF
- Inclusion:
  - Essential terms:
    - Parties' identities;
    - Price;
    - Property description:
      - Legal description OR
      - Metes and bounds (very detailed description, every land and angles and lakes) OR
      - Address of property OR
      - A subdivision established by single development (usually with map)
  - Writing: formal contract (purchase contract) and informal memorandum (a letter, or check, or memo)
  - Signature: signed by the party against whom the enforcement to be sought.
- Part performance --> installment land contract
  - Elements:
    - Takes **possession**;
    - **Pays** at least part of the purchase price;
    - Makes **improvements** to the property.
  - Variance: possession + (payment or improvements) == payment + (possession + improvement)
  - Note:
    - Usually applied in **land contract**, move in + monthly payment --> purchase contract on **installment payment**. If the buyer miss the payment, then he or she could lose to gain the title to the property;

- The purchaser did not get the title and the equity until they finished the payment (in many years) --> the part performance exception to protect the purchaser, though many jurisdictions require the improvement to the land.
  - Commonly seen at Chicago due to their identities as minority.
- Equitable Estoppel: An oral contract may be enforced if:
  - One party acts to detriment in reasonable reliance on another's oral promise; AND Serious injury would result if enforcement is refused.

## B. Marketable Title --> rescind

- Definition: a marketable title 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.
- Situations:
  - The seller's property interest is **less than** the one she purports to sell;
    - Usually assumed to be a fee simple absolute; so any other estate is not enough
  - The seller's title is subject to an **encumbrance**; or
    - Easement (a right to use the property, e.g., use the path); restrictive covenants; mortgage interest, lien.
  - There is a reasonable doubt about either (1) or (2) --> the buyer may be **hazard to a litigation** regarding the 1 or 2.
- Application:
  - Time: after the signing of contract but before the closing.
  - Default rule: in every contract for the sale of real property, the seller *expressly or impliedly* promises that she will deliver marketable title, unless the contract specifies otherwise.
- Two kinds of encumbrances:
  - Municipal restrictions: mere existence **does not** render title unmarketable. E.g., zoning ordinance.
  - Private restrictions: absent an express exception, their existence does render title unmarketable. E.g., restrictive covenants imposed by prior owners; mortgage interest; mechanic's lien; easement.

## C. Equitable Conversion

- Equitable Conversion: a legal fiction based on the equitable principle, which permits the vendee to be considered the equitable owner of the land and debtor for the purchase money, and vendor to be regarded as a secured creditor.
- Assignment of risk of loss: during the period between signing of purchase agreement and the closing.
  - **Majority**: risk of loss on vendee from the moment of contracting.
  - **Minority**: seller continues to bear the risk until actual transfer of title, absent express agreement.
  - **Trend**:
    - Risk of loss on vendee, if he has the **right of actual possession and control** of the property
    - Risk of loss on vendor, if 1) the vendee does not have the right to possess and control; 2) no fault on vendee for the loss ==> vendee can **rescind** and **recover** payment.

## D. Duty to Disclosure --> rescind

### 1. *General Rule: Still during the executory period*

- **Majority**: The seller is obligated to disclose defects that 1) **materially affect** the **value** of the property and 2) are not known to or **not readily discoverable** to a buyer.
  - Remedy: B can rescind the purchase agreement.
- **Minority**: traditional rule, "*caveat emptor*". Generally, the seller has no duty to disclose unless 1) affirmative misrepresentation - the seller affirmatively misrepresents the property; 2) "ACD" - the seller actively conceals defects; 3) the seller has a fiduciary duty to the buyer

- Remedy: rescind of the purchase agreement
- Narrow exception: the *Stambovsky rule*.
  - 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.
  - Nondisclosure constitutes a basis for rescission as a matter of **equity**.
  - The possible issues: the material impairment, and whether that is discoverable by a prudent purchaser.
- Statutory Reforms for disclosure
  - **Disclosure of violation/defects**: building code violation, zoning violation, contractual defects, drainage issues.
  - **Implied warranty of quality**: the builder has duty to disclose about whether the property is fit for its intended use; the duty is extended to the subsequent buyers.
  - **Psychological impact** on some buyer - HIV/ADIS or mass murder --> usually not
  - Not to the buyer
- 2. *Off-site Conditions: habitability*
- Off-site conditions, reluctant to impose such duty to the seller, since they cannot control such conditions.
- Reasoning: the court actually extended the general majority rule. Expansion of duty to disclose the off-site conditions
  - It applies to the **professional developer** of the housing and builders, and
  - Their **brokers or agents**.
- Rule (p.575)
  - A **builder-developer** of residential real estate or a **broker** representing it is liable for nondisclosure of off-site physical conditions *known to it and unknown and not readily observable* by B, if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property.
- Comparison: the degree of seriousness
  - For the off-site: that would make the house unlivable.
  - For the on-site: more of market value.
- If you simply suspect it, no duty to disclose.

## II. The Closing

### A. The Deed

- Required the **essential deed component, delivery and acceptance**
- 1. *Essential Component: Statute of Fraud*
  - Essential Information:
    - Identities of grantor and grantee
    - Description of the property
    - An **intent to convey title**.
  - Writing: in writing
  - Signature: by **grantor**
  - Comparison: SoF of the purchase contract; the "SoF" here is for the deed itself.
    - Signature: the deed, the grantor; the purchase contract, the party against the enforceability
    - The price: the deed, not required; the purchase contract, required.
- 2. *Delivery: the grantor must,*
  - 1) **intent to immediately transfer an interest to the grantee; and**
  - 2) **provide some objective manifestation of that intent.**

### 3. Different Types of Deed:

- The doctrine of merger: general warranty deed, special warranty deed, quitclaim deed.
- Before the buyer obtained the ownership, the S had the ownership, and before that, the previous S had the ownership.
  - 1) General Warranty deed: **all defects** in title, not only applies during the period of the property, but also applies indefinitely before that. Even if some defects happened before the S had ownership, e.g., S2, he or she would still be responsible.
  - 2) Special Warranty deed: all defects during the direct S's ownership are covered by a special warranty deed
  - 3) Quitclaim deed: the S made no warranty. The grantee only receives what grantor had.

## B. The Mortgage

- The mortgager (the borrower), the mortgagee (lender)
- Three Security Devices: Seller --> Purchaser/Mortgagor
  1. **Mortgage Loan**: P will require loan fund from the mortgagee for agreed mortgage term, authorizing the agreement term for closure.
    - Title Theory: **transfer of title**. the mortgagor remained in *possession of the property*, but the -ee held title until the loan was repaid.
    - Lien Theory(Maj): **security interest**. Both title and possession with the mortgagor until and unless foreclosure occurs.
  2. **Deed of trust**: S to P, P gave deed to trustee for the bank; the bank will hold the deed during the period of payment.
  3. **Installment land contract**
    - The buyer promises to pay the purchase price in installments over a period of time, *taking possession* immediately, but *taking title* only after all payments are made.
    - S convey the title to P after all purchase price is paid in full.
    - Note: historically, this is very punitive to the P, they cannot miss any payment, S could hold their payment.
- **Judicial Foreclosure (mortgage)**

The mortgage gives the lender the right to use a special remedy if the borrower **defaults**

  - **Foreclosure**: sell the property and use the sales proceeds to pay off the loan
    - File complaint + judgement by default + court-supervised public auction + judicial confirmation of sale.
  - If after the selling, the mortgager still owes money. Mortgager may sue -ee --> **deficiency judgment**
  - Mortgagor remedies of **reinstatement** (reinstate the loan) + statutory right of **redemption** (redeem the property)
- **Power of Sale (Deed of Trust)** commercial reasonable
  - The trustee has NO fiduciary obligation to the purchaser (superficial analogy at best)
    - In trust of estate: trustee manages the property for the beneficiary, he is subject to a fiduciary duty, requiring to act to promote the best interest of the beneficiary.
  - The threshold is that the price is **commercially reasonable**.
    - As long as it did not *shock the conscience* of the Court "or to *amount to fraud*." It is still permissible to sell at that price.
    - **Reasonable** Requirement: Every aspect of the sale, *the method of the sale, advertising, time, place and terms*, must be commercially reasonable.
    - "Discrepancy between the foreclosure sale price and the amount of the mortgagor's indebtedness is not sufficient to make the sale commercially unreasonable. "
- Note b at p. 594:
  - If deed of trust, the **trustee** carries the duty to convey in the event of default, such as **public auction**.

- If that is a mortgage, it need to go through **judicial foreclosure**.
- **Installment Contract:**
  - Minority (**expanding**): Forfeiture provision upon the buyer's default is invalid and otherwise unenforceable.
  - Majority: forfeiture of the land and all payments made if they buyer missed even one payment
    - If someone lacked enough credit history, then the purchaser usually need to enter into the installment contract.

### III. Title Assurance

- If the purchaser knew the deficiency after the closing, they had title covenants, title opinion based on search of public records, title insurance.
- The doctrine of merger: general warranty deed, special warranty deed, quitclaim deed.
  - Before the buyer obtained the ownership, the S had the ownership, and before that, the previous S had the ownership, too.
  - General warranty deed: **all defects** in title, **before and after**, not only applies during the period of the property, but also applies indefinitely before that. Even if some defects happened before the S had ownership, e.g., S2, he or she would still be responsible.
  - Special Warranty: **all defects during** the direct S's ownership are covered by a special warranty deed
  - Quitclaim deed: the S made **no warranty**. The grantee only receives what grantor had.

#### A. Title Covenant: *the grantor promised in the deed that he has a good title to convey.*

- Theory:
  - Doctrine of Merger: once the grantee accepted the deed, all prior promises (in the purchase agreement) were extinguished.
  - Consequence of doctrine of merge: grantees demand that grantors provide title covenants in the deed itself.
- 2 categories and 6 types
  - 3 present covenants: reach if all at, **when deed is delivered** (starting point for statute of limitation)
    - Covenant of seisin: is the owner of described **estate** in deed, including the type of estate and quantity of land.
    - Covenant of right to convey: has legal right to **transfer** the title.
    - Covenant against encumbrances: **no encumbrance** unless that is expressly record on the deed, e.g., the mortgage, lien, easement, or lease (especially the commercial lease)
  - 3 future covenants: for the S, can be breached, if at all, after the closing when grantee is actually or constructively evicted by a third party holding superior title.
    - Covenant of warranty: the grantor promise to defend the grantee's title. "promise of a **good title** to transfer"
    - Covenant of quiet enjoyment: **no disturbance or eviction of use and enjoyment of land**.
      - Such breach requires **actual or constructive** eviction, i.e., interference with grantee's enjoyment and use of land, and must be by one holding **paramount title**.
      - Mere existence of superior title is not a breach (that is for present covenant)
    - Covenant of further assurance: any action or document to perfect grantee's title.
- Right of Remote Grantees:
  - If both covenants contains all six covenants, could Brown directly sue the Grantor?
  - Usually only future covenants could run with the land to remote grantees.
- Subprime Mortgages: due to a large quantity of loans based on **risky** criteria, e.g., the loan was equivalent to the price of the property (down payment is rather low) + with insufficient due diligence.

B. Title Opinion Based on Search of Public Records: *an attorney or other professional renders an opinion about the state of title after searching the public land records.*

- An attorney to search the public land records and give a written opinion on the state of title.
- Recording System: looking through the recording system at Grantor-Grantee Index or Tract Index (Each parcel of land is assigned a unique identifier).
  - Each county has office of register of deed + Centralizing recording system
  - Grantor-Grantee Index:
    1. Grantee Index for the current grantor, e.g., X's name, then his grantor as the grantee.
    2. Grantor Index from the first grantor, then descend the tracing.
      - Look for if they transfer the full titles or reverse some interest, or if there is mortgage, lease, easement
      - Trace the document or deed.
  - "Wild Deed:" some deed that is outside the time period, though usually invalid, but that will be wild deed.
  - The reasonable DD scope might not cover such deed research, especially in the jurisdiction adopting tract index.
- The subsequent buyer did not realize the deed include the MH clause --> though such clause did not make the deed unenforceable, but only **insufficient constructive notice**.
- **Mother Hubbard** clause: emergency situations, difficult to grantee to decide which property been transferred.
  - Convenient for **death bed transfers**, and in situations where time is of essence ad specific information concerning the legal description of the property to be conveyed

C. The Recording Act

1. *Different System*

- **First in time**: the purchaser who obtained the **deed first** has priority.
- **Race**: the PERSON (not purchaser) who **records first** has priority; criticizing for unethical, especially it awards the grantee who have knowledge of a prior conveyance of the same property. Adopted by NC and Louisiana.
- **Notice**: the **subsequent bona fide purchaser** has priority. Adopted by about 50% states
  - Bona fide purchaser: 1) purchase for value (pay some compensation); 2) have no knowledge of the prior conveyance of the same property. [3) subsequent: refer to a grantee who receives the title of the same property from the same grantor relative to an earlier grantee.]
    - "a subsequent purchaser who pays **valuable consideration** for property **without notice** of prior conflicting interest in the property."
  - If B **recorded** first, then C **cannot be** a bona fide purchase. The minor exception is that the deed has to be **recognized by a public**.
- **Race-notice** statute: the subsequent bona fide purchaser who records first has priority. Adopted by about 50% states.

2. *Expansion Rule*

- **Shelter rule**:
  1. O to C, then to D.
  2. If C is a subsequent bona fide purchaser, then D is deemed as a bona fide purchaser even if D acted in bad faith.
  3. [It is the due diligence for the purchaser to record the deed, so the subsequent purchaser would had constructive knowledge.]
- **Forgery and Fraud**
  1. A **Forged deed** is **void**, transferring no interest to the grantee.
  2. **Fraud in the inducement**: a deed induced by fraud is **voidable**, but if the grantee conveys title to a **subsequent bona fide purchaser**, the subsequent bona fide purchaser prevails.

3. **Fraud in the inception:** if the grantor didn't know that the instrument he or she signed was a deed, then the instrument is **void**.

## Chapter 8 Private Land Using

- Land Using
  1. Private agreement (servitude): **easement, restrictive covenant, equitable servitude**
  2. Public legislation/statute: **zoning law**, environmental law, **taking/eminent domain**, nuisance law.

### I. Easement

- Easement: a non-trespassory right to land in the possession of another.
  1. Lease: non-freehold estate, transfer of exclusive right to possession
  2. License not an interest in land but a revocable privilege
- Easement **appurtenant** (benefit the owner of the dominant land) v. Easement **in gross** (personal)
- Affirmative (do something) v. negative (not do something)

### A. Express Easement:

- Statute of Fraud:
  - 1) identifies parties; 2) describes dominant and servient land; 3) exact location of easement;
  - 4) state the **purpose** for which easement might be used.
- **Express easement by reservation:** [COMMON OWNER] when the servient land is transferred to the other party, the grantor or a third party reserves the easement.
- **Express easement by grant:** the servient owner grants an easement to the dominant owner.
- The label used in contract is irrelevant, we still need to look at the nature of such relationship

### B. Implied Easement

1. **Implied easement by prior existing use:**
    - **Severance** of title to land held in common ownership
    - An existing, apparent, and continuous use of one parcel for the use or benefit of another at the time of conveyance.
      - Apparent: not only readily apparent, but also discoverable by a reasonable inspection
    - A **reasonable necessity** for that use: no alternative without disproportionate effort and expense.
  2. **Easement by Necessity**
    - Severance of title to land held in common ownership
    - "Strict necessity" for the easement at the time of conveyance.
      - The easement remains in effect so long as the necessity exists.
      - Interpretation of **necessity**: it requires a higher degree of necessity than "prior existing use"
        - Strict: no legal means of reaching, no matter how impractical + completely surrounded by private land
        - Reasonable: convenient or beneficial to the normal use and enjoyment of land.
        - "Lack of **reasonable practical** access."
  3. **Prescriptive Easement: CHOT.** The claimant's use/easement must be:
    - C: continuous
    - H: adverse and hostile
    - O: open and notorious
    - T: for the statutory time period
- Difference: with AP
    - Elements: CHOT v. CHOATE + no need for the history of use.

- Result: AP results in possession of property; PE rewards a legally recognized easement.
- For the examination of elements: AP examines possession, while PE examines use.
- Public prescriptive easement:
  - Beach access
  - Public trust doctrine: If the sovereign conveys such property to a private owner, it remains encumbered by the trust, and the rights of the owner are accordingly limited.

## II. Restriction

- extend the burdens and benefits of **land use covenants** to the **successors** of the original parties.

### A. Real Covenant

- Two sides: 1) burden (promisee): performing the covenant; 2) benefit (promisor): enforcing the covenant.
- **Elements:**
  1. **Statute of Fraud** (of deed)
  2. **Intent to bind:** the original parties have to intent to bind their successor. Express language and probably inferred from the language.
  3. **Touch and Concerns:** related to the possession, use and enjoyment of the property, usually the physical restriction. It can be monetary obligation, but not a pure one, e.g., pay rent + pay homeowner's dues.
  4. **Notice** to the successor: in order for the burden to run with the land, it depends on if the successor is notified
    - Actual notice:
    - Record notice: subject to original **deed** and has been recorded
    - Inquiry notice: physical observation that could enable a reasonable person to make a inquiry. Pink house in a white community.
  5. **Horizontal** Privity: relationship between original parties
    - [Super Majority] Grantor-Grantee relationship: all successive interest, not necessarily grant or lease, but can be easement.
    - [Majority] **Mutual Interest:** the original agreement has to be the interest **in the same property**, including landlord-tenant, co-owners or cotenant, owners of the dominant land and easement on the servient land.
    - [Modern Trend] no requirement
    - Old English rule: only Landlord-Tenant relationship.
  6. **Vertical** Privity: agreement between the original party and its successor, when the original party conveys **100% of its interest**.
    - The successor must receive the entire interest of the original party --> NO adverse possession or Term of year.

- Requirement:

	<b>Burden</b>	<b>Benefit</b>
1	Statute of Fraud	Statute of Fraud
2	Intent to Bind	Intent to Bind
3	Touch and Concerns	Touch and Concerns
4	Notice	N/A
5	Horizontal Privity	N/A
6	Vertical Privity	Vertical Privity

- Note for application: **Intent to bind**, no express agreement, but the homeowner association included the covenant to ensure compliance with provisions --> recorded it + mere existence of the association.

## B. Equitable Servitude:

- Equity:
  1. Not legal requirement, but the **fairness** of the situation, more flexible.
  2. **Remedy**: monetary damage is not applicable, only the injunctive relief, i.e., issuing an injunction.
  3. Not restrictive **Statute of Fraud**, extra-statutory.
- No requirement for horizontal and vertical privity.
- Requirement:

	Burden	Benefit
1	SoF or common place	SoF or common place
2	Intent to bind	Intent to bind
3	Touch and Concern	Touch and Concern
4	Notice	N/A

- Note:
 

Note the **nature of the agreement, deed or lease**, if that is a 100% conveyance?  
First treat as a real covenant; then equitable servitude.

## Chapter 9 Public Land Using

### I. Zoning

- Zoning Ordinance contains: 1) text of the ordinance - residential + commercial + agricultural ; 2) map that implement the ordinance.
- Constitutionality of zoning law/regulation: *rational basis test*, a law is unconstitutional only if it is "clearly *arbitrary and unreasonable*, having no substantial relation to the public health, safety, morals, or general welfare
- Example: 1) Euclidian zoning: sprawl; 2) cluster zoning: promote more open space; 3) PUD: planned unit development.

### A. Nonconforming Use

- **Grandfather use**, which was being used for a then-lawful manner for a use that, by later legislation, becomes non-permitted.
- Rule / How does nonconforming use end?
  1. Abandonment: not use for a specific period of time
  2. Termination: 1) destruction of structure, housing the use; 2) if the use is a nuisance; 3) by eminent domain [public use]
  3. **Amortization**: requiring its termination over a reasonable period of time.
- Permitted use for nonconforming use
  1. Intensification: permitted, e.g., two nights a week to four nights a week
  2. Expansion: not permitted, e.g., build a new house for the same purpose.

### B. Tools for Zoning Flexibility

#### 1. Zoning Amendment

- Two types of amendment: 1) map, put land in a different zone; 2) text of zoning ordinance may be changed into different uses.
- Standard for amendment:

- Legislative decision
  - Concerns: 1) comprehensive land use planning; 2) a heightened risk of governmental corruption.
  - **Spot Zoning**: rezoning that confers a special benefit on a small parcel of land regardless of the public interest or comprehensive planning.
  - **Change or Mistake**: 1) correct a mistake; 2) condition fundamentally changed.
- Judicial review: judicial **deference** to legislative policy judgment
  - 1) review for the clear error;
  - 2) presumption that the Board acted in a reasonable way;
  - 3) the burden of proof is upon the challenger/plaintiff to establish otherwise --> **arbitrariness**.

## 2. Zoning Variance

- Variance from ordinance as will not be contrary to the public interest, where a literal enforcement will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.
- Test for the need of zoning variance
  - Burden property with unnecessary hardship that is unique to the property + the hardship is not self-inflicted.
  - Granting of the variance will not have an adverse impact on the public health, safety, and welfare.
  - The variance sought is the minimum variance that will afford relief.

## 3. Special Exception

- Zoning ordinance authorizes certain uses as special exceptions if specified conditions are met:
  - Property owner apply for a permit
  - Typically sued for uses that causes aesthetic, noise, traffic, or other problems.
- Others
  - Authorized within the text of ordinance --> usually hazard to promote the safety of community.
  - Required the satisfaction of numbered conditions **prior to** authorizing certain uses, such as airport, junkyard.
- Note:
  - NOT requiring amendment or variance
  - Quasi-judicial action, so heightened judicial scrutiny.

## II. Eminent Domain

- Power of the government (federal, state or local government) to take private property for a public use upon payment of a just compensation.
  - Inherent power in fifth amendment, taking clause.
  - Public use: e.g., university, highway, military use --> physically used or occupied by public.
  - Just compensation: fair market value + with concern for personal sentimental attachment.

## III. (Regulatory) Taking

- Physical Taking: government seizes land
- Regulatory taking: where public law restrict to use in such an extreme way that they effect a "taking" requiring just compensation.
- Modern Approach:
  - No bright-line rule for determining when a taking has occurred
  - Use of ad hoc, factual inquiries -- a.k.a. case by case analysis.
- **Three balancing Factors**:
  - Economic impact of the regulation;
  - Investment-backed expectation;
  - Character of the governmental action.

- Additional categorical tests:
  - Authorizes a **permanent physical occupation** of land;
  - Adopts a regulation that causes **loss of all economically beneficial or productive use** of land, unless justified by back ground principles of property or nuisance law.
  - Demands an exaction that has **no essential nexus** to a legitimate state interest or lacks **rough proportionality** to the impacts of the particular project.