PROPERTY

Property - the relationship between things and people; the relationship is the bundle of rights associated with the owner and the object.

- It is divided up into real property (land and any structures built on it) and personal property (everything else that are tangible and intangible).
- Courts and legislatures make decisions considering and balancing the factors:
  1) fairness p. (i)-(iii) Gilberts
  2) economic efficiency-generate more wealth
  3) Life
  4) Distribution of goods

Chapter 1. First Possession: Acquisition of Property by Discovery, Capture, and Creation

A. Acquisition by Capture
- A person who first captures resources is entitled to the resources; Whoever is prior in time wins.
  1. Capture of Wild Animals: If wild animals (ferae naturae) are captured, they belong to the captor. But capture is required; merely chasing the animal is not enough.
    - Competition – society’s object is to capture foxes (to destroy them) → to foster competition, resulting in more wild animals being captured, society does not want to reward the pursuer, only the captor.
    - Rewarding capture, an objective act, is an easier rule to administer than protecting pursuit, which is hard to define and can take many forms.
    - Today the rule promotes over capture which depletes limited resources.
    - Pierson v. Post – Post and his hounds are pursuing a fox. Pierson spots the fox and shoots it, killing it. Pierson is entitled to the fox because capture not just pursuit is required. (Dissent: A pursuer acquires title to a wild animal if he is in reach of the animal or if he has a reasonable prospect of capturing the animal). → A hunter must either trap or mortally wound an animal in order to acquire title to it.

  2. Wounded or trapped animals: If an animal has been mortally wounded or trapped so that capture is virtually certain, the animal is treated as captured. But if the animal is only in the process of being entrapped, and the door has not snapped shut, it has not been captured.

  3. Custom: The captor must acquire physical control over the animal, in some hunting trades, a custom, which is thought more effective in getting animals killed, may dictate a different result.
• **Ghen v. Rich** – Ghen shot and killed a whale, which sank to the bottom of the sea. Three days later, Ellis found the whale on the shore and sold it to Rich. The custom was to award the whale to the ship that first killed the whale. The custom advanced the killing of whales (society’s objective) because the killer ship could be off looking for other whales w/o waiting for the whale to rise. This custom was recognized by the courts as giving possession. → **Title to a wild animal is acquired when a hunter apprehends the beast in accordance with custom.**

• **Pierson v. Post VS. Ghen v. Rich** – In P v. P it was custom to award the wild fox to the man first in hot pursuit, but in that case the custom did not promote the efficient capture of wild animals, or the least the majority did not think that custom promoted this goal.

4. **Interference by non-competitor:** If a person is in the process of entrapping animals, a competitor who also wants to capture the animals can interfere with the other person’s activity and try to capture the animals. But a person who does not want to capture the animal cannot interfere. (Remember: Society wants the animals caught.)

• **Keeble v. Hickeringill** - Keeble puts out decoys on his pond to attract ducks and sets nets to catch them. Hickeringill, a neighbor, shoots off guns at the pond to scare the ducks away. Hickergill is liable for damages. (Hickeringill would be able to shoot to kill the ducks flying over his land to the pond. → A person may not maliciously prevent another from capturing wild animals in the pursuit of his trade.

• This case may be understood by appealing to the goal that the law promote the efficient capture of wild animals. A man cannot scare off wild animals about to be captured by another out of spite.

• In Keeble they are attempting to protect trade and they are attempting to find a legal property rule that gets you there.

• Every man should be able to enjoy his land as he sees fit and profit from it.

• **Constructive Possession** – Dominion and control over an object through no physical possession

More on the Rule of Capture and Wild Animals

• The govt owns wild animals, may regulate their taking, and may confiscate animals taken in violation of regulations.

The Rule of Capture and Other “Fugitive” Resources
• Whoever first captured the water, then, was really its owner all others followed the American rule of reasonable use, itself a rule of capture but with the slight addition that wasteful uses of water, if they actually harmed neighbors, were considered unreasonable and hence unlawful.
• Under the rule of capture, the gas was no longer hers. Because fugitive resources are to be treated like “wild animals” when they “escape” or are “restored to their natural wild and free state, the dominion and individual proprietorship of any person over them is at an end and they resume their status as common property.
• Applying the rule of law and capture to oil and gas gives an incentive to produce oil and gas.
• The basic principle in prior appropriation is that the person who first appropriates (captures) water and puts it to reasonable and beneficial use has a right superior to later appropriations.

B. Acquisition by Creation
-A person can acquire property by creating it, but here are a number of difficulties in defining “creation,” as this section shows. The primary purpose in recognizing property by creation is to reward labor.

1. Intellectual Property – Intellectual property is the “catchall” label for property created by exercising the mind. The term includes copyrights, patents, and trademarks, but it may also cover property in ideas or in a persona.
   • The dilemma in recognizing property is how to nurture individual creativity and reward labor w/o going too far by creating monopolies and stifling creativity in others.
   • Unfair competition – Courts have sometimes protected labor and investment under the law of unfair competition. (i.e. INS v. AP)
     - International News Service v. Associated Press – INS copied news that AP gathered. The court held that a news agency has a quasi-property interest in news it has gathered and an prohibit competitors from disseminating the news until its commercial value as news has passed away. → 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.
   • Encouraging competition: To avoid monopoly and encourage competition, the common law commonly allows copying and imitation. (i.e. Cheney)

• Cheney Brothers v. Doris Silk Corp. – Doris copied a fashion design from Cheney Brothers. All such designers have a short life. There can be no common law patent protection because it would be too difficult
to define the boundaries of such protection. →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.

- Another way to see it in INS v. AP is that the court is protecting the chattels (the words themselves not merely the IP. After all (D) was copying the words not the business idea. The view is consistent with Cheney. In that case, Doris was not appropriating the actual clothes but merely the intellectual idea. Since Cheney Brothers had not patented the idea, they were not protected. Had Doris physically taken the chattels, as INS had done, it would have been liable.
- As a way of public policy: In INS, the court is trying to protect the news service business, while in Cheney it is trying to protect competition.

2. **Cyberspace**

- **Virtual Works, Inc. v. Volkswagen of America Inc.** – Virtual Works registered the domain name vw.net with the intent of selling it to Volkswagen of America, Inc. →Registering a domain name that is identical or confusingly similar to a trademark with the bad faith intent to profit by selling that name to the trademark owner constitutes cybersquatting under the law and will result in liability for monetary damages and transfer or cancellation of the domain name.
- **review de novo** – a standard of review wherein the appellate court looks at the evidence in the record as if it were the trial court
- Unlike many of the cases we have considered, this is a legislative answer to property rights rather than a judicial answer.

3. **Property in One’s Persona**

- A celebrity’s “right of publicity” is widely recognized as a kind of property interest, assignable during life, descendible at death. The property interest includes name, likeness, and other aspects of one’s “identity.” The celebrity’s labor in creating a persona of value is protected against another’s using it for profit.

4. **Property in One’s Person**

- Rights in Body Products – Some body parts have long been sold on the market (blood, hair, sperm). But recent advances in medical services have created an unprecedented demand for body products or body parts of other types.
• **Moore v. Regents of the University of California** – The court held that a man did not have a property right to his spleen following its removal from his body by doctors who made it into a patented cell line of great commercial value. The doctors who made it into a patented cell line thus acquired original ownership.

• The court held that the patient had only the right to sue the doctors for failure to disclose their research and economic interest in the patient’s cells. → A doctor has a duty to disclose the extent of his research and economic interests in a patient’s body parts. Human body parts are not property such that they may be converted.

• The court was concerned about making body parts property that could be sold. However, transferability in the market is not an essential characteristic of property. Although most property is freely transferable, some property is not alienable, and some property can be given away but not sold.

• The concern in question is that recognition of property rights in one’s cells would necessarily entail “a right to sell one's own body tissue for profit.”

• **Dissent by Mosk** - “bundle of rights” the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift…” <<what does the bundle of rights allow you to do with any particular piece of property?>> Answer: you can sell it, destroy it, exclude others from it (refuse to sell it), to use it, and “a right to include in others into the right to property”

• You must prove that you would not have consented to.

• **Fiduciary duty** – the duty to act in the interest of another

• **Conversion** – the act of changing from one form to another, the process of being exchanged; the wrongful possession or disposition of another’s property as if it were one’s own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another’s right, whereby that other person is deprived of the use and possession of the property

• **A doctor has a duty to disclose the extent of his research and economic interests in a patient’s body parts.** Human body parts are not property such that they may be converted.

5. **The Right to Include, the Right to Exclude** – It is generally accepted that the essence of private property is the right of the owner to exclude others. The reason for this type of protection is that if A wants to enter B’s land, B should bargain with A for this right and not seize it. (i.e. Jacque v. Steenberg *not on syllabus)*

• **Worker’s rights to organize** - Under federal law, workers have a right to organize a union, and unions have a right to communicate with workers on the employer’s premises seeking their votes.
State v. Shack - Shack entered Tedesco’s property to give legal aid to a migrant farm worker. Shack refused to depart upon Tedesco’s demand and is prosecuted for trespass. The court holds that to secure a worker’s rights an employer housing migrant farm workers can no exclude union organizers from coming on the property. → Property rights may not be exercised so as to endanger the well-being of others.

Chapter 2. Subsequent Possession: Acquisition of Property by Find, Adverse Possession, and Gift

### SUMMARY OF PRIORITY RIGHTS IN PROPERTY

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<thead>
<tr>
<th>True Owner</th>
<th>Possessor</th>
<th>Subsequent Possessor</th>
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<td>Prevails over</td>
<td>e.g. finder or even a thief</td>
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A. Acquisition by Find

- An owner of property does not lose title by losing the property. A finder has rights superior to everyone but the true owner; however there are important exceptions to this rule.

Prior Possessor wins: p. 17 Gilberts list reasons

1) Prior possession protects an owner who has no indicia of ownership. Possession is not the same as ownership.
2) Entrusting goods to another is an efficient practice, facilitating all kinds of purposes that ought to be encouraged.
3) Prior possessors expect to prevail over subsequent possessor. By giving them their expectation, the law reinforces the popular belief that the law is just.
4) The protection of peaceable possession is an ancient policy in law, aimed at deterring disruptions in the public order.
5) Protecting a finding who reports the find rewards honesty.
6) Protecting a finder rewards labor in returning a useful item to society.
• **Armory v. Delamirie** – Armory found a jewel and took it to Delamirie’s jewelry shop to be appraised. Delamirie refused to return the jewel. Armory is entitled to recover from the jeweler either the jewel or the full money value of the jewel. Armory, the prior possessor, has the superior right. The finder of lost property has a title of superior to all but the true owner. →**the prior possessor, has the superior right**

• **Bailment** – a delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose under an express or implied contract; unlike sale, bailment involves a change in possession but not in title

• **Winkfield Doctrine** – the courts usually bar an action by the true owner against the present possessor if the bailee has recovered from the present possessor; (bailee) is not expected to double pay if something goes wrong

• **Object found in private home** – objects found inside a private home are usually awarded to the owner of the home. If the owner of the house has been moved into the house (has not made it his “personal space”), it has been held that the owner of the house is not in constructive possession of articles therein of which he is unaware.

  Hypothetical: Which is more fair: double pay or the true owner loose the item?
  TO>F1>F2>BFPV can true owner go after F2 if F1 is out of picture, F1=finder/bailor(Armory),F2=2nd finder or possessor(goldsmith), BFPV=bonafide purchaser (bailee)who cant be held liable because he did not know.
  If F2 had to pay F1 and the True owner sues F2, then F2 can go after F1.

  Results: the true owner can go after F2; if F2 has paid F1 for the item, F2 can go after F1. But if no one can find F1, F2 does have to double pay.
  In Ghen v.Rich, title was no good because of thieves.

• **THE TRUE OWNER CAN GO AFTER F2; IF F2 HAS PAID F1 FOR THE ITEM, F2 CAN GO AFTER F1. BUT IF NO ONE CAN FIND F1, F2 DOES HAVE TO DOUBLE PAY.**

• **Hannah v. Peel** – Peel owns a large house requisition by the govt to quarter soldiers. Peel bough the house two years earlier and never moved in. A soldier finds a brooch in the house hidden on a window ledge. The soldier prevails over Peel because Peel never moved into the house and took physical possession of it. (underlying policy incentive may have been rewarding honesty) →If the owner of property has never occupied his land, the finder of property on this land has a superior title against the land owner.

  o Hypo: Neighbor finds a brooch in the house before someone moves in and having the place prepared(e.g. painting it) before
he moves in. Who owns it? The individual who owns the house because there is distinction from preparing the house for private use and renting or using the house for a public use.

B. Acquisition by Adverse Possession
-If, within the number of years specified in the state statute of limitations, the owner of land does not take legal action to eject a possessor who claims adversely to the owner, the owner is thereafter barred from bringing an action in ejectment. Once the owner is thereafter barred from suing in ejectment, the adverse possessor has title to the land.
-Adverse possession is a means of acquiring a title to property by long, uninterrupted possession.
-Although an adverse possessor acquires title to the property, it is due to the running of the statute of limitations—the former owner is barred from suing to recover the property. The adverse possessor may have difficulty selling the property because she has not record title.

Purpose of the doctrine:
(1) To protect title – protection of possession in fact protects ownership because title may be difficult to prove.
(2) To bar stale claims – Another purpose of the statute of limitations is to require a lawsuit to be brought to oust a possessor while the witnesses’ memories are still fresh
(3) To reward those who use land productively
(4) To honor expectations

Length of time required – The statutory period of adverse possession varies from state to state—from five to 21 years. The modern trend is to shorten the period of adverse possession.

Purpose of adverse possession:
✓ Promotes economic use of land
✓ Make people keep track of their land (sleeping theory because you are not allowed to sleep on your rights)
✓ AP can improve the land and is rewarded for doing so → “reward theory”, “earning theory”

Requirements of Adverse Possession:
(1) Actual entry giving exclusive possession
   -If there is an actual entry on part of the land described in a deed, the possessor may be deemed in constructive possession of the rest.
   -The requirement that the adverse possessor be in exclusive possession means that she not be sharing possession with the owner nor with the public generally.
(2) Open and notorious possession – The adverse possessor must occupy the property in an open, notorious, and visible manner.
(3) Adverse and under a claim of right – To be an adverse possessor, a person must hold adversely to the owner and under a claim of right; without the owner’s consent
Continuous, uninterrupted possession – Continuous possession only the degree of occupancy and that the average owner would make of the particular type of property.

Effects of Adverse Possession

- Adverse possession is a means of acquiring title to property by long, uninterrupted possession. The running of the statute of limitations on the owner's action in ejectment not only bars the owner's claim to possession, it also extinguishes the old title of the owner and creates a new title by operation of law in the adverse possessor.
- The adverse possessor's right to possession, heretofore good against all the world except the rightful owner, is now good against the rightful owner as well.
- Once the adverse possessor has title, it can be transferred in the same manner as any other title to land(by deed, will, or through intestacy to heirs).
- However, and this is very important, title acquired by adverse possession cannot recorded in the courthouse (as can a deed or will) because it does not arise from a recordable document but rather from operation of law.
- If the adverse possessor wishes to have his title and name as owner recorded in the courthouse, he must file a quiet title action against the former owner barred by the statute of limitations.
- The decree in this lawsuit will be recorded and will declare that the adverse possessor has legal title.

1. The Theory and Elements of Adverse Possession

   The Law of Real Property

   - Adverse possession functions as a method of transferring interests in land without the consent of the prior owner, and even in spite of the dissent of such owners. It rests upon social judgments that there should be a restricted duration for the assertion of “aging claims,” and that the passage of a reasonable time period should assure security to a person claiming to be an owner.

   Title by Adverse Possession

   - prescription – the effect of lapse of time in creating and destroying rights

   Color of Title and Constructive Adverse Possession

   - Van Valkenburgh v. Lutz – The Lutzes occupied the Van Valkenburg’s land by building a one bedroom shack on it, but cultivating a garden on it, and by storing rubbish on it. In another action to establish a right of way across the land, the Lutzes admitted that the land belonged to the Van Valkenburghs. → In order to acquire title by adverse possession, possession must be actual, it must be under claim of title, and the land must be either enclosed or sufficiently improved.
   - The land was not sufficiently improved for because the shack was too small and the garden was insubstantial.
• Since Lutz testified that he knew that the land belonged to the Van Valkenburghs in this action and in the prior action by Lutz to establish a right of way, he fails to prove the “claim of title” element of the adverse possession statute.

• **Color of title** – a written instrument or other evidence that appears to give title, but does not do so.

*Claim of title Standard:*
1) Act like the owner; involves no intent issues, supports sleeping and earning theory (majority)
2) Hostile; must have bad faith, want to steal something from someone, supports the earning theory
3) An honest mistake where you have good faith, supports earning theory

• **Manillo v. Gorski** – A property owner sought to enjoin the alleged trespass of an adjoining landowner whose pathway encroached 15 inches and who claimed title to the strip by adverse possession. →Possession need not be knowingly and intentionally hostile, but it must be notorious enough to give the true owner actual or constructive notice of the encroachment.
  o Why did they argue that tacking was not ok in this case?
    S: There was no privity between Kunto and McCall
  o Privity – gain privity by selling land; a legal conclusion about the relationship between two parties
  o Privity cannot be based on adverse possession in general
  o They expand the definition of privity to include the definition of privity to mistaken deeds and not just more land than the deed describes.
  o Hypothetical: Tacking 10 year statute for adverse possession
    A adversely possesses for 8 yrs
    B ousts A out and lives for 3 yrs.
    Who owns the land? Neither A nor B. There is no privity because there is no deed or relationship between possessors.
    Note: American law unlike English law is where privity matters.
  o Hypo 2: Prior owner was O. A adversely possesses for 8 yrs. B kicks A out and lives 6 mos. A comes back and takes land.
    How long does A need to stay to possess the land?
    American Law and Answer: 2 years because A gets to tack on years from his prior possession.
    Note: English law would require 1.5 years because can tack on from other prior possessors.
Abandonment: If A abandons the property, the continuous time is reset.

- “When the encroachment of an adjoining owner is of a small area and the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey for certain disclosure,” the encroachment is not open and notorious. T/f the statute of limitations will run against the owner only if the owner has actual knowledge of the encroachment.
- **claim of title** – one way of expressing the requirement of hostility or claim of right on the part of adverse possessor; possession of land while claiming it as one’s own
- **color of title** – on the other hand, refers to a claim founded on a written instrument (a deed, a will) or a judgment or decree that is for some reason defective and invalid as when the grantor does not own the land conveyed by deed or is incompetent to convey, or the deed is improperly executed; the appearance of title

Hypo Info: A-adverse possessor, O -owner, W-wife, H-heir

Hypo 3: 1985: A starts adverse possessing
1986: O dies, leaves a will that says: "to W for life (life estate), then to H (remainder-remaining time)"
In 1996, who owns Orange acre?
Answer: A gets the land because no need for new owner to sleep on not knowing there is an adverse possessor.

Hypo 4: In 1987, A starts adversely possession
In 1998, W dies who owns the land?
Answer: H owns it by the will and A an adversely posses it 2008. A could only get what the life estate until W died. In other words, A can only get what the owner had until transferred to another.
Note: 1985: A starts AP against O-> 10 years later A get everything owned by O.
In 1997: W dies and A looses property
To protect H's stake in land, H must have W sue to get A off the land, so H will have it or sue together with W against A.

**Color of Title vs. Claim of title**
Do not confuse claim of title with color of title. Claim of right (or claim of title) expresses the necessary adversity. Color of title refers to a claim founded on a written instrument (a deed, a will) or judgment or decree which, unknown to the claimant, is defective and invalid. Examples: The grantor's name is forged to deed; the grantor does not own the land deed; the grantor was mentally incompetent; the deed is improperly executed; the deed is a tax deed void because the owner was not given notice of the tax sale. In all these cases, the grantee without knowledge of the defect takes possession under color of title. Where a person enters with color of title, no further claim of title or proof of adversity is required. In most states, color of title is not required to be an adverse possessor.
Class note: with color of title you get more land than you possess (land described in the void deed by constructive possession), but must still satisfy adverse requirements for what you are using.

Hypothetical: If A takes 40 acres of O’s 100 acre lawn, what is A entitled to?
Under claim of right he gets what he actually possesses
Under color of title: he gets constructive possession of 100 acres
Rule is that constructive possession isn’t as strong as actual possession. \If owner lives there: gets actual possession
The purpose of color of title is to relax the requirement of exclusive use in a particular area, you get more than what you just possess, but you still have to do all the elements to what you do possess (satisfy adverse possession)

Elements of adverse possession:
✓ Continuous
✓ Open and notorious
✓ Adverse to true owner’s claim (hostile)
✓ Exclusive use

2. The Mechanics of Adverse Possession
- **Howard v. Kunto** – Kunto had a house on and occupied land to which Howard had title. Use of a summer home only during the summer for the statutory period is continuous use. → *Land that is used in a customary manner is deemed to be used continuously.* Tacking between successive adverse possessor is established if there is a reasonable connection between them.
- American belief that the squatter should not be able to profit by his trespass.

Problems: Tacking
- **Tacking** – the joining of consecutive periods of possession by different persons to treat the periods as one continuous period; esp., the adding of one’s own period of land possession to that of a prior possessor to establish continuous adverse possession for the statutory period
- For tacking to be permitted, remember that there must be privity of estate between the possessors. All this means is one possessor voluntarily transferred possession or an estate in land to a subsequent possessor.
- **Tacking by successive adverse possessors:** To establish continuous possession for the statutory period, an adverse possessor can tack onto her own period of adverse possession any period of adverse possession by predecessors in interest. Thus, separate periods of actual possession by those holding adversely to the owner can be
tacked together, provided there is privity of estate between the adverse possessors.

- Reasons for privity: 1) don't want to award trespassers
  Note: expand the idea of privity to include mistaken deeds
  Tacking Hypo: 10 year statute for adverse possession
  A adversely possesses for 8 yrs
  B ousts A out and lives for 3 yrs.
  Who owns the land? Neither A nor B. There is no privity because there is no deed or relationship between possessors.
  Note: American law unlike English law is where privity matters.
  Hypo 2: Prior owner was O. A adversely possesses for 8 yrs. B kicks A out and lives 6 mos. A comes back and takes land.
  How long does A need to stay to possess the land?
  Rule: American Law and Answer: 2 years because A gets to tack on years from his prior possession.
  Note: Rule 2: English law would require 1.5 years because can tack on from other prior possessors.
  Abandonment: If A abandons the property, the continuous time is reset

- Suppose, for example, that X buys certain property described in a deed from the seller, who as it happens had also (but knowingly) adversely possessed a strip adjacent to the described land. “If the evidence shows that the deed to X was intended by the parties to convey not only the described land but also the adversely possessed strip, is X allowed to “tack” that strip onto the land described in the deed? In Buchanan v. Cassel, cited in H v. K, at page 157, the court held that X could do exactly that.” p. 160

Problems: Disabilities

- A disability is immaterial unless it existed at the time when the cause of action accrued. And after the words “such person” you should insert, as a result of judicial construction, the words “or anyone claiming from, by, or under such person.”
- Most legislatures think it unfair for a statute of limitations to run upon a person who is unable to bring a lawsuit (under a legal disability).
- Most states give an additional period of time to bring an action if the owner is under a disability.
- Disability provisions are strictly limited in two ways: (1) only the disabilities specified in the statute (e.g. insanity, infancy) can be considered; and (2) usually only disabilities of the owner at the time adverse possession begins count

Types of Disabilities:
- Insane, mentally incapacitated
- youth
- Incarcerated

[These are reasons to give O a break and give him extra time]

**Rules to satisfy in terms of disabilities (p. 161):**
- Have to be disabled when A enters
- Owner has to be disabled
- No tacking of disabilities

Background: 1985: A starts adverse possessing
1986: O dies, leaves a will for land that says: "to W for life, then to H"

Hypo: O is insane in 1985
W is insane in 1985
In 2000, W is cured

Answer: Don't worry about W because you look at when A enters the land in 1985. A gets the land in 1996, which is 10 years after O dies.

### Adverse Possession against the Government
- Adverse possession does not run against the government. Courts often say, in justification, that the state owns its land in trust for all the people, who should not lose the land because of the negligence of a few state officers or employees.

**Rules for Adverse Possession against the government (p. 162):**
- General rule is that if it is a public land used for public purposes you cannot adversely possess it.
- **EXCEPTION** Can do it if it is an old building (like an old post office)

### 3. Adverse Possession of Chattels
- A person can acquire title to chattels by adverse possession just as he can acquire title to land.
- Generally the requirements for adverse possession of chattels are the same as for land, except the period of limitations is shorter.
- Adverse possession of land is open and notorious whereas adverse possession of chattels seldom is.
- **O’Keeffe v. Snyder** – Three of O’Keeffe’s paintings were stolen from an art gallery. The thefts were not reported to anyone. →The statute of limitations is tolled if the owner of stolen chattel makes diligent efforts to locate and recover the lost chattel.
A majority of courts appear to hold that the statute of limitations does not begin to run on the owner of stolen goods as long as the owner continues to use due diligence in looking for them. The conduct of the owner, not the possessor, is controlling. The cause of action thus accrues when the owner first knows, or reasonably should know through the exercise of due diligence, where the stolen goods are.

C. Acquisition by Gift

- A gift is voluntary transfer of property without any consideration. There are there requirements for a gift of chattels:
  - The donor must intend to make a gift.
  - The donor must deliver the chattel to the donee (there are some acceptable substitutes for manual delivery); and
  - The donee must accept the chattel.
  - NOTE: Almost all the litigation concerning the gifts occurs over the second requirement, delivery—i.e. what it means and what substitutes are acceptable in place of manual delivery.

- Gift inter vivos: An inter vivos gift is a gift made during the donor's life when the donor is not under any threat of impending death. Once made, donor cannot get the object back. (Of course the donee could, if she wished, give it back.)

- Gift causa mortis: A gift causa mortis is a gift made in contemplation of immediately approaching death. The court may be more strict in the case of a gift causa mortis vs. inter vivos, because there may be greater danger of fraudulent claims since the donor is dead and cannot speak. A gift causa mortis is revoked if the donor recovers from the illness that prompted the gift. In practical effect, a gift causa mortis is a substitute for a will.

- If manual delivery is not practicable because of the size or weight of the object or its inaccessibility, constructive or symbolic delivery may be permitted.
  - Constructive delivery – handing over a key or some object that will open up access to subject matter of the gift
  - Symbolic delivery - handing over something symbolic of the property; the usual case of symbolic delivery involves handing over a written instrument declaring a gift of the subject matter

- The law has long required that, to make a gift of personal property, the donor must transfer possession (“hand over the property”) to the donee with the manifested intention to make a gift to the donee. Both intention and delivery must be present.

- Intention to make a gift may be shown by oral evidence; delivery requires objective acts.

- Delivery can be accomplished through a third person.

- Professor Mechem’s suggestions for the survival of the delivery requirement (livery of seisin) in gifts of personal property:
1) Handing over the object makes vivid and concrete to the donor the significance of the act performed. By feeling the “wrench of delivery” the donor realizes an irrevocable gift has been made.
2) The act is unequivocal evidence of a gift to the actual witnesses of the transaction.
3) Delivery of the object to the donee gives the donee, after the act, prima facie evidence in favor of the alleged gift.

Gift requires:
1) Intention
2) Delivery
3) Acceptance

The actual rule is that you don’t have to come back to re-give. Delivery and intent can be separated.
There is no gift until the check is actually paid because you could revoke the gift at any time by stopping payment on the check.

Hypo: O gives the ring to A says want A to have the ring its yours, but I'll hold it for you for a while. Result: A owns it, O is a bailee.
Hypo: O says , I promise to leave you this ring when I die to A. Result. There is no transfer and wills have to be writing otherwise void by statute of wills. Concept by this rationale: If promise an object at death, must back up with will, or state law decides it.
Hypo: O writes a check to B on her checking account and hands the check to B. Before B can cash the check, O dies. Result: No gift until check paid because donor retains dominion and control of funds, donor could stop payment or die , revoking command to bank and pay the money.

Newman v. Bost – O, lying on his deathbed, calls in his housekeeper Julia, hands her the keys to all the furniture in the house, and says she is to have everything in the house. In his bedroom bureau which one of the keys unlocks, is an insurance policy. O has not made a gift of the insurance policy because it is in the room where O lies dying and is capable of manual delivery. Julia does, however, receive as a gift all the furniture unlocked by the keys (either constructive or symbolic delivery) because it is impractical to hand the furniture over manually. →Symbolic delivery of a gift is not effective. Constructive delivery is allowed only when it is impractical to deliver actual possession.
Gruen v. Gruen – The elder Gruen gave Gruen a painting but reserved a life estate for himself. Gruen has never had possession of the painting.

A party may give a future interest in chattels as a gift while reserving a life estate in himself.

- A chose in action (e.g., a debt) not evidenced by written instrument can be transferred by a written assignment. A remainder interest, which has no physical existence, can also be transferred by a written assignment.
- An inter vivos gift requires that the donor intend to make an irrevocable present transfer of ownership; if the intention is to make a testamentary disposition effective only after death, the gift is invalid unless made by will.
- Under these circumstances, it would be illogical for the law to require the donor to part with possession of the painting when that is exactly what he intends to retain.

Donative Intent
- An inter vivos gift requires that the donor intend to make an irrevocable present transfer of ownership; if the intention is to make a testamentary disposition effective only after death, the gift is invalid unless made by will.
- The correct test is “whether the maker intended the [gift] to have no effect until after the maker’s death or weather he intended it to transfer some present interest.”
- As long as the evidence establishes an intent to make a present and irrevocable transfer of title or the right of ownership, there is a present transfer of some interest and the gift is effective immediately.

Delivery
- What is sufficient to constitute delivery “must be tailored to suit the circumstances of the case.”

Acceptance
- Acceptance by the donee is essential to the validity of an inter vivos gift, but when a gift is of value to the donee, as it is here, the law will presume an acceptance on his part.

Part II. The System of Estates (Leaseholds Aside)


A. Up from Feudalism
- William of Normandy parcelled out land to his supporters and imposed on England a highly organized feudal system. Out of the feudal system developed a system of estates in land, which is fundamental to modern property law.

1. Tenure
- Every landowner, except the king, had a lord above him
2. Feudal Tenures and Services
   a. Free Tenures – three major tenurial structures to organize three social orders: men who fight, men who work, and men who pray
      i. Military Tenures
         - almost all the land granted by William was in knight service, including large tracts of land given the church
         - Knight service was effective in defending the borders
      ii. Economic Tenure (or Socage) – To provide subsistence and maintenance for the overlords, the tenure of socage developed. It was the most common form of tenure; and kind of service could be reversed, such as money rent or 10 days of ploughing.
      iii. Religious Tenures – bestowing land on the church

b. Unfree Tenure: Villeinage – choice portion of lands kept by the king for a castle or manor house, with surrounding farm and pasturage

3. Feudal Incidents – Besides the services, a tenant owed other duties and was subject to several liabilities benefiting his lord; came due on the tenant’s death and were a form of inheritance tax
   a. Homage and Fealty
   b. Aids
   c. Forfeiture
   d. Liabilities of Death of Tenant

4. Avoidance of Taxes (i.e., Feudal Incidents)
5. Statute Quia Emptores (1290)
6. The Decline of Feudalism

B. The Fee Simple – estate that has the potential of enduring forever (i.e. It is created by O, the owner of Blackacre, granting the land “to A and his heirs.” This estate resembles absolute ownership, and the holder of a fee simple is commonly called the owner of the land)

1. How the Fee Simple Developed
   a. Rise of Heritability – In feudalism, the land was not owned by the possessor but was held by the possess as tenant of someone else; in time the lord recognized an obligation to admit the dead tenant’s son, and so, in advance would consent to descent → to A and his heirs
b. Rise of Alienability – With this increasing demand for land, the idea that a tenant should be able to convey the fee to another during his life openly and without the lord’s consent began to gain currency → fee was freely alienable

c. Rise of the Fee Simple Estate – Instead of thinking of the land itself, the lawyer thinks of an estate in land, which is imagined as almost having a real existence apart from the land;

2. Creation of Fee Simple – A common law it was necessary to use words of inheritance (“and his heirs”) to create a fee simple by deed. Tenants quite naturally wanted the land to pass to their at their death, and so the tenants bargained with the lords for inheritability. If the lord agreed to accept the tenant’s heir in his place at his death, the lord granted the land “to the tenant and his heirs.” Thus the lord assented to descent. → an inheritable estate known as a fee simple developed and the words “and their heirs” were necessary to create

3. Inheritance of a Fee Simple – (ex: O, owner in fee simple, conveys “to A in fee simple.” At common law, A takes only a life estate. To create a fee simple, O should have conveyed “to A and his heirs.”

Four types of possessory estates:
(iv) fee simple
(v) fee tail
(vi) life estate
(vii) leasehold

Estate are classified by duration
To identify an estate:
1) Look for the technical language that creates the estate(e.g. "and his heirs" "an the heirs of his body," etc.) Although this language may no longer be necessary to make a valid conveyance, lawyers use it, and it is often found on exams.
2) Consider how long the estate can endure (e.g. forever, for someone's life, until the happening of some event, etc.)

Two Types of Estates
1) Fee simple (absolute) – unless said otherwise it is absolute meaning there are no restrictions on it, an interest in land that being the broadest property interest allowed by law, endures until the current owner ides with their heirs, especially a fee simple absolute
   a. You must say “and his heirs” to create a fee simple
   b. Any heir
2) Fee tail – an estate that is inheritable only by specified descendant of the original grantee and that endures until its current holder dies without issue
   a. You must say “to A and the heirs of his body”
   b. Direct descendants only

Hypo: O gives to A in fee tail, O dies, then A dies w/ no issues
Result: There is reversion that goes to whoever owns O's estate
Note: to die without issue means to end the bloodline in fee tail (no children)

Problems with fee tail:
1) hard to administer because it is so hard to keep track of all the bloodline.

Extra Gilberts Notes:
- **Heirs have no present interest** – A grant “to A and his heirs” gives A’s heirs no interest in the property. The words “and his heirs” are only words of limitation indicating that A take a fee simple. A can sell or give away the fee simple, or devise it by will thus depriving A’s heirs of the land.
  - Ex: O conveys land “to A and his heirs.” A then gives the land to B. A’s heir, H, has no interest in the land (only a hope of inheriting it) and cannot prevent the gift.
- Under modern law, a deed or will is presumed to pass the largest estate the grantor testator owned. → A conveyance of Blackacre “to A” conveys a fee simple if the grantor had a fee simple.
- If the fee simple owner does not devise his land but dies without a will, the fee simple is inherited by the owner’s heirs.
- **Heirs** – those persons who succeed to the real property of an intestate decedent (i.e. someone without a valid will) under a state’s statute of intestate succession (sometimes called the statute of descent)
  - At common law a spouse could not be an heir. This disqualification of the spouse as an heir has been abolished in all states. In most states, dower and curtesy have been abolished, and the spouse is given a fractional share as heir of the decedent.
- **Next of kin** – refers to those persons who succeed to the personal property of an intestate decedent under the applicable statute of intestate succession.
- Uniform Probate Code - If decedent leaves a spouse, the spouse takes one-half. The other one-half goes to the decedent’s issue, or, if not issue, to the decedent’s parents, to the spouse.
- **Issue** – children, grandchildren, great-grandchildren, and all further descendents
  - Issue ↔ descendants
- If the decedent leaves a spouse and children, the spouse takes half, and the children divide half. If the decedent leaves no spouse, the children take all in equal shares.
  - If a child predeceases the decedent, leaving issue, the issue represent the child and take the child’s portion (called per stripes)
  - Grandchildren do not take if their parent is alive.
  - An adopted child is treated as a child of the adoptive parents and, in some states, as a child or the natural parents as well.
  - A child born out of wedlock inherits as a child of her mother and, ifaternity is established, as a child of her father
  - Stepchildren do not take
• If the decedent leaves issue, parents do not take. If the decedent leaves a spouse and no issue, parents take one-half and the spouse one-half. If the decedent leaves no spouse and no issue, parents take all.

• **Collateral relatives** – all blood kin except ancestors and descendants

• If a fee simple owner dies without a will and without heirs, the fee simple escheats (↔reverts) to the state.

• If a decedent leaves a will, the persons who are devised land are called devisees. The persons who are bequeathed personal property are called legatees.

**Heirs take when the decedent leaves no will; devisees and legatees take under a will.**

C. **The Fee Tail** – (Black’s) An estate is inheritable only by specified descendants of the original grantee, and that endures until its current holder dies without issue (e.g. “to Albert and his heirs of his body”)

- Lasts as long as the grantee or any of his descendants survives
- it is inheritable only by the grantee’s descendants

• Unless otherwise specified in the grant, a fee tail was inheritable by any issue of the fee tail tenant. There can be a fee tail male, fee tail female, and fee tail special (inheritable only by the issue of a grantee and a specific spouse)

**Abolition of the Fee Tail** – The fee tail has been abolished in England in all American jurisdiction except in four states. In these states, the fee tail tenant can at any time disentail and convey a fee simple absolute by deed. → A fee tail merely excludes collateral kindred of the grantee from inheriting the land. (A, the fee tenant, can even get around this limitation by conveying a fee simple to a “straw person,” who then conveys the fee simple back to A.)

**Fee tail:**
1) only direct descendants
2) Reversion is built in
3) Under common law in 1600, if sold the fee tail, still reverts back to your descendents.

In modern times, the fee tail is destroyed if sold and becomes a fee simple. Thus, in modern times B would own it in Hypo.

Note: To convert a fee tail to fee simple: sale it to someone and have them give it back it to you to make fee simple.

Life estate: O conveys to "A for life"
In 1600: reversion to O and his heirs
In 2003:

D. **The Life Estate** – (Black’s) An estate held only for the duration of a specified person’s life, usu. the possessor’s.
-Like a fee simple, a life estate can be created so as to be determinable, subject to a condition subsequent, or subject to an executory limitation
Courts must then construe the instrument to determine whether the estate conveyed is a fee simple, life estate, or leasehold estate.

A life tenant ordinarily free to transfer, lease, encumber, or otherwise alienate her estate inter vivos → transferee gets no more than the life tenant had (an estate that ends at the expiration of the measuring life)

**White v. Brown**

- Jessie Lide died leaving a will stating “I wish Evelyn White (P) to have my home to live in and not to be sold…My house is not to be sold.”
- In this case, it appears that Lide attempted to pass a fee simple to White (P) and further attempted to restrain her from alienating the property.
- A restraint on alienation is void as against public policy, leaving P with a fee simple.
- Unless contrary intention appears by the terms of the will and its context, a will conveys a testator’s entire interest.

_Gilbert’s example:_ “To my wife, W, to be used as she shall see fit, for her maintenance and support.” Does this give W a fee simple or a life estate with power to consume the principal? MV: A fee simple is created; the words “for her maintenance and support” merely state the reason for the gift.

**Rules for reading the will and deciding what it means:**

*Primary: testator's intent*

1. Presume that the testator wanted to devise all of her property
2. TN Rule: fee simple is default rule unless language which makes other estate clear.
3. Words in context

**Restraints on alienation (rights to sell)** p. 227:

1) **Disabling restraints** – withholds from the grantee the power of transferring his interest (e.g., O conveys Blackacre “to A and his heirs but any transfer hereafter in any manner of an interest in Blackacre shall be null be void”)
2) **Forfeiture constraint** – provides that if the grantee attempts to transfer his interest, it is forfeited to another person (e.g. O conveys Blackacre “to A and his heir, but if A attempt to transfer the property by any means whatsoever, then B her heirs”)
3) **Promissory constrain** – the grantee promises not to transfer his interest (e.g. O conveys Blackacre “to A and his heirs, and A promises for himself, his heirs and successors in interest that Blackacre will not be transferred by any means”)

(contract issue rather than a property issue therefore the remedies are contract remedies i.e. an injunction against the sale or damages.)

-totally removed the restraint on alienation, any absolute restraint of a fee simple is void; partial restraint must be reasonable to be enforced; with life estate usually forfeiture is ok
One of the reasons alienation is important and one of the reasons people might want to restrain alienation is because if you are not allowed full alienation rights to the property then the people you owe money to cannot get at the property.

_Alienation is important:_ If not allow full alienation rights of the people who owe money, can get rights to the property and sell it to get proceeds (for debt purposes to pay off). Restraints on alienation take property out of the market, making it unusable for the beats use dictated by the market. They tend to make property unmortgageable and therefore unimprovable, to concentrate wealth in class already rich, and to prevent creditors from reaching the property to pay the owner's debts.

**Valuation of Life Estate and Remainder** – For lack of a better method, courts, taxing authorities, and insurance companies value life estates and remainders by resort to life expectancy table.

**Baker v. Weedon**

- John Weedon left a life estate to Weedon (P) and a remainder to the Bakers (D). D wishes to sell the land now and reap its value; P wishes to retain ownership of the land to allow its value to increase.
- Equity may intervene and order sale of the property if the sale is necessary for the best interest of all the parties. This is a flexible remedy, which equity exercises sparingly because of the underlying notion that the grantor wants the land itself and not the economic value represented by the land passed on the holders of the remainder.
- A trial court shall order sale only if it is in the best interest of both the freehold tenant and the holder of the future interest.

- **Affirmative (voluntary) waste** – Affirmative or voluntary waste occurs when the life tenant actively causes permanent injury by, for example, destroying buildings or removing natural resources.
- **Permissive (involuntary) waste** – occurs when the land is allowed to fall into disrepair, or the tenant fails to take reasonable measure to protect the land from the elements (ex: failing to pay taxes)

  *The life tenant has no obligation to keep the property insured, an if a bldg burns down w/o the fault of the life tenant, this is not waste. If the life tenant does insure, she is not required to rebuild the property for the remaindern’s benefit or hold the insurance proceeds in trust for the remaindern.*

**Seisin** ↔ _ownership_

E. **Leasehold Estates** – nonfreehold possessory estates; leasehold tenants do not have seisin

- Modern leasehold estates include the term of years, the periodic tenancy, and the tenancy at will.
F. Defeasible Estates

Defeasible Fees

- **Fee simple determinable** – fee simple so limited that it will automatically end when some specified event happens
  
  “so long”, “while”, “until”, “shall”, “during” i.e. words of duration

- For a determinable fee, it must be necessary to use words limiting the duration of the estate; expressions of the grantor’s motive for or purpose behind the grant do not create a determinable fee.

- A fee simple determinable may be transferred or inherited in the same manner as any other fee simple, as long as the stated event has not happened. **But the fee simple remains subject to the limitation no matter who holds it.**

- **Possibility of reverter** – the grantor’s future interest resulting because there is a possibility that the grantee’s determinable fee may come to an end on the happening of the stated event

- **Fee Subject to a Condition Subsequent** – fee simple that does not automatically terminate but may be cut short (divested) at the grantor’s election when a stated condition happens — the condition upon which the grantor can exercise her right of entry
  
  “but if…premises”, “upon condition”, “provided, however” i.e. words of condition

- may be transferred or inherited in the same manner as any other fee simple until the transferor is entitled to and does exercise the right of entry

The determinable fee automatically ends, regardless of whether the grantor does anything. With a fee simple subject to condition subsequent, the grantor must act to retake the property or the grantee’s estate continues

- **Fee simple subject to an executory limitation** – fee simple that, on the happening of a stated event, is automatically divested in favor of a third person (not the grantor)

  - ex: O conveys Blackacre “to School Board, but if within the next 20 years Blackacre is not sued for school purposes, then to A.” A’s future interest is called an executory interest.

  **Mahrenholz v. County Board of School Trustees**

  - The Huttons conveyed land to the School Board (D) “to be used for school purposes only.” Subsequently, the school sued the land for storage.

  - Language such as “to be used for school purposes only” creates a fee simple determinable.

Restraint on use: A restraint on the use of property makes the property less alienable by eliminating prospective purchasers who desire to make use of property in a manner forbidden by the restraint. But restraints on the use of property have almost always upheld. Even a restraint that the property can be used only by the grantee has been upheld.

Pros and Cons for alienation restriction:

1) effects of demand by the number of potential buyers
2) encourages charity
3) Waste because can't change use and make improvements or provide a benefit to the community
4) Provides benefits of surrounding land
5) Remedy - who gets stuck with bill or void transfer or forfeiture

**Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano**

- A deed provided that a lot shall revert back to the grantor if the grantee, a lodge (P), either failed to use the lot or attempted to sell it.
- The use of land may be restricted in a conveyance.
- A restraint on the use of property makes the property less alienable by eliminating prospective purchases who desire to make use of the property in a manner forbidden by the restraint. But restraints on the use of property have almost always been upheld. Even a restraint that the property can be used only by grantee has been upheld.

**Ink v. City of Canton**

- The descendants of Harry Ink conveyed to The City of Canton (P) land to be used for park purposes only. Subsequently, the state of Ohio instituted eminent domain proceedings against the land.
- **EMINENT DOMAIN:** When the govt exercise eminent domain, taking title to land where a fee simple determinable is owned by A and a possibility of reverter is owned by B, it is necessary to value the separate interest. The majority rule is that the entire condemnation award belongs to A unless the fee simple determinable would expire within a reasonably short period.
- The proceeds from an eminent domain proceeding are to be divided between the holder of the fee simple on condition subsequent and the holder of the reverter.
- Replace a charity with another when the original one is no longer available because it changes things in future times.

**Marriage p. 265**

- Previously could leave stuff to wife until she remarries, probably because assumed needed to be taken care of. Must determine if the purpose is to provide to someone until marriage or to deter from getting married.

Hypothetical: H dies, devises Blackacre to “W for life for her use and benefit so long as she remains unmarried, remainder to D.”

- “So long as” gives you a determinable estate → creates life estate determinable
- “[until” would create a life estate subject to a condition subsequent]
- D has a vested remainder that can accelerate into possession

Hypothetical: H dies, devises Blackacre to “W for life for her use and benefit so long as she remains unmarried, remainder to D so long as he remains unmarried.”
-D gets a fee simple determinable
-H gets a life estate determinable

-a remainder can’t be anything other than a fee simple

Chapter 4. Future Interests

Gilbert Tips:

- Classifying the present estate may help you figure out the future interest, since some future interest can only follow a particular type of present interest. (e.g. a possibility of reverter can only follow a determinable estate, and a right of reentry can only follow an estate subject to a condition subsequent).
- Look who has the future interest. If it is retained by the grantor, you’ve narrowed it down to a reversion, a possibility of reverter, or a right of entry. If it is given to someone other than the grantor, it must be a remainder or an executory interest.
- Think about how the Future Interest Will Become Possessory. For interests in the grantee, remember that a remainder waits patiently for the natural termination of the preceding estate, whereas an executory interest either divest the prior estate or springs out of the grantor’s interest, in both cases cutting short the prior estate.
- For future interest remaining in the grantor, the reversion usually follows the natural termination of the prior estate (e.g., after the life tenant dies). Similarly, the possibility of reverter does not cut short the preceding determinable estate, but succeeds it. On the other hand, the right of entry, like the executory interest, divests the preceding estate.
- Determine whether the interest is given to an unascertained person or is subject to a condition precedent.
- Distinguish between a condition precedent, which comes “between the commas” and a condition subsequent which divests a vested interest.

Apply the Following Rules to Contingents Interests

(i) Destructibility of contingent remainders (applicable to contingent remainders only);
(ii) The Rule in Shelley’s case;
(iii) The Doctrine of Worthier Title; and
(iv) The Rule Against Perpetuities

A. Introduction

**Future interest** – a property interest in which the privilege of possession or of other enjoyment is future and not present

(1) Interests retained by the transferor (one who conveys interest in property) know as:
    (a) Reversion
    (b) Possibility of reverter
    (c) Right of entry (aka the power of termination)
(2) Interests created in a transferee, known as:
   (a) Vested remainder
   (b) Contingent remainder
   (c) Executory interest
   - A future interest gives legal rights to its owner.
   - Although a future interest does not entitle its owner to present possession, it is a presently existing interest that may become possessory in the future

Hypo: "to A for life (1), then to B (2), but if B does not give A proper funeral (3), then to O.
Result: (1)-life estate, (2)-vested remainder in fee simple condition subsequent to, (3)-condition subsequent to.

B. Future Interests in the Transferor
   1. **Reversion** – future interest left in the grantor after the grantor conveys a vested estate of a lesser quantum than he has
      - All reversions are retained interests, which remain vested in the transferor.
      - Ex: O conveys “to A for life.” O has a reversion in fee simple that is certain to become possessory. At A’s death, either O or O’s successor in interest will be entitled to possession.
      - Ex: O conveys “to A for life, then to B and her heirs if B survives A.” O has a reversion in fee simple that is not certain to become possessory. If B dies before A, O will be entitled to possession at A’s death. On the other hand, if A dies before B, O’s reversion is divested on A’s death and will never become possessory.
      - No such phrase as possibility of reversion

Rights you have with a reversion:
   - Will it
   - have it go to heirs when you die
   - fully alienable
   - transfer or sell it

<<Hypo: O conveys to "A and B for joint Life", then to survivor in fee simple"
Result: A and B share a joint life estate, contingent remainder in fee simple

Hypos:
1) O conveys " to A for life, then to B if B survives A, and if B does not survive A, to C" shorthand : to X means to X and his heirs
2) O conveys " to A for life, then to B, but if B does not survive A, then to C."

Results: 1) A has life estate, B and C both have alternative contingent remainders in fee simple, O has nothing.
        2) A has life estate, B have a vested remainder subject to divestment, C has a shifting executory investment, O has nothing.
Rule: If 1st is contingent, 2nd must be contingent. If 1st is vested, 2nd must be executory interest.

2. **Possibility of Reverter** – arises when an owner carves out of his estate a determinable estate of the same quantum
   - Almost always follows a determinable fee
   - Ex: O conveys “to Board so long as is used for school purposes.” The Board has a determinable fee; O has a possibility of reverter. O’s interest is not a reversion because O, owning a fee simple, has conveyed a fee simple determinable to the Board. All fees simple are of the same quantum.

3. **Right of Entry** – ROE is retained when the grantor creates an estate subject to condition subsequent and retains the power to cut short the estate
   - Ex: O conveys B to “the Board, but if the Board ceases to use B for school purposes, O retains a right to reenter.” The Board has a fee simple subject to a condition subsequent; O has a right of entry.

<table>
<thead>
<tr>
<th>Possessory Estate</th>
<th>Correlative Future Interest in Grantor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life estate</td>
<td>Reversion</td>
</tr>
<tr>
<td>Fee Simple Determinable</td>
<td>Possibility of Reverter</td>
</tr>
<tr>
<td>Fee Simple on Condition Subsequent</td>
<td>Right of Entry</td>
</tr>
</tbody>
</table>

**Types of Future Interests**

<table>
<thead>
<tr>
<th>In GRANTOR</th>
<th>In GRANTEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reversion</td>
<td>Remainder</td>
</tr>
<tr>
<td>Possibility of Reverter</td>
<td>Executory Interest</td>
</tr>
<tr>
<td>Right of Entry</td>
<td></td>
</tr>
</tbody>
</table>

For future interests, in the grantee, determine whether the interest cuts short a previous estate (executory interest) or naturally follows (remainder).

C. **Future Interests in Tranferees (Grantees)** – Three types of future interests in tranferees: vested remainders, contingent reminders, and executory interests.
   - A remainder or executory interest cannot be retained by the transferor; these interests are created only in transferees.
   - Once created, a remainder or executory interest can be transferred back to the grantor, but the name originally given the interest does not change.

1. **Introduction**
2. **Remainders** – future interest in a grantee that: (i) has the capacity of becoming possessory at the expiration of the prior estates, and (ii) cannot divest the prior estates
   - Ex: O conveys “to A for life, and on A’s death, to B and her heirs.” A has a possessory life estate; B has a remainder in fee simple. B’s interest is a
remainder because it can become possessory on A’s death, and it will not divest A’s life estate prior to A’s death.

• A remainder is vested if:
  1) it is given to an ascertained person and
  2) it is not subject to a condition precedent (other than the natural termination of the preceding estates)

• A remainder is contingent if:
  1) it is given to an unascertained person or
  2) it is made contingent upon some event occurring other than the natural termination of the preceding estates.

• A remainder created in a class of persons (such as in A’s children) is vested if one member of the class is ascertained, and there is no condition precedent. The remainder is vested subject to open or subject to partial divestment if later-born children are entitled to share in the gift.

3. Executory Interests – An executory interest is a future interest in a transferee that must, in order to become possessory,
   (1) divest or cut short some interest in another transferee (this is known as a shifting executory interest), or
   - Ex: O conveys “to A and his heirs, but if B graduates from law school, to B and her heirs.” A has a fee simple subject to executory limitation; B has a shifting executory interest. B’s interest can become possessory only by divesting A of the fee simple. A shifting interest is a useful device to shift title upon the happening of some uncertain event.
   (2) divest the transferor in the future (this is known as a springing executory interest)
   - Ex: O conveys “to my daughter A when she marries B.” O retains the fee simple and creates an executory interest in A to spring out of O in the future when A marries B. A springing interest was, in early days, a useful device to give the groom assurance that the bride would come to the alter endowed with property.

a. Two Prohibitory Rules: No Shifting Interests; No Springing Interests – Prior to 1536 Common law courts laid down two rules based upon their ideas of estates and of conveying.
   1) No future interest could be created in favor of a transferee if the interest could operate to cut short a freehold estate.
      -Ex: O has a son, B, who is studying for the priesthood in Rome, but he may return home. O conveys Blackacre “to A and his heirs, but if B returns from Rome, to B and his heirs.” (There must have been a lot of going and coming from Rome in those days, because this is the standard
example used in all the old texts.) By this conveyance, A takes a fee simple, and B has no interest recognized at law.

2) No freehold estates could be created to spring up in the future.
-Ex: O conveys “to A and her hairs when she marries B.”
This attempt to make seisin spring out in the future was ineffective at law. Seisin remained in O.

b. The Rise of the Use – In feudal times, it was frequent found expedient to vest ownership of property in one person would hold it for the use and benefit of another. One early example was where O, going off to fight a crusade, enfeoffed (i.e. conveyed a freehold of land into the possession of) his brother, A, with the understanding that O’s wife and children would have the use of the land. The common law courts refused to enforce uses, but the chancellor compelled the feoffee to uses, A, to hold the land in accordance with the understanding, on the ground that it was unconscionable to permit A to violate the confidence reposed in him

feoffee to uses ↔ trustee

c. Abolition of the Use: The Statute of Uses – The statute provided in substance that, “if any person be seised of land to the use of another, the person having the use shall henceforth be deemed in lawful seisin and possession of the same lands in such like estate as he had in such like estate as he had in use.”
- The Statute is said, therefore, to have “executed” or “converted” the use into a legal estate.
- Ex: After 1536, O enfeoffs “X and his heirs to use of A and his heirs.” The Statute “executes the use” and turns A’s use into a legal fee simple in A. X gets nothing.

d. Modern Executory Interests
- A possibility of reverter or a right of entry can be created only in the transferor; an executory interest can be created only in a transferee.
- If the transferor wants to create a future interest in a transferee after a defeasible fee, it will not necessarily be an executory interest.

See page 129 in Gilberts

D. Rules Furthering Marketability by Destroying Contingent Future Interests
To destroy contingent interests and make land marketable, the judges invented a number of rules (that follow):

1. Destructibility of Contingent Remainders – (only in effect in a few states)
English judges laid down a rule that a legal contingent remainder in land is
destroyed if it does not vest at or before the termination of the preceding freehold estate.

- If the preceding freehold terminates before the remainder vests, the remainder is struck down and can never take effect.
- Ex: O conveys Blackacre “to A for life, remainder to A’s children who reach age 21.” At A’s death, his children are all under age 21. The remainder is destroyed. Blackacre reverts to the reversioner, O, who owns it in fee simple absolute.
- Destructibility doctrine does not apply to the following interests in property:
  1) Vested remainders and executory interests
  2) Personal property (There is no seisin in personal property, only in land)
  3) Interests in trust
- Avoidance of rule
  1) Term of years – If the drafter creates a term of years rather than a life estate, the destructibility rule can be avoided.
  2) Trustees – The destructibility rule can also be avoided by creating trustees to preserve contingent remainders

Abolition of the Destructibility Doctrine

- The destructibility rule has been abolished in the large majority of the states by judicial decision or statute.
- Where destructibility is abolished, a contingent remainder takes effect if the contingency occurs either before or after the termination of the life estate.
- Ex: If O conveys “to A for life, remainder to A’s children take if and when they reach 21. Their interest takes effect in possession after A’s death, and is called either an indestructible contingent remainder or an executory interest.

2. Rule in Shelley’s Case – (abolished in most states, present in some) (Black’s) rule that if -- in single grant – a freehold estate is given to a person and a remainder is given to the person’s heirs, so the person is held to have a fee simple absolute

- Simplified statement of the rule is:
  1) one instrument
  2) creates a life estate in land in A, nad
  3) purports to create a remainder in persons described as A’s heirs (or the heirs of A’s body), and
  4) the life estate and remainder are both legal or both equitable
- Ex: O conveys “to A for life, then to A’s heirs.” The Rule in Shelley’s Case converts the remainder limited to A’s heirs into a remainder in fee simple in A. Then the doctrine of merger steps in, and A’s life estate and vested remainder merge, giving A a fee simple in possession.
Abolition of the Rule in Shelley’s Case – the rule in Shelley’s case has been abolished in an overwhelming majority of states.

- If the Rule in Shelley’s Case is abolished, a conveyance “to A for life, then to A’s heirs” creates a life estate in A, and a contingent remainder in A’s heirs."

**The rule in Shelley’s Case cannot be avoided by expressions of intent such as, “I intend that the Rule in Shelley’s Case not apply.” O’s intent is irrelevant. **

3. The Doctrine of Worthier Title – restricts remainders; contains an inter vivos branch and (perhaps) a testamentary branch

Common Law Doctrine

- **Inter vivos branch of Doctrine** – When an inter vivos conveyance purports to create future interest in the heirs of the grantor, the future interest is void and the grantor has a reversion.
  - Ex: O conveys “to A for life, then to O’s heirs.” The remainder to O’s heirs is void, and O has a reversion.
  - **Original reason for** the Doctrine of Worthier Title is probably the same as for the Rule in Shelley’s Case. Feudal incidents were due on descent of land. In the above feudal incidents would be due on O’s death if he had a reversion passing to his heirs, but not if his heirs took by way of remainder created during O’s life. Hence the Doctrine prevented O from depriving his lord of feudal incidents by an inter vivos conveyance of this kind. →further alienability

- **Testamentary branch of Doctrine** – If a person devises to his heirs, the devise is void and the heirs take by descent.
  - The simplest example of this is devise by T “to A for life, then to T’s heirs.” The devise to T’s heirs is void; T’s heirs take the reversion after A’s death by descent.
  - The Restatement of Property section 314(2) says the testamentary branch of the Doctrine of Worthier Title does not exist in this country.

Modern rule
- In view of the fact that the testamentary branch of the Doctrine is moribund or non existent, further references in this Summary to the Doctrine refer only to the inter vivos branch.
- The common law DWT was a rule of law applicable to land only.
- **The modern DoWfT applies to personal property as well as to land.**
- Note that the DWT is different from the Rule in Shelley’s Case. The DWT is a rule construction, which may be rebutted by evidence of the grantor’s intent; the RSC is a rule of law and the grantor’s intent cannot change it.
  →The DWT can be justified as a rule designed to carry out the grantor’s intent.
The DWT gives the grantor the right to change his mind by voiding the remainder and creating a reversion in the grantor.

Another justification for the modern rule is that it makes property alienable earlier.

<table>
<thead>
<tr>
<th>Destructibility rule</th>
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<tbody>
<tr>
<td>This rule applies only to legal contingent remainders in land. It does not apply to equitable interests, to interests in trust, nor to personal property. It is a rule of law, not a rule designed to carry out the grantor’s intent.</td>
</tr>
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<table>
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<tr>
<th>Rule in Shelley’s Case</th>
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<tr>
<th>Doctrine of Worthier Title</th>
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</thead>
<tbody>
<tr>
<td>This doctrine applies to legal and equitable remainders and executory interest in real or personal property. It is a rule of construction designed to carry out the grantor’s intent, and can be overcome by contrary evidence of intent.</td>
</tr>
</tbody>
</table>

4. **The Rule against Perpetuities** - The common law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years after the death of some person alive when the interest was created

- The purpose of the rule was to limit the time that title to property could be suspended out of commerce because there was no owner who had title to the property and who could sell it or exercise other aspects of ownership.

  a. **The Common Law Rule** – The culmination of the long struggle between landowners who wanted to keep land within the family and the royal judges who for centuries had tried to stand firm against these efforts is the RAP.

    - The RAP originated in the Duke of Norfolk’s Case and as fleshed out in the next 200 years it took the form of a compromise between the landed class and the judges families – the fathers – were much concerned about securing family land, perhaps acquired only a couple of generation earlier, from incompetent sons.

- **Reason for period** – A parent could realistically and perhaps wisely assess the capabilities of living members of the family, and so, with respect to them, the parent’s judgment was given effect.

- **The RAP applies to contingent remainders and executory interests. It does not apply to vested remainders or to future interests in the grantor** (reversion, possibility of reverter, and right of entry), which are treated as vested upon creation. Grantor’s interests (reversion, possibility or reverter, rights of entry) are considered to be vested and thus safe from the RAP.

  - Ex: O conveys “to A for life, then to A’s children for their lives, then to B and her heirs.” A has no children. The conveyance is entirely valid. The remainder for life given to A’s children will
vest, if at all, at A’s death. The remainder in fee simple in B is a vested remainder when created.

- **What-Might-Happen Is Test:** The Rule is directed at the creation of contingent interests that might vest in the distant future (being defined as more than 21 years after the expiration of lives being at the creation of the interest). If there is any possibility that a contingent interest will vest too remotely, the contingent interest is void from the outset. This rule is a logical proof. (Don't care that it might vest)

- **Validating or measuring life** – a person who will enable you to prove that the contingent interest will vest or fail within the life of, or at the death of, the person, or within 21 years after the death of the person

- **Jee v. Audley** – T devises property “to Mary, and if Mary’s’ line of descendants ever run out, to the daughters then living of Elizabeth Jee (aged 80). The event upon which the Jee daughters’ gift is conditioned – the death of Mary and all her descendants – is an event that may happen centuries hence. The gift to Jee’s daughter is not valid. There is no relevant life by which they can prove the gift valid. The gift will not necessarily vest or fail at Mary’s death, because the condition precedent (“expiration of Mary’s issue”) will not necessarily happen at Mary’s death.

<< Jee v. Audley Hypo:
"To W for life, to MH and her issue, but if MH dies without issue (bloodline runs out), then to Jee daughters then (should be now) living.
W: has a life estate
MH: vested remainder subject to complete divestment
Jee daughters: shifting executory interest

Problems w/ then:
1) Don't know when MH will die without issue
2) Or who Jee daughters will be
Problems w/ now:
1) Solves only who Jee daughters are.
Use now and then: b/c When Jee daughters die the shifting executory interest disappears.
Note the Jee daughters are measuring lives.>>

- The law conclusively presumes that a person can have children so long as the person is alive (a person can adopt a child).
- The law assumes that a person’s surviving spouse might turn out to be a person not now alive.
- Child in womb: A child in the womb when the interest is created is treated in being if the child is later born alive. Any actual periods of gestation are included within the permissible perpetuities period.

**Gifts to Classes**
Under the RAP a class gift is not vested in any member of the class until the interests of all members have vested.

A gift that is vested subject to open is not vested under the RAP.

For a class to be vested under RAP the class must be closed (that is, each and every member of the class must be identified), and all conditions precedent for each and every member of the class must be satisfied within the perpetuities period.

(a) To B, if A dies childless contingent remainder—Ok under RAP (rule against perpetuities)
    if A has kids—reverts to T

To B, if A has no grandchildren then living, when A children dies
    Fails under RAP—T dies, A has after born kid, A’s kids have kids (too remote because A children were not alive during conveyance.)

(b) To B's children
    Analysis: if B has children: vested remainder in fee simple subject to open or partial divestment—vests, B is a measuring life, Ok under RAP
    if B has no children: contingent remainder in fee simple
    Note: Look at if living was ascertained into be considered measuring life

(c) To B's children, then living
    Analysis: then implies that this is a contingent remainder. B was made at time of conveyance, thus making B a measuring life. Fails under RAP—will be more than 21 years
    if A and B both die and A's children can be considered measuring lives since not alive during conveyance

RAP example for a class gift
O conveys to "To A for life, then to A's children that reach 21."

At conveyance, A has 1 child who is 6
A: has a life estate

Analysis:
1) K1 dies at 26 so, does W-> G1, G2 K1 interest (vested remainder subject to open)
2) When A dies-> G1 and G2 vested remainder interest becomes possessory (fee simple subject to partial divestment) Under RAP—everyone must be vested to acquire title: K2 has an executory interest
3) 8 years later, K2 turns 21-> partial divests G1 and G2 of the fee simple (note: If no one was vested, doctrine of destructibility would apply.: Ok under RAP>

b. The Wait-and-See Doctrine
   __________________________ i. Wait-and-See for the Common Law Perpetuities Period
   __________________________ ii. Wait-and-See for 90 Years
   __________________________ c. Abolition of the Rule
   __________________________ Public Policy and the Dead Hand
   __________________________ Table of Perpetuities Laws in 2001
Dynasty Trusts
See p. 157 Gilberts Interests Under the RAP

Chapter 5. Co-ownership and Marital Interests
Co-ownership – situations when two or more persons have concurrent rights of present or future possession, and those situations are the central subject of this chapter

A. Common Law Concurrent Interests
   1. Types, Characteristics, Creation
      A. Tenancy in Common – form of concurrent ownership wherein each co-tenant is the owner of a separate and distinct share of the property, which has not been divided among the co-tenants
         • Each tenant in common has the right to possess and enjoy the entire property subject to the same right in each co-tenant.
         • One co-tenant can go into possession of the whole unless another co-tenant objects.
         • There is no right of survivorship among tenants in common.
         • Equal shares are not necessary for tenancy in common. A and B can be tenants in common, with A holding 3/4s interest and B holding a ¼ interest. It is presumed that the shares of tenants in common are equal but this presumption can be overcome by evidence that unequal shares were intended.
         • Tenants in common can have different types of estates.
         • A tenant in common can sell, give, devise, or otherwise dispose of her undivided share in the same manner as if she were the sole owner of the property.

      EXAM TIP: “to A and B,” and A and B are not a married couple, A and B have a tenancy in common. For A and B to get a joint tenancy the grant must expressly indicate that a joint tenancy is intended, usually done by an express mention of the right of survivorship

      The chief difference between a tenancy in common and a joint tenancy is this: a tenant in common has NO RIGHT OF SURVIVORSHIP, whereas a joint tenant has a right of survivorship.

      B. Joint Tenancy - form of concurrent ownership wherein each co-tenant owns an undivided share of property (as in tenancy in common), and the surviving co-tenant has the right to the whole estate
         • Joint tenants HAVE THE RIGHT OF SURVIVORSHIP
         • On the death of each joint tenant, the property belongs to the surviving joint tenants, until only one is left.
         • A joint tenancy can be created by deed or will, or by a joint adverse possession. Joint tenancy does not arise where persons
Inherit property by intestate succession. **Heirs always take tenants in common.**

- **Four Unities Requirement:**
  - **Time** – The interest in each joint tenant must be acquired or vest at the same time.
  - **Title** - All joint tenants must acquire title by the same instrument or by a joint adverse possession. A joint tenancy can never arise by intestate succession or other act of law.
  - **Interest** – All must have equal undivided shares and identical interests measured by duration.
  - **Possession** – Each must have a right to possession of the whole. After a joint tenancy is created however, one joint tenant can voluntarily give exclusive possession to the other joint tenant. (Also essential for tenancy in common)

- The joint tenancy turns into tenancy in common when the unities cease to exist. Hence, joint tenants can change their interest into tenancy in common by a mutual agreement destroying one of the four unities.
  - Any one joint tenant can convert a joint tenancy into a tenancy in common unilaterally by conveying his interest to a third party; this severs the joint tenancy as between the third party and his cotenants because it destroys one or more of the unities.

C. **Tenancy by the entirety** – form of concurrent ownership that can be created only between a husband and wife, holding as one person.

- Tenancy by the entirety is like the joint tenancy in that the four unities (plus a fifth—the unity of marriage) are required for its creation, and the surviving spouse has the right of survivorship.
- Husband and wife are considered to hold as one person at common law. → Neither husband nor wife can defeat the right of survivorship of the other by a conveyance of a moiety to a third party; only a conveyance by husband and wife together can do so.
- The tenancy by the entirety exists today in somewhat less than half the states. Because the tenancy by the entirety gives rise to marital interests of importance in many states.

→ English common law, disliking division of land into smaller parcels (a policy also underlying primogeniture), favored joint tenancies over tenancies in common. If an instrument conveying property to two or more persons were ambiguous, a joint tenancy resulted.
Today the situation is reversed; the presumption favoring joint tenancies has been abolished in all states (with an exception in a few states where the conveyance is to husband and wife). Usually the abolition has been accomplished by statutes providing that a grant or devise to two or more persons creates a tenancy in common unless an intent to create a joint tenancy is expressly declared.

Courts have sometimes thought a conveyance to A and B “jointly” merely indicates an intent to create some type of concurrent estate but not necessarily a joint tenancy.

The granting clause of deed is given priority over the habendum clause unless the language of the former is ambiguous. See p. 343 for example.

Avoidance of probate p. 343
- Probate is the judicial supervision of the administration of the decedent’s property that passes to others at the decedent’s death: The probate court appoints and administrator or executor who collects the decedents assets, pays debts and taxes, and distributes or changes the title to the property to the beneficiaries. 
- Joint tenancies are popular, particularly between husband and wife, because a joint tenancy is the practical equivalent of a will but at the joint tenant’s death probate of the property is avoided.
- Probates are costly.
- A joint tenancy avoids probate because no interest passes on the joint tenants death. Under the theory of joint tenancy, the decedent’s interest vanishes at death, and the survivor’s ownership of the whole continues w/o the decedent’s participation. 
- A joint tenant cannot pass her interest in a joint tenancy by will.

If the creditor waits until after the joint tenant’s death, the decedent joint tenant’s interest has disappeared, and there is nothing the creditor can seize.

If the joint tenants are husband and wife, one half is subject to taxation when one spouse dies (though no taxes are paid on it because any amount of property passing to the surviving spouse qualifies for the material deduction and passes tax-free)

*If not husband and wife, will be subject to federal estate taxation.

Unequal shares – The rule of unequal shares in joint tenancy is increasingly ignored by courts today.
- In most states joint and survivor bank accounts are owned by the parties during life in proportion to the net contributions by each.
- IRS Code §2040 provides that a decedent joint tenant (other than a spouse) is deemed to own, and is taxed on, a fractional share of the property proportionate to the decedent’s contributions.

2. Severance of Joint Tenancies
Riddle v. Harmon – Mrs. Riddle did not want her husband to get their land automatically when she died, so she tried to sever the joint tenancy without him → A joint tenant can unilaterally sever a joint tenancy without
the use of an intermediating third party by conveying his or her property interest to himself or herself.

- **Livery of seisin** – element of the common law ceremony of feoffment by which a feoffor (person who conveys a fee to another person) would hand over a symbol of the land being conveyed, such as a lump of the soil or a branch, to the feeoffee (person to whom a fee, or interest in land, is conveyed) as a means of transferring possession of the land

- **Strawman** – a third party who receives property from a joint tenant with the intent to convey the property right back to the joint tenant with the purpose of helping to sever the joint tenancy

- **Killer** loses his right of survivorship in the decedent’s share.

**Harms v. Sprague** – As a favor to Sprague, John mortgaged his and William’s land, without telling William, and later devised everything to Sprague when he died. → A mortgage does not sever a joint tenancy, and the surviving joint tenant takes the interest of a deceased joint tenant without being encumbered by the mortgage.

- In the lien theory states, a mortgage does not sever the joint tenancy but the states differ on whether the surviving joint takes one-half subject to the mortgage if the debt is not paid off before the debtor joint tenant dies.

- Ex: Suppose that A and B are joint tenants of Blackacre, located in a lien theory state. A gives a mortgage on her interest in Blackacre. This does not sever the joint tenancy. B still has a right of survivorship. Now suppose that A does. Does B take A’s interest subject to the mortgage or does B own the entire interest in Blackacre free of the mortgage? Jurisdiction split on this question. Some hold that B takes A’s interest subject to the mortgage. This view seems fair to the mortgagee, who would otherwise lose his security. It also protects B’s survivorship rights. Other courts hold that B has the right to A’s half unencumbered by the mortgage.

3. **Joint Tenancy Bank Accounts** – In a joint and survivor bank account, either party on the account can withdraw the amount deposited and survivors takes whatever sum is remaining in the account when the other joint tenant dies.

- Suppose that O deposits $5,000 in a joint and survivor bank account with O and A as joint tenants. O may intend to make a present gift to A of one-half the sum deposited in addition to survivorship rights to the whole sum on deposit. Courts sometimes refer to this as a “true joint tenancy” bank account. Or O may intend to make a gift to A only of survivorship rights. This may be called a “payable-on-death” account. Or O may intend that A only have power to draw on the account to pay O’s bills and not have survivorship rights. This is often called a “convenience” account.

- With a joint tenancy account, the bank is safe in paying all the money on deposit to any joint tenant or to the survivor.
4. Relations among Concurrent Owners – Each tenant owns an equal interest in all of the fee and each has an equal right to possession of the whole…’Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estates.”

The rules governing co-ownership should also distribute in a fair manner the benefits and burdens of co-ownership. Keep efficiency and fairness in mind as we consider first the action of partition – the privilege of each co-owner to transform a concurrent estate into estates held in severalty – and next some of the rules that govern the sharing of benefits and burdens of ownership during the life of concurrent interests.

a. Partition – Concurrent owners can agree on a division of the property or the proceeds from its sale, no problem arises; the termination can be accomplished through a voluntary agreement. But in the not unlikely event that such an arrangement is impossible, recourse to the equitable action that partition is necessary.

-This action is available to any joint tenant or tenant in common; it is unavailable to tenants by the entirety.

Delfino v. Vealencis – The Delfinos owned 99/144 of the property and wanted a residential development, while Vealencis owned 45/144 and wanted to keep her garbage business on it. →A partition by sale should only be ordered if the physical attributes of the land in question are such that a partition is impracticable or inequitable, and the interests of the owners would be promoted by a partition by sale.

• The court may order physical partition of the property into separate tracts if that is feasible. Once the land is physically partitioned, each party owns her tract alone in fee simple. If the separate tracts are not equal in value, the court will require one tenant to make a cash payment, called owelty to the other tenant to equalize values.

b. Sharing the Benefits and Burdens of Co-ownership

Spiller v. Mackereth – After another tenant vacated their building, Spiller used it as a warehouse, and Mackereth demanded he pay rent or vacate half of the building. → In the absence of an agreement to pay rent, a cotenant in possession is not liable to his or her cotenants for the value of his or her use and occupation of the property unless there is ouster of a covenant.

• If B is not excluded (ousted) by A, A is entitled to use and occupy every part of the property without paying any amount to B. B cannot recover a share of the rental value of the land unless B has been ousted A, or A agreed to pay B, or A stands in a fiduciary relationship to B.
Swatzbaugh v. Sampson – Mr. Swartzbaugh leased part of some land for a boxing pavilion, but Mrs. Swartzbaugh, the joint tenant, never signed the lease and wants to cancel it. A joint tenant, during the existence of a joint estate has the right to convey or mortgage his or her interest in the property, even if the other joint tenant objects.

- One joint tenant has the right to lease her interest in the property, even over the objection of the other joint tenant.

Accounting for Benefits, Recovering Costs

Notes: Accounting For Benefits, Recovering Costs p. 379

- In all states, a cotenant who collects from third parties rents and other payments arising from the co-owned land must account to cotenants for the amounts received.
- A cotenant paying more than his share of taxes, mortgage payments, and other necessary carrying charges generally has a right to contribution from the other cotenants, at least up to the amount of the value of their share in the property.
- As to necessary repairs, in most jurisdictions a cotenant making or paying for them has no affirmative right to contribution from the other cotenants in the absence of the agreement.
- As with repairs, a cotenant has no right to contributions from other cotenants for expenditures for improvements; beyond this (and unlike the case of repairs), no credit for the cost of the improvements is given such in an accounting or partition action.

B. Marital Interests

1. The Common Law Marital Property System – One was the English system. Its fundamental principle is that husband and wife have separate property; ownership is given to the spouse who acquires the property.

   - Community property rests on the notion that husband and wife are a marital partnership (a “community”) and should share their acquests equally.

a. During Marriage (The Fiction that Husband and Wife are One) – The English martial property system, feudal in origin, mirrored the need of the patriarchal landed class to keep their estates inact and under the control of a single male.

   - A married woman was to be supported for her entire life, but she was not entitled to exercise powers of ownership.
   - At the instant of marriage, a woman moved under her husband’s protection or cover; she ceased to be a legal person for the duration of the marriage.
   - Husband and wife were regarded as one, and that one was the husband.
The husband had the right of possession to all the wife’s lands during marriage, including land acquired after marriage. That right, known as jure uxoris, was alienable by the husband and reachable by his creditors. 

Beginning with Mississippi in 1839, all common law property states had, by the end of the 19th C, enacted Married Women’s Property Acts. These statutes removed the disabilities of coverture and gave a married woman, like a single woman, control over all her property.

The MWPA prompted by a desire to protect a wife’s property from her husband’s creditors, as well as to give her legal autonomy, did not give the wife full equality.

**Sawada v. Endo** – The Endos conveyed their property to their sons the same day that Kokichi got into an auto accident that injured the Sawadas. → An estate by the entirety is not subject to the claims of creditors of only one of the spouses because neither spouse acting alone can transfer his or her interest.

- Under this view, creditors of one spouse cannot reach the property because neither the husband nor the wife acting alone can transfer his or her interest.
- The courts in the majority of states recognizing tenancy by the entirety hold that the equality intended by MWPA can be achieved in this way:
  1) give both husband and wife equal rights to possession during the marriage (putting the wife in the same position the husband had at common law)
  2) forbid both husband and wife, acting alone, to convey his or her interest (putting the husband in the same position the wife had at common law)

**b. Termination of Marriage by Divorce** – At common law, upon divorce property of the spouses remained the property of the spouse holding titles. Property held by the spouses as tenants in common or as joint tenants remained in such co-ownership.

- Because the unity of marriage was severed by divorce, property held in tenancy by the entirety was converted into a tenancy in common.
- Marital property is defined in some states to include all property acquired during marriage by whatever means (earnings, gifts, or inheritances); in others it includes only property acquired from earnings of either spouse during marriage.
  → The last approach is based on the principle underlying community property – that marriage in a partnership and property acquired from earnings of the spouses during marriage should be equally divided upon dissolution of the partnership.
- Alimony is largely viewed today as support for a limited period of time until the spouse can enter the job market and become self sufficient (called “rehabilitative alimony”)

**In re Marriage of Graham** – Flight attendant supports husband through business school, covering 70% of their expenses, and after he graduates they get a divorce. → An education degree is not property, and therefore is not subject to division upon divorce.

c. Termination of Marriage by Death of One Spouse
   i. Common Law – With respect to personal property, the common law gave a surviving widow one-third if there were surviving issues and one-half otherwise. A surviving widower took all his wife’s personal property absolutely.
      - Dower – At common law, a wife has dower in all freehold land (i) of which her husband is seised during marriage and (ii) which is inheritable by issue born of the marriage. Dower is a life estate in one-third of each parcel of qualifying land.
      - Curtesy – At common law, on the wife’s death, a surviving husband had curtesy, which was roughly comparable to dower but somewhat different. First, the husband had curtesy only if issue were born of the marriage (giving the husband received a life estate in all of his wife’s lands, and not merely a third of them, as in dower.
      - The important consequence of dower in modern times is that both husband and wife must sign deeds to land to release dower, even though title is in only one of them.

   ii. The Modern Elective Share
      - Legislatures began to enact “forced share” legislation, giving spouse an elective forced share in all property – real and personal – that the decedent spouse woned at death.
      - The surviving spouse is not entitled only to support, as dower and curtesy provided, but to an ownership share in the decedent spouse’s property.
      - The surviving spouse can renounce the will, if any, and elect to take a statutory share, which is usually one-half or one-third or some other fractional share.
      - A spouse has a claim to a forced share whether married to the decedent for one hour or 50 years.

2. The Community Property System
   a. Introduction – earnings of each spouse during marriage should be owned equally in undivided shares by both spouses
      - Community property included earnings during marriage and the rents, profits, and fruits of earnings.
- Separate property is property acquired before marriage and property acquired during marriage by gift, devise, or descent.
- Property acquired or possessed during marriage by either husband or wife is presumed to be community property.

b. Community Property Compared with Common Law Concurrent Interests
- None of the community property states recognizes dower or curtesy; none recognizes the tenancy by the entirety.
- Community property, compared with tenancies in common and joint tenancies, has these significant differences:
  - Community property can exist only between husband and wife, whereas a tenancy in common or a joint tenancy can exist between any two or more persons.
  - Unlike tenants in common or joint tenants, neither spouse acting alone can convey his or her undivided one-half share of community property, except to the other spouse.
  - With respect to traditional community property, each spouse has the power to dispose by will of one-half the community property at death. There is no survivorship feature, as with joint tenancy.

c. Management of Community Property
- In a tenancy in common or a joint tenancy each tenant separately can convey his or her undivided interest, but this cannot be done with community property.
- The manager of community property is kind of fiduciary. The community property must be managed for the benefit of the community. Each spouse must act in good faith in exercising authority, but good judgment is not necessary.
- In most community property states liability to creditors follow management and control. The creditors of managing spouse can reach whatever community property the creditor spouse is legally entitled to manage.

d. Mixing Community Property with Separate Property
- Mixed property sometimes arises when property is acquired before marriage but part of the purchase price is paid after marriage with community funds.
- Under the “inception of right” rule, the character of the property is determined at the time the wife signed the contract of purchase; the house is her separate property.

e. Migrating Couples - Whether property characterized in accord with the community property system or in accord with the common law
property system depends upon the domicile of the spouses when the property is acquired.
- Common law property states generally recognize community property when it is brought into the state from a community property state.
- The common laws in most states do not give the surviving spouse a forced share in the decedent spouse’s share property owned at death.

3. Rights of Domestic Partners
- Now recognized in only 11 states.
- To have a common law marriage, the cohabiting parties must manifest their intent to be husband and wife and hold themselves out to the public as H and W.
- Even common law marriage, where recognized would not give property rights to persons not claiming to be married.
- If the partnership terminates while both partners are living, the couple’s property is divided according to the principles set forth for the division of marital property.

Baker v. State – Three same-sex couples denied marriage licenses sued the State claiming that the State Constitution guarantees them the same privileges and benefits provided to opposite-sex couples. → The Common Benefits Clause of VT Const guarantees same-sex couples the same privileges and benefits provided to opposite-sex couples.

Part III. Leaseholds: The Law of Landlord and Tenant
1. Term of years – an estate that lasts for some fixed period of time or for a period computable by a formula that results in fixing calendar dates for beginning and ending, once the term of years is created or becomes possessory.
2. Periodic tenancy – lease for a period of some fixed duration that continues for succeeding periods until either the landlord or tenant gives notice of termination.
   - Ex: “to A from month to month” (If notice is not given the period is automatically extended for another period.
   - Unlike common law rules, half a year’s notice is required to terminate a year-to-year tenancy.
   - For any periodic tenancy of less than a year, notice must be given equal to the length of the period, but not to exceed six months.
3. Tenancy at Will – a tenancy of no fixed period that endures so long as both landlord and tenant desire.

Garner v. Gerrish – Donovan leased house to Gerrish (D) for as long as D wished. → If the lessee has the option of terminating a lease when he pleases, a determinable life tenancy is created
   ✓ L leases land to T ‘so long as T should wish.” This creates a life estate in T, determinable on his death or prior relinquishment of possession.

4. Tenancy at sufferance – arises when a tenant remains in possession (hold over) after termination of the tenancy. Common law rules give the landlord confronted with a holdover essentially two options:
   1) eviction (plus damages)
2) consent (express or implied) to the creation of a new tenancy

**Crechale & Polles, Inc. v. Smith** - When Smith (D) held over past the expiration of his lease, Creshale (P) decided to treat D as a trespasser. Later, he decided to hold him over to a new term. → Once a landlord elects either to treat a holdover as a trespasser or to hold him to a new term, he may not change his mind.

**The Lease**

- Considerations determining a lease: intention of the parties, the number of restrictions on use, the exclusivity of possession, the degree of control retained by the granting party, the presence or absence of incidental services.
- It matters primarily whether or not an arrangement amounts to a lease because leases give rise to the landlord tenant relationship, which gives carry with it certain incidents – certain rights and duties and liabilities and remedies – that do not attach to other relationships.

  *Conveyance versus contract* – A lease is both a conveyance and a contract. A lease transfers a possessory interest in land, so it is a conveyance that creates property rights. But it is also the case that leases usually contain a number of promises (or covenants, which originally referred to promises under seal) – such as a promise by then tenant to pay rent or a promise by the landlord to provide utilities – so the lease is contract, too, thus creating contractual rights.

  → Last few decades courts have emphasized the contractual nature less.

**Statute of Frauds** – Every state has a SoF; American statutes provide that leases for more than one year must be in writing. All but a few jurisdictions permit oral leases for a term less than a year; those that do not usually hold that entry under an oral lease plus payment of rent creates a periodic tenancy that is not subject to the Statute.

**Form leases and the question of “bargaining power”**
- Deeds are commonly brief, whereas leases can be wordy, full of clauses to handle various contingencies.
- Landlords use form leases – standardized documents offer to all tenants on a take-it-or-leave-it basis, with no negotiation over terms.

  → Rationale

  1) Costly to negotiate too many
  2) Competition exists, so not truly take it or leave it

**Selection of Tenants**
- Federal and state statutes not prohibit discrimination in the sale or rental of property on various grounds—including race, religion, or natural origin.

**Soules v. U.S. Department of Housing & Urban Development** – A single mother sued for discrimination after being denied the opportunity to apply for an apartment based on her family status. → Housing providers can defeat discrimination claims by showing legitimate reasons for refusing to rent and
factfinders are allowed to inquire into the providers’ subjective intent in questioning prospective applicants.

Delivery of Possession

Hannan v. Dusch – When Hannan’s (P) lease was to begin, Dusch (D) failed to evict a hold-over tenant. →A landlord only has a duty to deliver the right to possession of the premises to a tenant, not actual possession.

✓ In some jurisdiction, the landlord has no duty to deliver actual possession at the commencement of the term, and hence is not in default under the lease when the previous tenant continues wrongfully to occupy the premises. This is known as the “American rule” – although it is the minority view.

Lessor ↔ landlord
Lessee ↔ tenant

The American Rule puts the lessee in legal possession.
The English Rule puts the lessee in actual possession.

- The American rule, which recognizes the lessee’s legal right to possession, but implies no such duty upon the lessor as against wrongdoers, are irreconcilable.
- The English rule is that in the absence of stipulations to the contrary, there is in every lease an implied covenant on the part of the landlord that the premises shall be open to entry by the tenant at the time fixed by the lease for the beginning of his term.

American Rule:
Go after the wrongdoer not the landlord.
The tenant could have contracted around the provision.

English Rule:
When the lease starts you get actual possession
Landlord is in a better position to know what’s going on

Subleases and Assignments

✓ The common law rule is that if a tenant transfers less than the entire remaining term of his leasehold, he has made a sublease, and he becomes the landlord of the sublessee.
✓ The sublessee is not in privity of estate with the landlord and cannot sue or be sued by the landlord.
✓ Since the sublessee has made no contract with the landlord, he cannot sue or be sued on a contract either.
✓ Common law view (right of entry): The common law view is that such a transfer is an assignment, not a sublease, because T retained no reversion. The right of entry reserved by T is viewed as merely a means of enforcing T2’s contractual obligations. Since it is an assignment there is privity of estate between L and T2, so that L can hold T2 personally liable for the rent reserved in the L to T lease ($200 per month).
Modern view-right of entry make it a sublease. The reservation of the right to reenter for nonpayment of rent is deemed a “contingent reversionary interest,” so that the transfer is a sublease even though no actual reversion is retained by T. Since it is a sublease, there is no privity of estate between L and T2. Thus if T2 fails to pay the rent, L cannot sue him directly. L can sue T for rent based on privity of contract. L can evict T2 for breach of the promise to pay rent made in the L to T lease as readily as he could evict T. The distinction is that since this is only a sublease, there is no privity of estate, and hence L cannot hold T2 personally liable for rent.

**Ernest v. Conditt** – Rogers, the original lessee, transferred his interest to Conditt (D). → In determining whether an assignment or a sub-leasing has occurred, the court looks to the intentions of the parties.

- A few recent cases have rejected both the common law rule that retention of a reversion is necessary for a sublease and the rule that retention of a right of entry is sufficient to create a sublease. These cases hold that the intent of the parties determines whether a transfer is an assignment or a sublease, and that reservation of an additional rent by itself is an indication that the parties intended a sublease. On the other hand the transfer of the lease for a lump sum, even if pmt is tot be made in deferred installments, indicates an assignment.

**Kendall v. Ernest Pestana** - Ernest Pestana (D) demanded increased rent in exchange for consent to assign a lease. → A lessor may not unreasonably and arbitrarily withhold his or her consent to an assignment. (Minority view, but in growing number of jurisdiction)

✓ The landlord may look at factors such as the financial responsibility of the proposed new tenant and his suitability for the building, but the landlord cannot consider her general economic advantage (i.e. She cannot refuse consent as a stratagem to get T to terminate the lease)

*The Tenant Who Defaults*

**Berg v. Wiley** – Wiley (D) changed the locks on property that he lease to Berg (P). → A landlord may not use self-help to regain possession of his land.

✓ A growing number of states prohibit self-help in recovering possession and require the landlord to resort to a statutory remedy. If she does not, she is liable in damages.

✓ The landlord may bring an action in ejectment to recover possession, but may not come to trial for some time, and is rarely brought.

✓ Summary proceedings provide a quick and efficient means by which to recover possession (and, in some jurisdictions, rent) after termination of a tenancy.
Tenant Who Has Abandoned Possession

**Sommer v. Kridel** – Sommer (P) failed to make efforts to re-let an apt when Kridel (D) abandoned it. → A landlord is under a duty to mitigate damages by making reasonable efforts to re-let an apt wrongfully vacated by the tenant.

- ✓ In a growing number of states, probably a majority, the landlord has a duty to mitigate damages. A lease is treated as any other kind of contract and is not viewed, on this issue, through property glasses. If the landlord must mitigate damages, the landlord cannot leave the premises vacant and sue for rent as it comes due

Quiet Enjoyment and Constructive Eviction

**Reste Realty Corp. v. Cooper** – Whenever it rained the basement that Cooper (D) was leasing flooded. → A tenant may vacate premises and terminate the lease if his quiet enjoyment is interfered with by the landlord.

- ✓ Any act of the landlord or failure to act that substantially interferes with the tenant’s use and enjoyment is sufficient for constructive eviction. Look for failure of the landlord to furnish heat or services or that repair in violation of an express or implied covenant to do so.

<<Options for tenant for breach of quiet enjoyment cant withhold rent
Option1-quiet enjoyment- can stay in possession and sue for damages to your property, Option2-declaratory judgment- a person who thinks is going be sued, goes to court and say will be sued and ask for allowed for not being liable( often courts wont here these judgments) has been overtaken by implied warranty of habitability
Option3-to leave by constructive eviction and possibly get sued
Under Common Law, landlord has no obligation to repair, but if do repair must do it carefully
Constructive eviction- must leave and stop paying rent the court must decide if exist-can be sued by landlord.>>

Illegal Lease

Minor technical violations do not render a lease illegal nor do violations of which the landlord had neither actual or constructive notice. A tenant under an illegal lease is a tenant at sufferance and the landlord is entitled to the reasonable rental value of the premises given their condition.

The Implied Warranty of Habitability

**Hilder v. St. Peter** – St. Peter (D) leased an apartment unit for habitability to Hilder (P). Though P informed D of these defects, he failed to remedy them. → There is an implied warranty of habitability in every residential lease.

- ✓ Implied covenant of habitability – a landlord has a duty of delivering habitable premises and of maintaining them in a habitable shape

Ch. 9 Judicial Land Use Controls: The Law of Nuisance p. 747
The law of nuisance is part torts and part property – torts because nuisance liability arises from negligent or otherwise wrongful activity, and property because the liability is for interference with the use and enjoyment and land. 

*Sic utere tuo alienum non laedas* – one should use one’s own property in such a way as not to injure the property of another

**Morgan v. High Penn Oil Co.** – Trailer park owner sued for injunction against operator of a nearby oil refinery which produced nauseating fumes. → A private nuisance occurs when there is a substantial interference is either intention and unreasonable, or unintentional and the result of negligence, reckless, or abnormally dangerous activity. 

✓ Serious discomfort and inconvenience in the use of land is another important factor in determining a nuisance. Objectionable noise, odors, or smoke are frequently the interference complained of. The standard of unreasonable interference is measure by the sensibilities of the average person.

**Remedies (and More and Substantive Law)**

**Estancias Dallas Corp. v. Schultz** – The Schultzes sued Estancias Dallas Corp. to permanently enjoin it from operating excessively loud equipment on a neighboring building. → An injunction will be denied as a remedy for nuisance only if the necessity of others compels an injured party to seek damages in an action at law, and not because the party causing the nuisance has the right to work a hurt or injury to his or her neighbor.

**Boomer v. Atlantic Cement Co.** – A court found that a cement plan constituted a nuisance to neighbors, but denied an injunction. → Courts can grant an injunction conditioned on the payment of permanent damages to a complaining party in order to compensates him or her for the impairment of property rights caused by nuisance. 

✓ If one party’s conduct has great social value (e.g., a factory employing many people), a court will be reluctant to enjoin it as a nuisance. On the other hand, if the harm is serious and the pmt of damages will not shut down the plan, the court will order the pmt of damages for nuisance and refuse to enjoin activity.

**Ch. 10 Private Land Use Controls: The Law of Servitudes**

**Servitudes** – an encumbrance constituting in a right to the limited use of a piece of land w/o the possession of it; a change or burden on an estate for another’s benefit 

Land use arrangements arising out of private agreements involve two or more parcels of land, and the purpose of the agreements is to increase the effect of the agreements is to burden one parcel of land for the benefit of another parcel.

**Easements** - The most important questions about easement relate to their creation and termination. An easement can be created by an express agreement, by estoppel, by implication from an existing use when land is divided, by necessity when land is divided, and by prescription.

**Real Covenants** – The most important issue about real covenants is whether they will run to assignees. Privity of estate is required for the covenant to run. Privity is a difficult concept. Concentrate on it and get it straight. Remember also that the remedy for breach of covenant is damages.
Equitable Servitudes - Landowners often want to make agreements with their neighbors respecting the use of one of both of the parcels of land. These agreements can be divided into two broad categories (i) rights arising from a grant of right by one landowner to another (known as easements or profits) and (ii) rights arising from a promise respecting the use of land by one landowner to another (known as a real covenant or equitable servitude.

Easements

profit – (Black’s) servitude that gives the right to pasture cattle, dig for minerals, or otherwise take away part of the soil → interest in land

affirmative easement – (Black’s) an easement that forces the servient estate owner to permit certain actions by the easement holder, such as discharging water onto the servient estate

- (p. 785) an easement being in interest in land, is within the Statute of Frauds; creation of easement generally requires a written instrument signed by the party to be bound thereby
- However, in addition to the usual exceptions of fraud, past performance, and estoppel, an easement may, under certain circumstances, be created by implication
- Statute of Frauds – (Black’s) A statute (based on the English Statute of Frauds) designed to prevent fraud and perjury by requiring certain contracts to be in writing and signed by the party to be charged

Willard v. First Church of Christ, Scientist - McGuigan sold Petersen a lot with an easement allowing nearby churchgoers to park on it, but Petersen sold it to Willard without mentioning the easement. →A grantor can reserve an easement in property for a person other than the grantee.

✓ Some modern cases hold that an easement may be reserved in favor of a third person. There is no reason to prohibit this in modern law. Moreover, if the easement is invalidated, the grantee is unjustly enriched by getting more than she bargained for (i.e., she pays the value of land with an easement and gets land without an easement).

✓ An easement may be created in favor of a third party.

easement in gross – (p. 790) does not benefit the owner of the easement in the use of land belonging to the owner, but benefits the owner w/o regard to ownership of land; attaches to a person, rather than the land; (Black’s) An easement benefiting a particular person and not a particular piece of land, the beneficiary need not, and usually does not, own any land adjoining the servient estate

→If it is unclear which type of easement is intended by the parties, the law construes in favor of an easement appurtenant

Hypothetical: If it is an easement appurtenant and the church moves and sells it another church does the new church have right to the easement? Yes.

Hypothetical: If the church sells to a church? Willard gets fee simple without the determinable

Licenses
**license** – what you get when you are allowed to enter someone else’s land; (Dukenheimer) is oral or written permission given by the occupant of land allowing the licensee to do some act that otherwise would be a trespass; (Black’s) A revocable permission to commit some act that would otherwise be unlawful; esp. an agreement (not amounting to a lease or profit a pendre) that it will be lawful for the licensee to enter the licensor’s land to do some act that would otherwise be illegal, such as hunting game →not an interest in land; a contract

*Licensees are revocable, easement is not revocable, and profits are not revocable.*

Exceptions:
1) A license coupled with an interest cannot be revoked.
2) A license that becomes irrevocable under the rules of estoppel.

**Holbrook v. Taylor** – Holbrook tried to block off a road on his property after Taylor used it extensively while building a tenant house for himself. →A license cannot be revoked after the licensee has erected improvements on the land at considerable expense while relying on the license.

- If the licensee has constructed substantial improvements on either the licensor’s land or the licensee’s land, relying on the license, in many states the licensor is estopped from revoking the license. The theory is that it would be unfair to the licensee to permit revocation after he spends money in reliance.

- **easement by estoppel** - A court-ordered easement created from a voluntary servitude after a person mistakenly believing the servitude to be permanent, acted in reasonably reliance on the mistaken belief

**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. →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.

- **implied easement** – (Black’s) An easement created by law after an owner of two parcels of land uses one parcel to benefit the other to such a degree that upon the sale of the benefited parcel, the purchaser could reasonably expect the use to be included in the sale

- **easement appurtenant** – (p. 789) benefits the owner of the easement in the use of land belonging to the owner; (Black’s) An easement created to benefit another tract of land, the use of the easement being incident to the ownership of that other tract

- To have a **quasi-easement**, the previous use must be apparent. IT is apparent if a grantee could, by a reasonable inspection of the premises, discover the existence of the use. “Apparent” does not mean the same thing as “visible”; a non-visible use may be apparent. Thus, for example, underground drains may be apparent even though not visible, if the surface connections would put a reasonable person on notice of their presence.
Warranty deed - you warrant that it is yours to give; (Black’s) A deed containing one or more covenants of title

Ways to create easements:
1. By deed / express grant (Willard)
2. by implication (Van Sandt)
3. by estoppel (Holbrook)
4. by prescription / adverse possession (Othen)
5. by necessity (Othen)

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. An easement can be created by implied reservation only when it is shown that there was unity of ownership between the alleged dominant and servient estates, that the easement is necessity and not a convenience, and that the necessity existed at the time the two estates were severed; an easement by prescription can only be acquired if the use of the easement was adverse.

- Easement by necessity is implied only when land is divided. The necessity must exist when the tract is severed. The easement is implied only over that portion of the divided tract that blacks access to a public road from the landlocked parcel.
- An easement of necessity cannot be implied over land that was never owned by the common grantor of the dominant and servient estates.
- Prescriptive easement – an easement that prohibits the servient estate owner from doing something such as building an obstruction

Brown v. Voss – Voss (D) blocked off a private road easement for parcel B after Brown (P) started building a house that would sit on both parcels B and C.

- An easement granted for the benefit of lot 1 cannot be used for the benefit of lot 2, even though the same person owns lots 1 and 2. The dominant owner cannot increase the scope of the easement by using it to benefit a non-dominant tenement.

Preseault v. United States – Property owners sued the Government for an unauthorized taking after the govt authorized the conversion of an abandoned RR easement into a nature trail across the owner’s property. An easement is terminated by abandonment when nonuse is coupled with an act manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence.

- A grant of a limited use, or for a limited purpose, or of an identified space without clearly marked boundaries creates an easement.
- A sale of interest for less than the fair market value of fee simple indicates an easement.
- If the owner of the servient land pays taxes, and the used space is not separately assessed, this also indicates an easement.

6. Negative Easements
negative easements – right of the dominant owner to stop the servient owner from doing something on the servient land.

English courts recognized four types of negative easements: the right to stop your neighbor from

1) blocking your neighbors windows
2) interfering with air flowing to your land in a defined channel
3) removing the support of your building
4) interfering with the flow of water in an artificial stream

-To keep land titles unencumbered, judges did not favor negative easements.
-Today there is little pressure on the courts to expand the traditional list of negative restrictions on land can be, and usually are, treated as equitable servitudes.

Requirements for burden of covenant to run at law:
1) the contracting parties must intend that successors to the promisor be bound by the covenant
2) There must be (at least in some states) privity of estate between the original promisor and promisee as well as privity of estate between the promisor and his assignee
3) the covenant must touch and concern the land
4) a subsequent purchaser of the promisor’s land must have notice of the covenant

Requirements for benefit of covenant to run at law:
1) the contracting parties must intend
2) some from of the contracting parties must intend may be required
3) the covenant must touch and concern the land

B. Covenants running with the land
1. Historical Background
   a. Covenants Enforceable at law: Real Covenants

   -Bargains between neighboring property owners can operate to allocate resources efficiently by arranging land uses so as to minimize conflicts.
   -Where there is privity of estate, the judges held, the contract is enforceable by and against assignees.

   -Unlike the English courts, American courts did not define privity of estate to include only a landlord tenant relationship.
   **Horizontal privity** – privity of estate between the original covenancing parties
      -For the burden of covenant to run to assignees, the traditional rule is that the original parties to the covenant must be in privity of estate.

   **Vertical privity** – privity of estate between one of the covenancing parties and a successor in interest
      -For the burden to run to a successor owner of the land, the successor must be in vertical privity of estate with the original promisor.
The first Restatement of Property declared that horizontal privity of estate is required for the burden of covenant to run at law. The restatement went on to say, in accordance with most authority, that horizontal privity is not required for the benefit to run.

The Restatement (Third) repudiates the first Restatement and takes the position that horizontal privity of estate is not required for a covenant to run at law to successors.

-At common law a real covenant does not run with the land, as the common expression has it; it runs with an estate in land. Thus, the burden of a covenant does not run to an adverse possessor, who does not succeed to the coveantor’s estate but takes a new title by operation of law.
-The burden and benefits of affirmative covenants run to persons who succeed to estates of the same duration as were held by the original parties to the covenant, that is, those persons who satisfy the traditional privity requirement. The burdens also run to adverse possessor.

B. Covenants Enforceable in Equity: Equitable Servitudes

**Tulk v. Moxhay** – Tulk had a covenant which required maintenance of a garden on some land, but Moxhay later tried to put buildings on it after buying it. →A covenant will be enforceable in equity against a person who purchases land with notice of the covenant. 
✓ To hold the covenant unenforceable would give Moxhay an advantage he didn not bargain for and would unjustly enrich him. From this acorn grew a new servitude known as an equitable servitude.

2. Creation of Covenants
-A real covenant must be created by a written instrument signed by the covenantor. A real covenant cannot arise by estoppel, implication, or prescription, as can an easement.
-A equitable servitude is an interest in land that may be implied in equity under certain limited circumstances. An equitable servitude which arise out of a promise, cannot be obtained by prescription.

**Sanborn v. McLean** – The McLeans tried to build a gas station on their lot in a residential district, but were enjoined from doing so by their neighbors. →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 a development of a residential subdivision and the purchaser of the lot has notice of it.
✓ At least one court has held that a purchaser buying into a built-up residential area where the houses appear to have been built in accordance with a plan should look at the other deeds out from the developer to see if any basis for an implied covenant exists.
✓ The lay of the land puts him on inquiry notice to look at the deeds of the neighboring lots from the developer.
Neponsit Property Owners’ Association, Inc. v. Emigrant Industrial Savings Bank
– Emigrant Bank took title to land previously deeded by Neponsit Realty, and the Neponsit Association tried to foreclose a lien contained in the earlier deed. → An affirmative covenant to pay money for improvements or maintenance done in connection with, but upon the land which is to be subject to the burden of the covenant does touch and concern the land, and a homeowner’s association, as the agent of the actual owners of the property, can rightfully enforce the covenant.

✔ A homeowner’s association may use to enforce the benefit of covenant even though the association succeeds to no land owned by the original promisee. The homeowners’ association is regarded as the agent of the real parties in interest who own the land.

- At common law only parties to a contract could sue to enforce it. Today in contract law generally any intended third-party beneficiary can sue on a contract.
- An affirmative easement cannot be created in favor of a third party but a negative easement in the form of an equitable servitude can be (at least if the 3rd party is in privity with the promisee).

Caullett v. Stanley Stilwell & Sons, Inc. – A developer deed a lot to Cuallet for $4,000, and the deed included a covenant giving the developer the right to build the first structure. → A restrictive covenant does not run with the land at law or in equity when the benefit it creates would not touch and concern the land.

✔ If a covenant will not run in equity because the benefit is in gross, neither will a covenant run at law.

- In England, a dominant tenement is required for an easement.
- In the US an easement in gross can be created, and the burden will run with the servient land.
- A defeasible fee differs from a servitude in that the remedy for its breach is forfeiture, whereas the remedy for breach of a servitude is damages, injunction, or enforcement of a lien.
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**Shelley v. Kraemer** – A black couple was buying a house while unaware of a racially based restrictive covenant on that street; the white homeowner tried to stop them.  

→ Judicial enforcement of a restrictive covenant based on race constitutes discriminatory state action, and is thus forbidden by the equal protection clause of the 14th amdt.  

✓ Judicial enforcement of racial covenants is state action which deprives a person of equal protection of the laws.  

✓ The covenant is not void, but it cannot be enforced.

Read p. 330 Distinguishing characteristics of real covenants and equitable servitudes

4. Termination of Covenants

**Western Land Co. v. Truskolaski** – Homeowners want to prevent a shopping ctr from being built in their subdivision, even though the surrounding area has become more crowded and more commercialized. → A restrictive covenant established 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.

**Rick v. West** – West bought land from Rick under a restriction covenant, and refused to lease the covenant when Rick attempted to sell similar land to a hospital. → A landowner in a subdivision under a restrictive covenant has the right to insist upon adherence to the covenant even when the other owners consent to its release.

✓ A court of equity may deny an injunction when the hardship to the D is great and the benefit to the P is small. But where the right to the benefit is clear, the defense of disproportionate harm and benefit is usually not persuasive.

**Chapter 11. Legislative Land Use Controls: The Law of Zoning**
-By dividing up a city into use zones form which harmful uses are excluded, zoning purports to prevent one landowner from harming his neighbor by bringing in an incompatible use.
-Zoning is a nuisance law made predictable by declaring in advance what uses are harmful and prohibited in the various zones.
-Modern zoning often regulates uses to achieve public benefits or to maximize property values (the tax base) in the city.

**Village of Euclid v. Ambler Realty Co.** – A realty company challenged a municipal ordinance which established a zoning plan restricting the use and size of bldgs in various districts. →Zoning ordinances are a valid exercise of the police power and thus do no violate the constitutional protection of property rights.

**PA Northwestern Distributors, Inc. v. Zoning Hearing Board** – After an adult bookstore was opened, a local zoning board enacted an adult business ordinance which gave the bookstore operator only 90 days to comply. →If a zoning law or regulation has the effect of depriving a property owner of the lawful pre-existing nonconforming use of his or her property, it amounts to a taking for which the owner must be justly compensated.
✓ A minority of courts have held amortization ordinances unconstitutional as a taking of property without compensation.

Commons v. Westwood Zoning Board of Adjustment – A builder trying to construct a home on lot that was below the local zoning ordinance’s minimum size requirements was denied a variance. →A zoning board shall have the power to grant a variance because of some exceptional situation of the property, the strict application of a zoning ordinance would result in undue hardship upon the developer of the property, and the variance would not substantially impair the public good and the intent and purpose of the zone plan and ordinance.
✓ This is a proper case of a variance. If the shallow lot were created after the enactment of the zoning ordinance, the difficulty would be self-created, and a variance would be improper.

**City of Ladue v. Gilleo** – A resident alleges a city ordinance that prohibits the displaying of signs, such as an antiwar protest sign, on front yards. →A city may not constitutionally adopt ordinances that prohibit nearly all signs on residential property.
✓ Political speech occupies a preferred position and is given greater protection than most other kinds of speech. Political speech includes comment on any matter of public interest. For example, ordinances prohibiting political signs entirety in front yards of residential areas have usually been held void, because adequate alternative means of communication are not available to the owners.