On the exam, DO NOT set out your essay in terms of arguments of the parties. Inefficient. Set out in terms of what they might have, and what that means for the court.

I. CONCEPT OF PROPERTY

1.) Property Interest – a right, privilege, power, or immunity with respect to property – legal relations between persons with respect to a thing

2.) Private Property – legal relations between an individual and small group/society with respect to a thing or things that are exclusive or particular to that individual or small group; exclusivity is the key – this relationship is meaningless unless others exist
   o Value: relationship can exist with or without commercial value – however, things with value are generally the subject of private property relationships – Scarcity is an important factor
   o Dominion: presence of use is not conclusive proof of existence of relationship, nor is the lack of it proof of non-existence
   o Transferability: may be transferable, but does not have to be for the interest to exist
     ▪ When leasing an apartment, one has a property interest, but may not transfer
   o Exclusion: must have the capacity to exclude, literally or figuratively – support in law or lawful authority
   o Government Intrusion: Under certain circumstances, government may limit rights or take control of the property
     ▪ 5th Amendment – if private property taken for public use, then just compensation given
   o “To the world: keep off, unless you have my permission, which I may grant or withhold. Signed, Private Citizen. Endorsed, the State.”

3.) Right—A legally enforceable claim of one person against another, that the other shall or shall not do a given act. Duty: The correlative of a right, i.e., if a person has a right that you do something, you have a duty to do it.

4.) Privilege—A legal freedom on the part of one person as against another to do or not do a given act. Absence of right: The correlative of a privilege is the absence of a right, i.e., if one has a privilege to do something, others have no right that you not do it.

5.) Power—An ability to change a given legal relation by doing or not doing a given act. Liability: The correlative of a power is a liability, i.e., if a person has a power to change the legal relations of another, the person subject to that power has a liability.

6.) Immunity—A freedom against having a particular legal relation altered by another. Disability or absence of power: The correlative of an immunity is a disability or an absence of power, i.e., if a person has an immunity against another changing a legal relation, then the other person has a disability or an absence of power.
7.) **Interest**—Any aggregate of rights, privileges, powers, and immunities, or any one of them individually. Complete property: The totality of interests (rights, privileges, powers, and immunities) that it is legally possible for a person to have with respect to land or other things, and that differ from those that all members of a society possess.

8.) **Legal and Equitable Interests in Land**
   - (a) Interests in land are legal and equitable.
   - (b) A legal interest has its origin in the principles, standards, and rules developed by courts of law as distinguished from courts of chancery.
   - (c) An equitable interest has its origin in the principles, standards, and rules developed by courts of chancery.
   - (d) There’s a distinction between court systems of law and equity. One consequence of this is that in many cases, equitable property interests may be recognized and protected in persons who have no legal property interests.
   - (e) Equitable property interests arise most often as a result of the creation of a trust or the making of a specifically enforceable contract.

9.) **Possessory Interests in Land**—These exist in a person who has...
   - (a) A physical relation to the land of a kind that gives a certain degree of physical control over the land
   - (b) Intent to exercise that control so as to exclude others from any present occupation.
   - (c) Interests in the land that are substantially identical to those arising when the elements stated in (a) and (b) exist (constructive possession).

10.) **Real Property**—Property interests in land, also known as freehold interests. It omits interests in chattels and intangible things, as well as some interests in land. E.g., estates for years, estates from period to period, estates at will, and estates at sufferance.
   - The subject matter of property may be land, chattels, or intangible things. In general, property in land (and things attached thereto) is referred to as real property, and the land itself (with the things attached, like buildings or other structures) is often termed real estate or realty.
   - Real property is an Anglo-American law corresponds substantially with immovable property in the European civil law. Property in chattels and in intangible things is classified as personal property, and corresponds substantially with moveable property in the European civil law.

11.) **Estate**—An interest in land that
   - (a) Is or may become possessory; and
   - (b) Is ownership measured in terms of duration.

12.) **Owner**—A person who has one or more property interests.
13.) **Conveyance**
   - (a) An act by which it is intended to create one or more property interests, irrespective of whether the act is effective to create such interests.
   - (b) To convey means to make a conveyance.

14.) **Devis** – A testamentary act by which a now deceased person manifested his intent to create one or more property interests (in land or other things), irrespective of whether such act is effective to create such interests. A specialized form of conveyance.

15.) **Transfer** – The extinguishments of property interests in one person and the creation of them in another.

A. Private Property Concerns

**Certainty** – consistency in regard to the law itself, which governs our conduct

**Clarity** – ability to understand the principle

**Fairness** – just results

**Efficiency** – most economic solution

**Peaceful Resolution** – Civility
   - Justice – costs upon society, costs of court system, costs to individual

**Feasibility** – public cost

II. PRESENT AND FUTURE ESTATES

**In re O’Connor** (252 N.W. 826)

- **Facts**: O’Connor died intestate, without heirs. His estate in land escheated to the state of Nebraska upon his death. County of Adams brought suit, contending that the state was and is liable for payment of inheritance tax. County successful in district court, and Supreme Court of Nebraska reversed in favor of the State.

- **Arguments**:
  - **County**: There is a transfer of property at death, and there is taxing statute, which states that if someone takes as a beneficiary or as an heir, then there is a tax.
  - **State**: The state is not an heir, it is a reversion. The State has had an interest all along and it is simply coming back.

- **Holding**: The State is the original and ultimate proprietor of all real property, and private ownership is actually tenancy. Escheat is not a succession but a reversion to the original owner. The law providing for inheritance tax intends tax interest that are created at or by the death of the owner, and a reversion to the State (or escheat) does not create a new interest in real property. Since it’s a reversion and the state now possesses something it already had, it does not have to pay inheritance tax.
- **Note:** result would have been different if personal property had been the issue, as the state would not have had a previous interest in said property.

  - **Key Points:**
    - 1.) If the state had been in the will, they would have been an intended beneficiary, and thus should be taxes for the estate inherited as any other beneficiary. But, the state could renounce their claim to the interest and so would not be taxed, and then the property would escheat to them anyway.
    - 2.) Escheat is an incident of state sovereignty; reveals a system of ownership of real property known as tenancy or tenure, originating in feudal England.
    - 3.) A succession by will or inheritance, or transfer inter vivos or in contemplation of death creates a new property interest.
    - 4.) This is not a tax on an exchange of possession, only upon the creation of an interest at death; not a tax on an exchange of possession or benefit.
    - 5.) Concept of body of tax law (creation at death) tied to the property concept as to when something is created – death is the taxable event.

  - **Escheat** – Reversion of property to the State, when there is a lack of anyone to inherit it – historic sovereign right – reverting back of benefit or possession to whom the person directly held.
    - Requirements:
      - 1.) No lifetimes transfer of the asset.
      - 2.) Asset is a part of the estate.
      - 3.) Died without heirs.
      - 4.) Dies without a will (intestate.)
    - Comprehensive term – when it applies to thins that do not involve a reversion, it is not the same thin as the escheat referred to in O'Connor.

  - **Reversion** – a time limit applied to property.
    - **Tenure:** right to hold or use; holder does not absolutely own (does not own alodially) – the state also has an interest
      - Notion that more than one person or entity has an interest in a subject matter at the same point in time, even though only one may have ownership at that time, in tenure
      - Multiple, simultaneous ownership of real property, in which more than one property interest or estate can exist at the same time in the same subject matter.
    - **Subinfeudation:** owner by tenure creates a tenurial interest in a third party, but retains an interest
      - Statute of Quia Emptores (1290) effectively abolished subinfeudation.
    - **Substitution:** transfer, retaining no interest
• All have an interest in the land, even when it is only one who has the ultimate claim of possession for that piece of that for that period of time

• Property Interest v. Estate
  o Estate: property interest that is characterized by a time duration and is either possession or may become possessory; the time measurement is critical.
    ▪ Segments in time
    ▪ Do not have to be possessory, and possession at some future date need not be a certainty
    ▪ Future Interest: non-possessory estate – exist in the present, but future in terms of possession, not in terms of interest.
  o Estate in Land: all of the interest, complete owner – interest measure in terms of time – all estates must be property interests, but all property interests do not have to be estates

III. VENDOR/PURCHASER
• Fee Simple Absolute: estate of potentially infinite duration that can pass to collateral heirs.
  o O to A and his heirs
    ▪ Alienable
    ▪ Inheritable
    ▪ Devisable, after the Statute of Wills (1540)
  o Considered the largest (in terms of duration) and most valuable estate.
  o Assumption at common law that an estate is a FSA unless otherwise specified (assuming the grantor had the FSA to convey) – “preferred” by courts
  o No “absolute ownership” – may be subject to restrictions on rights while retaining identity (easements, restrictive covenant, mineral rights, mortgage, etc.)

• Cole v. Steinlauf (136 A.2d 744 – Connecticut 1957)
  o Facts: Contract whereby defendants purport to convey to plaintiffs a title to the premises in Connecticut free and clear of any defect. Purchasers had option to reject the deed if there were any problems with it, at which time all sums were to be refunded. Plaintiffs paid $420 deposit. Their attorney discovered that the previous devise (in NY) conveying the title was given to “the grantee and assigns forever” and had no mention of “and heirs,” which is necessary to convey a FSA in Connecticut. Purchaser exercises option, refusing the deed and requesting the $420 and expenses for search of title, and defendant refused. Plaintiffs brought suit to recover the sum, and the trial court found for defendant, holding that the claimed defect did not render the title unmarketable. The Supreme court reversed and remanded, with direction to enter judgment for plaintiffs.
Holding: The deed objected to on its face conveyed only a life estate under Connecticut law, although it would convey a fee simple in New York. It would put the plaintiffs to an intolerable burden at a future time to make them prove the intent of a prior grantor. In Connecticut, a devise to a grantee "and his assigns forever" vests only a life estate unless it can be determined from the clearly expressed intent of the parties that a FSA was intended.

Key Points:
- 1.) A quiet title suit may find that defendant’s title is clear of defects, but plaintiffs do no have to gamble on that.
- 2.) The only question is whether the title offered was free from reasonable doubt, marketable, and it cannot be said that the title was marketable in Connecticut.
- 3.) A title is a history of ownership. A title abstract is a reconstruction of that history from public records (individual deeds don’t necessarily exist.)
- 4.) Marketable Title (perfect title): one that is free and clear of defects; unrestricted possessory fee simple absolute without reasonable doubt on the face of the record itself.
- 5.) An estate can be a FSA without being marketable; a FSA is the greatest estate as far as it’s durability – it’s infinite – but it can be limited, restricted, and have smaller estates cut out of it.
- 6.) In CT, will convey a FSA if the deed has the language “and heirs” or if the parties truly intended a FSA through litigation it can be reformed to conform to that.

Notes: Statute 7085 and 7087
- Johnson v. Whiton (34 N.E. 542 – Massachusetts 1893)
  - Facts: Defendants inherited land from their grandfather, the deed including language devising Sarah Whiton 1/3 of her grandfather’s estate, to Sarah and “her heirs on her father’s side.” Defendants attempted to execute the deed to plaintiff, but P refused the deed on the grounds that D could not convey a FSA. Plaintiff brings action to recover deposit paid under agreement to purchase land. Judgment for defendant.
  - Holding: Words “and heirs on her father’s side” are words of limitation (and thus inheritance) and not words of purchase. A man cannot create a new kind of inheritance (an estate descending only to heirs on the father’s side) in this way and deny Sarah the power to convey a FSA.
  - Key Points:
    - 1.) Unless other information negates the passage of a fee simple absolute, it does just that; you cannot create a new kind of transfer.
2.) The greater the variation you permit, the more and
different kinds of things will pop up.
3.) Court concerned with alienability and
marketability; allowing the testator to create this new
kind of estate would remove the estate from the
market – would be like the fee tail, which has been
outlawed.

• Words of Purchase and Words of Limitation
  o Words of Purchase: “who takes” – designate the taker of
the estate; does not imply consideration (may be a gift) only
that the estate is created other than by operation of law
  o Words of Limitation: “how much/what they take” –
designate the amount or duration of the estate conveyed

• Property Law Attributes
  o Duration
  o Methods of Creation
  o Attributes
    ▪ Little or no deviation is permitted on personal initiative
      or preference

III. DEFEASIBLE FEES
• Defeasible Fee Simple: potentially infinite duration (like a FSA) but
its duration may be determined or cut short by some event.
• Purposes:
  o Control the land (how its used or who uses)
  o Control the behavior of individuals
  o Control inheritance
• Classifications have both legal and operational consequences:
  rights, interest
• Three species:
  o 1. Fee Simple Determinable:
    ▪ Construction:
      ▪ To A and his heirs, so long as the land is
        farmed.
      ▪ To A and his heirs, until the land is farmed.
      ▪ To A and his heirs while the land is farmed.
        • A receives a FSD, and the grantor retains
          a possibility of reverter and at the
          breach, the land automatically reverts
          back to the grantor.
      ▪ A fee subject to a limitation; potentially infinite
duration, but can come to an end or expire
automatically upon the happening or non-happening of
an event stated as a limitation in the conveyance or
will creating the estate.
    ▪ Characteristics:
      ▪ Possession is conditional
      ▪ Freely alienable
      ▪ Indefinitely inheritable
- Devisable, after the Statute of Wills (1540)
  - To create, requires language of duration (“special limitation”): so long as, during, until, etc.
  - Possibility of reverter does not necessarily have to be specified, and reverts automatically on breach.

2. **Fee Simple Upon a Condition Subsequent**:

   - **Construction**:
     - To A and his heirs, but if the land is not farm, then O may reenter and claim the land.
     - To A and his heirs, provided that if the land is not farmed, then O may reenter and claim.
     - To A and his heirs on condition that if the land is not farmed, then O may reenter and claim.
     - O makes a grant, A gets a FSCS and O retains a right of reentry, at the breach, there is an optional reentry by O to reclaim possession.

   - **Characteristics**:
     - Possession is conditional
     - Freely alienable
     - Indefinitely inheritable
     - Devisable, after the Statute of Wills (1540)

   - Requires conditional language: provided that, on the condition that, etc.
   - Right of reentry (power of termination (should be expressly retained) and must be exercised to take effect.
   - Preferred by courts to FS Determinable, because courts do not like forfeitures; they prefer the optional situation. When there is a conflict in language, court will generally find a FSCS rather than a determinable fee.

3. **Fee Simple Subject to Executory Limitation**:

   - Requires conditional divesting language: unless, but if, etc.
   - Possibility of reverter or right of reentry, which would be in grantor, is given to a third party.
     - A to B in fee simple, unless B should ever practice law, then to C in fee simple absolute.
     - A to B in fee simple, upon condition B does not ever practice law, [provision for reentry], then to C in FSA.

   - Termination can be optional or automatic.

**Reverter vs. Right of Reentry**

- **Possibility of Reverter**
  - Alienable and devisable
  - Inheritable

- **Right of Reentry**
In some jurisdictions are defeasible, and in some devisable – agreed that they should not be transferred during the lifetime of the holder

- *Collette v. Town of Charlotte* (45 A.2d 203, Vermont 1946)
  - **Facts:** Scofield conveyed a portion of his land to the town of Charlotte to be used for school purposes, and the deed stated that when the town failed to use it as such, “it shall revert to said Scofield, his heirs, and assigns.” The property including this portion was conveyed by Scofield to West, and West conveyed it by warranty deed to plaintiff. The land stopped being used for school purposes in 1936, and the town sold the school house to defendant Boisvert in 1944. Plaintiff seeks an injunction against interference by defendants. Trial court finds for plaintiff, D appeals.
  - **Holding:** The language of the deed conveys a fee simple determinable, and Scofield retained the possibility of reverter, which is alienable. Plaintiff took the possibility of reverter when he purchased the farm. When the land ceased to be used for school purposes in 1936, it reverted back to plaintiff and became a possessory FSA.
  - **Key Points:**
    - 1.) Quit Claim deed (a gift, a donation without ongoing promises) is less significant than a Warranty deed, which give insurances.
    - 2.) Right of Re-entry must be exercised within a reasonable time, lest it be extinguished.
    - 3.) Deed contained a conflict in language: it contained conditional language (NOT special limitation) together with an express possibility of reverter. Under Restatement, would have created a FSCS.
    - 4.) Historically, possibilities of reverter and rights of reentry have been inalienable and destructible (ie, attempt to transfer destroyed interest.)
    - 5.) Collette court reasons that it ought to enforce personal agreements unless there are compelling reasons to override them, thereby deciding that possibilities of reverter were in fact alienable.

Possibility of Reverter is alienable. Is possibility of reverter destructible? No...

- *Chouteau v. City of St. Louis* (55 S.W. 2d 199 – Missouri 1932)
  - **Facts:** In 1822, MO legislature authorized (through enabling statute) procurement of a sit for a courthouse for St. Louis county. Chouteau et al executed a deed conveying a parcel in fee simple “but upon this condition nevertheless that the said piece of ground… shall be used and appropriated ‘forever’ as the site on which the courthouse of the County of St. Louis shall be erected.” Land used for courthouse until 1930. Chouteau’s heri at law seeks to reenter the property
because it was no longer used for said purpose. Trial court found for city, heir appealed.

- **Holding:** For the City. Court finds that while the deed had conditional language, it did not provide for action in the event of the breach, and so conveyed a FSA. The declaration of the conditional language was probably just a declaration of purpose.

- **Key Points:**
  - 1.) For FS Determinable, the language of special limitation is magic; it’s all you need to create determinable estates. The deed contained conditional language, but no language of special limitation and no language describing what is to happen if there is a breach.
  - 2.) Conditional language also requires an express reservation of a right of reentry to create a FSCS. Otherwise, the language may be viewed as merely precatory, or a restrictive covenant.
  - 3.) If there is sufficient evidence that a defeasible estate is intended, a court may find so even in the absence of the needed language, but the evidence of intent must be convincing beyond a reasonable doubt.
  - 4.) Courts are reluctant to find defeasible estates where there has been substantial compliance with the condition.
  - 5.) Language must be consistent with circumstances and public policy.
  - 6.) Court emphasized that Chouteau had benefited from the transfer, as his land value had increased due to the court house.

- **Board of Education v. Miles (207 N.E.2d 181 – NY 1965)**
  - **Facts:** Townsends conveyed a fee to Walton Academy for school purposes only, and if not should revert to Townsend or his heirs. The lot ceased to be used for educational purposes in 1962, and Townsend’s heirs assert possession. Board of Education (successor of Walton) sues to quiet title. In trial court, judgment for P, due to the fact that the heirs’ interest is extinguished by retroactive application of recording statute. Heirs appeal and challenge constitutionality of statute.
  - **Holding:** Judgment reversed, for heirs. Defeasible fee, doesn’t matter of which kind because heirs exercised right of reentry. Heirs have a right to possession unless their interest was extinguished retroactively by 345, which requires recording to preserve reversion and right of reentry. Retroactive legislation cannot impair vested right unless it satisfies a decent objective of police power. Act is unconstitutional in its retroactive component.
Key Points:

1.) What species the defeasible fee is does not matter to the court, because of alienability and timely reentry; it passed by law to the defendants, and both species are alienable by law, and they reentered in a timely fashion.

2.) Miles contains two errors in judgment:
   - It is premised on the idea that the only goal that is a legitimate use of police power is the protection of third parties against fraud. (In fact, promoting the marketability and alienability of titles is a legitimate use of police power – goal of title recording and marketability acts.)
   - Court states that the recording statute requires the recording of a interest before there is an interest to record. Thus, it would be necessary for unascertained persons, perhaps not even born yet, to have recorded a declaration of intention to preserve a reverter which would not take effect until an indefinite future time. The owners would not be known until the interest becomes possessory.

3.) Implication of the court is that non-possessory future interest, such as possibilities of reverter, don’t exist until they becomes possessory. Paradoxically, then there would never be anything to record because the interest doesn’t exist before it matures and is extinguished of a possessory FSA when it does.

4.) Marketability acts (IO, MN) promote the marketability of titles by limiting the depth of the title search required. If a vendor can demonstrate a clear title through a specified prior period of time then the burden shifts to an potential claimants to come forward to record their claim. If they fail within a period, their interests are extinguished. These acts have been upheld as constitutional. Intent is to shorten title research time; register good titles and are achieved without extinguishing anything.

5.) Non-compliance with the statute is the only way it fulfills its objectives by the court’s rationale, and that’s not constitutional. (Court is failing to see that these non-possessory interests are real, and by their rationale a court could never regulate a non-possessory interest until it becomes possessory.)

6.) Recording acts which are designed solely to prevent fraud protect future purchasers from
purchasing deed from original grantor. (A conveys to B, then later tries to convey to C.)

How much do we need to know about all the recording acts described in Board of Education v Miles?

  - **Facts**: In 1891, P’s ancestors conveyed deed for $100 to School District, stating that the deed was null and void as soon as it stopped being used for school purposes. Land used for school purposes until 1968, and plaintiff brings suit to quiet title. Lower court dismissed, saying the statute (which extinguishes possibilities of reverter and rights of reentry after thirty years) extinguished plaintiff's interest. Plaintiff appeals, on the grounds that the statute is unconstitutional.
  - **Holding**: Affirmed, for defendants. The title conveyed a fee simple determinable, but the possibility of reverter was extinguished by the retroactive statute. Statute is constitutional as a valid exercise of police power because the value of interests destroyed is slight and the value to society is high due to increase in land utility and marketability.
  - **Key Points**:
    - 1.) In looking at statutes which extinguish interests, reasonableness is the key. Must look at three things:
      - Purpose of Legislation – propriety of the goal.
      - Nature of the interest being affected.
      - Extent of the Modification (how far it goes.)
    - 2.) Police power – may interfere with property and contracts rights if it is justified use.
    - 3.) In this case, the purpose of marketability and alienability of property interests is legitimate. The value of the interests extinguished is slight, and they are not covered under the Eminent Domain provision in the Neb. Constitution. The means is also reasonable – even-handed and limited use of police power.
    - 4.)
  - **Title Recording Acts**
    - Can prevent fraud if obeyed; if not, they simply allocate the costs of fraudulent sale. Primary purpose: promote marketability by lessening the risk of purchasing real property.
    - **Three varieties**: Pure Notice, Pure Race, and Race-Notice.
      - **Pure Notice**: statutes protect subsequent bona fide purchasers for value and without notice. Allow previous purchasers to protect interest and give notice to subsequent purchasers by recording their deed. Recording not required, but failing to record prior to later sale may extinguish interest in favor of
subsequent purchaser’s. Costs of grantor’s fraud are allocated to those who do not record.

- **Pure Race**: statutes provide the greatest incentive to record and harshest consequence for not. Initial grace period during which a prior purchaser can secure his interest in recording. Afterward, whoever gets there first gets the interest.

- **Race-Notice**: most common. Protect bona fide subsequent purchasers for value but also require that the subsequent purchaser record first.

### IV. FEE TAIL

- **Construction**:
  - A (FSA) to B and the *heirs of his body*.
    - B: words of purchase
    - Heirs of his body – words of limitation – tells us what B takes
  - 2 Components:
    - 1.) Language of inheritance: “and heirs”
    - 2.) Language of Procreation: “of his body”
  - B has no choice – at his death, must pass to next generation of descendants, and so forth – at the end of his line of descendants, it will REVERT back to A (retains a reversion in FSA)
    - Possible to divest the reversion to C in fee simple, or C and her heirs (would be vested remainder in FSA)
    - Restricted to REAL PROPERTY ONLY
  - Could create a fee tail male or female, or special: confine it to heirs of body begotten with a certain person.

- **Characteristics**
  - Not freely alienable
  - Inheritable in a modified way
  - Not devisable

- **Fee Simple Conditional**
  - Precursor to fee tail
  - “to B and the heirs of his body” – courts construed as giving B the power to convey a fee simple if and when a child was born alive to B; conditioned on issue being born to the donee – against the grantor’s intention.

- **Statute of "De Donis“ 1285** – creates a fee tail.
  - Purpose to keep land in grantee’s family so long as there were descendants – after De Donis, B only had a power to convey for the term of B’s life – B and each succeeding heir acquired a mere life estate in the property.

- **Local Law changing the Fee Tail**
  - 1.) Common law fee tail, but with the power to convey a fee simple during the lifetime. (MA, RI (deed), ME, DE)
  - 2.) A fee tail for life, but the first heirs of the body to inherit would take a FSA. (CT, OH, RI (wills))
3.) A life estate with contingent remainder in FS to B’s heir sof the body of lineal descendants. (AK, CO, FL, GA, IL, MO, VT)
4.) A fee simple conditional (IA, OR, SC)
5.) A fee simple absolute or with limitation, i.e. a FS subject to an EL. (33 states.)

- Rule in Shelley’s Case
  - Language must contain a remainder as opposed to an executory interest.

- Doctrine of Merger
  - When two consecutive interests are vested in the same person, the smaller estate merges into the larger estate.

- What happens in a fee tail situation where there is a remainder in FSA in C and the statute converts the fee tail to a FSA... what happens to C’s remainder? Gone unless the statute provides otherwise – some statutes recognize that problem – if the fee tail is held without a remainder, converted to a FSA and the reversion is destroyed but if there is a remainder and then it’s treated like a fee simple defeasible with a definite failure of issue construction – b in fee simple, but if B’s interest... definite failure

- Caccamo v. Banning (75 A.2d 222 – Delaware 1950)
  - Facts: Potter devised real estate to his wife for life, then to his granddaughter Anna (Caccamo, remarried) in fee simple absolute, but in case she die without leaving “lawful issue of her body begotten” then to children of William Potter in FS. Anna purported to bar the fee tail pursuant to Section 3698 (1935) which converted the interest into a FSA and conveyed it back to her. She sold the land to Banning, but Banning rejected saying she couldn’t convey a marketable title, claiming she had a FS subject to an executory limitation in the children of William Potter, with a definite failure of issue. Anna brought action for specific performance, arguing that she had a FSA.

  - Holding: Judgment for Anna. In Delaware, presumption in favor of “indefinite failure of issue“ construction, unless something specifically indicates a definite. (Nothing in this will does so; “leaving” I not enough.) Anna took a fee tail with a vested remainder in the children of William Potter (rather than a FS subject to an EL in the children of WP.) Anna barred the entailment, and she could convey a marketable title.

  - Key Points:
    1.) Assumptions needed to reach court’s ruling:
      - It is possible to create a fee tail without language that says “to Ana and the heirs of her body” or some variation of that. One could create a fee tail by language other than the traditional form so long as what is said is
something tantamount to a fee tail. (Leads to indefinite failure of issue.)

- We can give this language a certain understanding and meaning and if we do give it that operative meaning, we come out with a fee tail. If we give it another meaning we come out with a FSEL and a definite failure of issue (William Potter’s children get the fee if Anna dies without issue surviving her, and do not if she doesn’t.)

- **2.) Definite failure of issue:** the gift to William Potter’s children can be eliminated if she has issue that survives her. Their interest is fully extinguished if she dies with issue. There is no automatic gift to the issue, it is just what keeps the fee in her possession. Anna could then leave it to anyone.

- **3.) Indefinite failure of issue:** the gift over to WP’s children is never eliminated. Consequences that befall the ending of a fee tail – treats the language the same as if it had said “to Anna, but whenever her line of descent comes to an end, be it at her death or any time in the future, then to the children of WP.”

- **4.) Courts favor the FSA the most, and the estate at will the least.** If the estate is not a FSA, it has to be something else, and courts look to the closest. Fee simple defeasible is a fee, an imperfect title. Retaining this presumption is strange given the typical modern hierarchy of preferred estates. A presumption in favor of the definite failure of issue construction (creating a FSD) would seem more in keeping.

- **5.)** “Die without issue” is a rule of construction, and is authority for giving indefinite failure of issue construction.

- **6.)** Barring the entailment: arises from the right of the holder of a fee tail to convey a FSA (in Delaware.) The owner simply conveys to a “straw” such as a lawyer, who then conveys it back to the original holder of the fee tail. In this way, it is converted into a FSA and the entailment is barred. Destroys remainder interest in a third party.

- **Indefinite vs. Definite Failure of Issue**
  - “To B and his heirs, but if B dies without issue, then to C and his heirs” – “die without issue” are ambiguous.
  - **Indefinite Failure of Issue**
    - Failure of issue (ie, lineal descendants) at an undefined point in time. B takes a fee tail. This construction cuts down B’s interest (from a FS) to one that will last only so long as he has lineal descendants.
Traditionally there was a presumption in favor of this construction at common law.

- **Definite Failure of Issue**
  - Failure of issue at the time of B’s death only. B takes a FS subject to an EL in C. C will take only in the even that B dies leaving no lineal descendant surviving him. (Survivorship of issue is usually required, but the condition may be satisfied by merely having a child at some point.)

- **Bibo v. Bibo** *(74 N.E.2d 08 – Illinois 1947)*
  - **Facts**: Philip and Elizabeth Bibo conveyed land to their son Max “and his bodily heirs.” Philip Bibo later died, leaving everything to his wife, Elizabeth, in his will. Later, Max died testate with no bodily heirs, leaving everything to his wife Myrtle in his will. Elizabeth (and her children) brought action against Myrtle to secure the title to the tracts. Lower court found for Elizabeth. Myrtle appeals.
    - Elizabeth argues that the deed conveyed a fee tail, with a reversion in Philip. “Max and his bodily heirs” were words of limitation. Section 6 of the Conveyance Act converted it to a life estate in Max with a contingent remainder in FS to his bodily heirs. Since Max had no bodily heirs, the remainder failed and the title reverted to Philip and passed by will to Elizabeth.
    - Myrtle argues:
      - “And bodily heirs” were words of purchase, meaning it goes to Max and a group of people who are known as bodily heirs. The estate given to Max and his bodily heirs was a FSA. Max and his bodily heirs took concurrently (by definition this cannot be because to be a “bodily heir” you have to survive, and it’s determined at death.)
      - They were words of limitation, it’s a fee tail, Philip had a reversion in FSA, and the reversion should go to Philip’s heirs at law – The will does not take over. Max would have qualified as an heir at law because he survived his father, and Myrtle succeeds Max, so gets 1/5 of the estate.
  - **Holding**: Lower court decision upheld. Elizabeth has the FSA. “And bodily heirs” were words of limitation. The estate was a fee tail, and §6 converted it into a life estate in Max with a remainder to the bodily heirs. When Max died without issue, the estate reverted to Philip, and passed by will to Elizabeth.
  - **Key Points**:
    - 1.) Statute, section 6 of Conveyance Act of 1945 (enacted 1821). Changes fee tail to a life estate in the
grantee, with a remainder to the grantee’s bodily heirs. They take a FSA (bodily heirs must be determined at death of grantee.) Statute eliminates interest in potential generations of grantee and would eliminate the remainder as well.

- 2.) Historically “and bodily heirs” is the language of a fee tail. When we see it absent something that clearly indicates a different kind of meaning or context, the assumption is that we always attribute that meaning to the language.

- 3.) Court says that you cannot say that because of §6 “and bodily heirs” are now used as words of purchase. You cannot say that a statutory provision converts them into words of purchase and gets rid of the feet ail when the statute requires a fee tail for application; you would be denying the very estate upon which the application of §6 depends.

- 4.) Most persuasive argument for Myrtle would be that these are indeed words of limitation, but that people now use this language to mean a FSA. You cannot create something new and different, and the fee tail no longer exists. You look at the closest estate, and that is a FSA.

  
  - **Facts:** in 1925 Sard Giles died testate. He devised land to his daughter Leta for life, “with remainder over to the heirs of the body of her” and if she died without issue, then the estate went to Elmo Giles “for and during his natural life with remainder over to the heirs of the body of him, the said Elmo Giles.” 1951, Elmo died leaving Elmo Jr, his only child. 1968 Elmo Jr died without issue. 1972 Leta died without issue. Devisees of Leta (P’s) brought suit against devisees of Elmo Jr. (D’s) to claim the title. Lower court found for plaintiffs. Defendants appeal.
  
  - **Arguments:** The parties agree that the devise created a life estate in Leta followed by alternate contingent remainders.
    
    - P’s argue that both remainders failed because Elmo Jr. did not survive Leta, and this was required for him to take. Therefore, the heirs of Sard Giles took the reversion by intestacy. Plaintiffs then take Leta’s ½ interest by will.
      
      - If the Rule in Shelley’s case and the Doctrine of Merger DO aply, then there are consecutive fee tails and section 6 applies to both of these. Then would come back to Sard Giles when Elmo’s issue failed.
    
    - D’s argue that survivorship was not required for Elmo Jr. to take. When Leta died without having issue, the
removal interest became possessory in the devisees of Elmo Jr.

- **Holding:** Lower court reversed. Survivorship is not required. Defendants take entire estate.

- **Majority:**
  1. Rule in Shelley’s Case and Section 6 of Conveyance Act: each applies separately to both the primary devise to LT and the alternate contingent limitation to Elmo Sr.
  2. The Rule operates on the devise to Leta by vesting the remainder to the “heirs of her body” in her. Then the Doctrine of Merger, which combines the two, creates a fee tail in Leta. Similarly, the Rule and Doctrine create a contingent remainder in fee tail in Elmo Sr.
  3. Section 6 applies to each entailment, creating a life estate in Leta and a continent remainder in FSA to the “heirs of her body.” Likewise, the contingent entailment of Elmo Sr. becomes a contingent remainder for life in Elmo Sr. and a contingent remainder in FSA to the “heirs of his body.”
  4. Survivorship of the life tenant under the first limitation (Leta) was not a condition of the first contingent remainder nor was there other indication of intent to require survivorship.
  5. There was no requirement that Elmo Sr. survive for his devisees to have taken his alternate contingent remainder in FSA.
  6. When Leta died without issue, Elmo Sr. took a life estate, his was dead so it went to his heirs, Elmo Jr., who took in FSA, and then by will went to Defendants.

- **Dissent:** Elmo Sr. never became seized of anything, so §6 does not apply to his interest. The statute does not purport to deal with contingent future seisin but only operates where a person becomes seized of a fee simple. The critical point is that the determination in whom the contingent estate vests isn’t made until the death of the life tenant. Elmo Jr. never had a vested interest to devise.

- **Key Points:**
  1. The conditions for Elmo Jr to take as written are: you have to be born, you have to survive your parent, and Leta has to die without issue. There is nothing in the language that says he had to survive Leta. Courts usually don’t find conditions unless they are expressed.

**V. LIFE ESTATES**

- **Construction**
  - A to B for life
- A to B until B dies
- A to B and then at death to C
- A to B for the life of C (*per autre vie*)
- Cole v. Steinlauf – even if it says “and assigns forever”
- Common law:
  - A to B
  - A to B forever
  - A to B in FSA

- **Characteristics**
  - Alienable
  - Not inheritable*
  - Not devisable*
    - *except for the life estate *per autre vie*
  - Primarily created by purchase (form of a deed, trust, or will)
  - Can be created by operation of law
    - Interest created by dower – and by courtesy
    - Section 6 of Illinois – FT conversion statute
  - Generally, the life tenant may use the estate in the same way as if it were a FS, except that he property must be left reasonably intact for the reversioneer (or remainderman.)
  - The life tenant must keep the property in repair, except for ordinary wear and tear, and must pay the current taxes, and any interest on mortgage.
  - Life tenant has the right to the rents and profits from his estate.
  - If the property is damages by a wrongdoer, the life tenant may recover for the injury to his life interest.

- **Restatement**
  - An estate for life is not viewed as an estate of inheritance (ie, FS or FT) and further it is an estate specifically described as to its duration in terms of the life or lives of one or more human beings. It is not terminable by an fixed or computable time. It is an estate which cannot, given its description, last longer than the life or lives of one or more human beings.

- **Life estate Per Autre Vie**
  - Today, the interest in the property between the death of B and that of C, passes to the successors of B’s estate as if it were personal property.
  - An estate per autre vie may be created with more than one measuring life.
  - Courts frown upon constructions such as “A to B for the life of B and the lives of anyone who may be ever known as a descendant of B” because it creates something that has the same impact as a FT.

- **Defeasible Life Estates**
  - A life estate may be one of special limitation (ie determinable) or subject to a condition subsequent or executory limitation.
o Prevailing rule in the US is that the lease simply at the will of the lessee creates either a determinable FS or a determinable LE, depending on the language. If the language indicates that the option to terminate can only be exercised by the lessee, and not by his heirs or assigns, a determinable LE will be created.

• **Chesnut v. Chesnut (151 A.339 – PA 1930)**
  o **Facts:** Nancy Chesnut died testate, leaving her land to her sister, Sara Jane, to have and use, but if there was any of her estate (or the proceeds) unused or not required for Sara Jane’s support, then at her death the remaining estate shall be “given, devised, and bequeathed” to Nancy’s brother, Daniel Chesnut.
  o **Holding:** Judgment for plaintiff. SJ received a life estate with the power to consume. A FS will result because of section 12 of the Wills Act of 1917, unless it appear by a devise over, or by the words of limitation or otherwise in the will, that the testator intended to devise a lesser estate. The language in the second clause does not appear to be precatory. It appear that the testatrix herself gives the unused portion to her brother, and that gift will prevail over the statutory presumption. SJ was given a life estate with power of consumption over the principal, but what was left over was to be given in to Daniel in FSA. The power of consumption did not enlarge her estate to a FSA.
  o **Key Points:**
    - 1.) Power of Consumption – allows the trustee to invade the principal and allocate it for the immediate needs of the life tenant. How much does one have to add to a LE in effect to create a FS?
      - Scope of power to sell and invade the subject matter – any limitations upon it – not always easy to interpret.
      - What constitutes an act of consumption?
    - 2.) For the estate to be a fee, it has to have potentially infinite duration, and there is no such potential in this situation. Two possible outcomes:
      - 1.) The estate is not consumed, in which case it goes to Daniel.
      - 2.) The estate is consumed, in which case it no longer exists.
    - 3.) Generally, if a will or deed specifies a remainder, a legal nothing is not intended. However, if the precedent, possessory estate(s) is not accurately defined, then the statutory presumption in favor of the FS will render the remainder void and any condition precatory.
  • **Thompson v. Baxter (119 N.W. 797 – Minnesota 1909)**
Facts: P owns the property in question, which she purchased from the former owner, but subject to all rights vested in D. The previous owner leased and demised (in writing) the premises to D for $22 per month “while he shall wish to live in Albert Lea.” P contends that D has either a tenancy at will, at sufferance, or from month-to-month, and that she has the power of termination at any time by giving proper notice. D claims a determinable LE.

Holding: D received a determinable life estate. The lease is not a tenancy at will. Its term is not indefinite within the meaning of the law on this subject, so not a tenancy at will or periodic tenancy. The tenancy is limited by the time D shall live in Albert Lea (not a tenancy at will because power of termination on in tenant.) There has been no wrongful possession (not a sufferance.) A life estate may be created by a general grant, without defining any specific interest or limitation in point of time. Making the grant subject to a condition of defeasance does not alter this analysis.

Key Points:
1.) Critique – how can you rule out a TAW or periodic tenancy based on the indefinite time argument? These estates are no more indefinite than the one supposedly created. They can all exist until death and end any time in between.
2.) A freehold estate requires a writing. An oral lease must be a TAW or periodic tenancy (also an estate for years if the period is less than the Statute of Frauds allows.)
3.) Periodic consideration is never conclusive of a periodic tenancy. If there is express reservation of a right of termination by both parties, then it’s probably a tenancy at will (ie, periodic rent does not override.)

Foley v. Gamester (170 N.E. 799 – Massachusetts 1930)

Facts: Minnie McCall signed and delivered an instrument to D where she lent the land in question “for as many years as desired” by him at a yearly rent of $300. She later gave written permission for him to erect a building and remove it “when his lease expired.” D took possession and erected a gas station. Minnie later conveyed the premises to P, and P served D notice to vacate. D tendered rent but P did not accept it. P brings action to recover possession. D claims he had a tenancy from year-to-year, and so is entitled to hold for at least a year. P contends that since the lessee can terminate at will, she has the same right.

Holding: Defendant has a tenancy-at-will properly terminated. In Mass., when a lessee is not bound for any definite period and is at liberty to terminate at any time, the
lessor is not prevented from ending the relationship. A lease at the will of one party must be terminable by both.

- **Key Points:**
  - 1.) If P were a subsequent purchaser for value without notice of D’s interest (assuming it was a freehold) he may win on the basis that the document conveying the interest was neither signed nor recorded (re: title recording acts.)
  - 2.) Statute of frauds only requires the signature of the party against whom it is being executed.
  - 3.) Court doesn’t consider a defeasible periodic tenancy, in which the tenant and the landlord have the right to terminate at the end of the period with proper notice, but the tenant also has the right to cut the estate short. For as many years a desired, units of a year.

  - **Facts:** Donovan leased a house to Gerrish “for and during the term of quiet enjoyment … Gerrish has the privilege of termination [sic] this agreement at a date of his own choice.” Fixed rent at $100 per month. The lease also reserved a right of reentry if rent were not timely paid. Donovan died, and the executor served Gerrish notice to quit at that point, but Gerrish refused. Executor brings action for eviction. P contends that the lease created a TAW because it failed to state a definite term. D contended that it was a determinable life estate.
  - **Holding:** Plaintiff had a determinable life estate, not a TAW.
  - **Key Points:**
    - 1.) Transfer of livery of seisin to create a life estate – historically before writings were acknowledged and became the principal way of creation of interest, there was a symbolic act that had great seriousness to it. Absent that kind of exchange of transfer, it could not become a freehold estate.

- **Types of Tenancies:**
  - **Tenancy (or estate) at Will**
    - Requires reservation of the right of termination to both parties
    - Indefinite and uncertain term – no predictable maximum duration
    - The right of either party to terminate by proper notice (at any time for any reason)
  - **Tenancy at Sufferance**
    - Naked possession without right
    - When a tenant wrongfully holds over after the expiration of his term
    - No notice required to terminate
**Periodic Tenancy**

- Similar to tenancy at will except that rent is fixed for a certain period (can also happen with a TAW) and timely and proper notice is required that is linked to the rental payment (i.e., one month’s notice for month-to-month)
- The fact of periodic payments of rent does not by itself make a tenancy a periodic tenancy
- State of continuous duration without a predictable maximum duration.
- If a tenant holds over and continues to pay rent, the relationship is converted into a periodic tenancy
- Non-freehold estate
- Notice
  - Written notice
  - Year-to-year – 6 month notice
  - Must give notice a full period in advance unless the tenancy is more than months
  - Can only be terminated on the anniversary of the period

**Tenancy (or estate) for Years**

- Duration for years must be certain – defined period
- Includes both its commencement and termination
  - Able to compute exactly the day, month, and year which it will end on the day the estate commences
- Self-terminating, ends automatically – no notice required

**VI. FUTURE ESTATES**

- Interest that remain in the grantor after he has conveyed away a lesser estate than the one he owns.
  - 1.) Reversion
  - 2.) Possibility of Reverter
  - 3.) Right of Reentry (Power of Termination)
- Interests that are created in a third party other than the grantor.
  - 1.) Remainder
    - Vested Remainders
      - Indefeasibly Vested
      - Vest Subject to Open
      - Vested Subject to Divestment
    - Contingent Remainders
  - 2.) Executory Interest
### Summary of Transferability

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<th>Present Interests</th>
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<th>Inheritable</th>
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<tr>
<td>Right of Reentry</td>
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</tr>
</tbody>
</table>

### Reversion

- When a person who owns an estate in land and conveys to another an estate the duration of which is less than that which the transferor owns, there is a remainder in the transferor called a reversion if the transferred estate is either a life estate or a non-freehold estate. A reversion is said to be created by operation of law.
- **Vested Reversion:**
  - 1.) Those that cannot be divested:
    - A has FSA
    - A to B and the heirs of his body (A has a reversion)
    - A to B for life (A has a reversion)
    - A to B for X years (A has a reversion)
  - 2.) Those subject to divestment:
    - A has a FSA
    - A to B for life, and if C pays B $100 before B’s death, then to C and his heirs.
      - A has a reversion which is subject to complete divestment if and when C pays B $100.
    - A to B for life, and 2 years after B’s death, to C and his heirs. O has a reversion for 2 years after C’s death. The reversion will then be divested by the executory limitation in C.
- An attempt to create a remainder in a conveyance in favor of the heirs of the grantor is ineffective under the Doctrine of
Worthier Title, and the grantor retains a reversion (unless the doctrine has been abolished.)

- **Possibility of Reverter**
  - The interest left in the transferor who conveys a FS determinable. Future interest that can become possessory only if the limitation attached to the FSD occurs.
  - Today, generally alienable, devisable, and descendible. At common law, was considering inalienable when standing alone.
  - Not subject to the common law Rule Against Perpetuities because is was always viewed as vested.
  - Cannot be a reversion because a reversion cannot remain after the conveyance of a FS, or even a FSD.
  - May be attached to or be incident to a reversion.
    - A, who has a FSA leases it to B for 10 years or for so long as intoxicating liquors are not sold on the premises. A has a reversion with a possibility of reverter as an incident thereto.

- **Right of Reentry (Power of Termination)**
  - Future interest retained by the transferor who conveys an estate subject to a condition subsequent.
  - Never takes effect automatically, even if the transferee has broken the condition.
  - To become effective:
    - The transferor must elect to exercise the R of RE
    - The transferor must do some affirmative act to terminate the estate in the transferee
  - Until the exercise of the R of RE by the transferor, the estate of the transferee continues even though the condition subsequent has been broken
  - May be incident to a reversion
    - A to B for life, provided that if liquor is sold on the premises, then I or my heirs have the right to reenter
    - A has a reversion attached to a R of RE
  - A R of RE attached to a reversion is alienable, devisable, and descendible as an incident to reversion.
  - A transferor who fails to exercise a R of RE for an unreasonably long time after the breach may be deemed to have waived the right. Other acts may also constitute a waiver of the right, such as acceptance of rent after breach of condition.
  - Courts prefer to look at language as a covenant, the breach of which is an action for damages – they feel the result of a R of RE, forfeiture, is harsh.
  - Deemed vested, so not subject to Rule Against Perpetuities.

- **Remainders**
o Future interest created in a third party, which is capable of becoming possessory immediately upon the expiration of the preceding estate.
  ▪ 1.) May only follow an estate that expires. (At common law, limited to non-freehold estates, the LE or FT. Modern usage permits such prior estate to be either a LE, FT, or an estate for years.)
  ▪ 2.) Must be capable of taking effect in possession immediately upon expiration of the preceding estate.
  ▪ 3.) Must not take effect in possession before the expiration of the preceding estate.
o May be either a fee simple, a fee tail, a life estate, or an estate for years.

- **Vested v. Contingent Remainders**
  o **Vested** – X has a vested remainder if:
    ▪ X is a person, born and ascertainable AND
    ▪ There is no condition other than the expiration of the preceding estate which must be met before X’s interest becomes possessory
  o **Contingent** – X has a contingent remainder if:
    ▪ X is unborn or unascertainable, OR
    ▪ There is a condition which must be satisfied before X may come into possession (condition precedent,) other than the expiration of the preceding estate.
  o At common law, a contingent remainder was destroyed if at the expiration of the preceding estate the contingency has not yet occurred or became impossible
  o Destructibility rule for contingent remainders has been abolished in most but not all states.
  o At common law, a vested remainderman has a right against the prior estate owner for waste. (Alone, a contingent does not.)
  o A vested remainderman has the right to compel the prior estate owner to pay taxes an interest on encumbrances to the extent of the value of the rents and profits. (Contingent does not.)

- **Kinds of Vested Remainders**
  o **Indefeasibly Vested Remainder**
    ▪ A to B for life, then to C and her heirs
      ▫ C has an indefeasibly (absolute) vested rem. in FSA
    ▪ A to B and the heirs of his body, remainder to C and her heirs
      ▫ C has an indefeasibly vested rem. in FSA
    ▪ A to B for life, C for life, D for life, E for life, F for life, G and the heirs of his body
C, D, E, and F have indefeasibly vested remainders for life, G has an indefeasibly vested remainder in FT

- **Vested Remainder Subject to Open**
  - A to B for life, then to B’s children
  - B has one child, C. C has a vested remainder subject to open. (The class opens to let in after-born children until the death of B.)

- **Vested Remainder Subject to Complete Divestment**
  - A to B for life, then to C and her heirs but if C predeceases B, then to D and his heirs.
  - C has a vested remainder subject to complete divestment (D has a contingent executory interest.)

- **Executory Interests**
  - A future interest created in favor of transferee under the Statute of Uses (1535) or the Statute of Wills (1540) in the form of a springing or shifting use which was converted to into a legal estate and which could not be construed as a remainder

- **Shifting Executory Interest**
  - Future interest created in a transferee, that in order to become possessory must, upon the occurrence or non-occurrence of a stipulated event, divest a present interest of another transferee or a vested future interest of another transferee
  - Estate shifts from one transferee to another
  - A to B in FSA, but if B becomes bankrupt then to C in FSA
  - B has a FSA subject to a shifting executory interest in C in FSA

  - The preceding estate must be divested, so it must terminate upon the happening of a condition rather than a limitation

  - Can take effect at the termination of a FS determinable or a FS conditional where that estate is recognized – exception to the general definition of a shifting executory interest because both of the estates terminate, if at all, upon the happening of a limitation, not a condition

- **Springing Executory Interest**
  - Future interest limited in favor of a transferee that in order to become possessory must divest the transferor of a retained interest after some period of time during which there is no other transferee entitled to a present interest
  - A to B and his heirs from and after the marriage of B to C
  - A has a FSA subject to a springing executory interest in B in FSA.
Elements for Creation

1.) Always in favor of a transferee, one other than the transferor
2.) Takes effect either before the expiration of the preceding estate (shifting) and therefore, in derogation of that estate or by divesting it, or after the termination of the preceding estate (springing)

An executory interest always divests a preceding vested estate either

1.) of the grantor, in which case it is a springing interest, or
2.) of another grantee, in which case it is shifting

Indestructible – out of the indestructibility of executory interest has evolved the Rule against Perpetuities

Rule in Shelley’s Case

When, in the same conveyance, an estate for life is given to a B with a remainder to B’s heirs (or heirs of the body) the rule conveys to B a life estate and then a remainder in FS or FT, and eliminates the interest in the heirs.

A to B for life, and after B’s death to the heirs of B.
   ▪ If Rule operates, life estate in B, vested remainder in B in FSA.

A to B for life, remainder to the heirs of B’s body
   ▪ If Rule operates, life estate in B, vested remainder in B in FT.

Rule of law and not of construction – applies even when the result is wholly contrary to the intention of the grantor

Doctrine of Worthier Title

Any limitation in an inter vivos conveyance of real property to the heirs of the grantor is void and the grantor has a reversion

Requires only that there be a conveyance of real property, and a limitation to the grantor’s heirs, or its equivalent

At common law, was a rule of law and not of construction. In modern law, generally became a rule of construction under which the intent of the grantor is given effect.

Doctrine of Merger

When a person has two simultaneous interest in an estate, the lesser interest collapses into the larger.

When the Rule in Shelley’s Case gives a life estate to B and a vested remainder in FSA, the D of M collapses the life estate into the FSA and gives B a present possessory estate in FSA.

The Law of Waste

Goal: to preserve the benefits of remaindermen or reversioneers.
   ▪ The owner of the possessory life estate is generally entitled to income, profits, use and enjoyment, but cannot invade, consume, or alter the substance or the
principal or corpus. Accordingly, there is a duty to both refrain from injuring the property and to reasonably prevent injury from occurring.

- This obligation to prevent waste is not absolute; the tenant is not an insurer, and the damages must be within his reasonable control (not liable if a hurricane destroys the premises. The tenant is not liable for ordinary wear and tear, and the obligation to maintain and repair is often limited by the income generated by the property. There is generally no obligation to use assets and resources outside of the property for this purpose.
- Remedies for waste include injunction, damages, and multiple damages (by statute – double damages in Melms.) Forfeiture is usually not awarded.

- Issues in Determining Waste
  - Public interest/good – concerned with the willful destruction of important resources, optimal use of them.
  - Protection of the holder of the non-possessory interest.
    - Is the condition of defeasance likely to come about? What the probability?
  - Nature and quality of the act
  - Do not want to deter productive use

- Definitions of Waste
  - Permanent injury of loss of the freehold
  - Destruction or lessening of value of the inheritance
  - Destruction of the identity of the property
  - Material change in the nature and character of the buildings, even if the value has been enhanced
  - Permanent and lasting, lessen value of inheritance, alter its identity even though it increases value, may impair evidence of title (not really a problem anymore. We now use other means to do so.)

- Meliorating Waste
  - Allows the tenant to change the course of husbandry upon the estate if such change be for the betterment of the estate
  - While such a change in a building on the premises may constitute technical waste still it will not be enjoined inequity when it clearly appears that the change will be, in effect, a meliorating change which rather improves the inheritance rather than injuring it.

- Equitable Waste
• That which a prudent man would not do to his own property
• Wanton or unconscionable waste, especially when the probability of the future estate becoming possessory is high

• **Melms v. Pabst** *(79 N.W. 738 – Wisconsin 1899)*
  o **Facts**: Melms owned the land in question, and on it a house and the adjoining real estate with a brewery on the premises. He died testate in financial difficulty. His brewery and homestead were sold and conveyed to Pabst. There was an earlier action which determined that the brewing company only had Mrs. Melms’ life estate in the homestead, and that plaintiffs were the owner of the fee. (Pabst had the brewing property in fee.) As time went on, the street around the homestead changed and became industrialized, and undesirable and unprofitable as a residence. Pabst leveled the house and cut it down to street level, so that it could be used as a business property, and largely enhanced the value (material change in the subject matter.) P’s sue for waste, seeking damages, and the court found for defendants.
  o **Holding**: Plaintiffs interests were not injured. In the absence of contract or express/implied provision to use the property for a specified purpose or to maintain unchanged, then a radical change in the surrounding conditions is an important, perhaps controlling consideration upon the question of waste. What Pabst has done does not constitute waste; depends on the substantial change in the conditions and circumstances surrounding the item in question. If there is no value in the property, it is not waste
  o **Key Points**:
    ▪ 1.) There was a change in circumstance, but Pabst was not responsible for the initial change in value itself.
    ▪ 2.) There was no damages, so the court finds no basis for awarding damages to P.
    ▪ 3.) Wisconsin’s Statute with respect to waste – double damages.
    ▪ 4.) Active waste: positive acts of destruction by a life tenant, a holder of interest less than a fee.
    ▪ 5.) Involuntary or passive waste: failure to maintain property. There is an obligation to maintain the principal in working condition, though cannot invade.
    ▪ 6.) This homestead property is an exemption of certain property of debtors from action by creditors. The exempted property can be realty or person property, but generally it’s a home.

• **Gannon v. Peterson**
Facts: Grantor dies testate, survived by widow and 9 children. He left real estate (with a bed of coal under it) to his three sons, Matthew, Peter, and Francis, and to their heirs and assigns forever. Upon the death of any of them the surviving brother or brothers shall take such share, to have and to hold the same to him or them, and if all three should die without issue, then the property goes to Joseph and Mary. Peter and Francis died intestate without issue. Matthew (appellant) is 40 and married, without children. Joseph died intestate, leaving 6 children and a widow. Matthew opened a mine on the land and leased the coal in and under to a third party to mine and remove. Matthew receives ¼ a cent of each bushel of coal mined. $50,000 worth has been removed, and $8,000 paid to Matthew. Joseph’s children filed suit, claiming that they have the FSA if Matthew dies without issue, and Matthew is hence guilty of waste b/c the coal is the principal value of the land. Circuit court found for plaintiffs, Matthew appeals.

Holding: Sons were given concurrent fee simples. Matthew has a vested, possessory defeasible fee simple. Plaintiffs’ interest is contingent, and its merely expectant upon the even of Matthew dying without issue; their interest is fragile and tenuous. “Issue” means “children,” so definite failure of issue (determined at Matthew’s death.) Except under rare circumstances, people who have a fee simple should be able to do with it what they wish, since it’s an estate that can last forever.

Key Points:

1.) Lower court appoints a receiver to oversee mining, all royalties to be paid to him (including what was already paid to Matthew) and when it is determined who has the FSA, they will get the $.
2.) Court should have classified Matthew’s interest as a FS subject to a contingent executory interest.
3.) When the language “die without issue” is present, you are confronted with the interpretation of definite vs. indefinite failure of issue.
4.) If court gave the language an indefinite failure of issue, given the IL statute, Matthew would only have a life estate and his actions would constitute waste.
5.) Court says that the three had a tenancy in common, but it is not acting like one because the other two do not have interests that last beyond their death without issue. There is a contradiction in terms – courts will always say that you can’t have a remainder following a fee simple, that there is no such thing as cross remainders following fee simple.
6.) In terms of waste, if the duration of the estate is limited, the rights should also be limited.

7.) Pro Bono Publico – for the public good – that which a prudent man wouldn’t do to his own property, when a party commits extravagant waste, wanton and unconscious abuse – might be actionable against the owner of a defeasible fee.

8.) The relative rights of the future estate and possessory estate owners is tied to the relative strength and value of their interests. Owners of a FS are usually not subject to action for waste by holders of contingent executory interests. Vested remaindermen and reversioneers do have rights with respect to holders of a LE.

- **Tenancy in Common**
  - A to B and C and their heirs, as tenants in common.
    - While it remains a concurrent interest, each may have half interest, it is not physically divided.
    - If B dies, B’s share goes to heirs, as if we’ve drawn a line down the middle.

- **Joint Tenancy**
  - A to B and C and their heirs, in joint tenancy with right of survivorship.
    - If B dies and has not devised, it all goes to C.
    - Joint tenant can SEVER by a lifetime transfer, which requires an act, and sever joint tenancy and convert it to a tenancy in common. Ether party can do this while alive. At B’s death, C benefits in no way.

- **Restraints Against Alienation**
  - Provision which forbids or penalizes the exercise of the power of alienation which ownership of the aliened interest implies. Three types: disabling, forfeiture, and promissory
  - Is the restraint enforceable or unenforceable?
    - **Disabling Restraint**
      - Provision to the effect that the estates shall not be aliened
      - Generally deemed void
      - May be valid with respect to trusts of “reasonable”
      - May be upheld if they are restricted to a small group or number of people or perhaps a race of people
      - Disfavored because they increase transaction costs
      - Allow people to control property from the grave
      - Detrimental to economic efficiency
      - Impede marketability
    - **Promissory Restraint**
      - The parties agree or promise not to do X, and if there is a breach, the non-breaching party can receive damages or injunctive relief.
- **Forfeiture Restraint (defeasible estates)**
  - May be upheld with respect to estates less than a fee simple
    - Insubstantial impact of the restraints on these interests
    - Less marketable and the land use issue doesn’t exist because of the law of waste
  - Generally not upheld on vested non-possessory estates
  - If the future interest is contingent, may be upheld
    - Strong policy argument because of the insubstantial impact of such restraint on a contingent interest
    - Why frustrate/ignore the wishes of the grantor unless there is a strong policy rationale for doing so?
  - Disabling restraint offers much greater problems than forfeiture, because in forfeiture there is always someone who can enforce it an it can be restored to the marketplace.

- **Restatement View**
  - Will allow certain kinds of restraints, even if imposed on a fee, if they are deemed to be reasonable. Factors to consider:
    - Period of time in which restraint is going to exist
    - How complete the restraint is
    - Does it distinguish between donative and those for consideration?
    - Voluntary or involuntary?

- **Mandelbaum v. McDonnell (Michigan)**
  - **Facts**: McDonnell dies testate, leaving his wife a defeasible life estate in the premises with remainder to his 3 sons, a grandson, an adopted daughter, and a goddaughter. Executors instructed that the premises “shall remain unsold until Francis shall be 25 yrs, or until 21 years from the date thereof, in case of his death, and not then to be sold in case my wife is still living and that she remains my widow, and until after her death... that it shall not be competent for any of my devisees hereinbefore names to either dispose of, alienate, mortgage, barter, pledge, etc., any portion of the real estate or any of the proceeds thereof... before the same shall be actually paid by my executors to such devisees.” All beneficiaries except grandson consent by signing. Within the restriction, all beneficiaries sold interest to Mandelbaum. He has sole title to the premises if the devisees an the widow had that ability to convey despite the restrictions.
  - **Holding**: Judgment for plaintiff, restrictions were not valid. The widow received a life estate so long as she remained...
unmarried. Devisees received vested remainders in FSA. Devisees have just as much right to sell the interest devised as if there had been no intervening life estate.

- **Key Points:**
  - 1.) Grantor concerned with the ability of kids and wife to benefit and manage the estates they receive.
  - 2.) Two kinds of restraints – one upon the executory and one upon the devisees themselves so that they cannot sell it; they cannot transfer the interest prior to possession (payment by executor.)
  - 3.) Issue before the court – concerned with the validity of a disabling restraint which lasts no longer than the time in which the interests which have been restrained are non-possessor.
  - 4.) If the restraint had been imposed upon a contingent interest in a circumstance upon which the restraint could not last longer than the time upon which the interest could be deemed to be a contingent interest, outcome may have been different.
    - Contingent interest are so uncertain, depressing marketability, so the impact would NOT be substantial.
  - 5.) Court wants to discourage removal of largest estate (FSA) from the marketplace – courts generally forbid direct restraints when imposed on a fee simple.
    - Notion that the world ought to belong to the living.
    - If you restrict alienability, notion that land is not going to be developed and used for highest uses to which it can be put.
  - 6.) Commitment to marketability; rule within the context in which it is applied. Surely we ought not to assume every time the criteria for the rule and its application occur, we apply it regardless of its consequences. If applying the rule does not promote the policy, we should be worried about the application of the rule in those circumstances.

- **Conger v. Lowe**
  - **Facts:** Lewis Conger dies testate, and conveyed a LE to his wife, and a remainder for life to his son Samuel, with the condition that he live on and occupy the land. At Sam’s death or refusal to live on/occupy, the estate went in FSA to the lawful heirs of Samuel. At testator’s death, Sam had four children living, others born since. Widow died, and Sam took possession. He later conveyed the land by warranty deed to Lowe. Sam’s children bring suit to reclaim title.
    - P Arguments: Sam’s kids had a vested title, and they became entitled to possession when their father
conveyed the farm. “Heirs” means “children” so the Rule in Shelley’s case does not apply, the children had a vested remainder in FSA (subject to open?)

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1. D Arguments: Sam took a fee within the rule in Shelley’s case, and the condition is void because you cannot restrict a fee like that. “Heirs” is the legal definition, so the Rule applies. The fee vested in Sam.

   - Holding: Sam had a life estate, and the children had a vested remainder in FSA, and a contingent executory interest in Sam’s defeasible life estate. “Heirs” meant children, so the Rule does not apply. Upon the testator’s death the remainder in fee vested in the children then living, and was subject to open to let in after-born children.

   - Key Points:
     1. Restraints on alienation are legal on possessory life estates, though not on fee simples.
     2. Condition of defeasance is illogical if “heirs” means the legal definition, because you cannot have those while alive, so it must mean children for the condition to have meaning.
     3. To restrain alienation there must be a vested remainder or reversionary interest, and there was a valid one in Sam’s children.
     4. POLICY – notion that we like things that are marketable and alienable, and this preference for thing for which there are no impediments is something that animates and underlies so much of what courts do by way of decision making.
     5. Alienability promotes the development of the land, and we do not wish to curtail that directly, but the owner of a life estate is not in the position to develop it because it constitutes waste.
     6. Two factors that affect marketability:
        a. the duration of the period of non-possession; the longer it is, the more marketability is depressed.
        b. Introduction of an uncertainty, a contingency

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2. Mountain Brow v. Toscano. (California)

   - Facts: Toscano’s donated a lodge, containing a habendum in the deed: the property was restricted for the use and benefit of the second party only, and if not used or or in the event of sale or transfer, it shall revert to the Toscanos, their successors, heirs, or assigns.

   - Holding: The condition which prohibits alienation is an absolute restraint against alienation and is void. The portion relating to use created a FSCS with a reversion in the
grantors if the lands ceased to be used for the lodge or similar purposes.

- **Key Points:**
  - 1.) Majority sees this a restriction upon the manner of use, and so is enforceable.
  - 2.) Dissent feels that like things ought to be treated alike, and the restriction stipulating sue by the grantee is a direct restraint.

### VII. MARITAL ESTATES

- **Life Estates at Common Law**
  - **Estate by the Marital Right**
    - Common law – the husband had, by right of marriage, a life estate in all lands of which his wife was seised of a freehold estate (of inheritance or for life) at any time during the marriage and prior to birth of issue. This entitled the husband to the use and occupation of the land, as well as the rents and profits, free from any claim of the wife. Husband could convey without her consent, and land was liable to execution for his debts (but the purchaser retained an estate that could not outlast he marriage.)
    - The estate continued until the marriage was dissolved by death or divorce, or until issue was born alive of the marriage.
    - 19th Century – legislation abolished the husband’s estate by the marital right, and the statutes generally gave to married women the same property rights as if they were unmarried subject in some jurisdictions to the husband’s estate by the curtesy consummate or to the requirement that the husband must join in a conveyance of the wife’s lands to make the transfer fully effective.
  - **Tenancy by the Curtesy**
    - Common law – a life estate to which the husband was entitled in all lands of which his wife was seised in fee simple or in fee tail at any time during the marriage provided there was issue born alive capable of inheriting the estate.
    - On the birth of such issue the husband’s tenancy by the marital right was enlarged to an estate for his own life which he held “by curtesy of the law of England.”
    - The husband’s estate for his life was called curtesy initiate prior to his wife’s death and curtesy consummate after her death – he had a present life estate in both situations and there was no substantial difference between the two.
    - Now, there are statutes in most states allowing the surviving spouse, whether it be the husband or wife,
to waive the provisions of the will of the deceased spouse and take a specified share of the decedent’s estate (usually a third) instead of curtesy or dower.

- **Dower**
  - Common law – a widow was entitled on the death of her husband to a life estate in one-third of the lands of which he had been seised at any time during the marriage of an estate in FS or FT, provided that the estate was one capable of being inherited by issue of the marriage. Neither conveyance nor creditor claim could defeat her right to dower.
  - *Inchoate Dower* – during the husband’s lifetime the wife had a protected expectancy.
  - *Dower Consummated* – on the husband’s death, the widow was entitled to have assigned or set-off to her the specified lands to be held in dower – when the dower had become consummated, her statutes was the same as any other life tenant.
  - Wife not entitled to lands in which husband had a reversion or a remainder; did not attach to equitable interests, nor to trustee titles.
  - 20th Century – common-law dower had become of diminished importance and was abolished in a large majority of states, and statutes frequently gave to the widow a fractional share in FS in the realty owned by the husband at his death.
  - In most situations, dower and curtesy are treated as derivative and the interest of the surviving spouse cannot outlast the basic estate from which is derived.

- **Homestead Rights**
  - Sometimes established by a constitution or by statute, is intended to protect certain property from the claims of creditors and from alienation by the owner without spousal consent. Purpose is to assure the home for the family both during the lifetime of the holder and that of the surviving spouse.

**VIII. CONCURRENT ESTATES**

- **Common Law**
  - **Joint Tenancy**
    - To A and B not as tenants in common, but joint tenants with right of survivorship
    - Upon the death of one or more tenants, the number of co-owners is reduced by one, and the ownership of the survivors increased proportionately.
    - Four unitities: time, interest, title, and possession – lack of any of these created a tenancy in common
    - If one joint tenant conveys his interest to a third party, the latter acquires an tenancy in common –
such a conveyance severs the joint tenancy by removing the unities of time and title

- **Tenants in Entirety**
  - To H and W, husband and wife.
  - To H and W, and the survivor.
  - To H and W as tenants by the entirety.
  - Concurrent estate that can exist only between husband and wife. Right of survivorship and four unities, but not severable. Neither could separately convey interest nor subject it to claims by creditors.
  - Today, where the tenancy by the entirety exists, any of the three concurrent estates can be created in a husband and wife, depending on the expressed intention by the conveyor.
  - A divorce converts this into either a joint tenancy or tenancy in common.

- **Tenancy in Common**
  - To A and B.
  - To A and B as tenants in common.
  - No right of survivorship.
  - Interest of a tenant is freely alienable inter vivos, and if not conveyed inter vivos, passes at death to devisees or heirs.
  - Unity of possession only unity required.
  - Modern statutes create a preference for this type of tenancy, so that unless the intention to create a joint tenancy is properly expressed, a tenancy in common will result.

- **Community Property**
  - 8 States (AZ, CA, ID, LA, NV, NM, TX, WA) follow a system of marital property called Community Property.
  - Starts with the theory that property acquired during marriage results from the joint efforts of husband and wife, which entitles each to equal ownership, and such equal ownership is to be recognized immediately when the property comes into the marriage.
  - At the death of a spouse, ½ of the community property, passes to the surviving spouse.

**IX. LANDLORD AND TENANT**

- **Leaseholds**
  - Elements:
    - 1.) An estate in the tenant
    - 2.) A reversion in the landlord
    - 3.) Exclusive possession and control of the land in the tenant
    - 4.) Generally, a contract between the parties
  - Privity of estate arises whenever 1, 2, and 3, are present. Privity of contract requires just that.
- Lease is both a conveyance of real property interests and a contract – there has been a shift away from property and toward contract.
- Licenses, easements, and profits a prendre involve use of land instead of possessions (roadways, utility lines, removal of minerals)

### Several Tenancies

#### Estate for Years
- Term of the tenancy must have a definite and specific ending time or date
- May be created subject to special limitation, right of reentry for condition broken or executory limitation
- An ineffective creation of an E fo Y (such as in violation of Statute of Frauds) usually results in a tenancy at will, subsequent events, such as payment of rent may transform it into a periodic tenancy
- Contracts will reveal:
  - 1.) privity of estate, the tenant being an owner of an estate for years with a reversion in the landlord
  - 2.) privity of contract, by which each party to the lease undertakes personal obligations arising out of promises set forth in the lease

#### Periodic Tenancies
- Indefinite, “seamless” term, being year-to-year, month-to-month, week-to-week – not a series of successively repeating periods
- Common law – year-to-year terminable by either party by giving six months notice; others can be terminated by either party giving the other notice to terminate equal to one term
- Landlord’s interest is a reversion – possible but uncommon to be subject to a possibility of revert, a right of reentry, or executory limitation

#### Tenancy at Will
- Possession at the will of both tenant and lessor – can be terminated by either party without notice – landlord’s interest is a reversion
- Taking possession with the consent of the owner in fee, there being no agreement as to term or rent, and no pattern of rental payments, creates a tenancy terminable at the will of either party

#### Tenancy at Sufferance
- Naked possession without right
- Commonly created by entering into possession rightly and retaining possession wrongfully

### Statutory Modifications

#### Statute of Frauds (1677)
• Effect was to require the transfer of all interest in land (other than those by act and operation of law) to be in WRITING except leases “not exceeding the term of three years from the making thereof”

• Evolution of Landlord-Tenant Relations
  o Implied Covenant of Quiet Enjoyment
    ▪ Landlord covenants to refrain from physical interference with tenant’s possession
    ▪ Tenant covenants to pay rent
    ▪ Covenants are mutually dependent – all others independent of obligation to pay rent
  o Constructive Eviction
    ▪ Landlord does not physically interfere with possession (actual eviction) – however, the premises are made uninhabitable by action of the landlord (constructive eviction)
    ▪ If there is an express covenant of habitability, the tenant can either sue for damages, or vacate and cease rent payment
    ▪ Vacating is the remedy for constructive eviction
  o Implied Covenant of Habitability
    ▪ Landlord is obligated to tenant in a positive, affirmative way to maintain premises
    ▪ All lease covenants are mutually dependent
    ▪ Remedies additional to constructive eviction became available

• AH Fetting v. City of NY (Maryland 1930s)
  o Facts: Plaintiffs rented to defendant for five years, payable in equal monthly installments. The lease contained covenants to vacate at end of term, and to become liable to lessors for all loss or damage which lessors might suffer through a loss of sale or lease by reason of tenant’s failure to leave. Before expiration, discussed new lease, but could not agree. Tenant requested to stay for a month or two, but lessor would not agree to less than six months. Tenant did not vacate, but stayed for an extra month. Tenant sent a check for the equivalent of a monthly installment, lessors declined except as payment for another year of rent. Finally, agreed that the payment did not prejudice either side. Lessor does attempt to re-let. Lessors brought action to recover rent for remainder of the year.
  o Holding: For the plaintiff; the landlord is entitled to the rent for the year.
  o Key Points:
    ▪ 1.) Surrender – when tenant terminates and landlord accepts – formal relinquishing of someone who has a possessory interest to someone who has a non-possessory interest.
2.) 2 Issues:
   - focuses on the requisites absent any other covenant that speaks to the holding over – what are the prerequisites for forming a new tenancy?
   - When a covenant that speaks for a holdover is present, what is its effect?
3.) Landlord has a unilateral right to force upon a tenant a new tenancy, and can do so even though the tenant is silent, says no, or if the tenant makes it clear the tenant has a new lease elsewhere.
   - Most court will say this is a duty implied by law
4.) Confidence in leaseholds – to protect tenants in general – to protect the next tenant so that he can know that he will be able to take his lease – deterrent to wrongfully holding over.
5.) Most courts will say that a holdover results in a periodic tenancy, ongoing until and if properly terminated – majority look to the previous duration at the previous rent – landlord just has to elect to hold the tenant.
6.) When we’re talking about a principle that rests upon so-called agreement, some mutual notion of understanding between landlord and tenant, the underpinning of the lease of a successive lease under the English rule requires areement, but the moment we begin to restrict the meaning people can give to their own actions, we begin to wonder about whether we are left with a principle that requires agreement at all.
7.) Provision in the lease is an expression of that which would already exist, even if there was silence – provision given something landlord would otherwise have.
8.) Difficult to say that an expression of a right that the landlord would already have was intended as something in lieu of something the landlord would already have.

- **English Rule**
  - All leases must result from agreement – for a landlord and tenant to make a lease at the outset, they must agree – for certain kinds of interest you have to have them in writing – there has to be a manifestation of agreement as between landlord and tenant
- **American Rule - Unilateral**
  - There has to be a basis for agreement, either expressed or implied, result from the acts of the parties
- Implied: tenant holds over, offers rent, landlord accepts, process continues

- **Commonwealth Building Co. v. Hirschfield (Illinois)**
  - **Facts:** Tenants did not hold over for very long, only a few hours, and the landlord elects to treat the tenant as a tenant under a new lease for a year. There was an extra provision in the contract that discussed what to do in a holdover, that double rent would be charged for the time stayed.
  - **Holding:** Landlord cannot hold tenant to a new lease. If you add something so significant as a double-rent provision, it is assumed that it is a substitute for other recourse, the opportunity to bind tenant to a new term.
  - **Key Points:**
    - 1.) English or American Rule? Under which rule must you discuss both double rent and intent?
      - English – dicta – Under the English rule we do not have to discuss the double-rent provision.
      - American – holding – in the absence of intent to establish a new lease, even with the double-rent provision, there is nothing to prevent the parties to enter into something else. It is absolutely essential for the court to find that the parties did not intend to lease for another year.

- **Herter v. Mullen (New York)**
  - **Facts:** Tenant held over because of sickness out of control of tenant.
  - **Key Points:**
    - 1.) If an act of God forces a tenant to hold over, they should not be held to a new tenancy.
    - 2.) When there’s an obligation implied and imposed by law and performance becomes impossible not because the part upon whom the obligation is imposed is at fault, the law will not impose it.
    - 3.) If parties choose to displace the burden to one party, and that obligation is formable at the time the agreement is signed, and this becomes impossible because of an act of God and the party seeking to enforce the obligation is not at fault, the court will be obliged to enforce unless there is something else that impliedly suspends it.

- **Mason v. Wierengo’s Estate (Michigan)**
  - **Facts:** Tenant moving out of leasehold, not a residence, and died, and the estate held over. Landlord seeks rent.
  - **Holding:** Landlord is able to recover rent.
  - **Key Points:**
    - 1.) Moving could have continued regardless of the death. Not a true impossibility