PROPERTY OUTLINE - BECKER

ESTATES
- Interest in land that is or may become possessory and is measured by some period of time. One does not own a piece of land but rather he owns an estate in land.
- **Land held tenurially** – if person dies intestate, land escheats to state in which land is located.
  - Theory of tenurial escheat – if tenant dies without heirs, escheat takes place by reversion (*In Re O'Connor*).
- **Land owned allodially** – if there is no tenure (as in some states) and person dies without heirs, land escheats to state as an intestate successor. Escheat still results, but the land passes forward so inheritance taxes still apply.

**Present (Possessory) Estates**
- **Freehold Estates** (has *seisin*) - holds a (1) freehold estate, and has (2) possession of the land or a tenant holds possession from him)
  i) **Fee Simple Absolute** – an estate that has the potential of enduring forever, i.e. absolute ownership; no limits on its inheritability; can’t be divested.
  1. **Future Estate** – None
  2. **Language Creating**
     a) To “A and his heirs”
     b) To “A, his heirs and assigns”
     c) To “A”
        - Common law – “and his heirs” were necessary to create FSA by deed. Otherwise, it was presumed to be a LE. More relaxed about wills – would sometimes say it was okay to just have to A in FSA.
        - Modern law – deed or will is presumed to pass the largest estate the grantor or testator owned.
  3. **Duration** – Unlimited
  4. **Transferability** – by deed, will or intestacy
- **Words of Purchase** – words in a conveyance which describe and identify the person or persons who take the estate.
- **WHO TAKES**
  - **Words of Limitation** – words which describe or limit the estate which is transferred. **HOW MUCH**
    - “To A and his heirs” – “A” is a word of purchase; “and his heirs” are words of purchase which describe the estate conveyed.
  - **Heirs** – those persons who succeed to the real property under the state of intestate succession
    - **Spouse** – if decedent leaves no blood kin, spouse will succeed title.
    - **Ancestors** – if decedent leaves no kin or spouse, parents take.
  - **Uniform Probate Code**
    i) Share of spouse – takes $\frac{1}{2}$, other $\frac{1}{2}$ goes to children, if none, to parents, if none to spouse.
    ii) Share of issue (children, grandchildren, and all further descendents)
      - Children – if decedent leaves a spouse and children, spouse takes $\frac{1}{2}$ and children divide $\frac{1}{2}$. If no spouse, children take all in equal shares.
      - Per stirpes distribution: if child predeceases parent, leaving issue, the issue represent the child and take the child's portion.
      - Grandchildren: don't take if parent is alive. Only share under principle of representation.
      - Adopted children – treated as child of adoptive parent.
      - Illegitimate children – inherit as a child of mother, and if paternity is established, as a child of father.
      - Stepchildren – don't take.
    iii) Parents’ share – if decedent leaves issue, parents don't take. If leaves spouse and no children, spouse takes $\frac{1}{2}$ and parents take $\frac{1}{2}$. If no spouse and no issue, parents take all.
    iv) Devises and legatees – if decedent leaves will, the persons who are devised land are called devises. Persons who are bequeathed personal property are called legatees. Both take under will.
- **Restrictions**
  - Easements, restrictive covenants, mortgages, licenses, profit a pendré, first rights of refusal—these aren’t carving out estates, just interests.
  - **Deferable Fee** – an estate that ends either because there are no more heirs of the person to whom it is granted or because a special limitation, condition subsequent, or executory limitation takes effect before the line of heirs runs out.
    1. **Fee Simple Determinable** – an estate that will automatically end and revert to the grantor if some specified event occurs.
       a) Future Estate – Possibility of Reverter
(b) Language Creating – language of duration (so long as, until, during that time) and will specifically
develop for automatic termination upon the happening of the stated contingency and revesting in the
grantor. That language is called language of special limitation.
(i) “To A so long as the premises are not used for commercial purposes, and if so used the estate will
terminate and automatically revest in the grantor and his heirs.”
(c) Duration – potentially infinite, so long as event does not occur.
(d) Transferability – by deed, will or intestacy
   o any estate can be made determinable.

(2) Fee Simple on Condition Subsequent – an estate subject to the grantor’s power to end the estate if some
specified event occurs.
   (a) Future Estate – Right of Reentry, or Power of Termination
   (b) Language Creating – language of condition (on condition that, provided that) and will expressly provide
for a right of reentry upon breach of that condition.
   (i) “To A on condition that the premises are not used for commercial purposes, but if the premises are
ever used for such purposes the grantor or his heirs shall have the right to reenter and take
possession.
   (c) Duration – potentially infinite, so long as the condition is not breached, and, thereafter, until the holder of
the right of reentry timely exercises the power of termination.
   (d) Transferability – by deed, will, or intestacy

(3) Fee Simple Subject to an Executory Limitation – an estate subject to divestment in favor of someone other
than the grantor if a specified event occurs.
   (a) Future Estate – Executory Interest
   (b) Duration – potentially infinite, so long as stated contingency does not occur
   (c) Transferability – by deed, will, or intestacy

   o Note: The existence of a POR or POT detracts substantially from the marketability of the estate. So, a number of
statutes limit the life of the POR or POT to a stated number of years. Other statutes provide for the disregarding
of any condition that has an unsubstantial impact.

iii) Fee Tail – an estate that is inheritable only by specified descendants of the original grantee, and that endures until
its current holder dies without issue; mostly obsolete. Was created in 1285 in the Statute De Donis.
(1) Future Interest – Reversion in conveyor, his heirs or devisees, or remainder in a grantee or devisee other
than the taker of the fee tail
(2) Language Creating – words of inheritance and words of procreation
   (a) To “A and the heirs of his body”
   (b) To “A and the heirs of his body, remainder to B”
(3) Duration – for the life of the first taker (commonly called “tenant”) in tail and thereafter through succeeding
generations so long as there are any living lineal descendants of the first tenant in tail.
(4) Transferability – by deed, but the transferee acquired an estate which would end at the transferor’s death in
favor of the latter’s bodily heirs. Descent limited to heirs of body. Not devisable by will.
(5) Can be limited to male or females or can be general or special.
   o Largely obsolete in the US today.
(1) Most commonly, what would have been a fee tail is converted into a fee simple in the first grantee or devisee
named in the deed or will. Some of these states also provide that any remainder purportedly created to
follow the fee tail shall be construed as an executory interest in fee simple to become possessory if the first
taker dies without lineal descendents.
(2) Other states change what would have been a fee tail into a life estate in the first grantee or devisee named in
the will or deed, with a remainder in fee simple absolute to the lineal descendents of the first taker.
(3) Third kind provides that first taker shall acquire a fee tail and that the lineal descendents of the first taker
shall acquire a fee simple estate.
(4) Four states recognize the fee tail substantially as it existed except that a tenant in tail has the power to
convey an estate in FSA by an ordinary deed of conveyance and thereby “bar the entail” and all future
interest limited to take effect upon termination of the fee tail by “failure of issue.”
   o Definite failure of issue – “if A dies w/o issue” can mean if A has no issue surviving him at his death. The definite
time being A’s death. Substitute gift eliminated if A dies with issue.
   o Indefinite failure of issue – when A and all descendents are dead. Substitute gift is never extinguished. Favored
at common law.
iv) **Life Estate** – an estate held only for the duration of a specified person’s life, usually the possessor’s; most life estates are beneficial interests under trusts, the corpus being personal property, not real property.

(1) Future Interest – **Reversion** in grantor, his heirs, or devisees, or remainder in grantee or devisee other than the life tenant

(2) **Language Creating**
   a) To A for life
   b) To A for and during his natural life
   c) To A until he dies
   d) To A for the life of B
   e) Also created by operation of law – see marital estates.

(3) **Duration** – For the life or lives of the person or persons indicated by the conveyor as the measuring life or lives. Usually the estate will be created for the life of the transferee. (An estate in one person for the life of another is a life estate pur auro vie.)

(4) **Transferability** – By deed only. An estate pur autre vie held by the decedent at the time of his death will in most states pass by will or intestacy of the life tenant.

   o Note: Life estates can be made defeasible. Also be aware of the conflict between the interest of a life tenant and those awaiting possession – questions of maintenance, payment of taxes, exploitation of mineral, and other use of the property which may increase the value of the current possessor’s estate at the expense of the future estate. (See waste.)

b) **Non-Freehold Estates** (possession, i.e. lease)
   i) **Term of Years** – tenancy whose duration is known in years.
   ii) **Periodic** – tenancy that automatically continues for successive periods unless terminated at the end of a period by notice. Periodic consideration never conclusive of PT.
   iii) **At Will** – tenancy in which the tenant holds possession with the landlord’s consent but without fixed terms.
   iv) **At Sufferance** – tenancy in which a person takes lawful possession of the property but then wrongfully remains as a holdover after his interest is terminated.

II) **Future Estates**
   o Future estates are only future only in the sense that they will become possessory in the future. Someone who owns a future estate owns the interest in land now. Whenever a person has a present possessory estate that is less than a FSA, somebody else must have a future interest.

   o **Hints**
     o Classify the present estate
     o Look at who has the future interest (if it’s the grantor, 3 choices)
     o Think about how the future interest will become possessory
     o Determine whether the interest is vested or contingent
     o If contingent, apply the following rules
       i) Destructibility of CR
       ii) RSC
       iii) Doctrine of Worthier Title
       iv) RAP

   a) **Reversion**
      i) Created when a grantor who holds a FSA conveys to someone else a lesser estate. They can also be created by grantors who hold less than a FSA.
      ii) Reversions are freely transferable by will, deed, and intestate succession.
      iii) One can have a reversion even though it isn’t certain ever to become possessory.

   b) **Possibility of Reverter**
      i) Interest that is created in a grantor who conveys a fee simple determinable.
      ii) Subject to a condition precedent in that it can become possessory only upon the happening of the condition that terminates the prior possessory estate.
      iii) Generally held to be devisable and descendible. The modern view is usually to hold them alienable inter vivos as well, although there are still a few states that follow the common law which didn’t allow this.
      iv) In those states where statutes limit the time during which fee simple estates can be made determinable, the POR is extinguished upon the expiration of the time period.

   c) **Right of Reentry (Power of Termination)**
i) Right or power in grantor to take certain action which will terminate a possessory estate which the grantor has previously conveyed. This is only reserved for the grantor or his successors and can't be created in any other person. It's created by a conveyance which transfers a possessory estate on a condition subsequent.

ii) Words of reentry or their equivalent should always be included for the sake of clarity.

iii) Generally held to be devisable and descendible, but at common law weren't transferable inter vivos except by release to the holder of the possessory estate. Many statutes today make R/R transferable inter vivos.

iv) In those states where statutes limit the time during which fee simple estates can be made subject to condition subsequent, the R/R is extinguished upon the expiration of the time period.

d  Remainders

   o Future interest created in someone other than a transferor which, according to the terms of its creation, will become a present estate (if ever) immediately upon and no sooner than the expiration of all prior estates created simultaneously with it.

      i) Requirements

         (1) Must be created at the same time as, and by the same instrument that creates, the prior estate or estates.

         (2) May never follow a fee simple defeasible. Must either follow nonfreehold estates or life estates.

         (3) Must not have the capacity to cut short the prior estate. Must take in possession only upon the natural termination of the prior estate.

         (4) There must be no built in time gap between the termination of the prior estate and the remainder's taking of possession.

      ii) Remainders can be for life, in fee tail, or for a term of years, and can be made defeasible.

      iii) Unless a succession of remainders ends with a remainder in FSA, the conveyor will have retained a future interest (reversion, POR, or R/R).

      iv) Distinction between vested and contingent remainders.

         (1) Vested remainders aren't destructible. Contingent remainders were at common law and a few states follow this view.

         (2) CR may not be alienable inter vivos in a few states. All VR are fully alienable.

         (3) CR are subject to the Rule Against Perpetuities; VR (unless to a class of persons) are not.

   o CONTINGENT REMAINDERS

      i) The taker of the remainder is unascertainable; or

      ii) The remainder is subject to an unfulfilled condition precedent.

      iii) The death of the life tenant of the prior estate is not considered a condition precedent—otherwise every remainder would be contingent.

      iv) So long as the remainder is contingent, the grantor retains a reversion. Reversion persists until the condition is satisfied.

      v) Unless a CR is so limited that it will terminate on or before the death of the remainderman, it is devisable and descendible. They are alienable inter vivos in all but a few states. Don't forget that the successor takes the CR exactly how it was—it is still contingent and it will fail if the condition is not fulfilled.

      o Alternative Contingent Remainder – express condition precedent for both possible takers and this leaves reversion in the grantor. (To A for life, remainder to such of A’s children as survive A, and if none survive A then to the children of B.)

      o Destructibility of CR – At common law, a CR must vest on or before the termination of the preceding estate; if it doesn't, it's destroyed. This rule was consistent with a negative attitude toward CR. The rule was not applied where the CR was in the form of a beneficial interest under a trust.

         (a) Forfeiture

         (b) Merger

      o Also at common law, rule against springing interests and shifting interests.

   o VESTED REMAINDERS

      i) Ascertained taker

      ii) That taker is ready, so long as his or her estate continues, to take possession whenever and however the preceding estate ends.

      iii) No condition precedent.

      o Indefeasibly Vested Remainders – B (or B's successors) are absolutely assured of receiving the land when A dies. There’s no risk that B’s share will be reduced fractionally or lost totally. Certain to become possessory.

         (a) To A for life, remainder to B.
- **Remainders Vested Subject to Complete Defeasance** – may come to an end prematurely; involves a condition subsequent (to be distinguished from the condition precedent in CR)
  - **To A for life, remainder to B, provided, however, if B dies under the age of 25, then to C.** In this example, B has a fee simple subject to an executory interest because if he dies under 25, the estate will go to C—this is a condition of defeasance or a condition subsequent. The estate may be cut off even after it becomes a possessory estate upon A’s death, if B is still under 25. However, if B turns 25 while A is still alive, the condition has been met, and B’s interest will become indefeasibly vested. C’s interest is an executory interest because it will take effect by cutting short B’s vested remainder if B dies under 25 while A is still living.

- **Difference between condition subsequent and condition precedent**
  - **To A for life, and if B survives A, remainder to B.**
    - (a) This is a condition precedent—therefore CR.
    - (b) Destructible and subject to RAP.
    - (c) If this read to A for life, and if B survives A, remainder to B, but if B fails to survive A, then to C:
      - (i) Then the interests would be alternative contingent remainders.
  - **To A for life, remainder to B, but if B dies in A’s lifetime, then to C.**
    - (a) This is a condition subsequent—therefore vested subject to complete defeasance.
    - (b) Not destructible, not subject to RAP.

- **Construction**
  - (a) Mechanically, if the conditional language comes in a later clause than the language granting the remainder itself, it will likely be a condition subsequent. In general, the clause begins with something like “but if.”
  - (b) If the conditional language comes before the language creating the remainder, or if it appears to be part of the description of the taker, it will likely be said to be a condition precedent.
  - (c) When there is doubt, the courts express preference for a vested construction.

- **Remainders Vested Subject to Open (or to partial defeasance)** - Remainder given to a class of persons that is capable of increasing in membership.
  - **To A for life, remainder to A’s children.**
    - It is assumed that A can have children until A’s death.
    - If one of the children dies before A, the interest does not fail, but will be passed on by will or intestacy unless the child has transferred it by deed.
    - The class closes at the time the interest becomes possessory.

- **Other considerations**
  - All VR are alienable, devisable, and descendible.
  - If the interest is transferred, it will still be subject to open or subject to complete defeasance.

- **EXECUTORY INTERESTS** – any future interest created in a 3rd party which is not a remainder because it fails to comply with one or more of the 4 rules for remainders. They take effect by “springing” into possession or “shifting” from one person to another. Generally take effect by divesting (cutting off prematurely) the preceding estate. Every interest that take effect in someone other than the grantor, and does so by way of divesting a prior vested estate, is an executory interest.
  - One exception – there is one type of executory interest that does not divest a prior estate – those given after a fee simple defeasible.
  - These interests must take effect in someone other than the grantor and must do so by way of automatically divesting either a possessory estate or a vested future estate, and only executory interests can operate in this way.
  - Can be limited to create future interests other than those in FSA.
  - Most EI are contingent.

1) **Shifting executory interest** – divests an estate in someone other than the conveyor.
2) **Springing executory interest** – divests a possessory estate in the conveyor or his successors.

- Can also divest future estates.
  - **To A for life, then to B if she attains 21.**
    - B’s interest would be destroyed if destructibility doctrine were the rule. If not at A’s death, if B is not 21, the grantor’s reversion becomes possessory subject to defeasance and B has an executory interest. This is because it will take effect by divesting the grantor’s reversion rather than at the expiration of the life estate.
RULE IN SHELLEY’S CASE
To A for life, remainder to the heirs of A.
To A for life, remainder to the heirs of the body of A.
  ○ Held that the language “remainder to the heirs of A” described, not an interest to be taken by A’s heirs, but a remainder in fee simple to be taken by the purchaser A personally. Thus heirs of A would get the land, if at all, not from the grantor as purchasers under a CR, but by descent or inheritance from A. The words seemingly describing an interest in the heirs of A were considered not words of purchase, but words of limitation, defining A’s second estate as a remainder in FSA.
  ○ Became an absolute rule, not just a rule of construction.
  ○ Under RSC, a gift “to A for life, remainder to the heirs of A” would create:
    1) a life estate in A
    2) a vested remainder in A in FSA
       ○ the two successive estates would then merge, leaving with A a present FSA. If the language describing the remainder was to the heirs of the body of A, A’s future estate would be a remainder in fee tail, which again (by merger) would leave A with an estate in fee tail.
  ○ In order for it to apply:
    1) There must have been an estate of freehold in the ancestor (e.g. “To A for life”)
    2) There must have been a remainder in the heirs or the heirs of the body of the ancestor (e.g. “To A for life, remainder to the heirs (or heirs of the body) of A”)
    3) The estates must have been created in the same gift or conveyance.
    4) The interests to the heir and the ancestor must have been either both legal or both equitable (in trust).
    5) The grantor must have used the word “heirs” in the technical sense—that is, to refer to those who would take A’s land upon A’s death by intestate succession. If the grantor really meant children or issue, RSC would not operate.
  ○ Since RSC plainly contradicts the grantor’s intent, it’s mostly abolished today. But the legislation is not retroactive, so RSC still applicable to old deeds or will executed before the statutes were adopted.

DOCTRINE OF WORTHIER TITLE
To A for life, remainder to the heirs of the grantor.
To A for life, then to my heirs.
  ○ Similar to RSC. But not the same, since it concerns a conveyance by the landowner to his or her own heirs, not the heirs of the grantee life tenant.
  ○ Applied to an inter vivos transfer and holds that the seeming remainder in favor of the heirs of the grantor is a nullity. This leaves the grantor with a reversion which will become possessory at the termination of the life estate.
  ○ Relevant today only with respect to deeds. Frustrates intention—nullifies an interest which the grantor plainly intended to create—a remainder contingent until the grantor’s death.
  ○ Usually regarded as a rule of construction, so impact has been tempered somewhat. So if court finds that grantor really intended to create a remainder in his heirs and not a reversion, the Doctrine is overcome.

RULE AGAINST PERPETUITIES
No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.
  ○ It’s a compromise – want to give latitude to landowners to carve a fee simple into successive estates one or more of which is contingent but also tries to assure that land will be alienable and not tied up in families or removed from the stream of commerce for unreasonable periods.
  ○ To my wife for life and then to such of my lineal descendents as are alive 100 years after the date of my wife’s death.
  ○ Wife has part of the fee (life estate). At termination of LE, donor will have right to possession by way of a reversion which will last for 100 years. But this can be cut short by the executory interest in favor of certain persons whose identity remains unknown for life of wife and 100 years afterward. So removed from market for very long time.
  ○ RAP addresses whether this should be allowed. Same problem as with fee tail – RSC takes care of it there and destructibility doctrine does much of same thing.
  ○ But executory interests are indestructible, but courts want to maintain alienability.
  ○ Interests covered by the rule
    ○ Contingent remainders, executory interests (because most are contingent), class gifts even if technically vested because they’re subject to open, and options and rights of first refusal to buy land.
    ○ Not applicable to reversions, nor to vested remainders even if they are subject to complete defeasance.
Remoteness of vesting
- Doesn’t require that all future interests become possessory within the period, just that all interests be certain to vest or fail to vest within the period.
- If it’s possible at the time of the creation of the contingent future interest, under any imaginable set of facts, that the future interest will neither vest or fail within the stated period, it’s void.

Life in being
- If we can find anyone within whose life, or within 21 years after whose life, the future interest is certain to vest or fail, then the future interest is valid; otherwise it’s void.
- Only persons who we can be certain are already born at the time of the conveyance can be used as measuring lives.

Effect of a violation
- Only the void future interest itself is regarded as deleted, along with any language which becomes nonsensical when the future interest is removed. The rest of the conveyance is then taken at face value and enforced.
- Executory interests which have no time limit on their vesting are absolutely void.
- This is the common law rule. Some states have adopted a “wait-and-see” approach under which the court doesn’t declare the interest void from the beginning but waits to see whether the interest does in fact vest within the prescribed limit. Other states have adopted wait-and-see approach in Uniform Statutory Rule Against Perpetuities which validates an unvested future interest if it actually vests or terminates within 90 years after the effective date of the instrument creating it. After expiration of 90 year period, court can reform CI that violate RAP in order to best effectuate the intention.

DIRECT RESTRAINTS ON ALIENATION
- High priority on freedom of alienation—owners of land should, in general, be able to transfer land without regard to limitations imposed by their predecessors.
- At the same time, any division of FSA into present and future estates has a practical effect on the alienability of the land involved. So, a cost must be paid for this type of indirect restraint. Direct restraints are another matter.

I) Disabling Restraints – one that purports to make transfer of the land literally impossible. These are almost always held to be void where imposed on fee estate or life estate.
To A and her heirs, but A shall have no power to transfer said estate without the grantor’s prior consent, and any attempted transfer shall be ineffective.

II) Forfeiture – grantor seeks to create an estate in the grantee which either automatically terminates upon an attempt to alienate or which is subject to a POT held by the grantor in such event. VOID when imposed on a fee estate. But where it is limited in time or scope (for a term of years or a transfer to a small number of people), one can find authority for upholding it. Sometimes held to be valid when imposed on a life estate. Valid on leasehold estates.
To A and her heirs, but if A attempts to transfer said estate without the prior consent of the grantor, it shall immediately revert to the grantor.

III) Promissory – grantor seeks to create a contractual promise by a grantee not to convey an interest in land which the grantee is receiving. Upheld in same ways as forfeiture restraint.
To A and her heirs, but A covenants for herself, her heirs and assigns that no transfer of said estate shall be made without the grantor’s prior consent.
- Spendthrift trust – provision of a trust that prohibits the beneficiary from transferring the beneficial interest in the trust voluntarily, and also prevents the beneficiary's creditors from attaching or executing on it. Upheld in most states.

- Restraints on FS
  i. Total restraint: upon a FS is void.
  ii. Partial restraint: one that purports to restrict the power to transfer to specific persons or by a specific method or until a specific time. Mainly held void, but some exceptions:
     1. **reasonable restraints doctrine**: partial restraints are valid if reasonable. Restraint must have a reasonable purpose and be limited in duration.
  iii. Cotenants: agreements by tenants in common or joint tenants that they will not partition the property is valid if reasonable in purpose and limited in time.
  iv. **Restraint on use**: almost always been upheld.
  v. **Racial restraints**: restraints prohibiting the transfer or use of the property to or by a person of a specified racial, religious or ethnic group are not enforceable.

- Restraints on a LE
  i. Restriction on a LE may add little practical inalienability because it’s not marketable since the life tenant may die at any time. Disabling restraints have been struck down, but forfeiture and promissory restraints have often been upheld.

- Rules for when direct forfeiture restraints are enforceable
i. Direct forfeiture restraints enforceable if by its terms it cannot last longer than the time in which the interest restrained is both nonpossessor and subject to an independent uncertainty (separate from the uncertainty caused by the forfeiture restraint).

ii. Direct forfeiture restraints enforceable during time in which interest restrained is both nonpossessor and subject to independent uncertainty.

iii. In both can focus either on nonpossession or independent uncertainty.

iv. Restatement says enforceable where reasonable. Insufficient impact is one of factors to consider.

v. Direct forfeiture restraints enforceable if by its terms it can’t last longer than the time in which the interest restrained is unmarketable and is therefore insubstantial. Problem with this is that you’d constantly need more information to determine whether the interest was insubstantial.

PROTECTIONS ON FUTURE INTERESTS – WASTE

- Law of waste operates to restrict a possessor in her use if her possessory estate is limited (less than FSA). Involve a determination of the extent to which the holder of a future estate may protect the value of that estate by limiting the diminution in value which the owner of the possessory freehold (LE, FT, DefF) may cause.

- Waste – unreasonable use of the property by the owner of the possessory estate which reduces the value of a future estate.

- Nature of the future estate has a bearing on both the extent of user considered to be reasonable and the remedy which the holder of the future estate may pursue in the event of actual or threatened waste.

  - **Life tenant** – entitled to the use of property ultimately to be enjoyed by the reversioner or remainderman, provided the use does not unreasonably reduce the value of the future estate. (investment example: LT entitled to income, but no right to encroach upon the principle.)
    - **Voluntary waste** – committing acts which will decrease the value of the future estate
    - **Permissive waste** – permitting the property as a whole to decrease in value for want of regular repairs and maintenance that a reasonable person would do.
    - Not liable for ordinary wear and tear and won’t have to repair things destroyed by natural forces.
    - If use of land is for timber, mining, etc, LT can use it for that – but can only continue use for that manner if that’s how it was already being used—open mines policy.

  - **Owner of fee simple** – broader privileges because interest may last forever. But there are some limitations on actions because may not last forever.
    - Chargeable for waste only in limited circumstances: conduct must be unconscionable and there must be a reasonable probability that the future interest will become a present interest.
    - Doubtful that damages should be awarded before it is clear the future estate will become possessory. Possible damages include those for injuries, under various statutory provision people can get multiple damages, or maybe an injunction.

- Meliorating waste – person does something that’s a benefit to the inheritance.

MARITAL ESTATES

I) At common law, provided for surviving spouses out of the land in which a deceased spouse was seised of an estate of inheritance at any time during the marriage. Surviving spouse was given a life estate in such lands, or part of them.

- **Dower** – the widow’s life estate; consisted of 1/3 of such lands provided the husband’s estate was inheritable by the wife’s issue and provided the wife had not released her dower during the marriage. Only entitled to lands in which husband had present estate, but didn’t matter if possessory. It’s a derivative estate—not capable of enduring longer than the husband’s estate.
  1. **Inchoate** – partially competed – what she had during husband’s life; could not be defeated by inter vivos conveyance by husband without wife’s consent or by husband’s will or by sale to satisfy creditors’ claims. Could be barred by nuptial agreements.
  2. **Consummate** – what she got if she survived her husband

- **Curtesy**
  1. During marriage, husband had right to all wife’s land. Women didn’t have complete control over land until 16th and 17th centuries.
  2. When a child of the marriage was born, husband then had **curtesy initiate** – protected expectancy which could not be defeated or diminished by the wife’s attempt to transfer. It was a present estate for his life, defeasible if he should die first, and it gave him sole possession, use and income.
  3. **Curtesy consummate** – what he got if he outlived her – in all the lands.

II) Modern modifications
Dower and curtesy mostly abolished by law. In states where still exists, confined to lands owned by deceased spouse at death.

Intestate share comes to surviving spouse as absolute ownership rather than life estate.

Spouse given right to claim a share if not in will.

**Augmented share** – Uniform Probate Code – surviving spouse has right to elective share of 1/3 value of augmented estate.

Can take against the will or take elective share.

**HOMESTEAD RIGHTS**

- Sometimes created by state constitution and sometimes by statute.
- To protect certain property from the claims of various creditors and from alienation by the owner without the consent of his or her spouse. To assure a home for the family both during the lifetime of the owner and for the lifetime of the surviving spouse.
- Common factors: Usually required that the owner have a family. Homestead shall consist of dwelling and the land upon which it is situated. Homestead rights are usually limited to stated value or area or both.
- Upon death of owner, rights continue until the death of surviving spouse. Upon death, spouse’s interest can not be defeated by decedent’s will, but they may be able to choose whether to take under homestead rights or will. Subject to these rights, homestead property passes by will or descent like other property.

**CONCURRENT ESTATES**

I) Common Law Concurrent Estates

- **Joint Tenancy** – To A and B, not as tenants in common, but as joint tenants with right of survivorship.
  1. Principle characteristic is right of survivorship – upon the death of one of 2 or more joint tenants, ownership of the survivors is increased proportionately. The last survivor owns the whole.
  2. Four unities (not followed as strictly now)
     a. Unity of time – interests arise at same time
     b. Unity of title – interests acquired by same instrument
     c. Unity of interest – tenants acquire identical interests
     d. Unity of possession – common right of possession and enjoyment
     e. Lack of any of these resulted in tenancy in common.
  3. One important remnant of 4 unities is rule that if one JT conveys his interest to a 3rd party, the latter acquires an interest as tenant in common with the remaining JT who continue as JT among themselves. So, that is a severance – that serves to destroy right of survivorship between old JT and new JT.
  4. Interests freely alienable inter vivos. May be terminated without notice to or consent of the other tenants.
  5. Each has right to possess the whole, subject to the same right of the others. The undivided interests can be partitioned – physical division of the land into separately owned parts. However, transferor can use language to restrain this right if reasonable and limited to period of perpetuities.
  6. Now, courts prefer tenancy in common. If want to create JT, must be expressly done with mention of right of survivorship.
  7. Sole owner can’t convey to himself and another person to create JT—would usually result in tenancy in common. So, use straw man.
  8. JT can be created in personal property.

- **Tenancy by the Entirety** – To H and W, husband and wife; To H and W, husband and wife, as tenant by entirety.
  1. Can only exist between husband and wife.
  2. At common law, needed 4 unities, but was not severable.
  3. Before, inequality between rights of husbands and wives (disability of coverture). Today, this has been abrogated.
  4. Before, any conveyance to husband and wife created tenancy by the entirety. Now, can create any of the 3.
  5. If there’s a divorce, converted into either joint tenancy or tenancy in common.

- **Tenancy in Common** – To A and B; To A and B as tenants in common.
  1. No right of survivorship.
  2. Freely alienable inter vivos and if not conveyed during lifetime, passes at death to devisees or heirs.
  3. Only unity of possession is required.
  4. Tenant in common is owner of undivided fractional part of the whole.
  5. Preference for tenancy in common, so unless intention to create JT is properly expressed, tenancy in common will result.
COMMUNITY PROPERTY
- System of marital property exists in 8 states (AZ, CA, ID, LA, NV, NM, TX, WA), known as community property.
- In these states it's a substitute for the common law marital property system of other states. Originates from European civil law institution.
- Underlying community property is the philosophical premise that husband and wife are equals. Together they form something of a partnership. Each can own individual property known as separate, but other property is community.
- Separate property – or individual property; free from claims of other spouse; acquired before marriage; acquired by gift, devise, bequest, or inheritance even during marriage is also separate.
- Community property – marital property in Uniform Marital Property Act; acquisitions after marriage that are donative or lucrative; product of husband-wife team.
- When one spouse dies, other gets ½ of that spouses community property interest; the other ½, the deceased spouse can devise.
- Uniform Marital Property Act largely adopts these principles.

LANDLORD AND TENANT – Leaseholds
- Leaseholds are classified on the basis of
  1. expressed intention of the parties respecting the identity of the tenancy or its duration or terminability
  2. agreement of the parties concerning periodic payments of rent OR
  3. acts of the parties, such as by a tenant’s merely taking possession of land with consent of the owner.
- Leasehold estate does not arise upon proper execution of a deed, but only when lessee takes possession under his lease.
- Leaseholds distinguished from other relationships—every leasehold has following elements:
  1. estate in the tenant
  2. reversion in the landlord
  3. exclusive possession and control of the land in the tenant
  4. generally, a contract between the parties

I) Term for Years
- Duration—for a fixed time in units of one year or multiples or divisions thereof. The term may be subject to POR, R/R, or executory limitation.
- Creation—by agreement (lease, oral or written, subject to the requirements of the applicable statute of frauds).
- Landlord's ownership is subject to the outstanding term for years and is described as a reversion.
- Termination—by expiration of the stated period, by happening of stated limitation or contingency if such occurs within the specified term, by surrender of the unexpired portion (conveyance by tenant to landlord of the tenant's interest), by release (conveyance by landlord to tenant of the landlord's interest), by condemnation, by expiration of landlord's estate, or by certain other circumstances.

II) Periodic Tenancy
- Duration—indefinite, not a series of successively repeating periods. Either party may terminate only by notice to the other given a certain time in advance of successively repeating points in time. Possible, but uncommon, for it to be subject to POR, R/R, or executory limitation.
- Creation—by agreement (express terms of oral or written lease), by landlord giving possession to tenant for an indefinite or unspecified period of time with agreement that rent will be paid, by a tenant’s remaining in possession with consent of the landlord subsequent to termination of a prior tenancy (holdover), by tenant's taking under void lease, but making periodic rental payments.
- Termination—notice given by landlord or tenant prior to the end of the current period if the tenancy is year to year. For periodic tenancies in which the period is less than one year, notice is required a full period prior to the end of the current period. So continues until terminated by proper notice.
- Landlord’s interest is called reversion or ownership subject to an outstanding periodic tenancy.

III) Tenancy at Will
- Duration—only so long as both the landlord and tenant refrain from taking any action inconsistent with its continuation.
- Creation—by agreement, by the taking of possession with the consent of the owner without more, by entry into possession under a void lease prior to making periodic rental payments.
- Termination—at common law, by either party without formal notice of termination, but if landlord does it tenant gets reasonable time to vacate. Or if landlord conveys.

IV) Tenancy at Sufferance
- Duration—until demand for possession by landlord or until landlord elects to have a tenancy other than tenancy at sufferance.
- Creation—by one entering into possession rightfully and retaining possession wrongfully, a holdover tenant.
Termination—no tenancy to terminate; landlord is usually given 2 alternatives:
1. May consider the tenant as holding under a new tenancy for an additional period of time; OR
2. As a wrongdoer from whom possession can be recovered immediately.

To be distinguished from:
- Licenses and Easements—involve use of land, rather than possession; common examples include roadways and utility lines.
- Profits a prendre—rights to remove a substance, such as sand or minerals, from another’s land.
- Mortgagee in Possession—holder of a mortgage on land who, under certain circumstances, is allowed to go into and to remain in possession of the mortgaged land. Not leasehold.

Contract Purchaser in Possession—purchaser under an installment sale contract who is still paying on the purchase price, and therefore has not received a title deed, but who is allowed to hold possession while performing the contract. Not leasehold.

V) Statutory Modifications
- Statute of Frauds—must be in writing unless for term less than 3 years; many states have this for all terms over 1 year.
- Statutory definitions of TAW and TAS—some state statutes outline different definitions for these tenancies.
- Uniform Residential Landlord and Tenant Act

- Implied Covenant of Quiet Enjoyment
  Landlord covenants to refrain from physical interference with tenant’s possession (i.e. a covenant against actual eviction).
  Tenant covenants (i.e. agrees) to pay rent.
  These covenants are mutually dependent. However, all others are independent of the obligation to pay rent.

- 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, then tenant can either (1) sue for damages or (2) vacate premises and cease paying rent.
  Option (2) is the remedy of constructive eviction.

- Housing Codes
  Landlord and tenant obligated to meet standards for the public good. Violation involves payment of fines, etc. to government bodies.
  Enacted in latter 19th century—existed in almost every major urban area.

- Implied Covenant of Habitability (Lemle, Javins)
  Landlord is obligated to tenant in a positive, affirmative way to maintain premises.
  All lease covenants mutually dependent.
  Therefore, remedies additional to constructive eviction became available, e.g., rent abatement, etc.

ESCHEAT

In Re O’Connor (NE 1934)—OC died without heirs, estate escheated to state, county wants inheritance tax.

Holding: escheat not subject to inheritance tax because it is a reversion.
- Escheat—lapsing or reverting to the state an estate, but reason of failure of persons legally entitled to hold the same. Had the court followed the allodial theory, inheritance tax would have applied.
- Ownership is actually only a tenure from the state. Upon termination of this tenancy, property reverts to estate. The remainder of an estate for years can be transferred, with taxes. Escheat does not apply where person dies testate.
- After escheat, the state assumes all obligations and benefits of ownership.
- Inheritance tax applies when there is a creation of a new interest at death.

HYPOTHETICALS—Note: All transfers inter vivos unless otherwise specified.
1) O’C (IV transfer) → B in FSA
   Estate in B not created at or by death of O’C. Therefore, no tax.
2) O’C (will or devise) → B in FSA
   Estate in B created at death of O’C. Tax applies.
3) O’C (inheritance) → O’C₁ in FSA
Estate in O'C created by law at death of O'C. Tax applies.

4) O'C → B for life, C for life, D for life
   Estates in B, C, D created simultaneously during O'C's lifetime. No tax.
   Possession changes hands at death of B, C, D, but nothing new is created. No tax.

5) O'C → B for life, C for life, E in FSA
   E (devise) → E1 in FSA
   Estates in B, C, D, E created during life of O'C. No tax.
   Estate in E1 created at death of E. Tax applies.

6) O'C → B for life, B's heirs (B1 and B2) in FSA
   B1 (inheritance) → T in FSA
   B2 (devise) → T in FSA
   Estates in B, B1, B2 created during life of O'C. No tax. (Note: avoids tax when B1 and B2 take and same
   operational consequence as “to B in FSA”)
   Estates in T created at deaths of B1, B2. Tax applies.

6a) O'C → O'C for life, O'C's heirs
    O'C1 in FSA
    Tax would apply by statute in most states because so similar to taking by inheritance.

7) O'C → B in FSA, but if B dies without descendants, then to C in FSA
   Estates in B, C created during the life of O'C. No tax.
   a) B dies with descendants, but wills to C.
      New estate in C created at death of B. Tax applies.
   b) B dies without descendants, but wills to C.
      Estate in C created by O'C becomes possessory. No tax despite the will.

8) O'C → B for life, C for life, D for life (reversion in FSA to grantor)
   O'C (will) → O'C1 in FSA
   Estates in B, C, D created during life of O'C. No tax.
   Estate in O'C1 created at death of O'C. Tax applies (even if nonpossessory)

9) O'C → B for 50 years, C in FSA
   Estates in B, C created during life of O'C. No tax.
   What if B dies in 25 years, and wills the remainder to C?
   o New estate in C (in addition to FSA) created at death of B. Tax applies.
   o What if B dies in 25 years intestate with no heirs? Then it escheats to the state for 25 years (not to
     O'C or successors in interest).

10) O'C → B for life, C in FSA
    a) C → C1 for life (of who?)
       a. If for life of B, effective transfer. No tax applies.
       b) B → C2 in FSA
          a. Ineffective transfer, B cannot transfer an estate larger than a life estate.

11) O'C (revocable for life) → B for life, C for life, D in FSA
    Tax would apply by statute in most states because so similar to taking by will.

12) O'C → B for life, C in FSA
    a) B has General Power of Appointment to B's children (B may devise to any of B's children.)
    b) B has Specific Power of Appointment to B's children (B may devise to specific child or children of B)
       Tax would apply (to estates created in B's children) by statute in most states because so similar to taking by
       will.

MARKETABILITY/LANGUAGE

Cole v. Steinlauf (CT 1957) — Cole contracted to purchase real estate from Δ on the condition that Δ convey title free of defects.
Attorney who examined title discovered that the deed in which Δ was grantee ran to grantee and assigns forever—no mention of
and heirs. Holding: under common law, a deed must use the words "and heirs" to create a FSA. If the words are omitted, can
fix, but need parties involved to prove intent. Also, question here isn't whether defect can be fixed but whether it raises
reasonable doubt.

Terms:
   o Eminent domain — private property shall not be taken without compensation
   o Enabling power — public use and proper compensation
Zoning – form of regulation of property, as to what land can be used for
Police power – fundamental government power to legislate for the public good
Constructive taking – if court concludes a taking, an exercise of eminent domain
Quitclaim deed – promise to convey all that vendor has; buyer beware
Warranty deed – must obligate grantor to warrant and defend grantee’s title against all lawful claims unless special and limited

Notes:
Obligation of vendor to give marketable title – one that is free and clear of all defects and encumbrances. Time is allowed for attorney to search title and time is given to vendor to cure the defects.

Johnson v. Whiton (NE 1893)—will said “after the decease of all my children, I give, devise, and bequeath to my granddaughter, SAW, and her heirs on her father’s side, one third part of my estate, both real and personal, and to my other grandchildren and their heirs respectively the remainder, to be divided in equal parts between them.” Issues are (1) do words of limitation as expressed in phrase “heirs on her father’s side” signify a qualified fee on the grantee, and therefore an inability to convey a fee simple? (2) does the phrase limit the estate to something less than FS by signifying words of purchase? Holding: this is an issue of alienability, not a question of descent. Words of limitation. A new kind of estate CANNOT be created. SAW has FSA. So, no qualified fee, estate not limited to something less than FS.
RW should have written remainder to heirs on her father’s side.

DEFEASIBLE ESTATES/WORDS OF LIMITATION
Collette v. Town of Charlotte (VT 1946)—LS conveyed to Δ a quitclaim deed which provided that said land was “to be used for school purposes, but when said Town fails to use it for school purposes it shall revert to LS, his heirs, and assigns, but Town shall have the right to remove all buildings located thereon. Town shall not have the right to use the premises for other than school purposes.” Later, LS deed to the town was conveyed to Collette by warranty deed. The land was used for school purposes until June 1936, then for storage until June 1944, when the town sold the school. Issues are whether POR or R/R can be transferred/conveyed inter vivos to another party. Holding: POR and R/R are alienable inter vivos. So, when land failed to be used for school purposes, it reverted to Δ. Said this was a FS determinable.
Notes:
Language of special limitation was missing in this case, but expression of the consequence was there.
Remember: issues of alienability and destructibility.

Chouteau v. City of St. Louis (MO 1932)—on November 1823, Δ acknowledged deed conveying land to appointed justices to be “used and appropriated forever” for courthouse. Courthouse was built and used by county until 1876 when county was switched. Stopped being used as courthouse in 1930. Δ says it was defeasible fee, Δ says FSA. Issues are (1) are words of limitation necessary in a deed to qualify a defeasible estate? (2) does a declaration stating that property will be used for certain purpose still qualify deed as a FS? Holding: words of limitation are needed and it’s still a FS. To create an estate on CS, need express provision for R/R. There were no words of limitation – this was just declaration of how land should be used.
Notes:
Need words of special limitation. Language of special limitation suffices to create a determinable fee.
For FSCS, need express provision for R/R. Otherwise the language will probably be viewed as precatory.
Courts do look at intention of the grantor when there can be no other reasonable construction as to the intent of the deed. For example, decreased purchase price to indicate lesser estate.
Courts don’t like forfeitures, prefer FSCS.
If said this were a covenant, still probably wouldn’t matter because of substantial compliance. (Ritenour)

Board of Education v. Miles (NY 1965)—In 1854, John Townsend to the trustees of Walton Academy recorded a fee simple determinable on the condition that said building and lot would be used for the purposes of an Academy. It was used for that purpose until 1962, at which point defendant declared their possession of the property in fee simple absolute. Δ appeal from verdict declaring them barred from all right, title or interest in the property under Section 345—say it’s unconstitutional. It was a retroactive statute that barred maturation of the POR before the breach. Holding: section 345 unconstitutional in its retroactive sense here because it purports to bar the remedy before the right to enforce it has occurred. The statute assumes many people won’t record and the interests will be extinguished thereby converting many into FSA. So, noncompliance promotes the purpose. Says it’s to prevent fraud, but not what it does.
Notes:
Promoting alienability and marketability is a legitimate use of the police power. This is the goal of the recording acts and marketability acts this court mentions. So is protection against fraud.
Marketability Acts – (IA, 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 period of time then the burden shifts to any potential claimants to come forward on notice of sale to record their claim. If they fail to do so within a certain time, their interests are extinguished. These have been upheld as constitutional.

Title Recording Acts – can prevent fraud if they are obeyed; however, if not obeyed, simply spread the costs of the fraudulent sale. Their primary purpose is to promote marketability by lessening the risk of purchasing real property. The usual common law rule is first in time is first in right whether recorded or not. Short term leaseholds are usually not within the scope. Consistently upheld as constitutional.

1. Pure Race – first one to get to the courthouse and record is the owner
   - Statute that goads people into recording so we know what exists
   - Promote marketability – best achieved if everyone records
   - Allocate the fraud, but don't really prevent it

2. Pure Notice – protect bona fide purchasers for value and without notice. Do this by allowing any previous purchasers to protect their interest and give notice to subsequent purchasers by recording their deeds. Recording is not required, but if they fail to do so their interest can be extinguished. So cost of fraud allocated to those who do not record.

3. Race-Notice – most common; operate as a pure race statute but also require that subsequent purchaser record first.

**Hiddleston v. NE Jewish Education Society (NE 1971)**-- In 1891, plaintiff's predecessors conveyed by warranty deed an acre of land to trustees of School District #60, under the condition that "...this deed is to become null and void as soon as the land ceases to be used as school property." The land was used for such purposes until 1968, at which point it was sold as surplus to the highest bidder. Plaintiff alleged that the land was conveyed in fee simple determinable, that the defendant's interest was terminated under the broken condition, and that a statute providing for retroactive invalidity of possibilities of reverter more than thirty years in duration was unconstitutional. Defendants demur, arguing that the Averys simply set forth the purpose of the conveyance without limiting the estate conveyed. Plaintiffs appeal from an order of dismissal. Issue is whether a retroactive statute providing for the invalidity of POR is unconstitutional. **Holding:** court says constitutional. Constitutionality depends on reasonableness, the nature of the right, and extent of modification of the right.

**Notes:**
- Statutes justified under police power if:
  - Legitimate purpose
  - Reasonable and appropriate means
  - Deference to legislative purpose
- Compared to Miles: Miles the means are less appropriate because discriminates against those who know of the act.

**FEE TAIL**

**Bibo v. Bibo (IL 1947)**-- Philip Bibo executed two deeds conveying tracts in 1921 with the following language: “Convey and warrant to Max S. Bibo and his bodily heirs...” Philip Bibo died testate in 1928, with four sons, including Max, and a daughter as his only heirs at law. Max inherits lands, and died in 1944, who bodily heirs, but leaving a wife, Myrtle. Philip's wife, Elizabeth (P) argument:

1. Entitled to possessory FSA; others have nothing.
2. “Max” as words of purchase, “and his bodily heirs” as words of limitation created a fee tail.
3. Philip retained a reversion not eliminated by § 6 b/c of a contingent remainder
   a. if there was a reversion, estate went from Philip to Elizabeth.
   b. ILL. Statute § 6: a fee tail creates a life estate in devisee, and FSA in contingent remainder.
4. Max died w/o any bodily heirs; life estate is over, reversion to Philip.

Myrtle’s (D) argument:

1. Two contentions
   a. entitled to 1/5 by reversion as sole beneficiary of her husband
   b. full title in fee even w/o bodily heirs
2. Agrees w/everything except:
   a. since a reversion was not part of the will, goes to his heirs at law, and thus Max is entitled to 1/5 of the estate
   b. OR “and his bodily heirs” are words of purchase
      1) thus, “Max and his bodily heirs” are together
      2) if consecutive, reversion to Elizabeth
      3) if concurrent, both take at the same time
Max did not have bodily heirs, so immediate possessory interest is void. Since there were no heirs, Max took in FSA from the beginning.

Issues are whether (1) words “and the heirs of his body” are considered words of purchase (2) if the grantee of a FT has no bodily heirs at death, does estate revert back to original owner? **Holding:** they are words of purchase and it does revert.

**Notes:**
- If would have been words of limitation, result would have been for Myrtle.
- Did this because estates tail mostly abolished, so create LE.
- Whenever lesser estate is created, owner always has a reversion.

Caccamo v. Banning (DE 1950)-- Potter devised certain real estate to his wife for life and upon her death to Caccamo (P), providing that if P "should die without leaving lawful issue of her body begotten," the property should go to other named devisees in fee simple. P, by local statute, tried to disentail her interest by purporting to convey a FS by deed to a third party, and then having it deeded back to her. She then sold the land at auction to Banning (D) for $2,025. D paid P $405, then refused to pay the balance arguing that P could not deliver title in fee simple. P sues to recover the balance due. Issue is whether a grantee of FT can disentail the interest by transferring the property to a straw man in FS and then getting it back. **Holding:** holder of FT can disentail under statute.

**FEE TAIL AND RULE IN SHELLEY’S CASE**

**Evans v. Giles** (IL 1980)-- Sard Giles creates a will which devised the land to his daughter, Leta Timmons, for life, “with remainder over to the heirs of her body, and if there are no heirs, devise and bequeath to Elmo S. Giles for and during his natural life with remainder over to the heirs of his body.” Leta Timmons dies having had no children, but prior to her death, both Elmo Giles and Elmo Giles Jr. die leaving no heirs.

**Arguments:**
- The parties agree that the devise created a life estate in Leta Timmons followed by alternate contingent remainders.
- Plaintiffs argued that both remainders failed because Elmo Jr. did not survive LT, and this was required for the interest to be transmissible at death; therefore, the heirs of Sard Giles took reversion by intestacy. Plaintiffs took LT’s ½ of the interest by will.
- Defendants argued that survivorship was not required for Elmo Jr. to devise contingent remainder. Therefore, when LT died without having had children, the remainder interest became possessory in the devisees of Elmo Jr. Circuit court found for plaintiffs, holding that survival of LT by Elmo Jr. was necessary for defendants to take entire interest. Therefore, the heirs took reversion by intestacy and plaintiffs took ½ interest. Defendants are appealing.

**Issues:** (1) if 2 CR are created in a will, is there a condition precedent to vesting of the alternative remainder that both alternate devisee and alternate remainderman survive the failure of the first CR in order to take? **Holding:** no survivorship needed.

**Notes:**
- **Doctrine of Merger** – can act independent RSC. If a person owns two consecutive interests, they merge. Doesn’t apply where there is an intercedent 3rd party LE.
- **RSC** – makes “remainder to the heirs of A” words of limitation (instead of words of purchase), gives A remainder in FS (or FT)—see conditions above.
  - Example: A to B, remainder to the heirs of B
    - Gives B a FS and remainder in FS; DM makes B have FSA.
  - DM often operates after RSC to merge smaller interest into larger interest, as long as there is no intervening estate.

**LIFE ESTATES/NON-FREEHOLD ESTATES**

**Chestnut v. Chestnut** (PA 1930)-- Nancy Chestnut, in her will, bequeathed to Sarah Chestnut all of her estate. In the second paragraph of the will, it is written that, “Should there be any of my estate remaining...the unused proceeds not required for the support of my said sister at her death shall be bequeathed to Daniel Chestnut...” Sarah Chestnut dies, and her assigns bring suit. Trial court finds Sarah Chestnut possessed a fee simple absolute. D appeals. Issue is whether language following a clause granting a FS describing the intent of a testator can limit the FS. **Holding:** the language can limit it. Even though there is language to create a FSA, the language in rest of will indicated intent to convey lesser estate. Even though power of consumption usually not given to LT, court finds SC had LE.

**Notes:**
- Normally power to consume won’t elevate LE to FS. Important issues include:
  - Scope of power to consume
  - What constitutes consumption
How much does one have to add to LE to make it FS

**Thompson v. Baxter** (MN 1909)—plaintiff leased and demised the premises to defendant with the following stipulation: “to have and to hold the premises to the tenant his assigns for and during the full term of while he shall live in Albert Lea.” π argues that it created either TAW, TAS or T from month to month. **Holding:** determinable LE.

**Notes:**
- Freehold estates require a writing.

**Foley v. Gamester** (MA 1930)—McCall leases land to defendant “for as many years as desired by the party of the second part.” When this conveyance was made, the defendant was not in default in any of the terms of the written instrument. Defendant was given two written notices to vacate. Defendant contends that he was entitled to hold “for at least a year.” Plaintiff contends that as the lessee could terminate the tenancy at his will, he was a tenant at will. **Holding:** tenancy at will. In MA, when tenant has right to terminate at any time lessor is not prevented from terminating either. Lease at will of one party must be terminable by both.

**Hypotheticals**

1) by written agreement, A to B.
   - FSA, possible LE. No basis of determining a period. Possible TAW.
2) no specific agreement or writing. A says to B you can use the land.
   - No FSA, LE, or FT, but a TAW
3) A to B at X dollars per year
   - Periodic tenancy from year to year
   - **BUT,** if in writing, a possible FSA. Periodic rental doesn’t prevent a freehold
4) A to B at X dollars a year, with power to terminate at any time/reason
   - TAW, not periodic, b/c both have power to terminate.
5) not in writing, to B in consideration of B’s promise to pay to A 1/5 of the gross proceeds from all sales generated from property
   - not in writing, so NO FREEHOLD. TAW, b/c no referable point in time
   - quarterly payment of proceeds could be a periodic tenancy
6) A to B for years, so long as either can terminate at any time (in writing)
   - TAW
7) A to B, so long as neither A nor B terminates, which they can do at any time
   - defeasible freehold, TAW
8) A to B, so long as premises are used to produce alcoholic beverages, in writing
   - defeasible freehold
9) A to , so long as b practices law, in writing
   - determinable LE, ends at B’s death (can’t practice law)
10) A to B, so long as B desires, in writing
    - periodic tenancy defeasible, TAW, defeasible LE
11) A to B, so long as B desires, in monthly payments
    - defeasible LE, defeasible periodic tenancy, TAW

**Garner v. Gerrish** (NY 1985)—Donovan leased a house to Gerrish (D) for rent of $100 per month. The lease was to continue until D terminated the agreement at a date of his own choice. D moved in and lived there for over four years when Donovan died. Garner (P), Donovan’s executor, served D with a notice to quit the premises. D refused, and P initiated an eviction proceeding on the claim that the lease created a tenancy at will. D claimed the lease was a tenancy for life, but the court granted P summary judgment, holding that since the lease term was indefinite, it was a month-to-month term. The appellate court affirmed and D appeals. Issue is whether if tenant has the right to terminate a lease at a date of his own choice, the tenant has a determinable LE. **Holding:** Yes.

**Notes:**
- If the agreement does not create a term of years or periodic tenancy, but the tenancy is to continue so long as the tenant wills, the tenant has a determinable LE.
- Livery of seisin abolished. Follow Restatement rule.
- Also look at intent of grantor.

**WASTE**
Melms v. Pabst Brewing Co. (WI 1899)-- The Pabst Brewing Co. (D) acquired all the land around a quarter acre homestead in fee simple; D used the land, as it had previously been used, as a brewery. D acquired the quarter acre homestead, but as a life tenancy only. Neighborhood conditions had so changed that the quarter acre lot and house were useless as a residence; they were useful only as a part of the brewery. D destroyed the house and graded the land on the homestead level. It then proceeded to use the land for brewery purposes. This use enhanced the reversionary interest. Melms (P), the reversioner, brought this double damage action under a state statute providing for that remedy in the event of waste. The trial court dismissed the complaint and P appealed. Issue: if changed conditions of the surrounding area operate to convert active waste into ameliorative waste, dies this excuse the tenant from liability for alterations to premises? **Holding:** Yes.

**Notes:**
- Homestead interests – exemption of certain property of debtors from action by creditors. Can be realty or personalty.

**Hypotheticals**
- A to B for life, C in FSA. Nice home on property.
  - cannot remodel or destroy home, nor let it become rundown
- A lets home become dilapidated. Does B have obligation to make it livable?
  - NO, just maintain status quo
- Home destroyed by hurricane
  - B under obligation? NO
- B lets home negligently burn down
  - B under obligation? YES
- natural wear and tear?
  - b under obligation to keep it under previous condition? NO
- what if hurricane knocks out some windows?
  - Pay for new windows?
- if furnace breaks down?
  - fix it?
- a seawall, if not fixed, will destroy house in 5 years
  - must fix seawall
- cost of seawall exceeds year’s income
  - how do we articulate limits of duty to repair? Use own capital resources?

Gannon v. Peterson (IL 1901)-- Michael Gannon, in his will, devised property to his three sons and their heirs, and assigns forever. In the case that all three should die without issue, it was to be given to Joseph and Mary Gannon and their heirs. Two of the sons die without issue intestate, leaving Matthew Gannon (P) with the lands. Matthew opens a coal mine on the field and leases it. The coal being the greatest value of the land, the defendants, owners in fee simple unless Matthew has heirs, contends that he is guilty of waste in mining and removing coal, and want an injunction restraining the commission of any further waste. At this time M doesn't have any kids. Issues: (1) if the contingency of a FS upon executory interest requires that heirs survive the original devisee, and the devisee has no children, does the law presume that he will die without children, thereby giving a present vested interest in the 3rd party? (2) is the mining of resources from property equitable waste if the property is a contingent or executory estate? **Holding:** No to both. M has FS determinable. Heirs have CEI. M not using land unreasonably, so mining okay.

**Notes:**
- Possibility of issue is always supposed to exist in law unless extinguished by the death of the parties, even if donees are 100 years old.
- Generally, holders of FS determinable not chargeable with waste by those who hold CEI.
- Equitable waste is something that ordinary men wouldn't do with their property.
- Also look at whether the interest is likely to become possessory and the nature and quality of the act.

**Hypotheticals**
1) A → B for life, then to C in FSA.
2) B has a life estate. C has a VR in FSA. C may sue for legal or equitable waste.
3) A → B for life, Z for life, then to C in FSA.
4) B has a LE. Z has a VR for life. C has a VR in FSA. C may sue for legal or equitable waste, but Z alone probably couldn't, although he may enjoin.
5) A → B for life, if C survives B then to C in FSA; otherwise to D in FSA.
6) B has a LE. C and D have alternate CRs in FSA. C and D could jointly sue or enjoin for waste, but not independently, only if wanton or chance of possession is high.
7) A → B for life, but if B should practice law, then to C for remainder of B’s life.
8) B has a LE subject to a CEI. C has a CEI for the life of B. A has a reversion in FSA. A could sue. C might enjoin if chance of possession is high.
9) A → B for life, the to C in FS, but if C is not a licensed lawyer by the death of B, then to D in FSA.
10) B has a LE. C has a VR subject to a CEI. D has a CEI. C and D together could sue. C could enjoin if the likelihood of possession is high.

DIRECT RESTRAINTS ON ALIENATION
Mandelbaum v. McDonnell (MI 1874)-- John McDonnell leaves a will giving his wife a life interest, with remainder to his three sons, a grandson, an adopted daughter and a Goddaughter. It was instructed that, “the premises remain unsold until Francis shall be 25 years of age, or until 21 years from the date hereof 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.” and that, “it shall not be competent for any of my devisees hereinbefore named to either dispose of, alienate, mortgage, barter, pledge, or transfer 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.”

Despite the directions, three devisees executed conveyances, and later, the remaining interests were conveyed during the restricted period”. The Superior Court granted the decree for a release to complainant as prayed by the bill. Issue(s): Do devisees of a remainder in fee have a right to sell their interest, even if a restriction exists preventing them from doing it for a certain period of time? Holding: the restraints weren’t valid, so could alienate.

Conger v. Lowe (IN 1890)-- Lewis Conger dies leaving a will conveying a life estate to his wife, then his son, and at his death, or his refusal to live on or occupy the property, devising the property to Samuel Conger’s lawful heirs. Suit is by children of Samuel Conger who claim that under the will the title vested in them and they became entitled to the possession when their father abandoned and conveyed away the farm. Issue(s): Can a condition in a conveyance restrain the power of alienation of the devisee of a life estate with a reversion/remainder? Holding: yes. Restraints can be put on LE because of vested remainder or reversionary interests.

Mountain Brow Lodge v. Toscano (CA 1967)-- Action to quiet title to real property. James and Marie Toscano deeded a lot to Lodge (P). The deed contained a clause which provided that if (i) the land failed to be used by P or (ii) P sold or transferred the lot, then the lot reverted back to James and Marie, their successors, heirs, and assigns. James and Marie subsequently died. P sued Toscano heirs (D) to quiet title in itself. P lost and appealed. P contends the restriction was an absolute restraint on alienation and thus void. D contends the covenant created a fee simple subject to a condition subsequent. Issue: May a grantor restrict the use of the land? Holding: deed created FSCS with R/R. This is valid.

Hypotheticals

1. to B for life Remainder to C in fs, however if C attempts a transfer before the death of B, then to D in FSA. C has vested remainder subject to divestment, D has contingent remainder.
2. To B for Life, and then if C has not previously attempted a transfer of Cs interest during the life of B, to C in FSA, but if C has attempted to transfer during life of B, to D in FSA. Difference, in this case C and D have alternate contingent remainders.
3. To B for life, then if C has survived B and has not attempted a transfer during the lifetime of B, to C in FSA. Otherwise to D in FSA. C and D have alternative contingent remainders.
4. To B for life, remainder to C in FS, however, if C predeceases or attempts a transfer during the lifetime of B, then to D in FSA. C has a vested remainder, not absolute and is subject to divestment. D has a contingent remainder
5. To B for life, and then if C attains age 30 and has not attempted a transfer during the lifetime of B, then to C in FS. Otherwise to D in FSA. C and D have alternative contingent remainders
6. To B for life remainder to C in FS. However, if C fails to attain age 30, or attempts to make a transfer at any time during the life of C, then to D in FSA. In this instance C has a vested remainder subject to divestment, and D has a contingent executory interest
7. To B for life, remainder to C in FS, however, if C fails to attain age 30 or attempts a transfer before attaining age 30, then to D in FS. C has a vested remainder subject to a defeasible executory interest in D.
Look to tests concerning independent uncertainty and nonpossession, insubstantial impact to determine whether enforceable.

LANDLORD AND TENANT – CREATION AND DISSOLUTION

AH Fetting v. Waltz (MD 1930)—The defendants signed a lease with covenants stating that the lessee vacate the premises at the end of the term, and if they did not, to become liable to the lessors for all loss or damage which the lessors might suffer through a loss of sale or of lease or otherwise by reason of its failure to leave as agreed. Defendants wished extend their lease by one month, but both parties failed to reach an agreement. Defendants held over one month, and sent a check equal to one monthly installment of the yearly rent. Plaintiff declined to receive check except as a monthly payment for an additional yearly rent. Defendant claims that he was not holding over under a new renting, and that the plaintiffs did not receive any loss within the contemplation of the covenants of the lease. Judgment recovered by the plaintiffs for the yearly rental, less the monthly payment previously received. Issues: (1) if a tenant holds over after the expiration of a lease, may he be held liable as a tenant for a further period, without reference to his actual wishes? (2) do covenants stating the liability of a tenant holding over depend on whether the tenant is considered a trespasser or renewed lessee? Holding: Yes to both.

Notes:
- Proper termination requires formal notice.
- American Rule – two choices
  - Can hold tenant as trespasser, sue for eviction as tenant at sufferance
  - Hold as tenant for new term, whether they like it or not
    - Irrebuttable presumption that tenants want to be bound
    - Contract implied in law
    - Terms of new tenancy based on the old with the exception of duration
- English Rule – look to intent of parties; must have mutual assent for new lease agreement to exist.
  - Problem: silence of one or both parties; when words/acts of a party aren't consistent with new year to year tenancy.
  - Most common form of defeasible estate is lease, estate for years. Usually FSCS with R/R—have direct restraints on alienation, subject to the law of waste.
  - At common law, landlord does not have to mitigate damages.
  - Depending on what the double damages provision is for, sometime upheld but sometimes seen as punitive. Or sometimes seen as precluding landlord's common law alternatives.

Commonwealth Bldg Cor v. Hirschfield (IL 1940)—Hirschfield (D) leased property from Commonwealth (P) for $275 per month. The lease contained a clause which provided that if the lessee held over he would be held liable for double rent for the period. D decided to move at the expiration of the lease on September 30, 1938, and so notified P. With the help of some of P's employees, most of the goods had been moved by the 30th; but there were a few items that remained that night and were moved the following day. Early in the morning of October 1, 1938, P's agent served notice on D that because the premises were not vacated on September 30, P had elected to hold D as a tenant for another year. P sued D to recover $3,300 and the jury awarded P $1,100. D appeals. Issue: Where P was aware of D's intentions to vacate by the end of the term and where D has substantially complied, may P hold D as a tenant for another similar term and recover rental payments for that period? Holding: can't hold him to new lease.

Notes:
- Most modern cases give a tenant relief where the tenant does not intend to hold over but is forced to do so by circumstances beyond the tenant's control. The landlord cannot elect to hold the tenant to another term if, in light of the circumstances, the tenant vacates as soon as possible.
- Here double rent provision precludes right to elect tenant for another term.

Herter v. Mullen (NY 1899)—Defendants were forced to hold over for 15 days one room due to an “act of God” which afflicted their mother with a disease, thereby forcing her to remain bedridden. Before that time, defendants had notified plaintiff that they would not retain the premises for another year. Plaintiff seeks to recover rent for a portion of the succeeding year, on the ground that the defendants held over after the expiration of their term, and thus became liable for the rent of the premises for that time. Trial courts find for the plaintiff. Issue: Can a person be excused of a duty created by law, and not by express contract, if the performance is prevented by an “act of God”? Holding: can be excused. This was a duty imposed by law. Damages could still be recovered, but not rent for the next year.

Mason v. Weirengo (MI 1897)—Mason (P) leased a building to Wierengo, who used it as a store, for a term of years. Before October 1, when the lease expired, Wierengo told P he would vacate the building. While he was removing his goods, however,
Wierengo became sick and died on October 6. His employees did not finish the removal until October 11. P sued for the rent for an additional year. Wierengo’s executor (D) claimed that an act of God prevented Wierengo from vacating. The first court found for D, but on appeal, P recovered part of the amount he claimed. P appeals. Issue: May a landlord treat his holdover tenant as a tenant from year to year even though the tenant was unable to vacate due to sickness? Holding: yes. Party only excused by act of God when performance is impossible.

Miss. State Dept. of Public Welfare v. Howie (MS 1984)—Landlord brings action against his tenant, the Department of Public Welfare, charging the department with holding over after expiration of an annual lease and seeking performance of a lease renewal and rent based on the renewal. Defendant, when instructed of the upcoming expiration of their lease, asked for a month extension. Plaintiff replied that a month extension under the current lease terms would be given if he heard a reply by a certain date, and that if he did not, that by operation of law the present lease will be renewed for a one year term. Defendants, needing to hear from their superiors, were unable to respond, but did issue vouchers which plaintiff accepted as payment for the extra month held over. Defendants file a demurrer, arguing the defense of sovereign immunity and that they could not be sued on the lease. Trial courts held that the doctrine of sovereign immunity is not a defense to a claim based on breach of contract, that the defendant was a holdover tenant, and that plaintiff is entitled to rent payments for the renewal period of one year and the 5% late fee required under the lease. Issue: (1) Can the court uphold a claim of sovereign immunity in contractual matters between a subdivision of the state and individuals doing business with it? (2) If a landlord elects to treat a tenant as a trespasser and refuses to extend the lease on a month to month basis, but fails to pursue his remedy of ejecting the tenant and accepts monthly checks for rent due, can this be considered an extension of the lease on a month to month basis? Holding: no claim of sovereign immunity where state enters into business contract with an individual. On second issue, yes.

First Capital v. Pennington (GA 1988)—After appellees vacated the premises which they had previously leased from appellant, appellant filed suit seeking rentals which had accrued under the terms of the lease, but which had not been paid. The lease contained a provision requiring the payment of double rent in the event that the appellees remained in possession of the premises beyond the original lease period without entering into a new lease. The trial court held the double rent provision to be a penalty, and entered summary judgment for the appellees. Issue: Can a clause in a lease contract stipulating double rent for possessing premises beyond the original lease period be considered a penalty, and therefore unenforceable? Holding: can be enforced. Doesn’t violate public policy or law. The issue here is not whether the amount sought constitutes liquidated damages or a penalty, but a suit for enforcement of contract provision.

LANDLORD AND TENANT – MUTUAL RESPONSIBILITIES (THE PACKET)

Mitchell v. Weiss (Texas, 1930)—Fire; Mitchell (landlord) repairs, but not in as good a condition as before the fire, so didn’t fully comply with the covenant; Weiss (tenant) won’t pay full rent but continues to occupy. Holding: The covenant of the landlord to repair and the tenant’s covenant to pay rent are regarded as independent covenants unless the contract between the parties evidences the contrary. So breach by Mitchell doesn’t mean Weiss doesn’t have to perform if he continues to occupy. He can’t have lease terminated, only can get damages for loss of rental to sublessee.

Hughes v. Westchester Dev. Corp (D.C., 1935)— Lease to Hughes for 1 year, monthly rent Oct. 1 to Sept. 30); pays until Feb.; landlord wants rent for rest of period. Tenant said the premises unlivable – cockroaches, noise, etc – did everything to make it better, but didn’t work, stopped paying rent, says it’s constructive eviction (but for this, landlord must have done something of a permanent character with intention and effect of depriving tenant of enjoyment of property); moved out, but not relieved of obligation to pay rent. Holding: Upon a demise, there is no implied warranty that the property is fit for the use of which the lessee requires it, whether that is habitation, occupation, or cultivation.

Pines v. Perssion (Wis, 1961)— agreed that Perssion would lease house to Pines; house was in terrible condition, but Perssion said he would fix it up; Pines paid deposit and gave signed lease; when moved in, house was still dirty; tenants cleaned it themselves and fixed it up; frustrated, had building inspectors come, who found violations; gave landlord time to fix, but tenants moved out. Holding: The covenant to pay rent and the covenant to provide a habitable house are mutually dependent, and thus a breach of the latter by the landlord relieves the tenant of any liability under the former. So, tenants were justified in moving out.

Brown v. Southall Realty (D.C., 1968)— action for payment of rent and possession; there were housing code violations at the premises; landlord said house was habitable; tenant moved out. Holding: A lease for premises that do not meet local housing codes for safety and health may be declared illegal and void. Tenant okay in moving out.
East Haven Associates v. Gurian (NY, 1970)—question is whether constructive eviction is available to a residential tenant when landlord is responsible for conditions that render part of the premises uninhabitable and the tenant abandons that part but continues to reside in the rest. Tenant moved in, terrace uninhabitable, terrace was main reason for moving in, abandoned terrace. The concept of partial constructive eviction is sound in principle, is supported by compelling considerations of social policy and fairness, and is in no way precluded by controlling precedent. From the time of the partial constructive eviction, the tenant had a right to stop paying rent.

Javins v. National Realty Corp (D.C., 1970)—landlord rented to each of appellants; wants payment of rent because tenants defaulted; tenants alleged housing violations; violations occurred after lease started; Holding: Landlord's responsibility to maintain the premises. The old common law rule imposing an obligation upon the lessee to repair was never really intended to apply to residential urban leaseholds. Value of lease before was the actual land; in residential, it's the place to live in. Contract principles provide a more rational framework for the apportionment of landlord-tenant responsibilities. They strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings. Housing regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing they cover. Under contract principles, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition.

Atult v. Trusdell (Hawaii, 1971)—month-to-month tenancy; landlord gave notice for tenant to vacate; tenant didn't vacate; action for possession; tenant says primary motivation is to stop tenant's speech. When a court awards possession to a landlord, even if the landlord is motivated by his disagreement with the actions and speech of the tenant he is evicting, no state action is involved which denies or infringes the tenant's rights to exercise his 1st Amendment rights. LT relationship is contractual – don't want to change provisions of the k parties entered into. Didn't find violation of tenant's 1st Amendment right anyway. Just because evicted, tenant can still belong to union and express beliefs.

Robinson v. Diamond Housing Corp (D.C., 1972)—month-to-month tenancy with understanding that landlord would repair deteriorating condition of premises; landlord didn't keep this promise; tenant began withholding rent; landlord sued for possession; tenant says there were lots of violations at time lease was signed so lease shouldn't be enforceable; then landlord brought suit saying tenant was trespasser; court said no, just can't enforce the k, she was tenant at sufferance and lease can be terminated upon 30 day notice; housing code says if uninhabitable, premises should be taken off the market, so that's what landlord says he wanted to do. Holding - An eviction grounded on a desire to punish a tenant's exercise of a right to report housing code violations is plainly illegal, and its illicit status remains unchanged even if it is accompanied by withdrawal of the unit from the housing market. The mere desire to take a unit off the market is by itself not a legitimate business reason which will justify an eviction. Landlord would have to repair and then evict for some legal reason, or show that it is impossible to make the repairs and evict and take the premises off the market. Could go out of business altogether, but can't just end part of his enterprise.

Interstate Restaurants v. Halsa Corp (D.C., 1973)—21-year leasehold in Interstate; operation of restaurant, coffee shop, cocktail lounge; relationship between landlord and tenant deteriorated; 9 years after beginning of lease, Halsa filed complaint for possession predicated on multiple breaches of lease. Javins does not extend to commercial leases. Therefore, unless a contrary intention is expressed, the covenants in a commercial lease are independent and nonperformance by one party does not excuse the other party from obligations.
Berzito v. Gambtrio (N.J., 1973)— plaintiff rented from defendant; no written lease; at the time agreement was made, premises in deplorable state but defendant said would make them livable; not everything was done; tenant stopped paying rent; landlord recovered some of rent; tenant left wants rent paid. **Holding:** In any residential lease, not only will there be implied on the part of the landlord a covenant of habitability to be extended during the term of the demise, but also the covenant and the tenant’s covenant to pay rent will be treated as mutually dependent. When landlord breached covenant of implied habitability, tenant didn’t have to pay rent anymore.

City of St. Louis v. Brune (Mo, 1974)— landlord did not have tubs and showers connected as they were supposed to be under the local code; located in bad area where if the buildings were vacant they would be overrun with vandalism; tenants willing to pay very low rent for these without improvements. A local housing code may be deemed unconstitutional in certain situations with respect to certain landlords, i.e., if the cost to the landlord so far exceeds the benefit the society that it is not justifiable under the police power. Dissent thinks landlord still subject to code.

McKenna v. Begin (Mass, 1975)— breach of implied warranty; tenant wanted receiver appointed to receive rent and use the money to make repairs; court didn’t do this, but awarded damages; tenant says damages are inconsistent with relief sought; otherwise says they were not correctly computed. **Holding:** Damages to the tenant for a violation of the implied covenant of habitability are the difference between rent for premises as warranted (actual rent paid) and fair market value in defective condition. No notice of damages is required from tenant to the landlord if they existed from the outset.

Puritan Holding v. Holloschutz (NY, 1975)— plaintiff owns apartment building across the street from defendant’s building; says Δ building became abandoned and was a nuisance and the he suffered damages from this. **Holding:** When a building is abandoned and allowed to become a nuisance, damages may be recovered from adjacent owners for the difference in property values before and after the existence of the nuisance.

Kipsborough Realty Corp v. Goldbetter (NY, 1975)— tenant stopped paying rent claiming that landlord breach warranty of implied habitability by willfully and maliciously not fixing roof but she kept living there; also wants money for damages to household goods; landlord wants rent not paid. **Holding:** When a landlord exhibits “malicious, wanton, and reckless disregard and indifference for the law” in refusing to repair premises to make them habitable, then punitive damages equal to the rent claimed may be awarded as a set-off. Here it would be unreasonable for tenant to have to move out to claim damages because it would be impossible for her to find similar dwelling (this one was in Manhattan).

Ragin v. Schwartz (Penn, 1975)— challenging constitutionality of PA landlord tenant act article which authorizes a landlord’s seizure of a tenant’s property for unpaid rent without notice or opportunity to present a defense. **Holding:** Pennsylvania’s distraint statute is unconstitutional as violative of due process, primarily because confiscation by state officials occurs before hearings, etc.

Timber Ridge Town House v. Dietz (NJ, 1975)— tenant, Δ, defaulted on payment on rent for a month on grounds of breach of implied warranty; claimed that area surrounding premises was poorly maintained; here the condition affects them uniquely because can’t use their patio, etc. because of mud overflowing into this area; no housing code violations, but definitely affect whether premises are usable; landlord made representations that the exterior of premises would be nice. **Holding:** Under some circumstances, such as a townhouse, the implied covenant of habitability will be extended to the exterior of the physical structure, but only with respect to those things that affect the tenant(s) individually.

Blackwell v. Del Bosco (Col 1977)— Del Bosco bought existing car dealership and land on which it was located; on it was one-bedroom house occupied by Blackwell; DB notified her of his intention to tear it down and that he had no intention of making any repairs, but he let her stay for over 2 years; house was in terrible condition; Blackwell withheld payments because DB wouldn’t make improvements; rather than making improvements, DB brought action for forcible entry in detainer action demanding payment of rent and possession of premises; Blackwell wanted to recover payments she made while the house was in bad condition. **Holding:** No implied warranty of habitability is recognized at common law in Colorado. It may be a good idea, but is more properly left to the legislature.

J.B. Stein v. Sandberg (Ill, 1981)— commercial lease; action against landlords to recover damages arising out of destruction of property resulting from fire; alleged electrical wiring system overloaded; said breach of implied warranty; landlord said exculpatory clause relieved them of any liability **Holding:** Exculpatory clauses were valid at common law. Where a lease is
“extended,” a pro-active statute (invalidating exculpatory clauses) will not act on the extension if the original lease was agreed to prior to its enactment. The implied warranty of habitability is not applicable to commercial leases.

40 Associates v. Katz (NY, 1981)—**Holding:** The implied warranty of fitness for use is recognized in New York. This implied warranty cannot be waived by a lease provision. However, nature of warranty would necessarily be different from residential implied warranty.

Gottdiener v. Mailhot (NJ, 1981)—landlords sued for rent plus late charges and additional sums to repair and restore apartment; court didn’t find for landlord on grounds that constructive eviction was available to tenants in case of noisy neighbors; neighbors were really loud, slamming doors, screaming children, etc; complained to landlord who made some effort to stop it, but efforts not successful; tenants found new house and notified landlord of termination of their lease on basis that landlord breached covenant of quiet enjoyment, implied warranty; constructive eviction available. **Holding:** Constructive eviction is available as a remedy in cases of excessively noisy neighbors.

Barela v. Superior Court of Orange County (1981)—landlord wants tenants to vacate and back rent in unlawful detainer action (person’s possession was lawful, but now not); tenant says landlord sexually molested her daughter, told police; landlord gave notice to pay rent or quit, demanded higher rent. **Holding:** In an unlawful detainer action, a renter may raise as an affirmative defense the claim that a landlord seeks to evict in retaliation for the tenant’s complaint to the police that the landlord has committed a crime.

Gottdiener v. Mailhot (NJ, 1981)—landlords sued for rent plus late charges and additional sums to repair and restore apartment; court didn’t find for landlord on grounds that constructive eviction was available to tenants in case of noisy neighbors; neighbors were really loud, slamming doors, screaming children, etc; complained to landlord who made some effort to stop it, but efforts not successful; tenants found new house and notified landlord of termination of their lease on basis that landlord breached covenant of quiet enjoyment, implied warranty; constructive eviction available. **Holding:** Constructive eviction is available as a remedy in cases of excessively noisy neighbors.

Lowery v. Robinson (Mass 1982)—landlord didn’t heat apartment; financial inability to provide heat not a defense; conduct, not intention, is controlling; landlords violated quiet enjoyment covenant; landlord couldn’t raise tenant’s rent to pay for it; plaintiff was tenancy at will whose contract stipulated rent, can’t change rent without mutual consent, could have terminated. **Holding:** A landlord’s failure to provide heat during the heating season seriously impairs the character and value of the quiet enjoyment.

Nash v. City of Santa Monica (Cali 1984)—court ordered city to give landlord permit for demolition; city charter prohibits removal of rental units from housing market by conversion or demolition absent permit; city wouldn’t give permit; owner could have made money if building were occupied, but he didn’t want to deal with it; no involuntary servitude here so long as people remain in the building and he’s making money; would be more detrimental to public interest to allow demolition of the building than to deny him permit to demolish building. **Holding:** Demolition control provisions in a rent control statute are constitutional because they are reasonably related to legitimate public goals, and they do not constitute “involuntary servitude.” Dissent says right to go out of business legitimate and that police power can’t take this away.

Lloyd v. Service Corp of Alabama (Ala, 1984)—exculpatory clause in lease; after moving in, tenant realized sliding door was improperly installed, exposed area because of this; landlord notified of this but did nothing about it; burglar entered premises; tenant wanted these things fixed, landlord wouldn’t; broken into again, tenant was assaulted and raped. **Holding:** Enforcement of “unbargained for” exculpatory clauses in residential leases is against the best interests of the citizens of Alabama and contrary to public policy.

Van Buren Apts v. Adams (Ariz, 1984)—1 year lease, expired and tenant notified lease would not be renewed, offered to allow tenants to stay extra month until they could find new apartment, received no response, filed forcible entry and detainer action; tenants said landlord wouldn’t renew in retaliation for complaints made about plumbing. **Holding:** The retaliatory eviction defense extends to summary proceedings instituted at the expiration of a fixed term lease. Case remanded to find out if retaliatory.

Glasoe v. Trinkle (Ill, 1985)—landlord wants rent due; tenants say not due because of breach of implied warranty, say they are entitled to damages; in area where there are no housing or building codes. **Holding:** The implied warranty of habitability applies to all leases of residential real estate regardless of the existence of housing or building codes. In order to constitute a breach of the implied warranty, the defect must be of such substantial nature as to render premises unsafe or unsanitary, although the landlord is not required to insure that the dwelling is in a perfect or aesthetically pleasing condition. Remanded to find whether breach occurred.

Leardi v. Brown (Mass, 1985)—**Holding:** Tenants may be injured by the use of deceptive and illegal clauses in a standard apartment lease, despite the fact that the tenant was unaware of, and the landlord has never attempted to enforce, these illegal proceedings.
Tedder v. Raskin, (Tenn, 1987)— tenants brought action against landlord for injuries sustained when bullet came through wall from neighboring apartment; tenants say other tenant reported weird activity to landlord but didn't tell this to this tenant when lease was signed; tenants say breach of k or misrepresentation; security never discussed at time of signing; misunderstanding as to what 24-hour security meant. Holding: Notice of a parking problem and mere uncorroborated suspicion of illegal activity was insufficient as a matter of law to give notice of a dangerous condition to the landlord, triggering the duty of the landlord to act.

Braschi v. Stahl Assoc. Co, (NY, 1989)— gay life partner of tenant moved for injunction to prevent eviction; partner died, he says under NYC City Rent and Eviction Regulations he has right to stay. Regs provide that landlord can't dispossess surviving spouse of deceased or other member of deceased family who has been living with the tenant. Question as to whether more than 1 family. Holding: regs are to protect certain class of people from the sudden loss of their homes. Term family should not be rigidly restricted to those people who have formalized their relationships by law. Protection should be based on reality of family life – this includes life partners. Still maintains distinction between family and roommates or new relatives merely seeking to gain from death. Determination should be made upon objective examination of relationship. Dissent says family should be those with legal relationship or blood relation.

Diaz v. Perez-Tamayo, (NJ 1991)— action to dispossess tenants in a multi-unit residential unit; tenant rented 3-room apartment; had two kids and was pregnant at the time of signing lease, kids slept in a room, parents slept in living room; landlord says tenants in violation of rule limiting occupancy to 3 people; now 4 people live there; notice to cease sent to tenants, notice of termination sent later. Holding: anti-eviction act designed to limit eviction of tenants to reasonable grounds and provides for reasonable notice. There must be a substantial breach to evict. Legislature didn't intend that a tenant could be evicted because the size of the family increased by natural means. Even though a rule limits occupancy, tenants are not bound to this when family increased by natural means.

City Wide Assoc v. Penfield (Mass, 1991)— eviction proceeding against tenant subsidized by federal program. Holding: Eviction of a tenant who suffered from serious mental disability manifested by auditory hallucinations and struck back at apartment walls would be discriminatory and violative of the Federal Rehabilitation Act which prohibits discrimination on the basis of handicap. Even though violated lease by doing damage, tenant could still possess as long as didn't do anymore damage.

Holland v. Liedel (Mich, 1992)— tenant brought negligence action against landlord, alleging that she was abducted from parking garage due to faulty or defective security measures employed by landlord; access to parking garage only by key, patrolled by security guard; landlord said didn't breach any duty. Holding: A genuine issue of material fact existed as to whether a landlord breached a duty to protect a tenant from criminal activity of a third person in common area of leased premises; and instruction that jury could find foreseeable danger of criminal assaults upon tenants if it found that the apartment building was located in a high-crime area. Landlord may be held liable for exposing invitees to an unreasonable risk of harm arising out of tenant's use of common area. Also has duty to protect tenants from foreseeable criminal activities of 3rd parties in common areas. This was high crime area, so foreseeable.

Walls v. Oxford Management (NH, 1993) –π was sexually assaulted in her vehicle located on landlord’s premises; her mother leased from landlord; this had been the site of other incidents. Holding: landlord had no duty to protect tenants from criminal attack, but may be liable if landlord created or was responsible for known defective condition on premises that foreseeably enhanced risk of criminal attack or if landlord undertook gratuitously or by k to provide security and warranty of habitability implied in residential lease agreements did not require landlords to take affirmative measures to provide security against criminal attack.

Solow v. Wellner (NY, 1991)— landlord sought to recover rent, tenants said breach of implied warranty. Holding: Implied warranty of habitability doesn't require that the premises be maintained in accordance with reasonable expectations of the tenant but of most tenants. Tenants lived in luxury apartment and some of their expectations were ridiculous, so they were not covered by implied warranty.

Hall v. Rental Management Inc (Arkansas, 1996) — tenant's son shot and killed on premises, perpetrator was guest of another tenant; tenant says landlord failed to provide adequate security measures to ward off criminal attacks and used unqualified personnel as security. Holding: landlord does not owe duty to protect tenant from criminal acts. A landlord who assumes a duty not required of him is removed from the general rule. However, in this case the landlord only assumed moderate duty, but it didn't include such protection.
Johnson v. Marcel (VA, 1996) — tenant rejected landlord’s efforts to develop a business relationship; landlord demanded that tenant vacate the house; tenant had prepaid through the next month and refused to leave; tenants sought protection from landlord’s harassment and efforts to evict; harassment continued, landlord changed the locks and entered house without permission; tenants feared for physical and mental well being so vacated; lost security deposits, prepaid rent, and incurred expenses for temporary housing. **Holding:** as tenants, had right to possession and landlord had no right to enter without tenant’s consent – otherwise trespass. Can also recover emotional distress damages.

Walker v. Sturbridge (GA, 1997) — tenant was raped and sodomized in her apartment by intruder in early morning hours; landlords had not taken any action despite three prior daytime apartment burglaries. **Holding:** in light of landlord’s knowledge of two of the three prior burglaries, which were committed during daylight hours when apartments were vacant, it was reasonable for the landlord to anticipate unauthorized entry might occur while the apartment was occupied and personal harm to the tenant could result. Landlord’s duty to protect tenant from 3rd party criminal attacks extends only to foreseeable criminal acts. Dissent said this result will make landlords insurers and that’s not good.

Clemente v. Horne (FL, 1998) — constructive eviction; tenants claim emotional distress because not provided adequate alternative housing available to them and their 5 year old son. **Holding:** this type of conduct (not fixing flooding problems so that electrical company turns off electricity) would probably cause emotional distress, but the conduct is not so outrageous as to allow for recovery. Not beyond bounds of decency so as to be regarded as intolerable in a civilized society.

Walther v. KPKA Meadowlands (SD, 1998) — tenant was raped and stabbed by former boyfriend on premises. **Holding:** statute providing that landlord was to keep premises in food repair and safe did not create a duty that the landlord would protect tenant from boyfriend’s criminal act. Attack was not foreseeable to the landlord. No breach of implied warranty. Statute doesn’t imply duty beyond repairs.

Yarbrough v. Nahon (WA, 1998) — tenants invited Yarbrough to apartment, apartment manager was having party they went to, Yarbrough returned later by himself; manager didn’t remember him, asked him to leave; conflicting testimony about what happened next, but when tenant and Yarbrough returned someone shot at them; tenants said breach of duty to provide safe and secure environment. **Holding:** no evidence that shooting was foreseeable. Shooter didn’t have propensity of violence, nothing at party occurred to make them think something would happen. Landlord has no duty to protect tenants from unforeseeable criminal acts.

Conley v. Emerald Isle Realty (NC, 1999) — tenants brought negligence action seeking to recover for personal injuries that tenants suffered when sound-side of deck collapsed while they were standing on it. **Holding:** no implied warranty of habitability from landlords who lease a furnished residence for short period of time. Residential Rental Agreements Act does not apply – only applies to premises which are normally held out for use of residential tenants who are using the dwelling unit as their primary residence.

Johnson v. Scandia Assoc. Inc (IN, 1999) — tenant brought action against landlord for injuries suffered in apartment when caused by an electric shock she received when simultaneously touching 2 kitchen appliances while cooking; argues that implied warranty should be extended to such injuries. **Holding:** warranty of habitability may be express or implied, where warranty is implied in fact consequential damages may not be awarded, tenant in this case failed to show existence of warranty. Habitability is not the same as no risk. To extend to this type of injury would leave landlord strictly liable. Consequential damages should only be awarded where injury flows naturally and probably from the breach and was contemplated by the parties when the contract was made. Where warranty is express, consequential damages could be remedy.

Boulder Meadows v. Saville (CO, 2000) — tenant lived there for over 10 years; under terms of tenancy, tenant required to pay rent and maintain home and home site; 8 years into tenancy landlord posted notice for her to quit on basis that she hadn’t maintained home and lot site; tenant says medical condition precluded her from doing this; court found she was disabled; landlord brought unlawful detainer action. **Holding:** this is violation of CO Fair Housing Act. Discrimination includes a refusal to make reasonable accommodations in rules, policies, or services when such accommodations may be necessary to afford a renter equal opportunity to use and enjoy a dwelling. This duty arises when landlord becomes aware of tenant’s disability. Alternatives landlord presented weren’t reasonable. Tenant can recover for emotional distress and punitive damages are available because of wanton behavior.
Arnold Murray Construction (SD, 2001) — landlord sued handicapped tenant for possession of apartment alleging that he disturbed neighbors, violated parking rules, and blocked open security door. **Holding:** no reasonable accommodation would diminish threat that tenant posed to health and safety of other tenants so eviction permissible and tenant received reasonable notice and opportunity to be heard at meaningful time and in meaningful manner.

**FUTURE INTERESTS**

*Kost v. Foster* (IL 1950)— John and Catherine Kost conveyed land to their son Ross with the following language: "at his death to his lawful children, the lawful child or children of any deceased lawful child of Ross Kost to have and receive its or their deceased parent's share meaning . . . to convey to Ross Kost a life estate only . . . ." Ross had eight children, one of whom died shortly after birth, and five of whom were born prior to the execution of the deed. Before Ross died, one of his children, Oscar, died as a bankrupt. The trustee in bankruptcy conveyed Oscar's interest to Foster (D). The other children of Ross (Ps) sued to have the trustee's deed declared void and removed as a cloud on their title. D counterclaimed for partition of the premises. The trial court found for D. Ps appeal. Issue: Does the placement of the conditional language in the conveyance determine whether a remainder is vested or contingent? **Holding:** yes.

**Notes:**
- Legal and operational consequences of CR
  - Inalienability inter vivos (maybe)
  - Inability to sue for waste
  - Destructibility
  - RAP
  - These are different from VR
- CR—distinguished by uncertainty of right (not of possession).
- **Kost Rule:** if condition is precedent to grant, interest is CR, if condition is subsequent to grant, interest is VR.
- **Gray's Rules:**
  - If precedent, does it appear before or after the grant?
    - If before, the interest is CR.
    - If after, the interest is VR subject to divestment.
  - Is subsequent, or ongoing with respect to possession, it's a VR subject to divestment. This requires a substitute taker or gift over. It may be in the form of EI (contingent or non-vested), POR or R/R.
- Other test: precedent=preceding possession (contingent); subsequent=after possession (vested subject to divestment).
- One more: look at location of condition in wording of transfer; precedent=before taker is named (contingent); subsequent=after taker is named (vested).
- **An interest is viewed to be vested if there is no precedent condition other than termination of possession of previous holder. (Death of B, goes to C).**
- **There must be an alternate taker—some courts will hold it’s FS determinable others say contingent. Before can be subject to divestment, there must be an alternate taker stated.**
  - To B for life, remainder to C in FS, provided C has not previously practiced law.
- When there is an ongoing condition, then look to placement of language. So test that shifts from time of possession to placement of language.

**RULE AGAINST PERPETUITIES**

*Evans v. Walker* (Chancery Division, 1876 UK)—John Brown, by his will of 1812, devised to “Maria Evans, fifty pounds per annum from the day of my decease during the term of her natural life, and from and after her decease to the children she may have born in wedlock… during their natural lives…and from and after the decease of the survivors herein named to go to my nephew Edwin Walker, and my two nieces…” Maria Evans died without having been married. The nephew and two nieces of the testator died some time after her. Their personal representatives petitioned the court for a division of the corpus among them. **Holding:** Judgment for plaintiffs. “The circumstances of there being life estates given to all the children unborn of Maria Evans does not create a perpetuity if there are persons capable of taking immediately, and there are such persons [the nephew and nieces]. So they take immediate vested interests.

*Johnson v. Preston* (IL 1907)—Appellants contend that the following language in a will violates the Rule against Perpetuities: “I give and devise to my executor…for the space of 25 years from and after the date of the probate of this will...” The contention is
that the language “from and after the probate of this will,” being the uncertain contingency upon which the estate of the executor shall come into being, which may not happen within the time prescribed by the rule against perpetuities, makes the devise void.

**Holding:** Judgment for the appellant. The interest in the executor is void (springing EI in a tenancy for years).

It is clear from the language of the will itself that whatever interest the executor took under it could not vest in him until probate of the will, and while this usually would, in the ordinary and usual course of events probably occur within a few months, or at most [missing] years, after the death of the testatrix, yet it cannot be said that it is a condition that must inevitably happen within 21 years from the death of the testatrix.

**Notes:**
- An executor may be an institution, so it is not a life in being.
- The court uses 21 years from the testatrix’s death because there is no other validating life.
- Validating lives must (1) be relevant or made relevant to the interest created, and (2) have some causal connection to the timing and breach of the condition.

**Jee v. Audley** (Court of Chancery, 1787 U.K.)--Edward Audley, by his will, bequeathed as follows:

> “Also my will is that 1000 pounds shall be placed out at interest during the life of my wife, which interest I give her during her life, and at her death I give the said 1000 pounds unto my niece Mary Hall and the issue of her body lawfully begotten, and to be begotten, and in default of such issue I give the said 1000 pounds to be equally divided between the daughters then living of my kinsman John Jee and his wife Elizabeth Jee.”

At the time of the testator's death, his wife was dead. Mary Hall was 40 and unmarried, and the Jees had four daughters and were of very advanced age. These daughters brought a petition to secure the 1000 pounds in case Mary Hall should die without children. The petition was challenged, saying that the interest was void for violating the Rule against Perpetuities.

**Holding:** The interest in the daughters is void for remoteness.

The words are “in default of such issue I give the said 1000 pounds to be divided equally between the daughters then living of John Jee and Elizabeth his wife.” If it had been “daughters now living” or “who should be living at the time of my death”, it would have been very good, but as it stands, this limitation may take in after-born daughters.

Since the class to whom the remainder belongs (the Jee daughters) remains open until the death of the Jees, who are presumed capable of producing daughters until they die, it is possible that the class could consist solely of after-born daughters (i.e., lives not in being).

This unascertained group would take, if at all, when Mary Hall is in default of issue. The presumption is for the indefinite failure of issue construction, so this could be many years after Mary Hall's death. Thus the interest in the Jee daughters could vest more than 21 years after the last validating life, i.e., the Jees, Mary Hall, and the four daughters living at testator's death could all be dead more than 21 years when Mary Hall's lineal descendents fail and the class of after-born Jee daughters take.

**Notes:**
- This is personalty. If it were realty, the gift to Mary Hall would create a FT and the remainder in the Jee daughters would be considered vested, and hence, it would be valid if, as the court suggests, the will had closed the class at the testator’s death.
- Since it is personalty, the gift to Mary Hall created a FS subject to a shifting EI in the Jee daughters. Thus, even if the class closed at the death of the testator, the interest would not vest until Mary Hall's line died out. Thus, the interest would need another contingency, such as survivorship of “failure of issue” so that the EI must vest or fail by their deaths.
- If a contingent remainder is subject to destructibility doctrine (e.g., if not in trust), it is valid. For example, A → B for life, then to first child of B to reach 30. Under destructibility, if no child had reached 30 by B's death, the interest would be destroyed, and thus it is valid. If not subject to destructibility, may take effect as a springing EI beyond the allowable period (e.g., more than 21 years after A&B's death). Thus, it would be invalid.
- A condition that is always implicit is not a condition. E.g., if the world has not been blown up, or the completion of probate? (in spite of Johnson v. Preston)