



Weekly Information Sheet 12

Real Property – Leasehold Interests

Landlord and Tenants

Generally

Common Law vs. Modern Law:

At common law a lease was viewed as personal property, but today its viewed as real property.

The Nature of a Leasehold:

The nature of a leasehold interest is:

- An estate in land;
- A present possessory interest in the leased premises by the tenant; and
- A future interest (reversion) in the leased premises by the landlord/owner

Types of Tenancies:

There are Three Major Types of Tenancies – To Remember think of **Pull Your Weight**:

- **Periodic Tenancy** – A tenancy with a repeating term (i.e., month to month)
- **Tenancy for Years** – A tenancy for a defined term (i.e., three years)
- **Tenancy at Will** – A tenancy for an undefined term (i.e. as long as either party wants)

Statute of Frauds:

A tenancy for longer than one year, must be in writing due to the statute of frauds

The Doctrine of Quiet Enjoyment:

A landlord must deliver the premises to the tenant for the tenant's exclusive use and protect against the entry into the premises. It has nothing to do with noise.

Assignments vs. Subleases:

An Assignment relieves the tenant of liability on the lease whereby a sublease retains liability and makes the tenant the landlord for the new tenant.

Security:

Recent cases have held that landlords are liable to tenants for injuries caused by third party criminals where the landlord has failed to comply with Housing code provisions, failed to maintain ordinary security measures (such as working locks) or failed to maintain extra advertised security measures.

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Thank You For Being Such A Wonderful Class !!!



Final Exam Review Packet



Weekly Information Sheet 01

General Legal Principles -

The simple **DEFINITION** of the concept of **LAW** is:

Rules by which civilization is ordered.

The simple **DEFINITION** of the concept of **RIGHTS** is:

The legally recognized ability to exercise power and control over an action or object.

Types and Priority of Law

- The three basic types of law are **Constitutions, Statutes** and **Case Law**.
- The priority or ranking of law is as follows:
 1. **Constitution;**
 2. **Statute;**
 3. **Regulation;**
 4. **Executive Order or Policy.**
- It should be noted that Case Law (Common Law) is not ranked or given a priority order because its purpose is merely to decide a case in controversy or interpret or explain a constitution, statute, regulation or executive order.
- The Constitution (both federal and state) are the supreme law, and no other law within the federal or state systems can outrank them.
- Other than the Constitution, no other law can ever outrank a statute.
- A statute is a law enacted by Congress (federal) or the legislature (state).

American Constitutional Government

- American Government is based upon the representative, republican model (where people are elected to represent the voters).
- The purpose of government in that system is to protect the rights of individual people, and the **sovereignty of the government is vested in the people themselves.**
- Both the States and the Federal Government are founded upon written constitutions. The first governments in human history to do so. (2)

Eminent Domain

Generally

The power of eminent domain is the power of a governmental body to take private property for public purposes.

The law places the particular focus upon the Governmental Entity seeking to take the property.

Constitutional Requirements:

Eminent domain takings, pursuant to Article V of the United States Constitution (the takings clause), requires a public purpose and just compensation.

These constitutional requirements apply to all governments and protect all forms of property. A taking occurs that requires these Constitutional protections whenever a regulation permanently dispossesses an owner or prevents their use and enjoyment of the property.

- **Public Use** - The public use requirement is satisfied so long as there is a conceivable public purpose for the taking.
- **Compensation** - Compensation for the taking must be the market value of the property. The amount of compensation is the current market value not the value that will occur due to the public improvement. Compensation is required for regulations that constitute takings, no matter how long or short the regulation may endure.

Case Law on Takings Clause

Case law in both federal and state courts has outlined what is required to take property consistent with the "takings clause". This case law has held:

- All governments in the United States have the power to take private property for public purposes, but that power (the eminent domain power) is limited by the U.S. Constitution, state constitutions, state statutes and judicial decisions.
- The U.S. Constitution's Fifth Amendment specifically provides that "private property [shall not] be taken for public use without just compensation." This is called the "takings clause" or the "eminent domain" clause.
- These requirements protect all property and apply to all governments.
- The takings clause serves two important and related purposes.
 1. Prevent forcible redistribution of property
 2. Takings permitted only for public benefit

The Controversy and Meaning of Public Use

A literal reading of the Constitution's text in the takings clause would limit governmental power to only take private property to instances where the property will actually be used by the public (e.g., as a park, school, road, or military base).

Case law has held however, that what actually can constitute a public use can be much broader.

The question becomes pronounced when seizures are designed to produce some collateral public benefit.

In the Kelo decision, the Supreme Court of the United States held that the elimination of blight or the purpose of urban renewal can be enough of a public use to allow a taking under eminent domain.

Zoning

Generally

Zoning is the use of governmental power to regulate land use.

Zoning laws divide a political jurisdiction into specific separate geographic areas and impose limits on the permissible uses of land within each area.

Zoning has several legitimate objectives:

- To *prevent incompatible uses* from occurring (thus reducing the need for nuisance law),
- To *increase property values* generally by minimizing use conflicts (thus increasing the property tax base), and
- To *channel development into patterns that may serve larger social goals* (e.g., reduce urban sprawl to conserve resources and reduce air pollution from automobiles).
- **Trespass Defined** – Zoning is the use of public power to impose uniform results that might otherwise be accomplished in more piecemeal and selective fashion by private bargains.

Special Issues with Zoning

- **Use Limitations** - Zoning limits the use that may be made of property. Usually an area is zoned for a particular use (such as commercial, industrial, agricultural, residential).
- **Performed at the Local Level** - Zoning laws are local ordinances, enacted by cities, towns or villages, pursuant to legal authority conferred by a state enabling act. They must comply with the enabling state enabling act, as well as the state and federal constitutions, and all other state or federal laws that limit zoning power.
- **What Zoning Ordinances Do** - Zoning ordinances address many specific land uses such as density, aesthetics, or household composition, and when enacted, restrict or prohibit some prior lawful uses (but only most often only in new circumstances). Accordingly, to avoid challenges to the validity of the newly imposed regulation, zoning laws typically permit nonconforming uses to continue for a limited period of time (or for pre-existing property owners). Thus if an owner discontinues the use, it generally may not be renewed or taken up by a new owner.
- **Variances** – Variances are where the Zoning Board of Appeals grants an exception to the property owner from the ordinance, thus permitting otherwise prohibited uses or deviations from density or area controls. Zoning variances are granted only to alleviate undue hardships not of the applicant's creation.
- **Flexibility** - Exceptional uses are permitted by the zoning law under flexible criteria specified in the law.
- **Amendments and Spot Zoning** - Zoning amendments present the problem of spot zoning, an amendment that confers benefits on a discrete parcel without any public benefit, and often in disregard of the comprehensive use plan that zoning is supposed to implement.
- **Limitations on Zoning** - Constitutional and statutory law impose limits on the zoning power. Zoning for aesthetic purposes is generally permitted, particularly when it upholds property values. When zoning restricts free speech it is presumed void and the government has a heavy burden of justification. Zoning that restricts the ability of people related by blood or marriage to live together is presumed void, while zoning that restricts the ability of unrelated people to live together is presumptively valid.

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American Constitutional Government Continued

- When these constitutions were first drafted, they all followed the Adams framework, in his "*Thoughts on Government*" Essay.
- Under this Adams framework, all these governments contain three
 - separate,
 - independent,
 - competing and
 - co-equal branches,that would provide checks and balances, against the powers of each other.
- That is why, to this day, all the early state governments have a common structure.
- The federal government, which was modeled after these states, thus also has a similar structure.
- The states added after the US Constitution was adopted, then also followed this structure.

Court System:

- The Court System is structured as follows:
 - The highest court in the United States is the **United States Supreme Court**.
 - The mid level appellate court is the **Circuit Court of Appeals**.
 - The federal trial level court is the **United States District Court**.
 - The highest court in the State of New York is the **Court of Appeals**.
 - The mid level appellate court is the **Appellate Division**.
 - The state trial level court is the **Supreme Court**.

Founders and Property Rights

- The founders maintained a clear grasp of the connection between liberty, freedom and property rights.
- They understood that it is *the pursuit of property* that *is the catalyst of freedom*, and that a person's unfettered ability to freely exercise their property rights, is the gateway of liberty.
- Throughout the Declaration of Independence, the Constitution and the Bill of Rights, the pursuit of property, and a person's ability to freely exercise their property rights, is deemed sacrosanct.
- Property rights are thereby a foundational pillar upon which American government is built.

Law of Property

Because it developed from the Common Law, most law of Property is:

State Law

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Weekly Information Sheet 02

General Legal Principles -

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Types and Priority of Law

- The three basic types of law are **Constitutions, Statutes** and **Case Law**.
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1. Constitution; 2. Statute; 3. Regulation 4. Executive Order
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- The Constitution (both federal and state) are the supreme law, and no other law within the federal or state systems can out rank them.
- Other than the Constitution, no other law can ever out rank a statute.
- A statute is a law enacted by Congress (federal) or the legislature (state).

Evolution of Rights

- In our Constitutional system of law, government principle purpose is to protect the rights of individuals, especially property rights.
- Derived from Rome and England, America's legal system was the first in world history to provide such protections and recognize individual rights.
- Under American law these rights are unalienable.

Lineage of the Law

- Our laws have an important history from ancient times to today.
- The first real concept of a body of law, with an executive to enforce it, a senate to debate it, and courts to decide it, was in:

Rome

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Real Property – Continued

Trespass Generally

The law has also long recognized the concept that a property owner is entitled to use one's property with out interference from others.

It is the ultimate right of exclusion, and thus property owners have an inherent right to exclude those who wish to so interfere.

When this type of physical interference occurs, it can legally be classified as *Trespass*.

- **Trespass Defined** – At common law, any intentional and unprivileged entry onto land owned or occupied by another constituted a trespass. Although recent developments in the law have focused on carving out special exceptions to liability, the basic liability standards have not changed.

Special Issues with Trespass

- **Intent** - The element of intent has a special meaning in trespass law. A trespasser is strictly liable; good faith, knowledge, and fault are irrelevant. A person commits trespass, even if they merely walk across a property owner's land, mistakenly believing it to be their own. The trespass doctrine requires only that the trespasser intended to enter onto the land as a matter of free choice, not that he had a subjective intent to trespass or even knew he was trespassing.
- **Entry** - Although trespass always involves a physical invasion, a trespass may occur without any personal entry by the trespasser. For a trespasser will also be liable in trespass, if they cause a thing or a third person to enter the property owner's land. This doctrine also applies to entries below the land surface (e.g., through tunnels or caves) as well as-at least partially to entries in the air space over the land.
- **Exceptions** - An entry under a legally recognized privilege does not constitute a trespass. A privileged entry is one made with the landowner's consent. If an owner invites a repairman onto their land to fix a leaky pipe, then the workman's entry is privileged. Privilege may also be found of necessity. A firefighter may enter private property to save an adjacent house from fire. A police officer may enter to arrest a suspect. Private persons can also be found to have a privilege to enter another's land in an emergency situation (e.g., while fleeing from an attacking bear).

Remedies for Trespass

Remedies for trespass also include remedies at law and equity or both.

As a result, a party who has suffered a nuisance can bring an action for:

- **Money Damages**; (can be nominal – unlike most actions no need to demonstrate actual harm, only the trespass itself – could be \$1)
- **Injunction** (called ejectment, to have the trespasser removed from the property and/or enjoined from re-entering it); or
- **Both**

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Weekly Information Sheet 11

Real Property – Land Use

The Value of Title Searches

- A purchaser can only get the property rights of the seller
- Title searches identify the property rights the seller has
- Title searches prevent mistakes like the Creamery Bldg.
- Title searches make the buyer eligible for title insurance
- Title insurance guarantees rights found in title searches
- Title searches help the buyer know what they purchase

Nuisance

Generally

The law has long recognized the concept that one must not use one's property to injure another's property.

When this type of conduct occurs it can legally be classified as **Nuisance**.

There are two types of **Nuisance**.

- **Private Nuisance** – A private nuisance is the substantial interference with private rights to use and enjoy land, produced by either intentional and unreasonable conduct, or by unintentional conduct that is either negligent, reckless, or so inherently dangerous that strict liability is applied.
- **Public Nuisance** – A Nuisance that affects the rights held in common by many landowners, i.e. the public, rather than the specific rights of an individual, targeted landowner can be classified as a public nuisance.

Remedies for Nuisance

Remedies for nuisance include remedies at law and equity or both.

As a result, a party who has suffered a nuisance can bring an action for:

- **Money Damages;**
- **Injunction** (to have the person creating the nuisance cease creating it); or
- **Both**

Lineage of the Law Continued

- The reason the first set of laws was developed in Rome was because they viewed their society and culture as lasting longer than a human lifetime.
- They viewed **Law** as a means to maintain that society and to:
 - Promote the continuity of trade and commerce;
 - Help administrate military conquests; and
 - Instill consumer confidence.

Evolution of the Law

- The law we respect today has a lineage over time and distance.
- Beginning in Rome, it was transported to England as a Roman Colony.
- As English law developed, it was then brought to America when we were a British Colony.
- The law we know today in the **United States** is descended from:

England

- As a result, the body of law that was the most prevalent in Colonial and Early America, as descended from England was:

The Common Law

- **Common law** was the law made by **Judges** in deciding cases based upon precedent and custom.
- Most of the cases involved property disputes.
- In making the decisions that created the **Common Law**, **Judges** followed the legal principle of "**Stare Decisis**" which means:

"Let the Decision Stand"

Reporting on the Law

- The man who was the first to compile the reports and explanations of Case (Common) Law in British Courts, into his famous "Commentaries", that would become known as the "Bible of the Law", was:

Sir William Blackstone

- Blackstone's Commentaries would be used as the primary legal authority for common law courts in England and America until the middle of the nineteenth century, and are still often cited today.

Law and Equity

- Prior to 1800, Courts were divided between Law and Equity.
 - **Equity** had sole jurisdiction over injunctions. Its judges were clergy.
 - **Law** had sole jurisdiction over damages (\$). Its judges were lawyers.

Rights, Locke, Jefferson and Bentham

The Evolution of Rights

I. The Rise of English Jurisprudence

1. Roman Law
2. The Development of English Common Law
3. The Magna Carta
4. Clerical Philosophy and the Recognition of Natural Law
 - Magna Carta - 4th Lateran Council - St. Thomas Aquinas - William Ockham - John Wycliffe

II. The Social Contract Theory

III. The Definition of Right

IV. John Locke and the Pronouncement of Property Rights

- The Magna Carta and the Fourth Lateran Council were each major developments in the evolution of rights across the world.
- **John Locke**, author of the famous **Two Treatises on Government**, declared that natural law provides men with three rights. Such are:

Life, Liberty and the Pursuit of Property.

- **Thomas Jefferson**, author of the **Declaration of Independence** paraphrased Locke, when he declared three inalienable rights of:

Life, Liberty and the Pursuit of Happiness.

- **Jeremy Bentham**, the famous positivist legal commentator, linked property rights and the law when he wrote:

***Property and the Law are born together and die together.
Before laws were made there was no property,
take away laws and property ceases.***

Magna Carta

- The first real battle that was fought and won for property rights was:

The Battle of Runnymede in 1215

- At the Battle of Runnymede, the landed knights (freemen land owners) made **King John I** of England sign the **Magna Carta**, which is Latin for:

“Great Charter”

- King John was the son of King Henry and Brother to King Richard.
- A king following the Norman line started by William the Conqueror in 1066.
- The Magna Carta, signed by King John, was one of the forerunners of modern British law.

Real Property – Title Issues

Conveyances

Generally Continued

Step Four – Recording

Recording Defined:

Recording is the legal process whereby the world is given notice of:

- A conveyance of real property, and
- Under what limitations or encumbrances (if any) the new ownership will exist. (We no longer beat up the child).

Elements of Recording:

- **At Common Law** - In nearly all cases, priority was given to the grantee first in time. First in Time was considered first in right.
- **Example** - If A conveyed Blackacre to B and then made an identical conveyance to C, B would prevail over C on the theory that after the first conveyance A had no interest left.
- **Recording Acts** - Statutes known as "recording acts" require a grantee to make some sort of recordation so as to give "notice to the world" that title to certain property has already been conveyed, and thus to put subsequent purchasers on guard. These statutes are in effect in some form in every state.
- **What Recording Acts Do** - Basically, these statutes set up a system by which any instrument affecting title to property can be recorded in the county where the property is.
- **Purpose of Recording Acts** – To provide discoverable notice. Although recordation is not essential to the validity of a deed, its notice protects the grantee from future fraud.

Requirements for Recordation:

- **What Can Be Recorded** - Any Instrument Affecting an Interest in Land. As a result, practically every kind of *deed, mortgage, contract to convey*, or other instrument creating or affecting an interest in land can be recorded.
- **Grantor Must Acknowledge Deed** - Most recording statutes provide that, in order to be recorded, a deed must be acknowledged by the grantor before a notary public. This requirement offers some protection against forgery. Problems may arise if the recorder records a deed that has not been acknowledged or has been improperly acknowledged.
- **Payment of All Necessary Fees and Charges** – The recording party must pay all required fees, taxes and charges associated with recording, as collected by the County Clerk.

Mechanics of Recording:

- **Filing Copy** - The grantee or her agent normally presents the deed to the county recorder (the County Clerk in New York), who photographs it, and files the copy in the official records. These records are kept chronologically.

Indexing - The county recorder also indexes the deed to permit title searches. The usual indexes are the grantor-grantee and grantee-grantor indexes, which are arranged by reference. These indexes are often now available on the internet.

Real Property – Transfer of Title

Conveyances

Generally Continued

Step Three – The Deed

Deed Defined:

The Deed is the Legal Instrument by which the title to the Real Property is passed. (We no longer do livery of seisin).

Elements of a Deed:

- Must be in writing – Pursuant to the Statute of Frauds
- Must Describe the Land and the Parties – Words of Purchase and Limitation
- Must provide “words of intent” – How the property is transferred and held – i.e. fee simple absolute or any terms of limitation.
- Consideration is Unnecessary - Since the Deed merely represents the title and not the contract or agreement under which terms it is passed.
- Seal and Attestation are also Unnecessary - But can be required for recording.
- A Signature is Required from the Grantor - A grantee’s signature is not required even if it contains covenants, since their acceptance of the deed is deemed acceptance of the covenants or limitations contained in the deed.

Delivery of a Deed:

- A deed must be delivered and accepted to be effective
- Title to property passes upon effective delivery – Consequently, returning it back to the grantor has no effect, since title has already passed.
- Physical or manual (through the mail or courier) delivery is required.
- Delivery is presumed if:
 - Handed to grantee,
 - Delivery is acknowledged before a notary, or
 - The deed is recorded.

Types of Deeds:

There are three types of deeds characteristically used to convey property interests. To remember them think of Harry Potter (*Gryffindor is Stupendous at Quidditch*)

1. The General Warranty Deed – Contains all important title covenants
2. The Special Warranty Deed (often statutory) – Contains limited assurances
3. The Quit Claim Deed – Contains no covenants or assurances

The major difference between these deeds is the scope of assurances (covenants for title) they give to the grantee and the grantee's successors regarding the title being conveyed.

Magna Carta Continued

- It was also one of the foundational documents for the US Constitution and its Amendments (the Bill of Rights).
- Originally known by the people of England as the Charter of Liberties.
- It became a guiding document of both England, and several other countries.
- It expanded the rights and liberties of the people, and limited the power of the government.

What is in the Magna Carta

- Containing 63 clauses, this landmark document:
 - Created a council to the King (a forerunner to parliament);
 - Promised all freemen access to courts and a fair trial;
 - Specified many property rights from infringement by the king and his agents;
 - Eliminated unfair fines and punishments;
 - Gave certain legal powers to the Catholic Church; and
 - Addressed many lesser specific issues of the day.
- It should be noted, however, that **one major right the Magna Carta did not recognize, was that it did not abolish the condition of involuntary servitude (serfdom)**, since the freemen who drafted the document, depended upon this feudal system for their wealth, power and life.

Sovereignty

- Sovereignty, in which law recognizes the power of ruling, is vested in Great Britain in the government (the King in Parliament).
- In the United States, however, sovereignty vests in the people.
- Such is why the first three words in the Constitution are:

“We The People”



Weekly Information Sheet 03

The Four Postulates

The most important concept in our class is the collection of ideas known as the four postulates of property law.

These postulates outline all the nature that is property law, and collectively illustrate its meaning.

The Four Postulates of Property Law:

- 1. Property needs to be seen as a collection of “Rights” not a collection of “Things”;**
- 2. Property Rights are those recognized by Law and the Law evolved from Property Rights;**
- 3. Our Foundations of Law recognized that we are endowed with Property Rights; and**
- 4. Property Rights can be summarized by E-PUT**

Exercising Property Rights

E-PUT – Just what are your property rights?

They can be summarized by the initials EPUT.

These initials stand for:

E-PUT

- 1. The Right to Exclude;**
- 2. The Right to Possess;**
- 3. The Right to Use; and**
- 4. The Right to Transfer.**

Real Property – Transfer of Title

Conveyances

Generally Continued

Step Two – The Mortgage

Mortgage Defined:

The Mortgage is the Legal Instrument by which Real Estate can be Financed.

A mortgage is both a loan contract and a lien.

Elements of a Mortgage:

- **Must be in writing** – Pursuant to the Statute of Frauds
- **Must Describe the Land and the Parties**
- **A Mortgage is a Contract** - Like all contracts, Mortgages can have different terms (duration, interest rates and payment structures) but most clauses contained in the mortgage contract are written pursuant to federal and/or state regulation, causing most Mortgages to be highly uniform. This uniformity enables the mortgage to be sold on the secondary mortgage market (Fannie Mae and Freddie Mac – Federal National Mortgage Assn and Federal Home Mortgage Corp).
- **Mortgage Interest is Tax Deductible** - Under Federal and State tax law, Home Mortgage interest is tax deductible.
- **Most Mortgage payments are Amortized** - Each payment over the term (during each month of 30 or 15 years) is an equal amount.
- **Mortgage Interest Rates are front loaded** - Early payments are much more heavily weighted toward interest than principal, i.e first month 99% interest 1% principal.
- **15 year Mortgages Cheaper** – A 15 year mortgage is far less costly than a 30 year mortgage, due to the fact the buyer pays interest for a shorter period of time, and because of the reduced time the financier has their money at risk.
- **Not Subject to the Homestead Exemption** - Mortgages are an exception to the Homestead Exemption, and can be foreclosed on against tenants by the entirety, as such is a joint creditor execution, where both owners would be required to sign the mortgage.

Types of Mortgages:

- **First and Second Mortgages** – A property may contain more than one mortgage. The first mortgage is the first in time (and usually the first in right). The second or secondary mortgage (often a home equity loan) is financing on an amount between the amount of the first mortgage and the amount of the value of the home (i.e. the equity).
- **Amortized Mortgage** – A mortgage for a specified term (usually 15 or 30 years) with the monthly payments amortized over the period of the loan in equal amounts.
- **Balloon Payment Mortgage** - A mortgage for a specified term of years, where after a period of equal loan payments, a single, large balloon payment is due upon the conclusion of the loan.
- **Assumed Mortgage** – A mortgage taken by a previous owner of the property that is assumed (i.e. taken over) by a subsequent owner.
- **Purchase Money Mortgage** – A mortgage loan made by the owner of the property to the purchaser of the property for a portion of the purchase price.



Weekly Information Sheet 10

Real Property – Transfer of Title

Conveyances

Generally

There are four major factors to a transfer of real property. They are:

- **Contract**
- **Mortgage**
- **Deed**
- **Recording**

Step One – The Contract

Statute of Frauds:

Statute of Frauds - To comply with the Statute of Frauds, all agreements for the sale of real property must be in writing and signed by the Party to be charged.

Specific Performance:

Specific Performance - To allow for specific performance (where a sale can be enforced by either party, both the buyer and the seller sign a contract to purchase Real Estate.

Attorney Approval Clause:

Attorney Approval Clause - Because most contracts for the purchase of real property are provided to both parties by non lawyer realtors, such contracts contain a standard “attorney approval clause”, which permits the attorney for the buyer to examine the contract, within a specified period of time (usually 5 days) and cancel the contract if disapproved by such lawyer.

Marketable Title:

Right to Pass Free and Clear Title - In the contract, there is an implied warranty to transfer Marketable Title, which is the ability to pass ownership that is free from doubt and free from encumbrances (such as mortgages, liens, easements, covenants, encroachments).

Property Usually Sold “As Is”:

Duty to Disclose - Most contracts provide for the sale of the premises “as is”, but a duty to disclose known defects has been upheld by the courts and is now standard form in nearly all real estate contracts. Active concealment by a seller is, however, deemed fraud. Accordingly, Sellers frequently now also add specific disclaimers of liability, particularly on expensive items like leaky foundations or roofs.

Realtors:

Most buyers find real estate through a Real Estate Agent (also known as a Realtor)

Serve as Agent for the Seller - A realtor is usually hired by, and is an “Agent” for, the seller. A buyer can retain a real estate agent, but such is rare.

Listing Agreement - A Real Estate Agent is hired by means of a written listing agreement. Pursuant to such agreement, the seller is obligated to pay the realtor’s commission, which is usually between 6 to 7 percent of the sale value of the real property.

Real Estate Agents are licensed by the State of New York.

Realtors Work Off Commission - Although a realtor usually works for, and must therefore represent, the seller, because they make their income from a commission on the sale of the property, such realtor has a vested interest in making the buyer happy about the purchase.

Multiple Listings - A realtor may can represent many sellers, and they can offer one buyer several choices, especially through the multiple listing service.

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Types of Property

Property can be seen through the prism of three **types**.

These **types** of property allow one to exercise their property rights according to the use and function of the property.

These **types** include:

Types of Property

1. Real (Rights in Land);

Real Estate – Ownership/Leaseholds/Easements/Life Estates

2. Personal (Rights in Objects); and/or

Chattels – Tangible, visible “things”

3. Intellectual (Rights in Ideas).

Patents – Idea for Product or Process

Trademarks – Logo, Identification or Distinction

Copyrights – Written or Performed Works

Locke, Jefferson and Bentham

- **John Locke**, author of the famous **Two Treatises on Government**, declared that natural law provides men with three rights. Such are:

Life, Liberty and the Pursuit of Property.

- **Thomas Jefferson**, author of the **Declaration of Independence** paraphrased Locke, when he declared three inalienable rights of:

Life, Liberty and the Pursuit of Happiness.

- **Jeremy Bentham**, the famous positivist legal commentator, linked property rights and the law when he wrote:

Property and the Law are born together and die together.

*Before laws were made there was no property,
take away laws and property ceases.*

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Weekly Information Sheet 04

Intro to Property Terms and Rights

Why Do We Recognize Rights in Property?

- **First in Time First in Right**
(A way to allocate resources not yet owned);
- **Labor**
(People should be entitled to fruits of their labor);
- **Utilitarianism**
(Private Property exists in order to maximize the overall happiness and utility of all citizens – i.e. People respond to incentives);
- **Economics**
(Private Property exists to maximize the overall wealth of society – i.e. Society responds to incentives); and
- **Liberty and Personhood**
(Private Property is essential to the development of a free society and individuals).

Private Rights of Action in Property Cases

Election of Remedies

One who destroys, misuses, misdelivers, or otherwise wrongfully deprives the owner of chattel of his possessory rights, may be liable to the owner under various theories of recovery.

- 1) **Replevin** - Replevin is an action to recover the chattel itself;
- 2) **Trespass** - The action in trespass is to recover money damages incurred by reason of the dispossession; and
- 3) **Trover** - The action in trover is to recover the value of the chattel along with damages for dispossession.

Escheatment

When property “Escheats” it:

Returns to the State

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Real Property – Estates in Land

Interests in Land Continued

Non Possessory Interests - Defined

“**Possessory Interests**”, are interests in real property that either are, or will be (pre-vested interests) possessed by the holder of the property.

“**Non Possessory Interests**”, are interests in real property interests where the holder of such interest does not ever actually possess the property. It is the right to use land possessed by someone else.

Types Non Possessory Interests

- **Easements** - The right to use a tract of land for a specific purpose
- **Profits** - The right to enter a tract of land and take the soil or a substance of the soil
- **Covenants** - A written promise to do (or not do) something on a tract of land
- **Servitudes** - A unwritten covenant enforced by equity (for fairness)

Types of Easements

- **Affirmative** - Allows a non possessor to use land
- **Negative** - Prevents possessor from a specific use
- **Appurtenant** - Permits an adjoining landowner a specific use
- **In Gross** - Permits a use by a non adjoining landowner

Methods of Creation of Easements

- **Express grant**
- **Express reservation**
- **Implication, and**
- **Prescription.**

Special Circumstances

Easements:

- **Create a right to use land that is possessed by someone else;**
- **Can be held for a term any length; and**
- **Are subject to the statute of frauds – i.e., Need to be in writing**
(An exception to this last rule is an easement by prescription, which is an easement taken by adverse possession)

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Real Property – Estates in Land

Adverse Possession

Generally

At the core of adverse possession is a statute of limitations.

Statutes of Limitation bar suits after some period of time after the cause of action accrues.

Under NY State Law (Section 212 (a) of the CPLR) the statute of limitations (time period for adverse possession) for an action to recover real property is 10 years.

Basic Issues

In context of actions to recover possession of real property the cause of action accrues at the time the wrongdoer enters and takes possession of the property.

A cause of action for wrongful possession differs from that for trespass.

In trespass, there is a wrongful entry, not wrongful possession.

If someone purchases a building on top of property not owned or leased by them the owner of the land can sue the building owner for ejectment and make them take the building off the land.

The public policy reasons for the law allowing Adverse Possession include:

- Rewarding the possessor for productivity;
- Providing an incentive to encourage land productivity;
- Penalizing the original owner for sitting on his rights; and
- Promoting the quieting and settling of title.

Legal Requirements for Adverse Possession - COACHEN

- **Continuous** - The uninterrupted possession of the land
- **Open** – Conduct that puts a person of ordinary prudence on notice of the claim
- **Actual** – Using the land as a reasonable owner would use the land
- **Claim of Right** - A claim of land to hold it for oneself
- **Hostile** - Acting with an intention to claim the land and treat it as your own.
- **Exclusive** - The exclusive, unshared use of the land
- **Notorious** - That the possession by the adverse party is well and widely known in a public manner forming a part of common knowledge in the community

Special Circumstances

If a previous owner of a parcel of property met all the requirements of adverse possession, except for the time period to satisfy the statute of limitations, the new owner would be able to add their time of adverse possession to the previous owner's time of adverse possession. This concept is known as:

Tacking

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Property Terms and Rights Continued

Title to Personal Property

Rights and title to personal property are acquired or lost by:

1. Transfer – Sale;
2. Occupancy;
3. Adverse Possession;
4. Accession;
5. Confusion;
6. Judgment;
7. When the chattel is lost, mislaid, or abandoned; or
8. Gift.

Plants and Crops

Fructus Naturales

Plants that grow spontaneously on land, e.g., trees, bushes, and grass, are described as fructus naturales and are considered to be a part of the land, and therefore real property. Title to the land includes such Plants.

Fructus Industriales

Crops that are the result of annual planting, labor, and cultivation, e.g., grains, vegetables, and other crops, are described as fructus industriales. These crops are, as a general rule, regarded as personal property.

Lost, Mislaid and Abandoned Property

Lost or Mislaid Property:

Can be kept by the finder if it is under \$20 in value and a reasonable attempt has been made to find the owner.

Abandoned Property:

Can be kept by the finder no matter what its value.

Domesticated Animals

Are considered personal property under the law (they are moveable).

Special Rules: Wild Animals

Wild animals (ferae naturae) in their natural state are unowned.

They become private property upon being reduced to possession.

Acquisition of Title and Possession

An animal in its natural state is unowned.

The first person to exercise dominion and control over such animal becomes, with possession, the owner of it.

To become the owner, the claimant must establish that they have exercised dominion and control over the animal. (Pierson v Post)

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Special Rules: Wild Animals - Continued

Acquisition of Title - Constructive Possession

Animals caught in a trap or net belong to the one who owns and has set the trap or net.

By setting such a trap, one is said to constructively possess those animals snared.

Mere Pursuit

Mere pursuit does *not* constitute the exercise of dominion and control sufficient to give the hunter a property right in the animal.

However, where an animal has been *mortally wounded* so that actual possession is practically inevitable, a vested property right in the animal accrues and cannot be divested by another's intervening act in killing the animal.

Violation of Statute

One who violates a statute (e.g., fails to have a hunting license) forfeits his title in animals caught pursuant thereof.

One who violates a statute (e.g., fails to have a hunting license) forfeits his title in animals caught or killed.

Trespass

While a landowner is *not* regarded as the owner of all wild animals found on their property, a trespasser who kills game on another's land forfeits title in favor of the landowner.

This rule does not change the fact that the animal is unowned until reduced to possession.

In order not to give a benefit to the act of trespassing, however, the possessor will be forced to surrender title in favor of the landowner

Escape

If a wild animal, captured and held in private ownership, escapes and resumes its natural liberty, the former owner loses their property right in it. The animal is once again unowned and the first person thereafter to capture it becomes the owner.

Habit of Return

If a wild animal escapes and, although wandering about without restraint, retains a habit of periodic return to its master's home, or if, although endeavoring to escape, is still pursued by the owner or is by other means liable to be recaptured by its owner, title is not lost.

Marked Animals

When animals have been captured and reduced to private ownership, it is common for the owner to mark or brand them for purposes of identification.

If the animal escapes and resumes its natural liberty, the question becomes if title is lost.

Normally, modern courts will allow title to be retained in the former possessor as long as the animal is marked and the owner exercises all possible effort to recapture the animal.

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Weekly Information Sheet 09

Real Property – Estates in Land

Interests in Land

Fixtures

Generally:

- A **“fixture”** is a chattel (a piece of personal property) that has been affixed to land, and as such has ceased being personal property, and has become part of the realty.

Common Fixtures:

- Stoves
- Affixed flat screen TV's
- Curtain Rods
- Door Keys

Challenging Items:

- Flat Screen TV's;
- In Room Air Conditioners;
- Electrical Generators;
- Art Collections;
- Screened Yard Houses; and
- Satellite Dishes
- Basketball Units.

With a fixture, the former chattel becomes an accessory to the land (*i.e.*, a fixture) and passes with ownership of the land. If a fixture is detached from the real estate, it once again assumes its designation as personal property.

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Real Property – Estates in Land

Future Interests – Estates in Time

A future interest in real property stems from the fact that the law recognizes all the rights in land (E-PUT) as well as the ability of the land owner to separate those rights over time.

As a result, a **future interest** in real property can be defined as:

- A right to receive possession of property at a future time;
- An interest in land in which the privilege of possession or of enjoyment is future and not present; and
- A non possessory interest that will or may become a possessory estate in the future.

Types of Future Interests

- **Reversionary Interests**
(the future interest will vest in the original owner)
 - Reversions (Including Life Estates)
 - Possibility of Reverter
 - Right of Re-entry
- **Remainders**
(the future interest will vest in the original owner or a 3rd party)
 - Indefeasibly vested remainder
 - Vested remainder subject to open
 - Vested remainder subject to complete divestment
 - Contingent remainder
- **Executory Interests**
(the future interest will vest in a 3rd party)
 - Shifting executory interest
 - Springing executory interest

A Two Step Dance: Possession and Time

- *Present interests* (When the RIGHT to possess is NOW)
- *Future interests* (When the RIGHT to possess is in the future)

Title Limitation Rules

- **Rule in Shelley's Case**
(To A for Life with remainder in A's Heirs: Now to A in Fee Simple Absolute)
- **Doctrine of Worthier Title**
(To A for Life with remainder in O's Heirs: Now to A with reversion in O)
- **Rule Against Perpetuities**
(No property interest is good unless it must vest, if at all, not later than 21 years plus lives in being)
- **Rule Against Restraints on Alienation**
(All disabling and absolute restraints are void, some equitable, promissory, temporary restraints can be upheld)

These Rules All Seek to **Promote Marketable Title** and **Ensure that Real Property is NOT Controlled for any significant time from Beyond the Grave.**

It should be noted, that under the **Rule Against Perpetuities**, unborn children, conceived prior to the time the interest was created, ARE considered "lives in being" if they are born alive after the interest was created.

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Weekly Information Sheet 05

GIFTS -

There are two principal types of gifts.

These types of gifts have distinct legal names.

Types of Gifts

1. **Gifts Inter Vivos.**
(Gifts During Lifetime)
2. **Gifts Causa Mortis**
(Gifts in Contemplation of Death)

There are also three factors that make the transfer of property a gift.

These factors must be present for the gift to be legally valid.

The Three Factors that make a Gift

1. Donor's Intent
2. Delivery
3. Acceptance

Certain Special Circumstances

In order for a gift in contemplation of marriage to be legally valid:

- The marriage has to happen.

In order for a gift causa mortis to be upheld:

- The person offering the gift has to die (but not of what they were afraid they would die of); and
- The recipient of the gift must show evidence of actual delivery

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Liens

Lien Defined:

Black's Law Dictionary defines a "LIEN" as:

1. A charge or security or encumbrance upon property;
2. A claim or charge on property for payment of some debt, obligation or duty;
3. A right to retain property for payment of debt or demand

Liens can be statutory or based upon a common law right

Classes of Liens:

There are two principal *classes* of liens.

These classes of liens have distinct legal names.

1. General Liens.

(The Lien attaches as security to ALL the effected property of the person against whom the lien is levied – such as all the items left by a patron in a hotel room).

2. Special Liens

(The Lien attaches as security to ONE single item of property of the person against whom the lien is levied – such as a car in in a car loan).

Where a doubt exists as to whether the lienholder has a general or special lien, the law presumes the lien to be special rather than general.

Important Qualities to Know About Liens:

A Lien:

- Gives the Lien holder the right to possess and retain certain property under certain circumstances;
- Cannot be levied against an item not given by its owner; and
- Can be deemed waived by contract, acceptance of other security, or by a demand for unlawful charges.

Real Property – Estates in Land

The Castle Doctrine holds:

- That a person need not retreat from a home invader, and killing such burglar is justifiable homicide.

Deeds

Livery of Seisin

This was the ceremonial practice before deeds (since many people could not read) where land transfers occurred in front of neighbors, watching as the seller cut out a piece of sod of the real property and physically handed it to the buyer in exchange for gold (or other consideration).

Upon the conclusion of the transaction, a small male child would be beaten to have him remember the events (their version of recording).

Today's Deeds

Today, written deeds take the place of the ceremonial livery of seisin.

Accordingly, to determine what rights exist in an Interest in Land, there are two factors which tell the story and they appear in the deed as follows:

- **Words of purchase; and**
(Describe *who* takes the real property by grant, gift, inheritance or bequest)
- **Words of limitation:**
(Describe the *type* and *duration* of the estate taken by the transferee)

Together, the words of purchase and words of limitation are "the magic words".

Magic Words

The following are the words of purchase and words of limitation for the conveyance of many of the major types of estates in land:

1. **Fee Simple Absolute:**
To Grantee(s) and their heirs
2. **Fee Simple Determinable:**
To Grantee(s) and their heirs "for so long as" or "while" or "during" or "until" (the occurrence of an event).
3. **Fee Simple Subject to a Condition Subsequent:**
To Grantee(s) and their heirs "upon the condition that" or "provided that" or "but if" or "if it happens that" (the occurrence of an event).
4. **Fee Tail:** (No longer recognized under modern law)
To Grantee(s) and the heirs of their body (Now deemed fee simple absolute).
5. **Life Estate:**
To Grantee(s) for life (or if pur autre vie) for the life of (name of other person).



Real Property – Estates in Land

Interests in Land

• Possessory Interests in Land

(Either presently or in the future)

1. Fee Simple Absolute

2. Defeasible Estates

- Fee Simple Determinable with Possibility of Reverter
- Fee Simple Subject to a Condition Precedent
- Fee Simple Subject to an Executory Interest

3. Fee Tail (No longer exists – now fee simple absolute)

4. Life Estate

• Non Possessory Interests in Land:

(An Interest with a right that can be executed but is not presently possessed)

1. Easements

2. Profits,

3. Covenants, and

4. Servitudes

The law prefers, and presumes, that land will be held in what form of ownership:

Fee Simple Absolute

An Estate held in Fee Simple Absolute:

- Invests the owner with all possible rights (E-PUT) now and in the future;
- Is of perpetual and infinite duration; and
- Is the form of land ownership from which all others are derived.

The law prefers that title to land be held in fee simple absolute because:

- It promotes the marketability of title; and
- It helps to assure the productivity of the land.

Bailments

Bailment Defined:

Bailments can be understood from their definition. This definition is:

“A bailment is the relationship created by the transfer of possession of an item of personal property by one called the bailor to another called the bailee for the accomplishment of a certain purpose.”

Elements of a Bailment: DAPPER

A Bailment can be broken down to a series of *Elements*.

These elements include:

- Delivery
- Agreement
- Personal Property
- Purpose
- Entered into for the Benefit of one or both parties; and
- Ended with Redelivery

In order for a Bailment to be valid, all of the above *Elements* must be present.

Non-Dispensable Issues for a Bailment

Most importantly, for a bailment to exist, there must be:

- A Transfer of Possession; and
- An intent of the bailee to take control of the bailed item.

Duty of Care for a Bailment

The level of the duty of care of a bailee depends upon:

- Whose benefit the bailment is for.



Weekly Information Sheet 06

Intellectual Property

There are three recognized **types** of intellectual property.

Like the **types** of property itself, these **types** of intellectual property allow one to exercise their property rights according to the use and function of the intellectual property.

These **types** of intellectual property include:

Types of Intellectual Property

1. **Copyrights** (Rights in Writings, Arts or Expression);
2. **Patents** (Rights in Inventions or Discoveries); and
3. **Trademarks** (Rights in a Word, Name or Symbol).

These rights were NOT widely recognized in common law.

These rights are NOT enforceable world-wide (without a treaty).

These rights are recognized in modern law pursuant to federal statutes.

- *Title 17 of the United States Code outlines United States Copyright law.*
- *Title 35 of the United States Code outlines United States Patent law.*
- *Title 15 of the United States Code outlines United States Trademark law.*

Computer Programs have been held to be covered under copyright law as they are written code, not under patent law as processes.

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Real Property – Estates in Land

Interests in Land Continued

Defeasible Estates

1. **Fee Simple Determinable:**
Upon the occurrence of an event, automatically reverts back to the original owner.
 2. **Fee Simple Subject to a Condition Subsequent:**
Upon the occurrence of an event, reverts back to the original owner, after he acts.
 3. **Fee Simple Subject to an Executory Interest:**
Upon the occurrence of an event, property is automatically vested in a new 3rd party.
- A Right of Re-entry (under a Fee Simple Subject to a Condition Subsequent) can be waived by affirmative action.

Joint Interests/Concurrent Estates

Tenancy in the Entirety

- By Marital Right – only between husband and wife
- Right of Survivorship – by operation of law
- Severance Limited
(Death, divorce, agreement, joint creditor execution)

Joint Tenancy

- Created by unity of time, title, interest and possession
- Right of Survivorship – by operation of law
- Severance Less Limited
(Inter vivos conveyance or contract to convey, death, agreement, foreclosure on lien)

Tenants in Common

- No Right of Survivorship.
- Freely alienable.
- Joint ownership based upon percentage.
- Share & responsible proportionally in all gains / liabilities.

Creditors and Tenants in the Entirety

- If a couple owns property in the Tenancy in the Entirety a creditor of one party (husband or wife) cannot force a sale of the property, and can only put a lien on the debtor's one half share of the home, so as to collect on half of the proceeds of the sale of the property if the debtor and their spouse ever decide to sell it.
- If both husband and wife are joint debtors, however (such as in the home mortgage), then the creditor can seek a foreclosure on the property, force its sale, and collect on any deficiency (the amount owed after the collection on the foreclosure sale).

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Real Property – Estates in Land

Interests in Land Continued

Livery of Seisin

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Common Law Felonies

Remember **MR & MRS LAMB.**



Murder
Rape
Manslaughter
Robbery
Sodomy
Larceny
Arson
Mayhem
Burglary



Common Law Felonies vs. Modern Felonies

At common law, a **felony** was a capital offense, meaning the ultimate **punishment** was **DEATH**.

Today, a **felony** under New York law is generally considered **a crime that can be punished by more than a year in jail**. While a **Misdemeanor** is generally considered **a crime that can be punished by less than a year in jail**.

Murder

A person is guilty of murder when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person;
2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or
3. Acting either alone or with one or more other persons, he commits or attempts to a felony, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants.

Rape

A person is guilty of rape (in the first degree) when:

He or she engages in sexual intercourse with another person:

1. By forcible compulsion; or
2. Who is incapable of consent by reason of being physically helpless; or
3. Who is less than eleven years old; or
4. Who is less than thirteen years old and the actor is eighteen years old or more.

Robbery

Robbery is forcible stealing.

A person forcibly steals property and commits robbery when:

In the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

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Introduction to Real Property

The Value of Real Property

Historically, Real Property has meant:

- Wealth;
- Power; and
- Life.

Real Property has always been viewed as valuable throughout history because:

- It can be used to produce crops and maintain livestock upon which we depend for food; and
- It can be used as a platform upon which buildings can be constructed.

To understand Real Property, and its legal concepts, one must think in terms of:

Possession and Time.

Complex legal rules and holdings of Real Property have developed because of:

The inherent value and uniqueness of real property.

Because real property has always been held as special, distinct, unique and valuable in the law, the law has recognized:

- That rights in it can be limited in its transference and possession by the original owner;
- That rights in land can be limited in time; and
- That rights in land can be possessory or non possessory.

Real Property Taxes

There are two types of taxes that tax you on what you own or have, not on what you earn or acquire. They are:

Real Property Taxes and Estate (or Death) Taxes.

In New York State, Real Property Taxes are used to finance:

Local Governments and Schools.

The STAR Program in New York shifts school tax revenue:

From real property taxes to income taxes.

Governments use the real property tax to generate revenue because:

It is a more dependable, less fluctuating, source of revenue.

Real Property – Estates in Land

Specific Performance

The Doctrine of Specific Performance requires that both parties (buyer and seller) sign the contract to purchase real estate, because then:

Either party can enforce the sale and not just collect damages.

Interests in Land

- **Possessory Interests in Land**
(Either presently or in the future)

1. Fee Simple Absolute

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