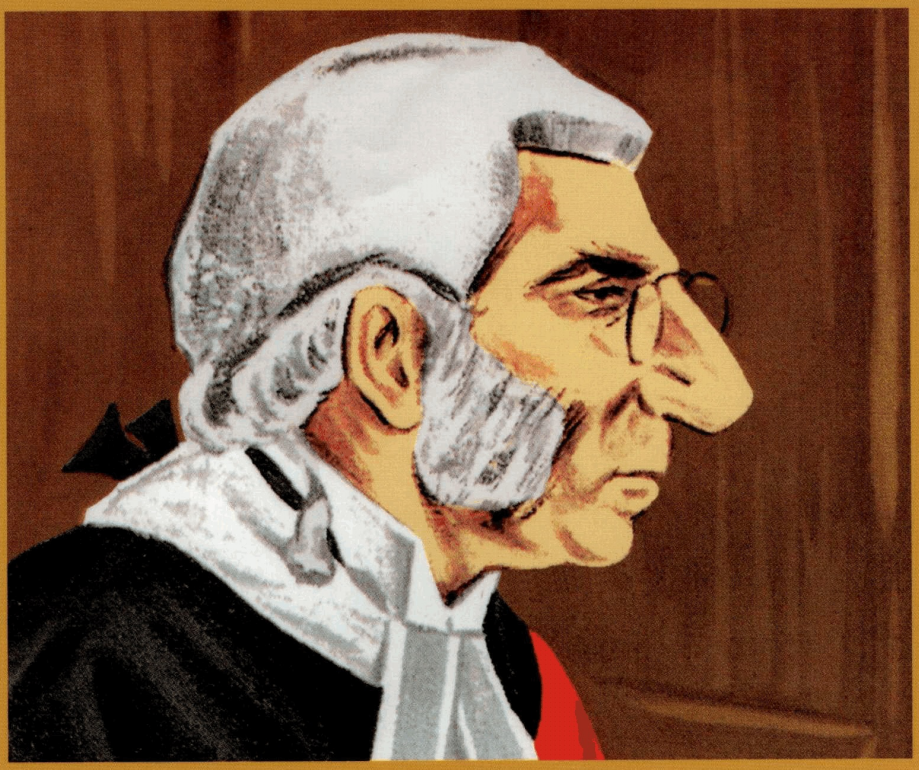


Selected Readings 10

emanuel®
law outlines



PROPERTY

Keyed to Dukeminier/Krier/Alexander/Schill, Sixth Edition

CALVIN MASSEY

ASPEN
PUBLISHERS

CHAPTER 9

SERVITUDES: LAND USE LIMITS CREATED BY PRIVATE BARGAIN

ChapterScope

This chapter examines the various ways land use may be restricted by private agreement, focusing particularly upon easements, real covenants, and equitable servitudes. Here are the most important points in this chapter.

- Easements are rights to use another's land. The right may be appurtenant to land ownership or purely personal ("in gross"). Personal rights to take things from another's land are called profits. Negative easements (the right to prevent another person from using their own land in a certain way) do exist, but only in limited circumstances. Easements may be created by grant, estoppel, implied from prior use, implied by necessity, and by prescription.
  - An easement by estoppel is a license to use land that has become irrevocable because the licensor has represented to the licensee that a certain use may be made of his land and the licensee has relied to his detriment upon that promise. The license remains irrevocable so long as necessary to honor the reasonable expectations of the party who relied upon the promise.
  - An easement may be implied from prior use if one party has used a part of his property to benefit another part, later divides the property, and at the time of division, the use is apparent, reasonably necessary to the enjoyment of the dominant estate, and continuous thereafter.
  - An easement may be implied from necessity if one party owns land and later divides it in such a way that a parcel becomes landlocked — lacks access to a public road. An easement for access is then implied across the property owned (or formerly owned) by the grantor connecting the landlocked parcel and a public road.
  - An easement by prescription occurs when a use is not permissive, continues for the relevant limitations period, and is conducted with the elements of adverse possession.
- Easements appurtenant are transferable. Easements in gross are transferable if the parties so intend or are commercial in nature. The scope of an easement may not generally be enlarged beyond the original expectations of the parties, but sometimes courts make an exception if a new use imposes no additional burden on the servient estate.
- Easements may be terminated by agreement, expiration, merger of the dominant and servient estates, abandonment, prescriptive use by the servient estate owner, or cessation of purpose.
- Covenants are promises to use or not use one's own land in a certain way. As between the original parties, enforcement issues are purely contractual, but when certain elements are present such promises may be enforced by or against successors in interest to the burdened or benefited estates in land. When damages are sought for enforcement of a covenant by or against a successor in interest the covenant is called a real covenant; when an injunction is sought for enforcement of a covenant by or against successors in interest the covenant is called an equitable servitude.

- Real covenants can only be created by an enforceable written contract. The original contracting parties must intend that the burden and benefit of the restriction bind their successors in interest and the substance of the covenant must "touch and concern" land use, rather than affect merely personal rights. Some jurisdictions require privity of estate between the original contracting parties ("horizontal privity") in order to enforce the burden against a successor, but that rule is rapidly disappearing. Many jurisdictions require privity of estate between the original contracting party and his successors in interest ("vertical privity") for either the burden or benefit to run to those successors. For the benefit to run, vertical privity means succession to "some interest"; for the burden to run, vertical privity means succession to the identical interest.
- Equitable servitudes may be created by an enforceable written contract and, in some states, by implication from a common scheme of development undertaken by a single owner of property that is intended to be burdened by a common use restriction. For an equitable servitude to bind a successor in interest the original use restriction must be intended to bind successors, the successor must take with notice of the restriction, and the substance of the restriction must touch and concern land use. Some commentators argue that the touch and concern is obsolete, and that its functions should be performed by rules governing termination or modification. Generally, an equitable servitude may not be enforced against a successor by someone who does not own land benefited by the restriction.

- Real covenants and equitable servitudes may not be enforced when they are illegal, unconscionable, violate public policy, impair fundamental rights, or impose unreasonable restraints on alienation. The circumstances under which they may not be enforced is a developing area of law, partly because of the increasing use of restrictions in planned developments.
- Real covenants and equitable servitudes may be terminated by agreement, merger, or changed circumstances that strip all benefits from the restriction. Courts generally protect equitable servitudes by a property rule (i.e., an injunction), without considering whether it might be more socially utile to protect such servitudes by a liability rule (i.e., damages).

I. INTRODUCTION

A. The concept: Neighbors often desire to make private agreements concerning use of their land and, because owners come and go, want those agreements to bind future owners or occupants. These agreements come in two varieties. First, one landowner may grant to another person the right to use his land for some specific purpose or in some manner. This type of agreement creates either an ***easement*** or ***profit à prendre.*** Both will be discussed in section II on easements. Second, one landowner may promise another landowner that she will use (or refrain from using) her land in a specified way. Depending on what remedy is sought for enforcement, these agreements create either a ***real covenant*** or an ***equitable servitude.***

B. Easements: The principal issues surrounding easements are ***creation, scope of the permitted use,*** and ***termination.*** Easements are created by express grant, by equitable estoppel, by implication from prior use of an owner who divides land into separate parcels, by necessity resulting from an owner's division of land into separate parcels leaving one or more without access, and by prescription (the analogue to adverse possession). Issues of scope involve identifying what landowner (or person) is entitled to use the easement and deciding the proper intensity of permitted use.

Easements may be terminated by abandonment, merger, release, actions inconsistent with the granted right and prejudicial to the burdened landowner, accidental destruction, prescription, or markedly changed circumstances.

C. **Covenants running with the land:** These promises concerning land use consist of ***real covenants*** (enforceable at law to recover damages for breach) and ***equitable servitudes*** (enforceable in equity by an injunction).

1. **Real covenants: Enforceable at law:** The principal issue concerning these covenants (created only by express agreement) is whether they may be enforced by or against subsequent owners of the land burdened or benefited by the promise. Often the sticking point in this inquiry is whether or not ***privity of estate*** exists. The traditional view is that *vertical privity* — privity of estate between the promisor and his assignee and between the promisee and his assignee — *must exist* for a real covenant to be enforceable by or against successors to the estate, although that view is under attack: The Restatement 3d Property (Servitudes) §5.2 proposes dispensing with privity for *negative covenants* — promises not to use land in some fashion — but retain the concept for *affirmative covenants* — promises actively to use land in a certain way. The reason for seeking to enforce a real covenant is to obtain damages resulting from its breach.

2. **Equitable servitudes: Enforceable in equity:** These promises may be created by agreement or, in some states, by implication from a development scheme undertaken by a common owner. Privity is ***not*** required for these promises to be enforceable by or against successors to the estate, but the promise must be intended to bind successors, the successor ***must have notice*** of the promise, the nature of the promise must ***touch and concern*** use of the burdened land, and the promise must benefit neighboring land. Equitable servitudes are enforceable by an injunction and, in some cases, a lien.

II. EASEMENTS

A. Introduction

1. **Defined and distinguished from fee simple:** An easement is an interest in land that entitles the holder to use land owned or possessed by another person. It is not a freehold estate. An ***easement*** almost always gives its owner the right to ***use*** **another person's** land; a freehold (e.g., fee simple) gives its owner the right to ***exclusive possession of*** **one's own land.** In rare circumstances an easement may give its owner the right to prevent another person from using their land in a certain way.

   a. **Ambiguous grants:** Some grants are none too clear about whether an easement or fee simple was intended, but if the interest conveyed is a limited area for a limited purpose, especially if there are no defined boundaries, an easement is the likely intention. Most courts employ a ***rebuttable presumption*** that an ambiguous grant conveys an ***easement.*** See, e.g., *Northpark Associates No. 2, Ltd. v. Homart Development Co.*, 262 Ga. 138 (1992); *Homan v. Hutchison*, 817 S.W. 2d 944 (Mo. App. 1991); *Boucher v. Boyer*, 301 Md. 769 (1984); 2 Thompson on Real Property, §381, at 505 (1980 ed.). This presumption is supported by economic reasoning — it minimizes the transaction costs of uniting ownership of efficiently usable parcels. See Richard Posner, Economic Analysis of the Law 76 (4th ed., 1992).

★**Example:** In 1899 the Rutland-Canadian Railroad acquired a ribbon of land through Vermont as a "right of way" for its track. By 1970 the railroad's successor terminated service and in 1975 it removed the tracks. In 1983 Congress enacted the Rails-to-Trails Act, which operated to transfer the railroad's interest in its right of way to Vermont public authorities for use as a public trail. In ***Preseault v. United States***, 100 F. 3d 1525 (Fed. Cir. 1996), the court of appeals affirmed a trial court's determination that the original interest was an easement because Vermont law stipulated that railroads acquiring rights of way acquired only the smallest interest in land necessary to accommodate its limited interest in creating a rail transport corridor. The difference between an easement or fee simple absolute was significant: A fee simple in the railroad would mean that the abandoned rail corridor remained the railroad's property and that it was validly conveyed to Vermont; an easement raised issues of whether it was abandoned (and thus title reverted entirely to the owner of the fee) or, if not, whether the public trail use was consistent with the scope of the easement for rail transport.

However, some courts presume that an ambiguous grant conveys the largest estate the grantor could convey — usually fee simple absolute. See, e.g., *Midland Valley R.R. v. Arrow Industrial Mfg. Co.*, 297 P. 2d 410 (Okla. 1956).

2. **Types of easements:** There are two ways to classify easements — (1) ***affirmative*** or ***negative*** and (2) ***appurtenant*** or ***in gross*** — with the result that there are four basic types of easements: ***affirmative appurtenant, negative appurtenant, affirmative in gross, negative in gross.*** To simplify, this discussion deals first with the distinction between easements appurtenant and in gross, then with the distinction between affirmative and negative easements.

   a. **Appurtenant and in gross:** Every easement must be either appurtenant or in gross.

      i. **Easement appurtenant:** An easement ***appurtenant*** is one that ***benefits the owner of another parcel of land.*** The benefited parcel is called the ***dominant estate*** (or dominant tenement) and the burdened parcel is called the ***servient estate*** (or servient tenement). An easement appurtenant passes with the dominant estate whenever the dominant estate is transferred to a new owner. The easement right is incidental to, or appurtenant to, the dominant estate.

      Example: Randall owns Blackacre and Guy owns Whiteacre, an adjacent parcel. Guy grants an easement across Whiteacre from Blackacre for foot passage to and from the beach. The easement benefits whoever possesses Blackacre and is therefore appurtenant to Blackacre. If Randall sells Blackacre to Rodney, the easement passes also and Rodney may enjoy the easement so long as he owns Blackacre.

      ii. **Easement in gross:** An easement that is designed to deliver a ***personal benefit*** rather than to benefit a landowner is an easement in gross. Easements in gross are not attached to, or appurtenant to, any parcel of land. They create a personal right to use the servient estate, but that personal right may be assigned if the parties so intended.

      Example: Refer to the prior example. Guy, owner of Whiteacre, grants "to Randall and his assigns the personal right to enter upon and cross Whiteacre for purposes of reaching the beach." An easement in gross is created in favor of Randall. If Randall sells Blackacre to Rodney without any assignment of this personal right, Rodney has no right to enter upon and cross Whiteacre, but if Randall assigns his easement in gross to Sally, she

will have the right to cross Whiteacre. If Guy sells Whiteacre to Moira, Whiteacre continues to be burdened with the easement in gross in favor of Randall and his assigns.

Example: Roscoe, owner of Broadmeadow, grants to Power Corp. the right to string electrical transmission cables over a portion of Broadmeadow. Because Power Corp. does not own any property benefited by this grant, the easement must be in gross.

iii. Ambiguous grants: Courts prefer to construe ambiguous grants as creating easements appurtenant. This preference is partly historical, because England did not (and does not) recognize easements in gross, but mostly is rooted in policy preferences. Easements appurtenant are easier to eliminate because the easement owner is easier to locate, are more likely to create value, and are more likely to be intended than an easement in gross.

Example: Suppose Guy, in the earlier example, conveyed "to Randall and his assigns the right to enter upon and cross Whiteacre for purposes of reaching the beach." This grant is ambiguous because it lacks the specific qualifier of the previous grant ("the ***personal*** right"). It will be construed as an easement appurtenant for three reasons: (1) Randall owns Blackacre and the easement benefits the owner of Blackacre, raising a presumption that an easement appurtenant was intended. (2) If beach access across Whiteacre becomes useless it is easier to eliminate the easement if the owner of Whiteacre can negotiate with the owner of Blackacre than if the owner of Whiteacre must locate Randall or some assignee (who may have no interest in asserting the easement and therefore is not easily located), and (3) An easement appurtenant creates value in Blackacre that probably more than offsets the burdens on Whiteacre, or the easement would not be created. If the burden on Whiteacre is $50 and the value to Blackacre is $100, Randall will pay more than $50 but less than $100 to obtain the easement. No matter how the difference between damage ($50) and added value ($100) is split between Guy and Randall, the easement, *if appurtenant*, will add $50 to the total value of Whiteacre and Blackacre, but if the easement is Randall's in gross, the only effect on land values will be to lower them by $50, the damage to Whiteacre produced by the easement.

b. Affirmative and negative easements: The overwhelming majority of easements are affirmative. Only a few types of negative easements may be created.

i. Affirmative easements: As the name implies, an affirmative easement ***permits a person to use the servient estate*** in a specified manner.

Example: Leroy owns Rockbottom, a farm situated between Hardscrabble, a farm owned by Lester, and a riverside dock used to ship farm produce. If Leroy grants Lester the right to cross Rockbottom for purposes of moving his farm produce to the riverside dock, an ***affirmative easement appurtenant*** has been created. Lester (or his successors in Hardscrabble, the dominant estate) have the affirmative right to use Rockbottom (whether owned by Leroy or his successors) in the specified fashion. If Leroy had granted to Cyril, an urban fly fisherman, the right to cross Rockbottom to fish in the river, an ***affirmative easement in gross*** would be created.

ii. Negative easements: A negative easement confers only the right to ***prevent specified uses of the servient estate***; it confers ***no right to use*** the servient estate.

Example: Jonah, owner of Hillside, grants to Deborah, owner of Laurel Hollow, the right to prevent diversion of the flow from the irrigation ditch that crosses Hillside on its

way to Laurel Hollow. This is a ***negative easement appurtenant.*** Laurel Hollow, the dominant estate, has no right to use Hillside, the servient estate, but does have a right to prevent Hillside from being used in a way that would divert the flow of water in the irrigation ditch.

Common law recognized only four negative easements, all appurtenant: (1) for light, (2) for air, (3) for subjacent or lateral support, and (4) for the continuing flow of artificial streams. By these easements, the owner of the servient estate could not block off his neighbor's light or air, or excavate to undermine his neighbor's structure or surface ground, or stop or divert irrigation ditches or aqueducts. Modern courts have analogized to these four by permitting negative easements for view (analogous to light and air) and for solar collection (a variation on light). It is sometimes claimed that negative easements are always appurtenant and that they may not be in gross. This was true at common law but is no longer correct.

iii. Conservation easements: Almost all states permit conservation easements, which do not benefit any dominant estate but are for the benefit of conservation organizations. The Uniform Conservation Easement Act is the principal statutory model for conservation easements. Conservation easements are perpetual, which raises concerns about the costs imposed on future generations by preventing property from future development, particularly when circumstances change. A tax incentive exists to create a conservation easement because the development value of the land is treated as a tax deductible charitable contribution in the year in which the easement is created. An important issue in conservation easements is whether the substance of the easement is within the scope of the statute. Typically, the statutes permit easements for conservation of natural resources and historic preservation.

Example: Lydia, owner of Flora Island, a nesting ground for terns, grants to the Audubon Society an easement to keep Flora Island "forever wild," as a habitat for nesting birds. This is a ***negative easement in gross***, and is permitted by the UCEA and other conservation easement statutes, but would not be permitted under common law principles.

Example: Florence, owner of an historic home in Charleston, S.C., grants to the Charleston Historical Society an easement to preserve the exterior of her home and to prevent its occupancy by anyone who does not use it as his or her principal residence. The former easement is surely within the scope of the statute; the latter one probably is not. Its validity under common law probably depends on whether the Historical Society owns real property that is benefited by the easement.

Even if a negative easement is not recognized as valid, the same promise restricting land use may be enforced as a real covenant or equitable servitude. See sections III and IV, below.

3. **Profits à prendre:** A profit (as it is normally shortened) is the right to take a natural resource or crop from the land of another. Typical profits include the right to take minerals (e.g., sand, gravel, ore), timber, fish, game, or crops. Common law courts preferred to construe profits as in gross rather than appurtenant, perhaps because in their origin many of these profits were vested in the landless. It makes economic sense to treat profits as in gross because the right conferred (e.g., to mine for copper ore) has substantial economic value by itself and thus is most efficiently utilized if it is easily transferable by itself, rather than as an adjunct to some unrelated property. For that reason, profits are freely assignable.

4. **Licenses:** A license is simply ***permission*** to enter the licensor's land. Licenses are ubiquitous (e.g., dinner guests, workers, shoppers all have licenses), may be oral or written, and are ***revocable*** at any time unless the licensor makes the license irrevocable, either expressly or by his conduct.

   Example: Aldo tells his neighbor Fred that he may leave his canoe on Aldo's beach. Fred has a license to do so, but Aldo may revoke the license whenever he wishes.

   a. **License or easement in gross?** The same language may be construed as either a license or easement in gross. The consequential difference is that an easement may not be revoked and continues to bind successors to the servient estate who have notice of it, while a license is revocable and binds only the licensor so long as it remains alive.

      Example: If, in the prior example, Aldo's act was construed as creating an easement in gross in Fred, the easement would continue to inure to Fred's benefit if Aldo sold his beach front to Winnie after telling Winnie about Fred's right. Not so if it is a license. ***Courts prefer to construe ambiguous cases as creating a license,*** because easements in gross are often difficult to eliminate (e.g., Fred moves, leaving no forwarding address) and thus depress land values and make land less easily alienable.

   b. **Assignment:** Licenses are generally not assignable, but this rule is not invariable. Licenses are assignable if the parties so intend, and also if a license becomes irrevocable through operation of equitable estoppel, thus effectively becoming an easement appurtenant. See section II.A.4.c, below.

   c. **Irrevocable licenses:** Licenses may become irrevocable in three different ways.

      i. **Intention:** A license is irrevocable if the licensor expressly makes the license irrevocable.

      ii. **Equitable estoppel:** A license is irrevocable if equitable estoppel operates to make it so. If a licensor grants a license on which the licensee reasonably relies to make substantial improvements to property, equity requires that the licensor be estopped from revoking the license.

      ★**Example:** Holbrook permitted Taylor to use a roadway across his property in order for Taylor to reach his own property. With Holbrook's knowledge, and without any objection, Taylor used the access road to construct a substantial single-family residence. Holbrook later blocked the road with a steel cable strung taut across it. In ***Holbrook v. Taylor,*** 532 S.W. 2d 763 (Ky. 1976), the Kentucky Supreme Court held that Holbrook was equitably estopped from revoking the license. See also ***Shepard v. Purvine,*** 196 Ore. 348 (1952); *Camp v. Milam,* 291 Ala. 12 (1973).

      ■ **Duration:** A license made irrevocable through equitable estoppel continues to exist until the reasonable expectations of the parties have been satisfied. See Restatement 3d Property §4.1, comment g. Where valuable improvements have been made this might well be at least as long as the useful life of the improvements, and some courts have hinted that such a license might last forever: "[T]he license will continue for so long a time as the nature of it calls for." *Stoner v. Zucker,* 148 Cal. 516 (1906).

      ■ **Easement compared:** An easement is of indefinite duration, and can continue forever. An irrevocable license may last for a shorter period (e.g., one that expires when the value

of the improvements has been fully recouped), but an irrevocable license might last as long as an easement (e.g., an irrevocable license for access, as in ***Holbrook v. Taylor***). Thus, an irrevocable license is "similar in its essentials to an easement, . . . irrevocable to prevent the licensor from perpetrating a fraud upon the licensee." *Cooke v. Ramponi*, 38 Cal. 2d 282 (1952).

- **Minority view — No estoppel:** A minority of jurisdictions reject application of equitable estoppel to oral licenses. The rationale for their view is that an irrevocable license is indistinguishable from an easement, and so the Statute of Frauds ought to apply to bar creation of irrevocable oral licenses. "The right . . . is essentially an easement and should be the subject of a [written] grant . . . . It is no hardship . . . to secure an easement in perpetuity . . . or, such being refused, to [assess] the uncertainty implicit in the making of expenditures on the basis of a revocable license." ***Henry v. Dalton***, 98 R.I. 150 (1959); *Crosdale v. Lanigan*, 129 N.Y. 604 (1892).

- **Policy arguments:** The argument in ***favor of irrevocability*** based on estoppel is that it is unfair for the licensor to stand by and watch the licensee expend considerable money and effort in reliance on the license, then to rescind the license. The licensor is in the best position to prevent these reliance expenditures. The argument ***against irrevocability*** is that estoppel penalizes the "good neighbor" who fails to say no until the improvement is completed. The landowner who freely gives permission and is loathe to be a "bad guy" is the one who bears the cost of an irrevocable license imposed on his land. On this theory, the licensee should pay to the licensor the value of the irrevocable license (measured by the damage to the licensor's land resulting from irrevocability).

iii. License "coupled with an interest": When a license is tied together with some other legally recognized interest the license is irrevocable until that other interest is vindicated.

Example: Dieter agrees to purchase from Parker a truckload of fertilizer, payment to be made only after Parker has delivered the fertilizer and spread it on Dieter's oat field. By virtue of the contract, Dieter has granted a license to Parker to enter upon Dieter's land, and that license is coupled with Parker's interest in performance of the contract, so it may not be revoked until Parker has had a reasonable opportunity to perform.

B. Creation of easements: Easements may be created by ***grant***, by ***estoppel*** (though usually called an irrevocable license), by ***implication*** (in two different ways), and by ***prescription*** (the close cousin to adverse possession).

1. Easements by grant: Most easements are created expressly by a deed or other grant. Because an easement is an interest in land its creation is subject to the Statute of Frauds, which requires a ***writing signed by the grantor.*** Of course, there are exceptions to the Statute of Frauds, which permit the creation of easements by estoppel, implication, and prescription.

a. By reservation: Grantors sometimes convey land and, in the same deed, purport to "reserve" an easement in favor of the grantor or a third party.

i. In favor of grantor: For archaic feudal reasons, early common law did not recognize easements reserved in favor of the grantor. Then common law judges invented the fiction that the grantee, by accepting the deed, had granted an easement back to the

grantor. The modern upshot is that a reservation of an easement in favor of the grantor is valid. Common law distinguished between such a ***reservation*** (which created a ***new easement***) and an ***exception*** (which passed title subject to a ***pre-existing easement***). The distinction was important when easements could not be created in the grantor by reservation, but is of no importance now.

ii. **In favor of a third party:** Common law did not recognize the validity of easements purportedly reserved in favor of a third party because the fiction of a grant back to the grantor could not be extended to a third party, who was a stranger to the deed. The reasons for this refusal no longer exist but the majority of modern courts continue to treat reserved easements in favor of a third party as void. See, e.g., *Estate of Thomson v. Wade*, 69 N.Y. 2d 570 (1987). In such states it is necessary to use two conveyances instead of one to create an easement in favor of a third party.

Example: Carolyn, owner of Blackacre, wishes to convey Blackacre to Jake but reserve an easement for parking in favor of her neighbor, Liza. Carolyn must first convey Blackacre to Liza, who would then convey to Jake, reserving an easement in favor of herself.

This rule is especially peculiar because a real covenant (which burdens land in much the same way as an easement) can be created in favor of a third party. A minority of modern courts have ruled that easements reserved in favor of a third party are valid.

★**Example:** McGuigan conveyed Lot 20 to Petersen by a deed that purported to reserve an easement for parking "during church hours" for the benefit of an adjacent church. Petersen conveyed Lot 20 to Willard under a deed that made no mention of the putative parking easement. After learning of the easement Willard sought to quiet title in Lot 20. The trial court applied the majority view of easements reserved in favor of a third party and ruled that the McGuigan-to-Petersen deed was ineffective to create the parking easement. In ***Willard v. First Church of Christ, Scientist***, 7 Cal. 3d 473 (1972), the California Supreme Court reversed, holding that the common law rule frustrates clear expressions of grantor intent and delivers windfall profits to people like Petersen (who presumably pay less for property burdened by an easement).

2. **Easements by estoppel:** An irrevocable license, the functional equivalent of an easement, can be created by estoppel. See section II.A.4.c.ii. above.

3. **Easements by implication:** Easements may be implied in law under two circumstances: (1) where property has been divided by a common owner and, prior to the division, one portion of the property has been used in an easement-like fashion for the benefit of another part of the property (implied from ***prior use***), and (2) where property has been divided by a common owner in such a manner that an easement for access is necessary (implied from ***necessity***).

   a. **Easements implied from prior use:** The problem is to identify when parties to a conveyance intend to create an easement without explicitly saying so. The following elements, which are often stated to be necessary to establishing an easement implied from prior use, are the principal factors that tend to establish an inference that the parties intended to create an easement:

      - **Common owner:** Prior to division, the ***quasi-servient estate*** and the ***quasi-dominant estate*** must be owned by the same person.

- **Reasonable necessity:** The prior use must be ***reasonably necessary*** for the use and enjoyment of the "quasi-dominant estate."
- **Continuous use:** The prior use must be ***continuous***, not sporadic.
- **Intended continuation:** The parties must ***intend***, at the time of division, to continue the prior use.
- **Existing use:** The prior use must be ***existing*** at the time of division, a requirement implied by the element of intended continuation.
- **Apparent:** The prior use must be ***apparent,*** which does ***not*** necessarily mean that it is visible.

i. Common owner: A person may devote part of her property to a use that benefits another part. There is no easement created while the property is owned by one person, but this prior use creates a so-called ***quasi-easement***, an inchoate easement-in-waiting. When the common owner divides the property by selling one part to another person an easement from prior use may be created. If the owner and grantor retains the quasi-servient estate (the burdened part) the implied easement is by ***implied grant.*** If the owner and grantor retains the quasi-dominant estate (the benefited part) the implied easement is by ***implied reservation.***

Example: Brenda owns two lots adjacent to each other. She constructs a driveway over Lot 1 to her house on Lot 2. No easement is created because Brenda cannot have an easement in her own property, but an inchoate quasi-easement exists. If Brenda sells Lot 2 to Richard, an easement by implied grant may be created: Brenda owns Lot 1, the servient estate, and Richard owns Lot 2, the dominant estate. If, instead, Brenda sells Lot 1 to Richard, an easement by implied reservation may be created: Richard owns Lot 1, the servient estate, and Brenda owns Lot 2, the dominant estate.

ii. Reasonable necessity: The easement must be ***reasonably necessary for the owner of the dominant estate to use and enjoy her property.*** Reasonable necessity assures that the easement was likely intended to continue after division. A corollary implication is that an easement implied from prior use can ***only be appurtenant.*** The term *reasonable* is capacious. Courts tend to find reasonable necessity if it would be costly or difficult to use the dominant estate without the easement, or if the price paid for either the dominant or servient estate reflects the existence of the easement. Most courts today require reasonable necessity for easements implied by grant and for easements implied by reservation.

★**Example:** Bailey owned three adjoining lots in Chanute, Kansas. She built a house on one of the lots and ran an underground sewer line across the other two lots to a municipal sewer. Later, she sold all three lots to separate owners under deeds making no mention of the sewer line. However, later owners built a house on each of the two vacant lots, and connected the plumbing in those houses to the original Bailey sewer line. Van Sandt, the "downstream" owner, sued to enjoin Royster, an "upstream" owner, from continuing to use the Bailey sewer after he awoke to 6 inches of sewage in his basement, on the theory that no easement had ever been validly created across his property. In *Van Sandt v. Royster*, 148 Kan. 405 (1938), the Kansas Supreme Court upheld a trial court ruling that an easement by reservation implied from prior use had been validly created by Bailey

when she conveyed title to each of the two "downstream" lots. The court rejected the older view that when an easement implied from prior use is created by implied reservation, ***strict necessity*** — absolute, indispensable necessity — is required. See, e.g., *Abbott v. Herring*, 97 App. Div. 2d 870 (N.Y. App. 1983); *Mitchell v. Castellaw*, 151 Tex. 56 (1952); *Winthrop v. Wadsworth*, 42 So. 2d 541 (Fla. 1949). The Kansas court rejected the logic underpinning the older view — that the grantor ought not be permitted impliedly to derogate from her grant — preferring to treat the "implied reservation" or "implied grant" character of the putative easement as but one element of a broader problem of determining the inferred intentions of the parties. Thus, if other elements tending to prove this inferential intention — especially apparent existing use — are present, it is hard to see why there should be a difference between reservation and grant. See also *Otero v. Pacheco*, 94 N.M. 524 (App. 1980); *Jack v. Hunt*, 200 Ore. 263 (1953).

iii. **Continuous use:** The use must be continuous, not sporadic. This element buttresses the fundamental concept that the use must be such that both parties ***intended for it to continue***. Continuous use does not mean that it must be used constantly; rather, it means that the easement must be embodied in some ***permanent physical alteration.***

Example: An outdoor concrete staircase serving Parcel A, but located entirely on Parcel B, is permanent (and thus continuous) even though it is not in constant use.

iv. **Intended continuation:** This is the fundamental element, but the parties rarely provide express evidence of their intentions, or they would have memorialized the easement by express grant. Accordingly, many of the other elements — reasonable necessity, continuity, and apparent use — are proxies for this element. The price paid (which is also considered in deciding whether the claimed easement is reasonably necessary) is helpful to this issue, because parties who intend for a quasi-easement to continue are likely to settle on a price that reflects the value (and detriment) of the easement.

v. **Existing use at division:** The prior use must actually exist at the time of division. If it does not, there is surely no reason to think that the parties intended the continuation of a nonexisting use.

vi. **Apparent use:** The use must be apparent. This does ***not*** mean that the use must be visible. A prior use is apparent if it could be detected, or even inferred, from a reasonable inspection of the premises.

★**Example:** Refer back to the ***Van Sandt v. Royster*** example. Although Bailey's private sewer line, crossing the two lots she sold without reference to any easement, was underground, the Kansas Supreme Court in ***Van Sandt v. Royster,*** 148 Kan. 495 (1938), ruled that the sewer line was apparent because later buyers should have inferred the existence of some sewer by noting the existence and operation of plumbing fixtures, and could have employed a skilled plumber to detect the actual location of the sewer. See also *Romanchuk v. Plotkin*, 215 Minn. 156 (1943). But see *Campbell v. Great Miami Aerie No. 2309*, 15 Ohio St. 3d 79 (1984).

vii. **Easements implied from a subdivision map:** When a common owner divides property under a deed that incorporates or refers to a map on which proposed streets or other rights of way are platted on the common owner's property, an easement in favor of the

grantee with respect to the platted streets is implied even though there has been no prior use. The rationale for this deviation from the elements of easements implied from prior use is that the purchaser has relied on the future creation of the streets and paid accordingly. See 3 Powell, The Law of Real Property ¶409 (1992 ed.).

b. Easements implied from necessity: An easement is implied from necessity only when a common owner divides his property in such a way that one of the resulting parcels is left without access to a public roadway. An easement for right of way between the landlocked parcel and the public road across the owner's remaining parcel is then implied, either because the parties must have intended this result or because it is economically efficient and socially beneficial to create an easement for access. Easements by necessity are permitted only for right of way — ingress and egress between the landlocked parcel and a public road.

Example: Eunice, owner of Black Heart Ranch, divides it into two parcels, Sweetwater and Bitterroot. Sweetwater is bounded by a public road on the west, two ranches owned by neighbors on its north and south sides, and Bitterroot on the east. Bitterroot is bounded by Sweetwater on the west and National Forest wilderness land on the remaining sides. An easement implied from necessity will burden Sweetwater for the benefit of Bitterroot, enabling the occupier of Bitterroot to cross Sweetwater to gain access to the public road.

i. Common owner: An easement by necessity can be created ***only*** over property owned by the person who also owned the landlocked parcel and who divided the property to create the access problem. In cases of multiple division, an easement by necessity is created at the moment a parcel is landlocked, and thus the easement burdens the ***last parcel*** split off by the common owner — the parcel that completed the landlocking.

★**Example:** Hill owned a large parcel of land in Texas, which he sold in bits and pieces over time in the 1890s. One of those parcels was landlocked and title to that parcel was eventually acquired by Othen, who habitually used a roadway crossing Rosier's land to reach a public road. To prevent erosion Rosier built a levee that impounded water, making the roadway impassable at times. Othen sued Rosier to enjoin further interference with his right of way, which Othen contended was implied by necessity. In ***Othen v. Rosier,*** 148 Tex. 485 (1950), the Texas Supreme Court upheld a determination that no easement by necessity had been proven *across Rosier's land,* because there was no proof that when Hill, the common owner, had conveyed the Rosier property to Rosier's predecessor in interest it was *that conveyance that landlocked the Othen parcel.* Rather, it appeared that at the time Hill conveyed the Rosier parcel Hill owned other land (never identified by Othen) that was contiguous to both the Othen parcel and a public roadway. Othen had an easement implied by necessity across some property, but it wasn't across Rosier's property.

A corollary is that an easement implied by necessity cannot burden property never owned by the common grantor who created the problem.

ii. Necessity at severance — Not prior use: Necessity must exist at the moment the property is divided. No prior use is needed to establish an easement by necessity. The necessity of access is present the moment the parcel is landlocked, though the practical need may lie dormant for years.

iii. **Duration:** An easement by necessity lasts as long as the necessity exists. If the necessity is removed (perhaps by creation of a new public road that provides access) the easement is terminated.

iv. **Location:** Once the servient estate is identified the owner of the servient estate is permitted to select a ***reasonably convenient location*** for the easement, on the theory that the servient estate owner can best minimize the damage to the servient estate.

4. **Easements by prescription:** Prescription is analogous to adverse possession. Easements are ***not possessory interests*** so an easement cannot be acquired by adverse ***possession***, but ***adverse use*** for a sufficient period of time can ripen into an ***easement by prescription.*** American courts ground prescription in the same policies that justify adverse possession. The archaic English fiction that a prescriptive use was pursuant to a grant, now lost, has been largely discarded by American courts. The English view pretended that prescription was really use by right; the American view frankly recognizes the adverse nature of prescriptive use. Easements by prescription may be appurtenant (as when one homeowner acquires a driveway easement over his neighbor's land) or in gross (as when repeated hunting or fishing create a prescriptive easement in gross in favor of the hunter or fisher).

   a. **Elements of prescriptive use:** Virtually the same elements are needed to establish prescriptive use that are needed to establish adverse possession: (1) ***adverse use under a claim of right*** that is (2) ***open and notorious*** and (3) ***continuous*** for the prescriptive period. Note, however, that the ***exclusive use*** element is so altered from its meaning in adverse possession that it is **effectively not required.**

      i. **Prescriptive period:** The required prescriptive period is the same as the limitations period applicable for adverse possession. If the jurisdiction has a 20-year limitations period for adverse possession, the adverse use of another's land must continue for 20 years in order for an easement by prescription to be created.

      ii. **Adverse use under a claim of right:** The use of another's land must be ***adverse*** and ***not with permission of the owner.*** As with adverse possession, there is an ***objective*** and ***subjective*** version of this test. The objective version focuses on whether a neutral observer would think the use is under a claim of right and not permissive. The subjective version requires the adverse user to prove that she had a good faith belief that she had a right to use the land, and not just permission to do so.

      Example: A frequent problem is the common driveway. Suppose Mary and Al, neighbors, agree to split the cost of a driveway which both will use and which is located exactly on the property line. Under the objective version of adverse use, Mary and Al may each be using their neighbors' property in a permissive fashion, because they have permitted each other to use a driveway for which they have each paid half the cost. The result is different under the subjective test — both Mary and Al likely have a good faith belief that they are entitled to use the driveway. See, e.g., *Shanks v. Floom*, 162 Ohio St. 479 (1955). Contra: *Banach v. Lawera*, 330 Mich. 436 (1951).

      If a use is permissive, it can never ripen into a prescriptive right, no matter how long the use goes on. However, a permissive use can become adverse if the user does things that are inconsistent with mere permission and that give the owner notice of the user's claim of right.

Example: Janet gives Bob permission to use a footpath through her rural wood for beach access. Bob then proceeds to widen the path, pave it with asphalt, and installs handrails. These acts are inconsistent with permission to use a rural footpath and ought to put Janet on notice that Bob claims a right to use the path that is independent of her permission. See, e.g., *Hester v. Sawyers*, 41 N.M. 497 (1937).

Similarly, an adverse use can be rendered nonadverse if the owner of the burdened estate grants permission for the use.

Example: Without permission, Evelyn walks her dog through Ricardo's wood twice daily, beating a worn path. Before the prescriptive period expires Ricardo informs Evelyn that she has his permission to walk her dog in his wood. Evelyn's use, initially adverse, is not turned into a permissive, nonadverse use.

Use of an easement by necessity ***after it has terminated*** is likely adverse and may ripen into an easement by prescription. Use of an easement by necessity is by right, and thus not prescriptive, but if the necessity ends the easement by necessity terminates. Further use of the terminated easement is adverse, unless permission for the continued use is granted.

iii. **Open and notorious use:** To be open and notorious the adverse use must be conducted so that the use may be discovered by any reasonable inspection. It may not be carried on in secret or carefully concealed.

iv. **Continuous use:** The element of continuous use is satisfied if the adverse user continually asserts her claim of right by making whatever use is consistent with the nature of the claimed easement, even if that use is periodic or episodic. It does ***not*** mean that the adverse user must use the property constantly.

Example: Adam and Eve own adjacent waterfront lots in a summer home community. Each summer Adam crosses Eve's lot whenever he wishes to go to the beach, sometimes several times a day, but sometimes only a few times a week. Adam beats down a clear footpath by his crossings and goes so far as to construct crude stone steps to the beach. Adam makes no use of the footpath during the fall, winter, and spring, when neither he nor Eve is there. This use involves a continual claim of right and adverse use that is consistent with the nature of the claimed easement — a footpath beach access during the summer period — and satisfies the continuous use element.

As with adverse possession, tacking is permitted, but occasional adverse use does not satisfy the continuous element.

Example: If Adam crossed Eve's lot only a few times each summer, made no alterations to the lot, and otherwise used a public beach access, his use would be so occasional that it would not satisfy the continuous element.

If the adverse use is interrupted, the prescriptive period starts over. Jurisdictions differ as to what constitutes interruption. Most states follow the adverse possession rule that only the owner's action of filing a lawsuit to stop the adverse use or physical prevention of the adverse use constitutes interruption. A minority hold that mere notice (a sign or letter) that tells the adverse user to stop is sufficient to interrupt the use. The minority view is a vestige of the "lost grant" theory of prescription: If prescription is founded on a fictional "lost grant," the owner's statement that there is no grant is sufficient to rebut the existence of the fictional lost grant.

v. **Exclusive use:** Many courts say that exclusive use must be shown to establish a prescriptive easement, but the meaning of exclusivity is so altered from adverse possession that, in effect, it is not required. For prescription purposes, exclusive use does not mean that the adverse user was the only user; rather, it means that the adverse user's claim "does not depend on a like right in others." *Page v. Bloom*, 223 Ill. App. 3d 18 (1991). In other words, exclusive use is shown simply by claiming an easement from ***one's own use***, and not in common with the public or somebody else. Thus, even in the case of the common driveway, each neighbor's use is "exclusive" in this sense. See, e.g., *Causey v. Lanigan*, 208 Va. 587 (1968). Not all states are so liberal with the exclusivity element, however. Some states presume that when a putative easement is used in common with others the use is permissive.

★**Example:** Refer to the ***Othen v. Rosier*** example, discussed under easements implied by necessity. Othen's alternative argument was that he had acquired an easement for right of way across Rosier's land by prescription, but the Texas courts rejected this claim because Othen used the roadway in common with Rosier.

b. Public prescriptive easements: Some jurisdictions permit the public at large to acquire prescriptive easements in private lands, so long as all the elements of prescription are satisfied. Other jurisdictions achieve the same result through ***implied dedication***, ***custom***, or the ***public trust doctrine***. Some states reject all these theories.

i. **Prescriptive easements in favor of the general public:** The general rule is that the public at large can obtain a prescriptive easement in private property so long as the elements of prescriptive use are established. See, e.g., *Citizens of Brunswick County Taxpayers Assn. v. Holden Beach Enterprises, Inc.*, 329 N.C. 37 (1991); *Buttolph v. Erikkson*, 160 Vt. 618 (1993); *Sellentin v. Terkildsen*, 216 Neb. 284 (1984). However, most courts apply a rebuttable presumption that public use is permissive and the use must be sufficiently widespread to be truly public. Use by the neighborhood alone may not be sufficiently public to create a public prescriptive easement. See, e.g., *Gore v. Blanchard*, 96 Vt. 234 (1922) (neighbors' use of a road to reach a pond for ice cutting was a mere "neighborly concession" and not "used for public purposes as a public way").

ii. **No public prescriptive easements:** States that reject public prescriptive easements rely on one of two rationales. The older reason is rooted in the fictional "lost grant" — because the "public citizenry" could not receive a grant there could not possibly have been such a grant, now lost; hence, no prescriptive easement in the public was possible. See, e.g., *Ivons-Nispel, Inc. v. Lowe*, 347 Mass. 760 (1964). The more modern objection is that the owner's cause of action (barred by elapse of the prescriptive period) can only run against specific persons, so the owner's cause of action to stop adverse use can never expire as against the entire public at large. See, e.g., *State ex rel. Haman v. Fox*, 100 Idaho 140 (1979). Some states have enacted statutes that permit owners to record and post notices that public use is by permission, thus negating any possible claim of public prescriptive right. See, e.g., Cal. Civ. Code §1009.

iii. **Implied dedication:** This theory is simply a pseudonym for a public prescriptive easement. The idea is that the owner ***intends to dedicate*** his property to ***public use***, but the evidence of such intent is entirely inferred from (1) long-standing public use and (2) the

owner's failure to halt the use. See, e.g., *Gion v. City of Santa Cruz*, 2 Cal. 3d 29 (1970) (subsequently overturned by legislation).

iv. **Custom:** Beach front property owners own the "dry sand" portion of the beach, because their title usually extends to the mean high-tide mark. Ancient common law held that the public acquired a customary right to use the dry sand portion of a beach if such public use had gone on so long that "the memory of man runneth not to the contrary." 1 W. Blackstone, Commentaries *67. That doctrine has been revived in at least four states: Florida, Hawaii, Oregon, and Texas. To establish this customary right, the public must prove ***immemorial usage without interruption*** that is ***peaceable, reasonable, certain,*** and ***consistent with other customs.*** See, e.g., *Public Access Shoreline Hawaii v. Hawaii County Planning Comm.*, 79 Haw. 425 (1995); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974); *State ex rel. Thornton v. Hay*, 254 Or. 584 (1969); *Matcha v. Mattox*, 711 S.W. 2d 95 (Tex. App. 1986). Idaho has embraced the doctrine in *dicta* but has not had occasion to apply it. *State ex rel. Haman v. Fox*, 100 Idaho 140 (1979). Claims of customary rights to private beaches have been considered and rejected elsewhere. See, e.g. *Bell v. Town of Wells*, 557 A. 2d 168 (Me. 1989).

v. **Public trust doctrine:** Some states approach the issue of public beach access by invoking the public trust doctrine, under which the water and beach front below the mean high-tide mark is held by the state in ***public trust,*** to enable the public to use these tidal waters and lands for swimming, boating, fishing, and other common pursuits. This approach can be problematic because access to such public lands is often only through privately owned land.

★**Example:** In ***Matthews v. Bay Head Improvement Assn.,*** 95 N.J. 306 (1984), the New Jersey Supreme Court ruled that private beachfront landowners organized as a "quasi-public" entity must give the general public "access to and use of privately-owned dry sand areas as reasonably necessary." ***Matthews*** involved dry sand beaches that were owned by a a non-profit corporation that controlled, either as fee owner or lessee, the dry sand portion of the beaches in Bay Head, N.J., and which restricted access to those dry sand beaches to residents of Bay Head and their guests. It is possible that this rule, as applied to privately owned dry sand beaches where the owners have not assumed "quasi-public" power, would amount to a taking of private property for which the Constitution requires just compensation. See Chapter 11.

In a later New Jersey case, *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*, 851 A.2d 19 (N.J. App. Div. 2004), the court ruled that, under the principles announced by *Matthews*, a private beach club must permit the public to enter and use its private dry-sand beach. The club was barred from charging any fees to transient users but was permitted to charge reasonable fees for its beach maintenance services to those who remain on the beach for extended periods of time. The practicality of this rule is doubtful. In *Glass v. Goeckel*, 473 Mich. 667 (2005), owners of lakefront property to the water's edge sought to bar trespass across the dry shore of the lake on their property. The Michigan Supreme Court ruled that the public trust doctrine applied to protect the public's right to walk along the dry shore between the water's edge and the "ordinary high water mark," the point at which there is a distinct indication of the end of water action on the land. The dissenters thought that the public trust doctrine stopped at the

water's edge, but would have defined the water's edge to end where wet sand gives way to dry sand.

c. **Prescriptive easements not permitted:** There are two types of easements that may not be acquired by prescription.

i. **Negative easements:** A negative easement may not be acquired by prescription because there is no cause of action that is cut off by elapse of the prescriptive period.

Example: Otto builds a solar collector on the roof of his home. Twenty years later his neighbor, Patricia, builds a tall addition to her home which completely blocks sunlight from falling on Otto's solar collector for 9 months of each year. Otto has no prescriptive easement for sunlight. During the 20-year period when Otto's collector was soaking up sunshine Patricia had no cause to action to stop him from doing so; thus, there is no right of Patricia's that is extinguished by elapse of time. Put another way, if Otto received a prescriptive negative easement for sunlight there is nothing Patricia could do (short of blocking Otto's sunlight immediately) that would stop Otto from acquiring an interest in her property. Sound public policy would not encourage neighbors to cut off each other's light and air simply to avoid the possibility that a prescriptive easement might otherwise result. See, e.g., *Cohan v. Fleuroma, Inc.*, 42 App. Div. 2d 741 (N.Y. App. 1973); *Parker & Edgarton v. Foote*, 19 Wend. 309 (N.Y. 1838).

ii. **Easements upon public land:** As with adverse possession, it is not generally possible to obtain a prescriptive easement in public land. This rule is, at bottom, another manifestation of the sovereign's prerogative. Also, sound public policy probably should not encourage people to use public land for purely private benefit and thus to acquire a private right at the expense of the general public.

C. **Transfer of easements:** The transferability of easements depends on the type of easement.

1. **Easements appurtenant:** By their nature easements appurtenant are transferable; they are a part of title to the freely transferable dominant estate.

Example: Ingrid, owner of Blackacre, the dominant estate with respect to an easement for passage across Whiteacre, conveys her fee simple to Hendrik. The easement for passage that is appurtenant to Blackacre goes with the title. Similarly, if Hortense, owner of Whiteacre, conveys her fee simple to Emily, the burden of the easement passes along with title to Whiteacre.

2. **Easements in gross:** Because the owner of an easement in gross is not nearly so easy to locate as the owner of an easement appurtenant, and thus a burden on land may persist long after its practical utility has ceased, courts tend to restrict transferability of easements in gross. The general rule today is that **commercial easements in gross are assignable** and **noncommercial easements in gross are not assignable unless the parties intend to permit assignment.**

★**Example:** Frank and Rufus Miller owned a large tract of land on a creek in the Pocono Mountains. They dammed the creek to create Lake Naomi, and conveyed to Pocono Spring, a corporation they organized and controlled, the land underlying the lake surface. Pocono Spring granted to Frank Miller and "his heirs and assigns . . . the exclusive right to fish and boat" in the lake. A year later Frank granted to Rufus Miller and his heirs and assigns a "one-fourth interest in and to the fishing, boating, and bathing rights . . . at, in, upon, and

about Lake Naomi." Frank and Rufus then operated a boating and bathing business at Lake Naomi as partners until Rufus died. Frank Miller and Rufus Miller's estate then began granting licenses to others to use the lake, one of which (from Rufus's estate) was to the Lutheran Conference "to boat, bathe, and fish in the lake." Frank Miller sued the Lutheran Conference to enjoin their further use of Lake Naomi. Frank argued (1) that he never had any bathing rights and so his purported conveyance of a one-quarter interest in them was a nullity, and (2) if he did have any bathing rights they were in gross and thus neither divisible nor alienable. A trial court granted the injunction which was affirmed in ***Miller v. Lutheran Conference & Camp Assn.,*** 331 Pa. 241 (1938). The court reasoned that Frank and Rufus, as partners, had acquired a bathing right by prescriptive use, and that the easement in gross so acquired, together with the easement in gross to fish and boat in Lake Naomi, was a commercial easement that was intended to be transferable. However, that did not end the case, for the court ruled that while the easements were transferable they were not divisible. For discussion of the indivisibility issue, see section II D.5.b.iii, below.

Because a commercial easement primarily produces economic benefits and a noncommercial easement primarily produces personal pleasure, courts reason that transferability of commercial easements is both efficient and reflects the probable intentions of the parties while rights granted for personal pleasure are likely to be the product of a personal relationship. Free assignment of commercial easements in gross advances the public convenience. The holders of these easements are mostly corporations, entities with perpetual existence, and thus are easily located, thus dampening fears of difficulty in eliminating easements by agreement. Also, corporations alter their existence by merger or acquisition and it would be most inconvenient to wipe out, e.g., utility easements, simply because one utility company acquired another.

Example: An easement in gross for underground utilities produces economic benefits, the social utility of which is enhanced by free transferability from one utility provider to another. An easement in gross for the right to meditate atop Mount Zen granted by Abbott Sensei, owner of Mount Zen, to Novice, a student of the Abbott, produces personal pleasure (and maybe enlightenment) but is surely rooted in the personal relationship between the two.

3. **Profits:** Profits have always been assignable. This might be due to the fact that, in their heyday, profits were valuable rights to the nonlandowning laboring class of England and common law courts recognized the exchange value of rights to take timber or game. But if profits may be freely assigned, why not easements in gross? Perhaps it is because profits are almost always commercial in nature.

D. Scope of easements: The scope of an easement involves two separate questions. How ***extensively*** and ***intensively*** may the ***easement holder use the easement?*** To what degree may the ***owner of the servient estate use or interfere with the easement?***

1. **Parties' intentions control:** The overriding principle in determining scope of an easement is to identify and uphold the parties' intentions, but this is not always so easy because intentions frequently must be at least partly inferred. To do so, courts examine the following factors.

   - ***How easement was created*** (i.e., whether by grant, implication, or prescription).
   - ***How conditions have changed to affect the originally intended use.***
   - ***What changes in use were reasonably foreseeable by the parties.***

- *What changes are necessary to achieve the intended purpose of the easement.*
- *Whether a changed use imposes an* **unreasonable burden** *on the servient estate.*

2. How easement was created

a. Easements by grant: The express language of the grant controls insofar as it may be dispositive, but extrinsic circumstances often must be consulted.

Example: An easement granted in 1870 in upper Michigan for "winter access to Horseshoe Pond for ice fishing" implied access by ski, sleigh, sled, or snowshoe in 1870, but it would not be unreasonable to interpret it today as including access by snow machine.

Example: In 1876 the owner of Blackacre conveyed an easement for right of way over Blackacre for the benefit of Whiteacre. The easement was used to transport animals to Whiteacre for slaughter and removal of their carcasses for sale. Around 1916 the slaughterhouse burned and Whiteacre was converted to farming. The easement was then used for farm machinery and crop removal. By the 1950s Whiteacre was used by the Kentucky Highway Department to store vehicles and equipment, which it moved in and out via the easement. In *Cameron v. Barton*, 272 S.W. 2d 40 (Ky. 1954), Kentucky Court of Appeals held that the easement "may be used in such a manner as is necessary in the proper and reasonable occupation and enjoyment of the dominant estate. As the passage of time creates new needs and the uses of property change, a normal change in the manner of using [an easement] does not constitute a deviation from the original grant, and modern transportation uses are not restricted to ancient modes of travel."

b. Easements by implication: The scope of implied easements depends on the reason for the implication.

i. By prior use: Easements implied from prior use are construed the same way as easements by grant.

Example: An agribusiness company constructed a roadway on its property to serve its lemon and avocado groves, then divided the property creating a roadway easement implied from prior use. The dominant estate was later acquired by a person who constructed a residence on the property. In *Fristoe v. Drapeau*, 35 Cal. 2d 5 (1950), the California Supreme Court ruled that even though the prior use that created the easement was agricultural it was "within the reasonable contemplation of the parties" at the time of division that the easement could be used for residential purposes.

ii. By necessity: The scope of an easement implied by necessity is exactly congruent with the necessity: no more, no less.

c. Easements by prescription: Because prescriptive easements come about by a particular long-standing adverse use by ***one party alone,*** there is no reason to assume that any greater or different use was intended by the parties. Accordingly, courts are most reluctant to permit any expansion of the scope of prescriptive easements to accommodate changed future needs of the dominant estate. See, e.g, *Wright v. Horse Creek Ranches, Inc.*, 697 P. 2d 384 (Colo. 1985), where a prescriptive roadway easement for ranching and hunting was not permitted to be used for providing access to a residential subdivision. Accord: *Aztec Ltd., Inc. v. Creekside Investment Co.*, 100 Idaho 506 (1979). Despite this general rule, some courts

permit modest alteration of the scope of a prescriptive easement where the ***burden on the servient estate is moderate*** and the ***alteration is consistent with the general pattern formed by the adverse use.*** See, e.g., *Glenn v. Poole,* 12 Mass. App. Ct. 292 (1981) (permitting a prescriptive roadway easement for hauling wood and gravel to be used for vehicle access to and from a garage and repair shop); *Farmer v. Kentucky Utilities Co.,* 642 S.W. 2d 579 (Ky. 1982) (permitting the holder of a prescriptive easement for overhead passage of utility cables to clear brush and trees underneath).

3. **Change in location of easement:** If an easement specifies a specific location, or one has been agreed to by the parties' conduct, the location is permanently fixed unless the parties agree to a change.

Example: Harold, owner of a tract of ground including Long Lake and Whitechapel Pond, grants to Edgar an easement in gross "to fish in Whitechapel Pond." Edgar may not thereafter unilaterally change the easement to one permitting him to fish in Long Lake.

Example: Rosemary, owner of Blackacre (bounded on the west by a public forest, on the east by Big River, on the north by a public road, and on the south by Whiteacre) grants an easement appurtenant to Whiteacre for "passage across Blackacre to Big River." Over time, a well-beaten path is created across Blackacre from Whiteacre to Big River, thus fixing the location of this easement.

This rule does not prevent some modifications to the easement that impose no additional burden on the servient estate.

Example: Landowner granted Public Irrigation District an easement across his property for an irrigation ditch. District permitted a public school, at its expense, to place the ditch entirely underground in a concrete pipe, but in the identical location as the surface ditch. In *Abbott v. Nampa School District No. 131,* 119 Idaho 544 (1991), the Idaho Supreme Court held that because no additional burden was imposed District and the public school could place the ditch underground.

4. **Enlargement of the dominant estate:** An easement, however created, cannot be used for the benefit of land that is not the dominant estate. See, e.g., *S.S. Kresge Co. of Michigan v. Winkelman Realty Co.,* 260 Wis. 372 (1952); *Kanefsky v. Dratch Construction Co.,* 376 Pa. 188 (1954); *Penn Bowling Recreation Center Inc. v. Hot Shoppes, Inc.,* 179 F. 2d 64 (D.C. Cir. 1949). However, that rule does not always mean that the appropriate remedy for such misuse is to enjoin the violation.

★**Example:** Voss owned a wooded tract in a rural residential area of Washington overlooking the Hood Canal (Parcel A). Voss's Parcel A was burdened by an easement for right of way benefiting Parcel B. Brown purchased Parcel B and an adjacent Parcel C that was not benefited by the easement for access crossing Parcel A. Brown began to construct a residence that straddled the lot line between Parcels B and C, both of which Brown owned, and used the easement to bring in construction materials and personnel. Annoyed, Voss obstructed the easement and Brown sued to enforce the easement. Voss countersued to enjoin Brown from using the easement to benefit Parcel C, the nondominant estate. A trial court denied the injunction sought by Voss on the theory that Brown's use of the easement was reasonable, even though Brown was using it to benefit land that was not the dominant estate. The Washington intermediate appeals court reversed and issued the injunction, applying the traditional rule that an easement may not be used for the benefit of property to which the benefit is not

appurtenant. In ***Brown v. Voss***, 105 Wn. 2d 366 (1986), the Washington Supreme Court reversed, reasoning that although the appeals court was correct to conclude that any physical enlargement of the dominant estate is wrongful, an injunction should not issue because there was no evidence of irreparable harm to Voss from the enlargement: There was no increase in the volume or type of traffic or other increase in the burden placed on Voss's servient estate. Accordingly the Washington Supreme Court sustained the trial court's award of $1 in damages to Voss. The usual remedy for using an easement for the benefit of a nondominant estate is an ***injunction*** to prevent the use, which leaves the parties free to reverse this outcome, if they wish, by private bargain. The approach taken by the Washington Supreme Court drags into court the private bargaining that would otherwise occur post-injunction, in the form of argument over the amount of damages and also over the relative equities of an injunction. Moreover, if damages only are awarded the litigation may not be over, because the use of the nondominant estate now benefited by the easement might change, leading to further dispute. A foresighted drafter of the easement might have provided for automatic termination of the easement if the dominant estate owner uses it for the benefit of a nondominant estate.

5. **Division of an easement's benefit:** Different rules apply to division of the benefit of an appurtenant easement and an easement in gross, but both have the same objective — ***preventing an unintended increase in the burden on the servient estate.***

   a. **Appurtenant easement: Division of the dominant estate:** The general rule is that a dominant estate may be divided and that each part of the divided estate is entitled to enjoy the easement, but this rule is subject to the important limit that the resulting increased burden on the servient estate must be within the original contemplation of the parties, a state of mind that is often necessarily inferred. Courts consider whether the division of the dominant estate is a "normal development," whether the division is foreseeable, and whether the burden on the servient estate is substantially increased.

   b. **Easements in gross and profits à prendre**

      i. **Nonexclusive easements:** The holder of a ***nonexclusive*** profit or easement in gross (one shared with the servient estate) may ***not*** divide it, because division would likely result in decreased utility of the use to the servient estate.

         Example: George, owner of Blackpool, grants Alexa the nonexclusive right to fish in Blackpool. If Alexa were permitted to subdivide the right, increased fishing pressure on Blackpool would result. This bright-line prevents that result and does not consider the relative burden of Alexa's division of her nonexclusive right into 2 or 1,000 users. The assumption embedded in the bright-line rule is that the more users, the higher the likelihood that each user will seek to catch as many fish as possible, because the cost of fewer fish will be borne by the other users. See, e.g., *Hinds v. Phillips Petroleum Co.*, 591 P. 2d 697 (Okla. 1979); *Stanton v. T.L. Herbert & Sons*, 141 Tenn. 440 (1919).

      ii. **Exclusive easements in one person:** If a profit or easement in gross is ***exclusive and vested in one person*** that person has the right to divide it, unless the easement or profit stipulates to the contrary. The rationale is that the risk of excessive use is borne by the easement or profit holder alone, and that person has it within their power to limit the risk by refraining entirely from division, so division ought not be objectionable.

iii. **Exclusive easements in multiple persons: The "one-stock" rule:** If a profit or easement in gross is ***exclusive and vested in two or more persons*** the traditional rule is that division is permitted ***but the easement or profit must be used as a single unit*** (the ***one-stock*** rule). This rule, derived from *Mountjoy's Case*, 1 Godbolt 17, 4 Leonard 147, Coke on Littleton 164b, 78 Eng. Rep. 11 (1583), holds that joint users may divide their easement or profit but that the entire use must be conducted as a single unit. This rule prevents undue exploitation of resources by one user at the expense of his fellow users. A solo user of a right held by multiple people has the incentive to take as much fish, or timber, or coal, as he can, because a disproportionate amount of the cost of exhaustion of the resource is borne by everyone else. By contrast, if the easement or profit must be worked together there is no incentive to overexploit, because the cost of exhaustion of the resource is borne entirely by the easement or profit holders.

★**Example:** Frank and Rufus Miller jointly owned the right to fish, boat, and bathe in Lake Naomi. When Rufus's estate began to grant separate licenses to third parties for these purposes Frank sought to enjoin the licensees from using Lake Naomi, partly on the ground that Rufus's estate lacked any legal authority to subdivide the rights by granting separate licenses. In ***Miller v. Lutheran Conference & Camp Assn.***, 331 Pa.241 (1938), the Pennsylvania Supreme Court applied the rationale and principle of *Mountjoy's Case* when it decided that the boating, bathing, and fishing easement in gross held jointly by the Miller brothers could not be divided.

iv. **Exclusive easements in multiple persons: The "no increased burden" rule:** The one-stock rule, while still predominant, has been discarded by some courts in favor of a rule that permits division (or *apportionment* as it is sometimes called) if the ***burden on the servient estate is not increased beyond what was initially contemplated.*** See, e.g., *Centel Cable TV Co. of Ohio v. Cook*, 58 Ohio St. 2d 8 (1991); *Jolliff v. Hardin Cable Television Co.*, 26 Ohio St. 2d 103 (1971); *Cousins v. Alabama Power Co.*, 597 So. 2d 683 (1992); *Witteman v. Jack Barry Cable TV*, 183 Cal. App. 3d 1101 (1986).

6. Use or interference by servient estate owner

a. **Use by servient estate owner:** Unless the easement grants an ***exclusive*** use right to the easement holder, the servient estate may use the easement to the extent that the use is ***reasonable*** and does not substantially interfere with the easement holder's use.

Example: Landowner granted a nonexclusive easement to the City of Pasadena for the installation and maintenance of underground water mains along a 5-foot-wide corridor, then granted California-Michigan Land & Water a similar easement along the same corridor. In *Pasadena v. California-Michigan Land & Water Co.*, 17 Cal. 2d 576 (1941), the California Supreme Court ruled that, because Landowner could use the easement so long as its use constituted no unreasonable interference with Pasadena's use, it was entitled to grant a competing easement to California-Michigan that was no more of an interference.

b. **Interference by servient estate owner:** The servient estate owner may not ***unreasonably interfere*** with the easement holder's use of the easement. What constitutes an unreasonable interference is highly fact specific.

Example: Sakansky owned property on Main Street in Laconia, NH, that included an appurtenant easement for right of way, 18 feet wide, over Wein's property. Wein proposed to build a structure over the easement, leaving a passageway 18 feet wide and 8 feet high. To accommodate overheight vehicles Wein proposed a new and more circuitous way over his property to Sakansky's dominant estate. In *Sakansky v. Wein*, 86 N.H. 337 (1933), the New Hampshire Supreme Court concluded that a "rule of reason" applied, that it was not reasonable to limit the headroom of the easement to 8 feet (even with the proposed alternative access), but that Wein was free to erect a structure over the easement so long as the headroom was reasonable.

Example: Servient estate owner constructs speed bumps in an easement for right of way to slow down the traffic. If the speed of the traffic before the speed bumps was excessive, this is a reasonable interference. See, e.g., *Marsh v. Pullen*, 50 Or. App. 405 (1981). However, if the prior traffic was already slow, or if the speed bumps are exceedingly large, hazardous, or numerous, the interference might be unreasonable. See, e.g., *Beiser v. Hensic*, 655 S.W. 2d 660 (Mo. App. 1983).

E. Termination of easements: Easements are extinguished in five principal ways: (1) *expiration*, (2) *merger*, (3) some *act of the easement holder*, (4) *complete cessation of purpose*, or (5) some *act of the servient estate owner*. Once an easement is extinguished it *cannot be revived* — it must be created anew in one of the ways easements are formed.

1. **Expiration:** An easement created by grant may expire by its terms.

   Example: Fred grants Wilma an easement appurtenant for right of way for 25 years. The easement expires automatically at the end of 25 years. If Fred had granted Wilma the easement appurtenant "only until the city constructs a dedicated street that abuts Wilma's property" the easement would automatically expire on that event.

2. **Merger:** If the easement holder also acquires title to the servient estate the easement is extinguished because an easement exists only in land owned by somebody else.

   ★**Example:** Refer back to the ***Brown v. Voss*** example. After the litigation was over, Brown defaulted on his purchase of Parcel B (the dominant estate), which was then sold to Voss, owner of Parcel A, the servient estate. At that moment the easement burdening Parcel A and benefiting Parcel B was extinguished forever.

   Example: Frieda owns an easement in gross to fish in Shire Pond, located on Shingleshire. Later, when Frieda buys Shingleshire the easement in gross is extinguished forever.

   The easement holder must acquire the ***entire servient estate*** for merger to extinguish the easement. If only part of the servient estate is acquired, and use of the easement still burdens the other part, the easement is not extinguished. See *Castle Associates v. Schwartz*, 63 App. Div. 2d 481 (N.Y. App. 1976). Note that these principles work in reverse, too. If the servient estate owner acquires the dominant estate, the easement is also extinguished forever.

3. **Actions of the easement holder:** The easement holder may do a number of things that will extinguish the easement.

   a. **Release:** The easement holder may release the easement, either unilaterally or as part of an agreement with the servient estate owner. Generally, a release must be written, because it affects an interest in real property and so is within the scope of the Statute of Frauds. An oral

release is valid, through applicable estoppel, when it is relied on by the servient estate owner to his substantial detriment.

b. Abandonment: An easement may be extinguished by abandonment if the easement holder manifests a ***clear and unequivocal intention to abandon*** the easement. Mere ***nonuse will not suffice*** to prove abandonment. Even if the easement is never used it is not extinguished by lack of use and nothing more. See, e.g., *Lindsey v. Clark*, 193 Va. 522 (1952). Abandonment is established by ***acts of the easement holder*** that clearly and unequivocally establish **either a *present intent to relinquish the easement* or a *purpose inconsistent with its future existence.***

★**Example:** The Vermont Railway owned a "right of way" easement for its rail line through Vermont. In 1970 it ceased operations over the portion of the line in dispute, using the tracks only to store railroad cars. In 1975 the Railway removed all of the tracks, switches, and other railroad equipment from the section in dispute. In the late 1980s a trial judge ruled that the Railway had abandoned its easement in 1975, and that ruling was affirmed in ***Preseault v. United States,*** 100 F. 3d 1525 (Fed. Cir. 1996). The easement holder's conduct manifesting an intent to abandon can be affirmative or negative.

Example: Railway, which owned an easement over Norton's land, removed its rail tracks and did not use the easement for 10 years. The affirmative act of removal, coupled with nonuse, proved abandonment. *Norton v. Duluth Transfer Ry.*, 129 Minn. 126 (1915).

Example: In 1955 Fagan granted an easement for access to Gull Lake over Lot 20 in favor of property owned by Hickerson's predecessor. In 1958 Fagan conveyed Lot 20 to Bender, who lacked knowledge of the easement. Bender built a house and other improvements that blocked the easement. Thirty years later Hickerson sought to enforce the easement, which Bender claimed had been abandoned. In *Hickerson v. Bender*, 500 N.W. 2d 169 (Minn. App. 1993), the Minnesota Court of Appeals agreed with Bender, ruling that the failure of the easement holders to object to Bender's blockage of the easement was "conduct clearly inconsistent" with continued use of the easement.

Don't assume it's easy to prove abandonment: "Far more decisions contain dictum about abandonment" than actually find abandonment; courts mostly "find that while the easement holder ceased to use the easement, he had no intention to abandon." R. Cunningham, et al., The Law of Property 465 (2d ed. 1993).

c. Alteration of dominant estate: If the ***dominant estate owner alters the dominant estate so that the easement may no longer be used*** the easement is extinguished.

Example: The owner of Adirondack, a three-story office building, grants an easement appurtenant to Catskill, an abutting three-story office building, "for access from Catskill, the presently existing office building, in case of fire or other emergency across the roof of Adirondack and down the existing fire escape." The owner of Catskill demolishes it and builds a ten-story replacement. The easement is extinguished because its ***particular purpose,*** providing emergency access from the then-existing building, has been eliminated by the dominant estate owner's act of demolition. See, e.g., *Cutting v. Boston*, 201 Mass. 97 (1909). If the easement was not limited to this particular purpose — if, instead, it was "for access from any structure ever erected on the ground presently occupied by Catskill" — the destruction of Catskill would not affect the easement. Unless the easement's limited purpose is very explicit, courts tend to place a general construction upon

the purpose of easements. See, e.g., *First Natl. Trust & Savings Bank v. Raphael*, 201 Va. 718 (1960).

4. **Cessation of purpose:** If the ***purpose of an easement*** has ***completely ceased*** the easement is extinguished.

   a. **Easements by necessity:** An easement created by implication from necessity terminates when the necessity is eliminated, because its purpose has ceased.

   b. **Easements by estoppel:** An easement by estoppel (an irrevocable license) terminates in most jurisdictions when the licensee has reaped the full value of the expenditures made in reliance upon the license. At that point its purpose has ceased to exist. See section II.A.4.c.ii. above.

   c. **Extrinsic changes that vitiate purpose:** If acts of third parties completely vitiate the easement's purpose the easement is extinguished.

      Example: Leaman's property benefited from a right of way easement appurtenant (created by grant, not implied from necessity) across American Oil's property for access to a public road. When the public road was abandoned and another created, making the easement pointless (it turned into a dead-end), its purpose ceased. Though this change was entirely brought about by third parties (public authorities) and was not of the dominant estate owner's volition, nonetheless the easement terminated. *American Oil Co. v. Leaman*, 199 Va. 637 (1958).

   d. **Accidental destruction of the servient estate:** If the servient estate is ***accidentally destroyed*** (i.e., not through the servient owner's intent) the easement is extinguished. This usually requires that the easement be ***limited to use of a specific building.*** If the easement extends to the ground itself, the destruction of a building will have no effect on the easement, but if the easement is just in the building (and not the land also) the easement terminates if the building is accidentally destroyed. See, e.g., *Cohen v. Adolph Kutner Co.*, 177 Cal. 592 (1918). Intentional destruction of the servient estate normally renders the servient owner liable for damages and does not extinguish the easement (see, e.g., *Rothschild v. Wolf*, 20 Cal. 2d 17 (1942)), but if a building is so obsolete and shabby that its continuation is uneconomic, its condition may be deemed "tantamount to [accidental] destruction," thus extinguishing the easement. See, e.g. *Walner v. City of Turlock*, 230 Cal. App. 2d 399 (1964).

5. **Actions of the servient estate holder:** There are two principal ways the owner of the servient estate can extinguish an easement.

   a. **Intentional destruction of servient estate:** A minority of states hold that a servient owner's intentional destruction of a building burdened by an easement in the building alone (not the land) extinguishes the easement if continued operation of the servient building is economically disadvantageous. See, e.g., *Union Natl. Bank of Lowell v. Nesmith*, 238 Mass. 247 (1921). Most states reject this rule. See section II.E.4.d. above.

   b. **Prescription:** A servient owner can extinguish an easement burdening the servient estate by adverse use sufficient to constitute prescription. The elements of adverse use are the same as for creation of an easement by prescription. See section II.B.4. above.

Example: Bender built a house and other improvements that blocked an easement for passage across his property to a lake. Thirty years later Hickerson sought to enforce the easement. The easement had been extinguished by Bender's adverse use. *Hickerson v. Bender*, 500 N.W. 2d 169 (Minn. App. 1993).

6. **Changed circumstances in the surrounding area:** The doctrine of ***changed circumstances in the surrounding area***, which may extinguish a real covenant or equitable servitude, does ***not generally apply to easements.***

Example: The Town of Brevard acquired an easement by grant for a garbage dump. The surrounding area changed and the garbage dump became disagreeable. Nevertheless, the mere change in ***surrounding circumstances***, while perhaps sufficient to extinguish a real covenant or equitable servitude, was not a valid reason to extinguish an easement by grant. *Waldrop v. Town of Brevard*, 233 N.C. 26 (1950).

Don't confuse this rule — which deals with changed circumstances in the ***surrounding area*** — with changed circumstances in the ***dominant estate*** or ***servient estate.*** Some changes in circumstances in the dominant estate or servient estate do in fact extinguish an easement (e.g., cessation of purpose or destruction of the servient estate). See, e.g., sections II.E.4 and II.E.5.a, above.

III. REAL COVENANTS

A. Introduction

1. **Real covenants defined:** A covenant is a promise and is generally the province of the law of contracts. A ***real covenant*** is a promise about land usage that **runs with an estate in land,** meaning that it **binds *or* benefits *subsequent owners*** of the estate. A real covenant may be **affirmative** or **negative.** A promise to ***use land in a specified fashion*** (e.g., to maintain a boxwood hedge) is affirmative; a promise ***not to use land in a specified fashion*** (e.g., no industrial use) is negative. Both types are enforceable.

2. **Benefit and burden:** A promise about land usage burdens some land and normally benefits other land.

Example: Barbara, owner of Blackacre, promises Thomas, owner of Monteverdi, that she and her assigns will maintain forever a boxwood hedge on Blackacre that forms a border with Monteverdi. Blackacre bears the ***burden*** of this promise and Monteverdi enjoys its ***benefit.*** (The nomenclature of dominant and servient estates is confined to easements).

3. **"Runs with the land":** If one party breaches a covenant made with another person — even if it concerns land usage — the issues presented are purely a matter of contract law. Property law becomes involved only when a covenant about land use is sought to be enforced either by or against a successor to the ***estate in the land*** benefited or burdened by the covenant.

Example: Refer to the prior example. If Barbara sells Blackacre to James and James rips out the hedge, Thomas may sue James for this breach of the covenant only if the burden of the covenant runs with the estate in Blackacre that James acquired from Barbara. Similarly, if Thomas sells Monteverdi to John and Barbara destroys the hedge, John may sue Barbara only if

the benefit of the covenant runs with the estate in Monteverdi that John acquired from Thomas. Finally, if both Barbara and Thomas have sold to James and John, respectively, John may sue James for breach of the covenant only if both the burden and the benefit of the covenant runs with their respective estates in land.

The question of exactly when the burden or benefit runs is a complicated, technical subject addressed in sections III.B, C, D, and E, below. When you recall that a ***real covenant*** is defined as a covenant about land use that ***runs with an estate in land,*** you will realize that almost all the substance of this subject lies in the issue of when burdens or benefits, or both, run with **estates** in land. Although lawyers commonly speak of covenants "running with the land" that usage is mildly misleading: A real covenant runs with the **estate in land,** not the land itself. This distinction is important when considering whether ***privity of estate*** is present. See section III.D, below.

4. **Remedy available: Damages:** There are two principal remedies for breach of a promise — ***money damages*** or an ***injunction*** to compel performance of the promise. For historical reasons, an award of damages is a ***legal remedy*** and an injunction is an ***equitable remedy.*** Although virtually all American courts are combined courts of ***law*** and ***equity,*** it is still necessary to establish your client's entitlement to the remedy she seeks. If your client wants ***damages*** for breach of a covenant about land usage, she must prove that the covenant is an enforceable ***real covenant.*** If she cannot do that, the same promise might still be enforceable as an ***equitable servitude,*** but the only remedy then available for breach will be an injunction. See section IV, below. When you think ***damages,*** think ***real covenant;*** when you think ***real covenant,*** think ***damages.***

5. **Development of the real covenant:** English judges invented the ***real*** covenant to make bargains about land use last. Before real covenants were invented, only the immediate parties to a covenant were able to sue to enforce the covenant or were liable for its breach. This rule frustrated the efficient allocation of interests in land.

   Example: Morton leases Blackacre to Selwyn for a term of 15 years. Morton promises to build a new barn if the existing one ever burns down, and Selwyn promises to pay an annual rent of £50. Now suppose Morton conveys his reversion in Blackacre to Algernon and then the barn burns. Before real covenants, only Morton was liable for failure to rebuild the barn. Similarly, if Selwyn conveyed his leasehold to Edward, Edward would not be liable for rent.

   Because these rules inhibited the formation and transferability of leaseholds, English judges decided that covenants about land use attached themselves to the estates in land benefited or burdened by the covenant. Thus, successors to those estates could enforce the covenant or be liable for its breach. This rule developed from *Spencer's Case*, 5 Co. 16a, 77 Eng. Rep. 72 (K.B. 1583) in which the requirements for "running covenants" first began to be stated. By the nineteenth century, though, English judges confined real covenants to leaseholds and have kept it there. See *Keppell v. Bailey*, 39 Eng. Rep. 1042 (Ch. 1834). In America, real covenants may be created when a fee simple is transferred or even between neighbors with no transfer of title; the rule governing this point (which is rapidly disappearing) is called ***horizontal privity of estate.*** See section III.E.1, below.

6. **Covenant, not condition:** A real covenant is a ***promise*** concerning land use; it is ***not*** a ***condition*** of continued land use. Breach of a real covenant renders the violator liable for damages; breach of a condition causes forfeiture of the estate. Conditions concerning land use are the meat of defeasible fees. See Chapter 2.

7. **Compared to easements:** Affirmative easements confer rights to use another's land; real covenants do not. Real covenants are promises that land will be used, or not used, in specified ways. Negative easements, however, are very much like real covenants. A ***right*** to an unobstructed view over your neighbor's land (a negative easement) is functionally identical to a ***promise*** by your neighbor not to obstruct your view (a real covenant). While courts are reluctant to create negative easements (see section II.A.2.b.ii, above) they may well enforce the promise as a real covenant. Mostly, an interest claimed in another person's land that requires that person to refrain from some use will be construed as a covenant, enforceable against successors if the elements of a running real covenant are established.

8. **Compared to equitable servitudes:** An equitable servitude is a covenant about land use that is enforceable in equity against successors to the benefited or burdened estates in land. The rules concerning the running of equitable servitudes differ from the rules concerning the running of real covenants. See section IV, below.

B. Creation of real covenants: A real covenant can only be created by a written instrument. A deed signed only by the grantor suffices to create a real covenant on the part of the grantee, because the grantee is held to have made the deed his own by accepting it. Real covenants may ***not be created by implication or prescription.***

C. Enforceability by or against successors: The elements necessary to enforce the ***burden*** of a real covenant against a successor to the burdened estate are more difficult to establish than the elements needed to claim the ***benefit*** of a real covenant by a successor to the benefited estate. The rationale is that, because the burden of a real covenant exposes the successor to liability that is potentially unlimited, this burden ought to be imposed only on those people who acquire the ***identical estate*** that was initially burdened. The elements necessary for the burden of a real covenant, or its benefit, or both, to run with the estate in land are as follows.

1. **Intent:** The original parties must have **intended *the burden (or benefit, or both) to run.*** Almost always this is satisfied by an explicit statement in the covenant that it binds "successors, heirs, and assigns." See section III.D, below.

2. **Horizontal privity:** The older, but now largely discarded view, is that ***horizontal privity — privity of estate*** between the ***original parties*** — is required for the ***burden*** to run, but **not** for the ***benefit*** to run. Only a few relationships satisfy this technical term and concept, which is discussed fully at section III.E.1, below. All commentators and many courts reject this requirement altogether.

3. **Vertical privity:** Virtually all courts require ***vertical privity — privity of estate*** between the ***original promisor and the successor to the burdened estate*** — for either the ***burden*** or ***benefit*** to run, but the definition of vertical privity is more easily met for benefits to run than for burdens to run. This technical concept is discussed fully at section III.E.2, below. The Third Restatement of Property (Servitudes) §5.2 rejects vertical privity in favor of treating *negative covenants* as binding on all future *owners or possessors* of the *burdened* and *benefited* properties, and creates entirely new rules for *affirmative covenants*. See section III.E.3, below.

4. **Touch and concern:** The substance of the promise must ***touch and concern*** the burdened land and, in most states, the benefited land as well. It is commonly said of real covenants that if the benefit is in gross, the burden will not run. See section III.F, below.

D. "Running elements": Intent: The original parties to the covenant must intend for its burdens or benefits, or both, to run to successors to their respective estates in land. Courts look first to the covenant itself: Covenants typically state that they are intended to run or, what is the same thing, the parties promise on behalf of themselves, "their heirs, successors, or assigns." If a covenant is silent on this point, courts will examine all the surrounding circumstances (e.g., covenant's purpose, conduct of the parties) to decide whether the parties intended to create a running covenant. Although old English law required that covenants dealing with things not yet in existence (e.g., a promise to build a structure) could not run unless the promisor had explicitly obligated his successors to perform the promise (see *Spencer's Case*, sections III.A.5, above and III.E.1, below), this rule has been abandoned nearly everywhere in America.

E. "Running elements": privity of estate: Privity of estate exists in two dimensions. ***Horizontal privity*** refers to a relationship between the **original parties** to the covenant. ***Vertical privity*** refers to a relationship between one of the original parties and her successor to the estate in land owned by the original party. Traditionally, both horizontal and vertical privity were required for the burden of a real covenant to run, but only vertical privity was required for the benefit of a real covenant to run. Today, horizontal privity has been discarded by professors and many courts, but *not by all courts*.

1. Horizontal privity: Horizontal privity expresses a value judgment: It exists when the law deems the relationship between the estates in land owned by the original contracting parties to be sufficiently connected to permit the burden of the covenant to run. But what connection is sufficient? There are three views, none of which are mutually inconsistent with the others. Each developed from a different reading of *Spencer's Case*, where Elizabethan judges ruled that an original leasehold tenant's promise to build a wall on the premises could be enforced against a successor tenant because the original parties were in privity of estate. The court, however, didn't explain why.

a. Landlord-tenant view: In 1834, two and one-half centuries after *Spencer's Case*, English judges finally held that horizontal privity was met ***only if the original parties were landlord and tenant.*** In the United Kingdom, horizontal privity is required and remains limited to covenants in leases. The burden of other covenants about land use are enforceable against successors, if at all, only as equitable servitudes. This view is no longer recognized in America, though some old cases did take this tight approach.

b. Mutual interests in the burdened estate: Another view of *Spencer's Case* is that the parties had ***mutual interests*** in the burdened estate: The lessee had a leasehold and the lessor had a reversion. On this view, ***any*** **mutual interest *that exists at the time the covenant is created*** would be sufficient to create horizontal privity. The requisite mutual interest could include a pre-existing easement or profit, or possessory and future interests in the same land, as well as a landlord-tenant relationship.

Example: Adam owns Blackacre in fee simple and has a possibility of reverter in Whiteacre, which Eleanor owns in fee simple determinable ("so long as Whiteacre is used for animal husbandry"). Eleanor promises Adam, for herself and her assigns, that she will never again raise emus on Whiteacre. Horizontal privity is established, because both Adam and Eleanor have mutual interests in Whiteacre which preceded the covenant. If Eleanor should transfer her determinable fee to Mary Jane, who knows of the covenant, its burden will run with the estate Mary Jane acquired.

Example: Oilco has the right to remove oil from Blackacre, owned by Isaac, who then then promises Oilco that he will not graze his sheep within 100 yards of each oil well drilled by Oilco on Blackacre. Horizontal privity is established: Both Oilco and Isaac had interests in Blackacre prior to execution of the covenant. See, e.g., *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P. 2d 618 (Utah. 1989).

Every American state that requires horizontal privity recognizes at least this form of horizontal privity. Some recognize only this form of horizontal privity. See, e.g., *Morse v. Aldrich*, 36 Mass. 449 (1837); *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85 (1979).

c. **Conveyances, or "instantaneous privity":** A third view of *Spencer's Case* is that the fact the promise was contained in a conveyance was what created horizontal privity. On this view, ***any "connection of interest"*** between the original contracting parties will do, whether or not that interest was mutual or in existence prior to the creation of the covenant. The most common such interest that suffices to create horizontal privity is a conveyance.

Example: Elmer divides Blackacre into two lots, retaining one and conveying the other to Juanita under a deed by which Juanita promises never to use the lot for commercial purposes. Horizontal privity is present. For that single, instantaneous moment when title passed from Elmer to Juanita there was a "connection of interest" between their estates. It's like the passing of the baton in a relay race — privity exists at the moment of exchange. See, e.g., *Runyon v. Paley*, 331 N.C. 293 (1992).

The conveyance view is cumulative — mutual interests (including of course landlord-tenant) will suffice to create horizontal privity, but so will conveyances. This view is adopted by the original (1944) Restatement of Property, §534, but the Third Restatement of Property (Servitudes) (2000) flatly rejects any requirement of horizontal privity.

d. **Applies to *burdens*, not *benefits*:** In virtually every jurisdiction that requires horizontal privity, the requirement is applicable ***only for the burden of a covenant to run,*** and is ***not necessary*** for the benefit of a covenant to run. See, e.g., *City of Reno v. Matley*, 79 Nev. 49 (1963); *165 Broadway Building v. City Investing Co.*, 120 F. 2d 813 (2d Cir. 1941). But there is the inevitable exception. See, e.g., *Albright v. Fish*, 136 Vt. 387 (1978).

e. **Horizontal privity abolished:** About eight states have had occasion to abolish horizontal privity altogether, as does the Restatement (3d) of Property (Servitudes) §2.4. See *Orange & Rockland Util. v. Philwood Estates*, 52 N.Y. 2d 253 (1981); *Gallagher v. Bell*, 69 Md. App. 199 (1986). Other states that have abolished horizontal privity include Illinois, Minnesota, Montana, New Mexico, and Pennsylvania. Still more have given broad hints that horizontal privity is on the way out, and many others have not had occasion to confront the issue. A moment's reflection will reveal that there is ***no logical connection*** between the relationship of the original parties' estates and the wholly separate question of whether the burden of a promise about land use ought to run with the estate in that land. Horizontal privity is simply a crude device to restrict the burdens of covenants from persisting into the future. If there are good reasons for doing so, they ought to be articulated and formulated into rules of law that restrict running covenants for those reasons.

2. **Vertical privity:** Vertical privity exists when the successor has acquired the burdened or benefited estate in land held by the original party to the covenant. It is ***harder to establish vertical privity for the* burden *of a covenant than it is for the benefit of that covenant.***

a. **Burden of a covenant:** To establish vertical privity to enforce the burden of a covenant against a successor, it is necessary to prove that the successor acquired ***the exact same estate in land*** owned by the original contracting party. See Restatement Prop. §535 (1944). If something less than the original promisor's estate is conveyed the burden does not run.

Example: Paul purchases fee simple absolute in Blackthorn from Phyllis, owner of adjacent Tumbleweed. In the deed Paul promises for himself and his assigns that he will not use Blackthorn for industrial purposes, but he later leases Blackthorn to Ace Industries for use as a factory. Phyllis may not enforce the burden of the covenant against Ace because Ace did not succeed to the ***identical estate*** held by Paul, but Phyllis may sue Paul for breach of contract. See, e.g., *Old Dominion Iron & Steel Corp. v. Virginia Electric & Power Co.*, 215 Va. 658 (1975).

b. **Benefit of a covenant:** The benefit of a covenant will run to a successor of ***some interest*** in the benefited estate. See Restatement Prop. §547 (1944). Just about any interest will do.

Example: Refer to the prior example. Suppose Paul had sold his fee simple absolute in Blackthorn to Ace, thus satisfying vertical privity for the burden. If Phyllis leased Tumbleweed to Jack for a 10-year term, Jack could sue Ace to enforce the real covenant and obtain damages because Jack succeeded to ***some interest*** of Phyllis in Tumbleweed. He need not acquire Phyllis's entire estate in order to reap the benefit of the original covenant. See, e.g., *Old Dominion Iron & Steel Corp. v. Virginia Electric & Power Co.*

c. **The problem of adverse possessors:** Land burdened or benefited by a covenant may later be acquired by adverse possession. Is the adverse possessor in vertical privity? Restatement Property §547 (Illus. 3) (1944) took the position that an adverse possessor lacked vertical privity with respect to both the burden and benefit of a covenant. The Third Restatement Property (Servitudes) §5.2 holds that the burdens of *negative* and *affirmative* covenants run to adverse possessors. Benefits of *affirmative* covenants run to adverse possessors who have acquired title, but adverse possessors who have not yet acquired title may only enforce *affirmative* covenants (1) to repair, maintain, or render services to the benefited property, or (2) that confer benefits that may be enjoyed by the possessor without diminishing the value of the covenant to the true owner and without materially increasing the burden of performance on the burdened party.

d. **The problem of third party beneficiaries:** Two parties may enter into a covenant about land use that imposes mutual benefits and burdens but also explicitly benefits a third party's estate. Is the third party beneficiary able to sue to enforce the benefit of the covenant?

★**Example:** Oboe purchases Lot 1 from Flute, under a deed that stipulates that Oboe, for himself and his assigns, agrees to use Lot 1 for residential purposes only, and which further states that the promise is for the benefit of Lot 2 (owned by Flute) and Lot 3 (owned by Cello, who purchased it from Flute prior to this transaction). Oboe builds a gas station on Lot 1. May Cello enforce the covenant at law? There is no vertical privity because Cello has not succeeded to any interest of Flute ***after the benefit was created.*** See, e.g., *Runyon v. Paley*. But Restatement Property §541 (1944) provides that a covenant may be enforced by "such third persons as are also beneficiaries of the promise." Cases recognizing the ability of third party beneficiaries to enforce covenants are almost always suits in equity, thus involving equitable servitudes, not real covenants. In ***Neponsit Property Owners Assn. v. Emigrant Industrial Savings Bank,*** 278 N.Y. 248 (1938), the New York Court of Appeals

held that a homeowners' association that did not succeed to any estate of the benefited promisee was able to enforce the benefit of such a covenant on the theory that it was the corporate agent of the owners of benefited estates.

3. **The Third Restatement's alternative to vertical privity:** The Third Restatement of Property, Servitudes, jettisons the vertical privity concept as to both real covenants and equitable servitudes. Instead, it distinguishes between ***negative*** and ***affirmative*** covenants. A negative covenant is a *promise not to do an act*; an affirmative covenant is a *promise to do an act*. The characterization should turn on the substance of the matter rather than the verbal formulation. Thus, a promise "not to allow the trees to obstruct the view," though phrased negatively, requires some affirmative action to discharge its burden.

   a. **Negative covenants:** Section 5.2 of the Third Restatement treats negative promises like easements, imposing the burdens of such promises on all subsequent owners or possessors of the burdened estate, and extending the benefits of such promises to all subsequent owners or possessors of the benefited estate.

   b. **Affirmative covenants:** The Third Restatement creates separate rules for affirmative promises for *lessees*, holders of *life estates*, and *adverse possessors*. In addition, the Third Restatement treats the burdens and benefits of affirmative promises differently in each category.

      i. **Lessees:** A lessee is bound by an affirmative promise that ***burdens*** the leased estate *only* if it is a promise that can more reasonably be performed by the lessee-in-possession than the owner not in possession of the property. Lessees enjoy the ***benefits*** of affirmative promises that inure to the leased estate if they are promises (1) to repair, maintain, or render services to the benefited property, or (2) confer benefits that may be enjoyed by the possessor without diminishing the covenant's value to the lessor and without materially increasing the burden of performance on the burdened party.

      ii. **Life estates:** All of the ***benefits*** and ***burdens*** of affirmative covenants run to holders of ***legal life estates*** (those that are not beneficial interests under a trust), but a life tenant's liability for breach of an affirmative covenant cannot exceed the value of the life estate. Third Restatement of Property, Servitudes §5.4.

      iii. **Adverse possessors:** Adverse possessors who have acquired title get the benefit of affirmative covenants, but adverse possessors who have not yet acquired title may only enforce *affirmative* covenants (1) to repair, maintain, or render services to the benefited property, or (2) that confer benefits that may be enjoyed by the possessor without diminishing the value of the covenant to the true owner and without materially increasing the burden of performance on the burdened party.

      These rules do not have the force of law; they are merely the advice of the American Law Institute. Because the Restatements of the ALI are influential, these rules are likely to be adopted over time. At the moment, however, reports of the death of vertical privity are, as Mark Twain quipped of himself, greatly exaggerated.

F. **"Running elements": Touch and concern the land:** In order for either the benefit or burden of a real covenant to run to successors in interest the substance of the covenant must ***touch and concern*** the benefited or burdened land. The same is true for equitable servitudes, and the meaning of touch and concern is the same for equitable servitudes and real covenants. Touch and concern originated

as a way to control which covenants should be permitted to burden or benefit successors in interest, but modern commentary (particularly the Third Restatement Property, Servitudes) is critical. The Third Restatement purports to discard touch and concern and asserts that the function of touch and concern can be fully performed by its doctrines governing termination of servitudes. Thus, Restatement (3d) Property, Servitudes §3.1 holds that a servitude "is valid unless it is illegal or unconstitutional or violates public policy." The roster of such invalid servitudes includes but is not limited to servitudes that (1) are "arbitrary, spiteful, or capricious"; (2) "unreasonably" burden a "fundamental constitutional right"; (3) impose an "unreasonable restraint on alienation"; (4) impose an "unreasonable restraint on trade or competition"; and (5) are "unconscionable." However, because courts have not yet embraced the Third Restatement's approach it is useful to canvass touch and concern.

1. **Essential meaning of touch and concern:** Judicial understanding of touch and concern has evolved. Early cases focused on whether the substance of the covenant delivered burdens and benefits that necessarily involved the ***tangible use and enjoyment*** of the land, but judicial and scholarly attention began to focus on the ***effects*** of the covenant.

★**Example:** As part of a planned development, the developer sold lots subject to a covenant to pay money annually to a homeowners' association for the purpose of maintaining private roads and sidewalks owned in common by all lot owners. In holding that the covenant touched and concerned the burdened estate the New York Court of Appeals, in ***Neponsit Property Owners' Assn. v. Emigrant Industrial Savings Bank,*** 278 N.Y. 248 (1938), concluded that the covenant "affect[s] the legal relations — the advantages and the burdens — of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general."

To conduct this inquiry courts have looked to the ***effect of the covenant*** — does it depress the value of the burdened land and increase the value of the benefited land? This approach uses ***marketplace values*** to determine what touches and concerns land. This approach may in the end be simply an attempt to determine which covenants are ***sufficiently economically beneficial that they would be imposed by the present owners if they had the opportunity to negotiate between themselves free of transaction costs.***

a. **The economic theory:** The law of servitudes is built on an implicit general presumption that servitudes reflect an efficient allocation of external costs associated with land use, and so should be enforced by and against the original promisors (and successors, if the other elements of running covenants are present).

Example: Quikfat, a fast food chain, proposes to build a store in a residential neighborhood. The presence of the store will damage surrounding residential values and will provide economic benefits to Quikfat. To simplify, say that the total benefit to Quikfat is $100,000 and that 100 neighbors will each suffer damage of $2,500. If each neighbor contributes $1,500 to purchase from Quikfat its promise not to build a fast food store on the property, Quikfat will be better off (it will receive $150,000 to forego a benefit of $100,000) and each neighbor will be better off (by paying $1,500 to avoid a loss of $2,500). Creation of a servitude to secure this bargain is efficient. See, e.g., Ronald Coase, The Problem of Social Cost, 3 J. Law & Econ 1 (1960). But neighbors won't pay unless they can be assured that the promise will endure, because they wish to forestall damage from Quikfat's use now and in the future. Hence, a function of "touch and concern" is to limit running covenants to those promises that are the **type of promise** ***about land use to which*** **future owners** ***reasonably***

might agree. From the above illustration it should be clear that these promises are those that ***deliver net social or economic benefits.*** In the above example, the servitude produces net economic benefits of $150,000 ($250,000 of avoided costs minus $100,000 of foregone gain). See Restatement Property, §537 (comment h) (1944) (relationship between benefit and burden must have a "reasonable prospect of promoting land utilization as a whole").

2. **Negative covenants:** Negative covenants almost always touch and concern the burdened land, because their nature is to restrict land use. In nearly every case they also deliver correlative benefits to other land.

   Example: A promise given to neighbors in a residential community not to use Willowside for industrial purposes imposes burdens on Willowside but also generates correlative benefits to the surrounding residential land. The burden of the promise touches and concerns Willowside and the benefit of the promise touches and concerns the neighbors' land.

   a. **Covenants against competition:** The burden of covenants against competition generally touch and concern land, so long as they are reasonable in scope and duration. See, e.g., *Newcomb v. Congdon*, 160 App. Div. 2d 1192 (1990). The benefit of such covenants surely enhances the value of the benefited land, at least for the use insulated from competition, and so also touches and concerns the benefited land. See, e.g., *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85 (1979). In *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 274 N.J. Super. 159 (App. Div. 1994), a New Jersey appellate court invalidated a covenant that a building not be used as a grocery on the ground that it was contrary to "public policy" in that the surrounding community was poorly served by existing grocers.

3. **Affirmative covenants:** Courts are more reluctant to enforce affirmative covenants than negative covenants and sometimes use the touch and concern element to express this reluctance. Enforcement of affirmative covenants may require continuing judicial supervision and impose large (and sometimes crushing) obligations on successors to the covenant. An affirmative covenant that fails to address the economic external costs of land use is almost certainly one that does not touch and concern land.

   Example: Kendall owned an ironworks and, in concert with other ironmongers, formed a corporation to operate a railroad and a lime quarry. On behalf of himself and his assigns Kendall promised the corporation that his ironworks would purchase its requirements of lime from the quarry. Kendall sold the ironworks to Bailey, who refused to purchase lime from the quarry. In *Keppell v. Bailey*, 39 Eng. Rep. 1042 (Ch. 1834), the English Chancery court ruled that the burden of the covenant did not touch and concern the ironworks. Though it did not say so, it is evident that the covenant's purpose had nothing whatever to do with any external costs of using the land as an ironworks; it was a purely personal promise.

★**Example:** Stanley Stilwell sold a building lot to Caullett under a deed by which Stilwell reserved "the right to build or construct the original dwelling or building" on the lot. In ***Caullett v. Stanley Stilwell & Sons, Inc.***, 67 N.J. Super. 111 (1961), the New Jersey courts held that the covenant was unenforceable because it did not touch and concern Caullett's land. The promise did nothing to restrict land usage except in "the very incidental fashion" of precluding Caullett from construction unless Stilwell derived the builder's profit, making this "at best a personal arrangement . . . designed to [ensure] a profit" for Stilwell. There was no negative externality of Caullett's land use that the promise was designed to control.

As an alternative, occasionally a court will enforce an affirmative covenant (having concluded that the covenant touches and concerns) by creative remedies that resemble enforcement of a negative covenant.

Example: A developer constructed a golf course and a subdivision of 932 homes, each sold under an affirmative covenant of the developer that he would maintain the golf course for the benefit of the homeowners. The developer then sold the course to Oceanside Land Co., who allowed its condition to atrophy. The homeowners sought an injunction requiring Oceanside Land to repair and maintain the course. In *Oceanside Community Assn. v. Oceanside Land Co.*, 147 Cal. App. 3d 166 (1983), the court denied the injunction but granted the homeowners an equitable lien on the course in the amount of $9,320 each month the course was not properly maintained. Thus, the homeowners could foreclose on the course and acquire ownership if the Oceanside Land failed to repair and maintain it, and Oceanside's financial exposure was limited to its investment in the land.

a. Covenants to provide utilities: These covenants generally touch and concern. See, e.g., *Choisser v. Eyman*, 22 Ariz. App. 587 (1974) (benefit of covenant to provide water); *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y. 2d 240 (1959) (burden of covenant to provide steam heat). However, when such covenants are no longer useful courts may construe their substance as not touching or concerning the burdened land. Recall that the Restatement (3d) Property, Servitudes, §7.10 substitutes for touch and concern the doctrine that servitudes may be modified or terminated if changed circumstances make it "impossible as a practical matter to accomplish the purpose for which the servitude was created." Which doctrine should apply?

Example: Orchard Hill developed a tract of rural land for use as summer homes, and sold lots subject to a covenant that the purchaser and his successors would take and pay for water provided by Orchard Hill for 6 months of the year. Orchard Hill conveyed its interest to Eagle, and Gross acquired a lot from an original purchaser. Gross drilled his own well and then refused to take and pay for Eagle's water. In *Eagle Enterprises, Inc. v. Gross*, 39 N.Y. 2d 505 (1976), the burden of the "take and pay" covenant was held not to touch and concern Gross's property, mostly because it had lost its utility to Gross and its invalidation would not harm other lot owners who relied on seasonal water. Under Restatement (3d) Property, Servitudes §7.10 the question would not be the initial validity of the covenant, but whether circumstances have sufficiently changed to make it impossible as a practical matter to accomplish the purpose of the servitude.

b. Covenants to pay money: The most common such covenant is one requiring payment of fees to a homeowners' association for the maintenance of common areas and facilities. These covenants are generally held to touch and concern land so long as the services produced by the payment enhance the value of the burdened land. This is virtually always the case when the payments maintain common streets, sidewalks, elevators, or other "essential" attributes of the development.

★**Example:** In ***Neponsit Property Owners' Assn. v. Emigrant Industrial Savings Bank,*** 278 N.Y. 248 (1938), the New York Court of Appeals held that a covenant to pay a fee to maintain common facilities touched and concerned the burdened property because the effect of the covenant was to impose burdens and advantages on estate holders in their unique capacity as landowners rather than as members of the general public.

There is some disagreement over whether covenants to pay for common recreational facilities touch and concern the burdened property. While the test is the same — does it enhance value? — courts examine the following factors to determine this: Is the facility part of a ***common plan of development?*** Is the facility in ***close proximity*** to the burdened land? Is the facility ***open to common use of all burdened property owners?*** Most courts considering this issue have found that such covenants do touch and concern land. See, e.g., *Streams Sports Club, Ltd. v. Richmond*, 99 Ill. 2d 182 (1983); *Regency Homes Assn. v. Egermayer*, 243 Neb. 286 (1993); *Anthony v. Brea Glenbrook Club*, 58 Cal. App. 3d 506 (1976). But see *Chesapeake Ranch Club v. CRC Members*, 60 Md. App. 609 (1984) (recreational facility benefited community as a whole and did not enhance value of burdened lots).

4. **Benefit in gross:** The majority rule is summed up by an old saying, "if the benefit is in gross, the burden will not run." The rule comes from England, where easements in gross are not recognized. It was thus sensible for English courts to refuse to enforce the burden of a covenant against successors where the benefit was held in gross, because such a covenant is functionally identical to an easement in gross (particularly when the covenant is negative). See, e.g., *London County Council v. Allen*, [1914] 3 K.B. 642. American courts recognize easements in gross but still cling to the rule that "if the benefit is in gross, the burden won't run." See, e.g., *Chandler v. Smith*, 170 Cal. App. 2d 118 (1959); *Johnson v. State*, 27 Or. App. 581 (1976). Restatement Property §537(a) (comment c), §543 (comment c) (1944). Contra: *Van Sant v. Rose*, 260 Ill 401 (1913). Restatement (3d) Property, Servitudes, §2.6, comment d (2000), squarely rejects the majority rule, holding that the burden runs even if the benefit is in gross.

   a. **Policy considerations:** Covenants with the benefit held in gross can be useful, as when landowners burden their property for historic preservation or environmental conservation purposes, and make a nonlandowning enterprise (e.g., the National Trust for Historic Preservation or the Audubon Society) the beneficiary of the covenant. The burden-won't-run-if-the-benefit-is-in-gross rule might justify a rebuttable presumption that (1) the covenant was not designed to deal with externalities and (2) there was no net benefit to land as a whole by the covenant, but those considerations do not justify a blanket prohibition against the running of the burden of a covenant whose benefit is held in gross.

5. **Burden in gross:** Though rarely encountered, it is possible for the benefit of a covenant to run with land and the burden of the covenant to be in gross. Courts have not hesitated to permit such benefits to run. See, e.g., *Mueller v. Bankers Trust Co. of Muskegon*, 262 Mich. 53 (1933) (seller of land promised to build a bridge over creek on the land; subsequent purchaser permitted to enforce covenant which touched and concerned the benefited land).

IV. EQUITABLE SERVITUDES

A. **Introduction:** An equitable servitude is a ***covenant about land use*** that will be enforced in equity (by an ***injunction***) against a successor to the burdened estate who acquired it with ***notice*** of the covenant. A covenant need ***not*** meet all the criteria of a real covenant to be enforceable as an equitable servitude. Covenants are more commonly enforced as equitable servitudes than as real covenants because they are easier to enforce by or against successors and most people prefer enforcement of a covenant by injunction than damages for its breach.

1. **Differences between real covenants and equitable servitudes:** A covenant about land use may be a real covenant, an equitable servitude, or both. There are four major differences between real covenants and equitable servitudes.

   a. **Remedy:** A real covenant is enforceable ***at law by an award of*** **money damages.** An equitable servitude is enforceable in ***equity by an*** **injunction.**

   b. **No privity needed:** Neither horizontal nor vertical privity is needed for either the benefit or burden of an equitable servitude to run to successors in the burdened or benefited estates.

   c. **Creation:** Equitable servitudes may be created by ***implication*** in many jurisdictions. A real covenant can only be created expressly and in writing.

★2. **Origins of the equitable servitude:** The equitable servitude originated in ***Tulk*** v. ***Moxhay***, 41 Eng. Rep. 1143 (Ch. 1848). Tulk sold Leicester Square to Elms who promised for himself and his assigns not to build on Leicester Square. With knowledge of the covenant, Moxhay purchased Leicester Square from Elms and then proposed to build on the Square. Under English law the burden of the covenant would not run because horizontal privity was lacking (see section III.E.1.a), so Tulk sought and obtained an injunction. The Chancellor reasoned that it was highly unfair for Moxhay to purchase Leicester Square knowing of the covenant (and probably paying less because of its existence), only to ignore it with impunity. Because the covenant was intended to bind successors, its substance touched and concerned the land, and Moxhay had notice of it, it was enforceable in equity against Moxhay.

B. **Creation:** Because equitable servitudes are interests in land the Statute of Frauds requires that they be created in a writing signed by the promisor, but acceptance of a deed containing a promise made by the grantee of the deed suffices even though the grantee does not sign the deed. There is, however, a ***major exception*** to this rule: Many states permit ***negative equitable servitudes*** (a promise to refrain from using one's land in a specified fashion) to be *created by implication when there is a common scheme of residential development.*

1. **By implication from a common development scheme:** Many states will imply a ***negative equitable servitude*** where a real estate developer sells lots in a subdivision on the promise that all the lots will be burdened with the same use restriction (e.g., single-family residences only) and later fails to carry through on the promise to burden all lots.

★**Example:** In the 1890s McLaughlin subdivided a tract of land in Detroit along Collingwood Avenue into building lots and started to sell them under deeds that restricted use to single-family residences. Later, McLaughlin sold some lots without those restrictions, including Lot 86, which eventually was acquired in 1910 by McLean. In the 1920s, as autos became more commonplace, McLean started to construct a gasoline filling station on Lot 86. His neighbors sought to enjoin this use as a violation of an implied negative equitable servitude. In ***Sanborn v. McLean***, 233 Mich. 227 (1925), the Michigan Supreme Court agreed that an injunction was proper, reasoning that because the initial restrictions imposed by McLaughlin, the developer, were "for the benefit of the lands held by [McLaughlin] to carry out the scheme of a residential district" an implied reciprocal servitude burdened McLaughlin's retained property (including Lot 86) and that servitude was equitably enforceable against McLean, who was on inquiry notice from the "uniform residence character given the lots by the expensive dwellings thereon" that Lot 86 might be burdened by a covenant restricting it to residential use. See also *Mid State Equip. Co., Inc. v. Bell*, 217 Va. 133 (1976).

As in ***Sanborn***, courts sometimes call the covenant so implied a ***reciprocal negative easement,*** although the term ***implied reciprocal covenant*** is more accurate. Whatever the label, it is (1) ***reciprocal*** (the common scheme contemplates covenants burdening all lots for reciprocal benefit) and (2) ***negative*** (it restricts land use rather than requiring affirmative acts or use). Although ***not*** an easement it is in the nature of an easement because an equitable servitude is an interest in land. For an implied reciprocal covenant to be implied the following elements must be present.

a. Common scheme of development: The development must be of uniform character and recognizable as such by purchasers. Otherwise, there is no basis for concluding that purchasers were relying on reciprocal covenants burdening everyone's use in order to produce a development of uniform character.

i. When does the scheme begin? Courts vary considerably in their answers to this question. In general, the following four factors are often used to determine the existence of a common scheme: (1) ***advertisements*** mentioning the reciprocal covenants, (2) use of a ***map showing the entire development*** as a sales aid in conjunction with sales of burdened lots, (3) ***representations*** to buyers that all lots will be similarly burdened, and (4) ***sale of a significant number of lots with a common use restriction.*** At one extreme are courts that hold that the common scheme must exist at the very beginning of the project, before any sales have occurred. See, e.g., *Johnson v. Mt. Baker Park Presbyterian Church,* 113 Wash. 458 (1920). Many jurisdictions are more lenient. In ***Sanborn v. McLean,*** discussed above, 21 lots (out of a total of 98) were sold with residential-only use restrictions before the lot at issue in the case was sold without such a restriction, yet the court ruled that a common scheme had been created, notwithstanding the fact that, by the time the "common scheme" was completed, less than 60 percent of the total lots in the subdivision were burdened by reciprocal covenants. By contrast, in *Tindolph v. Schoenfeld Bros., Inc.,* 157 Wash. 605 (1930), restrictions imposed on 2 lots out of 23 were held insufficient to create a common scheme. See also *3 W Partners v. Bridges,* 651 A. 2d 387 (Me. 1994) (no common plan when only 3 out of 67 lots were burdened).

ii. No covenants on lots conveyed before the common scheme begins: If a developer conveys land without use covenants ***before the common scheme begins*** no reciprocal covenant will be implied. The land is simply not part of the common scheme and so there is no basis for finding an implied reciprocal covenant.

Example: Developer buys Flatland, a 160-acre farm, and then sells Homestead, a 10-acre portion consisting of the house, barns, and adjacent pasture, without covenants restricting use. Later, Developer subdivides the remaining 150 acres into 300 lots, selling them as "residential-only lots — no farm animals permitted." MacDonald, the owner of Homestead, maintains a wide variety of farm animals on Homestead. While a common scheme may exist with respect to this 150-acre development, sufficient to create implied reciprocal covenants if necessary, no such covenant applies to Homestead. MacDonald can keep his farm animals so far as the law of servitudes is concerned.

b. Negative covenant: Courts will imply reciprocal covenants ***only*** when the substance of the covenant is **negative** — limiting the use that may be made of the property rather than requiring some positive act on the part of the owner of the burdened land.

2. **No implied covenants:** Some jurisdictions, notably California and Massachusetts, completely reject creation of equitable servitudes by implication. See, e.g., *Werner v. Graham*, 181 Cal. 174 (1919); *Sprague v. Kimball*, 213 Mass. 380 (1913). In California, even if use restrictions are recorded in the public records (e.g., in a subdivision map) they do not burden the lots described unless the deed specifically refers to the recorded restriction. *Riley v. Bear Creek Planning Comm.*, 17 Cal. 3d 500 (1976).

C. **Enforceability by or against successors:** As with real covenants, certain requirements must be met in order for the benefit or burden of an equitable servitude to run to successors to the original estate. These requirements are ***not the same as for real covenants:*** Some are identical but there are also significant differences.

1. **Intent:** This requirement is essentially the same as for real covenants. If the parties expressly or impliedly intended for the covenant to run to benefit or burden successors the equitable servitude created by the covenant will run.

2. **Privity not required:** Unlike real covenants, ***neither horizontal nor vertical privity of estate is required*** for either the burden or benefit of an equitable servitude to run.

3. **Notice:** As with real covenants, a purchaser who pays real value for an estate and has ***no notice*** of the servitude at the time is ***not bound*** by the servitude. Notice can be ***actual*** or ***constructive.*** Constructive notice most often comes through the ***record*** — the public records of real estate titles — but can also be the product of circumstances that should trigger ***inquiry*** on the part of the buyer, inquiry that would reveal the servitude.

   a. **Actual notice:** Actual knowledge of the servitude is actual notice. This can happen by design (e.g., the seller tells the buyer, perhaps in person, by letter, or in the sale contract) or by accident (e.g., an otherwise ignorant buyer mentions his prospective use plans to a neighbor who reveals a copy of an unrecorded servitude on the property).

   b. **Record notice:** Every American jurisdiction (usually each county) maintains a public record of all transactions affecting title to real property. If a servitude is anywhere in the ***chain of title*** — the series of records that trace ownership back to some original title or before a specified point in history — the buyer has constructive notice of the servitude. Buyers are charged with knowledge of the contents of the chain of title because they ought to read it (or hire a professional to do so and report on it).

      i. **Deeds from a common grantor *not* in the direct chain of title:** States differ on whether a deed from a common grantor but not in the ***direct*** chain of ownership should be treated as in the ***chain of title.***

      ★**Example:** In Massachusetts, a state that does not recognize implied reciprocal covenants, Gilmore subdivided a tract and imposed single-family residential use restrictions on several lots. In a deed to Guillette, Gilmore recited that the servitude created was thereby imposed on Gilmore's remaining lots. Later, Gilmore sold one of those lots to Daly without any servitude. Daly's direct chain of title went from himself to Gilmore to Gilmore's predecessor. No servitude was in any of those deeds. Nevertheless, in ***Guillette v. Daly Dry Wall, Inc.***, 367 Mass. 355 (1975), the Massachusetts Supreme Judicial Court held that Gilmore's deed to Guillette was in Daly's chain of title. The effect of this rule is to require purchasers of property to search the records for all possible grants of ***other property*** owned by each grantor in the chain of title on the possibility that there

might be some servitude created in a deed outside the direct line of ownership. See also ***Sanborn v. McLean***, 233 Mich. 227 (1925).

Most jurisdictions reject this latitudinarian view of the chain of title, on the ground that it imposes "intolerable" burdens on title searchers. See, e.g., *Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc.*, 267 N.Y. 242 (1935); *Land Developers, Inc. v. Maxwell*, 537 S.W. 2d 904 (Tenn. 1976).

c. **Inquiry notice:** A few courts have ruled that a purchaser should inquire about the existence of servitudes if the neighborhood exhibits a common character.

★**Example:** Recall the facts of ***Sanborn v. McLean.*** McLean's lot was free of any servitudes of record, but the Michigan Supreme Court thought that McLean should have inquired about restrictive covenants, and therefore had ***inquiry notice*** of the implied reciprocal covenant for residential use, because the neighborhood had a "strictly uniform residence character." But suppose that all the houses were two stories in height and had grass lawns edged by boxwood hedges. Should McLean have inquired about servitudes restricting use to two-story residences with grass lawns and boxwood hedges?

4. **Touch and concern:** As with real covenants, the traditional rule is that in order for either the benefit or burden of an equitable servitude to run to successors in interest the substance of the covenant must ***touch and concern*** the benefited or burdened land. The meaning of touch and concern is the same for equitable servitudes and real covenants and was discussed in detail in section III.F. above. Recall also that the Restatement (3d) Property, Servitudes substitutes for the touch and concern requirement a general rule that all servitudes are initially valid except those that are illegal, unconstitutional, or violate public policy, and permits modification or termination of servitudes when their purpose may no longer be accomplished due to changed circumstances.

D. Identifying the benefited land: Courts identify the benefited land by (1) ascertaining the intentions of the parties and (2) determining whether the land intended to be benefited has actually received a benefit. This is easy if the covenant expressly states what land is intended to be benefited, but poses some problems when courts must infer those intentions.

1. **Land retained by the promisee:** If the party imposing the covenant owns land adjacent to or near the burdened land, courts presume that the covenant was intended to benefit the retained land. See, e.g. *Grady v. Schmitz*, 16 Conn. App. 292 (1988). That presumption is rebuttable by proof that the promisee had no such intention. See, e.g., *Haldeman v. Teicholz*, 197 App. Div. 2d 223 (1994). So long as the retained land is in the immediate vicinity of the burdened land, courts will usually employ the presumption that the benefit attaches to the retained land. See, e.g., *Malley v. Hanna*, 65 N.Y. 2d 289 (1985) (benefited land three lots away from the burdened land).

a. **Promisee's assigns:** The corollary to this principle is that if the promisee later conveys his retained and benefited land, the benefit runs to the assignee (assuming the other elements for a running benefit are present).

Example: Developer acquires St. John's Point and subdivides it into 10 lots. Developer sells Lot 1 to Carol under a deed restricting use to a single residence. The benefit of Carol's promise attaches to the nine lots Developer retains. Developer then sells the remaining nine lots, each burdened by the same covenant. Carol starts to construct a small hotel. Bret,

owner of Lot 5, may enjoin Carol's hotel because he has succeeded to the benefit of Carol's promise. See, e.g., *Grange v. Korff*, 248 Iowa 118 (1956).

2. **Enforceability by third parties:** Sometimes the benefit of a covenant is sought to be enforced by a person who is neither a successor to the covenant nor a successor to land benefited by the covenant, but who was intended to be the beneficiary of the covenant. These situations are of two types: (1) the intended beneficiary is a ***prior purchaser*** of a lot in a subdivision developed by a common grantor, or (2) the intended beneficiary is a complete ***stranger to the chain of title*** — the beneficiary did not acquire his property from the person who imposed the covenant. Intended beneficiaries are generally, but not always, able to enforce a covenant. Note the curiosity that most states refuse to permit creation of easements in third parties (see section II.B.1.a.ii, above) but will permit third party enforcement of real covenants and equitable servitudes.

   a. **Prior purchasers:** A prior purchaser of a subdivision lot burdened by covenants restricting use may enforce the benefit of the covenant, under one of three theories.

      i. **Through the title chain to the person imposing the covenant:** Some states insist that the prior purchaser and intended beneficiary have acquired title from the person imposing the covenant. In the case of a subdivision this requirement is easily met, because the developer is that person.

      Example: Refer to the prior example. Suppose that Bret, owner of Lot 5, starts to construct a convenience store on his lot, and Carol, owner of Lot 1, wishes to enjoin that use. Does Carol enjoy the benefit of Bret's ***later covenant?*** Carol is not the successor to land that enjoyed this benefit at the time she acquired it, because she is the first purchaser in the subdivision. Nevertheless, she can trace her title to Developer, the person who imposed the covenant, and she was pretty clearly an intended beneficiary of Bret's covenant, so she may enforce its benefit. See, e.g., *Malley v. Hanna*, 65 N.Y. 2d 289 (1985); *Brown v. Heirs of Fuller*, 347 A. 2d 127 (Me. 1975).

      This insistence on a form of privity of estate prevents a covenant from being enforced by a stranger to the title chain descending from the person imposing the covenant.

      Example: Suppose Developer, in the prior example, had inserted into Bret's covenant a statement that it was intended to benefit landowners in Cormorant Cove, an adjacent subdivision developed by somebody else. Evelyn, a Cormorant Cove landowner, would be unable to enforce the covenant because she could not trace her title to Developer, the party imposing the covenant.

      ii. **Unrestricted third party beneficiary theory:** Some states follow the view, endorsed by Restatement Property §541 (1944), that any intended third party beneficiary can enforce the benefit of a covenant. Thus, in the prior example, Evelyn (an intended beneficiary) could enforce the covenant burdening Bret's land.

      Example: Barnes and Zamiarski, good friends, owned adjacent lots. Barnes conveyed his lot to Lewek under a deed restricting its use for the benefit of Zamiarski's lot. Kozial purchased the lot from Lewek and violated the restriction. In *Zamiarski v. Kozial*, 18 App. Div. 2d 297 (1963), New York's intermediate appellate court upheld an injunction of Kozial on the ground that Zamiarski's status as a third party beneficiary of the Barnes-to-Lewek covenant was sufficient, *by itself*, to permit Zamiarski to enforce the benefit of

the covenant. See also *Nature Conservancy v. Congel*, 253 App. Div. 2d 248 (1985). But the New York Court of Appeals, in *Malley v. Hanna*, 65 N.Y. 2d 289 (1985), takes a contrary view (requiring privity with the covenantee to enforce the benefit of the covenant), without mention of *Zamiarski*.

iii. **By implication from a common scheme:** This is the mirror image of implied reciprocal covenants (see section IV.B.1, above). The doctrine of implied reciprocal covenants creates ***burdens by implication.*** This doctrine is quite separate — it uses a common scheme of development to ***identify the property*** **benefited** ***by covenants that are*** **expressly created,** not produced by implication. Thus, a state that does not permit the creation of implied reciprocal covenants might still use the existence of a common scheme to identify the land benefited from express covenants in a subdivision.

Example: Shackelford subdivided Brier Neck into about 100 lots and sold them over a 16-year period as summer residential lots. Each lot was sold under a deed restricting use to a single dwelling. Later, a corner lot across the road from the entrance to Brier Neck was sold by Shackelford to Clark under the same restriction. Clark constructed a ice cream stand and grocery on the corner lot and owners of lots in Brier Neck sought to enjoin Clark's commercial use. In *Snow v. Van Dam*, 291 Mass. 477 (1935), the Massachusetts Supreme Judicial Court used the existence of a common scheme (including the corner lot) to identify the benefited property — all the land within the common scheme. Because Massachusetts does not permit the ***creation*** of servitudes by implication from a common scheme, the common scheme was relevant only to *determination of the benefited property.*

It may take more than two lots to create a common scheme sufficient to identify the benefited land.

Example: Lebold and Willett owned Lot 11 as co-owners. Lebold was the sole owner of a lot directly across the street from Lot 11 and Willett was the sole owner of the adjacent lot. Lebold sold his lot to Rodgers. Two years later Lebold and Willett conveyed Lot 11 to Reimann, subject to a covenant restricting the location of structures on Lot 11. Reimann began construction of a dwelling not in conformity with the covenant and Rodgers sought to enjoin the construction. In *Rodgers v. Reimann*, 227 Or. 62 (1961), the Oregon Supreme Court found the evidence insufficient to establish that the Lebold-Rodgers lot was the intended beneficiary of the covenant, whether via a common scheme or otherwise.

If the developer retains the right to modify or waive the use restrictions imposed by covenant, that may negate any implication that the covenants were intended for the benefit of lot buyers.

Example: Dickason subdivided a tract of land, conveying lots under deeds containing use restrictions that could be eliminated at any time by agreement between Dickason and the owner of the burdened lot to be freed from the covenant, without the consent of other lot owners. The retention of this power by Dickason, even though unexercised, negated any inference that other lot owners were the beneficiaries of the covenants. The reservation made the covenant "a personal covenant between the grantor and his individual grantees." *Suttle v. Bailey*, 68 N.M. 283 (1961). Other courts subject the exercise of a developer's reserved power to a rule of good faith, and thus inferentially hold that a developer's reservation does not necessarily negate intent to benefit lot buyers. See, e.g.,

Moore v. Megginson, 416 So. 2d 993 (Ala. 1982). Some states, notably California, reject the use of a common scheme altogether — either to create implied reciprocal covenants or to identify the property benefited by express covenants. In California, the scope of the benefit of a covenant is defined by its written text. See *Werner v. Graham*, 181 Cal. 174 (1919).

b. Complete strangers to the title chain descending from the person imposing the covenant: A landowner who is ***not part of a common scheme***, and who did ***not acquire the land (immediately or remotely) from the person imposing the servitude***, may only enforce the benefit of a covenant if (1) the landowner is the ***intended beneficiary***, and (2) the jurisdiction permits ***any third party beneficiary*** to enforce the benefit of a covenant.

V. INTERPRETATION OF COVENANTS

A. General rule: Courts try to implement the intentions of the parties in creating the covenant, but the very terms used in a covenant are often ambiguous.

B. Building restriction or use restriction: Covenants may restrict certain ***uses*** or they may restrict construction of certain types of ***buildings.*** The difference may be important.

Example: Aumiller purchased a lot under a covenant limiting "structures erected . . . to residential purposes." Aumiller, a building contractor, built a "model home" in multiple senses of the term — it was "entirely residential in appearance" but was used as a site at which Aumiller's customers could inspect his work product and negotiate home building deals. A Pennsylvania appellate court applied a Pennsylvania policy disfavoring use restrictions and concluded that the covenant only limited the nature of the structure, not the use to which it was put. In Pennsylvania, use restrictions must "squarely address the use or manner of occupation of the property." *Groninger v. Aumiller*, 435 Pa. Super. 123 (1994), applying *Schulman v. Serrill*, 432 Pa. 206 (1968). Accord: *Patton v. Madison County*, 265 Mont. 362 (1994) (bed and breakfast use); *Jackson v. Williams*, 714 P. 2d 1017 (Okla. 1985) (group home use). Contra: *Fox v. Smidt*, 869 S.W. 2d 904 (Mo. App. 1994).

C. Residential purposes: Many covenants limit use to "residential purposes." The content of this term is not self-evident because people commonly use their residences for a variety of purposes.

1. Combined business and residential use: Some states take the view that any commercial or money-making enterprise, no matter how "domestic" it might be, is not residential. In *Metzner v. Wojdyla*, 125 Wn. 2d 445 (1994), the Washington Supreme Court enjoined Wojdyla's provision of day care for six children (including two of her own) in her own home, reasoning that the activity was commercial. In *Fick v. Weedon*, 244 Ill. App. 3d 413 (1984), a "bed and breakfast" was ruled to violate a residential-only covenant. But *Persson-Mokvist v. Anderson*, 942 P. 2d 1154 (Alaska 1997), held that use as a "bed and breakfast" and for dog training was consistent with a residential-use only covenant; *Stewart v. Jackson*, 635 N.E. 2d 186 (Ind. App. 1984), held that day care for five children comported with a residential-use only covenant. Uses that are clearly not residential are often tolerated so long as no structures result. See, e.g., *Fitzwilliam v. Wesley United Methodist Church*, 882 S.W. 2d 343 (Mo. App. 1994) (church parking lot); *Bagko Development Co. v. Damitz*, 640 N.E. 2d 67 (Ind. App. 1994) (Little League practice field). Such interpretations often hinge on a reading of the covenant as limiting use to those that are compatible with the architectural type and character

of a single-family residence. See, e.g., *Deep East Texas Regional Mental Health & Mental Retardation Services v. Kinnear,* 877 S.W. 2d 550 (Tex. Civ. App. 1994), holding that a group home for six mentally retarded people was consistent with a "single-family residence only" covenant.

2. **Group homes:** Most courts conclude that group homes for the handicapped, juvenile delinquents, or other groups do not constitute a violation of residential-only covenants because people do in fact live there.

★**Example:** The Community of Damien, a non-profit charity devoted to providing homes for people with terminal illnesses, leased a home in an Albuquerque residential subdivision, the use of which was restricted to "single-family residence purposes." Four residents moved in, each suffering from AIDS and each needing some degree of nursing care. Neighbors sought to enjoin the use as a violation of the covenant. In ***Hill v. Community of Damien of Molokai,*** 121 N.M. 353 (1996), the New Mexico Supreme Court reversed a trial court's injunction, reasoning that because the Community provided the four residents "with a traditional family structure, setting, and atmosphere," and because the residents "use the home much as would any family with a disabled family member," the group home use was consistent with the covenant. See also *Double D Manor, Inc. v. Evergreen Meadows Homeowners' Assn.,* 773 P. 2d 1046 (Colo. 1989). However, some courts have ruled that use as a "group home" violates the residential-only covenant. See, e.g., *Main Farms Homeowners' Assn. v. Worthington,* 121 Wn. 2d 810 (1993). Enforceability of these covenants, as so construed, may be barred by the federal Fair Housing Act, 42 USC §3604(f)(1), state statutes, or by judicial notions of public policy. See, e.g., ***Hill v. Community of Damien of Molokai,*** 121 N.M. 353 (1996); *Broadmoor San Clemente Homeowners' Assn. v. Nelson,* 25 Cal. App. 4th 1 (1994) (Fair Housing Act and state statute); *Crane Neck Assn. v. New York City/Long Island County Serv. Group,* 61 N.Y. 2d 154 (1984) (public policy); *McMillan v. Iserman,* 120 Mich. App. 785 (1983) (public policy, alternative holding).

3. **What constitutes family?** Many residential-only covenants are phrased to limit use to "single-family residential use" or to a "single-family residence." This sparks the problem of defining "single family," particularly when the family is composed of unrelated individuals.

★**Example:** In ***Hill v. Community of Damien of Molokai,*** 121 N.M. 353 (1996), the New Mexico Supreme Court ruled that a group of four unrelated AIDS patients living together under the auspices of the Community of Damien were a family for purposes of the covenant because (1) they fit within the local zoning ordinance's definition of family, (2) "there is a strong public policy in favor of including small group homes within the definition of the term 'family,'" and (3) the residents possessed the "generic character of a relatively permanent functioning family unit."

However, some courts conclude that group residences, involving unrelated persons, are not single-family residences. See, e.g., *Omega Corp. of Chesterfield v. Malloy,* 228 Va. 12 (1984). Once again, enforceability of these covenants as so construed might be barred by federal or state statutes or public policy.

D. **Racial restrictions:** An unpleasant fact about our national past is racial bias manifested by covenants restricting use and occupancy of property to white people. These covenants, while

often still of record because they were created years ago, are ***not enforceable.*** The usual reason is that their enforcement is not constitutionally permitted.

★**Example:** Fitzgerald conveyed a residence in St. Louis to the Shelleys, who were of African ancestry. Kraemer sought to enjoin the Shelleys from occupying their new home because the property was burdened by a covenant restricting use and occupancy to persons "of the Caucasian race," and specifically barring ownership, use, or occupancy by "people of the Negro or Mongolian race." The Missouri courts enjoined the Shelleys from occupying the property and ordered that title be returned to Fitzgerald. In ***Shelley v. Kraemer,*** 334 U.S. 1 (1948), the U.S. Supreme Court reversed, holding that a state's refusal to permit a willing buyer and seller to transfer title to property because of the race of one of the parties was a violation of the equal protection clause of the Fourteenth Amendment.

Note that under the Restatement (3d) Property, Servitudes §3.1 a racially restrictive use covenant would be invalid even if it were not unconstitutional to enforce it.

E. Architectural approval: Covenants forbidding erection of any structure without first obtaining the approval of a designated "architectural review committee" are generally upheld so long as the architectural reviewers act reasonably and in good faith. See, e.g., *Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6 (1969).

VI. TERMINATION OF REAL COVENANTS AND EQUITABLE SERVITUDES

A. Merger: If the same person acquires title to the burdened land and all of the benefited land the covenant — whether a real covenant or an equitable servitude — is extinguished by merger. It cannot be revived but must be created anew. See, e.g., *Pollock v. Ramirez,* 117 N.M. 187 (1994).

B. Eminent domain: Real covenants or equitable servitudes may be extinguished by eminent domain, which happens when the government takes the burdened land for a purpose inconsistent with the restrictive covenants. The majority of states require that the owner of benefited land be compensated for the loss of the benefit. The measure of that loss is the difference in value of the benefited land with the benefit and without the benefit. See, e.g., *Southern California Edison Co. v. Bourgerie,* 9 Cal. 3d 169 (1973). A few courts cling to the view that the benefit of a servitude is not an interest in land, and so compensation for its destruction is not required, a poorly reasoned view because it ignores the fact that the constitutional requirement of compensation applies to governmental takings of ***all forms of property,*** whether tangible or intangible. See, e.g., *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984). Florida observes a unique rule: Compensation is required for takings of affirmative covenants but not for takings of negative covenants. Compare *Board of Public Instruction v. Town of Bay Harbor Islands,* 81 So. 2d 637 (Fla. 1955) (no compensation for government violation of a negative covenant) with *Palm Beach County v. Cove Club Investors, Ltd.,* 734 So. 2d 379 (Fla. 1999) (government required to pay monthly fees imposed by affirmative covenant on property taken by eminent domain).

C. Express waiver or release: If all the holders of the benefit of a covenant expressly ***release*** the covenant it is extinguished. If all the benefit holders expressly waive the covenant to permit a specific nonconforming use the covenant remains alive to bar other nonconforming uses. See, e.g., *Gibbs v. Knobrell,* 211 S.C. 261 (App. 1993).

D. **Expiration of the covenant:** Covenants sometimes have a defined life span (e.g., "until Jan. 1, 2000" or "for the next 40 years"). When its defined life has expired the covenant is extinguished.

E. **Doctrines terminating equitable servitudes:** Because equitable servitudes are enforceable in equity, the following equitable defenses, if proven, will effectively extinguish an equitable servitude by blocking its enforcement.

1. **Changed conditions within the affected area:** A covenant will no longer be enforced in equity if conditions have so radically and thoroughly changed ***within the area affected by a covenant*** (usually a subdivision) that the covenant can no longer achieve its purpose.

Example: When Shippan Point was subdivided in the 1910s the lots were conveyed subject to a covenant limiting use to one single-family dwelling per lot. By the 1990s 12 of the 25 lots in Shippan Point were in violation of the covenant. A Connecticut appellate court concluded that the covenant was no longer enforceable due to these changed circumstances. *Shippan Point Assn. v. McManus*, 34 Conn. App. 209 (1994).

Courts split on whether changed circumstances operate to extinguish the covenant entirely or merely bar its enforcement in equity. If the latter, a covenant unenforceable in equity might still be enforceable at law if the elements of a real covenant can be established. The modern trend is to extinguish covenants entirely when changed circumstances have been proven. See, e.g., *Hrisomalos v. Smith*, 600 N.E. 2d 1363 (Ind. App. 1992). Some courts deal with widespread violations of covenants as evidence of abandonment, rather than as a subspecies of changed circumstances. See section VI.E.3.a, below.

2. **Changed conditions in the surrounding area:** Another common claim is that the nature and character of the ***surrounding area*** has so changed that it would now be inequitable to enforce the servitude. To succeed with this claim it is necessary to establish that the extrinsic changes in the neighborhood have been so pervasive that ***all of the benefited lots*** have lost the benefit of the covenant at issue. Put another away, there is no point in enforcing the covenant any longer because its purpose can no longer be achieved.

Example: — Termination: Land in New York City in the early nineteenth century was burdened by residential-only covenants. As New York City grew northward an elevated railroad was constructed amidst this land, making it most unpleasant for residential use. The covenant was held unenforceable in equity. *Trustees of Columbia College v. Thatcher*, 87 N.Y. 311 (1882).

★**Example: — No termination:** In 1941 Western Land subdivided 40 acres of rural land southwest of Reno, burdening all of the lots with restrictive covenants limiting use to single-family dwellings. By 1969 Reno had grown up around the subdivision, bracketing it with high traffic volume boulevards. Western proposed to use a 3.5-acre undeveloped site at one of those busy intersections for a shopping center, but the homeowners sought and obtained a trial court injunction preventing Western from violating the covenant. In ***Western Land Co. v. Truskolaski***, 88 Nev. 200 (1972), the Nevada Supreme Court upheld the injunction, reasoning that because the covenant continued to be of "real and substantial value to the residents of the subdivision" the doctrine of changed conditions did not operate to terminate the covenant.

3. **Abandonment:** A servitude may be abandoned by widespread violation of the covenant without enforcement. If violations of a covenant are sufficiently numerous and there has been no enforcement action taken the covenant may be seen as abandoned. There are two competing

tests of when abandonment by widespread violation has occurred: (1) the average person would reasonably conclude that the use restriction has been abandoned, or (2) the covenant's purpose has been so frustrated that enforcement would seriously impair the value of burdened lots without producing any substantial benefit.

Example: —"Average person" test: Lots in Maple Hills were burdened by a covenant requiring the use of wood shingles on the roofs of all structures, but the Homeowners' Development Committee, which was required by another covenant to approve all construction, inadvertently misled owners to believe that the roofing covenant had been amended to permit tile roofs. Of the first 29 homes, only 8 had wood roofs. Of the 81 houses ultimately built in Maple Hills, 23 lacked wood shingle roofs. A Utah appellate court concluded that the violations were so great that the average person would conclude that the covenant had been abandoned. *Fink v. Miller*, 896 P. 2d 649 (Utah App. 1995).

Example: —"Frustration of purpose" test: Property in Landen Farms, a "planned development" of about 2,000 residences, was burdened by use restrictions forbidding basketball hoops and backboards in the front driveway of any residence. Nevertheless, about 50 homes sported poles bearing a backboard and a hoop. An Ohio appellate court concluded that the covenant had been abandoned by nonenforcement, partly because the value lost by enforcement would be greater than any benefit produced and partly because the purpose of a uniform aesthetic had been lost by nonenforcement. *Landen Farms Community Services Assn. v. Schube*, 78 Ohio App. 3d 231 (1992).

Some courts treat these factual patterns as simply another example of changed circumstances within the affected areas. See section VI.E. 1, above. Other courts call these cases of ***implied waiver*** or ***acquiescence.***

4. **Equitable estoppel:** If the party seeking to enforce a covenant has made knowingly false representations to a defendant ignorant of the true facts, intending and inducing the defendant's reliance on the misrepresentation, he will be estopped from enforcing the covenant. See, e.g., *Hohman v. Bartel*, 125 Or. App. 306 (1993).

5. **Laches:** The doctrine of laches — the unreasonable failure to assert a known equitable right coupled with some prejudice to the defendant — will bar enforcement of an equitable servitude. The elapse of time necessary to establish laches as well as sufficiency of the prejudice suffered by the defendant from nonenforcement are matters within the reasonable discretion of the trial court.

6. **Unclean hands:** The equitable notion that a plaintiff must not be guilty of the conduct of which he complains may bar a person from enforcing a reciprocal servitude if guilty of the same violation.

Example: Dick owns Blackacre and Jane owns Whiteacre, each burdened with a covenant limiting use to residential purposes, imposed for mutual benefit. Dick builds a "self-storage" warehouse on Blackacre; Jane builds a competing warehouse on Whiteacre. Dick will be barred by unclean hands from enforcing the covenant against Jane, and so will Jane. However, if Dick merely rented out a room in his home on Blackacre, he would not be barred from enforcing the covenant against Jane. Trivial violations don't count for purposes of unclean hands. See, e.g., *Grady v. Schmitz*, 16 Conn. App. 292 (1988).

7. **Balance of hardships:** Even when injunctive relief is otherwise appropriate, a court may deny an injunction if the hardship imposed by the injunction is very large in relation to the benefits produced, but this principle is rarely invoked by courts in servitude cases, and may be more theoretical than actual.

★**Example:** Rick subdivided 62 acres in 1946, restricting land use to single-family dwellings. West purchased a lot and built a house, but not many others followed suit. In 1959, Rick sought to sell 45 acres of the subdivision for industrial use but West refused to release the covenant. In 1961 Rick agreed to sell 15 acres for development of a much needed hospital. Although the court agreed that the site was a "desirable location" for a hospital, and implicitly that the social loss resulting from issuing an injunction was greater than the benefits produced, the court enjoined the proposed use. ***Rick v. West,*** 34 Misc. 2d 1002 (N.Y. Sup. 1962).

F. Affirmative covenants to pay money—Perpetual burden? Affirmative covenants to pay money (usually dues to a homeowners' association) may be enforced either by foreclosure of the equitable lien created by nonpayment or by suit to recover as money damages the unpaid dues. The latter remedy is, of course, an action at law to enforce the covenant as a real covenant and equitable defenses will not usually apply. The burden of these covenants is personal and may not be easily avoided.

★**Example:** In 1969 MacKenzie purchased a lot in a residential development burdened by an affirmative covenant to pay homeowners' dues for various common purposes. In 1987 MacKenzie sought to sell the lot and learned that, because its soil would not percolate sufficiently to support a septic system, it was not lawful to build a residence on the lot. Believing the lot to be worthless, MacKenzie offered to give it to the homeowners' association, which refused to accept the gift. MacKenzie then stopped paying taxes but nobody purchased it at a tax sale, and title remained in MacKenzie's name, although MacKenzie notified everyone with any practical interest in the lot that he was abandoning ownership of the lot. The homeowners' association sought and obtained a personal judgment against MacKenzie for the unpaid dues. On appeal the Pennsylvania courts upheld the judgment, ruling that it was not possible to abandon title to real property held in fee simple absolute and thus that MacKenzie continued to be personally liable for the covenant to pay money. ***Pocono Springs Civic Assn., Inc. v. MacKenzie,*** 446 Pa. Super. 445 (1995).

VII. COMMON INTEREST COMMUNITIES

A. Introduction: In recent decades America has sprouted vast numbers of developments that are burdened with a myriad of restrictive use covenants that purport to govern the behavior of the owners and occupiers in meticulous detail. Many, but not all, of these webs of covenants are contained in condominium developments. Among the covenants burdening these developments are covenants that permit a homeowners' association to impose additional use restrictions.

B. Covenants recorded in the master deed: A condominium development will have a recorded master deed in which the use restrictions that pertain to each unit are recited; thus, any purchaser of a condominium unit has constructive notice of such covenants. Courts divide as to the degree of deference to be given these covenants. Some states hold that these restrictions are "clothed with a very strong presumption of validity" and invalidated only when they are arbitrary, violate public policy, or interfere with the exercise of fundamental constitutional right. See, e.g., *Hidden Harbour*

Estates v. Basso, 393 So. 2d 637 (Fla. App. 1981); *Noble v. Murphy*, 34 Mass. App. Ct. 452 (1993). Other states think that such covenants should be generally enforceable unless they are ***unreasonable***.

★**Example:** The recorded master deed to Lakeside Village, a condominium development in Los Angeles, recited that no animals (including dogs and cats) "shall be kept in any unit." Nahrstedt purchased a unit and moved in with her three "noiseless" cats. The homeowners' association demanded their removal and assessed fines against Nahrstedt, who then sought to prevent the association from enforcing the covenant on the grounds that it was unreasonable. In ***Nahrstedt v. Lakeside Village Condominium Assn., Inc.***, 8 Cal. 4th 361 (1994), the California Supreme Court concluded that the restriction was reasonable because it did not violate a "fundamental public policy," was not "wholly arbitrary," and did not "impose a burden . . . that far outweighs any benefit." Because the covenant was a recorded use restriction of which Nahrstedt had constructive notice it was "presumptively reasonable," the burden being placed on the challenger to demonstrate that the covenant's "effect on the project as a whole" (rather than on the individual homeowner) was unreasonable.

C. Covenants imposed by homeowners' associations: States that clothe original recorded covenants with a "strong presumption" of validity are not so deferential to covenants imposed by homeowners' associations after the owners have acquired title. Such covenants are valid if ***reasonable***, a standard that is frankly designed to "fetter the discretion" of homeowners' associations and ensure that they will "enact rules and regulations that are reasonably related to the promotion of the health, happiness, and peace of mind" of the entire community of burdened homeowners. See *Hidden Harbour Estates v. Basso*, 393 So. 2d 637 (Fla. App. 1981); *Noble v. Murphy*, 34 Mass. App. Ct. 452 (1993).

D. Cooperative apartments: Condominiums are individually owned and financed separately from each other. Cooperative apartments are owned by a corporation; the individual apartments are occupied under long-term leases by people who acquire ownership of shares of stock in the apartment corporation and thus acquire the right to occupy the apartment. Because the nature of a cooperative apartment is that each owner-lessee is obligated for a portion of the entire cost of owning the building, and one owner's financial failure imposes immediate burdens on the others, the financial fate of cooperative apartment owners is far more interdependent than that of condominium owners. As a result, courts are willing to defer to the "business judgment" of the directors of the corporation and will permit the directors to deny ownership to anyone for any reason except violation of civil rights laws. See, e.g., *Weisner v. 791 Park Ave. Corp.*, 6 N.Y. 2d 426 (1959).



Exam Tips on SERVITUDES: LAND USE LIMITS CREATED BY PRIVATE BARGAIN

- Expect examination on these topics. This is a rich field, and it is in flux, so you need to understand the traditional rules and how they are breaking down. To be safe, you might analyze the problem presented under the traditional rules, but also note the differences between those rules and modern trends (which can easily produce a different outcome).
- Expect multiple issues concerning use rights and restrictions. Be certain you understand the various ways easements can be created. Use restrictions may manifest themselves as clear (or garbled) attempts to create a defeasible fee, through an agreement, or in the case of an equitable servitude, by a scheme of common development. Be certain you understand the different requirements for benefits to run both in law (real covenants) and equity (equitable servitudes), and for burdens to run in law and in equity.
- The modern trend is to shift emphasis onto the circumstances governing termination, modification, and enforcement, by using new criteria to address those circumstances. Be sure you understand the factors involved and the policies behind their adoption. Be alert to the possibility of illegal restrictions, or those that unfairly and unduly burden fundamental rights. This is a loose and fuzzy area; justify your conclusions with well-reasoned policy arguments.
- Don't neglect the possibility that your professor may ask you to advise a developer, or a city, or a nonprofit conservation agency. Be prepared to think like a legal planner and counselor as well as like a litigator.

CHAPTER 6

TRANSFERS OF REAL PROPERTY

Chapter Scope

This chapter examines transfers of real property, including the contract of sale, the deed by which title is transferred, and the financing devices that enable the sale to occur. Here are the most important points in this chapter.

- To be enforceable, a contract to convey real property must be in writing and signed by the party against whom it is sought to be enforced. Exceptions occur when there has been part performance and when equitable estoppel applies.
- Implied in any contract to sell real property is an obligation of good faith and timely performance, as well as an obligation to deliver marketable title. In order for a defect in title to make title unmarketable it must be substantial and likely to injure the buyer. Such defects include recorded encumbrances but not zoning restrictions unless the property actually violates them.
- Remedies for default of a contract of sale include specific performance, rescission, or damages.
- Sellers may not intentionally misrepresent the property, and they must disclose all seller-created conditions that materially impair value and which are not likely to be discovered by an ordinarily prudent buyer. The trend is to require sellers to disclose all latent defects known to the seller — defects that materially impair value and which could not be discovered by a reasonably prudent buyer. Builders are generally held to make an implied warranty of quality.
- Deeds must be in writing and signed by the grantor. To be recorded the grantor's signature must be acknowledged before a notary and that fact memorialized on the deed by a notarial seal and signature. A deed must contain an adequate description of the grantee and the property conveyed.
- Deeds may be a general warranty deed, a special warranty deed, or a quit claim deed. The difference inheres in the scope of the warranties of title made by the grantor.
  - A general warranty deed contains six warranties of title, three of which are promises about present conditions, and three of which are promises about future action. In substance, the present covenants are that the seller owns the property, has the right to convey it, and there are no encumbrances except those disclosed. The future covenants are that the seller will defend the buyer's title against lawful claims of superior title, the buyer will not be disturbed by such claims and the seller will do whatever is reasonably necessary to perfect title.
  - A special warranty deed contains the same six warranties, but only as to the time the seller owned the property.
  - A quit claim deed contains no warranties of title at all, but is effective to transfer whatever interest the seller happens to have in the subject property.
- To be effective a deed must be delivered to the grantee. This often becomes a problem when a grantor executes a deed with the intention that it become effective at his death.
- Purchase of real estate is usually financed in large part by a commercial loan of much of the purchase price to the buyer. The lender secures repayment of that loan by either a mortgage of

or deed of trust to the property. A mortgage is a lien on the property that can produce a transfer of title upon the borrower's default. A deed of trust is a transfer of title of the property to a trustee for the purpose of conveying it to the lender if the borrower defaults or back to the borrower if he does not default. In practice, both devices are treated as liens until title is transferred after borrower default.

- Sometimes sellers lend the buyer a portion of the purchase price by taking the buyer's note. Sellers may secure payment of the note by taking a mortgage or deed of trust, but sometimes they use an installment sale contract, under which title is not transferred until the buyer has paid the entire price. When a buyer defaults under such a contract, virtually every state treats the contract as functionally identical to a mortgage or deed of trust and requires the seller to act as would any other mortgage lender.
  - Mortgages usually involve a foreclosure sale, at which the property is sold to pay off the unpaid balance of the loan. Deeds of trust usually involve a private sale for the same purpose. Under either mechanism, the borrower usually has some statutorily defined period of time in which to redeem his property following sale, unless that right has been cut off by judicial decision. Some states impose on lenders the obligation to act in a commercially reasonable fashion when conducting a foreclosure sale or private sale, in order to realize fair value for the property.

I. CONTRACTS OF SALE

A. Introduction: All arm's length transfers for consideration will involve a contract for the sale of the land involved. Much of the law pertaining to that contract is the domain of your Contracts course. This discussion focuses on aspects of the contract for sale that are peculiar to the fact that land is the subject matter.

1. Brokers: Brokers are ubiquitous. Very few transfers of houses occur without the involvement of one or more brokers, and many transfers of commercial real estate involve a broker. In the typical arrangement, a seller hires a broker (the ***listing agent***) to sell the property on terms and for a commission specified in the ***listing agreement.*** In most states the commission is earned when the broker has produced a buyer ***ready, willing, and able*** to purchase on the terms of the listing agreement or other terms acceptable to the seller. Unless the listing agreement provides otherwise, most courts find that the broker is entitled to his commission if the deal fails regardless of seller's or buyer's default. The minority view is that if the deal falls through because the ***seller defaults*** or the ***seller refuses to sell on the terms of the listing agreement*** the broker is entitled to the commission anyway; but if the ***buyer defaults***, no commission is earned.

a. Brokers' fiduciary duties: A listing agent is the seller's agent and owes to the seller all of the fiduciary duties that come with an agency relationship. Reduced to the essentials, the broker must put his principal's interests ahead of his own and exercise diligence to obtain the best result.

★**Example:** Six siblings lacking knowledge of real estate transactions retained a broker to sell the Connecticut property they had inherited. The broker enlisted the services of another broker to assist in marketing the property. Less than 24 hours after a listing agreement was

signed in which the property was offered for sale for $125,000, the defendant broker offered to purchase the property for $115,000. The broker's offer was accepted. Six days after the closing the broker resold the property for $160,000, making a profit of $45,000 on a cash investment of $11,500. In ***Licari v. Blackwelder***, 539 A.2d 609 (Conn. App. 1988), a damage award of $45,000 against the broker was upheld. The broker had withheld from his client the fact that he was negotiating the sale of the property to a third party even before he purchased it; failed to exercise his best efforts to obtain the best price for his client; and misrepresented other facts.

Because the listing broker shares the commission with other brokers who are working with buyers, the ostensible buyer's broker is actually a subagent of the listing agent; thus, while the buyer may think "his" agent is representing him, in fact the broker is representing the seller. Some states require disclosure of this fact. Although true buyers' brokers have begun to exist, such brokers have no contractual right to share the listing agent's commission, thus presenting economic obstacles to the proliferation of buyers' brokers.

2. **Lawyers:** Most residential sale transactions are done via a standard, preprinted contract, with critical terms (e.g., price, financing, closing costs) to be supplied by the parties. Often brokers fill in these gaps and lawyers are not involved. Brokers must be careful not to do much more than "fill in the blanks" lest they be deemed to be practicing law. Of course, the choices made or advised by brokers have large legal consequences. Buyers and sellers are well-advised to consult lawyers in the making of the contract, but most don't. In some states, lawyers are engaged to prepare a ***title abstract*** — a history of the chain of title — and an opinion as to the state of title that would pass from seller to buyer. In other states, title insurance companies perform this chore and insure that the buyer receives good title. See Chapter 7. In more sophisticated transactions, lawyers will draft the sales contract, draft the deed, examine title or obtain title insurance, and oversee the closing.

3. **Mortgage lenders:** Very few people buy real property without borrowing a substantial portion of the purchase price. Key portions of any sales contract deal with the seller's existing and the buyer's proposed mortgage. The mortgage lender is usually a third party but sometimes the seller will become a mortgage lender by agreeing to receive a portion of the purchase price in the form of the buyer's promissory note secured by a mortgage to the property. See III. below.

4. **Closing:** Real estate sales are two-step transactions. The nature of a real estate sales transaction is that some time will elapse between execution of the sales contract and the closing — the actual exchange of title and purchase price. Time is needed for the buyer to arrange financing, for a proper examination of title, and for various inspections and other acts to occur as called for under the sale contract or as required by law. Closings are usually conducted through an independent ***escrow agent.*** The critical items are deposited into escrow — the executed deed, the purchase price, the mortgage (if any) executed by the buyer. The escrow agent makes various adjustments of the purchase price to reflect pro rata apportionment of taxes and other prepaid expenses, and then disburses a portion of the purchase price to extinguish the seller's old mortgage, records the deed and buyer's new mortgage, and finally delivers the balance of the purchase price to the seller.

B. Statute of Frauds: The Statute of Frauds, adopted in some form by every state, requires that, unless there is some exception available, a contract for the sale of land ***must be in writing*** and ***must be signed by the party against whom it is sought to be enforced.*** Because both parties wish to

enforce the agreement, if necessary, against the other, this means in practice that ***both parties must sign the contract for sale.***

1. **Formal contract not necessary:** A binding contract can be quite informal. So long as the key terms are present — price, description of the property, and the parties' signatures — an enforceable contract may exist. Parol evidence — evidence extrinsic to the document — is permissible to remove ambiguities.

   Example: George agrees to sell his beach house to Martha for $100,000. On a cocktail napkin, George writes "My Malibu beach house to Martha for $100,000 as soon as practical. [signed] George." Martha writes "OK. [signed] Martha." This contract is sufficient. As they part, George and Martha orally agree to close the transaction 90 days later. Parol evidence concerning this oral clarification of the closing date is admissible to clear up the contractual ambiguity of what is "as soon as practical."

2. **Single instrument not necessary:** The contract need not consist of a single document, so long as the multiple writings are consistent, embody the essential terms (price, parties, and property description), and are signed by the parties.

   Example: Martha sees her friend George in a bar and passes George a note, "George, will you sell me your Malibu beach house for $100,000 cash? Martha." George passes a separate note back to Martha: "Martha, I wouldn't sell my beach house to anybody but you and I'm happy to take $100,000 cash for it. George." The two notes, taken together, constitute an enforceable contract. See, e.g., *Ward v. Mattuschek*, 134 Mont. 307 (1958).

3. **Conditions:** Real estate sale contracts often make the buyer's obligation subject to financing conditions — that the buyer obtain loans in an amount sufficient to meet the purchase price and on terms acceptable to the buyer — or some other condition (e.g., the property is acceptable to the buyer's structural expert, or the issuance of a building permit to enable the buyer to build an intended structure). Financing conditions are usually spelled out carefully and precisely. If not, two problems can occur. If the financing conditions are vague, and there is no parol evidence to clarify the ambiguity, the contract may be void for want of an essential term. If the financing conditions are "to the buyer's satisfaction," an obligation is implied on the part of the buyer to use reasonable efforts to obtain the necessary financing on commercially reasonable terms. Failure to do so will result in buyer's default. The same obligation of good faith is implied with respect to other conditions that are "to the buyer's satisfaction."

4. **Electronic transactions:** The ubiquity of the Internet caused Congress to enact the "E-sign Act," which provides that an electronic contract is as fully enforceable as its paper equivalent. The E-sign Act defines an electronic signature as any electronic "sound, symbol, or process" that is "attached to, or logically associated with" the putative contract and which is created with "intent to sign." Some courts find an exchange of e-mails adequate to form a contract for the sale of realty, so long as their substance covers all the requisite points necessary to establish the contract. Other courts and some commentators are more wary. They fear that the cautionary and memorializing functions of traditional written contracts will be undermined by giving effect to electronic contracts. The virtue of the paper deal is that it takes longer, and that fact gives all sides more time to contemplate the significance of their actions. Also, the prospect of forged electronic contracts may be significantly greater. Are these objections weighty enough to reconsider E-sign?

5. **Exceptions to the Statute of Frauds:** There are two major exceptions to the Statute of Frauds — ***part performance*** and ***equitable estoppel.*** Each is an ***equitable doctrine*** and thus is generally available only when a buyer seeks ***specific performance*** of an otherwise unenforceable contract of sale.

   a. **Part performance:** The elements necessary to establish part performance vary among the states. Every state requires proof of an oral contract. The differences occur with respect to the additional elements.

      i. **Unequivocal evidence of contract:** Some states insist that the acts constituting part performance must be of the sort that would not occur but for the existence of a contract — often labeled as actions of ***unequivocal reference to a contract.*** These acts consist of ***payment of all or a part of the purchase price,*** taking ***possession,*** and making ***improvements.*** None of these things are likely to be done if there were not a contract. Some states require all of these elements to establish part performance, but others are satisfied if possession alone is proven.

      ii. **Reasonable reliance:** The modern trend is to require proof of (1) an ***oral contract*** and (2) ***reasonable reliance*** on the contract — enough reliance that it would be inequitable to deny specific performance.

      ★**Example — Reliance:** Mrs. Green orally agreed to sell Hickey a building lot for $15,000 and accepted but did not deposit Hickey's check for part payment. Hickey then sold his house, expecting to build a new house on the lot. Mrs. Green refused to complete the sale. In ***Hickey v. Green,*** 14 Mass. App. Ct. 671 (1982), the Massachusetts Appeals Court held that Hickey's reliance was reasonable and that equity required specific performance of the oral sale contract.

      Example — No reliance: Ireton orally agreed to sell his farm to Walker for $30,000. Although a written contract was discussed, none was prepared. When Walker asked for a written contract Ireton assured Walker he was honest and none was needed. Walker gave Ireton a $50 check as part payment and Ireton accepted but did not cash the check. Walker then sold his own farm without ever mentioning to Ireton his intention to do so. Ireton then refused to convey and, in *Walker v. Ireton,* 221 Kan. 314 (1977), the Kansas Supreme Court ruled for Ireton. Walker's sale of his own farm was not reasonable reliance on the oral contract because the parties had neither discussed that action nor was it foreseeable by Ireton.

      iii. **Enforceable by seller:** The part performance doctrine is a two-way street, available to both buyers and sellers. In most states a seller may invoke the part performance doctrine to compel specific performance by the buyer, if the buyer's acts are sufficient to constitute part performance and the buyer has acted to diminish the value of the property in the hands of the seller. A few states do not require any proof of diminished value. In those states the principle of mutuality reigns — if the buyer can compel specific performance, mutuality of remedies requires that the seller have the same opportunity.

   b. **Equitable estoppel:** The familiar doctrine of equitable estoppel may be used to enforce an oral sale contract if the seller has caused the buyer reasonably to rely significantly to his detriment upon the seller's oral agreement to sell. This is not much different from the reasonable reliance branch of part performance.

Example: Cities Service orally agreed to sell Newman two building lots and to convey title when "construction was well under way." Cities Service reaffirmed this promise to Newman's construction lender, inducing a $5,000 loan to Newman. After the foundation was constructed, Newman ran out of money and assigned his contract to Baliles. Cities Service refused to convey and the Tennessee Supreme Court ruled that Cities Service was equitably estopped from asserting the Statute of Frauds as a defense. *Baliles v. Cities Service Co.*, 578 S.W. 2d 621 (Tenn. 1979).

Example: Ireton orally agreed to sell his farm to Walker and, when Walker asked for a written contract to evidence the deal, Ireton told Walker that he was honest and that no written contract of sale for the farm was necessary. Should that statement, coupled with Walker's later sale of his own farm, be sufficient to trigger equitable estoppel? In *Walker v. Ireton*, 221 Kan. 314 (1977), the Kansas Supreme Court thought that Walker's reliance, in the form of selling his own farm, was "purely collateral" and thus found equitable estoppel inapplicable.

6. **Revocation of contracts:** Most states do not apply the Statute of Frauds to revocation of a contract for sale of realty. Thus, if both parties agree orally to revoke a contract, the oral agreement is sufficient to do so. A few states reason that the original contract vested equitable title in the buyer and that a revocation amounts to a transfer of title back to the seller. In those states, the Statute of Frauds applies to revocations.

C. **Implied obligations:** There are a number of obligations implicit in every contract for the sale of realty. The principal ones are considered here.

1. **Good faith:** Each party is required to act with good faith in discharging the express duties of the contract. This has particular force when the obligation to complete the transaction is expressly conditioned upon future events that are subject to influence by the parties. These conditions often refer to buyer's obtaining financing, or public approval of an intended use, or buyer's satisfaction with some unknown aspect of the property. A party must exert reasonable efforts to discharge such conditions. Failure to do so will result in default. See, e.g., *Bushmiller v. Schiller*, 35 Md. App. 1 (1977).

Example: Buyer agrees to purchase Blackacre "if Blackacre yields a well for potable water of at least 10 gallons per minute." Buyer makes no effort to determine whether Blackacre has any ground water. Buyer will be in default if he fails to complete the purchase. By contrast, if Buyer drills a well in the location recommended by a professional well driller, but it only yields 3 gallons per minute, Buyer has used reasonable efforts. Buyer need not drill in another location and may refuse to close without incurring liability.

2. **Time of closing:** Most contracts state a date for the closing — the completion of the transaction. But if the closing does not occur on the specified date, it still may be enforced in equity if full performance is tendered within a reasonable time after the closing date. Courts reason that a particular closing date is not an essential term on the contract. To avoid this lingering uncertainty, sale contracts often stipulate that ***time is of the essence*** of the agreement. By expressly making the time of performance an essential term of the agreement, a party able and willing to perform on the closing date is relieved of any future obligations under the sale contract if the other party fails to perform on the required closing date. On the other hand, if some unforeseen event occurs that makes timely closing impossible, such a clause may be more harmful than helpful.

3. **Marketable title:** Every contract for sale of realty contains an implied duty of the seller to deliver ***marketable title*** to the buyer. This obligation can be expressly disclaimed by agreement between buyer and seller. Marketable title is a title a prudent buyer would accept, one reasonably free of doubt that there is any other rival to title or any portion of it. Any defect in title must be ***substantial*** and likely to result in injury to the buyer.

   a. **Proof of marketable title:** A seller can deliver marketable title by either (1) producing ***good record title*** — a recorded chain of title, showing an unbroken transfer of title from some original root of title in the past to the seller, with no recorded encumbrances (e.g., mortgages, easements, or servitudes) — or (2) proving ***title by adverse possession*** — either through a successful quiet title action or evidence sufficient to establish that the rival claim to title would not succeed if asserted and "that there is no real likelihood that any claim will ever be asserted." A careful buyer may well insist on a contractual term obligating the seller to deliver ***good record title,*** thus depriving the seller of the ability to deliver marketable title by proof of adverse possession.

      i. **Root of title:** To deliver good record title it is usually ***not necessary*** to trace the chain of title back to the original possessor of the property. About 20 states have ***marketable title acts,*** which provide that a deed at some distance in the past (typically, older than 20, 30, or 40 years) is a ***root of title,*** and cuts off any claims to title founded on earlier instruments. See Chapter 7. Even in states without marketable title acts, good record title may be produced by a title search that goes back to the point that is deemed acceptable under local practice. The rationale is that a search of the records for the preceding 80 years, for example, is adequate to reveal virtually all present claims to title and, if there is any claim founded on some earlier instrument it is likely barred by the limitations statute. Even though this may not always be so, the risk of such claims is so low that the courts regard the record title thus produced as "marketable." This risk to the buyer may be even further reduced or eliminated by title insurance (see Chapter 7) or reliance on the seller's warranties of title in the deed (see section II.C, below).

   b. **Defective title:** To be unmarketable, the defect in title must be ***substantial*** and likely to injure the buyer. Defective title does not always prevent the transaction from taking place. Buyers can and often do waive certain defects (e.g., easements, or a mortgage that can be assumed by the buyer) and other defects can be removed prior to or at the closing (e.g., an existing mortgage may be paid off by the sale proceeds so that the buyer receives unencumbered marketable title). Common defects in title are discussed in this section.

      i. **Defective chain of title:** The chain of title may have a faulty or nonexistent link. If a deed describes the wrong land, for instance, it is a faulty link. If there is no record evidence of a deed from *B* to *C* in a chain of title purportedly from *A* to *B* to *C* to *D*, the nonexistent link makes *D*'s title unmarketable. Because a chain is only as good as its weakest link, such defects make title unmarketable unless there is adequate proof of adverse possession sufficient to create a new, valid, and marketable title. See e.g., *Conklin v. Davi*, 76 N.J. 468 (1978).

      ii. **Encumbrances:** Generally an encumbrance makes title unmarketable. An encumbrance is a burden on the title, such as mortgages, judgment liens, easements, or covenants.

      ★**Example:** Bower and Lohmeyer entered into a written agreement by which Bower agreed to sell and Lohmeyer agreed to purchase a one-story wood-frame house in

Emporia, Kansas. The lot was burdened by a covenant requiring all residences constructed on the land to be two stories tall. In ***Lohmeyer v. Bower,*** 170 Kan. 442 (1951), the Kansas Supreme Court opined that the mere *existence* of a covenant restricting use is an encumbrance making title unmarketable. Only because Lohmeyer had agreed to take title "subject to all encumbrances of record" did the mere existence of the covenant not make title unmarketable; however, Lohmeyer had not agreed to accept *existing* violations of the covenant. Those existing violations made title unmarketable. There are two exceptions to the general rule. (1) An easement that ***benefits the property*** (e.g., a utility easement) is regarded by some courts as ***not an encumbrance*** so long as the easement is ***known to the buyer*** before entry into the contract. (2) Covenants restricting use are encumbrances, but some courts treat them as not making title unmarketable ***if the sale contract specifies a particular use that is permitted by the restrictive covenants.*** The rationale for the second exception is that the buyer has bargained for a specific use, not all possible lawful uses.

iii. **Zoning restrictions:** Use limits imposed by public authority through zoning laws are not regarded as encumbrances upon title. The rationale is that all property is subject to the lawful regulation of public authority, and that all land titles implicitly incorporate such use limits. However, if the existing use of the property violates a zoning ordinance the title will be held unmarketable on the theory that the buyer could not possibly have intended to purchase a violation of law and consequent liability.

★**Example:** In the prior example, an Emporia zoning ordinance prohibited the location of any frame structure within 3 feet of any lot line. The house that Lohmeyer had agreed to buy from Bower was located 18 inches from one lot line. In ***Lohmeyer v. Bower,*** 170 Kan. 442 (1951), the Kansas Supreme Court held that the mere existence of the zoning law did not constitute an encumbrance making title unmarketable but that the present and continuing violation of the ordinance sufficiently exposed Lohmeyer "to the hazard of litigation" to make the title unmarketable.

D. Default and remedies: Default occurs when one party has tendered performance in time, demanded timely performance from the other party, and reciprocal performance is not forthcoming. Remedies for breach are ***damages, rescission,*** and ***specific performance.*** The plaintiff may choose the remedy.

1. **Specific performance:** Because land is unique damages are thought to be inadequate compensation for breach, but because specific performance is an equitable remedy the defendant may assert the usual equitable defenses (e.g., if specific performance would work an undue hardship upon the defendant it will be denied).

   a. **Sought by buyer:** Buyers are generally able to demand specific performance. If the seller's title is defective (e.g., an easement) and the buyer still wants the property, the buyer is entitled to an abatement of the price to reflect the diminution in value attributable to the defect.

   b. **Sought by seller:** Sellers have traditionally been able to demand specific performance from the buyer, but the emerging trend is to deny sellers specific performance if they are still able to sell the property at a commercially reasonable price. A seller entitled to specific performance will be required to reduce the price if there is an ***insubstantial defect in title.***

Of course, if the title defect is substantial, the title is not marketable and the seller would not be entitled to specific performance.

c. **Equitable conversion:** If a contract for the sale of realty is specifically enforceable, the doctrine of equitable conversion operates to treat the buyer as the equitable owner from the moment the contract becomes effective, even if title passes later, as it almost always will. Traditionally, this meant that the risk of casualty loss (e.g., fire, earthquake) was on the buyer from that moment forward. See, e.g., *Paine v. Meller*, 31 Eng. Rep. 1088 (Ch. 1801). The traditional view, while still probably the majority view, is being eroded. The Uniform Vendor and Purchaser Act puts the risk of loss on the party in possession until title has passed. Other states place the risk on the seller if the loss is substantial and central to the contract. Of course, the parties should explicitly agree who bears the risk of loss until title passes and express that agreement clearly in the sale contract. See section I.F. below, for a fuller discussion.

2. **Rescission:** The polar opposite of specific performance is rescission. If the seller breaches, the buyer may elect to rescind, recover his partial payments already made, and "walk away" from the deal. If the buyer breaches, the seller may elect to rescind the contract and sell the property to another party. The rescission right does not ripen until the closing date, however, because either party has until then to tender performance. An attempted rescission prior to the closing date is not only ineffective but is a breach of the contract.

3. **Damages:** If the plaintiff does not want (or cannot obtain) specific performance she may obtain money damages. The measure of damages is usually the ***benefit of the bargain***, but a frequently employed alternative for the buyer's breach is ***retention of the buyer's deposit***. Under some circumstances damages are limited to recovery of ***money out of pocket***, and damages may be defined by the contract's ***liquidated damages*** provisions.

   a. **Benefit of the bargain:** This measure of damages gives the aggrieved party the difference between the contract price and the fair market value of the property at the time of breach.

      Example (seller's breach): Seller agrees to sell Blackacre for $50,000, but refuses to convey at the closing date because she is aware that in the interim the value of Blackacre has risen to $90,000. Buyer is entitled to $40,000 damages — the value of which she is deprived by Seller's breach. Buyer thus gets the benefit of the bargain as of the date of breach. It would not reduce the damages if Seller were to sell the property later to another party for $80,000. The value of the bargain to Buyer on the date Buyer was entitled to it was $40,000.

      ★**Example (buyer's breach):** Mr. and Mrs. Lee entered into a contract to purchase Jones's home for $610,000, and then unjustifiably refused to perform. Jones later sold the house for $540,000 and sought to collect the $70,000 difference from the Lees. The trial court awarded Jones that amount as damages, together with another $87,000 in punitive damages and special damages for certain out-of-pocket expenses made by Jones in reliance upon the pending sale. In ***Jones v. Lee***, 971 P.2d 858 (N.M. App. 1998), the award of special and punitive damages was upheld, but the award of compensatory damages was vacated and the case remanded to determine whether the fair market value of the house on the date of the Lees' breach had declined to $540,000. The New Mexico appellate court instructed the trial court that, in making that determination, the later sale for a lesser price "may be considered evidence of the market value at the time of breach" and should be considered with all other

relevant evidence on that point. Note that even if no compensatory damages were proven, the Lees remained liable for the out-of-pocket losses incurred by Jones and for punitive damages because of the Lees' "wanton, utterly reckless" actions "in utter disregard of their contractual obligations."

b. **Deposit retention:** The venerable common law rule is that a seller may elect to retain the entire deposit made by the buyer in the event of buyer's breach, even if the deposit exceeds the actual damages to the seller. This rule has been criticized as unfair and inefficient. It is unfair because it gives the seller a windfall. It is inefficient because it deters efficient breaches — those that would be more economically beneficial than performance — by making the cost of the breach to the breaching party greater than the loss to the victim. See Richard Posner, Economic Analysis of the Law §4.10. Accordingly, a minority of courts limit retention of the buyer's deposit to the actual damages incurred by the seller, unless the parties have agreed to retention as liquidated damages.

★**Example:** Mr. and Mrs. Pirnie agreed to purchase the Kutzins' house and deposited $36,000 toward the purchase price. The contract contained no liquidated damages provision. After the Pirnies unjustifiably failed to perform the Kutzins sought to retain the entire deposit. A trial court ordered the Kutzins to return about half the deposit, but a New Jersey appellate court reversed that decision, applying the common law rule. In ***Kutzin v. Pirnie***, 591 A.2d 932 (N.J. 1991), the New Jersey Supreme Court abandoned the common law rule and adopted the rule in Restatement (2d) Contracts §374(1) that the party in breach is entitled to restitution of any portion of his deposit that is "in excess of the loss he has caused by his own breach." Principles of unjust enrichment and economic efficiency dictated the result. The court placed the burden of proof upon the party in breach and stressed that the rule was limited to realty sale contracts that did not dispose of the deposit as liquidated damages.

c. **Out of pocket:** This rule is primarily designed to limit the exposure of the seller who breaches innocently — whose breach is in good faith. About half the states limit damages awarded against a seller who has breached in good faith to the actual money that the buyer has expended in reliance on the contract, which means that the buyer is able to recover any part payments, expenditures on experts (e.g., engineers, lawyers, title insurers), and interest and fees incurred with respect to loans obtained in connection with the prospective purchase. The other half of the states make the good faith seller in breach liable for the entire benefit of the bargain.

Example: Seller agrees to sell Blackacre for $50,000 but cannot deliver marketable title due to a title defect previously unknown to Seller. At the closing date, Blackacre is worth $90,000. Buyer has paid $5,000 to Seller, and has incurred another $5,000 in lawyers' fees, appraisals, loan fees, and title examination costs. Seller's default is not the product of bad faith. In an ***out of pocket*** state Buyer is entitled to $10,000 damages. In a full ***benefit of the bargain*** state Buyer will be able to recover $40,000 damages.

d. **Liquidated damages:** Sellers typically protect themselves against a buyer's breach by stipulating in the contract that the buyer's deposit may be retained as ***liquidated damages*** in the event of buyer's breach. Such provisions are enforceable so long as there is some ***reasonable relationship*** between the deposit amount and the actual damages suffered by the seller.

Example: Seller and Buyer agree to transfer Blackacre for $50,000, and Buyer gives Seller a deposit of $5,000 which the contract recites may be retained by Seller as liquidated damages if Buyer should breach. Buyer breaches. Seller will assert that his actual damages consist of (1) the added cost of reselling the property (e.g., advertising and promotion), (2) the delay in consummating another sale and consequent reduction in the present value of a later sale at the same price (or, phrased differently, the loss of interest on the sale proceeds until the later sale is completed), (3) the uncertainty that any replacement sale will actually be for that price or better, (4) the loss of other prospective buyers, and (5) any expenditures made in reasonable reliance on Buyer's performance. Seller will probably be able to keep the $5,000 deposit as liquidated damages.

Example: Seller and Buyer enter into an ***installment sale contract*** for Blackacre, under which Buyer takes possession and pays Seller monthly installments of the $50,000 purchase price. Seller promises to deliver title after the entire purchase price has been paid. The contract recites that Seller may keep all payments as liquidated damages in the event of Buyer's breach. Buyer pays a total of $49,000 and then breaches. Almost no state will permit Seller to keep the $49,000 as liquidated damages. The installment sale contract will be treated as a mortgage (see section III, below) or the Seller will be required to refund to Buyer all payments in excess of Seller's actual damages. Otherwise, Seller gets $49,000 from Buyer and continued ownership of Blackacre.

E. Duties of disclosure and implied warranties: This section deals with the duties imposed by law on sellers to disclose known defects and the warranty, implied by operation of law, of quality in the construction of buildings. Warranties of title, which may be contained in the deed, are covered in section II, below.

1. Duties of disclosure: The traditional common law rule is that, absent a fiduciary relationship, a seller has no duty to disclose known defects in the property. The seller's duty was to refrain from ***intentional misrepresentation*** — the outright lie about the property's condition (e.g., the seller says "the roof is watertight" when he knows it leaks like a sieve) or ***active concealment*** of a known defect (e.g., the construction of a fake heating system to conceal the building's lack of a furnace). This rule of *caveat emptor* was justified on the theory that buyers ought to use diligence and care to examine the property for themselves. *Caveat emptor* has been largely abandoned today.

a. Fiduciary relationships: Even under *caveat emptor*, if the parties were in a fiduciary relationship — a relationship in which one party is dependent upon and reposes special trust in the other — the fiduciary was obligated to reveal all defects known to him. This duty arises from the fiduciary's obligation to place the other party's interests ahead of his own.

b. Disclosure of seller-created conditions: The narrowest departure from *caveat emptor* is the rule that a seller is obligated to disclose conditions that (1) are ***created by the seller,*** (2) ***materially impair property value,*** and (3) are ***not likely to be discovered by a reasonably prudent buyer using due care.***

★**Example:** Ackley owned a home in Nyack, New York, and repeatedly publicized various abnormal phenomena ("spectral apparitions") that had occurred in the house, encouraging the reputation of the house as haunted by ghosts. Stambovsky agreed to buy the house and

then learned "to his horror" that the house "was widely reputed to be possessed by poltergeists." He promptly sought to rescind the contract. In ***Stambovsky v. Ackley,*** 169 App. Div. 2d 254 (N.Y. 1991), a New York appellate court concluded that *caveat emptor* did not apply: The seller had promoted the property's reputation as haunted, and that reputation was not likely to be discovered by a reasonably prudent buyer ("the most meticulous inspection . . . would not reveal the presence of poltergeists . . . or unearth the property's ghoulish reputation . . ."). The court concluded, without discussion of the evidence, that the haunted reputation of the house "materially impair[ed] the value of the contract."

c. **Disclosure of latent material defects:** The emerging majority rule today is that a seller must reveal all ***latent material defects.*** A latent material defect is a defect that (1) ***materially affects the value or desirability*** of the property, (2) is ***known to the seller*** (or only accessible to the seller), and (3) is ***neither known to or "within the reach of the diligent attention and observations of the buyer."***

★**Example:** The Davises purchased Johnson's house, moved in, and learned within a few days that water leaked in around the windows and from the ceiling in two rooms. The Davises sued to rescind. In ***Johnson v. Davis,*** 480 So. 2d 625 (Fla. 1985), the Florida Supreme Court ruled for the Davises on two separate grounds. First, because Johnson had told the Davises that "the roof was sound" Johnson was liable for his fraud. Second, and quite apart from the fraud, the court concluded that Johnson was obligated to disclose any facts known to him or accessible only by him that materially affects the value or desirability of the property and which are either unknown to the buyer or cannot be learned by a diligent search.

See also *Lingsch v. Savage,* 213 Cal. App. 2d 729 (1963) and *Posner v. Davis,* 76 Ill. App. 3d 638 (1979). While courts may differ as to whether the test of materiality is ***objective*** (would the ***reasonable person*** think the defect was important?) or ***subjective*** (did the defect affect value or desirability to ***this particular buyer?***), a seller who fails to disclose all latent material defects has committed fraudulent concealment. The buyer may elect either damages or rescission. *Nystrom v. Cabada,* 652 So. 2d 1266 (Fla. App. 1995). The range of latent defects is quite broad. See *Reed v. King,* 145 Cal. App. 3d 261 (1983) (seller's failure to reveal the fact that the house had been the site of a decade-old multiple murder was actionable). Note particularly that in some statutes a seller is obligated to reveal the existence of environmental toxins known to be located on nearby property. See, e.g., *Strawn v. Canuso,* 140 N.J. 43 (1995); *Haberstick v. Gundaker Real Estate, Inc.,* 921 S.W. 2d 104 (Mo. App. 1966).

d. **Statutory disclosure obligations:** Some states have enacted statutes that require sellers to disclose a number of specified conditions. See, e.g., Cal. Civil Code §1102.6, which obligates sellers to reveal structural or soil defects, hazardous materials, underground tanks, alterations made without permits, encroachments, or neighborhood noise problems or other nuisances. This extensive disclosure obligation requires sellers to reveal the presence of annoying neighbors and possibly even barking dogs or crying infants. See, e.g., *Shapiro v. Sutherland,* 64 Cal. App. 4th 1534 (1998). California has gone from "buyer beware" to "seller tell all."

e. **Broker's disclosure obligations:** Some states impose upon the seller's broker the same disclosure duties that are imposed upon the seller. See, e.g., *McEneaney v. Chestnut Hill Realty Corp.,* 38 Mass. App. Ct. 573 (1995); *Easton v. Strassburger,* 152 Cal. App. 3d 90 (1984); Cal. Civ. Code, §2079.16.

f. **Post-closing survival of causes of action for nondisclosure:** The common law doctrine of merger held that upon passage of title all warranties in the sale contract were merged into the deed, and the buyer could then sue only on the warranties contained in the deed, if any. (On deed warranties, see section II, below.) This doctrine is now riddled with exceptions, the principal ones being that claims for fraud and actions based on promises collateral to the contract survive. The concept of a promise collateral to the contract can be expansive. See, e.g., *Davis v. Tazewell Place Associates*, 254 Va. 257 (1997) (promise to construct residence in "good and workmanlike manner" found to be collateral to sale of the land on which the construction was to occur).

2. **Implied warranty of quality:** The traditional rule was that a builder had no liability to anyone for his poor workmanship unless he had given an ***express warranty*** of quality. In time, a builder's warranty of quality was implied into the contract between builder and owner but the builder's liability for economic loss resulting from breach of this warranty was limited to those with whom he was in ***privity of contract*** -- the ***immediate purchaser*** of the structure from the builder or the owner with whom the builder contracted. Recovery in tort for the builder's negligence was generally unavailable because the loss was wholly economic -- neither damage to property or person. See, e.g., *Sensenbrenner v. Rust, Orling & Neale*, 236 Va. 419 (1988). In recent years, most jurisdictions have abandoned the traditional rules and now imply a warranty of quality by the builder of a new home that may be enforced by subsequent purchasers of the structure.

★**Example:** Dagenais built a garage for owners of property who then sold the property to the Lempkes. Shortly after the Lempkes took possession they noticed severe structural problems with the roof of the garage. After some fruitless attempts to persuade Dagenais to repair the garage the Lempkes sued Dagenais for negligence and breach of an implied warranty of quality. The trial court dismissed the complaint but the New Hampshire Supreme Court, in ***Lempke v. Dagenais,*** 130 N.H. 782 (1988), reversed as to the implied warranty claim. The court concluded that when a builder sells his structures a warranty of workmanlike quality is implied by law and runs for the benefit of subsequent purchasers with respect to *latent* defects that become apparent after the remote purchaser has acquired title and which could not have been discovered prior to the remote purchaser's acquisition. The court thought that abandonment of privity of contract was appropriate because in our mobile society defects often manifest themselves after a structure has changed hands, remote buyers are entitled to rely on a builder's skill even if they have not contracted with him, and because the builder already owes this duty to his immediate vendee an extension of this duty to others for a reasonable time does not unduly enlarge his liability.

a. **No disclaimer:** Courts generally agree that the implied warranty of quality in favor of subsequent purchasers may not be disclaimed but are divided about the rationale for that result. Some say it is grounded in tort law's implementation of public policies -- protecting innocent buyers of houses from shoddy work, imposing the risk of loss on the builder (the party most able to avoid the loss by building with care), and encouraging the creation of a sound housing stock. See, e.g., *LaSara Grain v. First Nat. Bank of Mercedes*, 673 S.W. 2d 558 (Tex. 1984). Other courts contend that the warranty is based on contract, but because the builder has created a defective product that will inevitably harm others beyond the initial buyer, have ignored privity of contract as a barrier to its enforcement. See, e.g., *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171 (1982). In theory, if the implied warranty is rooted

in tort it should be incapable of disclaimer but if founded upon contract its scope and existence ought to be limited by the bargain struck. Courts, however, pay no attention to theory here and generally are reluctant to permit disclaimer, perhaps because they have begun to agree that the warranty of workmanlike quality is implied by law to effect the public policies of placing the loss on the party best able to avoid it and to protect consumers from shoddy work they are illequipped to detect. See ***Lempke v. Dagenais,*** 130 N.H. 782 (1988).

b. Limitations period: Courts permit subsequent purchasers to bring suit against the original builder for a ***"reasonable time"*** — usually a period long enough for latent defects of the original construction to become apparent. Some states have enacted statutory limitations periods. See, e.g., Cal. Code Civ. Proc., §337.15 (10 years). The Uniform Land Transactions Act, §2-521, provides for a 6-year limitations period commencing with the initial sale, but that Act has not been adopted by any state.

c. Subsequent owner's liability: The owner of a home who is not the builder has no liability based on the implied warranty of quality. Only the original builder is liable on that theory, but a seller may be liable for breach of a duty to disclose a known defect.

F. Risk of loss and equitable title: During the time between making of the contract for sale and the closing various bad things can happen — the property can be destroyed or damaged, or one or both of the parties may die. The common law reacted to these possibilities by creating the notion of ***equitable title*** (or ***equitable conversion,*** as it is often called).

1. Equitable title: This doctrine holds that equitable ownership of the subject property passes to the buyer at the moment the contract of sale is made. Of course, the seller remains the legal owner until the closing, but for purposes of equity the buyer is treated as the owner. The seller's legal title is analogous to the legal title held by mortgage lenders in states that treat the mortgage as a transfer of legal title: It is retained as security for the buyer's payment of the purchase price. Because the doctrine is equitable, courts apply it in order to deliver fair results. The touchstone for its application is often whether it is necessary to carry out the parties' intentions or to avoid a palpable injustice. Note that only equitable title is passed to the buyer; unless the contract of sale permits the buyer to take possession prior to the closing, the buyer, as equitable owner, has no right to possession. If the contract does permit the buyer to take possession the buyer is obligated to avoid waste of the property, for that would impair the value of the seller's retained legal title. Equitable title does not apply to contracts giving the buyer an option to purchase until and unless the option is exercised.

a. Application to death of a party: An important effect of equitable title is that, for purposes of the seller's or buyer's death before closing, the parties are treated as having transferred the real property by entry into the contract. This means that a seller who dies after contracting but before closing leaves an estate that owns personal property — a contract right — and not real property. If the buyer dies before closing, the buyer's estate includes the real property.

Example: Opus, owner of Blackacre, enters into a valid contract to sell Blackacre to Baggins for $100,000. Before the closing, Opus dies. His will devises his real property to Bertha and his personal property to Camellia. At his death, Opus's interest in Blackacre is deemed to be personal property, which passes to Camellia. If Baggins performs, Camellia will receive the sale proceeds. If Baggins should default and equitable title should return

to Opus's estate Camellia will still receive Blackacre. At Opus's death, his interest in Blackacre was personal property; the later conversion of that interest into real property occurred after Opus's death so Blackacre represents the proceeds of the personal property. The character of Opus's property at his death is what matters. Similarly, if Baggins died before the closing his interest in Blackacre passes under his will as real property. Of course, Baggins's estate must perform at the closing for that real property to become tangible.

b. Application to risk of loss of the property: English law used the doctrine of equitable title to place on the buyer the risk of loss of the property from causes not attributable to either buyer or seller (e.g., fire, earthquake, storm damage). See *Paine v. Meller*, 6 Ves. 349, 31 Eng. Rep. 1088 (Ch. 1801). Most American states follow this rule, which requires the buyer to perform at the closing despite the loss. Of course, the seller must tender timely performance to perfect his choice of seeking either damages (measured by the diminution of value produced by the loss) or specific performance should the buyer default.

i. Entitlement to insurance proceeds: The old English rule was that the seller was entitled to insurance proceeds, even though the buyer had the risk of loss, because the insurance policy was regarded as a personal contract right of the seller. If the buyer wanted insurance protection, he would have to secure his own. Most American states reject this rule and require the seller to credit the insurance proceeds against the purchase price in an action for specific performance or, in an action for damages, reduce the damage award by the insurance proceeds. The rationale is that the seller is maintaining insurance as much for the benefit of the buyer as himself, and thus holds the proceeds in ***constructive trust*** for the buyer. See, e.g., *Bryant v. Willison Real Estate Co.*, 350 S.E. 2d 748 (W.Va. 1986); *Heinzman v. Howard*, 366 N.W. 2d 500 (S.D. 1985). It is always a good idea, however, for the buyer either to (1) procure his own insurance or (2) insert a provision in the sale contract requiring the seller to keep the property insured for the benefit of the buyer. A buyer who procures his own insurance keeps the proceeds even if risk of loss is on the seller, because it is quite clear that the buyer's insurance is obtained solely to protect the buyer's interest. No constructive trust is created.

ii. Minority rule: The minority of American courts place the risk of loss on the seller, despite the doctrine of equitable title, on the theory that an intact structure was an essential part of the bargain. See, e.g., *Caulfield v. Improved Risk Mutuals, Inc.*, 66 N.Y. 2d 793 (1985). Thus, if the loss is substantial, it falls entirely on the seller and the buyer may not be forced to perform. If the loss is insignificant, the buyer may still be forced to perform but is entitled to an abatement of the purchase price to reflect the lost value, usually measured by the insurance proceeds received by the seller. The minority rule is thus effectively the same as the majority rule in cases of ***insubstantial insured loss.*** The minority rule is different only in cases of ***substantial loss.*** In minority jurisdictions the buyer may ***not be forced to perform;*** in the majority of states the buyer ***must perform or incur liability,*** though the buyer will receive ***credit for the seller's insurance proceeds.***

2. Risk of loss goes with possession: Many states have enacted statutes that make the risk of loss go with possession. See, e.g., Cal. Civ. Code, §1662. Thus, despite equitable title, if the seller

remains in possession he assumes risk of loss. Buyers in these jurisdictions acquire risk of loss prior to closing only if they take possession or assume that risk under the sale contract.

II. DEEDS

A. Formal requirements and component parts: A deed is the usual method by which title to realty is transferred. This section addresses the formal requirements for a valid deed and the elements of the instrument.

1. **Writing required:** The Statute of Frauds requires a writing signed by the grantor in order to transfer an interest in land. A deed signed by the grantor is the usual method of compliance, but other writings will suffice. Because the grantor is the only party bound by the deed (as distinguished from the contract of sale) only the grantor needs to sign the deed.

2. **Notarial acknowledgment:** A notarial acknowledgment is the act of a notary public attesting to the fact of the grantor's signature and to the identity of the grantor. A deed is valid without acknowledgment but virtually all deeds are acknowledged because notarial acknowledgment is almost universally required for recording the deed in the public land records.

3. **The grant:** The first clause in a deed is the ***granting clause,*** which recites the parties, the words effecting the grant, the consideration, and the description of the property.

   a. **Words effecting the grant:** Any expression of an intent to effect a transfer of realty will accomplish the grant. No "magic words" are required.

   b. **Description of the grantee:** Ordinarily the grantee is described clearly and specifically, but a grantee can be described without reference to a specific person, so long as the description is sufficient to identify an actual person. Otherwise the deed may not be valid, either because of uncertainty as to ownership or inability to deliver the deed to a nonexistent grantee.

      Example: A deed to the "first born son of Diana, Princess of Wales" is sufficient to describe William. A deed to the "eldest daughter of Diana, Princess of Wales" is invalid because no such person exists or ever will exist.

      i. **No grantee named:** While the traditional rule has been that a deed that mentions no grantee is void, most American states today hold that the ***intended grantee*** has ***implicit authority,*** as the ***agent of the grantor,*** to fill in the intended grantee's name at ***any later time.*** Without a grantee the deed is a legal cipher, but once the intended grantee's name is inserted it becomes effective. See, e.g., *Board of Education v. Hughes*, 118 Minn. 404 (1912).

   c. **Consideration:** While consideration is ***not necessary*** to convey land, deeds often recite the ***fact of consideration*** rather than the actual amount of the consideration. Thus, the granting clause often states "for ten dollars and other good and valuable consideration" in order to establish that the buyer is a bona fide purchaser for value (which gives the grantee the protection of the recording acts; see Chapter 7) and simultaneously keeps the actual purchase price out of the public records.

   d. **Description of the land:** The property conveyed may be described in any fashion that clearly and precisely identifies the parcel. Common forms of description include ***metes and***

bounds (a surveyor's description of the length and direction of the boundaries), reference to a ***recorded survey map*** or other survey, and ***street and number.*** So long as the description contains enough to identify the land, an ambiguous description will suffice if extrinsic evidence will clarify the ambiguity. If there is no ambiguity in the description extrinsic evidence is not permitted to contradict the deed except to establish a mutual mistake in the description.

i. **Rules of construction:** If a property description is internally inconsistent, plainly mistaken, or incomplete, courts strive to ***determine the intentions of the parties.*** If there are no better clues to intent, courts employ a hierarchy of rules to sort out these problems. In descending order of preference and reliability, these are as follows: (1) ***original survey markers,*** (2) ***natural monuments*** (e.g., trees), (3) ***artificial monuments*** (e.g., structures), (4) ***maps,*** (5) ***courses of direction*** (e.g., "a line running ENE" or "a line 90 degrees to the left of the baseline"), (6) ***distances,*** (7) ***common names*** (e.g., "McDonald's Farm"), and (8) ***quantity*** (e.g., 140 acres).

Example: The deed description reads as follows: "Brigham's Farm, being that tract of 40 acres encompassed by a line beginning at an iron survey marker topped with a brass ball, located 10 feet due north of Highway 1, going east 1,000 feet to an old fir tree with a circumference of 25 feet, turning northerly 82 degrees and running for 1,220 feet to a wood rail fence marked on the USGS topographical map for the region, following the rail fence in a westerly direction for 1,750 feet to Bishop's Creek, then southerly along the bank of Bishop's Creek for 1,072 feet to the intersection with an undeveloped road platted on county survey map No. 872, as recorded in the county records, then southeasterly 420 feet to the point of origin." In trying to make sense of this description, we would first prefer the original iron survey marker even if it was not 10 feet due north of Highway 1, then we would prefer the old fir tree (even if it is more or less than 1,000 feet from the survey stake), then we would prefer the 82 degree course change to the 1,220 foot distance in order to reach the rail fence. If the fence is located in some place different from that marked on the USGS topographical map we would prefer its actual location to its mapped location. Again, we will prefer the meandering fence line to Bishop's Creek rather than the described distance and the natural course of the creek to the described distance along the creek. We will also prefer the mapped location of the undeveloped road to the asserted distance to it. Finally, as a last recourse, we would prefer "Brigham's Farm" over the described quantity of 40 acres. See, e.g., *Riley v. Griffin,* 16 Ga. 141 (1854).

B. Warranties of title: A seller's warranties concerning the state of the title conveyed are expressly contained, if at all, in the deed. No warranties are implied. There are three types of deeds: the ***general warranty*** deed, the ***special warranty*** deed, and the ***quitclaim*** deed. The general and special warranty deeds contain covenants that warrant the state of title; the quitclaim deed does not.

1. **General warranty deed:** The general warranty deed usually contains six covenants concerning title. Each covenant is a promise that the title is absolutely free of the warranted defect, regardless of whether the defect arose before or during the time the grantor had title. Occasionally, a general warranty deed will contain less than these six covenants. Some states have enacted statutes that provide that use of terms of conveyance in a deed (e.g., grant, sell, convey) carries with them the six general warranties of title. Such deeds are sometimes referred to as ***statutory warranty*** deeds; they are simply a statutory form of a general warranty deed.

a. **Covenant of seisin:** The grantor promises that he owns what he is conveying by deed.

b. **Covenant of right to convey:** The grantor warrants that he has the power or authority to convey the property.

c. **Covenant against encumbrances:** The grantor warrants that there are no liens, mortgages, easements, covenants restricting use, or other encumbrances upon title to the property other than those specifically excepted in the deed.

d. **Covenant of general warranty:** The grantor warrants that he will defend against ***lawful claims*** of a ***superior title*** and will compensate the grantee for any loss suffered by the successful assertion of a superior title.

e. **Covenant of quiet enjoyment:** The grantor warrants that the grantee will not be disturbed in his possession or enjoyment of the property by someone's successful assertion of a superior title to the property. This covenant is functionally identical to the covenant of general warranty and, for that reason, is frequently omitted from general warranty deeds.

f. **Covenant of further assurances:** The grantor promises to do whatever else is reasonably necessary to perfect the conveyed title, if it turns out to be imperfect. This covenant is also frequently dropped from general warranty deeds, perhaps because of the open-ended obligation imposed on the seller, or because it adds little to the first four covenants, or because the doctrine of after-acquired title (see section II.B.6, below) has made this covenant redundant.

2. **Special warranty deed:** A special warranty deed contains the same six (or fewer) covenants of the general warranty deed. The only difference is that the grantor warrants against defects of title that arose ***during the grantor's time of holding title.*** Defects arising ***before the grantor's ownership*** are not covered. The grantor warrants, in essence, only that the grantor has not created or suffered a defect to occur during his ownership period.

3. **Quitclaim deed:** A quitclaim deed contains no warranties of title whatever, but operates to convey to the grantee whatever interest in the property the grantor may own. If the grantor owns the Brooklyn Bridge, a quitclaim deed is sufficient to transfer ownership; but if the grantor owns no interest whatever in the Brooklyn Bridge, nothing is transferred by a quitclaim deed, nor is the grantor liable for breach of any covenants of title because none were made. The usual function of a quitclaim deed is to remove apparent and uncontested defects in title without resort to litigation.

4. **Merger doctrine:** The traditional rule is that any promises in the contract of sale ***with respect to title*** are "merged" into the deed once the buyer accepts the deed. This means that the buyer can only sue for breach of the deed covenants of title and may not rely on the contract of sale's provisions with respect to title. The justification for this rule is that buyer's acceptance of the deed is conclusive evidence that the buyer was satisfied that the deed fully conformed to the seller's obligations under the sale contract with respect to title. If the buyer was not satisfied that the deed conformed to the contract he should not have accepted the deed. The merger doctrine does not extinguish those portions of the sales contract that are ***independent of or collateral to the transfer of title,*** such as seller's promise to remove all rubbish from the premises. The merger doctrine is under attack and courts are apt to find a great many provisions of the sales contract to be independent of or collateral to transfer of title. The Uniform Land Transactions Act, §1-309, eliminates the merger doctrine and permits

all provisions of the sales contract to remain alive and enforceable by the buyer after acceptance of a deed.

5. **Breach of covenants of title:** Covenants of title may be divided into ***present covenants*** and ***future covenants.*** A present covenant is breached, if at all, at the moment the deed is delivered. A future covenant is breached when the grantee is actually or constructively evicted at some time in the future.

   a. **Present covenants — Seisin, right to convey, and encumbrances:** These are representations of presently existing facts. Either the grantor owns the property or he does not; he has the right to convey or he does not; title is burdened by an encumbrance or it is not. The covenant is either breached when made (because it was not true) or can never be breached (because the facts were as promised at that moment in time).

      i. **Breach of covenant of seisin:** This covenant is broken if the grantor doesn't own what he purports to convey, regardless of whether he is aware of the defect or not. The covenant is broken even if the grantee knows that the grantor does not own the interest purportedly conveyed. If title is totally defective (or so defective that the grantee is left with good title only to an unusable parcel) the grantee is entitled to a return of his purchase price but must reconvey the right to possession to the grantor. If title partially fails the grantee is entitled to recover that portion of the purchase price that is equal to the value of the failed title and must reconvey his possessory right.

      ii. **Breach of covenant of right to convey:** This covenant is broken if the grantor lacks the power or authority to convey the interest (e.g., grantor is a trustee who is barred by the trust instrument from transferring title), whether or not he is aware of the limits on his authority to convey. Grantee's knowledge of the grantor's lack of authority to convey is not usually a defense to suit on this covenant. The measure of damages for breach is the same as for breach of the covenant of seisin.

      iii. **Breach of covenant against encumbrances:** This covenant is breached if the title is encumbered (other than as expressly excepted in the deed) at the time of delivery of the deed, whether or not the grantor is aware of the encumbrance. In most states, the grantee's knowledge of the encumbrance does not excuse or obviate breach, but a minority of states hold that the grantee's knowledge (actual or constructive) of an ***open and visible*** encumbrance (such as an easement) prevents breach. See, e.g., *Leach v. Gunnarson*, 290 Ore. 31 (1980). The prevailing rule is that violations of governmental land use regulations that are not known to the seller and which have not become the subject of government enforcement are not encumbrances.

      ★**Example:** DiLoreto owned property abutting a tidal marsh. He contructed a bulkhead, filled a portion of the marsh, built a house, and sold it to Anzellotti by quitclaim deed. Two years later Anzellotti conveyed the property to Frimberger under a general warranty deed. When Frimberger sought to repair the bulkhead he learned that a significant portion of the lot unlawfully encroached on protected wetlands. Rather than seeking a variance from the use regulation Frimberger sued Anzellotti on the covenant against encumbrances. In ***Frimberger v. Anzellotti***, 25 Conn. App. 401 (1991), the Connecticut intermediate appeals court held that "latent violations of [governmental] land use regulations that do not appear on the land records, that are unknown to the seller . . . as to which . . . no official action to compel compliance [has been taken] at the time the deed

was executed, and that have not ripened into an interest that can be recorded . . . do not constitute an encumbrance." Recall that in ***Lohmeyer v. Bower*** the Kansas courts held that a present violation of zoning laws made title unmarketable and entitled the buyer to rescind the sale contract. The different result here is arguably justified by difference between an executory agreement and a fully executed one. In the executory agreement (e.g., ***Lohmeyer***) permitting the buyer to rescind enables the seller to minimize loss by finding another buyer willing to take the defective title (perhaps at a reduced price), but in the fully executed contract (e.g., ***Frimberger***) the damages imposed on the seller are under the buyer's control (perhaps Frimberger would conform to the use regulations in a particularly expensive way, calculated to enhance value to Frimberger). The ***Frimberger*** rule is not universally applied. See *Bianchi v. Lorenz*, 166 Vt. 555 (1997), in which the Vermont Supreme Court held that any significant violation of a government land use regulation, the existence of which could be determined by inspecting government records, constituted an encumbrance.

The measure of damages for breach depends on whether the encumbrance is removable by the grantee. If the ***grantee can remove the encumbrance*** (e.g., by paying off a mortgage or lien) the grantee is entitled to recover what he expended to remove the encumbrance. If a grantee fails to remove a removable encumbrance he will not receive damages unless he proves actual damage by selling the property for less than its unencumbered market value. If the encumbrance is ***not removable unilaterally by the grantee*** (e.g., an easement or use covenant) damages are measured by the difference between the unencumbered and encumbered fair market value at the time of the conveyance.

iv. **Statute of limitations:** Because breach of present covenants occurs, if at all, at the moment the covenant is given the statute of limitations begins to run at that moment. The length of these statutes varies, but is usually 3 to 6 years. Of course, the buyer ought to know about breach almost immediately.

v. **Assignment of present covenants:** The still-prevailing majority rule in America is that a present covenant is for the benefit of the immediate grantee and that, if breached when made, the grantee has a ***chose in action*** — the claim against the grantor — that is ***not impliedly assigned*** if the grantee conveys to a remote grantee. This rule is rooted in the now outmoded view that choses in action are not assignable. But because we permit assignment of choses in action today, there is no good reason to bar implicit assignment of the chose in action to the remote purchaser — the person who needs the benefit. Some states recognize this logic and hold, as do English courts, that a transfer to a remote grantee implicitly operates to assign the grantee's chose in action to the remote grantee.

★**Example:** Connelly acquired title to 80 acres at a foreclosure sale, then conveyed the property by general warranty deed to Dixon, who in turn conveyed by special warranty deed to Hansen & Gregerson. The foreclosure sale was invalid so Connelly never owned the 80 acres and thus breached the covenant of seisin given to Dixon, but because Dixon had conveyed by special warranty deed he had not breached the covenant of seisin he gave to Hansen & Gregerson. H&G sued Connelly on the covenant of seisin he had given Dixon, H&G's vendor. In ***Rockafellor v. Gray***, 194 Iowa 1280 (1922), the Iowa Supreme Court ruled that Dixon's chose in action was impliedly assigned to H&G by the conveyance to H&G.

b. Future covenants — General warranty, quiet enjoyment, and further assurances: These are representations as to future events, guaranteeing the grantee's security of title in the future. They are breached only when the grantee is actually or constructively evicted, which always occurs some time after the transfer. Actual eviction is, of course, actual dispossession from title or possession. Constructive eviction occurs whenever the grantee's possession is interfered with in any way by someone holding a superior title.

★**Example:** Bost conveyed 80 acres to Brown under a general warranty deed containing no exceptions, even though Bost only owned one-third of the mineral rights. After the statute of limitations on the present covenants had expired, Brown agreed to sell the mineral rights to Consolidated Coal for $6,000, but was forced to accept only $2,000 once it was learned that Brown owned only a third of the mineral rights. In ***Brown v. Lober***, 75 Ill. 2d 547 (1979), the Illinois Supreme Court ruled that Brown had not been constructively evicted because "the mere existence of a paramount title does not constitute a breach of the covenant" of quiet enjoyment. If the owner of the other two-thirds of the mineral rights were to start mining coal under Brown's land, Brown would be actually evicted. If, in order to prevent a real and manifest threat of such mining, Brown purchased the other two-thirds of the mineral rights from the owner, Brown would be constructively evicted, but if Brown purchased the other two-thirds of the mineral rights without such a threat it would probably not constitute constructive eviction.

i. Breach of future covenants: The future covenants are breached only when the grantee's possession has been disturbed by someone holding superior title. That can occur years after the original transfer and, as in ***Brown v. Lober***, after the statute of limitations has barred suit on the present covenants.

ii. Benefit runs with the estate: If there is ***privity of estate*** between the ***original grantor*** and the ***remote grantee*** the benefit of a future covenant given to the original grantee runs with the estate conveyed to the remote grantee. For this purpose, privity of estate means that the original grantor conveyed ***either*** **title** ***or*** **possession** and the same interest was conveyed to the remote grantee. If the original grantor had **neither** ***title nor possession*** (e.g., the original grantor was a brazen fraud with no interest in the subject property) there is no estate created with which the covenant can run. This rule, though logical, insulates wrongdoers from liability to remote grantees; thus it is not surprising that some courts have invented an "estate" held by the original grantor and passed on to the remote grantee, usually the mere possibility that the original grantor might later acquire an interest that would be passed on to the remote grantee under the doctrine of after-acquired title.

iii. Extent of the obligation to defend: The covenant of general warranty obliges the grantor to defend against **lawful** ***superior claims of title***, but imposes no obligation to defend against the spurious claim of paramount title. Because it is impossible to know one from the other with certainty prior to litigation, the effect is to require the ***grantee*** to defend. In the event the third party's claim of paramount title is lawful, the grantee will be able to recover the costs of defense plus damages. But if the third party's claim is defeated, the costs of the victory are borne entirely by the grantee, because the claim was not lawful. If the grantor is notified of the claim and asked to defend, the grantor will be bound by the result whether or not he defends.

Otherwise, the litigation between the grantee and the third party does not bind the grantor.

c. **General limit on damages for breach:** The overwhelming majority rule is that the grantee may not recover more than what the grantor-in-breach received for the property. This is problematic under several circumstances.

i. **Suit by original grantee:** When the original grantee has expended considerable sums to improve the property, or the property value has increased markedly due to extrinsic factors, the grantee will not be able to obtain the benefit of the bargain, but is limited to a return of his purchase price. On the other hand, without the basic damage limitation, grantors would face the specter of potentially ruinous open-ended liability. Prejudgment interest on the damages is often awarded but courts split over whether the interest should accrue from the date of the promise or the date of eviction. Courts holding to the former view argue that, because the grantee might be liable to the paramount for the grantee's wrongful occupation, interest is fair compensation for that potential liability. Courts holding to the latter view argue that, unless such a claim for rent is actually made, it would be a windfall to the grantee to award interest for the time the grantee is in possession. Some courts refuse to award damages to the grantee if the transfer was a gift.

ii. **Suit by remote grantee:** Nearly all courts agree that if the remote grantee has paid ***more*** for the property than the original grantor received, the remote grantee is subject to the general damage limit and will only recover what the original grantor received. See, e.g., ***Rockafellor v. Gray,*** 194 Iowa 1280 (1922). But if the remote grantee paid ***less*** for the property, courts differ on whether the remote grantee should recover (1) what the original grantor received, (2) what the remote grantee paid, or (3) actual damages up to the amount received by the original grantor.

6. **After-acquired title (estoppel by deed):** If a grantor conveys an interest in property that he does not own, and later acquires the unowned interest, this doctrine operates to send that after-acquired title directly and immediately to the grantee or his successors in interest. The grantor is estopped from denying the scope of the original deed. Put another way, the grantor's original deed carries an implied promise that he will convey the missing pieces of title should he later acquire them. Though originally limited to warranty deeds this doctrine now applies to quit-claim deeds conveying fee simple absolute, on the theory that the doctrine operates to effectuate the parties' probable intent.

Example: Schwenn gave her mineral rights to oil-producing property to her daughter. Then she conveyed the property (with no exception or reservation of the mineral rights) to Kaye. Once litigation threatened, Schwenn asked her daughter to reconvey the mineral rights to her and the daughter did so. At that moment, Schwenn's after-acquired title to the mineral rights was vested in Kaye. Schwenn was estopped from denying the validity and scope of her original deed to Kaye. *Schwenn v. Kaye,* 155 Cal. App. 3d 949 (1984).

C. **Delivery:** A deed must be delivered by the grantor in order to be effective to transfer an interest in land. ***Delivery*** means that the grantor has said or done things that demonstrate the ***grantor's*** **intent to transfer immediately** ***an interest in land to the grantee.*** Delivery does ***not necessarily require*** the physical act of handing over the paper deed to the grantee. The key is the ***grantor's intent.*** If a grantor hands a deed to the purported grantee and says, "You are to hold on to this until I'm dead,

and only then will it be effective," there has been no delivery. If the grantor executes and records a deed to the grantee, vacates the property, tells others that he has "given the farm" to the grantee, but neither informs grantee nor physically hands the deed to grantee, delivery has nevertheless occurred. Delivery problems do not usually occur in commercial transfers; usually delivery problems crop up when gifts are involved.

1. **Presumed delivery:** Courts employ a ***rebuttable presumption*** that delivery has occurred under any of the following circumstances: (1) ***physical transfer to the grantee,*** (2) ***notarial acknowledgment*** of the deed, or (3) ***recording*** of the deed. Courts also employ a ***rebuttable presumption*** that no delivery has occurred if the grantor retains physical custody of the deed.

★**Example:** Maurice Sweeney, estranged from his wife Maria, wished to ensure that upon his death his brother John would take Maurice's farm and tavern, rather than Maria. Maurice executed and recorded a deed of the property to John, and John executed a deed of the property to Maurice, which was not recorded. Both deeds were prepared at the same time by the town clerk, who gave the originals to Maurice. Later, Maurice gave both deeds to John. When Maurice died, Maria contended that the unrecorded but fully executed deed from John to Maurice had been delivered to Maurice and operated to vest title in Maurice. Accordingly, she claimed her elective share in Maurice's estate, including the farm and tavern. John asserted that there had been no delivery because he had never intended to deliver the deed to Maurice or, in the alternative, that there was an oral condition attached to the delivery — that the deed be effective only in the event John died before Maurice. In ***Sweeney v. Sweeney,*** 126 Conn. 391 (1940), the Connecticut Supreme Court of Errors ruled that because the John-to-Maurice deed had been manually delivered to Maurice there arose a presumption of delivery, which presumption was not rebutted by the fact that the motivation of John and Maurice was to defeat Maria's elective share by ensuring that title to the farm was in John at Maurice's death, but to cause title to return to Maurice if and only if John died before Maurice.

2. **Attempted delivery at death:** An attempt to deliver a deed at the death of the grantor is almost always ineffective. If the grantor intends that the deed become effective only upon his death, the deed is void unless it can be admitted as a will, and this is not usually the case because the formalities required for making a will are often lacking in the execution of a deed. If the grantor intended the deed to be effective during his life, the grantor's death does not destroy the delivery already accomplished by that intent.

★**Example:** Harold and Mildred Rosengrant, a childless elderly couple in failing health, owned a farm in Oklahoma which they wished to convey to their nephew, Jay Rosengrant, effective at their death. Harold and Mildred went to a local bank, where they executed a deed of the farm to Jay, which they handed to Jay, and Jay then handed the deed to the banker for safekeeping. Harold instructed the banker to keep the deed until he and Mildred had died, then to give it to Jay so that he could record the deed. The banker put the deed in an envelope marked J.W. Rosengrant or Harold H. Rosengrant and kept it in the bank's vault. After Harold and Mildred's deaths Jay Rosengrant retrieved the deed from the bank and recorded it. An Oklahoma trial court canceled the deed and in ***Rosengrant v. Rosengrant,*** 629 P. 2d 800 (Okla. App. 1981) the Oklahoma court of appeals affirmed, reasoning that the deed was never delivered during Harold and Mildred's lifetime because there was never any intent to give "outright ownership at the time of the delivery." The court made much of the fact that under the bank's policies the deed could have been taken at any time by Harold, but the court found the parties' extraordinarily clear intentions to be of lesser moment.

a. **Exception — Irrevocable escrow:** If a grantor executes a deed in favor of grantor and hands it over to an escrow agent with ***irrevocable*** instructions (either ***written*** or ***oral***) to hold it until the grantor's death, delivery has occurred. The rationale is that the escrow agent is the agent of ***both the grantor and the*** **grantee.** Delivery to the grantee's agent is delivery to the grantee. But if the escrow is ***revocable*** the escrow agent is deemed to be only the grantor's agent, so no delivery has occurred. It is sometimes said that delivery has not occurred because the deed is not yet out of the grantor's control. This rule is often criticized on the ground that a grantor can validly accomplish the same end by simply transferring the property into a revocable trust, with the grantor as both trustee and beneficiary for life, and the grantee as beneficiary upon the grantor's death.

b. **Uncertain exception — Express conditions:** A deed may contain an express provision that makes transfer of possession conditional upon the grantor's death (e.g., "to *A*, effective upon my death" or "to *A* if *A* survives me"). These conditional grants can be interpreted to mean either that the deed has passed a ***springing executory interest*** to the grantee or that ***no delivery has occurred*** — the deed is a nullity until the subsequent condition (the grantor's death) occurs. By the latter construction the deed would be of no effect unless it could qualify as a will. By the former construction the grantee received a valid springing executory interest which became possessory upon grantor's death. Courts are badly divided on this issue, and there is no safe general answer. The academic answer is that the deed should be given effect as making a transfer of a springing executory interest, because the deed is adequate by itself to indicate the grantor's intentions at death. There is little reason to be worried that, by giving effect to the deed, the grantor's wishes concerning disposition of his property upon death are not being carried out. Presumably the grantor appreciated the significance of the deed when he signed it and there is no need to rely on evidence other than the deed itself to carry out the grantor's wishes.

i. **Grant of life estate distinguished:** Of course, a grantor can convey by deed a life estate to himself and a remainder in another grantee. Such grants are valid and not problematic, so long as they are clear. The effect of a grant from *O* "to *A*, effective on my death" and a grant from *O* "to *O* for life, then to *A*" may be functionally identical, but only the latter clearly creates a life estate. The former style is uncertain. While it may be valid as a springing executory interest many courts will conclude that it is void for want of delivery — the present intention to transfer an interest in the subject land.

3. **Delivery subject to oral condition:** The usual response to delivery of a deed subject to an oral condition is to disregard the oral condition and treat the delivery as complete and unqualified, but this rule is not invariable.

★**Example — Unenforceable condition:** Refer back to *Sweeney v. Sweeney*, 126 Conn. 391 (1940), section II.C.1, above. John Sweeney claimed that the John-to-Maurice deed was delivered to Maurice subject to an oral condition — that delivery be effective only if John predeceased Maurice — and that because that condition had not occurred there was no valid delivery. Connecticut's highest court rejected this contention, noting that because the delivery had been made directly to the grantee (Maurice) rather than to a neutral escrow agent the condition was unenforceable.

★**Example — Enforceable condition:** Facing the prospect of hazardous military duty, Husband delivered a deed to Wife with oral instructions that if he were killed she should record the

deed, but if he returned she must return the deed to him for destruction. Husband returned from the mission but Wife refused to return the deed, perhaps due to other marital difficulties. In *Chillemi v. Chillemi*, 197 Md. 257 (1951), Maryland's highest court enforced the oral condition and voided the deed. The court styled as "primitive formalism" the "ancient rule" that physical transfer of a deed to the grantee subject to an oral condition of later effectiveness is a completed delivery. In the Maryland court's view, "conditional delivery is purely a question of intention, and it is immaterial whether the [deed], pending satisfaction of the condition, is in the hands of the grantor, the grantee, or a third person."

4. **Commercial escrows:** Most real estate transfers involve a commercial escrow. Usually, the seller gives the escrow holder specific written instructions that define the escrow agent's authority to hand over the deed to the buyer. The transfer of a deed into escrow along with written instructions is a completed delivery. Delivery is also completed when the deed is given to the escrow holder under oral instructions ***if there is a written sale contract.*** But without a written sales contract, an escrow agent holding a deed under oral instructions is deemed to be the seller's agent only, and the seller is empowered to revoke the escrow at any time. The power to revoke undermines the claim that the seller had an intention to pass title at the moment the deed was placed into the escrow agent's hands. Also, the oral instructions may well be silent on the essential issue of price. Despite these objections, a few states regard delivery as completed when the deed is placed in escrow under oral instructions.

   a. **Equitable title:** Although legal title passes only when the deed is handed over to the grantee out of escrow, equitable title passes to the grantee once delivery is completed to the escrow agent. This is more usually called the ***relation-back doctrine*** — the essential idea is that the buyer's title, once acquired out of the escrow, will "relate back" to the moment the deed was delivered into escrow. This fiction enables courts to ignore the effect of the grantor's death or incapacity after deposit into escrow, or a creditor's attempted seizure of the property after the deed is delivered into escrow. From that moment on, the buyer has equitable title.

      i. **Exception — Bona fide purchasers:** If a seller double-crosses his buyer after depositing a deed into escrow, by conveying a deed to a ***bona fide purchaser*** (a person who pays real consideration and has no knowledge of the pending escrow), the bona fide purchaser (holder of legal title) prevails over the first grantee's equitable title. As between two innocents, the loser is the one who has yet to rely completely upon the seller's duplicity.

5. **Delivery by estoppel:** Even if a grantor does not intend to deliver a deed, he will be estopped from denying delivery in two principal circumstances.

   a. **Entrustment to a deceitful grantee:** If the grantor gives a deed to a grantee with no intent to transfer title, but the grantee uses the deed to convey to a third party bona fide purchaser, the grantor will be estopped from denying delivery.

      Example: Damian gives Agnes a deed to Blackacre, telling her, "Look it over and think about it, for this is what I propose to do if you will marry my son, Mordred." Instead of marrying Mordred, Agnes records the deed and promptly sells Blackacre to Myrtle, who pays good value and is utterly ignorant of the circumstances under which Agnes obtained the deed from Damian. Damian will be estopped from denying delivery to Agnes. Damian had more opportunity than Myrtle to avoid the problem (he could have simply told Agnes of

his planned marital gift), so the loss should fall on him. Of course, he may have recourse against Agnes.

b. **Entrustment to a negligent escrow agent:** If the grantor gives a deed to an escrow agent but the grantee obtains it wrongfully, using it to sell the property to a bona fide purchaser, courts are split on whether the grantor is estopped from denying delivery.

i. **Rationale for estoppel:** The grantor chose his escrow agent so he ought to shoulder the consequences of a poor choice. The grantor could have picked a more careful or honest agent. The grantor is more culpable than the bona fide purchaser so the grantor should lose.

ii. **Rationale for no estoppel:** The grantor didn't intend delivery so he ought not be prevented from denying delivery. The problem with this view is that it does not really address the underlying issue — of two innocents, which should bear the loss? The usual answer to this question is that it should fall on the party who had the better ability to prevent the loss in the first place. To say that the grantor didn't intend delivery does not address this problem. However, courts holding to this view will estop the grantor if the grantor knew about the grantee's wrongful possession and did nothing about it. In a sense, these courts are saying that they will not hold the grantor's agent's conduct against him, but will hold the grantor responsible for his own conduct.

III. FINANCING DEVICES: MORTGAGES, DEEDS OF TRUST, AND INSTALLMENT CONTRACTS

A. **Mortgages:** Loans secured by mortgages are the principal device enabling people to acquire real property. Very few people are able or willing to pay the entire purchase price in cash. Instead, they borrow a significant portion of the purchase price from a lender on terms that require them to repay the loan with interest via monthly payments made over an extended period of time (frequently 30 years). To secure repayment of the loan, the lender will require the borrower to give the lender a mortgage on the property. The mortgage empowers the lender to sell the property in the event of the borrower's default on the loan, and to apply the sale proceeds to repayment of the loan. Any proceeds left over go to the borrower. Generally, if the sale proceeds do not eliminate the loan the borrower remains liable for the deficiency. This discussion of mortgages is only the tip of the mortgage law iceberg; there are a great many state variations on the general principles outlined here, but this outline will enable you to understand mortgages in the context of a first-year Property course.

1. **The mortgage transaction:** The term "mortgage" is often used loosely to refer to the entire transaction, which consists of two distinct elements: the ***loan*** and the ***mortgage.*** The loan is evidenced by a ***promissory note,*** a personal promise to repay the loan on the terms contained in the note. The mortgage is evidenced by a document called a ***mortgage;*** it is a ***security agreement*** between the parties, by which the borrower gives the lender the right to sell the property if the borrower defaults on the loan and to apply the sale proceeds toward reduction of the loan. The mortgage is usually recorded in the public land records, thus giving notice of the lender's security interest in the property. In some places the note and the mortgage are combined into a single instrument, but they still perform separate functions. The borrower is often called the ***mortgagor;*** the lender is the ***mortgagee.***

a. Development of the mortgage: The mortgage began as a conveyance. Lenders would require the borrower to convey the property to the lender in fee simple subject to a condition subsequent (e.g., "Borrower conveys Blackacre to Lender, but if Borrower pays £1,000 to Lender on Christmas Day, 1643, Lender will reconvey Blackacre to Borrower"). The law courts rigidly enforced this provision. If Borrower tendered £1,000 on Boxing Day (Dec. 26), 1643, it was too late; Blackacre was irrevocably Lender's.

i. Equity of redemption: The equity courts began to rule that the borrower had an equitable right to redeem the property at any time after the due date. This ***equity of redemption***, unlimited in time, was a constant cloud on title that made the property effectively inalienable. To remove the blot, lenders then brought suit in the law courts to ***foreclose equity of redemption*** — by obtaining a court order to extinguish the equitable right of redemption and sell the property free of that cloud to a new purchaser. Today's mortgage foreclosure is similar — the equity of redemption is extinguished, the property is ordered sold, the sale proceeds are applied to the loan and any excess is given to the borrower. Note carefully that the foreclosure sale cuts off ***only*** this ***judicially created equity of redemption.***

ii. Statutory right of redemption: About 20 states have created a separate, independent ***statutory right of redemption,*** which gives the borrower a defined period of time (anywhere from a few months to a year or two) ***after the foreclosure sale*** in which the borrower can redeem the property from the purchaser at the foreclosure sale.

b. Types of mortgages: Although all mortgages have the same general characteristics there are some terms of art used to describe mortgages with different features. The principal types follow.

i. First and second mortgages: The same property can be used to secure more than one loan. The first mortgage is the mortgage that is given first in time. The second mortgage is given next in time. Sometimes these are referred to as senior mortgages or junior mortgages. The second mortgage is taken subject to the rights of the senior mortgage. Upon foreclosure, the holder of a second mortgage is entitled to share in the sale proceeds only after the first mortgage has been fully satisfied.

ii. Fully amortized mortgage: A fully amortized mortgage loan is one in which the principal is retired over the life of the loan so that the monthly payments are constant (if the interest rate is fixed for the life of the loan) or vary with interest rates (if the interest rate is adjustable by formula during the life of the loan). Most residential mortgage loans in the United States are fully amortized.

iii. Balloon payment mortgage: Some mortgage loans provide for very small payments of principal during the life of the loan (or none at all). While such loans reduce the monthly payment, they require payment of the entire principal balance on the due date. Because few borrowers are likely to have cash on hand to make that payment, a balloon payment mortgage has the practical effect of forcing the borrower to obtain a new mortgage loan to retire the old one.

iv. Purchase money mortgage: A mortgage loan made for a portion of the purchase price is a purchase money mortgage.

2. **Title or lien?** States take different views of whether the mortgagee (the lender) has ***title*** to the mortgaged property or only a ***lien*** upon that property. The title theory predominates in the east and the lien theory is favored by western states. The difference is no longer of much practical consequence, because title theory states treat the lender's title as for security purposes only, thus making it virtually indistinguishable from a lien. The only difference lies in who is entitled to possession. In some title theory states the mortgagee is entitled to possession; in other title theory states the mortgagor is entitled to possession until default and the mortgagee is entitled to possession thereafter. In lien theory states the mortgagor is entitled to possession until foreclosure. In title theory states a lender has enhanced ability to recover possession after default fairly quickly (by suit for ejectment or judicial appointment of a receiver).

3. **Sale or transfer by the mortgagor:** A mortgagor is always free to transfer his ***"equity"*** — his interest in the property. *Equity* is the term used to describe the value of the borrower's interest in the property — the difference between market value and the principal balance of the loan secured by the mortgage. The term originated as a shorthand expression for the interest protected by the equity courts in the early days of mortgages. A buyer of the mortgagor's interest can acquire the interest ***subject to the mortgage*** or can ***assume the mortgage.***

   a. **Acquisition subject to the mortgage:** By taking title subject to the mortgage the buyer incurs ***no personal liability on the mortgage.*** In the event of default the mortgagee can foreclose and sell the property, but if the foreclosure sale proceeds do not extinguish the debt the lender has no further recourse against the owner who has acquired title subject to the mortgage. The lender can, however, obtain a personal judgment against the original mortgagor for the deficiency, except to the extent states prohibit deficiency judgments.

   b. **Assumption of the mortgage:** If a new buyer assumes an existing mortgage he becomes ***personally liable for the mortgage loan.*** The lender can obtain a deficiency judgment against the assuming buyer as well as the original mortgagee (unless the lender has released the original mortgagee).

   c. **Due-on-sale clauses:** Lenders dislike transfer of the mortgagor's interest, whether by assumption or by taking subject to the mortgage, because it is against their financial interest. In periods of declining interest rates, buyers will not likely assume or take subject to an existing fixed-rate mortgage, because they can obtain a new mortgage at lower rates. But in periods of rising interest rates, buyers will be anxious to assume or take subject to an existing fixed-rate mortgage at a lower-than-current-market rate. Lenders, of course, would prefer that the buyer obtain a new mortgage at a higher rate. Lenders also say they are concerned that the new buyer might be less creditworthy, but that argument is mostly bogus because the original mortgagor remains personally liable and the property is the principal security for the loan. To prevent assumption of or a sale subject to a mortgage lenders insert a ***due-on-sale clause*** into the mortgage and loan. This provision permits the lender to demand immediate payment of the outstanding principal balance of the loan in the event the mortgagor sells his interest. In the 1970s some states, particularly California, invalidated due-on-sale clauses. Lenders reacted by obtaining federal law, which preempts state law, making due-on-sale clauses enforceable. See, e.g., *Fidelity Fed. Sav. & Loan Assn. v. De La Cuesta*, 458 U.S. 141 (1982).

4. **Default by mortgagor:** In most states the lender has the option of a suit to collect the debt or to foreclose and effect a sale of the property to satisfy the debt. A few states require the lender first to foreclose and sell before seeking to enforce the debt personally by obtaining a deficiency judgment. The availability and utility of deficiency judgments are often limited by statute.

   a. **Anti-deficiency statutes:** Some states prohibit deficiency judgments on purchase money mortgage loans for residences. These statutes reflect a legislative bias in favor of homeowners. A variation is to permit a deficiency judgment only for the amount by which the debt exceeds a judicially determined fair market value for the property.

   b. **Statutory right of redemption:** The statutory right of redemption after foreclosure typically permits redemption by paying the ***foreclosure sale price*** rather than the ***mortgage debt.*** This is a strong inducement to the mortgagee, who is often the only bidder at a foreclosure sale, to bid the amount of the mortgage debt. Otherwise, the mortgagee might buy the property for a trifling fraction of the mortgage debt and seek to collect the remainder through a deficiency judgment. In some states the mortgagor in default may stay in possession until the expiration of the statutory redemption period.

   c. **Inadequate sale price at foreclosure:** The fact that the sale price at foreclosure is inadequate, in the sense that it is less than fair market value, will not by itself void the foreclosure sale. The usual rule is that the sale price will stand unless it is so far below market value that it "shocks the conscience" or fraud or other overbearing unfairness is present. Some states go further, however, and impose on the mortgagee a fiduciary duty to act in a commercially reasonable manner in conducting a foreclosure, such that reasonable efforts are made to realize a fair price.

   ★**Example:** The Murphys refinanced their home in 1980, executing a promissory note secured by a first mortgage in favor of Financial Development Corp. FDC then sold the mortgage to Colonial Deposit. By September of 1981 the Murphys were 7 months in arrears on their mortgage payments and the lender gave notice of its intent to foreclose. Although the Murphys then paid the overdue mortgage payments they failed to pay additional costs which had come due as a result of the foreclosure notice. The lenders scheduled a foreclosure sale for December 15, 1981, which occurred on that day. Present at the foreclosure sale were the Murphys, a lawyer retained by the lender to conduct the sale, and a representative of the lender. The lender made the only bid, $27,000, which was roughly the amount owed to the lender by the Murphys. Two days later the lender sold the Murphys' home to a realtor for $38,000. The Murphys sued to set aside the foreclosure sale; a trial court refused to set aside the subsequent sale to the realtor because he was a bona fide purchaser for value but did award the Murphys $27,000 damages, an amount equal to the difference between the foreclosure sale price and the market value of the home, and legal fees due to the lender's bad faith. In ***Murphy v. Financial Development Corp.***, 126 N.H. 536 (1985), the New Hampshire Supreme Court ruled that the lender was a fiduciary in conducting a foreclosure sale, and thus owed a duty of good faith and due diligence to exert commercially reasonable efforts to obtain a fair and reasonable price, but the court ruled that the lender did not act in bad faith. The lender did not advertise or use any other commercially reasonable methods to generate interest in the property. The New Hampshire Supreme Court also ruled that the trial court erred in its determination of damages: Rather than finding damages to be the difference between foreclosure price and *fair market value* damages are the difference between foreclosure price and a *fair price*. A fair price may

be less than fair market value because fair market value can be expected to be realized in a voluntary exchange with plenty of opportunity to shop for buyers; in a forced sale some diminution in price is reasonable. But the key point is that the lender must act diligently to generate a fair price.

B. Deeds of trust: The deed of trust is used in many states as the form of mortgage.

1. **How it works:** The borrower conveys the real property to a third party as ***trustee*** for the lender, for the limited purpose of securing repayment of the debt. The trustee is often a nominee of the lender (e.g., the lender's lawyer, employee, or affiliated corporation). The deed of trust gives the trustee the power to sell the property upon default (the ***power of sale***), to use the proceeds to pay off the debt, and return any excess to the borrower.

2. **Difference from the mortgage:** Traditionally, judicial foreclosure was required to enforce a mortgage, which meant bringing suit and conducting a judicially supervised sale, a time-consuming and costly process. A power of sale vested in a trustee, by contrast, is relatively quick and cheap. In some states, the mortgagee may not be given a power of sale; in other states, a mortgagee may exercise the power of sale if the mortgage gives the mortgagee that power. Under a deed of trust the sale is conducted by the third party trustee at the lender's request, which is virtually identical to the procedure under a mortgage with power of sale vested in the mortgagee. Some states treat deficiency judgments or redemption differently, depending on whether a deed of trust or mortgage is the security instrument.

C. Installment sale contracts: The installment sale contract is, in form, merely a contract of sale for real property obligating the purchaser to pay the purchase price in installments and obligating the seller to deliver title to the buyer after the purchase price has been paid in full. Economically, the transaction is indistinguishable from delivery of a deed to the buyer in exchange for a note and purchase money mortgage to secure the purchase price.

Example: Vendor, owner of Blackacre, agrees to sell Blackacre to Vendee for $133,333, under an installment sale contract by which Vendee takes possession and agrees to pay the purchase price at the rate of $1,111 per month for 10 years, and Vendor agrees to deliver a deed to Vendee when the purchase price is fully paid. This is economically identical to a transaction by which Vendor deeds Blackacre to Vendee now, and receives from Vendee a note for $100,000, bearing interest at 6 percent per year, requiring Vendee to make monthly payments of $1,111 for 10 years (at which time the debt will be extinguished), secured by a mortgage.

1. **Treated as contract of sale:** The original reason for the installment sale contract was the seller's desire to avoid the procedural difficulties of extinguishing a mortgagor's equity of redemption. If a buyer under an installment sale contract defaulted, the seller could summarily evict the buyer upon default and, perhaps, keep all or a large part of the partially paid purchase price as damages. See, e.g., *Jensen v. Schreck*, 275 N.W. 2d 374 (Iowa 1979). Because the seller retained legal title until the buyer had fully performed, buyer's default served to excuse any further performance on the seller's part. This result was very much like the old ***"strict foreclosure,"*** by which the equity of redemption was irrevocably cut off. See, e.g., *Harris v. Griffin*, 109 Ore. App. 253 (1991).

2. **Treatment as a security device:** The modern trend of courts is to treat installment sale contracts as security devices. There are two good reasons for this view: (1) the installment sale contract is economically indistinguishable from a mortgage, and (2) it is inequitable to

permit a buyer to lose his equity of redemption under circumstances where an identically situated mortgagor would not. Nowadays a court is likely to require judicial foreclosure of an installment sale contract, permit the seller to retain payments only to the extent of the reasonable rental value of the property, and perhaps give the buyer an equitable right to cure his default and resume payments (analogous to the mortgagor's equity of redemption).

★**Example:** Buyer agreed to purchase Seller's home under an installment sale contract for $15,000. The contract required Buyer to pay the $15,000 over 15 years at 5 percent interest on the unpaid balance, in monthly installments of $118.62, for a total of payments of about $21,350. The contract provided that if Buyer defaulted and failed to cure the default for 30 days Seller could terminate the contract, take possession, and retain all payments paid. Eight years into the contract Buyer defaulted, having paid about half the purchase price. Seller sought to eject Buyer and a New York trial court granted summary judgment to Seller. In ***Bean v. Walker***, 95 App. Div. 2d 70 (1983), a New York intermediate appeals court reversed, holding that the principle of equitable title or equitable conversion applied, causing title to vest in the buyer at the moment the contract was executed, placing the buyer in the same position as a mortgagor. See also *Parise v. Citizens Natl. Bank*, 438 So. 2d 1020 (Fla. App. 1983); *Skendzel v. Marshall*, 301 N.E. 2d 641 (Ind. 1973); *Union Bond & Trust Co. v. Blue Creek Redwood Co.*, 128 F. Supp. 709 (N.D. Cal. 1955).



Exam Tips on TRANSFERS OF REAL PROPERTY

- Note your professor's interests and inclinations. A lot of this area is contract law imported into Property. If your professor is fond of this material it is more likely to be tested. If your professor treats it in cursory fashion, don't ignore it, but it may be of lesser importance in his or her pedagogical calculation.
- Contracts of sale involve issues of enforcement and choice of remedies. Remember the implied duties imposed on sellers here; watch out for facts suggesting a lack of marketable title, or breach of a duty to disclose.
- Deed warranties are fruitful areas of testing. Pay attention to the type of deed and the facts that will indicate which, if any, covenants may be violated. Make sure you have a good understanding of the method by which damages for violation of deed covenants are determined.
- The law pertinent to real estate finance is a bit of a speciality, but if your professor covers this material, watch out for an exam question. Good candidates include an installment sale contract in which the buyer has defaulted, and foreclosure or private sale at which the lender arguably fails to act in a commercially reasonable manner.

CHAPTER 7

ASSURING GOOD TITLE TO LAND

ChapterScope

- This chapter examines the problem of how current owners can obtain assurance that they actually have good title to the land they purchase. Included is discussion of how problems occur, often by multiple purchasers of the same land from the same seller, and the mechanisms of resolving these competing claims — recording acts, marketable title acts, title insurance, and registered title. Here are the most important points in this chapter.
- In cases of conflicting claims to the same property, the common law preferred the earliest claimant in time. That rule has been largely displaced by recording acts, which operate to give priority to those claimants who comply with the terms of the act.
  - Recording acts are based on the fact that every county in America maintains a public record of title transactions in real estate, usually organized and indexed alphabetically by grantors and grantees, in which any title transaction may be recorded. There are three types of recording acts: Race, Notice, and Race-Notice.
    - Race statutes give priority to the title claimant who first records his deed.
    - Notice statutes give priority to the bona fide purchaser who lacks notice of a prior unrecorded claim.
    - Race-Notice statutes give priority to the bona fide purchaser who lacks notice of a prior unrecorded claim only if the bona fide purchaser records first.
- Marketable title acts function as a statute of limitations to cut off old claims of title. The acts bar assertion of title claims that are not in the chain of title within some specified period of time prior to the present, but there are many exceptions to the limitations bar of marketable title acts.
- Registered title substitutes a registration system for the prevailing notice system. Under registered title, the title is exactly what is registered in the registry, and nothing can impeach that title. It delivers certainty but if the registered title is in error, the results can be devastating. Registered title is not popular in the United States.
- Title insurance is the most widely used method of providing meaningful assurances of good title. A well-funded title insurer issues a policy of title insurance to the owner, promising to insure that title is as stated in the policy, and stands ready to reimburse the insured for any title defects, up to the policy limits.

I. INTRODUCTION

A. **The problem:** To paraphrase James Madison, if men were angels there would be no need for methods to assure good title to land. But humans are often rogues, and sometimes they convey the

same property more than once. The rogue grantor may be universally condemned, but the remaining problem is to decide which purchaser from the rogue is to prevail.

Example: Rogue, owner of Blackacre, conveys it to Angel on January 1 for $50,000. On January 10, before Angel has taken possession, Rogue conveys Blackacre to Beatrice for $50,000. Beatrice is ignorant of the prior conveyance to Angel. Rogue is, of course, a scoundrel, but let us suppose he has disappeared with his $100,000 and so cannot be forced to disgorge his ill-gotten gain. As to the innocents — Angel or Beatrice — who should prevail?

1. **The common law answer:** The common law used the ***first-in-time*** principle to award title to Angel. She was the first grantee and, at that moment, Rogue conveyed his interest in Blackacre. Rogue had no interest in Blackacre to convey to Beatrice, so she was the loser. To protect grantees, the common law relied heavily on the warranties of title contained in a general or special warranty deed (see Chapter 6, section II.B), but these were of little use if Rogue had skipped off with his loot.

2. **Modern answers:** Because the common law method was crude, uncertain, and harsh, Americans quickly devised better methods of assuring good title. A brief summary of these methods follows.

   a. **Recording:** The first innovation was ***recording.*** A recording act creates a system for placing conveyances in a public record, and then stipulates who has priority in the event of conflict. A deed is valid without recording, but an unrecorded deed is likely to lose out to a recorded deed if both deeds are from the same grantor to the same property. In the example, neither Angel nor Beatrice have recorded, so the recording act does not apply until one or both records. There are three different types of recording acts, and the answer may vary. See section II, below.

   b. **Registration:** A later method, and one not much used in the United States, is to create an official registry of land titles. This system is different from recording of conveyances in that the ***registry is the title,*** and the public records simply contain ***evidence of title.*** From the example above, Rogue's registered title, in a registry system, would be replaced by a new registration in Angel. Beatrice would probably never part with the purchase price because of the inability to register title in her name. See section III, below.

   c. **Title insurance:** A ubiquitous method for obtaining practical assurance of good title is to obtain ***title insurance.*** For a fee, a title insurer agrees to ***defend title*** and to ***compensate for the loss of the insured title to the claim of a paramount owner.*** So long as the title insurer remains solvent, this is good enough for most buyers. The title insurer, of course, carefully examines title before issuing its title insurance policy, and will refuse to insure if it finds any defects in title. But a title insurer will not generally insure title unless the purchaser's deed is recorded and the insurer is satisfied that no rival claimant can have a better title. In the example, because neither Angel nor Beatrice have recorded, it is not likely that either could find an insurer willing to provide title insurance without specifically excepting from its coverage any unrecorded prior conveyances.

II. RECORDING ACTS AND CHAIN OF TITLE PROBLEMS

A. **The recording system:** A public official in each county, often called the county recorder, maintains a record of the transactions affecting real estate located in the county, but that record is only as

complete as what is presented to the recorder for filing. Any instrument affecting realty may be filed and recorded so long as it meets the formal requirements for recording (usually notarial acknowledgment). The most common instruments that are recorded are deeds and mortgages, but such things as judgment liens, tax liens, installment sale contracts, and leases can and often are recorded.

1. **What the recorder does:** The recorder's job is mostly ministerial. The recorder accepts instruments for filing by stamping the date and time of filing on them, then photocopying them and placing the copy in an official record. The original is returned to the person who presented it for filing. Then the recorder ***indexes the instrument*** by noting a description of the instrument in an index maintained to facilitate location of the instrument. Just as a searcher for a library book must consult a catalog of books by author, or subject, or title, the searcher of title records must consult the recorder's index. There are two types of indexes.

   a. **Grantor-grantee index:** By far the most common type of index is the grantor-grantee index. An alphabetical record of all grantors and all grantees, by surname, is maintained in separate volumes. The typical entry will contain the date, the name of the grantor (or grantee, as appropriate), the other party to the transaction, a brief description of the property and the instrument, and a citation to the precise location in the public records of a complete copy of the instrument.

      Example: On July 2, 1988, Harry Simpson conveyed 123 Elm Street to Agnes Darby. Here is how that transaction might appear in the grantor index of the county:

      > SIMPSON, Harry to Darby, Agnes, 7/2/88, General warranty deed to 123 Elm Street, recorded in Book 484, Page 1186.

      And here is how that transaction might appear in the grantee index of the county:

      > DARBY, Agnes from Simpson, Harry, 7/2/88, General warranty deed to 123 Elm Street, recorded in Book 484, Page 1186.

   b. **Tract index:** A few jurisdictions maintain a tract index, in which every transaction pertaining to a particular parcel is entered in one location, instead of chronologically by grantor and grantee. Tract indexes are most common where property has been platted by map into various blocks and lots within blocks.

      Example: Here is how the transaction in the last example might be indexed in a tract index:

      > TRACT: BLOCK 39, Lot 2 (123 Elm Street), 7/2/88, General warranty deed from Harry Simpson to Agnes Darby, recorded in Book 484, Page 1186.

2. **What the title searcher does:** A title searcher's objective is to identify all the ***past*** title transactions pertinent to a particular parcel, in order to determine the ***present*** state of title. This is a simple job if the jurisdiction maintains a tract index; the title searcher finds the page describing all title transactions pertinent to the parcel. The process is more complicated if a grantor-grantee index is involved. The searcher begins by looking back in time through the grantee index to find the transaction by which the present owner acquired title, then searches the grantee index further back to find the transaction by which the present owner's grantor acquired title. This process continues until an adequate root of title has been found (usually a title transaction far enough back in time to cut off any prior claims by a statute of limitations)

Then the searcher will turn to the grantor index and search forward in time, beginning with the initial grantor, to see if any owner ever conveyed her interest prior to the grant that appears to make up the chain of title traced backward in time. In most jurisdictions the searcher need only search forward from the time the grantor acquired title to the point when the grantor transferred title to the next owner in the chain. But in a few jurisdictions it is necessary to search forward to the present for every grantor.

Example: In 1890, Arthur conveyed Blackacre to Smith. In 1910, Smith granted Wilson an appurtenant easement for right of way over Blackacre. In 1920, Smith conveyed Blackacre to Rogers. Rogers conveyed Blackacre to Candiotti in 1950. Candiotti conveyed to Alvarez in 1980. In 1990 Alvarez granted Trustco a mortgage upon Blackacre. Your client, Barker, wishes to purchase Blackacre. To determine the state of title you would search the grantee index, under Alvarez, from the present time back to 1980, when you would find the deed from Candiotti to Alvarez. Then you would search the grantee index under Candiotti back to 1950, when you would find the deed from Rogers. Then you would search the grantee index under Rogers back to 1920, when you would find the Smith conveyance. Ditto back to 1890 when you would find the Arthur conveyance. Assume that a conveyance more than 80 years old is an adequate root of title; that makes the Arthur to Smith conveyance of 1890 the root of title. Then you search forward from 1890 in the grantor index under Smith. You will first find the 1910 easement grant to Wilson, then the 1920 conveyance to Rogers. You will search the grantor index under Rogers until you find the 1950 conveyance to Candiotti. You will then search under Candiotti from 1950 until 1980, when you find the conveyance to Alvarez. A final search forward under Alvarez from 1980 will reveal the mortgage to Trustco in 1990. You now know that Alvarez has good title to Blackacre, subject to an easement for right of way in favor of the present owner of Wilson's property and a mortgage to Trustco.

a. **Legal obligations of the title searcher:** Any title searcher is obligated to exercise reasonable diligence in performing the search. A searcher is liable for a negligent search that results in damage to the buyer if the search results are provided to the buyer. This is true even if the search is performed for the seller, because the buyer is universally treated as the third party beneficiary of the search and it is obviously foreseeable that a buyer might rely on any such search.

B. **Race acts:** A race act provides that, as between two grantees to the same property, the ***earliest to record*** prevails. Hence there is a race to record first. Under a race act, it does not matter that the first person to record had notice of a prior unrecorded conveyance. The reason for ignoring such notice is that making the record dispositive obviates the need to rely on extrinsic evidence about notice, which may be controverted and unreliable. But most jurisdictions regard the equitable cost of the race statute as too high, because it permits a later grantee to prevail over a known earlier grantee so long as the later grantee is quicker to record.

Example: On January 15 Rogue, owner of Blackacre, conveys for value to Prof. Scatterbrain, who absent-mindedly leaves the deed on his desk for a month, before recording it on February 15. Prof. Sly, Scatterbrain's colleague, sees the deed on Scatterbrain's desk, reads it, and observes that it is not yet recorded. On January 30, Prof. Sly pays value to Rogue for Blackacre and receives a deed from Rogue, which Prof. Sly records on February 1. As between Sly and Scatterbrain, Sly prevails because he recorded first. Sly's knowledge of Scatterbrain's prior purchase is irrelevant.

C. **Notice acts:** Notice acts address the inequity of permitting a later purchaser to prevail over an earlier purchaser when the later purchaser knows of the prior purchase. They do so by providing that a ***subsequent bona fide purchaser*** **without notice of a prior unrecorded transfer** prevails over the prior purchaser who has failed to record. And this is true ***even if the subsequent purchaser has not recorded.*** Here is a simplified example of a notice statute: "No conveyance is valid against a subsequent bona fide purchaser who has no notice of the conveyance, unless the conveyance is recorded." About half of American states have notice acts.

Example: On January 15, Able conveys Blackacre to Hector, who fails to record the deed. On February 15, Able conveys Blackacre to Artemis for $100,000. Artemis is ignorant of the January conveyance to Hector. Artemis prevails over Hector, regardless of who might first record his deed. The critical facts are that, at the moment Able conveyed to Artemis for value, (1) Artemis lacked notice of the prior conveyance to Hector, and (2) Hector had not recorded his deed (which would have given constructive notice to Artemis).

D. **Race-notice acts:** A race-notice act protects a more limited class of subsequent bona fide purchasers who lack notice of the prior conveyance: It protects only those subsequent bona fide purchasers who lack notice and who ***record before the prior purchaser.*** Here is a simplified example of a race-notice statute: "No conveyance is valid against a subsequent bona fide purchaser who has no notice of the conveyance and who has recorded his conveyance first." The supposed virtues of a race-notice act, as compared to a notice act, are (1) encouraging recording, and (2) eliminating disputes over which of two conveyances was first delivered. The first rationale is probably true but weak, and the second addresses a largely imaginary problem. Even so, these arguments are persuasive enough to cause about half of American states to have enacted race-notice acts.

Example: On June 1, Bilbo conveys Blackacre to Jane, who does not record. On July 1, Bilbo conveys Blackacre to Sally for $100,000. Sally is ignorant of the prior conveyance to Jane. On July 15 Jane records her deed. On July 20 Sally records her deed. Jane prevails over Sally because, even though Sally lacked notice of the conveyance to Jane, Jane recorded before Sally.

E. **The consequences of recording:** Recording provides constructive notice to the world of a conveyance. Even if a later purchaser fails to consult the record he is charged with knowledge of its contents. In a race or race-notice jurisdiction recordation cuts off the possibility that either a prior unrecorded purchaser or a later purchaser could prevail. In a notice jurisdiction recordation provides constructive notice, thus preventing later purchasers from prevailing.

1. **The consequences of not recording:** There are two important consequences to failure to record.

   a. **Common law rule applies:** If nobody has recorded the common law principle of "first-in-time" continues to apply, except in a notice jurisdiction when the subsequent bona fide purchaser lacks notice.

   b. **Grantor can convey good title to a later purchaser:** More ominous to purchasers is the fact that, without recordation, the grantor is left with the power to convey good title to a later purchaser. Of course, the grantor who does this is often a scoundrel, and may well be liable to the losing first purchaser for the proceeds received from the second purchaser.

   Example: Olivia, the record owner of Blackacre, conveys Blackacre to Brewster, who fails to record. Then Olivia conveys Blackacre to Abigail for $100,000. Abigail, who is ignorant

of the conveyance to Brewster, then records. In all three types of jurisdictions Abigail will prevail. Had Brewster recorded before the sale to Abigail, Brewster would have prevailed everywhere. Brewster may be able to recover from Olivia the $100,000 she received from Abigail, on the theory that Olivia holds those proceeds in a constructive trust for Brewster, but Brewster could have avoided the whole mess by prompt recordation. Always record promptly.

F. When is an instrument recorded? To be recorded, an instrument must be eligible for recording and be entered in the records in a manner that complies with the jurisdiction's requirements. Virtually anything that affects title to or an interest in real property may be recorded. Most states require that an instrument may not be recorded without a notarial acknowledgment. To obtain a notarial acknowledgment, the grantor must prove his identity to a notary and sign the document with the notary as witness. Some states require or permit witnesses to perform the function of the notary. The problem is that recorders, being human, are not infallible. The following are the common instances of instruments appearing in the record that are wholly are partially unrecorded.

1. **Instrument not indexed:** This recorder's error is to fail to index an instrument or to index it so improperly that it cannot be found by a diligent searcher using the standard search methods. Jurisdictions split on the proper resolution of this problem. The older rule is that "a purchaser is charged with constructive notice of a record even though there is no official index which will direct him to [the particular instrument]." 4 Amer. Law of Prop. §17.25 (1952). On this theory, the purchaser has done all he can do by tendering an eligible instrument to the recorder for recording. See, e.g., *Haner v. Bruce,* 146 Vt. 262 (1985). However, the diligent searcher cannot find the unindexed instrument. Because constructive notice from the record is founded on the assumption that a searcher can find it if he looks, the newer rule is that the unindexed or improperly indexed instrument ought not provide constructive notice. See, e.g., *Hochstein v. Romero,* 219 Cal. App. 3d 447 (1990).

2. **"Omnibus" or "Mother Hubbard" clauses:** A variation on the improperly indexed instrument is an instrument that accurately describes one parcel, Blackacre, and also includes "all other land owned by the grantor in the county." These omnibus clauses are sometimes called "Mother Hubbard" clauses, because they "sweep the cupboard bare." The recorder can only record this instrument by reference to Blackacre, because it is an unreasonable burden on the recorder to search the records to identify all the other property owned by the grantor. Omnibus clauses are void as against later purchasers of the grantor's property (other than Blackacre) because a diligent searcher of the index (with respect to a parcel other than Blackacre) will never locate any reference to the omnibus clause.

★**Example:** Grace Owens owned interests in eight oil and gas leases in Coffey County, Kansas. She assigned to International Tours her interest in those leases under an assignment that specifically described each of the seven different parcels and included an omnibus clause that assigned to Tours Owens's interest "in all oil and gas leases in Coffey County, Kansas" owned by Owens, "whether or not [such leases] are specifically enumerated" in the assignment. The Kufahl lease, in which Owens had an interest, was not specifically described. Four years after Tours recorded the assignment Owens assigned her interest in the Kufahl lease to Burris, who had checked the public records and had obtained an abstract of title from a professional title searcher. Neither search revealed the existence of the omnibus clause in the Owens-to-Tours assignment. Kansas has a notice statute. In ***Luthi v. Evans,*** 223 Kan. 622 (1978), the Kansas Supreme Court held that the omnibus clause in the Owens-to-Tours assignment did not

give constructive notice to later purchasers of Owens's interest in the Kufahl lease. Burris prevailed, taking the Kufahl lease free of Tours's interest because it was not reasonable to expect a title searcher to locate and read every other conveyance ever made to Owens at any time conferring an interest in an oil and gas lease in Coffey County, Kansas. That would be a monumental task, greatly increasing the time and expense of title searches, which Kansas's recording act did not contemplate.

3. **Misspelled names:** Jurisdictions divide over whether a misspelled name in a recorded instrument gives constructive notice. All jurisdictions agree that if the misspelling is so significant that it does not even sound like the correct name, there is no constructive notice. Thus, "Kirk" for "Church" is inadequate, even though both names refer to a house of worship. The problem that divides jurisdictions is whether the misspelling that sounds like the correct name supplies constructive notice. The doctrine of *idem sonans* holds that a misspelling that sounds substantially identical to the correct name gives constructive notice. See 4 Amer. Law of Prop. §17.18, which adopts *idem sonans* so long as the misspelling begins with the same letter as the correct spelling. However useful *idem sonans* may be to establishing identity in other contexts, it is ***not*** *the prevailing rule* with respect to the issue of constructive notice from the real estate records.

★**Example:** Orr obtained a judgment against Elliott, but Orr's lawyer prepared the judgment by spelling Elliott's name as "Elliot." An abstract of the judgment, listing the judgment debtor as "Elliot" or "Eliot" was recorded in Orange County, California and indexed under those two names only. Elliott later conveyed property subject to the judgment lien to Byers and Orr sought to foreclose his lien against the parcel acquired by Byers from Elliott. In ***Orr v. Byers,*** 198 Cal. App. 3d 666 (1988), the California intermediate appeals court held that *idem sonans* did not apply in California, and thus that the recorded abstract did not give constructive notice of Orr's lien. Byers prevailed, but if he had had *actual notice* of Orr's lien he would have lost. The court reasoned that *idem sonans* would place an unreasonable burden on title searchers, especially given the uncertain contours of the doctrine in a highly multicultural society. Also, the problem can be more easily avoided by those who prepare instruments for recording.

4. **Ineligible instrument:** The usual ineligible instrument is an unacknowledged instrument that nevertheless appears on the record through the recorder's oversight. Because such an instrument is not eligible for recording, it is treated as unrecorded and thus does ***not give constructive notice*** of its contents. A subsequent purchaser will prevail unless she has ***actual notice*** of the prior conveyance or is under a duty to inquire and that inquiry would reveal the prior conveyance.

   a. **Defect not apparent on the face of the instrument:** Jurisdictions split on whether constructive notice is imparted by an apparently recorded instrument that is ineligible for recording due to some defect ***not apparent*** from the instrument itself. The majority rule is that an instrument with a defect on its face does ***not*** give constructive notice but an instrument with a hidden defect ***does impart*** constructive notice. See, e.g., *Metropolitan Natl. Bank v. United States,* 901 F. 2d 1297 (5th Cir. 1990); *Mills v. Damson Oil Co.,* 437 So. 2d 1005 (Miss. 1983). Because even the most diligent searcher of the records could not possibly have any inkling of a hidden defect, it makes little sense to rule that the instrument is not recorded and thus imparts no constructive notice, but some states do just that.

   ★**Example:** Caroline Messersmith and her nephew Frederick owned land in North Dakota as equal tenants in common. Caroline conveyed to Frederick her interest under a deed that

Frederick did not record, probably because the parties intended the deed to be a will substitute. Caroline, still in possession, conveyed a half interest in the mineral rights to Smith under a deed that Smith then took to a notary, who then spoke to Caroline by phone to ask whether the signature on the deed in front of the notary was hers. Upon being assured that the signature was Caroline's the notary affixed his notarial seal and acknowledgment, but this notarial acknowledgment was void because Caroline was not physically present to be certain that the document in front of the notary was in fact the deed she signed and not some other instrument. (It's possible that Smith could have forged her signature to a different deed which he then presented to the notary.) Smith then conveyed his mineral interest to Seale, who claimed to have no notice of Frederick's interest in the land. Only then did Smith record the Caroline-to-Smith deed; on the same day the Smith-to-Seale deed was recorded. Six weeks later Frederick recorded his Caroline-to-Frederick deed, and then brought suit to quiet title in his name. A trial court ruled that because Seale was a bona fide purchaser who lacked notice of the Caroline-to-Frederick deed and who recorded his deed from Smith and the Caroline-to-Smith deed before Frederick recorded, Seale should prevail under North Dakota's race-notice statute. On appeal the North Dakota Supreme Court, in ***Messersmith v. Smith,*** 60 N.W. 2d 276 (N.D. 1953), reversed, holding that no subsequent instrument in the chain of title passing through the secretly defective instrument is validly recorded. Given that the defect could not possibly be known to anyone carefully scrutinizing the record, it is hard to see what purpose was served by the ruling. Notarial acknowledgments are intended to prevent forgery, but there was no allegation of forgery and, absent that, the record should speak for itself.

G. Scope of protection afforded by recording acts: The protection afforded by a recording act is defined by the statute, as interpreted by the courts of the jurisdiction. Read the recording act carefully!

1. **Invalid conveyance:** Although recordation creates a presumption of validity, if in fact the instrument was invalid (e.g., it was forged or never delivered) recordation does not make it valid.

2. **Interests in land created by operation of law:** Recording acts only apply to ***conveyances*** (e.g., deeds, mortgages, grants, contracts) and ***liens*** created by operation of law (e.g., judgments). They do ***not apply to*** **interests *created by operation of law,*** such as adverse possession, prescriptive easements, or implied easements. Even though such interests are not of record, they are still valid and enforceable against subsequent purchasers.

3. **Bona fide purchasers:** Notice and race-notice recording acts are intended to protect the ***bona fide purchaser*** of property. A bona fide purchaser is one who gives ***valuable consideration*** to purchase the property and is ***without notice*** of a prior unrecorded conveyance. Race acts protect bona fide purchasers only to the extent they are the first to record. Obviously, a ***donee does*** **not receive protection** because a donee has not given value.

   a. **Shelter rule:** The protection given a bona fide purchaser under a recording act extends to all takers from the bona fide purchaser, even if such a taker knows of a prior unrecorded conveyance. This "shelter rule" is necessary to give the bona fide purchaser the full value of his purchase in reliance on the records. Part of that value is the ability to transfer good title to others.

Example: Ovid conveys to Alan, who does not record. Ovid then conveys to Barbara, a bona fide purchaser (BFP), who does record. Barbara then conveys to Charles, who knows all about the Ovid-to-Alan deed. Barbara will prevail over Alan in all three types of jurisdictions. In a notice or race-notice jurisdiction, Charles's knowledge of Alan's deed is irrelevant only because he is a taker from Barbara, a bona fide purchaser. Charles is "sheltered" by his vendor's status as a BFP.

4. **Mortgagees:** Mortgagees are generally treated as bona fide purchasers, either because the statute specifically includes them or because courts have interpreted the phrase *bona fide purchaser* to include them. But this only applies to the mortgagee who actually gives value (e.g., the loan proceeds) in return for the mortgage. In most states a mortgagee who receives a mortgage to secure a ***pre-existing debt*** without some detrimental change in its position (e.g., a reduction in the interest rate) has not acquired the mortgage for value and so is not a bona fide purchaser. See, e.g., *Gabel v. Drewrys Ltd., U.S.A., Inc.*, 68 So. 2d 372 (Fla. 1953). The contrary view is taken by the Uniform Simplification of Land Transfers Act, §§1-201(31) and 3-202.

5. **Creditors:** The status of creditors depends on the language of the act.

   a. **No protection:** If a recording act protects only "purchasers," a creditor is protected only if he should purchase the owner's interest at a judicial sale resulting from a successful lawsuit to collect the debt.

   b. **Specific protection:** If a recording act specifically protects "creditors" or "all persons" a creditor will receive protection without the necessity of a purchase at a judicial sale, but the scope of that protection is often limited by courts to ***judgment creditors*** or ***lien creditors.*** The rationale is that creditors do not generally rely on the state of the public land records in extending unsecured credit, but a creditor who has reduced a claim to judgment or lien intends to seize and sell the debtor's property. The judgment or lien creditor has an interest in the state of the record in order to know what his priority is with respect to the debtor's property.

H. Notice: To be protected under a notice or race-notice statute, a purchaser must be without ***actual or constructive notice*** of any prior unrecorded interests at the time the purchaser pays the consideration.

1. **Actual notice:** Actual notice is real, actual knowledge of the prior unrecorded transaction. Evidence beyond the record is necessary to prove actual notice.

2. **Constructive notice:** There are two forms of constructive notice: ***record notice*** and ***inquiry notice.***

   a. **Record notice:** The entire world, specifically including a subsequent grantee, is charged with constructive notice of the contents of the record. If an instrument is validly recorded, every subsequent grantee has constructive notice of it, and so cannot be a bona fide purchaser. However there can be argument over what constitutes the record, thus supplying constructive notice to subsequent purchasers.

      i. **"Wild deeds" — Outside the chain of title:** If a complete stranger to the record chain of title records a conveyance (a "wild deed"), the conveyance does not give constructive notice because it is not within the chain of title.

★**Example:** In Minnesota, a race-notice state, Hoerger conveyed a lot to Duryea & Wilson (D&W), who did not record. D&W then conveyed the lot to Board of Education, who did record, after which Hoerger conveyed the same lot to Hughes, who lacked notice of the conveyance from Hoerger to D&W. Hughes recorded. In ***Board of Education of Minneapolis v. Hughes***, 118 Minn. 404 (1912), the Minnesota Supreme Court decided that Hughes prevailed over the Board of Education because the conveyance from D&W to the Board of Education was outside the chain of title and did not impart constructive notice. At the time Hughes purchased from Hoerger, a diligent title search would reveal Hoerger to be the record owner. Even though the deed from D&W to the Board of Education was recorded first, it would appear to be a deed made by a complete stranger to the chain of title. Because the Hoerger-to-D&W link in the chain was not recorded a diligent searcher would never find the D&W-to-Board conveyance. See also ***Zimmer v. Sundell***, 237 Wis. 270 (1941).

ii. **Expanded chain of title — Deeds from common grantor:** Reciprocal implied covenants restricting land use may be implied by a developer's conveyance of property subject to express covenants burdening the developer's retained land (see Chapter 9), but such a covenant does not appear in the chain of title of the retained land, if it is conveyed without the implied covenant being made express. Does a deed by a developer to Lot 1, which imposes a use restriction on Lot 1 and all other lots retained by the developer (including Lot 2), impart constructive notice of the covenant to a later purchaser of Lot 2 from the developer? Note that the use restriction does not appear in the developer's deed to Lot 2. Jurisdictions split on this issue. Most conclude that the burden on title searchers to locate and read all deeds out from a common grantor is unreasonable. See, e.g., *Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc.*, 267 N.Y. 242 (1935). A few states conclude that purchasers of property from a common grantor have constructive notice of the contents of all deeds out from a common grantor, thus imposing the practical burden of searching all deeds out from a common grantor.

★**Example:** Gilmore, a developer and subdivider, conveyed a lot to Guillette under a recorded deed that restricted the lot's use to a single-family residence, and recited that "the same restrictions are hereby imposed on each of [the] lots now owned by seller." This was effective to impose the single-family residence use restriction on all of Gilmore's remaining lots. Later, Gilmore conveyed a restricted lot to Daly under a recorded deed that made no mention of any restrictions. Daly obtained a building permit to construct 36 apartment units on the lot. Other owners of lots in the development (all of whom obtained title from Gilmore) sought to enjoin Daly from violating the single-family residence use restriction. In ***Guillette v. Daly Dry Wall, Inc.***, 367 Mass. 355 (1975), the Massachusetts Supreme Judicial Court held that Daly acquired the lot with constructive notice of the restriction even though the restriction was not in the chain of title from Gilmore to Daly. The *Guillette* rule requires a purchaser to expand his search of title to include all conveyances made by the grantor of other adjacent property he owned, in order to be certain that the grantor did not burden his remaining property with a use restriction contained in a deed to a third party. Jurisdictions rejecting this rule reason that this search burden is not reasonable.

iii. **After-acquired title:** Suppose a grantor conveys title without having title, but then later acquires title. Under the after-acquired title doctrine (see Chapter 6) the title "shoots

through" the grantor to the grantee. But suppose the grantor conveys title twice, once before acquiring it and once afterward to a person without actual notice of the prior conveyance, and both conveyances are immediately recorded. Does the first conveyance, made at a time when the grantor has never been a grantee (and thus will not be found in the usual backwards-in-time search by grantees) impart constructive notice? Or should a title searcher be obligated to search a period earlier in time than the grantor acquired title, on the possibility that the grantor conveyed away his title before he ever got it? The majority rule is that the first conveyance does ***not impart constructive notice*** because it is not reasonable to expect title searchers to search the records for the time period prior to the grantor's acquisition of title on the off chance that the grantor might have conveyed his title before he received title.

Example: The United States owned a tract of land that Lowery occupied under a statutory right of temporary possession, a latter-day version of the Homestead Act under which Lowery could ultimately acquire title if he performed certain acts of improvement over a specified time period. While Lowery was in possession but before he had any title to the land Lowery conveyed his interest in the tract to Horvath, who recorded the deed. Later, after the United States had conveyed its title in the land to Lowery (and Lowery had recorded the deed from the United States), Lowery conveyed the same property to Sabo, who recorded his deed. In *Sabo v. Horvath*, 559 P. 2d 1038 (Alaska 1976), it was held that Sabo prevailed over Horvath, because Horvath's deed was outside the chain of title. A diligent title searcher would go back in time until he found the conveyance from the United States to Lowery in the grantee index, and would then search the grantor index (under Lowery) forward in time to see if Lowery had made any other conveyances, but could not reasonably be expected to search the grantor index ***before Lowery had title.***

A few old cases apply after-acquired title doctrine uncritically and hold that title searchers must examine the grantor index before the time each record owner acquired title in order to see whether the owner conveyed title before he acquired it. See, e.g., *Tefft v. Munson*, 57 N.Y. 97 (1874); *Ayer v. Philadelphia & Boston Face Brick Co.*, 159 Mass. 84 (1893). By requiring a more extensive search these cases expand the scope of the chain of title and such expanded searches are expensive, especially if the chain of title is long.

iv. **Deed recorded after grantor has parted with record title:** Must a title searcher search the grantor index forward past the point that the record discloses he has already parted with title? If the first recorded conveyance is to a bona fide purchaser (BFP) and the shelter rule applies there will be no need to do so, but if the first recorded conveyance is ***not*** to a BFP (perhaps it is to a donee or a purchaser with actual notice of a prior unrecorded conveyance) the question becomes more complicated. Jurisdictions split on this issue.

Example: Ovoid, owner of Blackacre, conveys to Alice, who fails to record. Then Ovoid conveys Blackacre to Ben, who knows of the Ovoid-to-Alice conveyance. Ben records his deed. Alice then records her deed from Ovoid. As between Alice and Ben, Alice will prevail because Ben is not a BFP without notice. But then Ben conveys to Charles, who pays value and is ignorant of the Ovoid-to-Alice conveyance. Charles records. Who prevails, Alice or Charles? The answer depends on whether the Ovoid-to-Alice deed

although recorded later than the Ovoid-to-Ben deed, gives constructive notice to Charles, a later BFP. About half the states rule in favor of Alice, holding that the chain of title includes all instruments of record up to the moment the subsequent purchaser acquires title, even though they may be recorded after a grantor has first parted with record title. In these jurisdictions, a diligent title searcher must shoulder the huge burden of searching the grantor index forward to the present for each person who ever owned the property. See, e.g., *Woods v. Garnett*, 72 Miss. 78 (1894); *Westbrook v. Gleason*, 79 N.Y. 23 (1879); *Mahoney v. Middleton*, 41 Cal. 41 (1871); *Angle v. Slayton*, 102 N.M. 521 (1985). The other half of the states rule in favor of Charles, reasoning that a title searcher should be excused from further search forward in time after he finds a recorded conveyance of title from the grantor to another person. Thus, once a searcher has found the Ovoid-to-Ben deed, he need not search any further forward in time. In these jurisdictions the Ovoid-to-Alice deed is outside the chain of title and provides no constructive notice. See, e.g., *Morse v. Curtis*, 140 Mass. 112 (1885); *Day v. Clark*, 25 Vt. 397(1853).

v. **Prior deed recorded after partial payment by later purchaser:** Courts are much vexed over the following problem: Owner conveys to Prior Purchaser, who fails to record the deed; Owner then conveys to Later Buyer (who lacks notice of the prior conveyance) under a contract calling for a down payment and subsequent payments; Later Buyer records his deed but before making the final payment learns of the prior conveyance. Who should prevail: Prior Purchaser because Later Buyer was on notice of the prior claim before he fully paid (depriving Later Buyer of BFP status) or Later Buyer because he lacked notice at the time he entered into the transaction? The traditional answer is to prefer Prior Purchaser and employ ***restitution*** as the remedy: Give the property to Prior Purchaser on condition that he reimburse Later Buyer for the payments made by him. The alternative answer is to give Later Buyer the ***benefit of the bargain:*** Award the property to Later Buyer but require that the remaining payments be made to Prior Purchaser rather than Owner.

★**Example — Restitution:** Jacula conveyed a lot to Daniels and in the contract of sale gave Daniels a right of first refusal to purchase another parcel contiguous to the first lot (the "Contiguous Parcel"). The contract was not recorded. Later, Jacula conveyed the Contiguous Parcel to Zografos for $60,000, under an installment sale contract calling for a $10,000 down payment and later installments. Zagrofos paid Jacula another $30,000 before learning of Daniels's prior claim, made the final payment of $20,000, and then received and recorded a deed. Daniels sought and received specific performance of his purchase option. In ***Daniels v. Anderson***, 162 Ill. 2d 47 (1994), the Illinois Supreme Court affirmed, reasoning that Zografos was protected by his lack of notice only for the payments made before he received notice, and concluding that an award of the property to Daniels with a requirement that Daniels reimburse Zografos for the total of his payments to Jacula was the best method to deal with the mischief caused by Jacula.

★**Example — Restitution:** Thomas and his son Charles owned a house as equal tenants in common. Thomas then conveyed his interest in the house to Mary, his daughter. A week later Thomas conveyed the same interest to Charles in return for $1,000 and Charles's promise to care for Thomas for the remainder of his life. Charles, who was unaware of the prior deed to Mary, recorded his deed. A few months later Mary recorded

her deed. Charles cared for Thomas until Thomas's death. Mary claimed a half interest based on her prior deed; Charles claimed to be a subsequent purchaser without notice of Mary's prior claim. In ***Alexander v. Andrews***, 135 W. Va. 403 (1951), the West Virginia Supreme Court held that Charles was protected only to the extent of the $1,000 he paid before Mary recorded. The value of his care of Thomas after Mary's recording was expended with constructive notice of Mary's claim.

★**Example — Benefit of the bargain:** The Lewises agreed to purchase a house from Shipley for $2.3 million. Before the closing Fontana Films filed for recording a *lis pendens* on the house. A *lis pendens* is a notice of pending litigation in which the plaintiff claims an ownership interest in the subject property; once duly recorded it is a lien on title and any subsequent purchaser takes subject to the plaintiff's claim. On February 28, 1992 the Lewises paid Shipley $350,000 down, gave Shipley their note for $1,950,000, and received and recorded a deed. On February 29, 1992 the *lis pendens* was indexed, the magic moment of recording in California; from then on it constituted constructive notice. (Note that because California is a race-notice state Fontana lost its priority to the Lewises because they recorded first without notice.) In March 1992 the Lewises paid Shipley the balance due on their note and then spent another $1 million or so on renovations. (This is Southern California.) Only in September 1993, when Fontana Films served them with summons and complaint, did the Lewises acquire *actual notice* of Fontana's claim but, of course, they had *constructive notice* of Fontana's claim since February 29, 1992. The Lewises sued to remove the *lis pendens* and quiet title in their names. A trial court denied this relief but, in ***Lewis v. Superior Court***, 30 Cal. App. 4th 1850 (1994), the California intermediate appeals court reversed. Limiting an 1895 California Supreme Court opinion applying the traditional rule to its specific facts, the court of appeal thought that the Lewises should get the benefit of their bargain for four reasons: (1) the traditional rule is inconsistent with modern expectations of a buyer who makes part payment and binds himself irrevocably to pay the rest of the purchase price; (2) the Lewises lacked actual notice throughout the saga and application of the traditional rule to constructive notice "penalizes a completely innocent purchaser for simply living up to his payment obligations"; (3) equity requires that the wrongdoer's interests be sacrificed first and, although the court did not say so, as between the trio involved in ***Lewis***, inasmuch as Shipley had been paid, the loss should fall on the party best able to avoid it — Fontana, because it could have recorded its *lis pendens* in timely fashion so that it would have been of record when the Lewises closed their deal with Shipley; and (4) the traditional rule provides an anomalous and unwarranted benefit to cash buyers (or those who finance their purchase with third party lenders rather than by installment sale or purchase money mortgages from the seller).

b. Inquiry notice: In most states a subsequent purchaser has an obligation to make reasonable inquiries, and is charged with knowledge of what those reasonable inquiries would reveal. The following subsections explore some of the circumstances that trigger a duty to inquire.

i. Record reference to an unrecorded instrument: If a recorded instrument refers expressly to an unrecorded instrument, a purchaser is under an obligation in many states to inquire about the substance of the unrecorded instrument to which the record refers.

★**Example:** In 1922 Susan Harper conveyed her Georgia farm to Maude Harper for life, remainder to Maude's children. The deed was mislaid and thus not recorded. In 1928, Susan having died, Susan's children executed and delivered a quitclaim deed to Maude by which they conveyed any interest they might have in the farm to Maude. The 1928 deed, which contained a recital that it was "to take the place of the deed made and executed by Mrs. Susan Harper during her lifetime," was duly recorded. In 1933 Maude executed a deed of trust of the farm to Ella Thornton to secure a $50 loan. Thornton foreclosed after default and received a sheriff's deed, recorded in 1936. Through a succession of recorded conveyances from Thornton title to the farm was vested in 1955 in the Paradises. In 1957 the mislaid 1922 deed was found and recorded. Upon Maude's death in 1972 her children sued to recover possession. A trial court ruled for the Paradises but in ***Harper v. Paradise,*** 233 Ga. 194 (1974), the Georgia Supreme Court reversed. Paradise could not rely on a Georgia statute protecting the title of innocent purchasers from heirs or apparent heirs who lack actual notice of prior claims because the recitals in the 1928 deed made specific reference to an unrecorded 1922 deed, thus negating the inference that otherwise would exist that the makers of the 1928 deed were conveying their inherited interest. Adverse possession was unavailing for Paradise because their entry was against Maude and all Maude owned was a life estate; thus the limitations period did not begin to run until Maude's death in 1972. Although the 1928 deed, upon which the Paradises' title was founded was recorded before the 1922 deed, upon which Maude's children based their claim, Georgia is a race-notice state and the court concluded that the recitals in the 1928 deed placed a duty upon subsequent purchasers to inquire of Maude to determine the details of the unrecorded deed referred to in the 1928 deed. Thus, the Paradises had constructive notice of the prior claim when they acquired title and so lost.

This rule is not universally followed, especially when the issue is whether a subsequent taker should be charged with inquiry notice by a recorded memorandum of a lease that does not set forth the specifics of the lease. Compare *Mister Donut of America, Inc. v. Kemp,* 368 Mass. 220 (1975) (inquiry notice, subsequent taker charged with constructive notice of lease contents), with *Howard D. Johnson Co. v. Parkside Dev. Corp.,* 169 Ind. App. 379 (1976) (no inquiry notice and thus no constructive notice of the lease contents).

ii. Possession: Most states impose a duty to inquire of whoever is in possession of the subject property.

★**Example:** Choctaw Partnership, a developer, built a condominium complex financed by construction loans secured by a recorded mortgage, later assigned to Eglin National Bank. Then Choctaw sold Unit 111 to Waldorff under a contract of sale that was unrecorded, but sufficient to vest in Waldorff equitable title to Unit 111. Waldorff moved in and occupied Unit 111 for 11/2 years, then moved out but kept furnishings in the unit and asserted exclusive possessory rights to the unit. Choctaw borrowed additional money from Eglin secured by a recorded mortgage to a number of condominium units, including Unit 111. Then Choctaw, which owed Waldorff money, executed and delivered a deed to Unit 111 in return for Waldorff's cancellation of the debt. Waldorff recorded the deed. Choctaw then defaulted on its notes to Eglin and Eglin sought to foreclose on Unit 111. The trial court ruled that Eglin's prior recorded mortgage liens had priority over Waldorff's interest, but in ***Waldorff Insurance & Bonding, Inc. v. Eglin Natl. Bank,*** 453 So. 2d 1383 (Fla. App. 1984), the Florida intermediate

appeals court reversed. Because Waldorff was in possession Eglin was on inquiry notice that Waldorff might have a prior unrecorded claim. Even though Waldorff, as the party in possession, in theory might be the party who could avoid the problem by recording it is unlikely that the contract of sale was notarized and capable of recording. Sellers under installment sale contracts dislike making such contracts recordable because they wish to avoid any clouds on title until the purchase price is fully paid.

If inquiry would reveal that the possessor occupies under an unrecorded conveyance from the record owner the subsequent purchaser has constructive notice of the claim by virtue of this doctrine of inquiry notice. See, e.g., *Miller v. Green*, 264 Wis. 159 (1953) (inquiry notice of a prior unrecorded contract of sale to a farm predicated upon the later buyer's knowledge of the prior purchaser's acts of fertilizing and plowing the farm in November, time when only owners are apt to be working their land). There are various permutations on the inquiry notice theme: Some states limit the obligation to inquire to instances where the possession is by a stranger to the record title; others limit inquiry to instances where the later purchaser has actual knowledge of the existence of a possessor.

iii. **Character of neighborhood:** As discussed in Chapter 9, reciprocal implied covenants restricting land use may also be implied by a uniform development scheme undertaken by a common owner/developer of property. In states that recognize implied reciprocal covenants from a common scheme, a purchaser is under a duty to inquire about the deeds out from a common grantor, deeds which may establish the common scheme, if the character of the neighborhood suggests such a common scheme. The leading case is ***Sanborn v. McLean***, 233 Mich. 227 (1925).

iv. **Immediate grantee of a quitclaim deed:** A few jurisdictions hold that a conveyance by quitclaim deed is inherently suspicious because it raises doubts about the grantor's belief in the validity of his own title. Thus, the immediate grantee of a quitclaim deed is obligated to inquire into the actual state of the grantor's title, and cannot simply rely on the public records. But this is ***not the majority rule;*** in most states, the mere fact that a conveyance is by quitclaim deed does not trigger inquiry notice. See 6A Powell, The Law of Real Property ¶905[1][B] (rev. ed. 1992).

3. **Tract index: A solution to chain of title problems?** Grantor-grantee indexes, which are by far the most common form of index to public land records in the United States, spawn a variety of problems with the chain of title which have been discussed above. Many of these problems will not occur with a tract index, but most jurisdictions do not maintain tract indexes, and it would be very expensive to find and index, by tract, all of the prior transactions presently indexed by grantor and grantee.

I. **Marketable title acts:** Marketable title acts are the principal legislative response to the fact that, like all human systems, the recording system is imperfect. Eighteen states have adopted marketable title acts, which are designed to limit the relevant chain of title to some specified period of recent history -- from 22 to 50 years in the past. If a chain of title can be traced back to a root of title older than the period prescribed by the marketable title act (say 40 years) most claims based on some older instrument are barred by the statute, unless they are incorporated into a later instrument recorded during the marketable title period.

Example: Blackacre is located in a state with a 40-year marketable title act. In 1953 Elvis, the record owner of Blackacre, conveyed to Frank an easement for parking on Blackacre, which

Frank recorded. George purchased Blackacre from Elvis, via a deed recorded in 1955. In 1964 George conveyed and recorded an easement for cable television access to Cablecorp. The present record owner is Lottie, who purchased from George, via a deed recorded in 1970. The deed from Elvis to George is the root of title, because it is more than 40 years old. If the state's act makes no exception for older claims, the easement in Frank is extinguished by the marketable title act but the easement in favor of Cablecorp is valid because it is of record within the past 40 years. Note that in 2010 the root of title will be updated to the George-to-Lottie deed in 1970, and that will eliminate the easement in favor of Cablecorp, which dates from 1964. This presumes also that none of the post-1953 deeds refer to Frank's parking easement and that none of the post-1964 deeds refer to the Cablecorp easement.

1. **Validity of pre-root interests:** Unless the act makes a specific exception for pre-root interests pre-root interests are invalid unless (1) they are referred to in the root of title itself or some post-root recorded instrument, or (2) they are recorded anew during the marketable title act period. In the preceding example, Frank and Cablecorp could keep their easements alive by re-recording them every 40 years.

   a. **Statutory exceptions:** The interests excepted from marketable title acts vary. Most statutes except most easements, claims of the current possessor, restrictive covenants, and, sometimes, mineral rights. These exceptions undercut the utility of marketable title acts.

III. TITLE REGISTRATION — THE TORRENS SYSTEM

A. **Introduction:** Title registration is a substitute for recording. Instead of recording evidence of title, which is what a recording system does, a registration system makes a certificate of title the exclusive and definitive title. Title registration was invented in Australia in 1858 by Sir Richard Torrens, whose name is commonly used to describe the system. For a registration system to work there must first be a final and conclusive determination of ownership, binding on all the world. This requires a court proceeding to cut off all rival claims. Then the definitive title is registered and indexed in a tract index. When ownership changes, the certificate of title is canceled and a new one issued. The Torrens system is widely used in the United Kingdom, Canada, Australia, and New Zealand. Title registration is an option in 11 American states but is not much used.

B. **Adjudication of title:** To implement title registration it is necessary to adjudicate title, in order to cut off all possible rival claims. The owner must bring an *in rem* action that is functionally identical to a quiet title action. Notice must be given to all persons who might have any conceivable claim to title or an interest in the property. At the conclusion of this proceeding, the court will issue a certificate of title that declares the definitive title to the property. It will state the owner and itemize as "memorials" all encumbrances upon the property (e.g., mortgages, easements, covenants, liens, etc.).

   1. **Scope of the certificate of title:** The certificate of title ***is title.*** It is binding on the entire world and cuts off all interests not included as memorials on the certificate, except for those discussed in this section. Otherwise, the certificate as registered in the public records is conclusive title. It is thus not possible to acquire title by adverse possession against a registered title. However, the exceptions which follow are significant and undercut the utility of title registration.

      a. **Federal government claims:** States lack the power to adjudicate claims of the federal government unless the federal government consents to such adjudication. Thus, a certificate

of title does not eliminate federal tax liens or any other interest that might be claimed by the federal government.

b. **Statutory exceptions:** Most of the American Torrens statutes except from the certificate of title any interests or claims held by persons in actual possession, mineral claims, visible easements, utility or railroad easements, public thoroughfares or other claims of state or local governments. These exceptions make the certificate of title a lot less definitive and conclusive than it purports to be.

c. **Defective notice in initial adjudication:** If a person with an interest in the property does not receive constitutionally acceptable notice of the initial title adjudication proceeding the certificate of title that results is not effective to bar the person's interest. The due process clause of the Fourteenth Amendment requires that governments give people adequate notice and opportunity to be heard before taking their property away.

d. **Fraud:** If fraud or deceit is employed to procure the initial certificate of title it can be set aside by the true owner or, alternatively, the registered owner will be held to hold in constructive trust for the true owner. It is not clear whether the true owner could obtain the same remedies against a bona fide purchaser of registered title from the initial and deceitful "owner." If the initial certificate of title is validly obtained, subsequent fraud that results in a new certificate upon which a bona fide purchaser relies is not sufficient to cancel the title held by the BFP.

Example: Arnold adjudicates title to Blackacre and obtains a certificate of title. Then Arnold gives his copy of his certificate to his brother, Bill, who forges Arnold's signature to obtain a new registered title in Bill's name. Then Bill sells Blackacre for value to Jane, who knows nothing of Bill's forgery. Jane has a valid registered title that cannot be upset by Arnold.

e. **Not bona fide purchaser:** Courts in many Torrens jurisdictions have preserved the rule that a person who takes with notice of some off-record claim or interest takes subject to that claim. Thus, a purchaser of registered title who actually knows of some interest not included as a memorial on the registered title is often held to take subject to that interest. See, e.g., *Butler v. Haley Greystone Corp.*, 347 Mass. 478 (1964).

C. Public records and title transfers in the Torrens system

1. **Public records:** Once a registered title has been adjudicated the official certificate of title is given to the recorder for preservation and a copy given to the owner. The recorder will then maintain a tract index of registered titles and will enter in the tract index the certificate of title. A title searcher simply finds the property in the tract index and reads the certificate of title. If any memorials are noted on the certificate (e.g., mortgages) the searcher will then look up the mortgage instrument to read it fully.

2. **Title transfers:** The holder of registered title may transfer title by surrendering his certificate, together with a deed or other instrument conveying title, to the recorder. The recorder will then cancel the old registered title and issue a new one in the name of the purchaser. If a holder of registered title mortgages the property, the mortgage is simply added as a memorial. If the mortgage is then paid off, the memorial is removed.

3. **Errors by the recorder:** Because the registered title *is title*, errors by the recorder are especially significant. If, for example, the recorder fails to include a mortgage as a memorial on the certificate of title the mortgage is extinguished. Or, if the recorder means to register title to Blackacre in Jones but actually registers title to Blackacre in Smith, Blackacre is owned by Smith, not Jones. This is a serious flaw; Torrens systems deal with this by providing for compensation to those who lose their interests due to recorder error, but the funds provided for compensation "are often absurdly small in comparison to . . . potential liability." Nelson, Stoebuck, and Whitman, Contemporary Property 1004 (1996). Moreover, governments use their sovereign immunity to avoid liability except to the extent of these meager compensation funds. Understandably, this glaring flaw has been a strong inhibition to acceptance of Torrens registration.

D. **The practical realities of Torrens registration:** Torrens registration has not caught on in the United States for three good reasons: initial cost, lack of comprehensiveness, and the risk of uncompensated recorder error.

1. **Cost:** The initial cost of title adjudication is high and most of its benefits are reaped in the form of lower costs of transferring title. There is little incentive for the first owner to incur costs for the benefit of later owners. A developer, however, might find it advantageous to register title for an entire subdivision, in order to minimize the title transfer costs as the subdivided lots are sold, and because the initial cost can be spread over the entire subdivision.

2. **Lack of comprehensiveness:** The exceptions that riddle the purported global effect of a certificate of title further dampen the incentive to incur the cost of obtaining a certificate that is not as conclusive as it is supposed to be.

3. **Risk of uncompensated error:** This problem could be corrected by governmental assumption of liability for all recorder errors, but it is probably politically and practically impossible for financially hard-pressed state and local governments to do so.

E. **Economic theory and Torrens registration:** Under Torrens registration the possessor of the registered title prevails as against a claimant to title however meritorious the claim might be in the absence of Torrens registration. Under the recording system, a meritorious claimant prevails against the possessor. This is of consequence if possessors attach a subjective value to their property, such that they value continued possession more than its market value to prospective purchasers. Many possessors (especially of residences) do attach subjective value to their homes. Under these conditions Torrens is better at accomplishing "exchange efficiency" — ensuring the property ends up in the hands of the party who values it more highly — *if transaction costs of reassigning the right are high.*

Example: Arthur owns Blackacre and would not part with title for less than $100,000. Nobody else would pay more than $70,000 for Blackacre. Arthur's subjective value of Blackacre is $30,000. Bertha, a meritorious claimant to Blackacre, would happily sell Blackacre for $70,000 (its market value) once she secures possession. Under the recording system, Bertha would prevail and Arthur would appear to lose his subjective value. Because Arthur values Blackacre more highly than Bertha, he would presumably pay Bertha a price somewhere between $70,000 and $100,000 to retain possession. Only if transaction costs exceed $30,000 (the total potential gains from trade) would the reassignment of the right back to Arthur not occur. Under the Torrens system, Arthur would prevail and reap the full subjective value of $30,000. If transactions costs are higher than the subjective value, Torrens produces an

"exchange-efficient" outcome. If not, Torrens simply ensures that possessors of registered title reap all the gains, thus essentially distributing income to Torrens holders from meritorious claimants.

Another measure of efficiency is "development efficiency," or the maximization of incentives for socially productive use of land. In theory, because Torrens ensures that there will no claimants, the risk of development is lowered and "development efficiency" is increased under the Torrens system. This conclusion, however, is undercut by the fact that title insurance to indemnify against claims under the recording system is readily available at a reasonable cost, and because the exceptions to Torrens registration are large enough to make it a practical necessity to obtain title insurance for a development even if the developer possesses Torrens title.

F. Possessory title registration: An innovative variant on the Torrens system is to permit landowners to register their title for a nominal fee, but receive a certificate of title that is good only from that day forward. Any claims or interests affecting the property that predate the issuance of the certificate of title are fully preserved. The certificate is not initially of much value but, over time, old claims or interests might disappear. When coupled with a statute of limitations as to old claims (patterned after the marketable title acts) the certificate of title issued under a possessory title registration system would become conclusive after the elapse of the limitations period. This would eliminate the initial cost objection to Torrens registration but, by itself, does nothing to eliminate the problems of lack of comprehensiveness or risk of uncompensated recorder error. Minnesota is the only state to have adopted possessory title registration as a voluntary option.

IV. TITLE INSURANCE

A. Introduction: Title insurance is the most common form of title assurance in the United States. Title insurance involves the issuance of an insurance policy to a person — usually either a mortgage lender or a purchaser of property — by which the insurer warrants that title is as stated in the policy. The policy is a personal contract between the insurer and the person who buys the policy. Title insurers perform their own examination of the public land records in order to issue an insurance policy. They either employ lawyers to search the public records or they maintain their own duplicate set of records, identical to that found in the recorder's office, but often supplemented by a tract index of their own creation.

B. Coverage: The scope of coverage is determined by the contract of insurance. The usual policy insures only that the title stated in the policy is a good record title. The policy does not insure against claims or interests that are not part of the record. Essentially, the insured has a claim under the policy only if someone else asserts a claim based on the public records inconsistent with the record title as stated in the policy.

1. **Duty to disclose defects in title:** Courts are beginning to impose on title insurers a duty to disclose anything they know about the parcel in question that is material or important, breach of which is actionable in tort.

★**Example:** Kosa acquired a parcel of land from Aiello under a deed that stated the total acreage of the tract was 12.486 acres, based on a survey done by Schilling. Walker Rogge agreed to purchase the tract from Kosa, after Kosa had shown Rogge a survey done by Price Walker that stated the tract consisted of 18.33 acres. The Kosa-to-Rogge contract stated that the acreage was

19 acres, more or less, and stipulated that the purchase price was to be reduced by $16,000 per acre if the tract was in fact smaller in area. The Kosa-to-Rogge deed referred to the Price Walker survey but did not state the acreage. Rogge hired Chelsea Title to examine and insure title. Chelsea did so, issuing an insurance policy that excepted from its coverage "matters which could be disclosed by an accurate survey." At the time Chelsea issued the policy it had in its files a copy of the Aiello-to-Kosa deed, stating the tracts's area to be 12.486 acres. In fact, the tract's acreage was 12.43 acres, close to the Schilling survey of 12.486 acres but significantly less than the Price Walker survey of 18.33 acres. Rogge sued Chelsea for damages on the title insurance policy and also for Chelsea's negligence in failing to disclose the acreage figure stated in the Aiello-to-Kosa deed. A trial court held that Chelsea was liable on its insurance contract because the quoted exception was too vague to apply to these facts and that Chelsea had no liability in tort because it had not assumed a duty to search title and disclose the results of its title search. In ***Walker Rogge, Inc. v. Chelsea Title & Guaranty Co.,*** 116 N.J. 517 (1989), the New Jersey Supreme Court reversed on the first point, upheld the second finding, but remanded for consideration of a different tort issue. First, the contract exception was clear enough to exempt Chelsea from contractual liability for an acreage shortfall that an accurate survey would reveal. Second, there was substantial evidence to support the trial court's finding that Chelsea had undertaken a duty only to ***insure*** title, and that any ***search*** of title was for its own benefit and ancillary to its duty to insure. However, the court remanded for a determination of whether Chelsea had assumed a duty to assure Rogge of the correct acreage of the tract. Facts suggestive of that duty included the following: (1) Chelsea had twice before insured title to the tract and had in its files a copy of the Aiello-to-Kosa deed stating the area at 12.486 acres, and (2) Chelsea handled the closing at which the purchase price was based on the tract's acreage. Under these circumstances, perhaps Chelsea had a duty to reveal to Rogge what it knew (or should have known).

About half the states impose a duty on title insurers to disclose all defects uncovered by the insurer's title search. Thus, if a title insurer issues an insurance policy excluding "encroachments not of record" but discovers an actual, unrecorded encroachment, it has insured only good record title but still has an obligation to reveal the actual encroachment it has discovered.

2. **Marketable title and encumbrances:** Although title insurance policies typically insure against any loss caused by ***defects in title,*** or ***liens*** or ***encubrances upon title,*** or ***unmarketability of title,*** courts limit the scope of this coverage to ***title*** rather than extending it to cover palpable diminutions of ***value*** that affect marketability but have no bearing on the clarity or certainty of ownership.

★**Example:** Lick Mill Apartments purchased and developed a portion of a 30-acre tract that had formerly been the site of chemical processing plants and warehouses. Chicago Title insured title against defects, liens, encumbrances, and unmarketability. Prior to insuring title Chicago Title hired Carroll to inspect the site and Carroll reported the "presence of certain pipes, tanks, [and] pumps." When title was insured the records of various government agencies disclosed the "presence of hazardous substances" on the property, but it was not clear whether those records were inspected by or known to either Lick Mill or Chicago Title. After Lick Mill took title it was required to expend considerable sums to remove and clean up the toxins on the site. Lick Mill then sought to recover those costs from Chicago Title, alleging that the toxins made title unmarketable and constituted an encumbrance on title. In ***Lick Mill Creek Apartments v. Chicago Title Insurance Co.,*** 231 Cal. App. 3d 1654 (1991), the California intermediate appeals court rejected these contentions. The court distinguished ***unmarketable title*** and

unmarketable land: the former consists of a serious problem with the claim to ownership, the latter consists of a serious problem with the physical condition or location of the property. Lick Mill's *title* was impeccable but the toxic wastes present on the land made the property unsaleable. As to encumbrances, while the toxic wastes did produce continuing liability of any owner to clean up the mess that fact was rooted in the property's physical condition, not some continuing defect of the claim to ownership that is title. Note that in ***Lohmeyer v. Bower*** (Chapter 6) a present violation of a zoning law constituted unmarketable title sufficient to enable a buyer to rescind his purchase contract, but in ***Frimberger v. Anzellotti*** (Chapter 6) a present violation of a zoning law did not constitute unmarketable title for purposes of breach of the covenant of general warranty. As with ***Frimberger,*** the difference in result is due to the *ex post* or *ex ante* posture of the problem. When the deal is still inchoate (***Lohmeyer***) it makes sense to allow it to unravel, for that permits avoidance of damage before it hardens, but when it is done (***Frimberger*** and ***Lick Mill***) a finding of unmarketable title shifts costs, perhaps unfairly. Diligent investigation on Lick Mills's part would have enabled it to avoid the loss; shifting the loss to Chicago Title would greatly increase the scope of liability for title insurers, thus raising the cost of title insurance generally and probably imperiling the continuing existence of some insurers.

3. **Exclusions:** Policies typically contain specific exclusions from coverage, including such items as ***liens not on the record*** (e.g., mechanics' liens), ***off-record interests asserted by persons in possession*** (e.g., adverse possession), ***boundary disputes*** (e.g., encroachments or other boundary disputes not of record but which might be revealed by a survey), ***off-record easements or servitudes*** (e.g., implied easements or covenants or prescriptive easements), and ***government land use regulations.***

4. **Measure of damages:** A title insurer is generally liable for the difference in value of the property with and without the insured-against defect, up to the maximum liability specified in the policy. This is true regardless of the amount paid for the property.

   Example: Jonah purchased Blackacre for $50,000 and obtained Titleco's insurance policy for $20,000 insuring good record title. It turns out that Watts, an adjacent landowner, has a record easement over Blackacre for access. If the value of Blackacre without the easement is $65,000 and the value of Blackacre with the easement is $40,000, Jonah has suffered $25,000 in damages, but can only recover $20,000 (the policy limits), even though the diminution in value from Jonah's purchase price is only $10,000. This rule makes sense because Jonah is entitled to the full benefits of his excellent bargain.



Exam Tips on ASSURING GOOD TITLE TO LAND

- Recording acts provide ample opportunity for creating a complicated exam question. First, be certain you understand how each of the types of acts works and recognize which is which — your professor may simply quote a statute and not tell you what it is. Second, be sure you understand

what constitutes notice. Actual notice is easy; the problems arise with constructive and inquiry notice. Constructive notice is supplied by the chain of title from the record, and that raises the question of what constitutes the chain of title and what is in the record. States differ on these points; you need to be certain that you understand the policy arguments that surround these differences. Third, be sure you understand the scope of protection afforded by the acts. Note the shelter rule, which protects transferees from bona fide purchasers who are protected, even if the transferee might independently lack protection.

- A marketable title act problem can easily be combined with a recording act problem. The two types of acts perform different functions.
- Title insurance issues typically revolve around the scope of the insurance contract. While your professor may test on this, typically neither this nor registered title is likely to be a significant examination issue.

barbri

Review

New York State Bar Review - 2007

Outlines:

PERSONAL PROPERTY
REAL PROPERTY
CONSTITUTIONAL LAW
NEW YORK TRUSTS
NEW YORK WILLS

III. FIXTURES

A. IN GENERAL

A "fixture" is a chattel that has been so affixed to land that it has ceased being personal property and has become part of the realty. For example, S and B contract to sell and buy a house. Before vacating, S removes a "built-in" refrigerator. B claims that the item was "part of the house." Is the refrigerator a "fixture"? If so, B is entitled to its return or appropriate compensation.

It is important in dealing with "fixture" problems to distinguish between ***common ownership*** cases and ***divided ownership*** cases. Courts treat them differently even though they often purport to apply the same tests. "Common ownership" cases are those in which the person who brings the chattel onto the land owns both the chattel and the realty (*e.g.*, X installs a furnace in her own home). "Divided ownership" cases are either ones where the person who owns and installs the chattel does not own the land (*e.g.*, T installs a furnace in her rented home, which belongs to L); or the person owns the land but does not own the chattel (*e.g.*, it is subject to a security interest held by the seller). In addition, there are cases involving more than two persons (*e.g.*, conflicting claims are made by the person having a security interest in the chattel and the mortgagee of the land).

B. CHATTELS INCORPORATED INTO STRUCTURE ALWAYS BECOME FIXTURES

In both common ownership and divided ownership cases, where the items become incorporated into the realty so that they lose their identity, they become part of the realty. Examples include bricks built into a building or concrete poured into a foundation. Similarly, where identification is possible, but removal would occasion considerable loss or destruction, the items are considered fixtures, *e.g.*, heating pipes embedded in the wall or floor of a house.

C. COMMON OWNERSHIP CASES

1. Annexor's Intent Controls in Common Ownership Cases

In all common ownership cases where a chattel is not incorporated into a structure, whether an item is a "fixture" (*i.e.*, part of the realty) depends upon the ***objective intention*** of the party who made the "annexation." This intention is determined by considering:

(i) The ***nature of the article*** (*i.e.*, how essential the item is to normal use of the premises);

(ii) The ***manner in which it is attached*** to the realty (the more substantially attached, the more likely it was intended to be permanent);

(iii) The ***amount of damage*** that would be caused by its removal; and

(iv) The ***adaptation*** of the item to the use of the realty (*e.g.*, custom window treatments, wall-to-wall carpet).

a. Constructive Annexation

In some cases, an article of personal property is considered a fixture even though it is not physically annexed to the real estate at all. This is because it is so ***uniquely adapted*** to the real estate that it makes no sense to separate it. Examples include the keys to the doors of a house; curtain rods that have been cut and sized to the brackets on the walls of a house, even if the rods themselves are not presently installed; and a carpet that has been cut to fit an unusually shaped room, even if the carpet is not nailed or glued in place.

b. Vendor-Purchaser Cases
The typical situation is where the owner of land affixes chattels to the land and subsequently conveys the land without expressly providing whether the chattels are to pass with the realty. The intention test works fairly well. The question boils down to whether an owner bringing the disputed chattel to the realty would intend that it become part of the realty. Or to put it another way, ***whether a reasonable purchaser would expect*** that the disputed item was part of the realty.

c. Mortgagor-Mortgagee Cases
The intention test is universally applied to determine whether the owner (mortgagor) intended the chattels to become "part of the realty." Where the mortgagor has made the annexation ***prior*** to the giving of the mortgage, the question is what the "reasonably objective" lender expects to come within the security of her lien. However, where the annexation is made ***after*** the giving of the mortgage, the same considerations arguably should ***not*** apply because each item that is "added" to the lien of the mortgage represents a ***windfall*** to the mortgagee should foreclosure occur. Nevertheless, courts universally apply the same intention test regardless of when the annexation was made. (Courts also usually apply the intention test where items are annexed by one in possession of land under an ***executory contract*** to purchase.)

2. Effect of Fixture Classification

a. Conveyance
If a chattel has been categorized as a fixture, it is part of the real estate. A conveyance of the real estate, in the absence of any specific agreement to the contrary, passes the fixture with it. The fixture, as part of the realty, passes to the new owner of the real estate.

b. Mortgage
To the extent that the owner of the real estate mortgages the realty, in the absence of an agreement to the contrary, the mortgage attaches to all fixtures on the real estate.

c. Agreement to Contrary
Even though the concept of fixtures may apply and a chattel becomes a fixture, an agreement between a buyer and seller (similarly, between a mortgagor and mortgagee) can cause a severance of title. For example, a buyer and seller may agree that the seller will retain the right to remove fixtures. Similarly, a mortgagor and mortgagee can agree that the mortgage lien shall not attach to specified fixtures. The effect of such an agreement is to de-annex, so far as relevant, the chattel from the realty and reconvert the fixture into a chattel.

D. DIVIDED OWNERSHIP CASES

In divided ownership cases, unlike the ones just discussed, the chattel is owned and brought to the realty by someone who is not the landowner (*e.g.*, a tenant, a licensee, or a trespasser). The question is whether the ownership of the chattel has passed to the landowner. Courts often say that the intention test (C.1., *supra*) is to be applied in these cases too. But the exceptions disprove the rule.

1. Landlord-Tenant
Early English law favored the landlord. However, American law created a trade fixtures exception under which tradesmen-tenants could remove an item that otherwise would have been a "fixture." Later, this exception was expanded to include all tenants generally. Some courts have treated the trade fixtures exception as consistent with the annexor's-intention test; *i.e.*, a tenant's annexations are removable because "it was not the intention of the tenant to make them permanent annexations to the freehold and thereby donations to the owner of it."

a. Agreement
An agreement between the landlord and tenant is controlling on whether the chattel annexed to the premises was intended to become a fixture. To the extent that the landlord and tenant specifically agree that such annexation is not to be deemed a fixture, the agreement controls.

b. No Intent If Removal Does Not Cause Damage
In the absence of an express agreement to the contrary, a tenant may remove a chattel that he has attached to the demised premises as long as the removal does not cause substantial damage to the demised premises or the virtual destruction of the chattel. In other words, the tenant will ***not*** have manifested an intention to permanently improve

the freehold (and the concept of fixtures will be inapplicable) as long as the removal of the chattel does not cause substantial damage to the premises or the destruction of the chattel.

c. **Removal Must Occur Before End of Lease Term**
Generally, a tenant must remove his annexed chattels before the termination of his tenancy or they become the property of the landlord. If the duration of the tenancy is indefinite (*e.g.*, tenancy at will), the removal must occur within a reasonable time after the tenancy terminates. Similarly, a tenant has a reasonable time for removal if he holds over during unsuccessful negotiations for a new lease.

d. **Tenant Has Duty to Repair Damages Resulting from Removal**
Tenants are responsible for repairing damages caused by removal of "fixtures."

2. **Life Tenant and Remainderman**
The same rules should apply here as in the landlord-tenant cases. Historically, however, results have been more favorable to the remaindermen (or reversioners). Apart from statute, the removal privilege has been unrealistically limited to the duration of the term.

3. **Licensee and Landowner**
Licenses to bring items onto land usually contain agreements respecting removal. In the absence of agreement, licensees are permitted to remove the items subject to a duty to repair damages caused thereby.

4. **Trespasser and Landowner**
Trespassers (*e.g.*, adverse possessors before the running of the statute of limitations) normally lose their annexations whether installed in good faith or not. Moreover, the trespasser can be held liable for the reasonable rental value of the property on which she annexed the item.

a. **Trespasser's Recovery Limited to Value Added to Land**
Some courts allow a good faith trespasser to recover for the improvement, but the recovery is measured by the value added to the land, not the cost to construct the improvement.

E. THIRD-PARTY CASES

Any of the foregoing cases is complicated by the addition of third-person claimants. The situations can be classified under two headings.

1. **Third Person Claims Lien on Land to Which Chattels Affixed**
Suppose Landowner mortgages her land to Mortgagee. Landowner then leases the land to Tenant, who annexes an item (*e.g.*, a machine) that is a "trade fixture" and thus removable at the end of the term. Landowner defaults before the end of the term, and Mortgagee forecloses. Is the item subject to the lien of the mortgage?

(i) Generally, no. In this situation, the mortgagee has no greater rights than the mortgagor, provided only that the original sufficiency of the security is not impaired (*e.g.*, removal would not substantially damage a building in existence when the mortgage was given).

(ii) The same result occurs where a buyer under an installment land contract leases to a tenant, the tenant makes annexations, and the buyer then defaults. The seller is treated in the same manner as the mortgagee in the first example.

If, in the above example, the land mortgage is made ***after*** the lease and after the tenant has annexed an item that is a "trade fixture" as against the landlord-mortgagor, and, as is usual, the land mortgagee has ***notice*** of the tenant's rights, the mortgagee is in no better position than the landlord-mortgagor. If the mortgagee does not have notice, he wins if the item would have been considered a fixture as between the mortgagee and the mortgagor. (The same result pertains in cases where the landlord ***sells*** the property after the making of a lease.)

2. **Third Person Claims Lien on Chattel Affixed to Land**
Suppose Landowner purchases a furnace from Seller and installs it in her house. She owes a balance on the purchase price of the furnace, and therefore grants Seller a ***security interest*** in the furnace (in accordance with Article 9 of the Uniform Commercial Code). Suppose further that Landowner also executes a ***mortgage*** on her house, to Mortgagee. If Landowner subsequently defaults on her payments, both on the furnace and the house, is Seller or Mortgagee entitled to priority? (Same issue where Landowner ***sells*** the house without mentioning the security interest.)

a. U.C.C. Rules

Normally, the rule is that whichever interest is ***first recorded*** in the local ***real estate records*** wins. (Thus, if the chattel security interest was recorded first, it constitutes "constructive notice" to all subsequent lenders or purchasers.) However, an ***exception*** allows a ***"purchase money security interest"*** in an affixed chattel (here, the interest given Seller to secure payment on the furnace) to prevail even over a ***prior recorded*** mortgage on the land, as long as the chattel interest is recorded ***within 20 days*** after the chattel is affixed to the land. [U.C.C. §9-334]

The document used to record the chattel security interest is known as a ***"fixture filing."*** (This is a separate instrument from the "financing statement," which is required to be filed to perfect the chattel security interest in the first place.)

b. Liability for Damages Caused by Removal

In the above example, if Seller were entitled to priority, she would be entitled to remove the furnace. However, she would have to reimburse Mortgagee for any ***damages or repair*** necessitated by the removal (but ***not*** for diminution in value of the property due to the lack of a furnace).

IV. RIGHTS IN THE LAND OF ANOTHER—EASEMENTS, PROFITS, COVENANTS, AND SERVITUDES

A. IN GENERAL

Easements, profits, covenants, and servitudes are ***nonpossessory*** interests in land. They create a right to ***use land possessed by someone else***. For example, A, the owner of Blackacre, grants to B, the owner of an adjacent parcel, Whiteacre, the right to use a path over Blackacre connecting Whiteacre to a public road. An easement has been created, giving B the right to use—but ***not*** to possess—the pathway over Blackacre. Easements, profits, covenants, and servitudes have many similarities in operation, coverage, creation, and termination. They also have important differences, mainly in the requirements that must be met for their enforcement.

B. EASEMENTS

1. Introduction

The holder of an easement has the ***right to use*** a tract of land (called the servient tenement) for a special purpose, but has ***no right to possess and enjoy*** the tract of land. The owner of the servient tenement continues to have the right of full possession and enjoyment subject only to the limitation that he cannot interfere with the right of special use created in the easement holder. Typically, easements are created in order to give their holder the right of access across a tract of land, *e.g.*, the privilege of laying utility lines, or installing sewer pipes and the like. Easements are either affirmative or negative, appurtenant or in gross.

a. Types of Easements

1) Affirmative Easements

Affirmative easements entitle the holder ***to enter upon the servient tenement and make an affirmative use of it*** for such purposes as laying and maintaining utility lines, draining waters, and polluting the air over the servient estate. The ***right-of-way*** easement is another instance of an affirmative easement. Thus, an affirmative easement privileges the holder of the benefit to make a use of the servient estate that, absent the easement, would be an unlawful trespass or nuisance.

2) Negative Easements

A negative easement does not grant to its owner the right to enter upon the servient tenement. It does, however, entitle the privilege holder to compel the possessor of the servient tenement to ***refrain from engaging in activity*** upon the servient tenement that, were it not for the existence of the easement, he would be privileged to do. In reality, a negative easement is simply a restrictive covenant. (*See* D.1.e.1), *infra*.)

Example: A owns Lot 6. By written instrument, he stipulates to B that he will not build any structure upon Lot 6 within 35 feet of the lot line. B has acquired a negative easement in Lot 6.

Courts hesitate to recognize new forms of negative easements and generally have confined them to a traditional handful: easements for ***light, air, subjacent or lateral support,*** and for the ***flow of an artificial stream.***

b. Easement Appurtenant

An easement is deemed appurtenant when the right of special use benefits the holder of the easement in his physical use or enjoyment of another tract of land. For an easement appurtenant to exist, there must be ***two tracts*** of land. One is called the dominant tenement, which has the benefit of the easement. The second tract is the servient tenement, which is subject to the easement right. One consequence of appurtenance is that the benefit passes with transfers of the benefited land, regardless of whether the easement is mentioned in the conveyance.

Example: A owns Lot 6 and B owns Lot 7, which are adjoining tracts of land. By a written instrument, B grants to A the right to cross B's tract (Lot 7). A's use and enjoyment of Lot 6 is benefited by virtue of the acquisition of the right to use Lot 7 for this special purpose. The right is an easement appurtenant. B remains the owner of Lot 7. A has only a right to use Lot 7 for a special purpose, *i.e.*, the right to cross the tract.

1) Use and Enjoyment

In an easement appurtenant, the benefits to be realized by the easement must be directly beneficial to the possessor of the ***dominant tenement*** in his physical use and enjoyment of that tract of land. It is not sufficient that the easement makes use of the land more profitable.

Example: A owns Lot 6 and B owns adjacent Lot 7. A grants to B the right to use part of Lot 6 to mine coal. The right is not an easement appurtenant because the benefit granted is not related to B's physical use and enjoyment of Lot 7.

2) Benefit Attached to Possession

The benefit of an easement appurtenant becomes an incident of the possession of the dominant tenement. All who possess or subsequently succeed to title to the dominant tenement become, by virtue of the fact of possession, entitled to the benefit of the easement. There can be no conveyance of the easement right apart from possession of the dominant tenement, except that the easement holder may convey the easement to the owner of the servient tenement in order to extinguish the easement.

3) Transfer of Dominant and Servient Estates

Both the dominant and servient parcels can be transferred. As discussed above, if the dominant parcel is transferred, the benefit of the easement goes with it automatically—even if it is not mentioned in the deed—and becomes the property of the new owner. If the servient parcel is transferred, its new owner takes it subject to the burden of the easement, unless she is a bona fide purchaser (*see* VI.E.3., *infra*) with no notice of the easement. There are three ways the person who acquires the servient land might have notice of the easement: (i) actual knowledge; (ii) notice from the visible appearance of the easement on the land; and (iii) notice from the fact that the document creating the easement is recorded in the public records. Everyone who buys land is expected to inspect the land physically and to examine the public records.

Example: A owns Lot 6 and grants B (the owner of Lot 7) an easement for a driveway across Lot 6 to benefit adjacent Lot 7. The easement is not recorded. Then A sells Lot 6 to X. The tire tracks of the driveway are plainly visible at the time of the sale. X is therefore not a bona fide purchaser, and takes Lot 6 subject to the easement.

c. Easement in Gross

An easement in gross is created where the holder of the easement interest acquires a right of special use in the servient tenement independent of his ownership or possession of another tract of land. In an easement in gross, the easement holder is not benefited in his use and enjoyment of a possessory estate by virtue of the acquisition of that privilege. There is no dominant tenement. An easement in gross passes entirely apart from any transfer of land.

Example: A owns Lot 6. By a written instrument, she grants to B the right to build a pipeline across Lot 6. B receives the privilege independent of his

ownership or possession of a separate tract of land. B has acquired an easement in gross.

Easements in gross can be either personal (*e.g.*, O gives friend right to swim and boat on lake) or commercial (*e.g.*, utility or railroad track easements). Generally, an easement in gross is transferable only if the easement is for a commercial or economic purpose.

d. Judicial Preference for Easements Appurtenant

If an easement interest is created and its owner holds a corporeal (possessory) estate that is or could be benefited in physical use or enjoyment by the acquisition of the privilege, the easement will be deemed appurtenant. This is true even though the deed creating the easement makes no reference to a dominant tenement.

Example: A conveys to "B, her heirs, successors, and assigns, the right to use a strip 20 feet wide on the north edge of Blackacre for ingress and egress to Whiteacre." Because there is ambiguity as to whether the benefit was intended to attach to B's land, Whiteacre, or to B personally, a court will apply the constructional preference and hold that the benefit was intended to be appurtenant, with the consequence that any conveyance of Whiteacre by B will carry with it the right to use the strip across Blackacre.

2. Creation of Easements

The basic methods of creating an easement are: express grant or reservation, implication, and prescription.

a. Express Grant

Because an easement is an interest in land, the Statute of Frauds applies. Therefore, any easement must be in writing and signed by the grantor (the holder of the servient tenement) unless its duration is brief enough (commonly one year or less) to be outside a particular state's Statute of Frauds' coverage. An easement can be created by conveyance. A grant of an easement must comply with all the formal requisites of a deed. An easement is presumed to be of perpetual duration unless the grant specifically limits the interest (*e.g.*, for life, for 10 years).

b. Express Reservation

An easement by reservation arises when the owner (of a present possessory interest) of a tract of land conveys title but reserves the right to continue to use the tract for a special purpose after the conveyance. In effect, the grantor passes title to the land but reserves unto himself an easement interest. Note that, under the majority view, the easement can be reserved ***only for the grantor***; an attempt by the grantor to reserve an easement for anyone else is void. (There is a growing trend to permit reservations in third parties, but it remains a minority view.)

Example: G owns Lot 6 and Lot 7, which are adjacent. G sells Lot 7 to B. Later, when G is about to sell Lot 6 to A, B asks G to reserve an easement over Lot 6 in favor of B. G agrees to do so, and executes a deed of Lot 6 to A that contains the following language: "Reserving an easement for a driveway in favor of Lot 7, which is owned by B." The reservation clause is void and no easement is created.

c. Implication

An easement by implication is created by ***operation of law*** rather than by written instrument. It is an exception to the Statute of Frauds. There are only two types of implied easements: (i) an intended easement based on a use that existed when the dominant and servient estates were severed, and (ii) an easement by necessity.

1) Easement Implied from Existing Use ("Quasi-Easement")

An easement may be implied if, prior to the time the tract is divided, a use exists on the "servient part" that is reasonably necessary for the enjoyment of the "dominant part" and a court determines that the parties intended the use to continue after division of the property. It is sometimes called a "quasi-easement" before the tract is divided because an owner cannot hold an easement on his own land.

a) Existing Use at Time Tract Divided

For a use to give rise to an easement, it must be apparent and continuous at

the time the tract is divided. "Apparent" means that a grantee could discover the existence of the use upon reasonable inspection. A nonvisible use may still be "apparent" if surface connections or the like would put a reasonable person on notice of its existence.

b) **Reasonable Necessity**
Whether a use is reasonably necessary to the enjoyment of the dominant parcel depends on many factors, including the cost and difficulty of the alternatives and whether the price paid reflects the expected continued use of the servient portion of the tract.

c) **Grant or Reservation**
An easement implied in favor of the grantee is said to be created by implied grant, while an easement implied in favor of the grantor is said to be created by implied reservation.

2) **Easements Implied Without Any Existing Use**
In two limited situations, easements are implied in a conveyance even though there is no preexisting use.

a) **Subdivision Plat**
When lots are sold in a subdivision with reference to a recorded plat or map that also shows streets leading to the lots, buyers of the lots have implied easements to use the streets in order to gain access to their lots. These easements continue to exist even if the ***public*** easements held by the city or county in the streets are later vacated.

b) **Profit a Prendre**
When a landowner grants a profit a prendre to a person to remove a valuable product of the soil (*e.g.*, grass, asphalt, ore, etc.), the holder of the profit also has an implied easement to pass over the surface of the land and to use it as reasonably necessary to extract the product.

3) **Easement by Necessity**
When the owner of a tract of land sells a part of the tract and by this division deprives one lot of access to a public road or utility line, a right-of-way by absolute necessity is created by implied grant or reservation over the lot with access to the public road or utility line. The owner of the servient parcel has the right to locate the easement, provided the location is reasonably convenient. An easement by necessity terminates when the necessity ceases.

d. Prescription
Acquiring an easement by prescription is analogous to acquiring property by adverse possession. (*See* V., *infra.*) Many of the requirements are the same: To acquire a prescriptive easement, the use must be ***open and notorious***; ***adverse and under claim of right***; ***and continuous and uninterrupted for the statutory period***. Note that the public at large can acquire an easement in private land if members of the public use the land in a way that meets the requirements for prescription.

1) **Open and Notorious**
The user must not attempt to conceal his use. Underground or other nonvisible uses, such as pipes and electric lines, are considered open and notorious if the use could be discovered (*e.g.*, through surface connections) upon inspection.

2) **Adverse**
The use must not be with the owner's permission. Unlike adverse possession, the use ***need not be exclusive***. The user of a common driveway, *e.g.*, may acquire a prescriptive easement even though the owner uses it too.

3) **Continuous Use**
Continuous adverse use does not mean constant use. A continuous claim of right with periodic acts that put the owner on notice of the claimed easement fulfills the requirement. Note that tacking is permitted for prescriptive easements, just as for adverse possession (*see* V.B.4.b., *infra*).

4) **When Prescriptive Easements Cannot Be Acquired**
Negative easements cannot arise by prescription, nor generally may easements in public lands. An easement by necessity cannot give rise to an easement by prescription. However, if the necessity ends, so does the easement, and the use is adverse from that point forward.

3. **Scope**
Courts enforcing easements are often called upon to interpret the arrangement in order to determine the ***scope*** and ***intended beneficiaries*** of the interest. The key to interpretation employed in all these cases is the ***reasonable intent of the original parties***. What would the parties reasonably have provided had they contemplated the situation now before the court? What result would reasonably serve the purposes of the arrangement?

a. **General Rules of Construction**
If, as typically happens, the language used is general (*e.g.*, "a right-of-way over Blackacre"), the following rules of construction usually apply: (i) ambiguities are resolved in favor of the grantee (unless the conveyance is gratuitous); (ii) subsequent conduct of the parties respecting the arrangement is relevant; (iii) the parties are assumed to have intended a scope that would reasonably serve the purposes of the grant and to have foreseen reasonable changes in the use of the dominant estate. The rule of reasonableness will be applied only to the extent that the governing language is general. If the location or scope of the permitted use is spelled out in detail, the specifics will govern, and reasonable interpretation will be excluded.

Examples: 1) In 1890, A, the owner of Blackacre, granted to B, the owner of Whiteacre, a "right-of-way" over Blackacre for purposes of ingress and egress to Whiteacre from the public highway running along the western boundary of Blackacre. At the time of the grant, there were only horses and buggies, no automobiles. Applying a "rule of reasonableness" to the general language creating the right-of-way, a court would probably find that the right-of-way could today be used for cars. If, however, the use of cars would impose a ***substantially*** greater burden on Blackacre, the court would probably find against this use on grounds that it was outside the scope reasonably contemplated by A and B.

2) If, in the example just given, the right-of-way was specifically dedicated ("only to the use of horses and carriages"), automobile use would be excluded. Similarly, if the right-of-way was specifically located (*e.g.*, "over the southern 10 feet of Blackacre"), the rule of reasonableness could not be invoked to change or enlarge the location.

b. **Absence of Location**
If an easement is created but not specifically located on the servient tenement, an easement of sufficient width, height, and direction to make the intended use reasonably convenient will be implied. The owner of the servient tenement may select the location of the easement so long as her selection is reasonable.

c. **Changes in Use**
In the absence of specific limitations in the deed creating an easement, the courts will assume that the easement is intended by the parties to meet both present and future reasonable needs of the dominant tenement.

Examples: 1) A roadway easement of unspecified width was created in 1920, when cars were only six feet wide. In the 1970s, however, cars were considerably wider. Because the original roadway easement was not specifically limited in width, the easement will expand in size to accommodate the changing and expanding needs of the owner of the dominant tenement.

2) But a basic change in the nature of the use is not allowed. Thus, a telephone or power line may not be added on the roadway. (Many courts are more liberal in allowing such additions if the roadway easement is public rather than private.)

d. **Easements by Necessity or Implication**
In the case of easements by necessity, the ***extent of the necessity determines the scope*** of the easement. Because there is no underlying written instrument to interpret, courts will look instead to the circumstances giving rise to the easement. Similarly, with other implied easements, the ***quasi-easement*** will provide the starting point for the court's

construction of the scope of the easement. Modifications in the easement will be enforced to the extent that they are necessary for reasonably foreseeable changes in the use of the dominant parcel.

e. Use of Servient Estate

Absent an express restriction in the original agreement, the owner of the servient estate may use her land in any way she wishes so long as her conduct does not interfere with performance of the easement, profit, covenant, or servitude.

Example: A grants to B Water Company the right to lay water pipes in a specified five-foot right-of-way. A is not by this grant necessarily precluded from granting similar rights in the same right-of-way to a competing company, so long as the second grant does not interfere with the use made by B, the original grantee. A may also build over the right-of-way so long as the structure does not unreasonably interfere with B's use.

1) Duty to Repair

If the holder of the benefit is the only party making use of the easement, that party has the duty to make repairs (*e.g.*, fill in potholes on a right-of-way) and, absent a special agreement, the servient owner has no duty to do so. If the easement is nonexclusive and ***both*** the holder of the benefit and the servient owner are making use of the easement, the court will ***apportion*** the repair costs between them on the basis of their relative use.

f. Intended Beneficiaries—Subdivision of Dominant Parcel

When an easement is created for the benefit of a landowner, and the landowner later subdivides the parcel, there is a question whether each subdivision grantee will succeed to the original benefit. The answer will turn on whether the extension of the benefit to each of the subdivided parcels will burden the servient estate to a greater extent than was contemplated by the original parties. Absent any other evidence on intent, a court will not find an intent to allow an extension if extending the benefit to each parcel in the subdivision will unreasonably overburden the servient estate. Weighing all the circumstances, a court could find subdivision into four lots reasonable, but subdivision into 50 lots unreasonable; it is determined on a case-by-case basis.

Example: A, owner of Blackacre, grants to B, owner of Whiteacre, a right-of-way easement of ingress and egress over Blackacre. B then subdivides Whiteacre into 150 lots. If A and B had not contemplated the subdivision of Whiteacre, and if use of the right-of-way by all 150 lot owners would substantially interfere with A's use of Blackacre (in a way that B's use alone would not), a court would probably not find an intent that the benefit of the right-of-way easement attach to each of the 150 parcels.

g. Effect of Use Outside Scope of Easement

When the owner of an easement uses it in a way that exceeds its legal scope, the easement is said to be ***surcharged***. The remedy of the servient landowner is an ***injunction*** of the excess use, and possibly damages if the servient land has been harmed. However, the excess use ***does not terminate*** the easement or give the servient landowner a power of termination.

4. Termination of Easements

An easement, like any other property interest, may be created to last in perpetuity or for a limited period of time. To the extent the parties to its original creation provide for the natural termination of the interest, such limitations will control.

a. Stated Conditions

If the parties to the original creation of an easement set forth specific conditions upon the happening of which the easement right will terminate, the conditions will be recognized. On this basis, the following conditions are valid: an easement granted "so long as repairs are maintained," an easement granted "so long as X is the holder of the dominant tenement," an easement granted "until the dominant tenement is used for commercial purposes," etc.

b. Unity of Ownership

By definition, an easement is the right to use the lands of another for a special purpose. On this basis, the ownership of the easement and of the servient tenement must be in different persons. If ownership of the two comes together in one person, the easement is extinguished.

1) **Complete Unity Required**
For an easement to be extinguished, there must be complete unity of ownership as between the interest held in the easement and that held in the servient tenement. In other words, if the holder of an easement acquires an interest in the servient tenement, the easement is extinguished only if he acquires an interest in the servient tenement of ***equal or greater duration*** than the duration of the easement privilege. Conversely, if the holder of the servient tenement acquires the easement interests, the title acquired must be ***equal to or greater than her interest*** or estate in the servient tenement. If there is incomplete acquisition of title, the easement will not be extinguished.

Example: A is the owner of the servient tenement in fee simple. B has an access easement across the servient tenement and the duration of the easement is in fee simple. A conveys a 10-year term tenancy in the servient tenement to B. There is no complete unity of ownership. The easement right is of longer duration than is the estate acquired by B in the servient tenement. Therefore, the easement is not extinguished.

2) **No Revival**
If complete unity of title is acquired, the easement is extinguished. Even though there may be later separation, the easement will not be automatically revived.

Example: A owns Lot 6, the servient tenement. B owns adjacent Lot 7. A grants to B the privilege of crossing Lot 6, *i.e.*, grants an easement appurtenant to B. Assume A conveys Lot 6 to B in fee simple. The easement would be extinguished because B then holds both the easement and title to the servient tenement. If, thereafter, B conveys Lot 6 to C, the easement is not revived. Of course, it could be created anew.

c. **Release**
An easement may be terminated by a release given by the owner of the easement interest to the owner of the servient tenement. A release requires the ***concurrence of both owners*** and is, in effect, a conveyance. The release must be executed with all the formalities that are required for the valid creation of an easement.

1) **Easement Appurtenant**
The basic characteristic of an easement appurtenant is that it becomes, for the purpose of succession, an incident of possession of the dominant tenement. This basic characteristic requires that the easement interest not be conveyed independently of a conveyance of the dominant tenement. However, an easement appurtenant may be conveyed to the owner of the servient tenement without a conveyance (to the same grantee) of the dominant tenement. This is an exception to the general alienability characteristics of an easement appurtenant (*see* I.b., *supra*).

2) **Easement in Gross**
The basic characteristic of an easement in gross is that unless it is for a commercial purpose, it is inalienable. However, an easement in gross can be released; *i.e.*, can be conveyed to the owner of the servient tenement. This is an exception to the general characteristics of an easement in gross.

3) **Statute of Frauds**
The Statute of Frauds requires that every conveyance of an interest in land that has a duration long enough to bring into play a particular state's Statute of Frauds (typically one year) must be evidenced by a writing. This writing requirement is also applicable to a release of an easement interest. If the easement interest that is being conveyed has a duration of greater than one year, it must be in writing in order to satisfy the Statute of Frauds. An oral release is ineffective, although it may become effective by estoppel.

d. **Abandonment**
It has become an established rule that an easement can be extinguished without conveyance where the owner of the privilege demonstrates by physical action an intention to ***permanently*** abandon the easement. To work as an abandonment, the owner must have manifested an intention never to make use of the easement again.

Example: A owns Lot 6 and B owns Lot 7, which are immediately adjacent. A grants to B an easement across Lot 6. This easement is specifically located on the servient tenement and is a walkway. Subsequently, B constructs a house on Lot 7 that completely blocks his access to the walkway. By the physical action of constructing the house in such a way that access to the walkway (*i.e.*, the easement) is denied, B has physically indicated an intent not to use the easement again. The easement is extinguished by abandonment.

1) **Physical Act Required**
An abandonment of an easement occurs when the easement holder physically manifests an intention to permanently abandon the easement. Such physical action brings about a termination of the easement by operation of law and therefore no writing is required; *i.e.*, the Statute of Frauds need not be complied with.

2) **Mere Words Insufficient**
The oral expressions of the owner of the easement that he does not intend to use the easement again (*i.e.*, wishes to abandon) are insufficient to constitute an abandonment of the easement. For words to operate as a termination, such expression will only be effective if it qualifies as a release. In other words, the Statute of Frauds must be complied with.

3) **Mere Nonuse Insufficient**
An easement is not terminated merely because it is not used for a long period by its owner. To terminate the easement, the nonuse must be combined with other evidence of intent to abandon it. Nonuse itself is not considered sufficient evidence of that intent.

e. **Estoppel**
While the assertions of the holder of the easement are insufficient to work a termination unless there is valid compliance with the requirements of a release, an easement may be extinguished by virtue of the reasonable reliance and change of position of the owner of the servient tenement, based on assertions or conduct of the easement holder.
Example: The owner of a right-of-way tells the owner of the servient tenement that the owner of the servient tenement may build a building on the servient tenement in such a way as to make the right-of-way no longer usable, and the servient owner does in fact build the building. There will be an extinguishment of the easement by estoppel.

For an easement to be extinguished by estoppel, three requirements must be satisfied. Namely, there must be (i) some ***conduct or assertion*** by the owner of the easement, (ii) a ***reasonable reliance*** by the owner of the servient tenement, (iii) coupled with a ***change of position***. Even though there is an assertion by the easement holder, if the owner of the servient tenement does not change her position based upon the assertion, the easement will not be terminated.

f. **Prescription**
An easement may be extinguished, as well as created, by prescription. Long continued possession and enjoyment of the servient tenement in a way that would indicate to the public that no easement right existed will end the easement right. Such long continued use works as a statute of limitations precluding the whole world, including the easement holder, from asserting that his privilege exists.

The termination of an easement by prescription is fixed by analogy to the creation of an easement by prescription. The owner of the servient tenement must so ***interfere with the easement*** as to create a cause of action in favor of the easement holder. The interference must be open, notorious, continuous, and nonpermissive for the statutory period (*e.g.*, 20 years).

g. **Necessity**
Easements created by necessity ***expire as soon as the necessity ends***.
Example: A, the owner of a tract of land, sells a portion of it that has no access to a highway except over the remaining lands of A. B, the purchaser, acquires by necessity a right-of-way over the remaining lands of A.

Some years later, a highway is built so that B no longer needs the right-of-way across A's property. The easement ends because the necessity has disappeared.

h. Condemnation
Condemnation of the servient estate will extinguish the nonpossessory interest. Courts are split, however, on whether the holder of the benefit is entitled to compensation for the value lost.

i. Destruction of Servient Estate
If the easement is in a structure (*e.g.*, a staircase), involuntary destruction of the structure (*e.g.*, by fire or flood) will extinguish the easement. Voluntary destruction (*e.g.*, tearing down a building to erect a new one) will not, however, terminate the easement.

5. Compare—Licenses
Licenses, like affirmative easements, privilege their holder to go upon the land of another (the licensor). Unlike an affirmative easement, the license is ***not an interest in land***. It is merely a ***privilege***, revocable at the will of the licensor. (Although licenses may acquire some of the characteristics of easements through estoppel or by being coupled with an interest.) The Statute of Frauds does not apply to licenses, and licensees are not entitled to compensation if the land is taken by eminent domain. Licenses are quite common; examples of licensees include delivery persons, plumbers, party guests, etc.

a. Assignability
An essential characteristic of a license is that it is ***personal to the licensee*** and therefore ***not alienable***. The holder of a license privilege cannot convey such right. In fact, most courts have held that the license privilege is so closely tied to the individual parties that it is revoked, by operation of law, upon an attempted transfer by the licensee.

b. Revocation and Termination
Another essential characteristic of a license is that it is revocable by nature. It may be revoked at any time by a manifestation of the licensor's intent to end it. This manifestation may be by a formal notice of revocation or it may consist of conduct that obstructs the licensee's continued use. Similarly, the licensee can surrender the privilege whenever he desires to do so. A license ends by operation of law upon the death of the licensor. In addition, a conveyance of the servient tenement by the licensor terminates the licensee's privilege.

1) Public Amusement Cases
Tickets issued by theaters, race courses, and other places of amusement have given rise to some controversy. The traditional rule is that such tickets create a license. Once describing the tickets as granting a license, the essential characteristic of a license applies; *i.e.*, it is revocable by nature. On this basis, the licensor may terminate the licensee's privilege at will.

2) Breach of Contract
A license may be granted pursuant to an express or implied contract between the licensor and licensee. On this basis, the termination of the licensee's privilege may constitute a breach of contract. While many courts may grant a cause of action for money damages for a revocation of a license in breach of contract, they continue to sustain the licensor's right to terminate the licensee's privilege to continue to remain on the servient tenement.

Example: A pays a $70 greens fee to play 18 holes of golf on B's property. After A has played only nine holes, B terminates A's right to be on B's property. Because A acquired a license and it is revocable by its very nature, B's action is not, in property terms, wrongful. However, A may have a cause of action against B to recoup part or all of A's $70.

c. Failure to Create an Easement
The Statute of Frauds requires that any conveyance of an interest in land (including an easement interest) of duration greater than one year must be in writing to be enforceable. If a party attempts to create an easement orally, the result is the creation of a license, *i.e.*, a revocable privilege. Note, however, that if an oral attempt to create an easement is subsequently "executed," to the extent that it would be inequitable to

permit its revocation (*e.g.*, the licensee has expended substantial funds in reliance on the license), the licensor may be estopped to revoke the license.

d. Irrevocable Licenses

1) Estoppel Theory
If a licensee invests substantial amounts of money or labor in reliance on a license, the licensor may be estopped to revoke the license, and the license will thus become the equivalent of an affirmative easement.

Example: A orally licenses B to come onto Blackacre to excavate a drainage ditch connected to B's parcel, Whiteacre. B does so at substantial expense. A will probably be estopped to revoke the license and prevent B from using the ditch.

Under the majority view, such irrevocable licenses or easements by estoppel last until the owner receives sufficient benefit to reimburse himself for the expenditures made in reliance on the license. A minority of courts treat easements by estoppel like any other affirmative easements and give them a potentially infinite duration.

2) License Coupled with an Interest
If a license is coupled with an interest, it will be irrevocable as long as the interest lasts.

a) Vendee of a Chattel
The purchaser of a chattel located upon the seller's land is, in the absence of an express stipulation to the contrary, given the privilege to enter upon the seller's land for the purpose of removing the chattel. The purchaser's right is irrevocable. He must, however, enter at reasonable times and in a reasonable manner.

Example: A, the owner of Blackacre, sells 100 crates of oranges stored in a shed on Blackacre and at the same time licenses B to come onto Blackacre to remove the crates of oranges. B has an irrevocable license to enter Blackacre and remove the crates within a reasonable time.

b) Termination of Tenancy
If a tenant's right to possess land has been lawfully terminated, the tenant may still reenter the land at reasonable times and in a reasonable manner for the purpose of removing his chattels. This is an irrevocable privilege.

c) Inspection for Waste
The owner of a future interest in land (*e.g.*, a landlord, holder of a reversionary interest, or a remainderman) is privileged to enter upon the land, at reasonable times and in a reasonable manner, for the purpose of determining whether waste is being committed by the holder of the present possessory estate.

C. PROFITS

Like an easement, a profit (profit a prendre) is a ***nonpossessory*** interest in land. The holder of the profit is entitled to enter upon the servient tenement and take the soil or a substance of the soil (*e.g.*, minerals, timber, oil, or game). Also, like an easement, a profit may be appurtenant or in gross. In contrast to easements, however, there is a constructional preference for profits in gross rather than appurtenant.

1. Creation
Profits are created in the same way as easements.

2. Alienability
A profit appurtenant follows the ownership of the dominant tenement. A profit in gross may be assigned or transferred by the holder.

3. Exclusive and Nonexclusive Profits Distinguished
When an owner grants the ***sole right*** to take a resource from her land, the grantee takes an exclusive profit and is solely entitled to the resources, even to the exclusion of the owner of the servient estate. By contrast, when a profit is nonexclusive, the owner of the servient

estate may grant similar rights to others or may take the resources herself. Ordinarily, profits (like easements) are construed as nonexclusive.

4. **Scope**
The extent and nature of the profit is determined by the words of the ***express grant*** (if there was a grant), or by ***the nature of the use*** (if the profit was acquired by prescription). Note that implied in every profit is an easement entitling the profit holder to enter the servient estate to remove the resource.
Example: A, the owner of Blackacre, grants B the right to come onto Blackacre to carry off gravel from a pit on Blackacre. B has a profit with respect to the gravel and also the benefit of an implied affirmative easement to go onto Blackacre by reasonable means to remove the gravel.

a. **Apportionment of Profits Appurtenant**
Courts treat the subdivision of land with a profit appurtenant just as they treat the subdivision of land with an easement appurtenant. The ***benefit of the profit*** will attach to each parcel in a subdivision ***only*** if the burden on the servient estate is not as a result ***overly increased***.
Example: A, owner of Blackacre, grants B, owner of adjacent Whiteacre, the right to take water from a pond situated on Blackacre. If the profit was to take water for purposes of household consumption on Whiteacre, then an increase in use from 1 to 150 households when Whiteacre is subdivided will probably be viewed as overburdensome to Blackacre.

If, however, the profit was to take water for purposes of irrigating Whiteacre, apportionment would be allowed because subdivision would not increase the number of acres to be irrigated and consequently would not impose a greater burden on Blackacre.

b. **Apportionment of Profits in Gross**
Because profits are freely alienable, a question frequently arises as to whether the holder of a profit can convey it to several people. If a profit is exclusive, the holder may transfer the profit to as many transferees as he likes. Likewise, if the grant of the profit specifies a limit on the profit (less than all), the right can be transferred to multiple transferees. If, however, the profit is nonexclusive and not limited as to amount, it is generally not divisible. Undue burden to the servient estate is again the benchmark, however, and a nonexclusive profit may be assigned to a single person or to several persons jointly if the multiple assignees work together and take no more resources than would have been taken by the original benefit holder.

5. **Termination**
Profits are terminated in the same way as easements. In addition, ***misuse*** of a profit, unduly increasing the burden (typically through an improper apportionment), will be held to ***surcharge*** the servient estate. The result of surcharge in this case is to extinguish the profit. (Contrast this with the result when the benefit of an ***affirmative easement*** is misused: Improper or excessive use increasing the burden on the servient estate is ***enjoinable*** but, in most jurisdictions, does not extinguish the easement.)

D. COVENANTS RUNNING WITH THE LAND AT LAW (REAL COVENANTS)

A real covenant, normally found in deeds, is a ***written promise*** to do something on the land (*e.g.*, maintain a fence) or a promise not to do something on the land (*e.g.*, conduct commercial business). Real covenants run with the land at law, which means that subsequent owners of the land may enforce or be burdened by the covenant. To run with the land, however, the benefit and burden of the covenant must be analyzed separately to determine whether they meet the requirements for running.

1. **Requirements for Burden to Run**
If all requirements are met for the burden to run, the successor in interest to the burdened estate will be bound by the arrangement entered into by her predecessor as effectively as if she had herself expressly agreed to be bound.

a. **Intent**
The covenanting parties must have intended that successors in interest to the covenantor be bound by the terms of the covenant. The requisite intent may be inferred from

circumstances surrounding creation of the covenant, or it may be evidenced by language in the conveyance creating the covenant (*e.g.*, "this covenant runs with the land," or "grantee covenants for herself, her heirs, successors, and assigns").

b. Notice

Under the common law, a subsequent purchaser of land that was subject to a covenant took the land burdened by the covenant, whether or not she had notice. However, under American recording statutes (*see* VI.E., *infra*), if the covenant is not recorded, a bona fide purchaser who has no notice of the covenant and who records her own deed ***will take free*** of the covenant. Hence, as a practical matter, if the subsequent purchaser pays value and records (as will nearly always be true), she is not bound by covenants of which she has no actual or constructive notice.

c. Horizontal Privity

This requirement rests on the relationship between the ***original covenanting parties***. Specifically, horizontal privity requires that, at the time the promisor entered into the covenant with the promisee, the two shared ***some interest in the land independent of the covenant*** (*e.g.*, grantor-grantee, landlord-tenant, mortgagor-mortgagee).

Examples: 1) A and B are neighboring landowners, neither having any rights in the other's land. For good consideration, A promises B, "for herself, her heirs, successors, and assigns," that A's parcel "will never be used for other than residential purposes." The horizontal privity requirement is ***not*** met, and successors in interest to A will ***not*** be bound because at the time A made this covenant, she and B shared no interest in land independent of the covenant.

2) A, owner of Blackacre in fee, promised B, holder of a right-of-way easement over Blackacre, "always to keep the right-of-way free of snow or other impediment to B's use of the right-of-way." Horizontal privity is met because, at the time the covenant was made, A owned the parcel in fee and B held the benefit of an easement in it.

3) A, owner of Blackacre and Whiteacre, deeds Whiteacre to B, promising "not to use Blackacre for other than residential purposes." Horizontal privity exists here by virtue of the grantor-grantee relationship between A and B.

d. Vertical Privity

To be bound, the successor in interest to the covenanting party must hold the ***entire durational interest*** held by the covenantor at the time she made the covenant.

Example: A, who owns Blackacre and Whiteacre in fee simple absolute, sells Whiteacre to B and, in the deed, covenants for herself, her heirs, successors, and assigns, to contribute one-half the expense of maintaining a common driveway between Blackacre and Whiteacre. A then transfers Blackacre to C "for life," retaining a reversionary interest for herself. B ***cannot*** enforce the covenant against C because C does not possess the entire interest (fee simple absolute) held by her predecessor in interest, A, at the time A made the promise.

e. Touch and Concern

The covenant must be of the type that "touches and concerns" the land. The phrase "touch and concern the land" is not susceptible to easy definition. It generally means that the effect of the covenant is to make the land itself more useful or valuable to the benefited party. The covenant must affect the legal relationship of the parties as landowners and not merely as members of the community at large. Therefore, as a general matter, for the burden of a covenant to run, performance of the burden must diminish the landowner's rights, privileges, and powers in connection with her enjoyment of the land.

1) Negative Covenants

For the burden of a negative covenant to touch and concern the land, the covenant must restrict the holder of the servient estate in his ***use of that parcel*** of land.

Examples: 1) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, that she would not erect a building of over

two stories on Blackacre. The burden of the covenant touches and concerns Blackacre because it diminishes A's rights in connection with her enjoyment of Blackacre.

2) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, that she would never operate a shoe store within a radius of one mile of Whiteacre. The covenant does not touch and concern Blackacre because its performance is unconnected to the enjoyment of Blackacre.

Note the similarity of negative covenants and negative easements. The primary difference between them is that negative easements are limited to a few traditional categories, but there are no limits on negative covenants.

2) Affirmative Covenants

For the burden of an affirmative covenant to touch and concern the land, the covenant must require the holder of the servient estate ***to do something***, increasing her obligations in connection with enjoyment of the land.

Examples: 1) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, to keep the building on Blackacre in good repair. The covenant touches and concerns Blackacre because it increases A's obligations in connection with her enjoyment of Blackacre.

2) A owned Blackacre and Whiteacre, which were several miles apart. A covenanted with B, the grantee of Whiteacre, to keep the building on Whiteacre in good repair. The covenant does not touch and concern Blackacre because its performance is unconnected to the use and enjoyment of Blackacre.

3) A, the grantee of a parcel in a residential subdivision, covenants to pay an annual fee to a homeowners' association for the maintenance of common ways, parks, and other facilities in the subdivision. At one time, it was thought that such covenants, because physically unconnected to the land, did not touch and concern. The prevailing view today is that the burden will run because the fees are a charge on the land, increasing A's obligations in connection with the use and enjoyment of it.

3) Relation Between Benefit and Burden

The Restatement of Property imposes as an additional requirement that for the burden of a covenant to run, both the benefit and the burden of the covenant must meet the touch and concern test. Thus, under the Restatement view, if the benefit is personal to the covenantee, the burden will not run; *i.e.*, for the burden to run, the benefit of the promise must benefit the promisee in the physical use or enjoyment of the land possessed by her. No clear majority of states has lined up behind the Restatement approach, and the most that can be said is that a conflict exists on the point.

2. Requirements for Benefit to Run

If all requirements for the benefit to run are met, the successor in interest to the promisee will be allowed to enjoy the benefit (*i.e.*, enforce the covenant).

a. Intent

The covenanting parties must have intended that the successors in interest to the covenantee be able to enforce the covenant. Surrounding evidence of intent, as well as language in the instrument of conveyance, is admissible.

b. Vertical Privity

The benefit of a covenant runs to the assignees of the original estate or of any lesser estate (*e.g.*, a life estate). The owner of ***any*** succeeding possessory estate can enforce the benefit at law. In the majority of states today, horizontal privity is not required for the benefit to run. As a consequence, if horizontal privity is missing, the benefit may run to the successor in interest to the covenantee even though the burden is not enforceable against the successor in interest of the covenantor.

Example: A, who owns Blackacre, covenants with her neighbor, B, who owns Whiteacre, that "A, her successors, and assigns will keep the building on Blackacre in good repair." Horizontal privity is missing. B then conveys Whiteacre, the dominant estate, to C. C can enforce the benefit of the affirmative covenant against A because horizontal privity is not needed for the benefit to run. If, however, A conveys Blackacre to D, neither B nor C could enforce the covenant against D, for horizontal privity is required for the burden to run.

c. Touch and Concern

For the benefit of a covenant to touch and concern the land, the promised performance must benefit the covenantee and her successors ***in their use and enjoyment of the benefited land.***

Examples: 1) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, not to erect a building over two stories on Blackacre. The benefit of the covenant touches and concerns Whiteacre because, by securing B's view, it increases his enjoyment of Whiteacre.

2) A, who owned Blackacre and Whiteacre, covenanted with B, the grantee of Whiteacre, to keep the building on Blackacre freshly painted and in good repair. The benefit of the covenant touches and concerns Whiteacre because, by assuring the view of an attractive house, it increases the value of Whiteacre.

Compare: A, who owned Blackacre, covenanted with B, a supermarket operator owning no adjacent land, to erect and maintain on Blackacre a billboard advertising B's supermarkets. The benefit of the covenant does ***not*** touch and concern because it is not connected to and does not operate to increase B's enjoyment of any piece of land.

3. Specific Situations Involving Real Covenants

a. Promises to Pay Money

The majority rule is that if the money is to be used in a way connected with the land, the burden will run with the land. The most common example is a covenant to pay a homeowners' association an annual fee for maintenance of common ways, parks, etc., in a subdivision.

b. Covenants Not to Compete

Covenants not to compete have created several problems. Clearly, the burden of the covenant—restricting the use to which the land may be put—"touches and concerns" the land. However, the benefited land, while "commercially enhanced," is not affected in its physical use. Thus, some courts have refused to permit the benefit of such covenants to run with the land.

The Restatement of Property, somewhat inconsistently, permits the benefit but not the burden of such covenants to run. Most courts seem willing to overlook these technical distinctions and permit both the benefit and the burden of covenants not to compete to run with the land.

c. Racially Restrictive Covenants

If a covenant purports to prohibit an owner from transferring land to persons of a given race, no court (state or federal) is permitted to enforce the covenant. To do so would involve the court in a violation of the Equal Protection Clause of the Fourteenth Amendment.

4. Remedies—Damages Only

A breach of a real covenant is remedied by an award of money damages, not an injunction. If equitable relief, such as an injunction, is sought, the promise must be enforced as an equitable servitude rather than a real covenant (*see* below). Note that a real covenant gives rise to personal liability only. The damages are collectible out of the defendant's general assets.

5. Termination

As with all other nonpossessory interests in land, a real covenant may be terminated by: (i) the holder of the benefit executing a ***release in writing***; (ii) ***merger*** (fee simple title to both the benefited and burdened land comes into the hands of a single owner); and (iii) ***condemnation*** of the burdened property.

E. EQUITABLE SERVITUDES

If a plaintiff wants an injunction or specific performance, he must show that the covenant qualifies as an equitable servitude. An equitable servitude is a covenant that, regardless of whether it runs with the land at law, equity will enforce against the assignees of the burdened land who have ***notice*** of the covenant. The usual remedy is an injunction against violation of the covenant.

1. Creation

Generally, equitable servitudes are created by covenants contained in a writing that satisfies the Statute of Frauds. As with real covenants, acceptance of a deed signed only by the grantor is sufficient to bind the grantee as promisor. There is one exception to the writing requirement: Negative equitable servitudes may be implied from a common scheme for development of a residential subdivision.

a. Servitudes Implied from Common Scheme

When a developer subdivides land into several parcels and some of the deeds contain negative covenants but some do not, negative covenants or equitable servitudes binding ***all*** the parcels in the subdivision may be implied under the doctrine of "reciprocal negative servitudes." The doctrine applies only to negative covenants and equitable servitudes and not to affirmative covenants. Two requirements must be met before reciprocal negative covenants and servitudes will be implied: (i) a common scheme for development, and (ii) notice of the covenants.

Example: A subdivides her parcel into lots 1 through 50. She conveys lots 1 through 45 by deeds containing express covenants by the respective grantees that they will use their lots only for residential purposes. A orally assures the 45 grantees that ***all*** 50 lots will be used for residential purposes. Some time later, after the 45 lots have been developed as residences, A conveys lot 46 to an oil company, which plans to operate a service station on it. The deed to lot 46 contains no express residential restriction. A court will nonetheless imply a negative covenant, prohibiting use for other than residential purposes on lot 46 because both requirements have been met for an implied reciprocal negative servitude. First, there was a ***common scheme***, here evidenced by A's statements to the first 45 buyers. Second, the oil company was on ***inquiry notice*** of the negative covenant because of the uniform residential character of the other lots in the subdivision development.

1) Common Scheme

Reciprocal negative covenants will be implied only if at the time that sales of parcels in the subdivision began, the developer had a plan that all parcels in the subdivision be developed within the terms of the negative covenant. If the scheme arises after some lots are sold, it cannot impose burdens on the lots previously sold without the express covenants. The developer's common scheme may be evidenced by a ***recorded plat***, by a ***general pattern*** of prior restrictions, or by ***oral representations***, typically in the form of statements to early buyers that all parcels in the development will be restricted by the same covenants that appear in their deeds. On the basis of this scheme, it is inferred that purchasers bought their lots relying on the fact that they would be able to enforce subsequently created equitable servitudes similar to the restrictions imposed in their deeds.

2) Notice

To be bound by the terms of a covenant that does not appear in his deed, a grantee must, at the time he acquired his parcel, have had notice of the covenants contained in the deeds of other buyers in the subdivision. The requisite notice may be acquired through ***actual notice*** (direct knowledge of the covenants in the prior deeds); ***inquiry notice*** (the neighborhood appears to conform to common restrictions); or ***record notice*** (if the prior deeds are in the grantee's chain of title he will, under the recording acts, have constructive notice of their contents).

2. Enforcement

For successors of the original promisee and promisor to enforce an equitable servitude, certain requirements must be met.

a. Requirements for Burden to Run

1) Intent

The covenanting parties must have intended that the servitude be enforceable by

and against assignees. No technical words are required to express this intent. In fact, the intent may be ascertained from the purpose of the covenant and the surrounding circumstances.

2) **Notice**
A subsequent purchaser of land burdened by a covenant is not bound by it in equity unless she had actual or constructive notice of it when she acquired the land. This rule is part of the law of equitable servitudes, and exists apart from the recording acts.

3) **Touch and Concern**
This is the same requirement as applies to real covenants (*see* D.1.e., *supra*).

b. **Requirements for Benefit to Run**
The benefit of the equitable servitude will run with the land (and thus to successors in interest of the original parties) if the original parties so ***intended*** and the servitude ***touches and concerns*** the benefited property.

c. **Privity Not Required**
The majority of courts enforce the servitude not as an in personam right against the owner of the servient tenement, but as an equitable property interest in the land itself. There is, therefore, no need for privity of estate.

Examples: 1) A acquires title to Blackacre by adverse possession. Even though he is not in privity of estate with the original owner, he is subject to the equitable servitude because the servitude is an interest in the land.

2) A and B are neighboring landowners, neither having any rights in the other's land. A promises B, "for herself, her heirs, successors, and assigns," that A's parcel "will never be used for other than residential purposes." B records the agreement. A sells Blackacre to C. The burden created by this promise would ***not run at law*** as a negative covenant because horizontal privity is missing. However, under an equitable servitude theory, the burden ***will run***, and an injunction will issue against other than residential uses.

3) Same as above, but A transfers only a life estate to C. Again, the burden would not run at law because of the absence of vertical privity. The burden would, however, be enforceable as an equitable servitude.

d. **Implied Beneficiaries of Covenants—General Scheme**
If a covenant in a subdivision deed is silent as to who holds its benefit, any neighbor in the subdivision will be entitled to enforce the covenant if a general scheme or plan is found to have existed at the time he purchased his lot.

Example: A subdivides her parcel into Lots 1 through 10. She conveys Lot 1 to B, who covenants to use the lot for residential purposes only. A then conveys Lot 2 to C, who makes a similar covenant. Thereafter, A conveys the balance of the lots to other grantees by deeds containing the residential restriction. Can C enforce the restrictions against B? Can B enforce against C?

Subsequent purchaser versus prior purchaser (C v. B): In most jurisdictions, C (the later grantee) can enforce the restriction against B if the court finds a common plan of residential restrictions at the very outset of A's sales. (Evidence would be the similar covenant restrictions in all the deeds.) The rationale is that B's promise was made for the benefit of the land at that time retained by A, the grantor. Such land, Lots 2 through 10, became the dominant estate. When A thereafter conveyed Lot 2 to C, the benefit of B's promise passed to C with the land.

Prior purchaser versus subsequent purchaser (B v. C): In most jurisdictions, B could likewise enforce the restriction against C, even though A made no covenant in her deed to B that A's retained land would be subject to the residential restrictions.

There are two theories on which a prior purchaser can enforce a restriction in a subsequent deed from a common grantor. One theory is that B is a third-party beneficiary of C's promise to A. The other theory is that

an implied reciprocal servitude attached to A's retained land at the moment she deeded Lot 1 to B. Under this theory, B is enforcing an ***implied*** servitude on Lot 2 and ***not*** the express covenant later made by C.

3. **Equitable Defenses to Enforcement**
A court in equity is not bound to enforce a servitude if it cannot in good conscience do so.

   a. **Unclean Hands**
   A court will not enforce a servitude if the person seeking enforcement is violating a similar restriction on his own land. This defense will apply even if the violation on the complainant's land is less serious, as long as it is of the same general nature.

   b. **Acquiescence**
   If a benefited party acquiesces in a violation of the servitude by one burdened party, he may be deemed to have abandoned the servitude as to other burdened parties. (Equitable servitudes, like easements, may be abandoned.) Note that this defense will not apply if the prior violation occurred in a location so distant from the complainant that it did not really affect his property.

   c. **Estoppel**
   If the benefited party has acted in such a way that a reasonable person would believe that the covenant was abandoned, and the burdened party acts in reliance thereon, the benefited party will be estopped to enforce the covenant. Similarly, if the benefited party fails to bring suit against a violator within a reasonable time, the action may be barred by ***laches***.

   d. **Changed Neighborhood Conditions**
   Changed neighborhood conditions may also operate to end an equitable servitude. If the neighborhood has changed significantly since the time the servitude was created, with the result that it would be inequitable to enforce the restriction, injunctive relief will be withheld. (Many courts, however, will allow the holder of the benefit to bring an action at law for damages.)
   Example: A, the owner of Blackacre and Whiteacre, adjacent parcels in an undeveloped area, sells Blackacre to B, extracting a promise that Blackacre "will always be used only for residential purposes." Fifteen years later, the neighborhood has developed as a commercial and industrial center. If B or her successors in interest to Blackacre now wish to use the parcel for a store, an injunction will probably ***not*** issue. A may, however, recover from B or her successors any damages that she may suffer from termination of the residential restriction.

      1) **Zoning**
      Zoning plays an important role in determining whether changed conditions will be allowed as a defense to enforcement of an equitable servitude. Zoning that is inconsistent with the private restriction imposed by the equitable servitude will not of itself bar the injunction, but it will provide good evidence that neighborhood conditions have changed sufficiently to make the injunction unjust. Thus, in the example above, the position of B or her successors would be fortified by a showing that the area in which Blackacre is situated is presently zoned for commercial uses.

      2) **Concept of the "Entering Wedge"**
      The concept of the "entering wedge" also plays an important role in changed condition cases. If the equitable servitude is part of a general plan of restrictions in a subdivision, and if the parcel in question is located somewhere at the outer edge of the subdivision, changed conditions outside of the subdivision will not bar the injunction if it is shown that lifting the restriction on one parcel will produce changed conditions for surrounding parcels, requiring that their restrictions also be lifted, and so on (the "domino effect"). Thus, in the example above, if removing the restriction and allowing commercial development of Blackacre would produce changed conditions for the neighboring, similarly restricted parcel—Whiteacre—with the consequence that its servitude could not be equitably enforced, the injunction against commercial use on Blackacre will probably be allowed, notwithstanding the changed conditions. Note that injunctive relief may be granted if the substantial change occurs within the subdivision.

4. **Termination**
Like other nonpossessory interests in land, an equitable servitude may be terminated by a ***written release*** from the benefit holder(s), ***merger*** of the benefited and burdened estates, or ***condemnation*** of the burdened property. (*See* B.4.b., c., h., *supra.*)

F. RELATIONSHIP OF COVENANTS TO ZONING ORDINANCES

Both restrictive covenants and zoning ordinances (*see* IX.C., *infra*) may affect legally permissible uses of land. Both must be complied with, and neither provides any excuse for violating the other. For example, if the zoning permits both residential and commercial use but an applicable covenant allows only residential use, the covenant will control.

These two forms of land use restrictions are enforced differently. As discussed above, covenants (if they meet the relevant requirements) can be enforced by nearby property owners at law or in equity. Zoning, on the other hand, is not subject to enforcement by private suit, but can be enforced only by local governmental officials.

G. PARTY WALLS AND COMMON DRIVEWAYS

Often, a single wall or driveway will be built partly on the property of each of two adjoining landowners. Absent an agreement between the owners to the contrary, courts will treat the wall as belonging to each owner to the extent that it rests upon her land. Courts will also imply mutual cross-easements of support, with the result that each party has the right to use the wall or driveway, and neither party can unilaterally destroy it.

1. **Creation**
While a ***written agreement*** is required by the Statute of Frauds for the express creation of a party wall or common driveway agreement, an "irrevocable license" can arise if there has been detrimental reliance on a parol agreement. Party walls and common driveways can also result from ***implication*** or ***prescription***.

2. **Running of Covenants**
If party wall or common driveway owners agree to be mutually responsible for maintaining the wall or driveway, the burdens and benefits of these covenants will run to successive owners of each parcel. The cross-easements for support satisfy the requirement of horizontal privity because they are mutual interests in the same property. And each promise touches and concerns the adjoining parcels.

V. ADVERSE POSSESSION

A. IN GENERAL

Title to real property may be acquired by adverse possession. (Easements may also be acquired by prescription.) Gaining title by adverse possession results from the operation of the statute of limitations for trespass to real property. If an owner does not, within the statutory period, take legal action to eject a possessor who claims adversely to the owner, the owner is thereafter barred from bringing suit for ejectment. Moreover, title to the property vests in the possessor.

B. REQUIREMENTS

1. **Running of Statute**
The statute of limitations begins to run when the claimant goes adversely into possession of the true owner's land (*i.e.*, the point at which the true owner could first bring suit). The filing of suit by the true owner is not sufficient to stop the period from running; the suit must be pursued to judgment. However, if the true owner files suit before the statutory period (*e.g.*, 20 years) runs out and the judgment is rendered after the statutory period, the judgment will relate back to the time that the complaint was filed.

2. **Open and Notorious Possession**
Possession is open and notorious when it is the kind of use the usual owner would make of the land. The adverse possessor's occupation must be ***sufficiently apparent*** to put the true owner on ***notice*** that a trespass is occurring. If, *e.g.*, Water Company ran a pipe under Owner's land and there was no indication of the pipe's existence from the surface of the land, Water Company could not gain title by adverse possession because there was nothing to put Owner on notice of the trespass.
Example: A's use of B's farmland for an occasional family picnic will not satisfy the open and notorious requirement because picnicking is not necessarily an act consistent with the ownership of farmland.

3. Actual and Exclusive Possession

a. Actual Possession Gives Notice

Like the open and notorious requirement, the requirement of actual possession is designed to give the true owner notice that a trespass is occurring. It is also designed to give her notice of the ***extent*** of the adverse possessor's claim. As a general rule, the adverse possessor will gain title only to the land that she actually occupies.

1) Constructive Possession of Part

Actual possession of a portion of a unitary tract of land is sufficient adverse possession as to give title to the whole of the tract of land after the statutory period, as long as there is a ***reasonable proportion*** between the portion actually possessed and the whole of the unitary tract, and the possessor has color of title (*i.e.*, a document purporting to give him title) to the whole tract. Usually, the proportion will be held reasonable if possession of the portion was sufficient to put the owner or community on notice of the fact of possession.

b. Exclusive Possession—No Sharing with Owner

"Exclusive" merely means that the possessor is not sharing with the true owner or the public at large. This requirement does not prevent two or more individuals from working ***together*** to obtain title by adverse possession. If they do so, they will obtain the title as tenants in common.

Example: A and B are next door neighbors. They decide to plant a vegetable garden on the vacant lot behind both of their homes. A and B share expenses and profits from the garden. If all other elements for adverse possession are present, at the end of the statutory period, A and B will own the lot as tenants in common.

4. Continuous Possession

The adverse claimant's possession must be continuous throughout the statutory period. Continuous possession requires only the degree of occupancy and use that the average owner would make of the property.

a. Intermittent Periods of Occupancy Not Sufficient

Intermittent periods of occupancy generally are not sufficient. However, constant use by the claimant is not required so long as the possession is of the type that the usual owner would make of the property. For example, the fact that the adverse possessor is using the land for the intermittent grazing of cattle will probably not defeat continuity if the land is ***normally*** used in this manner.

b. Tacking Permitted

There need not be continuous possession by the same person. Ordinarily, an adverse possessor can take advantage of the periods of adverse possession by her predecessor. Separate periods of adverse possession may be "tacked" together to make up the full statutory period with the result that the final adverse possessor gets title, provided there is privity between the successive adverse holders.

1) "Privity"

Privity is satisfied if the subsequent possessor takes by descent, by devise, or by deed purporting to convey title. Tacking is not permitted where one adverse claimant ousts a preceding adverse claimant or where one adverse claimant abandons and a new adverse claimant then goes into possession.

2) Formalities on Transfer

Even an oral transfer of possession is sufficient to satisfy the privity requirement.

Example: A received a deed describing Blackacre, but by mistake built a house on an adjacent parcel, Whiteacre. A, after pointing the house out to B and orally agreeing to sell the house and land to her, conveyed to B, by a deed copied from her own deed, describing the property as Blackacre. The true owner of Whiteacre argues that there was no privity between A and B because the deed made no reference to Whiteacre, the land actually possessed. Nonetheless, the agreed oral transfer of actual possession is sufficient to permit tacking.

5. **Hostile**
The possessor's occupation of the property must be hostile (adverse). This means merely that the possessor does ***not have the true owner's permission*** to be on the land. It does not mean anger or animosity. The state of mind of the adverse possessor is irrelevant. By the large majority view, it does not matter whether the possessor believes she is on her own land, knows she is trespassing on someone else's land, or has no idea of who owns the land.

   a. **If Possession Starts Permissively—Must Communicate Hostility**
   If the possessor enters with permission of the true owner (*e.g.*, under a lease or license), the possession does not become adverse until the possessor makes clear to the true owner the fact that she is claiming "hostilely." This can be done by explicit notification, by refusing to permit the true owner to come onto the land, or by other acts inconsistent with the original permission.

   b. **Co-Tenants—Ouster Required**
   Possession by one co-tenant is not ordinarily adverse to her co-tenants because each co-tenant has a right to the possession of all the property. Thus, sole possession or use by one co-tenant is not adverse, unless there is a clear repudiation of the co-tenancy; *e.g.*, one co-tenant ousts the others or makes an explicit declaration that he is claiming exclusive dominion over the property.

   c. **If Grantor Stays in Possession—Permission Presumed**
   If a grantor remains in possession of land after her conveyance, she is presumed to be there with the permission of her grantee. Only the grantor's open repudiation of the conveyance will start the limitation period running against the grantee. Likewise, if the tenant remains in possession after the expiration of her lease, she is presumed to have the permission of the landlord.

   d. **Compare—Boundary Line Agreements**
   There is a separate but related doctrine that may be helpful here. It operates where a boundary line (usually a fence) is fixed by agreement of the adjoining landowners, but later turns out not to be the "true" line. Most courts will fix ownership ***as per the agreed line***, provided it is shown that: (i) there was original ***uncertainty*** as to the true line; (ii) the agreed line was ***established*** (*i.e.*, agreed upon); and (iii) there has been ***lengthy acquiescence*** in the agreed line by the adjoining owners and/or their successors.

      1) **Establishment Requirement**
      The establishment requirement can be implied by acquiescence. A past dispute is not necessary to show uncertainty, although it can be good evidence of it. But a showing of original uncertainty is required; otherwise, in a court's view, a parol transfer of land would result.

6. **Payment of Property Taxes Generally Not Required**
Only a minority of states require the adverse possessor to pay taxes on the property. However, in all states, payment of property taxes is good evidence of a claim of right.

C. DISABILITY

1. **Effect of Disabilities—Statute Tolled**
The statute of limitations does not begin to run for adverse possession (or easements by prescription) if the true owner was under some disability to sue ***when the cause of action first accrued*** (*i.e.*, the inception of the adverse possession). Typical disabilities are: minority, imprisonment, and insanity.
   Example: O, the true owner, is five years old when A goes into adverse possession. The statute will not begin to run until O reaches the age of majority.

   Compare: O, the true owner, is declared insane six months after A begins using a pathway adversely. The statute is ***not*** tolled because O's disability arose ***after*** the statute began to run.

2. **No Tacking of Disabilities**
Only a disability of the ***owner*** existing at the time the cause of action arose is considered. Thus, disabilities of successors in interest or subsequent additional disabilities of the owner have no effect on the statute.

Examples: 1) O is a minor at the time A goes into adverse possession of O's land. One year before O reaches the age of majority, O is declared insane. The statute is not tolled by reason of O's insanity (a subsequent disability). Thus, the statute begins to run from the date O reaches the age of majority, whether she is then sane or insane.

2) O, the true owner, is insane when A begins an adverse use. Ten years later, O dies intestate and the land goes to her heir, H, who is then 10 years old. The statute of limitations begins to run upon O's death and is not tolled by H's minority. H's minority is a "supervening" disability and cannot be tacked to O's.

3. **Maximum Tolling Periods**
In some states, the maximum tolling period is 20 years; thus, the maximum period of the statute of limitations would be the regular statute of limitations period plus the maximum 20-year tolling period.

D. ADVERSE POSSESSION AND FUTURE INTERESTS

The statute of limitations does not run against the holder of a future interest (*e.g.*, a remainder) until that interest becomes possessory. Until the prior present estate terminates, the holder of the future interest has no right to possession, and thus no cause of action against a wrongful possessor.

Examples: 1) A devises Blackacre to B for life and then to C. Thereafter, X goes into possession and possesses adversely for the statutory period. X has acquired B's life estate by adverse possession, but has not acquired any interests against C. Of course, if following B's death, X or her successor stays in possession for the statutory period, X will have acquired C's rights also.

2) X enters into adverse possession of Blackacre. Four years later, A devises Blackacre to B for life and then to C. X continues her adverse possession for seven more years. The statute of limitations is 10 years. In this case, X has acquired the whole title by adverse possession. An adverse possession begun against the owner of the fee simple absolute cannot be interrupted by a subsequent division of the estate.

1. **Possibility of Reverter—Statute of Limitations Runs on Happening of Event**
In a conveyance "to A for so long as" some event occurs or fails to occur, on the happening of the event the fee simple determinable automatically comes to an end and the grantor (or his successors) is entitled to present possession. At that point, the grantor has a cause of action to recover possession of the property. If he does not bring the action within the period specified by the applicable statute of limitations (and if A or her successors have the requisite open, notorious, continuous, and adverse possession), his action will be barred.

2. **Right of Entry—Happening of Event *Does Not* Trigger Statute of Limitations**
In the case of a right of entry, on the happening of the stated event the grantor (or his successors) has only a right to reenter the property, a power to terminate the grantee's estate. Until the grantor asserts his right of entry, no cause of action arises because the grantee's continued possession of the land is proper: her fee simple estate has not been terminated. Thus (in most states), the statute of limitations does not operate to bar assertion of a right of entry even though the condition triggering the right of entry has been breached.

   a. **Grantor Must Act Within Reasonable Time to Avoid Laches**
   However, to avoid the title problems that might otherwise be presented, most courts hold that the holder of the right of entry must bring his action within a reasonable time after the event occurs. If he fails to do so, his action is barred by laches. As for what constitutes a reasonable time, many courts look to the statute of limitations governing actions for possession of real property.

E. EFFECT OF COVENANTS IN TRUE OWNER'S DEED

The exact nature of the title obtained depends on the possessor's activities on the land. For example, assume there is a recorded restrictive covenant limiting use of the land to a single-family residence. If the possessor uses the land in violation of that covenant for the limitations period, she takes title free of the covenant. But if she complies with the covenant, she takes title subject to it, and it remains enforceable against her (at least in an equitable action).

F. LAND THAT CANNOT BE ADVERSELY POSSESSED

The statute of limitations does not run against government-owned land (federal, state, or local) or land registered under a Torrens system.

I. ESTATES IN LAND

A. IN GENERAL

"Estates in land" are ***possessory interests*** in land. These interests may be ***presently*** possessory (present estates), or they may become possessory in the ***future*** (future interests). They may be "freeholds," which give possession under some legal title or right to hold (*e.g.*, fees or life estates), or they may be "nonfreeholds," which give mere possession (*i.e.*, leases). Estates in land may be of potentially infinite duration, as in the case of a fee simple, or they may be of limited duration, as in the case of an estate for years. But whatever their characteristics, "estates in land" must be distinguished from ***nonpossessory*** interests such as easements, profits, covenants, and servitudes.

This section of the outline will examine various estates in land. It divides the interests into two classes: present interests and future interests. However, some future interests (those following defeasible fees) will be considered with the present interests to which they are attached.

B. PRESENT POSSESSORY ESTATES

1. Fee Simple Absolute

An estate in fee simple absolute is the largest estate permitted by law. It invests the holder of the fee with full possessory rights, now and in the future. The holder can sell it, divide it, or devise it; and if she dies intestate, her heirs will inherit it. The fee simple has an indefinite and potentially infinite duration. The common law rule requiring technical words of inheritance ("and his heirs") has been abolished by statute in nearly all jurisdictions. Typically, such statutes provide: "A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended."

Example: A conveyance from "A to B" is presumed to pass a fee simple interest if A owned one. At common law, absent the words of inheritance, even a conveyance "to B in fee simple" would convey only a life estate to B.

2. Defeasible Fees

Defeasible fees are fee simple estates of ***potentially*** infinite duration that can be terminated by the happening of a specified event. Because defeasible fees can result in forfeitures, courts will construe, where possible, a purported limitation as a mere declaration of the grantor's purpose or motive for making the grant (*i.e.*, as precatory language).

a. Fee Simple Determinable (and Possibility of Reverter)

A fee simple determinable, also called a determinable fee, is an estate that ***automatically terminates*** on the happening of a stated event and goes back to the grantor. (It must be distinguished from the fee simple subject to a condition subsequent, where the grantor must take affirmative steps to terminate the estate of the grantee if the stated event occurs.) It is created by the use of durational, adverbial language, such as "for so long as," "while," "during," or "until." A fee simple determinable can be conveyed by the owner thereof, but his grantee takes the land subject to the termination of the estate by the happening of the event.

Example: O conveys land "to A for so long as no alcoholic beverages are consumed on the premises." This gives A a fee simple because the estate may last forever if no one ever quaffs a brew. If A conveys his fee simple determinable estate to B, B will own the "for so long as" estate. If A does not convey his estate, on A's death it will pass by will or intestacy to his successors, and so on. If, however, someone ever consumes an alcoholic beverage on the premises, the estate will automatically come to an end according to its own terms; and O will immediately and automatically become the owner of the fee simple, without taking any steps to terminate A's interest.

1) Correlative Future Interest in Grantor—Possibility of Reverter

Because the grantee's estate may end upon the happening of the stated event, there is a possibility that the land may revert back to the grantor. The interest that is left in a grantor who conveys an estate in fee simple determinable is called a "possibility of reverter." It is a future interest because it becomes possessory only upon the occurrence of the stated event.

a) Possibility of Reverter Need Not Be Expressly Retained

At common law and in nearly all states today, the grantor does not have to

expressly retain a possibility of reverter. It arises ***automatically*** in the grantor as a consequence of his conveying a fee simple determinable estate, with its built-in time limitation.

b) Transferability of Possibility of Reverter
At early common law, the possibility of reverter could not be transferred inter vivos or devised by will. An attempted transfer of the interest was invalid; but the possibility of reverter was not extinguished by the attempted transfer and would still descend to the heirs of the owner. Today, in most jurisdictions, the possibility of reverter can be transferred inter vivos or devised by will, and descends to the owner's heirs if she dies intestate.

2) Correlative Future Interest in Third Party—Executory Interest
A possibility of reverter arises only in the grantor, not in a third party. If a comparable interest is created in a third party, it is an executory interest. (*See* C.3., *infra.*)

b. Fee Simple Subject to Condition Subsequent (and Right of Entry)
A fee simple subject to a condition subsequent is created when the grantor retains the power to terminate the estate of the grantee upon the happening of a specified event. Upon the happening of the event stated in the conveyance, the estate of the grantee ***continues until the grantor exercises her power of termination*** (right of entry) by bringing suit or making reentry. The following words are usually held to create conditions subsequent: "upon condition that," "provided that," "but if," and "if it happens that."

Example: A, owning Blackacre in fee simple, conveys it "to B and his heirs, on the express condition that the premises are never to be used by B for the sale of liquor, and in the event that they are so used, then A or her heirs may enter and terminate the estate hereby conveyed." B has a fee simple subject to a condition subsequent. A has a right of entry. If the condition is broken, A has a power to terminate the estate of B by asserting her ***right of entry***.

1) Correlative Future Interest in Grantor—Right of Entry
A right of entry (also known as "right of reentry" or "power of termination") is the future interest retained by the transferor who conveys an estate on condition subsequent. It is necessary to ***expressly*** reserve the right of entry in the grantor; this retained interest does not automatically arise as in the case of a fee simple determinable and possibility of reverter.

a) Waiver of Right of Entry
Because the grantor can elect whether or not to terminate the grantee's estate, she may waive her right or power to enforce a forfeiture by express agreement or by her conduct. (Such is not the case with a fee simple determinable, where the forfeiture is automatic.)

(1) Inaction by Itself Not a Waiver
The general rule is that when there is a breach of the condition and the grantor simply does nothing about it, the power of termination is not waived. However, where there is any element of ***detrimental reliance*** by the fee holder, many courts treat inaction as a waiver on an estoppel or laches theory.

b) Transferability of Right of Entry
At common law, a right of entry was ***not devisable or transferable inter vivos*** to a third person. The right of entry did, however, descend to the heirs of the grantor on her death. Today, in most jurisdictions, a right of entry is still ***not*** alienable inter vivos. (Indeed, in a handful of states, an attempted transfer destroys it.) But in most states, rights of entry are devisable; and in all states, they descend to the owner's heirs.

2) Correlative Future Interest in Third Party—Executory Interest
A right of entry can be created only in favor of the grantor and her heirs. If a similar interest is created in favor of a third party, the interest is called an executory interest (*e.g.*, "if the property is ever used for other than church purposes,

then to C and his heirs"). Unlike a right of entry, an executory interest is subject to the ***Rule Against Perpetuities***. (*See* E., *infra.*)

3) **Compare—Fee Simple Determinable**
This estate is distinguished from a determinable fee in that the breach of the condition does ***not*** itself terminate the estate and immediately revest the fee in the grantor or her successor. The estate continues in the grantee or his successor unless or until the grantor or her successor affirmatively elects to terminate it.

c. **Fee Simple Subject to an Executory Interest**
A fee simple subject to an executory interest is an estate that, upon the happening of a stated event, is ***automatically divested in favor of a third person*** rather than the grantor.

Examples: 1) O conveys land "to Church; provided, however, that if the premises shall ever cease to be used for church purposes, title shall pass to the American Heart Association." Church has a fee simple subject to an executory interest in favor of the Heart Association. O does not have a right of entry because no such interest was reserved in the conveyance. The Heart Association's interest is not a right of entry because that future interest can be reserved only in favor of a grantor. The Heart Association's future interest is not a remainder because it divests a fee simple. Therefore, it is an executory interest.

Note: Executory interests are subject to the Rule Against Perpetuities, but the Heart Association's interest is valid because of the "charity-to-charity" exception to the Rule. (*See* E.1.e.1), *infra.*)

2) O conveys land "to Church for so long as the premises are used for church purposes, and if they shall ever cease to be so used, then and in that event to the American Red Cross." Church has a fee simple determinable subject to an executory interest in favor of the Red Cross. O has no possibility of reverter because he has not retained any interest; he has conveyed away his entire estate in the property. The future interest in the Red Cross cannot be a possibility of reverter because that interest arises only in a grantor, and the Red Cross is a grantee. It is an executory interest and not a remainder because it divests a fee simple. (Further discussion of these points will come later.)

Note: Were it not for the "charity-to-charity" exception to the Rule Against Perpetuities, the executory interest in favor of the Red Cross would violate the Rule.

d. **Limitations on Possibilities of Reverter and Rights of Entry**
In a few states, statutes limit the permissible duration of possibilities of reverter and rights of entry to a certain number of years (usually 30) in order to foster marketability of title. Other statutes (usually called "marketable title acts") require the rerecording of various future interests (including possibilities of reverter and rights of entry) every 20 to 40 years or they become unenforceable.

3. **Fee Tail**
The fee tail, typically created by the words "to B and the heirs of his body," limited inheritance to ***lineal descendants*** of the grantee. If no lineal descendants survived at the grantee's death, the property either reverted to the grantor or her successors or passed to a designated remainderman. Today, most United States jurisdictions have abolished the fee tail and have enacted statutes under which any attempt to create a fee tail results in the creation of a fee simple.

4. **Life Estate**
An estate for life is an estate that is not terminable at any fixed or computable period of time, but cannot last longer than the life or lives of one or more persons. It may arise by operation of law or may be created by an act or agreement of the parties.

a. **Life Estates by Marital Right (Legal Life Estates)**
Such estates arise under ***dower*** and ***curtesy***, the common law interests of wife and husband, respectively, in real property of which the other spouse was seised during marriage (including property acquired before marriage). At common law, a surviving

wife's dower right entitled her to a life estate in an undivided one-third of her husband's lands. A surviving husband's right of curtesy gave him a life estate in all of his wife's lands if issue were born. For exam purposes, it is important to remember that a conveyance by a husband to a bona fide purchaser does not defeat dower unless the wife joins in the conveyance. Likewise, a husband's creditors cannot defeat a wife's dower rights. Most states have abolished both dower and curtesy and have instead given the surviving spouse a statutory right to take a portion of the deceased spouse's estate. Community property states do not recognize either dower or curtesy.

b. Conventional Life Estate

1) For Life of Grantee
The usual life estate is measured by the life of the grantee and is called simply a life estate. It may be indefeasible (so that it will end ***only*** when the life tenant dies), or it may be made defeasible in the same ways that fee estates can be defeasible (*e.g.*, determinable, subject to a condition subsequent, subject to an executory interest). In such a case, the estate may end ***before*** the life tenant dies if the limiting condition occurs. (*See* Example 5), below.)

Examples: 1) A conveys "to B for life." In this case, B has an estate in the land for as long as he lives. On his death, the land reverts to A, the grantor.

2) "To A for life, then to B." This is a life estate because it is measured by the life of A and is not terminable at a fixed period of time.

3) "To A for life, but in no event for more than 10 years." This is an estate for years and not a life estate because the estate in A will end in 10 years (*i.e.*, a fixed time period).

4) "To A for 10 years if he lives so long." This is also an estate for years and not a life estate because the estate in A will end in 10 years.

5) "To A for life or until she remarries." This is a life estate subject to a limitation, but nevertheless a life estate. The estate in A will not end at any fixed or computable time period. It can be termed a "life estate determinable," and is analogous to the fee simple determinable discussed above.

6) "To B and C after the life of A." A has an implied life estate.

2) Life Estate Pur Autre Vie (Life of Another)
A life estate pur autre vie is a life estate measured by the life of someone other than the life tenant. Such an estate can be created ***directly*** by the grantor, *e.g.*, "to A for the life of B." A's estate ends when B dies. It can also be created ***indirectly***, as where the grantor conveys "to B for life," and B later conveys his interest to A. A owns an estate measured by B's life; it ends when B dies.

a) Inheritability
At common law, if A died before B, the property was regarded as without an owner until B died. Today, statutes provide that such estates are devisable and inheritable if no special occupant is named in the original grant. (A "special occupant" is a person named by the grantor to take the balance of the term, if any.)

c. Rights and Duties of Life Tenant—Doctrine of Waste
A tenant for life is entitled to all the ordinary uses and profits of the land; but he cannot lawfully do any act that would injure the interests of the person who owns the remainder or the reversion. If he does, the future interest holder may sue for ***damages and/or to enjoin*** such acts.

1) Affirmative (Voluntary) Waste—Natural Resources
As a general rule, a life tenant may not consume or exploit natural resources on the property (*e.g.*, timber, minerals, oil). ***Exceptions*** to this rule allow exploitation in the following circumstances:

(i) In reasonable amounts where necessary ***for repair and maintenance*** of the land;

(ii) When the life tenant is ***expressly given the right to exploit*** such resources in the grant;

(iii) When ***prior to the grant, the land was used in exploitation*** of such natural resources, so that in granting the life estate the grantor most likely intended the life tenant to have the right to exploit (*but see* "open mines doctrine," below); and

(iv) In many states, where the ***land is suitable only for such exploitation*** (*e.g.*, a mine).

Note: There is a vague "reasonableness" limit on the amount of oil or coal a life tenant can remove from the property.

a) Open Mines Doctrine
If mining (extraction of minerals) was done on the land before the life estate began, the life tenant may continue to mine the property—but is limited to the mines ***already open.*** The life tenant may not open any new mines. There is a trend away from this limitation, applying instead the rule in (iii), above, to all natural resources, including minerals.

2) Permissive Waste
Permissive waste occurs when the life tenant allows the land to fall into disrepair or fails to take reasonable measures to protect the land.

a) Obligation to Repair
A life tenant is obligated to preserve the land and structures in a ***reasonable state of repair,*** to the extent of the income or profits derived from the land (or if the life tenant is using the property himself and receiving no rent, then to the extent of the reasonable rental value of the land). But the tenant is under no obligation to make permanent improvements on the land, no matter how wise it might seem to do so.

b) Obligation to Pay Interest on Encumbrances
A life tenant is obligated to pay interest on any encumbrances on the land to the extent of the income or profits from the land (or in their absence to the extent of the reasonable rental value of the land). However, he does not have to pay anything on the principal of the debt; reversioners or remaindermen must pay the principal in order to protect their interests.

The foregoing applies to encumbrances on the entire fee simple estate. Of course, a life tenant could place a mortgage on the life estate alone, and would then be liable for both principal and interest payments.

c) Obligation to Pay Taxes
The life tenant is obligated to pay ***all ordinary taxes*** on the land to the extent of the income or profits from the land (or in their absence to the extent of the reasonable rental value of the land).

d) Special Assessments for Public Improvements
If the life of a public improvement on the land is shorter than the expected duration of the life estate, the life tenant is obligated to pay all of the assessment. However, if the improvement is likely to outlast the life estate (*e.g.*, curbing, sewers, water mains, a change in grade of a street), taxes and assessments are ***apportioned*** equitably between the life tenant and the holders of all future interests.

(1) Apportionment of Costs
Costs are usually apportioned by using the ratio produced by the market value of the life estate over the market value of the property.

e) No Obligation to Insure Premises
The life tenant is under no obligation to insure the premises for the benefit of a remainderman. However, both the life tenant and the remainderman have an insurable interest.

f) **No Liability for Third Party's Torts**
Under the modern view, life tenants are not responsible to remaindermen (as they were at common law) for damages caused by third-party tortfeasors. The life tenant's action against such third parties is limited to the damages to the life estate.

3) **Ameliorative Waste**
Ameliorative waste consists of acts that economically benefit the property. Ameliorative waste occurs when the use of the property is substantially changed, but the change increases the value of the property. At common law, any change to existing buildings or other improvements was always actionable waste, even if it improved the value of the property. Under modern authorities, however, a life tenant can substantially alter or even demolish existing buildings if:

(i) The market value of the future (or other nonpossessory) interests is not diminished; and ***either***

(ii) The remaindermen do not object; ***or***

(iii) A substantial and permanent change in the neighborhood conditions has deprived the property in its current form of reasonable productivity or usefulness.

Example: A holds a life estate in Blackacre, and B holds the remainder. The premises consist of an old and somewhat shabby apartment building that is nearly fully rented and produces a consistent income. The surrounding neighborhood includes many similar buildings. A proposes to demolish the building and construct a new shopping center on the land, which will produce much higher income. B objects to the change and brings an action to enjoin the demolition. B will prevail even though A's proposed changes would increase the value of the property. Because the existing building is economically productive and consistent with the neighborhood, A's commission of waste would not be justified.

a) **Compare—Leasehold Tenant**
Leasehold tenants are treated differently from life tenants. Most leasehold tenants remain liable for ameliorative waste even if the neighborhood has changed and the market value of the premises is increased. (*See* II.C.1.a.3), *infra*.)

b) **Compare—Worthless Property**
Under modern authority, a life tenant may ask for a judicial sale in a partition proceeding if it appears that the land is practically worthless in its present state. The proceeds are put in trust with income to the life tenant.

d. Renunciation of Life Estates
A life tenant who receives the estate by will or intestacy may renounce it, perhaps because owning it would be burdensome. If this occurs, the courts generally ***accelerate*** the future interest that follows the life estate, allowing it to become possessory immediately.

5. Estates for Years, Periodic Estates, Estates at Will, Tenancies at Sufferance
These nonfreehold present estates in land are considered in the Landlord and Tenant section of this outline (*see* II.A., *infra*).

C. FUTURE INTERESTS

A future interest is an estate that does not entitle the owner thereof to possession immediately, but will or may give the owner possession in the future. A future interest is a ***present***, legally protected right in property; it is not an expectancy.

Examples: 1) O conveys land "to A for life, and on A's death to B in fee simple." A has a present possessory life estate. B has a future interest. (B's future interest is an indefeasibly vested remainder.) Upon the termination of A's possessory life estate, B's remainder in fee simple will become a present possessory estate in fee simple.

2) O conveys land "to A for life, and on A's death to B in fee simple if B survives A." A has a present possessory life estate. B has a future interest. (It is a contingent remainder.) Upon the termination of A's life estate, B's remainder in fee simple ***may*** become a present possessory estate in fee simple. B must survive A in order to take. (In this example, O also has a future interest. He has not conveyed away the interest represented by the contingency that B may predecease A. If B does predecease A, on the termination of A's life estate title to the land will ***revert*** to O. O's retained future interest is called a reversion.)

3) After the conveyance "to A for life, and on A's death to B," B can transfer his remainder interest to another person. Alternatively, if B dies during A's lifetime, his vested remainder will pass to the devisees under his will or (if B left no will) to his intestate heirs.

1. Reversionary Interests—Future Interests in Transferor

a. Possibilities of Reverter and Rights of Entry
These future interests are discussed above in connection with the present estates to which they are attached.

b. Reversions
A person owning an estate in real property can create and transfer a lesser estate (in the durational sense). The residue left in the grantor, which ***arises by operation of law***, is a reversion.

Examples: 1) O, owning land in fee simple, conveys it (i) "to A for life," or (ii) "to A for 99 years." In each case, O has a reversion in fee simple. She (or her successors) will be entitled to present possession of the land when the granted estate terminates.

2) O, owning a life estate in land, leases it "to B for 20 years." O has a reversion in a life estate. If O is still alive when B's lease expires, title will revert to O for life. What happens if, 10 years after this transfer, O dies? B's lease will come to an end, for he was given a lease by one holding only a life estate. O cannot convey a greater interest than she has.

3) O, owning land in fee simple, conveys it "to B for life, and on B's death to C if C survives B." B has a life estate, C has a contingent remainder, and O has a reversion that will take in present possession at B's death if C predeceases B.

Reversions are transferable, devisable by will, and descendible by inheritance. The holder of a reversion may sue a possessory owner for waste and may recover against third-party wrongdoers for damages to the property (to the extent of the injury to the reversion).

c. All Reversionary Interests Are "Vested"
Although a reversionary interest becomes possessory in the future, it is a vested interest, not a contingent interest, because both the owner and the event upon which it will become possessory are certain. This is true even if the reversionary interest is determinable or defeasible. Because it is a vested interest, a reversionary interest is ***not subject to the Rule Against Perpetuities***.

2. Remainders
A remainder is a future interest created in a transferee that is ***capable of taking*** in present possession and enjoyment (*i.e.*, capable of becoming a present interest) ***upon the natural termination of the preceding estates*** created in the same disposition. Unlike a reversion, which arises by operation of law from the fact that the transferor has not made a complete disposition of his interest, a remainder ***must be expressly created in the instrument creating the intermediate possessory estate***. At common law, the only preceding estates that could support a remainder were life estates and fee tails. Because nearly all American jurisdictions have abolished the fee tail estate, a safe rule of thumb is that remainders ***always follow life estates***. (*Note:* According to the Restatement of Property, under modern law, a remainder can also follow a term of years. However, there is very little case law on the point, and it is so rare that it is extremely unlikely to be tested.)

Examples: 1) "To A for life, and on A's death to B and his heirs." A has a present possessory life estate. B has a remainder in fee simple. It is a remainder because

upon the expiration of A's life estate (natural termination of the preceding estate), B will be entitled to present possession and enjoyment of the property. The term "remainder" derives from the consequence that when A's life estate comes to an end, title "remains away" from the transferor instead of reverting back to him.

2) On Monday, O conveys Blackacre "to A for life." On Wednesday, O conveys "all of my right, title, and interest in Blackacre" to B. B holds a reversion, not a remainder. B's future interest was not created in the same disposition that gave A a life estate. The Monday conveyance gave A a life estate and raised a reversion in O. The Wednesday conveyance transferred O's reversion to B. "Once a reversion, always a reversion."

A remainder cannot "cut short" or divest a preceding estate prior to its normal expiration. Therefore, a remainder can ***never follow a fee simple***, which has a potentially infinite duration. Future interests that cut short a preceding estate or follow a gap after it are called executory interests. (*See* 3., *infra.*)

a. Indefeasibly Vested Remainder

An indefeasibly vested remainder is a remainder that:

(i) Can be created in and held only by an ***ascertained person or persons*** in being;

(ii) ***Must be certain to become possessory on termination of the prior estates*** (*i.e.*, there is no condition that may operate to prevent the remainder from someday becoming a present interest);

(iii) ***Must not be subject to being defeated or divested*** (compare the vested remainder subject to total divestment, c., *infra*); and

(iv) ***Must not be subject to being diminished in size*** (compare the vested remainder subject to open, b., *infra*).

Examples: 1) "To A for life, and on A's death to B." A has a life estate; B has an indefeasibly vested remainder which is certain to take in possession on the termination of A's life estate.

What if B dies in A's lifetime? There is no stated condition that B survive A in order to take, and the courts do not imply such a condition. B's indefeasibly vested remainder passes by will or intestacy to his successors, who own an indefeasibly vested remainder.

2) "To A for life, then to A's first-born son in fee." At the time of this disposition, A has no children. The state of title: life estate in A, contingent remainder in the first son to be born to A, reversion in fee simple in the transferor. (The reversion will take in present possession if A never has a son.) The remainder is not vested because it is not created in an ascertained person in being. Also, it is subject to the condition that A have a child.

Two years later A has a son, John. The state of title: life estate in A, indefeasibly vested remainder in fee simple in John.

b. Vested Remainder Subject to Open

This is a vested remainder created in a class of persons (*e.g.*, "children," "brothers and sisters") that is certain to take on the termination of the preceding estates, but is ***subject to diminution*** by reason of other persons becoming entitled to share in the remainder. It is also called a "vested remainder subject to partial divestment."

Examples: 1) "To A for life, and on A's death to her children in equal shares." If at the time of this disposition A has no children, the state of title is: life estate in A; contingent remainder in the unborn children of A; reversion in fee in the transferor, which will take in possession if A never has any children.

Suppose two years later a child, Bob, is born to A. The state of title is: life estate in A, vested remainder subject to open in Bob. Bob's remainder is vested because he is in existence and ascertained and his taking is

not subject to any contingency. But it is vested subject to open because A may have more children.

Two years later another child, Ray, is born to A. Bob's remainder has been partially divested in favor of Ray, who also meets the description "children of A." Bob and Ray now hold the vested remainder as tenants in common (each with an undivided one-half share) ***subject to open***—*i.e.*, their vested remainders will be partially divested if more children are born to A.

Two years later Bob dies; shortly thereafter, A dies. Bob's successors (by will or intestacy) and Ray are entitled to present possession and enjoyment of the property. Bob's share of the remainder was subject to partial divestment, but it was not subject to being totally defeated. No condition of survival was attached to Bob's interest. Bob (or his successors) was certain to take; the only question was the size of his share.

2) Gift by will "to my wife, Rowena, for life, and on her death to ***my*** children in equal shares." T is survived by Rowena and by three children. At first blush this looks like a vested remainder subject to open because it is a remainder to someone's children. In reality, though, it is ***indefeasibly vested***. T, being dead, can have no more children. (Slight qualification of answer: If Rowena is pregnant with T's child at T's death, the posthumous child, if born alive, will share in the gift.)

1) Divesting Interests Are Executory Interests
Once the remainder vests in one existing member of the class, the divesting interest in the unborn members of the class is called an executory interest.

2) Effect on Marketability of Title
Note that where there are outstanding interests in the unborn children, the vested remainderman and the life tenant cannot jointly convey good title.

Example: A "to B for life, remainder to C's children." D wants to buy the land, and desires to know if he can get good title if he purchases from B and all of C's living children. The answer is no, as long as C is alive, because it is possible for C to have more children (no matter what C's age). Thus, there would be outstanding interests in the unborn children of C, and D would not get good title.

c. Vested Remainder Subject to Total Divestment
A vested remainder subject to total divestment arises when the remainderman is in existence and ascertained and his interest is not subject to any condition precedent, but his right to possession and enjoyment is subject to being defeated by the happening of some ***condition subsequent***.

Examples: 1) "To X for life, remainder to A and his heirs, but if at A's death he is not survived by issue, to B and his heirs." Here, A has a vested remainder in fee simple, but his fee simple interest is subject to being divested if at his death he is not survived by issue. (B has a shifting executory interest.)

2) "To A for life, then to B for life." A has a life estate. B has a vested remainder in a life estate subject to total divestment. The transferor has a reversion in fee. B's remainder is vested even though (as a practical matter) he must survive A in order to take. But this practical requirement does not make B's remainder contingent. The only condition to B's taking is the natural termination of A's life estate, and this "condition" is inherent in any remainder life estate. There is no other condition precedent. However, B's remainder life estate is not indefeasibly vested, for it will be ***defeated if he dies in A's lifetime***. Therefore, it is a vested remainder subject to total divestment.

3) "To A for life, and on A's death to B; but if B predeceases A, on A's death to C." A has a life estate. B has a vested remainder subject to total divestment. Although B's taking is ***contingent on his surviving A***, that

contingency is expressed as a condition subsequent—meaning that B's remainder is vested subject to total divestment. (C has a shifting executory interest.)

d. Contingent Remainder
There are two ways to create a contingent remainder.

1) Subject to Condition Precedent
A remainder will be classified as contingent if its taking in possession is subject to a condition precedent ("contingent as to ***event***").

Examples: 1) "To A for life, and on A's death to B if B survives A." A has a life estate; B has a contingent remainder in fee simple. The transferor has a reversion, which will become a possessory estate on the termination of A's life estate if B predeceases A. Here, B's taking is subject to a contingency, stated as a condition precedent, that he must survive A in order to take.

Compare this with Example 3) in the preceding section. In that example, B's taking is also subject to a contingency: he must survive A in order to take. Thus in substance, this example and Example 3) are quite similar. But in classifying future interests, the general rule is that ***it is form and not substance that counts***. In Example 3), the contingency of survival is expressed as a condition subsequent; therefore, B's remainder is vested subject to total divestment. But in this example, the contingency of survival is expressed as a condition precedent; therefore, B's remainder is a contingent remainder.

2) "To A for life, and on A's death to B if B marries C." Here, B is an ascertained person, but there is a condition precedent to B's taking: he must marry C. If B marries C in A's lifetime, his remainder will become indefeasibly vested.

3) A conveys "to B for life, then to C and his heirs if C survives B; if C does not survive B, then to D and his heirs." Each remainder is contingent because each is subject to a condition precedent. They are mutually exclusive and exhaustive; *i.e.*, only one can come into possession, and when it does the other can never do so. These are called ***alternative contingent remainders***.

Compare: A conveys "to B for life, then to C and his heirs, but if C marries D, then to E and his heirs." Here C, an ascertained person, takes a vested remainder because it is not limited on a condition precedent. C's remainder is ready to come into possession whenever B dies. But the marriage condition is subsequent—C's marriage to D will forfeit his estate. E's interest is called an executory interest.

2) Unborn or Unascertained Persons
A remainder is contingent if it is created in favor of unborn or unascertained persons ("contingent as to ***person***"), because until the remainderman is ascertained, there is no one ready to take possession should the preceding estate come to an end.

Examples: 1) "To A for life, and on A's death, per stirpes to such of A's descendants as survive her." At the time of this disposition, A is in poor health and she has two adult children (B and C) who are very healthy. State of title: A has a life estate; there is a contingent remainder in such of A's descendants as survive A; the transferor has a reversion (for A may not be survived by any descendants).

While the odds are in B and C's favor that they will take the remainder upon A's death, they are not named as the remaindermen. The remainder is in such of A's descendants as survive A, and we will not be able to identify the remaindermen until A dies and we can see which of A's descendants survived her.

2) O transfers securities in trust "to pay the income to A for life, and on A's death to distribute the trust corpus to A's heirs." There is a contingent remainder in A's heirs. It is true that A's heirs will be determined the moment A dies and A's life estate terminates. But at the time O makes the transfer, the remaindermen are not ascertained, for "*nemo est haeres viventis*" (no one is heir of the living). The persons who turn out to be A's heirs will not be ascertained until A dies.

3) Destructibility of Contingent Remainders

At common law, a contingent remainder had to vest prior to or upon termination of the preceding freehold estate or it was destroyed.

Examples: 1) A conveyed "to B for life, and then to the heirs of C." If B predeceased C, there were no heirs of C to take possession so the remainder was destroyed and A or his estate retook possession.

2) A conveyed "to B for life, then to C if she reaches age 21." If B died before C reached 21, the remainder was destroyed. (Note that whenever a grantor created a contingent remainder, he retained a reversion, which was normally defeasible.)

Analysis: Why are the interests in the above examples remainders and not executory interests? In each instance it is possible that the future interest will take effect at the natural expiration of B's life estate (as remainders do), or that it will take effect following a gap after B's estate (as executory interests do). The rule is that if an interest may operate as either a remainder or an executory interest (depending on the circumstances at B's death), it is a remainder. Thus, at common law, if such a remainder was then called upon to act as an executory interest, it could not do so and was destroyed.

a) Rule Abolished

Today, the rule of destructibility has been abolished in all but a few states. Thus, in the two examples given above, on B's death, A's ***reversion*** would take over, and would then give way to a springing executory interest on C's death in the first example, and on C's attaining age 21 in the second. (Note that the contingent remainders are not destroyed when the preceding estate ends, but instead become executory interests because they will divest the transferor's estate.)

b) Related Doctrine of Merger

Whenever the same person acquires all of the existing interests in land, present and future, a merger occurs. That person then holds a fee simple absolute. For example, suppose A conveys by deed "to B for life." A now has a reversion. Subsequently, by a later deed, A conveys his reversion interest to B. B will have a fee simple absolute by merger. (A similar result would follow if B conveyed her life estate to A.) Moreover, the common law held (as an aspect of the destructibility doctrine) that if a person acquired all of the interests in land ***except*** a contingent remainder, the merger would occur anyway, and the contingent remainder would be destroyed! Contingent remainders were considered to be such flimsy, ephemeral interests that they would not keep the merger from occurring. Note that this is still the rule in those few states retaining the common law rule of destructibility.

Example: In Example 1), above (A "to B for life, then to the heirs of C"), title stands as a life estate in B, a contingent remainder in the as yet unascertained heirs of C, and a reversion (if C is still alive at the death of B) in A. If A then purchased B's interest, A would hold a life estate pur autre vie (for the life of B) and a reversion. At common law, A's two interests on either side of the contingent remainder ***merged***, wiping out the contingent remainder and giving A a fee simple.

(1) Compare—Interests Created Simultaneously

If a life estate and the next vested interest were created simultaneously

(by the same instrument), there would be no merger at that time because that would defeat the grantor's obvious intent to create a contingent remainder. However, if the life tenant subsequently conveyed his interest to the holder of the next vested estate, the contingent remainder would then be destroyed.

e. **Rule in Shelley's Case (Rule Against Remainders in Grantee's Heirs)**
At common law, where a freehold estate (usually a life estate) was given to A (by will or inter vivos transfer), and in the same instrument a ***remainder was limited to the "heirs" or to the "heirs of the body" of A***, and the freehold estate and the remainder were both legal or both equitable, the purported remainder in the heirs was not recognized, and A took both the freehold estate and the remainder. The Rule operated (regardless of the grantor's intent) to convert what would otherwise have been a contingent remainder in the heirs into a remainder in the ancestor.

Examples: 1) A grants or devises land "to B for life, and then to the heirs of B." Apart from the Rule in Shelley's Case, the title would be: life estate in B, contingent remainder in fee simple in B's heirs. But by virtue of the Rule, the title is: life estate in B, vested remainder in B in fee simple. (Here, the law of merger causes B's life estate to merge with his remainder so that B gets a present estate in fee simple.)

2) A "to B for life, then to C for life, then to the heirs of B." B has a life estate, and the Rule in Shelley's Case transforms the contingent remainder in the heirs of B into a vested remainder in fee simple in B. But merger does not occur because of the intervening ***vested*** remainder limited to C.

3) A "to B for life, then to C for life, then to the heirs of C." The Rule in Shelley's Case operates, as does merger, and C has a vested remainder in fee simple.

4) A "to B for life, then one day after B's death to the heirs of B." The Rule in Shelley's Case does not operate because the interest limited to the heirs of B is not a remainder (it can never take over immediately at the termination of the prior freehold estate), but rather is an executory interest.

Compare: O conveys land "to A and his heirs." A takes a fee simple—not by operation of the Rule in Shelley's Case, but because the words "and his heirs" are words of limitation denoting that a fee simple estate has been conveyed. (*See* I.B.1., *supra*.) (It is a common student error to conclude, in this case, that "A takes a fee simple because of the Rule in Shelley's Case." This rule is triggered ***only*** by the attempted creation of a remainder in the grantee's heirs.)

Note: This Rule has been ***abolished in most states today***, but arises occasionally where a conveyance was executed prior to abolition of the Rule.

f. **Doctrine of Worthier Title (Rule Against Remainders in Grantor's Heirs)**
Under the Doctrine of Worthier Title ("DOWT"), a remainder limited to the grantor's heirs is invalid, and the grantor retains a reversion in the property. This doctrine is still applied to inter vivos transfers in a majority of states, but most states treat it only as a rule of construction (*i.e.*, it does not apply if the grantor has clearly manifested an intent to create a future interest in his heirs).

Example: O deeds property "to A for life, and on A's death to my heirs at law," or ". . . and on A's death to my next of kin." In most states, the disposition gives A a life estate and presumptively leaves a reversion in fee simple in O. The burden of establishing that O really intended to create a remainder in his heirs (or next of kin) would be on the parties so contending. The litigation would arise after O's death, and would be between (i) the persons designated as O's heirs under the state's intestacy laws, claiming that they take on A's death by remainder, and (ii) the devisees under O's will, contending that O died owning a reversion.

In a state that has abolished the doctrine, the state of title is: life estate in A; contingent remainder in O's heirs; reversion in O.

Compare: 1) O deeds property "to A for life, and on A's death to my children in equal shares." On O's death, his children, X and Y, are O's sole heirs. DOWT does not apply. The doctrine applies only when there is a disposition, following a life estate, to the transferor's "***heirs***" or "***next of kin***," or words of like effect.

2) O deeds property "to A for life, and on A's death to the heirs born to my wife Martha and me." DOWT does not apply; the disposition creates a life estate in A and a vested remainder subject to open in the children of O and Martha. Although O used the term "heirs," it is clear from the context that he was not using the term in its technical sense, but was referring to his children by his wife Martha.

3. Executory Interests

Here is a good shorthand rule for classifying executory interests. Remember that there are two and only two future interests that can be created in a transferee: remainders and executory interests. ***If it is not a remainder because the preceding estate is not a life estate, then it must be an executory interest.*** Thus, an executory interest is any future interest in a transferee that does not have the characteristics of a remainder, *i.e.*, it is not capable of taking on the natural termination of the preceding life estate. More specifically, an executory interest is an interest that ***divests*** the interest of another.

a. Shifting Executory Interest—Divests a Transferee

A shifting executory interest is one that divests the interest of another transferee; *i.e.*, it cuts short a prior estate created by the same conveyance.

Examples: 1) "To A and her heirs; but if B returns from Canada, then and in that event to B and his heirs." A has a fee simple subject to an executory interest. Because the future interest is created in a transferee, it has to be either a remainder or an executory interest. B's future interest is not a remainder because it does not follow the natural termination of the preceding estate (here, A's fee simple estate). If B's interest does take in present possession, it will divest A's fee simple, and title will ***shift*** to B.

2) A conveys "to B for life, remainder to C and his heirs, ***but if C predeceases B***, to D and his heirs." D's interest does not await the expiration of C's vested remainder, but instead may cut it short.

b. Springing Executory Interest—"Follows a Gap" or Divests a Transferor

A springing executory interest is an interest that follows a gap in possession or divests the estate of the transferor.

Examples: 1) O conveys property "to A when and if A marries B." State of title: fee simple subject to an executory interest in O; springing executory interest in fee simple in A. A's interest is not a remainder because if A's future interest becomes a present interest (if A marries B), it will divest O's fee simple. Because it ***divests the estate of a transferor***, it is a springing executory interest.

2) O conveys property "to A for life, and one year after A's death to B." A has a life estate. O has a reversion. B has a springing executory interest in fee simple. B's interest cannot be a remainder because of the one-year gap; it is not capable of taking on the natural termination of the preceding estate (A's life estate). It is therefore an executory interest. It is a springing executory interest because it ***springs out of the transferor's reversion***.

c. Executory Interest Follows a Fee

A ***remainder cannot follow a fee simple interest*** of any kind. Therefore, any interest that follows a fee and is held by a third person is an executory interest.

Examples: 1) O conveys land "to Church for so long as the premises are used for church purposes, and if they shall ever cease to be so used, then and in that event to the American Red Cross." Church has a fee simple determinable subject to an executory interest; the Red Cross has an executory interest that is valid under the charity-to-charity exception to the Rule Against Perpetuities.

2) O conveys "to Church; provided, however, that if the premises shall ever cease to be used for church purposes, then and in that event to the American Red Cross." Church has a fee simple subject to an executory interest; the Red Cross has an executory interest that is valid under the charity-to-charity exception to the Rule Against Perpetuities.

d. Differences Between Executory Interests and Remainders

It is important to be able to distinguish between executory interests and remainders for the following reasons: (i) executory interests are not destructible, while contingent remainders are still destructible in a few jurisdictions; (ii) executory interests are not considered vested, whereas contingent remainders can become vested; and (iii) the Rule in Shelley's Case does not apply to executory interests, but it does apply to remainders limited to the heirs of the grantee for life.

4. Importance of Classifying Interests "In Order"

Future interests are classified clause by clause—which will often mean that the label appended to the first future interest created in a disposition will determine the label to be appended to a second future interest created in the same disposition. For instance, if the first future interest is a contingent remainder, subsequent future interests must also be contingent remainders. Similarly, if the first future interest is a vested remainder subject to divestment, the following future interests will be executory interests.

Examples: 1) O conveys land "to A for life, and on A's death to B if B survives A; but if B does not survive A, on A's death to C." A has a life estate. B has a contingent remainder because B's taking is subject to a contingency (expressed in condition precedent form) that B must survive A in order to take. C has an alternate contingent remainder.

Because the contingency of B's survival is expressed both as a condition precedent and (in the next clause) as a condition subsequent, why is B's remainder classified as contingent rather than as vested subject to total divestment? The explanation is that interests are classified "in order." Looking first at the clause giving an interest to B, here the contingency is expressed as a condition precedent; therefore, B's remainder is contingent. Then, having classified B's interest, we turn to C's interest. But because B's interest has already been determined to be a contingent remainder, C's interest is necessarily an alternate contingent remainder.

2) O conveys land "to A for life, and on A's death to B. But if B predeceases A, on A's death to C." Watch this one carefully, for the answer turns on the principle that we classify interests "in order." First of all, A has a life estate. Next we classify B's interest. It is a remainder, for it is capable of taking on the natural termination of the preceding estate (A's life estate). It is a vested remainder in fee simple because B is an ascertained person and there is ***no condition precedent*** to B's taking other than the termination of A's life estate. Having classified it as a vested remainder, we read on ("but if") and see that B's estate will be defeated if he predeceases A. Therefore, it is a vested remainder subject to total divestment upon the happening of this condition, which is expressed in ***condition subsequent*** form.

Having classified B's remainder as vested subject to total divestment, we turn to C's interest. It cannot be a remainder, for a remainder follows the natural termination of the preceding estate—B's estate, which is a vested remainder in fee simple. But ***no remainder can follow a fee simple***, for a fee simple is an estate of potentially infinite duration. If C does take, it will cut short B's vested remainder in fee simple some time short of infinity. Therefore, C's interest is an executory interest—a ***shifting executory interest***, because it divests a transferee.

But isn't C's interest capable of taking on the natural termination of A's life estate (if B predeceases A)? Yes, but that does not affect our classification. A remainder is a future interest capable of taking on the termination of the ***preceding*** estate, and here the preceding estate is B's.

Suppose, some years after this disposition, B dies during A's lifetime. What is the state of title? The answer: life estate in A, indefeasibly vested ***remainder*** in C. Now that B's estate is out of the way, the preceding estate is A's life estate, and so now we can change the label and call C's interest a remainder.

5. Transferability of Remainders and Executory Interests

a. Vested Remainders Are Transferable, Devisable, and Descendible
At common law and in all jurisdictions today, vested remainders are fully transferable during life, devisable by will, and descendible by inheritance. This is true of all types of vested remainders: indefeasibly vested, vested subject to open, and vested subject to total divestment.

b. Contingent Remainders and Executory Interests Are Transferable Inter Vivos
At common law, contingent remainders and executory interests were not assignable. While this is still the rule in a few states, most American courts hold that these interests are freely transferable.

c. Contingent Remainders and Executory Interests Are Usually Devisable and Descendible
Whereas the rule at common law was that contingent remainders and executory interests were not transferable inter vivos, it has always been held that these interests are devisable and descendible—***unless,*** of course, the holder's ***survival is a condition*** to the interest's taking.

Example: "To A for life, and on A's death to B; but if B does not survive A, on A's death to C." State of title: life estate in A, vested remainder subject to total divestment in B, and shifting executory interest in C. Suppose B dies in A's lifetime, leaving a will that devises "all my property" to Mrs. B. B's remainder interest does not pass under his will because, by the terms of the disposition, that interest failed when B died in A's lifetime.

d. Any Transferable Future Interest Is Reachable by Creditors
The rule followed in nearly all states is this: If a future interest can, under the laws of the state, be transferred voluntarily by its owner, it is also subject to involuntary transfer; *i.e.,* it can be reached by the owner's creditors by appropriate process.

e. Practical Ability to Transfer Marketable Title
Technically, most states consider all types of future interests transferable, but in practice those interests held by unborn or unascertained persons are not transferable because courts will not appoint a guardian for purposes of conveying land. (*See* VI.A.3.a.1)b), *infra.*)

6. Class Gifts
A "class" is a group of persons having a common characteristic. Typically, they stand in the same relation to each other or to some other person (*e.g.,* children, grandchildren, descendants, nephews and nieces). In a gift to a class, the share of each member of the class is determined by the number of persons in the class.

a. Definitional Problems

1) Dispositions to "Children"
A gift to a person's "children" generally includes that person's children from all marriages as well as adopted children. That person's stepchildren, grandchildren, and nonmarital children are generally not included in the class.

2) Dispositions to "Heirs"
A disposition to the "heirs" of someone presumptively includes those persons who would take the named person's estate according to the laws of descent and distribution if she were to die without a will.

3) Dispositions to "Issue" or "Descendants"
The terms "issue" and "descendants" refer to the lineal offspring of the designated person, whatever the degree of relationship (children, grandchildren, great-grandchildren, etc.). As a general principle, the issue or descendants take per stirpes.

4) Class Members in Gestation
Persons in gestation at the time set for distribution are included in a class. The common law presumption is that a child born within 10 lunar months or 280 calendar days after the necessary point in time was in gestation at that time.

b. When the Class Closes—The Rule of Convenience

When a gift is made to a group of persons generically described as a class, such as to someone's "children," there is the possibility that other persons may be born who meet the class description. This raises the question, when does the class "close"; *i.e.*, when is the maximum membership of the class determined, such that persons born thereafter are excluded from sharing in the gift? In resolving this problem, the common law courts developed the rule of convenience. This is a rule of construction, not a rule of law. It is applicable in the absence of an expression of intent to include all persons who meet the class description regardless of when they are born. Under the rule, a ***class closes when some member of the class can call for a distribution of her share of the class gift***. It is presumed that the ordinary transferor intends to include all members of the class, whenever born, ***provided*** that this would ***not cause any undue inconvenience***. Thus, the rule of convenience is based on a policy of including as many persons in the class as possible, consistent with permitting a distribution of the property at the first opportunity without the necessity of a future rebate.

1) Outright Gift—Class Closes at Time Gift Is Made

When a ***will*** makes an outright gift to a class, if any class members are alive at the testator's death, the class closes as of the ***date of the testator's death.***

Example: T's will devises property "to the children of my good friend, John Brown." John has three children (A, B, and C) at the time of T's death; another child (D) is born two years later. The class closes at T's death; A, B, and C share the gift. D is excluded by the rule of convenience.

Here, additional members of the class are included up to the time of T's death because there is no inconvenience in doing so. But we close the class at T's death because it is assumed that T would want an immediate distribution, rather than postponing distribution until John Brown's death, which is the only time we will be sure that John Brown will have no more children. If we were to include D, we would also have to include E, F, and G, who might be born later. Moreover, if we distributed one-third shares to A, B, and C at T's death, but required them to make rebates if more children should be born later to their father, John, all sorts of practical problems would arise. To avoid these problems, there is a strong constructional preference to close the class at T's death.

a) No Class Members Alive at Testator's Death—Class Stays Open

If there are no members of the class living at the testator's death, all afterborn persons who come within the class designation are included. Thus, if T had bequeathed $100,000 "to the children of John," and John had no children living at T's death or born within the period of gestation thereafter, then all of John's children, whenever born, are included, regardless of any possible inconvenience in keeping the class open this long.

2) Postponed Gift—Class Closes at Time Fixed for Distribution

When possession and enjoyment of a gift are postponed, as where the gift follows a life estate, the class remains open until the time fixed for distribution (*e.g.*, death of the life tenant).

Example: T's will creates a trust to pay the income to W for life, and on W's death to pay the principal to the children of John. At the time T executes his will, John has two children (A and B). After the will is executed but before T dies, another child (C) is born to John. After T's death but during W's lifetime, another child (D) is born to John. W dies; two years later John has another child (E).

The class closes at W's death; A, B, C, and D each take a one-fourth share. E is excluded by the rule of convenience. There was no inconvenience in leaving the class open until W's death, for the time had not yet come to distribute the corpus. But when W dies, it is time to make a distribution; the class is closed in order to determine the minimum shares going to each class member.

3) **Dispositions Subject to Condition of Reaching Given Age**
When there is a gift to a class conditioned upon the members attaining a certain age, the class closes when (i) the preceding estate, if any, terminates, and (ii) the first class member reaches the specified age. That class member's minimum share should be determined and distributed to her when she reaches the specified age.

Examples: 1) T's will devises his residuary estate "to the children of John who live to attain the age of 21." At T's death, John has three children: A (age 22), B (age 16), and C (age 10). The class closes at T's death. A is entitled to immediate distribution of her share, and the minimum size of that share must be fixed as of T's death, at one-third. If B lives to attain age 21, but C dies before attaining that age, on C's death, A and B's shares will be increased to one-half.

Two years after T's death, another child (D) is born to John. D is excluded by the rule of convenience. The class was closed at T's death in order to determine the minimum size of A's share so that this share could be distributed to her.

Suppose none of John's children is 21 at T's death. The class remains open until a child of John reaches the designated age, at which time the class closes.

2) T's will devises his residuary estate "to Wanda for life, and on Wanda's death to such of John's children as live to attain the age of 21." Here, the class will close, and the remaindermen who share in the disposition will be determined, when two things occur: (i) Wanda dies; ***and*** (ii) a child of John reaches age 21. If at T's death one of John's children is over age 21, it does not matter; the class remains open until Wanda's life estate terminates. Likewise, if at Wanda's death no child of John has attained age 21, the class remains open until one of John's children reaches that age. If at Wanda's death a child has attained age 21, the class will close at that time.

4) **Rule of Convenience Is a Rule of Construction Only**
The rule of convenience is a rule of construction only. If the transferor explicitly sets forth the time when membership of the class is to be determined, or if he provides that all members of the class, whenever born, are to share in the gift, then his directions will govern. However, courts have a strong preference for application of the rule of convenience unless there is a fairly clear indication that it is not to govern.

7. **Survival**
As a general rule, all future interests can pass at death by will or inheritance; *i.e.*, they are descendible and devisable. This is true ***unless*** the interest's taking is subject to an expressed or implied contingency of survival.

Examples: 1) "To my sister Sue for life, and on Sue's death to her children in equal shares." At the time of T's death, Sue has three children: A, B, and C. C dies, then Sue dies survived by A and B. The remainder is shared by A, B, and the estate of C (*i.e.*, the estate takes under C's will or by intestacy), each with one-third shares. *Analysis:* A, B, and C had vested remainders subject to open, but their interests were not in terms conditioned on surviving the life beneficiary—and the law does not imply such a condition of survival. On C's death, his vested remainder subject to open passes via his will or by intestacy. (*Note:* This example does ***not*** invoke the lapsed gift doctrine of Wills law, for C was alive at the testator's death.)

2) "To A for life, and on A's death to B if B is then living; but if B is not then living, to C." C dies, then B dies, then A dies. Who takes? Answer: The takers under C's will or by intestacy. B and C were given alternative contingent remainders. B's remainder was contingent on his surviving A, and B did not meet the condition; his estate was defeated. C's remainder was contingent on B's not surviving A; it was not in terms contingent on C's surviving A, and the law does not imply such a condition.

a. Express Words of Survival
In each of the following examples, the italicized language imposes a condition precedent that the remaindermen must survive the life tenant in order to take.
Examples: 1) "To A for life, remainder to his ***surviving children.***"

2) "To A for life, and should he ***die leaving children,*** to such children."

3) "To A for life, and after the death of A, remainder to the children of A ***then living.***"

b. Implied Contingency of Survival—Gifts to "Issue," "Descendants," or "Heirs"
Gifts to a person's "issue," "descendants," or "heirs" imply a condition of surviving the named ancestor.

D. TRUSTS

An express trust involves the holding of title to property by a trustee, who has an equitable fiduciary duty to deal with it for the benefit of other persons (the beneficiaries).

1. Private Trust Concepts and Parties

a. Settlor
The settlor is the person who ***creates the trust*** by manifesting an intent to do so. While a trust of personal property may be expressed orally, the Statute of Frauds requires a writing to create a trust of real property. The settlor must own the property at the time the trust is created and must intend to make the trust effective immediately.

b. Trustee
The trustee ***holds legal title to the property***, but must act under the instructions of the settlor who created the trust. The trustee has a fiduciary duty to use the highest care and skill for the beneficiaries. If the trustee has no duties at all, the trust will fail, and legal title will vest immediately in the beneficiaries. However, if the trustee dies, resigns, or refuses to serve, the trust will not fail; a court of equity will appoint a substitute trustee.

c. Beneficiaries
The beneficiaries are the ***persons for whose benefit the trust is created and held***; they hold equitable title to the property. Every private trust must have at least one beneficiary, and the beneficiaries must be definitely identifiable by the time their interest comes into enjoyment and, in all events, within the period of the Rule Against Perpetuities. Acceptance of the benefits of the trust is normally presumed, but a beneficiary may renounce his rights under the trust within a reasonable time after learning of its creation. A trust may be for a class of beneficiaries (*e.g.*, all the living descendants of Mary Jones), provided that the class is small enough to be "reasonably definite."

d. Res
The res is ***the property that is the subject of the trust***. If there is no res, the trust fails. The res may be real property or personal property (tangible or intangible), and it may be either a present interest or a future interest (vested or contingent). The trust res must be segregated from other property of the settlor, but this does not preclude a trust of a fractional share interest, such as a trust of "an undivided one-half interest in Blackacre," where the settlor owns all of Blackacre.

e. Application of Rule Against Perpetuities
The Rule Against Perpetuities (*see* E., *infra*) applies to the equitable future interests of the beneficiaries in a private trust just as it does to "legal" future interests.
Example: O conveys land to T "in trust for the benefit of A so long as the existing house on the land remains standing, and then for the benefit of the then-living descendants of A." The equitable interest of the descendants of A is void because it is not certain to vest or fail within 21 years after the life of any person living at the time the trust is created.

2. Creation of Trusts

a. Inter Vivos Conveyance
An inter vivos trust can be created by the settlor's conveyance of the trust res to the trustee while the settlor is alive. For real property, this must be done by a writing to satisfy the Statute of Frauds; this is usually accomplished by delivery of a deed.

b. Inter Vivos Declaration
The settlor may declare that he is now holding certain property (previously held outright by the settlor) in trust for certain beneficiaries. No deed or delivery is necessary, but if the res is real property, the declaration must be in writing and signed by the settlor.

c. Testamentary Conveyance
The settlor may create the trust by language in his will, and may also transfer the res to the trustee by a devise in the will. The trust will come into existence only upon the death of the settlor.

d. Pour-Over into Existing Trust
The settlor may create an inter vivos trust before death. The settlor's will may then bequeath property to the trust—"pouring it over" into the trust.

3. Charitable Trusts

a. Beneficiaries
A charitable trust, unlike the private trusts described above, must have an ***indefinite*** group of beneficiaries. The beneficiaries must be reasonably numerous and not individually identified. The trust may be for the benefit of an established charity (*e.g.*, the American Red Cross) or for a group of persons (*e.g.*, the victims of Hurricane Katrina).

b. Application of Rule Against Perpetuities
The Rule Against Perpetuities does not apply to trusts that are ***entirely charitable***. Such trusts may have infinite life. This is true even if the trust benefits two charities, one with a present interest and the other with a future interest that would normally violate the Rule Against Perpetuities. Note, however, that if either the first or second interest is noncharitable, the exemption from the Rule Against Perpetuities does not apply and the second gift is void.

Examples: 1) O conveys land to T in trust "for the benefit of the victims of Hurricane Katrina, and when all houses destroyed by the hurricane have been rebuilt, then for the benefit of the American Red Cross." The interest of the Red Cross may not vest until more than 21 years after the death of any person living when the trust is created, but it is still a valid interest.

2) O conveys land to T in trust "for the benefit of my son John, whose house was destroyed by Hurricane Katrina, and when his house has been rebuilt, then for the benefit of the American Red Cross." The interest of the Red Cross may not vest until more than 21 years after the death of any person living when the trust is created, and it is void.

c. Cy Pres Doctrine
If the purposes of a charitable trust are impossible to fulfill, are illegal, or have been completely fulfilled, a court may redirect the trust to a different purpose that is "as near as may be" (a translation of the Latin "cy pres") to the settlor's original intent.

d. Enforcement of Charitable Trusts
Neither the settlor nor the beneficiaries may bring an action to enforce a charitable trust. (This is contrary to the rule for private trusts, in which either party may bring such an action.) However, charitable trusts may be enforced by an action of the attorney general of the state.

E. THE RULE AGAINST PERPETUITIES

The Rule Against Perpetuities may be stated as follows: "No interest in property is valid unless it must vest, if at all, not later than 21 years after one or more lives in being at the creation of the interest." The Rule might be more easily understood if it had been expressed as an affirmative proposition: "An interest is void if there is any possibility, however remote, that the interest may vest more than 21 years after some life in being at the creation of the interest." This paraphrase of the Rule properly places the emphasis on the ***possibility*** of remote vesting, the test by which the invalidity of an interest is shown. If a situation can be imagined in which the interest might not vest within the perpetuities period, the interest is void. This is the result even though the circumstances that might bring about the remote vesting are unlikely to occur or are unrealistic. (All kinds of unlikely things are considered capable of happening under the Rule.) The Rule applies to the following legal and equitable future interests in personal or real property:

(i) Contingent remainders;

(ii) Executory interests;

(iii) Class gifts (even if vested remainders);

(iv) Options and rights of first refusal; and

(v) Powers of appointment.

1. Analysis of the Rule

a. When the Perpetuities Period Begins to Run
The validity of interests under the Rule is determined ***at the time the interests are created,*** taking into account the facts then existing. The "lives in being plus 21 years" period begins to run, and the measuring lives used to show the validity of an interest must be in existence, at that time.

1) Wills—Date of Testator's Death
The perpetuities period in the case of a will begins to run on the date of the testator's death.

2) Revocable Trusts—Date Trust Becomes Irrevocable
In the case of revocable trusts, the perpetuities period begins to run on the date the trust becomes irrevocable. This will be at the settlor's death unless the settlor amends the trust, making it irrevocable, during his lifetime.

3) Irrevocable Trusts—Date Trust Is Created
The perpetuities period for irrevocable trusts begins to run on the date the trust is created.

4) Deeds—Date Deed Is Delivered with Intent to Pass Title
In the case of a deed, the perpetuities period begins to run on the date the deed is delivered with the intent to pass title.

b. "Must Vest"
To be valid under the Rule, it must be shown that the interest created in the transferee must vest, regardless of what might happen, within lives in being plus 21 years. An interest becomes "vested" for purposes of the Rule when: (i) it becomes a present possessory estate; or (ii) it becomes an indefeasibly vested remainder or a vested remainder subject to total divestment. Remember that the Rule is applicable only to future interests created in third persons; consequently, the Rule generally applies only to contingent remainders, executory interests, and vested remainders subject to open.

Examples: 1) "To A for life, then to A's children for their lives, and on the death of the last survivor of A's children, to B in fee simple." At the time of this disposition, A has two very young children and is quite capable of having more children in the future. (i) A has a present possessory life estate. A's present children have vested remainders in life estates that are subject to open in favor of any future children born to A. There is a contingent remainder in a life estate in A's unborn children—but this interest is valid under the Rule because the children's life estates will vest at their birth, which will be in A's lifetime. B has an indefeasibly vested remainder in fee simple. (ii) B's interest is valid under the Rule even though it may be years before B (or her successors) is entitled to present possession and enjoyment of the property, and even though B (or her successors) may not succeed to present possession and enjoyment until the death of some person not now in being (*i.e.*, a future-born child of A may be the last survivor of A's children). Despite all this, B's interest is valid under the Rule because it is an ***indefeasibly vested remainder from the time of its creation.***

2) "To A for life, then to B; but if at B's death she is not survived by children, then in that event to C." (i) A has a present possessory life estate. B has a vested remainder subject to total divestment in fee simple. C has a shifting executory interest in fee simple. (ii) C's interest is valid under the Rule. B's is the relevant life that can be used to show

that C's interest will vest within the perpetuities period. If B dies in A's lifetime not survived by children, C's interest will become an indefeasibly vested remainder. If B survives A and thereafter dies not survived by children, C's executory interest will become a present possessory estate. Of course, B may die in A's lifetime (or after A's death) leaving children surviving her, in which case C's interest is extinguished. But that does not matter; the Rule requires that an interest must vest, ***if it does vest*** ("if at all"), within lives in being plus 21 years.

3) "To A for life, and on her death to such of her children as attain the age of 35." At the time this disposition takes effect, A is a 60-year-old woman who has had a hysterectomy. She has two children, ages 30 and 25. Under the common law Rule, here is what might happen: A ***might*** give birth to a child (defying medical science in the process). Then A's other two children might die before attaining age 35; then A might die before the afterborn attained his 14th birthday. (Key: 35 minus 21 is 14.) The afterborn child lives on to attain age 35. If these events were to occur, the remainder to such of A's children as attain age 35 would vest remotely. Because these events ***might*** occur, the remainder violates the Rule; it is stricken.

1) "Wait and See" Rule

A number of states (although not a majority) have modified the "must vest, if at all" rule above. Under the modified approach, these states suspend judgment as to whether the interest in question is good or void. Potentially, they wait until the end of the perpetuities period. If the interest in question ***actually*** vests during the period, it is good; if it does not vest or fail during that period, it is void. Until the end of the perpetuities period, it is impossible to know for sure whether the interest is good or not.

Example: Consider Example 3), above: "To A for life, and on her death to such of her children as attain the age of 35." Under the "wait and see" approach, the courts would inquire as to whether ***in fact*** any child of A reaches the age of 35 within 21 years after A's death. If one or more of A's children does so, the remainder is valid; if none does so, the remainder is void.

c. "If at All"

This simply means that the interest does not have to vest within the perpetuities period in order to be valid; after all, many contingent remainders never vest because the condition precedent to their taking is not satisfied.

Examples: 1) "To A for life, and on A's death to B if B is then living." A has a life estate, B has a contingent remainder, and the transferor has a reversion. B may never take, for she may predecease A. But if B does take ("if at all"), her interest will vest—here, will become a possessory estate—on A's death, when we will know whether B has survived A. In this case, B is "her own life in being," for the condition precedent to B's taking must occur, if it does occur, within B's lifetime. B's interest is valid under the Rule.

2) "To A in fee, but on the express condition that if marijuana is ever smoked on the premises during B's lifetime or within 21 years after B's death, then and in that event to B in fee." A has a fee simple subject to an executory interest; B has an executory interest in fee simple. B's interest might not take, for marijuana might not be smoked on the premises during B's lifetime or within 21 years thereafter. But if B's interest does take, by the terms of the disposition it must take during B's lifetime or within 21 years thereafter. B's interest is valid under the Rule.

d. "Lives in Being"

The law allows any lives to be used to show the validity or invalidity of an interest, but no lives are of any help unless they are somehow connected with the vesting of an interest. The measuring lives need not be given a beneficial interest in the property, and they need not even be expressly referred to in the instrument, but there must be some connection that insures vesting or failure of the interest within the perpetuities period.

Examples: 1) "To A for life, then to such of A's children as attain the age of 21." Here, the relevant measuring life is A. All of A's children are going to attain age 21, ***if at all,*** within 21 years after A's death. (This includes a child in the mother's womb at A's death, for the perpetuities period includes any period of gestation actually involved.)

2) Outright disposition of residue by will, "to such of my nephews and nieces as attain the age of 21." At the time of T's death she has two brothers and six nephews and nieces, all of whom are under age 21. Is the gift valid under the Rule? The answer: It depends. Specifically, it depends on whether T's parents are living. The ***relevant measuring lives*** are T's brothers and sisters, because all of T's nephews and nieces will attain age 21, if at all, within 21 years after their parents' deaths. If T's parents are dead, her two brothers are all the brothers she is ever going to have; and T's nephews and nieces will be the children of these brothers. The disposition is valid.

But if T's parents are alive, they ***might*** have another child (call him Excelsior), a brother or sister of T not alive at T's death. Then T's two brothers and six nephews and nieces who were alive at T's death might die. Then Excelsior might have a child who lives to attain age 21—more than 21 years after any life in being. Because this might happen, the disposition is invalid under the Rule.

1) Who Can Be Used as Measuring Lives

In all the examples in this chapter, the measuring lives used to show the validity or invalidity of interests are referred to or are indirectly involved in the disposition itself. It is a common drafting practice to use a ***"perpetuities saving clause"*** (i) to make sure that the Rule has not been accidentally violated, for the Rule is difficult to master; and (ii) sometimes to extend the duration of trusts to the maximum extent permitted under the Rule. The clause reads something like this: "Notwithstanding anything herein to the contrary, any trust created hereunder shall terminate, if it has not previously terminated, 21 years after the death of the survivor of the following named persons: _____; and the remaining principal and undistributed income of such trusts shall be distributed to . . . ."

In the blanks are inserted the names of the persons to be used as "artificial" measuring lives. Most commonly, the descendants then living of the transferor are specifically named. Alternatively, the clause might provide: "after the death of the survivor of all my descendants who shall be living at the time of my death"—this clause works in a will but does not work in an irrevocable trust. A few more aggressive draftsmen will name 10 healthy babies born in some local hospital on the day the instrument is executed—the probability is that this will permit the trust to run for 100 years.

2) Reasonable Number of Human Lives Can Be Used

Animals and organizations cannot be used as measuring lives; only humans can be used as measuring lives. Also, the number of measuring lives must be reasonable.

Examples: 1) "The trust will terminate 21 years after the death of the survivor of all persons listed in the Manhattan telephone directory." Clearly impermissible.

2) "The trust will terminate 21 years after the death of the survivor of all the descendants of Queen Victoria who are alive at the time of my death." This "royal lives" clause was widely used in England shortly after the turn of the century, and the English courts grudgingly sustained it. If the name of some currently famous person were used in this fashion, it is highly questionable whether American courts would sustain the disposition.

e. Interests Exempt from Rule

1) Gift Over to Second Charity

A charitable trust may last forever (*i.e.*, neither the Rule Against Perpetuities nor

any analogous rule applies). However, like any other gift, a gift for charitable purposes is void for remoteness if it is contingent upon the happening of an event that may not occur within the perpetuity period. The only exception to this rule is that if there is a gift to Charity A, followed by a gift over to Charity B upon a possibly remote event, the gift over is valid. Remember, this is the charity-to-charity exception. The Rule Against Perpetuities applies to dispositions over from a ***charity to an individual*** on a remote condition, ***and*** to dispositions over from an ***individual to a charity*** on a remote condition.

Examples: 1) "To the Georgetown YMCA for so long as the premises are used for YMCA purposes; and when they shall cease to be so used, then and in that event to the American Cancer Society." The YMCA has a fee simple subject to an executory interest; the Cancer Society has a shifting executory interest. The gift over to the Cancer Society is valid under the charity-to-charity exception to the Rule.

2) "To the Georgetown YMCA for so long as the premises are used for YMCA purposes; and when they shall cease to be so used, then and in that event to John Hancock, his heirs, successors, and assigns." Classifying the interests without regard to the Rule, the YMCA would have a fee simple subject to an executory interest; Hancock would have a shifting executory interest—which is stricken because it violates the Rule. The YMCA has a fee simple determinable, and the transferor has a possibility of reverter.

3) "To John Hancock, his heirs, successors, and assigns, provided that no marijuana is ever smoked on the premises; and if marijuana is ever smoked on the premises, to the Georgetown YMCA." Classifying interests without regard to the Rule, Hancock would have a fee simple subject to an executory interest; the YMCA would have a shifting executory interest—which is stricken because it violates the Rule; thus, Hancock has a fee simple absolute.

2) Vested Interests

A vested remainder in an individual is not subject to the Rule. Thus, a devise "to A for life, then to A's children for life, then to B in fee simple" is wholly valid. B has a presently vested remainder. It may vest in ***possession*** long after lives in being if A leaves some surviving children born after the testator's death, but the remainder to B is presently vested in interest, and that is what counts.

a) Compare—Class Gifts Are Subject to Rule

Vested remainders in a class, however, are subject to the Rule ***so long as the class remains open***.

3) Reversionary Interests

Reversions, possibilities of reverter, and rights of entry are all vested in interest and hence are not subject to the Rule Against Perpetuities. (Even so, in many states, there are statutes expressly limiting the duration of possibilities of reverter or rights of entry.)

a) Compare—Executory Interests Are Subject to Rule

Possibilities of reverter and rights of entry, which are exempt from the Rule, must be carefully distinguished from executory interests, which are subject to the Rule. Remember that executory interests are created in ***transferees***; possibilities of reverter and rights of entry are created only in the ***grantor*** (or the ***testator's heirs*** if a will is involved). An understanding of this distinction has frequently been tested by the bar examiners.

Example: O conveys Blackacre "to School so long as it is used for educational purposes, and when it is no longer so used, to A." A has an executory interest that violates the Rule because it may vest in possession many years after all lives in being are dead. Because any interest that violates the Rule is void and is stricken from the instrument, this leaves a determinable fee in the school and a possibility of reverter in O. O can now, by a second deed, transfer her possibility of reverter to A (if possibilities of reverter have been made transferable by statute in

the jurisdiction). To get a possibility of reverter in A, two pieces of paper are required: one creating the possibility of reverter in O; the second transferring it to A.

f. Consequence of Violating the Rule—Interest Is Stricken
An interest that violates the Rule is void and is stricken (subject to the possible application of a perpetuities reform statute). However, all other interests created in the instrument of transfer that are valid under the Rule are given effect.

1) **Exception—"Infectious Invalidity"**
There is an important exception to the preceding statement. Under the principle of "infectious invalidity," if the invalid gift is an essential part of the transferor's dispositive scheme, such that to strike this interest and give effect to the remaining interests would be to subvert the transferor's intent—if it is determined that the transferor would prefer that the entire disposition fail—then the entire disposition is void.

2. The Rule in Operation—Common Pitfall Cases

a. Executory Interest Following Defeasible Fee Violates the Rule
An executory interest that follows a defeasible fee, with no limit on the time within which it must vest, violates the Rule Against Perpetuities and is stricken. The effect on the remaining fee estate depends on whether the estate is determinable or subject to a condition subsequent. If the defeasible fee is phrased in durational terms (*e.g.*, "for so long as," "until"), the estate will still terminate upon the happening of the stated event and the grantor will have a possibility of reverter. In contrast, if the fee is subject to a condition subsequent, the condition is also stricken and the estate becomes a fee simple absolute.

Examples: 1) "To John Brown for so long as no marijuana is smoked on the premises; and if marijuana is ever smoked on the premises, then to Candy Barr." (i) John Brown has a fee simple subject to an executory interest; Candy Barr has an executory interest in fee simple. (ii) Candy's interest violates the Rule. Things may stay quiet for generations, long beyond 21 years after the deaths of John and Candy (the only relevant lives in this case). Then someone might light up, triggering the executory interest. Because this ***might*** happen, the executory interest might vest (*i.e.*, might become a possessory estate) long after lives in being plus 21 years. Candy's interest violates the Rule, and it is stricken. This leaves a fee simple determinable in John Brown, and a possibility of reverter in the transferor. The possibility of reverter is valid; retained interests in the transferor are not subject to the Rule.

What if marijuana is smoked on the premises within five years after the transfer, well within lives in being plus 21 years, meaning that in actuality there was no remote vesting? It does not matter. Under the Rule we do not "wait and see." (*But see* 1.b.1), *supra.*) It is ***what might happen*** that counts, viewing the facts as they exist ***at the time the interest is created.*** What actually happens is irrelevant.

2) "To John Brown; provided, however, that if marijuana is ever smoked on the premises, then to Candy Barr." (i) John Brown has a fee simple subject to an executory interest; Candy Barr has an executory interest in fee simple. (ii) Candy's interest violates the Rule, under the analysis given in Example 1). Again we strike Candy's interest—leaving John Brown with a fee simple absolute. (Contrast this with the result in Example 1), where the transferor had a possibility of reverter. This is the result of two different forms of expressing the gift to John Brown. Whenever a fee simple determinable is created ("so long as"), the transferor automatically has a possibility of reverter. But when a fee on a condition subsequent is created, the transferor does not have a right of entry unless the right of entry is expressly raised.)

b. Age Contingency Beyond Age Twenty-One in Open Class
A gift to an open class conditioned upon the members surviving to an age beyond 21 violates the Rule Against Perpetuities.

Example: "To A for life, then to such of A's children as live to attain the age of 25." At the time of this disposition, A has two children: X (age 12) and Y (age nine). (i) A has a life estate; there is a contingent remainder in A's children who live to attain age 25, and a reversion in the transferor (for none of A's children may ever reach age 25). (ii) The remainder to A's children violates the Rule. After this transfer, A ***might have another child*** (Z); before this afterborn child (who cannot be used as a life in being) attains age four, A, X, and Y might die; then Z might live on to age 25, at which time the remainder to A's children would vest in Z. But if this were to happen (and it might), the remainder would vest beyond lives in being plus 21 years. Because the interest might vest remotely, it is stricken.

c. The Fertile Octogenarian

A woman is ***conclusively presumed*** to be capable of bearing children regardless of her age or medical condition.

Example: Suppose, in the preceding example, X and Y were age 24 and 22, respectively, and A was a 60-year-old woman who has undergone a hysterectomy. Under the "remote possibilities" test, it is ***possible*** for a woman, of whatever age and medical condition, to bear children. Thus, A might have another child, Z. The remainder to A's children violates the Rule.

d. The Unborn Widow or Widower

The problem is that the term "widow" (and "widower"), like "heir," is a technical word with a technical meaning: You do not know who a person's widow (or widower) is until he dies and you can determine to whom he was married at his death.

Example: "To A for life, then to his widow for life; and on the death of A's widow, to such of A's descendants as are then living." (i) A has a life estate; there is a contingent remainder in a life estate in his widow; there is a contingent remainder in fee simple in A's descendants; and the transferor has a reversion. (ii) The remainder in the descendants violates the Rule. Although A is now happily married, he might divorce his wife (or she might die), and A might marry someone who was not alive at the time the interest was created. A might have a child by this widow; then everyone now on the scene might die; the ***widow might live for more than 21 years after the death of all lives in being,*** then die—leaving the afterborn child or children as "A's descendants then living."

e. The Administrative Contingency

A gift that is conditioned on an administrative contingency (*e.g.*, admission of will to probate) violates the Rule. The key question is "under the facts as they existed at the time of the gift, what might happen?"

Example: Disposition of residuary estate "per stirpes to such of my descendants as are living at the time my will is admitted to probate." Alternatively, a will of a German national written during World War II: "to such of my relations in Germany as are living at the time World War II is officially declared at an end." Under the "what might happen" approach of the common law Rule, wills are not probated, wars do not come to an end, decrees of distribution are never entered, etc. Moreover, because no person's lifetime is connected to the condition attached to this type of gift, we cannot use a life in being; we must use the "period in gross" of 21 years. And because the will "might not" be probated within 21 years, the gift is void.

The fact that the testator's will is in fact probated three weeks after her death does not matter. We do not wait and see. (*But see* I.b.1), *supra.*) Rather, looking from the time of the testator's death, and taking into account facts as they existed at that time, the question is what might happen.

f. Options and Rights of First Refusal

The right of a purchaser under an option or a right of first refusal (*see* F.4.d., *infra*) is treated as a contingent future interest (*e.g.*, an executory interest). If the option is structured so that it ***might*** be exercised later than the end of the Rule's period, it is usually held void.

Example: A is a subdivision developer and gives B an option to purchase a lot in the subdivision "to be exercised within 60 days after the City Council grants approval for the filing of a subdivision plat." While the parties may expect this to occur soon, it is ***possible*** that it will not occur within 21 years after any life in being at the creation of the option. Hence, the option may be held void.

1) **Reasonable Time Limit May Be Inferred**
A significant minority of courts, in applying the Rule to these interests, will construe the option as lasting only for a reasonable time, which is invariably less than 21 years, and thus will uphold it. Under this view, the option in the example above would be sustained on the ground that the parties intended it to expire if the City Council failed to act within a reasonable time, less than 21 years. Similarly, if the parties to the option are natural persons, some courts construe the option as lasting only for their lifetimes; hence, it is valid under the Rule.

2) **Options Connected to Leaseholds**
If a tenant under a lease has an option to purchase the leased premises during the lease term, the Rule is not applied, no matter how long the term. However, a tenant may attempt to transfer the option to some other party, thereby separating it from the leasehold estate. While some courts do not permit the option to be transferred separately, most courts hold that the transferability of the option depends on the original parties' intent when they entered into the lease and option agreement. If the court finds that the option has been separated from the leasehold estate, so that it is no longer exercisable by the tenant, the option becomes subject to the Rule Against Perpetuities.

3. Application of the Rule to Class Gifts

a. "Bad-as-to-One, Bad-as-to-All" Rule
The general principle that the Rule does not invalidate interests that "vest" within the perpetuities period ***does not apply to vested remainders subject to open.*** The class gift rule, sometimes called the "all-or-nothing" rule, requires that:

(i) The ***class must close*** within the perpetuities period; and

(ii) All conditions precedent for ***every*** member of the class must be satisfied, if at all, within the perpetuities period.

If it is possible that a disposition might vest remotely with respect to any member of the class, the ***entire class gift is invalid.***

Examples: 1) "To A for life, then to such of A's children as live to attain the age of 35." At the time of this disposition, A has two children: X (age 38) and Y (age 33). (i) A has a life estate. X has a vested remainder subject to open. There is a contingent remainder in such of A's other children as live to attain the age of 35. (ii) The remainder to A's children violates the Rule; the transferor has a reversion in fee. While X's remainder is vested subject to open, it is not vested for purposes of the Rule. Here is what might happen: A might have another child (Z); before Z attains age 14, A, X, and Y might die, etc. The ***gift with respect to any afterborn child of A clearly violates the Rule;*** under the "bad-as-to-one, bad-as-to-all" class gift rule, ***the entire class gift is void.***

Why does the "class closing" rule not save the gift? Because X is already age 35, doesn't this mean that the class will close on the life tenant's death? The answer is: yes it does, but this does not help. Although we will close the class at that point, the class as closed might include the afterborn Z, who might be under age 14 at that time; and it still might be more than lives in being plus 21 years before Z's interest might vest.

2) "To A for life, then to A's children for their lives, and on the death of the last survivor of A's children, to A's grandchildren in fee." At the time this disposition takes effect, A is alive and has two children and three grandchildren. A has a life estate, the two children have vested remainders subject to open in a life estate, and the three grandchildren have

vested remainders subject to open in fee. The remainder to A's grandchildren is void because every member of the class will not be ascertained until the death of the survivor of A's children; and that surviving child might be born to A after the date of this disposition. Then all of A's children and grandchildren who are lives in being might die and 21 years after their deaths, this afterborn child might give birth to a child (GC-4); although GC-4's interest would vest at birth, under the hypothesized facts it would vest remotely.

b. Class Closing Rules May Save Disposition

In some cases, the "rule of convenience" applicable to class gifts can be relied on to save a gift from the Rule.

Example: "To A for life, and on her death to A's grandchildren in fee." At the time of this disposition, A has two children and three grandchildren. A has a life estate and the grandchildren have vested remainders subject to open. As in the preceding example, A might have an afterborn child who might produce afterborn grandchildren—but there is one difference. Under the "rule of convenience" the ***class will be closed at the time any member of the class can demand a distribution***—here the death of A, a life in being. Consequently, all members of the class who will be permitted to share in the remainder will be determined on A's death.

c. "Gift to Subclass" Exception

Separate gifts vest at different times. Each gift to a subclass may be treated as a separate gift under the Rule.

Example: "To pay the income to A for life, then to A's children for their lives, and as each child of A dies, to distribute the corpus to such child's issue then living, per stirpes." A has two children at the time of this disposition. In this case, the remainder to issue has been made by a gift to subclasses; as each child dies his issue are to take the share on which he was receiving income. With respect to A's two children now alive, the class of "issue then living" will be determined on their deaths; the gift is good. If A should have another child after the date of this disposition, the ***remainder to such afterborn child's issue is void*** because it might vest beyond the lives in being plus 21 years.

d. Per Capita Gift Exception

When there is a separate gift of a fixed sum to each class member, each gift is tested separately under the Rule.

Example: T's will bequeaths "$1,000 each to such of A's grandchildren as live to attain the age of 21, whether alive at my death or born thereafter." At T's death, A has two children and five grandchildren. Here, we have a per capita gift to each member of the class; there is no problem of knowing within the perpetuities period the number of class members who share in an aggregate gift, and thus the size of each share. Here, the amount to be received by each member is ascertainable without reference to the number of persons in the class. The bequest is valid for all grandchildren by A's two children who were alive at T's death. (This includes all future-born grandchildren as well as the five now on the scene, for all such grandchildren will reach 21, if at all, within 21 years after their parent's death.)

However, the ***bequest is void for any grandchildren by a child born to A after T's death.*** Such an afterborn child cannot be used as a life in being.

4. Perpetuities Reform Legislation

Most states have enacted one of the following types of statutes designed to eliminate some of the harsh results of the common law Rule Against Perpetuities:

a. A ***"wait and see"*** statute, under which the validity of an interest following one or more life estates is determined on the basis of facts existing at the end of the life estate rather than at the creation of the interest (*see* 1.b.1), *supra*);

b. A ***cy pres*** approach, borrowed from Trusts law, under which an invalid interest is reformed to comply with the Rule and carry out the grantor's intent as nearly as possible;

c. A statute dealing with ***specific perpetuities problems*** (*e.g.*, age contingencies reduced to age 21, women over age 55 presumed incapable of childbearing, gift to widow presumed to mean the person who was the spouse on the date the gift was created); or

d. The ***Uniform Statutory Rule Against Perpetuities***, which provides an alternative 90-year vesting period. The Uniform Rule takes a "wait and see" approach in determining whether an interest actually vests within 90 years.

5. Technique for Analysis of Perpetuities Problems
In applying the Rule Against Perpetuities, these three steps should be followed:

a. Determine What Interests Are Created
First, determine what interests are created, applying the proper future interests labels, as though there were no Rule Against Perpetuities.

b. Apply the Rule
Determine the measuring life or lives that can be used to show either that the interest must vest within lives in being plus 21 years ***or*** that the interest might not vest within that period. At this step, assume that there is no such thing as a perpetuities reform statute, for the statute is not brought into play unless there is a perpetuities problem.

c. Apply Reform Statute
If the particular jurisdiction has a perpetuities reform statute that is triggered by the perpetuities violation, apply the statute to reform or save the gift.

F. THE RULE AGAINST RESTRAINTS ON ALIENATION

As a general rule, any restriction on the transferability of a legal (as distinguished from an equitable) interest in property is void: The restriction violates the common law Rule Against Restraints on Alienation. "Restraint on alienation" means an express restriction on the transferability of property. Like the Rule Against Perpetuities, this is a rule of public policy that is designed to prevent property from being tied up and taken out of commerce.

1. Types of Restraints on Alienation
There are three types of restraints on alienation: (i) ***disabling*** restraints, under which any attempted transfer is ineffective; (ii) ***forfeiture*** restraints, under which an attempted transfer results in a forfeiture of the interest; and (iii) ***promissory*** restraints, under which an attempted transfer breaches a covenant.

Examples: 1) Property is transferred to A in fee simple, with the added proviso that "neither A nor any of her children shall have the right to transfer the land or any interest therein." Under this restriction, if given effect (***it is not***), any attempted transfer would simply be ineffective. This is a ***disabling restraint***.

2) Property is transferred to A in fee simple, with the added proviso that "if A shall attempt to transfer the land or any interest therein during her lifetime, her estate shall cease, and title therein shall vest in B." This is a ***forfeiture restraint***.

3) Property is transferred to A in fee simple, with the added proviso that "A hereby covenants that she will not transfer the land or any interest therein without [the transferor's] prior written consent." Under this ***promissory restraint***, if given effect, the remedy is injunction or damages for breach of contract.

2. All Disabling Restraints on Legal Interests Are Void
All disabling restraints on legal interests of whatever type (*e.g.*, fee simple, life estate) are void. Disabling restraints are seen as particularly offensive because (i) unlike the other types of restraints, transfers are totally prohibited, (ii) they enable a person to deny the validity of his own conveyance, and (iii) they exempt the property from the person's creditors even while he is enjoying the property.

3. Absolute Restraints on Fee Simple Are Void
Absolute restraints of whatever type on fee simple estates are void. The grantee may ignore the restraint and freely transfer the property.

a. Compare—Partial Restraints on Fees Simple
Although absolute restraints on fee simple estates are void, a restraint ***for a limited time*** and ***for a reasonable purpose*** is likely to be upheld.

Example: A owns and resides in a house. He conveys a one-half interest in the house to his brother, B, including in the deed a covenant that "during their joint lifetimes, each party promises not to convey his interest to any other person without the consent of the other party." This promissory restraint is limited to the joint lifetimes of the parties and is a reasonable way to ensure that neither party will be faced with the prospect of residing with a stranger. The restraint would probably be upheld.

4. Valid Restraints on Alienation

a. Forfeiture and Promissory Restraints on Life Estates
Forfeiture and promissory restraints on life estates are valid. A life estate is inalienable as a practical matter because few would be willing to pay full value for an estate of uncertain duration; thus, little is lost by giving effect to the transferor's intention to restrict the estate's transferability. (However, ***disabling*** restraints on legal life estates are void.)

b. Forfeiture Restraint on Transferability of a Future Interest
A forfeiture restraint on the transferability of a future interest, during the period when the interest is a future interest, is valid.

c. Reasonable Restrictions in Commercial Transactions
The courts tend to uphold restrictions on transferability that arise in the context of a commercial transaction on the theory that the restriction appears in an agreement entered into by the parties, it is a product of their bargaining, and presumably serves a useful purpose in facilitating the parties' objectives. Thus, restrictions on transferability that are part of a bargained-for agreement, as distinguished from a donative transaction, are valid.

Examples: 1) O borrows money from M Bank and gives the bank a mortgage on land. The mortgage provides that the land shall not be transferable by O without M's consent, and that if the land is transferred without consent, the entire indebtedness shall be accelerated and shall become immediately due and payable. This "due on sale" restriction on transferability is reasonable because M has an interest in approving who shall be the transferee of the land in which it has a security interest.

2) A, B, C, and D each own 25% of the stock in a closely held corporation. The articles of incorporation provide that no shareholder shall transfer her stock without the consent of a majority of the other shareholders. This restriction on transferability is valid because, due to the closely held nature of the business, the shareholders have a legitimate concern over the identity of their associates.

d. Right of First Refusal
The right to have the first opportunity to purchase real estate when it becomes available, or the right to meet any offer, is valid if reasonable (*e.g.*, by specifying fair market value or other reasonable price). [Restatement (Second) of Property §4.4]

e. Restrictions on Transferability of Leaseholds
A provision in a lease prohibiting the lessee's assignment or subletting of her leasehold interest without the consent of the landlord is given effect in all jurisdictions. (*See* II.E.3., *infra.*)

f. Note—Restraints on Alienation of Equitable Interest (Spendthrift Clauses) Are Valid
The rule applicable to restrictions on equitable interests (*i.e.*, those held in trust) is the exact opposite of the rule applicable to legal interests. Spendthrift clauses, which are true disabling restraints, are given effect in the great majority of American jurisdictions. (*See* Trusts outline.)

G. CONCURRENT ESTATES

Any of the estates in land previously discussed can be held concurrently by several persons. These persons all have the right to the enjoyment and possession of the land at the same time. Three of the chief forms of concurrent ownership in land are discussed here: joint tenancy, tenancy by the entirety, and tenancy in common.

1. Joint Tenancy

A joint tenancy can be created between two or more co-tenants. Its distinguishing feature is the ***right of survivorship***. Conceptually, when one joint tenant dies, the property is freed from his concurrent interest; the survivor or survivors retain an undivided right in the property, which is no longer subject to the interest of the deceased co-tenant. The survivors do not succeed to the decedent's interest; they hold free of it.

a. Creation

1) Four Unities Required

At common law, four unities are required to create a joint tenancy:

a) Unity of ***time*** (interests vested at the same time);

b) Unity of ***title*** (interests acquired by the same instrument);

c) Unity of ***interest*** (interests of the same ***type*** and ***duration***); and

d) Unity of ***possession*** (interests give identical rights to enjoyment).

2) Modern Law

The above requirements have been eroded in some jurisdictions; *e.g.*, by statute in some states, an owner can create a joint tenancy in herself and another by a single deed (she need not use a strawman conveyance), even though the unities of "time" and "title" are not satisfied. Similarly, as indicated below, a number of transactions are no longer found to sever a joint tenancy despite the seeming absence of continued unities.

3) Express Language Required

Under modern law, ***joint tenancies are disfavored***. Hence, there must be a clear expression of intent to create this estate, or it will not be recognized. The usual language required is "to A and B as ***joint tenants with right of survivorship***." Today, when two or more persons take property by a single conveyance, a tenancy in common, not a joint tenancy, is presumed. A joint tenancy results only when an intention to create a right of survivorship is clearly expressed.

b. Severance

A joint tenancy can be terminated by a suit for ***partition***, which can be brought by any joint tenant. It may also be terminated by various acts by any joint tenant.

1) Inter Vivos Conveyance by One Joint Tenant

An inter vivos conveyance by one joint tenant of her undivided interest destroys the joint tenancy so that the transferee takes the interest as a tenant in common and not as a joint tenant. This rule applies to both ***voluntary and involuntary*** conveyances (even secret conveyances).

a) When More than Two Joint Tenants

When property is held in joint tenancy by three or more joint tenants, a conveyance by one of them destroys the joint tenancy ***only as to the conveyor's interest***. The other joint tenants continue to hold in joint tenancy as between themselves, while the grantee holds her interest as a tenant in common with them.

b) Conveyances that May Not Result in Severance

When a joint tenant makes a conveyance but retains some interest in the property, the transfer may not effect a severance.

(1) Judgment Liens

In most jurisdictions, when a plaintiff obtains a money judgment against a defendant, that judgment becomes a lien on the defendant's real estate in the county where the judgment is docketed. (This is automatic in some states; in others, the lien must be recorded in the real estate records.) The lien then "runs with the land," burdening it until the judgment is paid or until the lien expires under a statute of limitations (*e.g.*, 10 years). Suppose such a lien is obtained against one of several joint tenants but not against the others. Does it sever the joint tenancy, converting it into

a tenancy in common? The majority view is that it does not; a lien is not considered a sufficiently substantial "conveyance" to destroy the unities of time and title. However, if the plaintiff who obtained the judgment then proceeds to enforce it by ***foreclosure*** (often termed a "judgment sale"), the sheriff's deed issued to the buyer at that sale ***will sever*** the joint tenancy. That follows from the fact that the sheriff's deed conveys the defendant's full title.

Example: A and B own land as joint tenants with right of survivorship. P sues A on a tort claim, and obtains and records a judgment. If A dies at that point, B owns the entire land (by virtue of the right of survivorship), and P has a lien on nothing. However, assume that P has a judgment sale, and a sheriff's deed is issued to Q, who buys at the sale. Then A dies. B and Q each own a one-half interest in the land as tenants in common.

(2) Mortgages

In the majority of states, a mortgage is regarded as a lien on title, and one joint tenant's execution of a mortgage on her interest does not by itself cause a severance. (Rather, the severance occurs only if the mortgage is foreclosed and the property sold.) But in the minority of states, which regard a mortgage as a transfer of title, the transfer destroys the unity of title and severs the joint tenancy.

Example: A, B, and C are joint tenants. A mortgages her interest to Lender, who records. Thereafter, A dies and Lender seeks to enforce her mortgage on an undivided one-third interest in the property. In a state following the "lien theory" of mortgages, Lender loses. A's mortgage did not sever the joint tenancy. Lender's rights were lost when A died prior to foreclosure. A's interest evaporated, and with it Lender's security interest.

(3) Leases

Theoretically, when one joint tenant leases her interest in jointly held property, the lease destroys the unity of interest and thereby should effect a severance (which is the view taken by some states). But other states hold that the joint tenancy is not destroyed but is merely temporarily suspended (for the length of the lease).

(a) Death of Lessor

There is a split among the states following the latter view, on what happens if the lessor/joint tenant dies before the end of the lease. Some courts hold that because the lessor's own right to possession would cease on her death, so must the right of any lessee (*i.e.*, the lessor could not convey more than she had). Others hold that the lease operates as a "temporary severance," and the remaining joint tenant's survivorship rights are therefore postponed until the end of the lease.

2) Contract to Convey by One Joint Tenant

In most states, a severance also results where one joint tenant executes a valid contract to convey her interest to another, even though no actual transfer of title has yet been made. The contract to convey is enforceable in equity, and hence is treated as an effective transfer of an equitable interest. Thus, if the vendor dies before the title is transferred, the purchaser is entitled to a deed from the vendor's estate and becomes a tenant in common with the original joint tenant or tenants.

a) Compare—Executory Contract by All Joint Tenants

There is a split as to whether an executory contract to sell, entered into by all the joint tenants, will terminate the joint tenancy. Suppose that on January 1, A and B, joint tenants, contract with X to sell and deliver title to Blackacre to X on February 1. A dies on January 15. Two questions arise: (i) On February 1, is B entitled to the full sales proceeds as surviving joint tenant, or is A's estate entitled to one-half (on the theory that the January 1 contract worked an equitable conversion, which created in the vendors a contract right to

receive money that was held in tenancy in common)? And, (ii) will X have to obtain a deed not only from B but also from A's administrator on the theory that the retained legal title (for security purposes) was held in tenancy in common?

(1) **Common Law View—Joint Tenancy Continues**
The common law view, still followed by many courts, is that a joint tenancy continues in both the right to the proceeds and the retained legal title, meaning that B gets the full sales proceeds and can give good title.

(2) **Other Courts—Tenancy in Common**
Other jurisdictions, however, proceed on the doctrine of equitable conversion and hold that the executory contract converts A and B's land ownership rights to a mere contract right to receive the purchase price (which they hold as tenants in common because of the statutory presumption favoring such tenancies). Further, the legal title to the land, retained for security purposes, is also held to be in tenancy in common.

3) **Testamentary Disposition by One Joint Tenant Has No Effect**
A joint tenancy is not terminated where a joint tenant executes a will devising her interest to another or dies with such a will in effect. The reason is that a will is ambulatory (effective only at death) and hence is inoperative as to joint tenancy property, because at the instant of death the decedent's rights in the property evaporate. (The result would be contra if all joint tenants had agreed that the decedent could devise her interest; but in such a case, the agreement itself would cause the severance.)

a) **Compare—"Secret" Deeds**
As indicated above, an inter vivos conveyance severs a joint tenancy. This is true even though the deed is kept "secret" and the interest transferred is to take effect only upon the death of the grantor. However, if the grantee does not know about the deed, the grantee's acceptance ***after*** the death of the grantor does not relate back to defeat the right of survivorship. (*See* VI.C.4.b., *infra*.)

4) **Effect of One Joint Tenant's Murdering Another**
Some states have passed statutes under which the felonious and intentional killing of one joint tenant by another joint tenant operates as a severance. In other states, the surviving joint tenant holds the ill-gained portion on a constructive trust for the decedent's estate. Thus, the homicidal survivor keeps her original share but does not profit from her felony.

2. **Tenancy by the Entirety**
A tenancy by the entirety is a marital estate akin to a joint tenancy between husband and wife. It is not recognized in community property states, but in about 21 common law jurisdictions, it arises presumptively in any conveyance made to husband and wife.

a. **Right of Survivorship**
The estate carries a right of survivorship, which operates in the same manner as the right of survivorship incident to a joint tenancy.

b. **Severance Limited**
The major distinction between a joint tenancy and a tenancy by the entirety concerns severance. A tenancy by the entirety cannot be terminated by involuntary partition. It can be terminated only by: (i) the death of either spouse (leaving the survivor sole owner of the fee); (ii) divorce (leaving the parties as tenants in common with no right of survivorship); (iii) mutual agreement; or (iv) execution by a joint creditor of ***both*** husband and wife (a creditor of one or the other cannot execute).

c. **Individual Spouse Cannot Convey or Encumber**
In most states, an individual spouse may not convey or encumber tenancy by the entirety property. A deed or mortgage executed by only one spouse is ineffective.

3. **Tenancy in Common**
A tenancy in common is a concurrent estate with no right of survivorship. Each owner has a distinct, proportionate, undivided interest in the property. This interest is freely alienable by

inter vivos and testamentary transfer, is inheritable, and is subject to claims of the tenant's creditors. The only "unity" involved is possession: Each tenant is entitled to possession of the whole estate. Today, by statute, multiple grantees are presumed to take as tenants in common. The same is true where multiple transferees take by descent.

4. Incidents of Co-Ownership

a. Possession

Each co-tenant has the right to possess all portions of the property; no co-tenant has the right to exclusive possession of any part. A co-tenant out of possession cannot bring a possessory action unless there has been an "ouster" by the tenant in possession. A claim of right to exclusive possession can constitute an ouster.

b. Rents and Profits

In most jurisdictions (but not all), a co-tenant in possession has the right to retain profits gained by her use of the property. A co-tenant in possession need not share such profits with co-tenants out of possession, nor reimburse them for the rental value of her use of the land, unless there has been an ouster or an agreement to the contrary. However, a co-tenant out of possession has a right to share in ***rents from third parties*** and in ***profits*** derived from a use of the land that reduces its value (*e.g.*, removal of minerals, etc.).

c. Effect of One Concurrent Owner's Encumbering the Property

A joint tenant or tenant in common may place a mortgage on her interest, but may not, of course, encumber the other co-tenant's interest. If a tenancy in common is involved, the mortgagee can foreclose only on the mortgaging co-tenant's interest. Likewise, if a joint tenancy is involved and the mortgage itself does not sever the joint tenancy (*see* 1.b.1)b)(2), *supra*), the mortgagee can foreclose on the mortgagor/co-tenant's interest and the foreclosure sale itself will cause a severance. But in the case of a joint tenancy, the mortgagee runs the risk that the mortgaging co-tenant will die before foreclosure, extinguishing the mortgagee's interest. The same principles apply to judgment liens obtained against an individual co-tenant.

Example: A and B are joint tenants with right of survivorship. A injures C in an accident, and C sues A, obtaining a personal injury judgment against A for $1,000. This judgment is, by statute, a lien on A's one-half interest in the land, but it does not cause a severance. If A dies before the lien is foreclosed and is survived by B, B owns the land free and clear of the lien. But if C forecloses the lien before A's death, the foreclosure sale will cause a severance, and the buyer at the sale will own a one-half interest in the land as a tenant in common with B.

d. Ouster

Under the unity of possession, each co-tenant is entitled to possess and enjoy the whole of the property subject to the equal right of her co-tenant. If one tenant ***wrongfully excludes*** another co-tenant from possession of the whole or any part of the whole of the premises, there is an ouster. The ousted co-tenant is entitled to receive his share of the fair rental value of the property for the time he was wrongfully deprived of possession.

e. Remedy of Partition

A joint tenant or tenant in common has a right to judicial partition, either in kind (division of the tract into parcels) or by sale and division of the proceeds (in accordance with the ownership interests as modified by permitted recoupments for improvements, repairs, taxes, and the like).

1) Restraint on Partition by Co-Tenants

Although in general, a co-tenant has the right to demand a partition by judicial sale at any time, courts give effect to a provision prohibiting partition by any one co-tenant, provided that the restriction is to ***last for only a reasonable time***. The restriction is not considered to be an invalid restraint on alienation because (i) any co-tenant can transfer her interest to a third person at any time, and (ii) the restraint can be eliminated if the co-tenants join in a deed to a third person, thereby terminating the co-tenancy relationship.

f. Expenses for Preservation of Property—Contribution

Under certain circumstances, equity courts will compel contribution between concurrent owners.

1) **Repairs—Contribution May Be Compelled for Necessary Repairs**
A co-tenant who pays more than her pro rata share of the cost of necessary repairs is entitled to contribution from the other co-tenants in actions for accounting or partition. Although the courts are split on whether a co-tenant who makes necessary repairs can maintain an independent action for contribution against the other co-tenants, the majority view is that she can compel contribution, provided she has notified the other co-tenants of the need for repairs. Moreover, several recent decisions authorize contribution even without such notice.

The common law view was that because no co-tenant has a duty to make necessary repairs, a co-tenant who makes such repairs cannot bring an action to compel contribution from the other co-tenants. This is now the minority view.

2) **Improvements—No Contribution or Setoff**
Generally, there is no right of contribution for the cost of improvements, nor can they be set off in an action for accounting. Only in an action for partition can the value of improvements be recouped.

3) **Taxes and Mortgages—Contribution Can Be Compelled**
Each co-tenant has a duty to pay her share of taxes and payments due on mortgages on the entire property. A tenant who is not in sole possession can pay the taxes and mortgage payments and then compel contribution from the other co-tenants. However, a co-tenant in sole possession will receive reimbursement only for the amount that exceeds the rental value of the property.

g. **Duty of Fair Dealing Among Co-Tenants**
A confidential relationship exists among co-tenants. Accordingly, the acquisition by one co-tenant of any outstanding title or lien that might affect the estate held by all the co-tenants is deemed to be an acquisition on behalf of all the other co-tenants as well. Thus, when one co-tenant purchases or otherwise acquires a bondholder's (mortgagee's) claim against the co-tenancy property, she must give the other co-tenants a reasonable time to pay their share and acquire a proportionate interest. Courts carefully scrutinize the fairness of transactions between co-tenants. Lastly, it is difficult for one co-tenant to ***adversely possess*** against other co-tenants. (*See* V.B.5.b., *infra*.)

Example: A and B own land as co-tenants. Neither pays the annual property taxes. The county conducts a tax sale and A buys the property for $500. If B is willing to pay A $250, many courts will compel A to put the property in co-tenancy again.

VI. CONVEYANCING

A. LAND SALE CONTRACTS

Most transfers of land are preceded by contracts of sale. These normally contemplate escrow (delivery of deed to a third person to be held until purchase price paid) before closing (exchange of purchase price and deed).

1. Statute of Frauds Applicable

To be enforceable, a land contract must be in writing and signed by the party to be charged. The writing need not be a formal contract; a memorandum suffices—*e.g.*, escrow instructions can be the contract of sale. The Statute of Frauds requires that the writing contain all "essential terms" of the contract. These are: (i) a ***description*** of the property (*see* B.3., *infra*), (ii) identification of ***the parties*** to the contract, and (iii) the ***price*** and manner of payment (if agreed upon). Incidental matters (*e.g.*, prorating of taxes, furnishing of deeds, title insurance, etc.) can be determined by custom; they need not appear in the writing nor even have been agreed upon.

a. Doctrine of Part Performance

A court may give specific performance of a contract (though not damages) despite the absence of a writing if additional facts are present.

1) Theories to Support the Doctrine

a) Evidentiary Theory
Courts state that if acts done by a party can be explained only by reference to an agreement, these acts unequivocally establish the existence of an oral contract.

b) Hardship or Estoppel Theory
If acts done by a party in reliance on the contract would result in hardship to such an extent that it would be a fraud on that party were the contract not specifically enforced, the other party will be estopped from asserting the Statute of Frauds as a defense.

2) Acts of Part Performance

In most states, two of the following are required:

(i) ***Possession*** of the land by the purchaser;

(ii) Making of substantial ***improvements***; and/or

(iii) ***Payment*** of all or part of the purchase price by the purchaser.

Some state courts will go beyond this list and will accept as "part performance" other types of detrimental reliance by the purchaser, such as performance of services or sale of other land.

3) Can Seller Obtain Specific Performance Based on Buyer's Acts?

a) Evidentiary Theory
Under the evidentiary theory, it is immaterial who performed the acts constituting the part performance. Because they refer unequivocally to a contract, the seller may obtain specific performance based on the buyer's acts.

b) Hardship or Estoppel Theory
Under the hardship or estoppel theory, however, the ***plaintiff*** must be the one whose action would result in hardship if the Statute of Frauds were invoked. Consequently, the seller normally ***cannot*** rely on the buyer's acts. Even so, make sure that you ascertain whether the ***seller*** has done anything that would cause him a hardship if the Statute of Frauds were successfully asserted by the buyer.

2. Doctrine of Equitable Conversion

Under the doctrine of equitable conversion, once a contract is signed and each party is entitled to specific performance, equity regards the purchaser as the owner of the real property. The seller's interest, which consists of the right to the proceeds of sale, is considered to be personal property. The bare legal title that remains in the seller is considered to be held in trust for the purchaser as security for the debt owed the seller. But note that possession follows the legal title; so even though the buyer is regarded as owning the property, the seller is entitled to possession until the closing.

a. Risk of Loss

If the property is destroyed (without fault of either party) before the date set for closing, the majority rule is that, because the buyer is deemed the owner of the property, the ***risk of loss is on the buyer***. Thus, the buyer must pay the contract price despite a loss due to fire or other casualty, unless the contract provides otherwise. Some states, however, have adopted the Uniform Vendor and Purchaser Risk Act, which places the risk on the seller unless the buyer has either legal title or possession of the property at the time of the loss.

1) Casualty Insurance

Suppose the buyer has the risk of loss, as is true under the majority view, but the seller has fire or casualty insurance that covers the loss. In the event of loss, allowing the seller to recover the full purchase price on the contract and to collect the insurance proceeds would be unjust enrichment. Hence, the courts require the seller to give the buyer credit, against the purchase price, in the amount of the insurance proceeds.

b. Passage of Title upon Death

The doctrine of equitable conversion also affects the passage of title when a party to a contract of sale dies before the contract has been completed. In general, it holds that a deceased seller's interest passes as personal property and a deceased buyer's interest as real property.

1) Death of Seller

If the seller dies, the "bare" legal title passes to the takers of his real property, but they must give up the title to the buyer when the contract closes. When the purchase price is paid, the money passes as personal property to those who take the seller's personal property. Note that if the property is ***specifically*** devised, the specific devisee will probably take the proceeds of the sale. (*See* F.1.b., *infra*.)

2) Death of Buyer

If the buyer dies, the takers of his real property can demand a conveyance of the land at the closing of the contract. Moreover, they are entitled to exoneration out of the personal property estate; thus, the takers of his personal property will have to pay the purchase price out of their share of the buyer's estate.

3. Marketable Title

There is an implied warranty in ***every*** land sale contract that at closing the seller will provide the buyer with a title that is "marketable."

a. "Marketability" Defined—Title Reasonably Free from Doubt

Marketable title is title reasonably free from doubt, *i.e.*, title that a reasonably prudent buyer would be willing to accept. It need not be a "perfect" title, but the title must be free from questions that might present an unreasonable risk of litigation. Generally, this means an unencumbered fee simple with good record title.

1) Defects in Record Chain of Title

Title may be unmarketable because of a defect in the chain of title. Examples include: a significant ***variation in the description*** of the land from one deed to the next, a deed in the chain that was ***defectively executed*** and thus fails to meet the requirements for recordation, and evidence that a prior grantor ***lacked capacity*** to convey the property. Many courts hold that an ancient lien or mortgage on the record will not render title unmarketable if the seller has proof of its satisfaction or the statute of limitations on the claim would have run under any possible circumstance, including tolling for disabilities.

a) Adverse Possession

Historically, a title acquired by adverse possession was not considered

marketable because the purchaser might be later forced to defend in court the facts that gave rise to the adverse possession against the record owner. On the bar exam, ***title acquired by adverse possession is unmarketable***, despite the fact that most modern cases are contra. Most of the modern cases hold adverse possession titles to be marketable if: (i) the possession has been for a very lengthy period; (ii) the risk that the record owner will sue appears to be very remote; and (iii) the probability of the record owner's success in such a suit appears to be minimal. Because the bar examiners have yet to recognize this line of cases, the modern view should be considered only as a fallback position on the bar exam.

b) Future Interest Held by Unborn or Unascertained Parties
Even though most states consider all types of future interests to be transferable, it is often impossible for the owners of the present and future interests, acting together, to transfer a marketable fee simple absolute title. This is because the future interests are often held by persons who are unborn or unascertainable.

Example: "To A for life, and upon A's death to A's eldest surviving daughter." Assume that at the time of this conveyance A has one daughter, B. State of title: A has a life estate, and B has a contingent remainder. A and B together can transfer the land to a purchaser, such as C, but the title is not marketable. It may turn out that, upon A's death, B will have predeceased A, and some other daughter (perhaps not even yet born when A and B transferred to C) will be "A's eldest surviving daughter." Because that daughter did not join in the conveyance to C, she is not bound by it, and she owns the land. On the other hand, if B does turn out to be A's eldest surviving daughter (which cannot be determined until A's death), then C's title will become a marketable fee simple at that time.

While most courts will appoint a guardian ad litem to represent unborn or unascertained persons in ***litigation***, the majority will not appoint such a guardian for purposes of ***conveying*** the land.

2) Encumbrances
Generally, mortgages, liens, easements, and covenants render title unmarketable unless the buyer waives them.

a) Mortgages and Liens
A seller has the right to satisfy a mortgage or lien at the closing with the proceeds from the sale. Therefore, as long as the purchase price is sufficient and this is accomplished simultaneously with the transfer of title (usually through the use of escrows), the buyer cannot claim that the title is unmarketable; the closing will result in a marketable title.

b) Easements
An easement that reduces the value of the property (*e.g.*, an easement of way for the benefit of a neighbor) renders title unmarketable. The majority of courts, however, have held that a beneficial easement (*e.g.*, utility easement to service property) that was visible or known to the buyer does not constitute an encumbrance. Some courts go so far as to hold that the buyer is deemed to have agreed to take subject to any easement that was notorious or known to the buyer when she entered into the contract.

c) Covenants
Restrictive covenants render title unmarketable.

d) Encroachments
A significant encroachment constitutes a title defect, regardless of whether an adjacent landowner is encroaching on the seller's land or vice versa. However, the encroachment will not render title unmarketable if: (i) it is very slight (only a few inches) and does not inconvenience the owner on whose land it encroaches; (ii) the owner encroached upon has indicated that he will not sue on it; or (iii) it has existed for so long (many decades) that it has become legal by adverse possession, provided that the state recognizes adverse possession titles as being marketable (*see* 1)a), *supra*).

3) **Zoning Restrictions**
Generally, zoning restrictions do not affect the marketability of title; they are not considered encumbrances. An ***existing violation*** of a zoning ordinance, however, does render title unmarketable.

4) **Waiver**
Any of the above-mentioned title defects can be waived in the contract of sale.

b. **Quitclaim Deed—No Effect**
The fact that a contract calls for a quitclaim deed, which does not contain any covenants for title, does not affect the warranty to provide marketable title (unless so provided in the contract).

c. **Time of Marketability**
If, as is usual, the seller has agreed to furnish title "at date of closing," the buyer cannot rescind prior to that date on grounds that the seller's title is not marketable.

1) **Installment Land Contract**
Similarly, where an installment land contract is used, the seller's obligation is to furnish marketable title ***when delivery is to occur***, *e.g.*, when the buyer has made his final payment. Therefore, a buyer cannot withhold payments or seek other remedies (*e.g.*, rescission) on grounds that the seller's title is unmarketable prior to the date of promised delivery. The buyer might get rescissionary relief before the date of delivery by showing that the seller cannot possibly cure the defects in time. Or, under compelling circumstances, a court might require the seller to quiet title during the contract period.

d. **Remedy If Title Not Marketable**
If the buyer determines that the seller's title is unmarketable, he must notify the seller and give a reasonable time to cure the defects, even if this requires extension of the closing date. The notice must specify the nature of the defects. If the seller fails to cure the defects, the buyer may pursue several remedies.

1) **Rescission, Damages, Specific Performance**
In the absence of a contractual stipulation to the contrary, if title is not marketable, the buyer can rescind, sue for damages for breach, get specific performance with an abatement of the purchase price, or, in some jurisdictions, require the seller to quiet title. The seller cannot sue successfully for damages or specific performance.

2) **Merger**
If the buyer permits the closing to occur, the contract is said to merge with the deed and, in the absence of fraud, the seller is no longer liable on the implied contractual warranty of marketable title. (However, the buyer may have an action for violation of promises made in the deed; *see* D., *infra*.)

4. **Time of Performance**

a. **Presumption—Time Not of the Essence**
In general, the courts assume that time is not "of the essence" in real estate contracts. This means that the closing date stated in the contract is not absolutely binding in equity, and that a party, even though late in tendering her own performance, can still enforce the contract if she tenders within a reasonable time after the date. (A month or two is typically considered a reasonable time.)

b. **When Presumption Overcome**
Time will be considered "of the essence" if:

1) The ***contract*** so states; or

2) The ***circumstances*** indicate it was the parties' intention; *e.g.*, the land is rapidly fluctuating in value or a party must move from out of town and has no other place to go; or

3) One party gives the other ***notice*** that she desires to make time of the essence, and does so within a reasonable time prior to the date designated for closing.

c. **Effect of Time of the Essence Construction**
If time is of the essence, a party who fails to tender performance on the date set for closing is in total breach and loses her right to enforce the contract.

d. **Liability When Time Not of the Essence**
Even if time is not of the essence, a party who is late in tendering performance is liable in damages for the incidental losses she has caused, such as additional mortgage interest, taxes, etc.

5. **Tender of Performance**
In general, the buyer's obligation to pay the purchase price and the seller's obligation to convey the title are deemed to be ***concurrent conditions***. This means that neither party is in breach of the contract until the other party tenders her performance, even if the date designated for the closing has passed.

a. **When Party's Tender Excused**
A party's tender is unnecessary and is excused if the party has repudiated the contract, or if it is impossible for the other party to perform (*e.g.*, if the seller does not have marketable title and cannot get it).

b. **Neither Party Tenders Performance**
If neither party tenders performance, the closing date is automatically extended indefinitely until one of them does so.

c. **Buyer Finds Seller's Title Unmarketable**
If the buyer determines that the seller's title is unmarketable, the buyer must give the seller a reasonable time to cure title defects.

6. **Remedies for Breach of the Sales Contract**

a. **Damages**
The usual measure of damages is the difference between the contract price and the market value of the land on the date of the breach. Incidental damages, such as title examination and moving or storage costs, can also be recovered.

1) **Liquidated Damages**
Sales contracts usually require the buyer to deposit "earnest money" with the seller, and provide that if the buyer defaults in performance, the seller may retain this money as liquidated damages. The courts routinely uphold the seller's retention of the deposit if the amount appears to be reasonable in light of the seller's anticipated and actual damages. Many courts will uphold a retention of a deposit of up to 10% of the sales price without further inquiry into its reasonableness. Even without a liquidated damages clause, many courts will uphold retention of the deposit, on the ground that giving restitution of the funds to the buyer would unjustly reward a party in breach.

b. **Specific Performance**

1) **Buyer's Remedy**
A court of equity will order a seller to convey the title if the buyer tenders the purchase price. The remedy at law (damages) is deemed inadequate because the buyer is getting land and land is unique.

If the seller cannot give marketable title, but the buyer wishes to proceed with the transaction, she can usually get specific performance with an ***abatement of the purchase price*** in an amount reflecting the title defect.

2) **Seller's Remedy**
Somewhat illogically, the courts also generally will give a specific performance decree for the seller if the buyer is in breach. This is sometimes explained as necessary to have "mutuality of remedy." A few courts in recent years have refused to award specific performance to sellers if the property is not unique (*e.g.*, if a developer is selling a house in a large subdivision of similar houses).

c. **Special Rules for Unmarketable Title**
If the seller's title is unmarketable for reasons that do not indicate the seller's bad faith

(*i.e.*, he did not realize that his title was defective when he signed the contract), about half of the courts limit the buyer's recovery of damages to incidental out-of-pocket costs (title examination, etc.) and return of the buyer's earnest money deposit. The other half of the courts give the buyer the standard measure of contract damages mentioned above.

7. Seller's Liability for Defects on Property

a. Warranty of Fitness or Quality—New Construction Only
The common law rule is that contracts of sale and deeds of real property, unlike conveyances of personal property, carry no implied warranties of quality or fitness for the purpose intended. One exception is a contract for the sale of a building under construction or to be constructed, on the ground that the buyer has no opportunity to inspect. A majority of courts have now extended the implied warranty of fitness or quality to the sale of any ***new house*** by the builder. The warranty implied is that the new house is designed and constructed in a reasonably workmanlike manner and suitable for human habitation. A few courts have gone further, allowing a later owner of the house to recover from the original builder despite lack of privity.

b. Negligence of Builder
A person who contracts for construction may always sue a builder for negligence in performing a building contract. Moreover, many courts now permit the ultimate vendee (*e.g.*, a subdivision buyer) to sue the builder despite the fact that the seller hired the builder and the buyer thus lacks "privity."

c. Liability for Sale of Existing Land and Buildings
A seller of existing land and buildings (not new construction) may be liable to the purchaser for defects in the improvements (*e.g.*, a leaky roof or basement, termite infestation, a nonfunctioning septic system) on any of several different theories.

1) Misrepresentation (Fraud)
This theory requires proof that the seller made a ***false statement of fact*** (oral or written) to the buyer, that the buyer ***relied*** on the statement, and that it ***materially affected*** the value of the property. The seller must either have known that the statement was false, or have made it negligently (without taking reasonable care to determine its truth).

2) Active Concealment
The seller is liable as above, even without making any statement, if the seller took steps to conceal a defect in the property (*e.g.*, paneling over a wall to conceal cracks).

3) Failure to Disclose
A majority of states now hold sellers liable for failure to disclose defects if the following factors are present:

(i) The seller ***knows*** or has reason to know of the defect;

(ii) The defect is ***not obvious*** or apparent, and the seller realizes that the buyer is unlikely to discover it by ordinary inspection; ***and***

(iii) The defect is ***serious*** and would probably cause the buyer to reconsider the purchase if it were known.

These decisions are more likely to impose liability on the seller if the property is a personal residence, if the defect is dangerous, and if the seller personally created the defect or previously attempted to repair it and failed to do so.

d. Disclaimers of Liability
Sellers sometimes attempt to avoid liability for property defects by inserting clauses in sales contracts exculpating the seller.

1) "As Is" Clauses
A general clause, such as "property sold as is" or "with all defects," is ***not*** sufficient to overcome a seller's liability for fraud, concealment, or (in the states that recognize it) failure to disclose.

2) **Specific Disclaimers**
If the exculpatory clause identifies and disclaims liability for specific types of defects (*e.g.*, "seller is not liable for leaks in the roof"), it is likely to be upheld.

8. Real Estate Brokers
Most real estate sales contracts are negotiated by real estate brokers. The broker who obtains the "listing" from the seller is the ***seller's agent***. Other agents who participate in the sale (*e.g.*, through a multiple listing service) are also the seller's agents, unless they specifically agree to serve as the buyer's agent. While these agents owe a fiduciary duty to the seller, they also have a duty to the buyer to disclose material information about the property if they have actual knowledge of it. Traditionally, the agent's commission was earned when she found a buyer who was "ready, willing, and able" to purchase the property, even if the buyer later backed out of the contract. But the growing trend of the cases is to award the commission only if the sale actually closes, or if it fails to close because of the seller's fault.

B. DEEDS—FORM AND CONTENT

Transfer of title to an interest in real property occasionally occurs through operation of law; but in most circumstances, transfer can be accomplished only by a deed that satisfies various formalities required by statute.

1. Formalities

a. Statute of Frauds
The Statute of Frauds requires that a deed be in ***writing***, signed by the grantor.

b. Description of Land and Parties
A deed must identify the land. The description need not be formal, and it may incorporate extrinsic information, but it ***must be unambiguous***. The parties (grantor and grantee) must also be identified. This may be done by name, or by describing them in some other way (*e.g.*, "I grant this land to my eldest daughter," or "I convey this land to the present members of the law review at State University"). If the deed is delivered with the identity of the grantee left blank, the courts will presume that the person taking delivery has authority to fill in the name of the grantee, and if she does so, the deed is valid. But if the land description is left blank, no such authority is presumed, and the deed is void unless the grantee was explicitly given authority to fill in the description, and did so. The grantee must actually exist; hence, a deed delivered to a grantee who is in fact dead at the time of the delivery is void.

c. Words of Intent
The deed must evidence an intention to transfer realty, but technical words are unnecessary. The word "grant" by itself is sufficient in many states.

d. Consideration Not Required
The deed need not recite any consideration, nor must any consideration pass in order to make a deed valid.

e. Seal Is Unnecessary
A seal is unnecessary.

f. Attestation and Acknowledgment Generally Unnecessary
Attestation by witnesses is generally unnecessary, as is an acknowledgment. *But note:* Either or both might be required for the deed to be recorded.

g. Signature
A deed must be signed by the grantor. The grantor may designate an agent to sign on the grantor's behalf, but if the signing is not done in the grantor's presence, the Statute of Frauds generally requires that the agent's authority be written. In the case of deeds by corporations, statutes usually provide for execution by two officers of the corporation and the affixing of the corporation's seal. If the deed represents a conveyance of all or a substantial part of the corporation's assets, a resolution of the board of directors approving the transfer may be necessary. (The ***grantee's signature is not necessary*** even if the deed contains covenants on her part. Her acceptance of the deed is sufficient to make the covenants enforceable.)

2. Defective Deeds and Fraudulent Conveyances

a. Void and Voidable Deeds
A deed that is defective may be either void or voidable. "Void" implies that the deed will be set aside by the court even if the property has passed to a bona fide purchaser. "Voidable" implies that the deed will be set aside only if the property has ***not*** passed to a bona fide purchaser.

1) Void Deeds
Deeds considered void include those that are forged, were never delivered, or were obtained by fraud in the factum (*i.e.*, the grantor was deceived and did not realize that he was executing a deed).

2) Voidable Deeds
Deeds considered voidable include those executed by persons younger than the age of majority or who otherwise lack capacity (*e.g.*, because of insanity), and deeds obtained through fraud in the inducement, duress, undue influence, mistake, and breach of fiduciary duty.

b. Fraudulent Conveyances
Even when a deed complies with the required formalities mentioned above, it may be set aside by the grantor's creditors if it is a fraudulent conveyance. Under the Uniform Fraudulent Transfers Act, which nearly all states have adopted, a conveyance is fraudulent if it was made: (i) with actual intent to hinder, delay, or defraud any creditor of the grantor; or (ii) without receiving a reasonably equivalent value in exchange for the transfer, and the debtor was insolvent or became insolvent as a result of the transfer. However, the deed will not be set aside as against any grantee who took in good faith and paid reasonably equivalent value.

3. Description of Land Conveyed
In ***land contracts and deeds***, property may be described in various ways; *i.e.*, by reference to a government survey, by metes and bounds, by courses and angles, by references to a recorded plat, by reference to adjacent properties, by the name of the property, or by a street and number system.

a. Sufficient Description Provides a Good Lead
A description is sufficient if it provides a good lead as to the identity of the property sought to be conveyed.
Example: A conveyance of "all my land," or "all my land in Alameda County," provides a sufficient lead. The intention of the grantor is clear and the meaning of this intention can be proved without difficulty (by checking the land records of Alameda County).

b. Insufficient Description—Title Remains in Grantor
If the description is too indefinite, title remains in the grantor, subject to the possibility of a suit for reformation of the deed.
Example: A conveyance of "one acre off the western end of my 30-acre tract" (the 30-acre tract being adequately described) would probably fail for uncertainty. "Off the western end" is too vague to ascertain ***which*** acre, and the admission of parol evidence here would be considered a violation of the Statute of Frauds.

c. Parol Evidence Admissible to Clear Up Ambiguity
The general rule is that parol evidence is admissible to explain or supplement a written description or to clear up an ambiguity. If there is a ***patent ambiguity***—one appearing on the face of the deed—parol evidence is normally admissible to ascertain the parties' intent. For example, one part of the deed states that it is conveying "Blackacre" but later it purports to convey an interest in "Whiteacre." Parol evidence is admissible to show which property the grantor intended to convey. Where the ambiguity is ***latent***—not apparent on the face of the deed—parol evidence is generally admissible. For example, if A grants to B "my house in San Francisco," parol evidence is admissible to show which house A owns.

1) Compare—Inadequate Description
If, however, A grants to B "my house in San Francisco," and it turns out that A owns ***three*** houses in that city, the conveyance would probably fail for lack of adequate description. (***But note:*** If there is an underlying original agreement in which there was no mistake or ambiguity, and the only mistake was in the ***writing*** of the instrument, relief might be available by way of ***reformation*** of the deed.)

d. Rules of Construction
Where there is a mistake or inconsistency in the description (as where the deed leaves in doubt the exact location of a property line, or measurements give two different locations for the line), the following rules of construction are applied to carry out the parties' probable intent. (These are not "rules of law" and will not be applied where there is clear evidence showing a contrary intent.)

1) Natural monuments prevail over other methods of description; *i.e.*, artificial monuments, courses and distances, surfaces, acreage, or general descriptions (*e.g.*, a call from "Point X to the old oak tree," prevails over a call from "Point X south 100 feet").

2) Artificial monuments (*e.g.*, stakes, buildings, etc.) prevail over all but natural monuments.

3) Courses (*e.g.*, angles) prevail over distances (*e.g.*, "west 90 degrees to Main St." prevails over "west 100 feet to Main St.").

4) All of the foregoing prevail over general descriptions such as name (*e.g.*, "Walker's Island") or quantity (*e.g.*, "being 300 acres").

e. Land Bounded by Right-of-Way

1) **Title Presumed to Extend to Center of Right-of-Way**
If land is described as being bounded by a street, highway, or other right-of-way, or if the land conveyed is otherwise described but actually is bounded by such, there is a rebuttable presumption that the title of the grantee extends to the center of the right-of-way (assuming that the grantor owns to the center), or to the full width of it if the grantor retains no adjoining land. This presumption accords with (i) the presumed intention of the parties, and (ii) the public policy that disfavors a grantor's retention of thin strips of land.

a) **Evidence to Rebut Presumption**
In many jurisdictions, a description such as "running ***along*** the street" has been held sufficient to rebut the presumption that the grantee took title to the center. (This is to be distinguished from the language "***bounded*** on the west by the highway" to which the presumption applies.)

But when the monument involved is a ***body of water***, more definite language is necessary to rebut the presumption that the grantee takes title to the center. This is because, unlike streets, there are no public rights in most bodies of water abutting on land (except possible navigation easements), and because a grantee of land adjoining water normally expects a right of access to the water.

b) **Measuring from Monument**
Notwithstanding the general rule, and unless a contrary intention is expressed, measurements ***from*** a right-of-way are presumed to start from the side and not the center. Again, this is based on the parties' presumed intent.

2) **Variable Boundary Line Cases**

a) **Slow Change in Course Changes Property Rights**
The ***slow and imperceptible*** change in course of a river or stream serving as a boundary operates to change the legal boundary. Where land is described as abutting upon a body of water, any slow and imperceptible deposit of soil ("accretion") belongs to the owner of the abutting land (the riparian owner). Where accretion builds up in an irregular pattern over the lands of several adjacent property owners, courts determine title to it in a "just and equitable manner," either by (i) merely extending the property lines out into the water with each landowner getting the property that falls within the lines as extended; or (ii) dividing up the newly formed land in proportion to the owners' interests in the adjoining lands. Similarly, slow erosion of a stream's bank results in the owner losing title to the affected area.

b) **Avulsion Does Not Change Property Rights**
A sudden, perceptible change of a watercourse ("avulsion") does not change

property rights. Thus, if a river changes course suddenly, boundaries remain where they were, even if someone who formerly had river access now finds himself landlocked.

c) **Encroachment of Water Does Not Change Fixed Boundary Lines**
According to the majority view, where property is encroached upon by a body of water (*e.g.*, lake enlarges), previously fixed boundary lines do not change and ownership rights are not affected. Indeed, the boundary lines can still be proven even though the land is completely under water.

f. Reformation of Deeds
Reformation is an equitable action in which the court rewrites the deed to make it conform to the intention of the parties. It will be granted if the deed does not express what the parties agreed to, either because of their ***mutual mistake*** or a ***scrivener's*** (drafter's) ***error***. It will also be granted for ***unilateral mistake***, but only if the party who is not mistaken induced the mistake by ***misrepresentation*** or some other inequitable conduct. If the property has passed to a bona fide purchaser who relied on the original language of the deed, the court will not reform it.

C. DELIVERY AND ACCEPTANCE

1. Delivery—In General
A deed is not effective to transfer an interest in realty unless it has been delivered. Physical transfer of a deed is not necessary for a valid delivery. Nor does physical transfer alone establish delivery (although it might raise a presumption thereof). Rather, "delivery" refers to the ***grantor's intent***; it is satisfied by ***words or conduct*** evidencing the grantor's intention that the deed have ***some present operative effect***; *i.e.*, that ***title*** pass immediately and irrevocably, even though the right of possession may be postponed until some future time.

Examples: 1) A drafts an instrument conveying Blackacre to B and hands the instrument to B "for safekeeping." Although handed to the named grantee, this is not a valid delivery. There is no evidence that A intended the instrument to have any ***present*** operative effect.

2) A drafts an instrument conveying Blackacre to B. A attempts to give the instrument to B personally but is unable to find B; nevertheless, A quits possession of Blackacre and thereafter treats B as the owner thereof. Nearly all courts would hold that there has been a sufficient delivery.

Under some circumstances (*i.e.*, when a third party is involved), conditional delivery is permissible. This type of delivery becomes effective only upon the occurrence of a condition, but the transfer then ***relates back*** to the time of the conditional delivery. The grantor has only limited rights to revoke prior to the occurrence of the condition. (*See* further discussion of conditional deliveries, 3., *infra*.)

a. Manual Delivery
The delivery requirement will be satisfied where the grantor physically or manually delivers the deed to the grantee. Manual delivery may be accomplished by means of the mails, by the grantor's agent or messenger, or by physical transfer by the grantor's attorney in the grantor's presence.

b. Presumptions Relating to Delivery
As a matter of theory, a deed may be delivered by words without an act of physical transfer. Delivery is presumed if the deed is: (i) ***handed*** to the grantee, (ii) ***acknowledged*** by the grantor before a notary, or (iii) ***recorded***. Unless there is some clear expression of intent that the grantor envisioned the passage of title to the grantee without physical delivery, the continued possession of the deed by the grantor raises a presumption of nondelivery and therefore no passage of title. Conversely, possession by a grantee of a properly executed deed raises a presumption that the delivery requirement has been satisfied. Note, however, that the presumptions involved are rebuttable.

c. Delivery Cannot Be Canceled
Title passes to the grantee upon effective delivery. Therefore, returning the deed to the grantor has no effect; it constitutes neither a cancellation nor a reconveyance.

d. Parol Evidence

1) Admissible to Prove Grantor's Intent
The ***majority rule*** is that any type of parol evidence, including conduct or statements made by the grantor ***before or after*** the alleged delivery, is admissible to prove her intent.

2) Not Admissible to Show Delivery to Grantee Was Conditional
If a deed is ***unconditional on its face*** and is given ***directly to the grantee***, in most jurisdictions parol evidence is not admissible to show that the delivery was subject to a condition.

Example: A delivers an absolute deed of Blackacre to B, but ***tells*** B that the deed is effective only if B pays off the encumbrance on the property, or only if A does not return from the hospital. Under the above rule, even if B never pays off the encumbrance or if A returns from the hospital, B is the owner of Blackacre and A cannot claim that there was no valid delivery. *Rationale:* The rule is designed to avoid unsettling of land titles which appear to be in the grantee's name, and to protect both innocent third parties and grantees from testimony fabricated by grantors.

3) Admissible to Show No Delivery Intended
But while parol evidence is not admitted to prove that a delivery was subject to a condition, parol evidence ***is*** admissible to prove that the grantor did not intend the deed to have any present effect at all.

Example: A tells B, "I want you to have Blackacre when I die, and I'm giving you this deed to Blackacre so that you can have it ***at that time***." Most courts would hold that A's statements are admissible, and that despite the unconditional nature of the deed itself, they show that A did not intend the deed to have any present effect.

a) Deed Intended as Mortgage
Parol evidence is ***always*** admissible to show that a deed absolute on its face was intended by the parties to be a mortgage; *i.e.*, there was no intent to convey title outright. (*See* VII.A.4., *infra.*)

b) Transfer of Deed to Bona Fide Purchaser
Suppose A gives B a deed for examination by B's attorney (deed not intended to be effective at this point). B wrongfully records it and sells to C, a bona fide purchaser ("BFP"). On these facts, A would prevail against C unless estopped to assert lack of delivery (*see* below). In other words, absent estoppel, a subsequent BFP is not protected; if there was no delivery, the BFP's grantor had no power to convey.

(1) Estoppel in Favor of Innocent Purchaser
Even though the grantor is allowed to show that no delivery at all was intended as against the grantee, he often is estopped to assert lack of delivery against an innocent purchaser. For example, A gives B a deed but does not intend the deed to be presently effective. B shows the deed to an innocent purchaser, P, who buys the land in reliance thereon. P will prevail in litigation with A, the original grantor, if it appears that A ***negligently permitted*** B to have possession of the deed. The rationale is that as between two innocent parties, the one who contributed most directly to the loss must bear the burden of it, and that in many cases A must be deemed responsible for entrusting B with a deed absolute on its face. The same result occurs where the grantee records the deed and an innocent purchaser relies on the recordation.

4) Comment
Obviously, the above rules give the courts flexibility to find either delivery or nondelivery in many situations. It is also evident that there exists a theoretical inconsistency in admitting parol evidence to show that no delivery was intended, but not to show that delivery was "conditional." This inconsistency has been criticized by numerous commentators.

2. Retention of Interest by Grantor or Conditional Delivery
Problems arise when the grantor attempts to retain an interest in the property (*e.g.*, a life

estate) or when he attempts to make the passage of title dependent upon the happening of a condition or event other than delivery.

a. **No Delivery—Title Does Not Pass**
If the grantor executes a deed but fails to deliver it during his lifetime, no conveyance of title takes place. Without adequate delivery, the title does not pass to the intended grantee.

b. **No Recording—Title Passes**
If the grantor executes and delivers a deed but fails to have it recorded, title passes even though the parties thought the deed would be ineffective until recording. Therefore, an agreement between the grantor and grantee to the effect that the deed will not be recorded until some event takes place in the future does not affect the passage of title.

c. **Express Condition of Death of Grantor Creates Future Interest**
When a deed, otherwise properly executed and delivered, contains an express provision that the title will not pass until the grantor's death, the effect is to create a present possessory life estate in the grantor and a future estate in the grantee. Note, however, that this result follows only when the deed expressly contains such a provision.

d. **Conditions Not Contained in Deed**
If a deed is absolute on its face, but is delivered to the grantee with an oral condition (*e.g.*, "title is not to pass until I return from the Orient"), the traditional view was that the condition dropped out and the delivery became absolute. A growing minority of cases enforces the condition. Where the condition is the grantor's death, the deed is usually held "testamentary" and therefore void (unless executed with testamentary formalities).

e. **Test—Relinquishment of Control**
To make an effective delivery, the grantor must relinquish absolute and unconditional control.

3. **Where Grantor Gives Deed to Third Party**
In this situation, the rules are quite different; ***conditional delivery is permissible***. Three situations should be distinguished: (i) where the grantor gives the deed to a third party, there being ***no conditions*** appended; (ii) where the grantor in a ***commercial*** context gives such a deed to a third party, there being conditions appended; and (iii) where the situation is the same as in (ii), but the transaction is ***donative***.

a. **Transfer to Third Party with No Conditions**
If A (the grantor) gives C a deed naming B as grantee and instructs C to give the deed to B, has a delivery occurred? Most courts say yes. Because A indicated an intent to make the deed presently operative, B has a right to the deed and A should not be able to get it back. However, if A told C to retain the deed and give it to B upon A's later instructions, no delivery would have occurred.

When there are no specific instructions regarding delivery, the question is one of A's intent. If C is B's attorney, delivery seems clear. But if C is A's attorney, a court might infer that C was merely A's agent and that A thus retained the power to recall the deed. (A few courts hold that C is to be treated as A's agent ***in all circumstances***, even if A manifests a clear intention of present effectiveness, and consequently no delivery occurs.)

b. **Transfer to Third Party with Conditions (Commercial Transaction)**
Suppose that A gives C a deed naming B as grantee and tells C to transfer the deed to B when B has paid $5,000 on A's account on or before September 1. This is the ***true escrow*** situation—the true conditional delivery. Under the circumstances outlined below, a valid conditional delivery has occurred. The deed has a present operative effect in that title will transfer automatically upon the occurrence of the condition. A will retain title only if the condition does not occur.

1) **Parol Evidence Admissible to Show Conditions**
Even though a deed is unconditional, the general rule is that parol evidence is admissible to show the conditions and terms upon which a deed was deposited with the escrow. (This is contrary to the rule excluding parol evidence where

transfer is directly to the grantee.) If the escrow custodian has violated parol conditions, there will be no valid delivery. Once the condition occurs, whether parol or not, title automatically vests in the grantee and the escrow holds the deed as the grantee's agent.

2) **Grantor's Right to Recover Deed**

a) **Majority View—Can Recover Only If No Written Contract**
Under the majority view, if the grantor seeks to recover the deed prior to the occurrence of the condition, the grantee can object only if there is an enforceable written contract to convey. (On the other hand, once the condition occurs, title passes even in the absence of an enforceable contract.)

(1) The requirement of a written contract is based on the Statute of Frauds' consideration that oral contracts to convey realty should not become enforceable simply because the deed has been deposited with a third party.

(2) Ordinarily, the contract to convey will be a buy-sell land contract. However, written escrow instructions are often a sufficient memorandum of the contract to satisfy the Statute of Frauds.

b) **Minority View—No Right to Recover**
A strong minority prohibits revocation even in the absence of an enforceable underlying contract. Deposit of the deed with a third party on stated conditions is seen to obviate most possibilities of fraud.

3) **Breach of Escrow Conditions—Title Does Not Pass**
When the grantee wrongfully acquires the deed from the escrow holder prior to performance of the conditions of the escrow, title does not pass. Therefore, even though the grantee is in possession of the deed, she cannot convey any interest in the land to a subsequent transferee, even a BFP.

a) **Estoppel Cases**
A ***few*** cases have held that where the escrow holder was chosen by the grantor, the grantor is bound by the escrow holder's acts and is estopped to deny a valid delivery and passage of title to the grantee. Thus, an innocent purchaser (BFP) from the grantee may acquire good title. An important factor is whether the grantor has allowed the grantee to take possession of the property prior to completion of the conditions of the escrow. If the grantor has remained in possession, the purchaser may be held to have notice of the grantor's interest and cannot be a BFP.

4) **"Relation Back" Doctrine**
In an escrow transaction, title does not pass to the grantee until performance of the named conditions. However, where justice requires, the title of the grantee will "relate back" to the ***time of the deposit of the deed in escrow***. Generally, the relation back doctrine will be applied if:

(i) The ***grantor dies*** (doctrine applied to avoid the rule that title must pass before death if instrument is not a will);

(ii) The grantor ***becomes incompetent*** (doctrine applied to avoid the rule that an incompetent cannot convey title); or

(iii) A ***creditor*** of the grantor (who is not a BFP or mortgagee) ***attaches the grantor's title*** (doctrine applied to cut off the creditor's claim).

a) **Not Applied If Intervening Party Is BFP or Mortgagee**
The relation back doctrine is not applied where the intervening third party is a BFP or mortgagee. However, if the sales contract is recorded, there can be no intervening BFPs because its recordation gives constructive notice.

b) **Not Applied in Favor of Escrow Grantee with Knowledge**
The relation back doctrine will not be applied in favor of an escrow grantee who, at the time she performs the terms and conditions of the escrow, has

actual or constructive knowledge of prior equities of other persons (*e.g.*, that the grantor conveyed to another). But if the escrow grantee has performed part of the conditions when she acquires such knowledge, she will be protected against all but BFPs or mortgagees.

c. Transfer to Third Party with Conditions (Donative Transactions)
If the grantor gives a deed to a third party with instructions to turn it over to the named donee only when certain conditions occur, is there a valid delivery or can the grantor change her mind and demand the deed back before the conditions occur?

1) Condition Unrelated to Grantor's Death—Delivery Irrevocable
When A gives to C a deed naming B as grantee, and instructs C to give it to B "when B marries," etc., many courts find a valid conditional delivery despite the absence of any enforceable contract to convey. In such cases, the courts have held that A's intent at ***the time of the transfer to C*** was to create a "springing future interest" in B. Such a finding makes the delivery irrevocable.

2) Where Condition Is Grantor's Death
When A executes a deed to B and hands the deed to C with instructions to give it to B upon the death of A, most courts hold that the grantor ***cannot*** get her deed back because her intent was to presently convey a future interest to the grantee (either a remainder, with a life estate reserved in the grantor, or an executory limitation). Note that this analysis also makes the gift inter vivos, not testamentary, and thus not in conflict with the Statute of Wills. *Caution:* In dealing with death cases, make sure that it was the grantor's intent that the deed be operative immediately to convey a future interest.

a) Limitation—No Delivery If Conditioned on Survival
When A's instructions to C are to deliver the deed to B only if B survives A, it is generally held that there is no valid delivery because it was A's intent to retain title and possession until her death.

4. Acceptance

a. Usually Presumed
There must be an acceptance by the grantee in order to complete a conveyance. In most states, acceptance is presumed if the conveyance is beneficial to the grantee (whether or not the grantee knows of it). In other states, acceptance is presumed only where the grantee is shown to have knowledge of the grant and fails to indicate rejection of it. Acceptance is presumed in all states if the grantee is an infant or an incompetent.

b. Usually "Relates Back"
Acceptance (presumed or otherwise) usually "relates back" to the date of "delivery" of the deed in escrow. However, many courts refuse to "relate back" an acceptance where it would defeat the rights of ***intervening third parties*** such as BFPs, attaching creditors of the grantor, or surviving joint tenants. A few states will not even "relate back" an acceptance if doing so defeats the devisees of the grantor.

5. Dedication
Land may be transferred to a public body (*e.g.*, a city or county) by dedication. An ***offer*** of dedication may be made by written or oral statement, submission of a map or plat showing the dedication, or opening the land to public use. An ***acceptance*** by the public agency is necessary. This may be accomplished by a formal resolution, approval of the map or plat, or actual assumption of maintenance or construction of improvements by the agency.

D. COVENANTS FOR TITLE AND ESTOPPEL BY DEED

There are three types of deeds characteristically used to convey property interests other than leaseholds: the ***general warranty*** deed, the ***special warranty*** deed (usually statutory), and the ***quitclaim*** deed. 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. The general warranty deed normally contains five covenants for title (*see* 1.a.1)-5), *infra*). The special warranty deed contains fewer and more limited assurances. The quitclaim deed usually contains no assurances; it releases to the grantee whatever interest the grantor happens to own. Covenants for title must be distinguished from covenants for other than title (*i.e.*, covenants running with the land used for private land regulation). "Covenants for title" is a self-contained topic.

1. **Covenants for Title in a General Warranty Deed**
In this day of recording acts and title insurance, covenants for title are not much relied upon for title assurance. A general warranty deed is one in which the grantor covenants against title defects created both by himself and by ***all prior titleholders***. In a special warranty deed, however, the grantor covenants only that he himself did not create title defects; he represents nothing about what prior owners might have done. General warranty deeds are a rarity in a number of states where many conveyances are made with statutory form special warranty deeds.

   a. **Usual Covenants**
   A grantor may give any or all of the following covenants, which are classified as the "usual covenants for title." A deed containing such covenants is called a "general warranty deed."

      1) **Covenant of Seisin**
      The covenant of seisin is a covenant that the grantor has the estate or interest that she purports to convey. Both title and possession at the time of the grant are necessary to satisfy the covenant.

      2) **Covenant of Right to Convey**
      The covenant of the right to convey is a covenant that the grantor has the power and authority to make the grant. Title alone will ordinarily satisfy this covenant, as will proof that the grantor was acting as the authorized agent of the titleholder.

      3) **Covenant Against Encumbrances**
      The covenant against encumbrances is a covenant assuring that there are neither visible encumbrances (easements, profits, etc.) nor invisible encumbrances (mortgages, etc.) against the title or interest conveyed.

      4) **Covenant for Quiet Enjoyment**
      The covenant for quiet enjoyment is a covenant that the grantee will not be disturbed in her possession or enjoyment of the property by a third party's ***lawful*** claim of title.

      5) **Covenant of Warranty**
      The covenant of warranty is a covenant wherein the grantor agrees to defend on behalf of the grantee any lawful or reasonable claims of title by a third party, and to compensate the grantee for any loss sustained by the claim of superior title. This covenant and the covenant for quiet enjoyment are generally considered to be identical.

      6) **Covenant for Further Assurances**
      The covenant for further assurances is a covenant to perform whatever acts are reasonably necessary to perfect the title conveyed if it turns out to be imperfect. This is not one of the "usual covenants" but is frequently given in addition thereto.

      7) **No Implied Warranties or Covenants**
      In the absence of statute, no covenants of title are implied in deeds. Moreover, the implied (or express) covenant of marketable title found in contracts of sale of real estate is no longer assertable once a deed has been delivered, unless fraud or mistake is shown.

   b. **Breach of Covenants**
   Three of the covenants (seisin, right to convey, encumbrances) are ***present covenants*** and are breached, if at all, at the time of conveyance. Quiet enjoyment, warranty, and further assurances are ***future covenants*** and are breached only upon interference with the possession of the grantee or her successors. This distinction is important in that it determines when the statute of limitations begins running and whether a remote grantee of the covenantor can sue.

      1) **Covenants of Seisin and Right to Convey**
      The covenants of seisin and right to convey are breached at the time of conveyance ***if the grantor is not the owner*** of the interest she purports to convey (or has not been authorized to so convey). If there is a breach, the grantee has a cause of

action against which the statute of limitations begins to run at the time of conveyance. If the grantee reconveys, the general rule is that the subsequent grantee has no right of action against the covenantor. In a few jurisdictions, it is implied that the original grantee assigned the cause of action to the subsequent grantee, thus permitting suit against the original grantor-covenantor. (The latter is probably the better rule because the subsequent grantee most likely paid the original grantee the market value.)

Example: A conveys Blackacre to B by a deed containing a covenant of seisin. A purports to convey a fee simple, but in fact X was the owner of Blackacre. Soon thereafter, B conveys to C. Under the usual view, B, but not C, may recover from A. In a few jurisdictions, it is implied that B assigned her cause of action to C.

2) **Covenant Against Encumbrances**
The covenant against encumbrances is breached and a cause of action arises at the time of conveyance if the property is encumbered. Most jurisdictions hold that the covenant is breached even if the grantee knew of the encumbrance, whether it be an encumbrance on title (*e.g.*, a mortgage) or a physical encumbrance (*e.g.*, an easement or servitude), but others hold there is no breach if the grantee knew of a physical encumbrance.

These jurisdictions charge grantees with constructive notice of visible physical encumbrances (*e.g.*, right-of-way). Several cases go so far as to hold that a covenant against encumbrances is not breached where the encumbrance ("visible" or not) is a benefit to the land involved (*e.g.*, an easement for a sewer or for an adjacent street).

3) **Covenants for Quiet Enjoyment, Warranty, and Further Assurances**
Covenants for quiet enjoyment, warranty, and further assurances are not breached until a ***third party interferes with the possession*** of the grantee or her successors. (*But note:* A covenant for quiet enjoyment or of warranty is not breached by the covenantor's refusal to defend title against a ***wrongful*** claim or eviction by a third party.)

a) **Covenant Runs to Successive Grantees**
These covenants are viewed as "continuous"; *i.e.*, they can be breached a number of times. Their benefit "runs" with the grantee's estate (unlike covenants of seisin and against encumbrances).

Example: A conveys to B by a deed containing a covenant of warranty. B thereafter conveys to C and C to D, and then D is evicted by a third party with title that was paramount when A conveyed to B. D can successfully sue A.

b) **Requirement of Notice**
The covenantor is not liable on her covenant of warranty or of further assurances unless the party seeking to hold her liable gives her notice of the claim against the title she conveyed.

c) **Any Disturbance of Possession**
Most courts hold that any disturbance of possession suffices to constitute a breach. Thus, if the covenantee cannot obtain complete possession or pays off an adverse, paramount claim in order to retain possession, this is a sufficient disturbance of possession. *Compare:* A disturbance of the covenantee's possession is not required as a prerequisite to recovery for breach of covenants of seisin, right to convey, or against encumbrances.

c. **Damages and Remote Grantees**
Suppose successive conveyances from A to B to C to D, each conveyance containing full covenants. D is evicted by X, who was the true owner when A conveyed to B. D may sue A, B, or C because each gave a covenant of warranty the benefit of which "ran" with the land. But what is the measure of D's recovery? Is it the consideration the defendant (*i.e.*, A, B, or C) received? Is it the consideration D paid (an indemnity theory) so that if D was a donee, she gets nothing?

Many states permit D to recover to the extent of the ***consideration received*** by the defendant-covenantor (even though it exceeds the consideration paid by D). Under this

view, defendant-shopping is advisable (to sue whomever received most). The defendant who is held liable then has a cause of action against any prior covenantor, until ultimately A is held liable. In other states, D can recover only the ***actual consideration she paid*** (but not to exceed the amount received by the defendant-covenantor).

2. Statutory Special Warranty Deed

Statutes in many states provide that (unless expressly negated) the use of the word "grant" in a conveyance creates ***by implication*** the following two limited assurances against ***acts of the grantor*** (not her predecessors): (i) that prior to the time of the execution of such conveyance, the ***grantor has not conveyed the same estate*** or any interest therein to any person other than the grantee; and (ii) that the estate conveyed is free from encumbrances made ***by the grantor***.

3. Quitclaim Deeds

A quitclaim deed is basically a ***release of whatever interest***, if any, the grantor has in the property. Hence, the use of covenants warranting the grantor's title is basically inconsistent with this type of deed; *i.e.*, if the deed contains warranties, it is not a quitclaim deed.

4. Estoppel by Deed

If a grantor purports to convey an estate in property that she does not then own, her ***subsequent acquisition of title to the property will automatically inure to the benefit of the grantee***. In other words, the grantor impliedly covenants that she will convey title immediately upon its acquisition.

Example: On Day 1, A, who does not own Blackacre, purports to convey Blackacre to B by general warranty deed. On Day 1, B has no interest in Blackacre. On Day 3, A acquires Blackacre from C. That interest automatically passes to B, so that on Day 3 B owns Blackacre. A's warranties will prevent her from denying ownership when she executed the deed on Day 1.

a. Applies to Warranty Deeds

The doctrine is most frequently applied where the conveyance is by warranty deed. Regardless of covenants for title, many courts hold that if the deed expressly purports to convey a fee simple or other ***particular estate***, the grantee is entitled to that estate if later acquired by the grantor. In most states, however, the doctrine will not be applied when the conveyance is by a quitclaim deed.

b. Rights of Subsequent Purchasers

The majority of courts hold that title inures to the benefit of the grantee only ***as against the grantor*** (who is estopped to deny that she acquired title on behalf of the grantee). This is a personal estoppel only. Consequently, if the grantor transfers her after-acquired title to an innocent purchaser for value, the BFP gets good title. (There is no basis for invoking an estoppel against an innocent purchaser without notice.)

1) Effect of Recordation by Original Grantee

If the original grantee records the deed she receives from the grantor, the question arises as to whether this recordation imparts sufficient notice of the grantee's interest, so as to prevent a subsequent purchaser from being a BFP. This depends on the subsequent grantee's ***burden of searching the title***. (*See* discussion, E.4., *infra*.)

c. Remedies of Grantee

In jurisdictions following the estoppel rationale, the original grantee, at her election, may ***accept title*** to the land ***or sue for damages for breach of covenants*** for title. However, if an innocent purchaser of the after-acquired title is involved, the grantee has no rights against the BFP.

E. RECORDING

At common law, in nearly all cases priority was given to the grantee ***first in time***. Thus, if A conveyed Blackacre to B and then made an identical conveyance to C, B prevailed over C on the theory that after the first conveyance A had no interest left to convey.

1. Recording Acts—In General

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. Basically, recording acts set up a system by which any instrument affecting title to property located in a certain county can be recorded in that county. These acts seek to protect all subsequent BFPs from secret, unrecorded interests of others.

a. Purpose of Recordation—Notice
Recordation is not essential to the validity of a deed, as between the grantor and grantee. However, if a grantee does not record her instrument, she may lose out against a subsequent BFP. By recording, the grantee gives constructive (or "record") ***notice to everyone***. Hence, as stated earlier, proper recording prevents anyone from becoming a subsequent BFP.

b. Requirements for Recordation

1) **What Can Be Recorded—Instrument Affecting an Interest in Land**
Practically every kind of ***deed, mortgage, contract to convey***, or other instrument creating or affecting an interest in land can be recorded. *Note:* A judgment or decree affecting title to property can also be recorded. And, even before judgment, where a ***lawsuit is pending that may affect title*** to property, any party to the action can record a ***lis pendens*** (notice of pending action), which will effectively put third parties on notice of all claims pending in the lawsuit.

2) **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.

c. Mechanics of Recording

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

2) **Indexing**
The 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 to the parties to the conveyance. Tract indexes, which index the property by location, exist in some urban localities.

2. Types of Recording Acts
There are three major types of recording acts, classified as "notice," "race-notice," and "race" statutes. Note that the burden is on the subsequent taker to prove that he qualifies for protection under the statute.

a. Notice Statutes
Under a notice statute, a subsequent BFP (*i.e.*, a person who gives valuable consideration and has no notice of the prior instrument) prevails over a prior grantee who failed to record. The important fact under a notice statute is that the subsequent purchaser ***had no actual or constructive notice*** at the time of the conveyance. Constructive notice includes both record notice and inquiry notice (*see* 3.b.3), *infra*). A typical notice statute provides:

> A conveyance of an interest in land, other than a lease for less than one year, shall not be valid against any subsequent purchaser for value, without notice thereof, unless the conveyance is recorded.

Note also that the subsequent bona fide purchaser is protected, regardless of whether she records at all.

Example: On January 1, O conveys Blackacre to A. A does not record. On January 15, O conveys Blackacre to B, who gives valuable consideration and has no notice of the deed from O to A. B prevails over A.

What if A records before B? Suppose in the example above that A recorded on January 18, and B never recorded. This is ***irrelevant*** under a "notice" statute, because B had no notice ***at the time of her conveyance*** from O. B is protected against a ***prior*** purchaser even though B

2) Purchaser from Donee, Heir, or Devisee

A person who buys land from the donee, heir, or devisee of the record owner is protected against a prior unrecorded conveyance from the record owner.

Example: O conveys Blackacre to A, who does not record. O dies, leaving H as her heir. (H does not prevail over A because he is not a purchaser.) H conveys to B, a BFP, who records. B prevails over A in nearly all jurisdictions.

An heir who purchases the interests of her co-heirs, without notice of the prior unrecorded conveyance, is entitled to the same protection as any other purchaser to the extent of her purchase.

3) Mortgagees

Mortgagees for value are treated as "purchasers," either expressly by the recording act or by judicial classification.

Example: A, the owner of a parcel in State X known as Blackacre, deeds the parcel to B on Monday, but B fails to record the deed. On Tuesday, A executes a mortgage to Bank. State X has a race-notice recording statute. Bank is a good faith purchaser for value, and immediately records its mortgage. *Result:* Bank has a valid mortgage on the land, while the title to the land is held by B. (If Bank had not been a BFP, or had failed to record, B would hold the title free of Bank's mortgage.)

4) Judgment Creditors

In nearly all states, a plaintiff who obtains a money judgment can obtain, by statute, a judgment lien on the defendant's real estate. A typical statute reads as follows:

> Any judgment properly filed shall, for 10 years from filing, be a lien on the real property then owned or subsequently acquired by any person against whom the judgment is rendered.

Is a plaintiff who obtains a judgment lien under such a statute protected by the recording acts from a prior unrecorded conveyance made by the defendant? The cases are split, but the majority holds that the judgment lienor is ***not*** protected. These courts usually reason either (i) the plaintiff is not a BFP because he did not pay value for the judgment, or (ii) the judgment attaches only to property "owned" by the defendant, and not to property the defendant has previously conveyed away, even if that conveyance was not recorded.

Example: On January 1, O grants a mortgage on Blackacre to A. A does not record the mortgage. On January 15, B, who had previously sued O on a tort claim, obtains and properly files a judgment against O. B has no knowledge of the mortgage from O to A. Which lien has priority, A's mortgage or B's judgment lien? By the majority view, A has priority despite A's failure to record the mortgage. B is not protected by the recording act.

5) Transferees from Bona Fide Purchaser—Shelter Rule

A person who takes from a BFP will prevail against any interest that the transferor-BFP would have prevailed against. This is true even where the transferee had ***actual knowledge*** of the prior unrecorded interest.

Example: O conveys to A, who fails to record. O then conveys to B, a BFP, who records. B then conveys to C, who has actual knowledge of the O to A deed. C prevails over A. (And this is true whether C is a donee or purchaser.)

a) Rationale

If the rule were otherwise, a BFP might not be able to convey an interest in the land. The transferee is not protected for her own sake, but rather for the sake of the BFP from whom she received title.

b) Exception—No "Shipping Through"

This rule will not help someone who ***previously*** held title and had notice of the unrecorded interest. In the example above, if O repurchased from B, O

would have notice of A's interest and could not claim the benefit of the "shelter rule."

6) Purchaser Under Installment Land Contract

In most states, a purchaser who has paid only part of the purchase price under an installment land contract (*see* VII.A.3., *infra*) is protected by the recording acts only to the extent of payment made. In a dispute between the contract purchaser and a prior claimant, the court may:

(i) Award the contract purchaser a share of the property as a tenant in common equal to the proportion of ***payments made***;

(ii) Award the land to the prior claimant, but give the contract purchaser a lien on the property to the extent of the ***amount paid*** [Westpark, Inc. v. Seaton Land Co., 171 A.2d 736 (Md. 1961)]; or

(iii) Award the land to the contract purchaser, but give the prior claimant a lien on the property to the extent of the ***balance still owed*** [Sparks v. Taylor, 90 S.W. 485 (Tex. 1906)].

Example: O conveys Blackacre to A, who does not record. O then conveys Blackacre to B as a gift. B, knowing nothing of the O-A conveyance, records her deed. B then sells Blackacre to C for $100,000 via an installment land contract. C is to make four payments of $25,000. C makes the first payment and records his deed. A learns of the B-C conveyance and files suit against C to quiet title. *Result:* The court may (i) award C a one-fourth interest in Blackacre as a tenant in common; (ii) award Blackacre to A, but order A to pay C $25,000; or (iii) award Blackacre to C, but order C to pay the remaining $75,000 to A.

a) Exception—Shelter Rule

If B in the example above were a BFP, the shelter rule would apply and C would be fully protected even though C had notice of the O-A conveyance partway through C's payments.

b. Without Notice

"Without notice" means that the purchaser had no actual, record, or inquiry notice of the prior conveyance at the time she paid the consideration and received her interest in the land. The fact that the purchaser obtains knowledge of the adverse claim after the conveyance but before she records it is immaterial; she only has to be "without notice" ***at the time of the conveyance***.

1) Actual Notice

The subsequent purchaser must show that she did not actually know of any prior unrecorded conveyance. Actual notice includes knowledge obtained from any source (*e.g.*, newspaper, word-of-mouth, etc.).

2) Record Notice—Chain of Title

The fact that a deed has been recorded does not necessarily mean that a purchaser is entitled to the protection of the recording system. A subsequent purchaser will only be charged with notice of all conveyances that are recorded and appear in the chain of title.

a) "Wild Deeds"

A "wild deed" is a recorded deed that is not connected to the chain of title. It does not give constructive notice because the subsequent bona fide purchaser cannot feasibly find it.

Example: Presume that A owns Blackacre, which she contracts to sell to B. The contract is not recorded, and A remains in possession. B thereupon conveys Blackacre by deed to C, and C records. A then conveys Blackacre by deed to D. Did C's recordation charge D with constructive notice of C's claim to equitable title to Blackacre derived through B? ***No.*** D is not charged with notice because there was no way for him to find the B-C deed. Nothing related it to A. It was not in A's chain of title; it was a "wild deed."

Compare: If the jurisdiction maintained a tract index, it would not be hard to find that B-C deed. It would be indexed under Blackacre's block and lot number. But it is impossible to find in a grantor-grantee index without looking at the descriptions of all the recorded properties.

b) Deeds Recorded Late

A deed recorded after the grantor therein is shown by the record to have parted with title through another (subsequent) instrument is not constructive notice in most states.

Example: A conveys to B on May 1. A conveys to C, a donee, on May 15. C records on June 1. B records on June 15. C conveys to D on July 1. D has no actual notice of the A-B deed.

C v. B: As between B and C, B would win because C (a donee) was not a bona fide purchaser.

D v. B: In ***notice*** statute jurisdictions, most courts hold that D will prevail over B because the A-B deed was recorded "late" and is not in D's chain of title; *i.e.*, the search burden is too great if D is required to search "down" the grantor index to the present time for each grantor in the chain.

In several ***race-notice*** jurisdictions, however, B's recordation is treated as giving constructive notice to any purchaser ***subsequent to*** such recordation. In these states, the title searcher must search to the present date under the name of each person who ever owned the property in order to pick up deeds recorded late.

(1) Exception—Shelter Rule

If C in the example above were a BFP, D would win in any event, for she would "shelter" under C. This result would be the same even if D had actual knowledge of the A-B deed; otherwise C's power to transfer would be restricted.

(2) Lis Pendens Protection

What can B do to protect herself when she records her deed and finds the A-C deed on record? She can bring suit against C to expunge C's deed and file a lis pendens (litigation pending) notice under C's name, so any purchaser from C will have notice of B's claim.

c) Deeds Recorded Before Grantor Obtained Title

There is a split of authority on whether a recorded deed, obtained from a grantor who had no title at that time but who afterwards obtains title, is constructive notice to a subsequent purchaser from the same grantor.

Example: Suppose that on June 1, O owns Blackacre, but on that same day, A conveys Blackacre by warranty deed to B who promptly records. On July 2, O conveys Blackacre to A, and this deed is also promptly recorded. On August 3, A conveys Blackacre to C, a bona fide purchaser who has no actual notice of the prior A-B deed.

Majority view: Most courts protect C over B on the theory that a deed from A that was recorded prior to the time title came to A is not in the chain of title and so does not give C constructive notice of B's claim to Blackacre. *Rationale:* It would put an excessive burden on the title searcher to have to search the index under each grantor's name ***prior*** to the date the grantor acquired title.

Minority view: However, a minority of courts protect B over C on the basis that as soon as A acquired title from O, it transferred automatically to B by virtue of A's earlier deed to B. Therefore, A had nothing to transfer to C. (*Criticism:* The minority view sharply increases the costs of title search.)

d) Deed in Chain Referring to Instrument Outside Chain
If a recorded document in the chain of title refers to another instrument, such reference may be sufficient to impart constructive notice of the other instrument, even if it is unrecorded or is not itself in the chain of title.

Example: O mortgages Blackacre to A, who does not record. Later, O sells Blackacre to B by deed which recites that title is subject to A's mortgage. This deed is recorded. B then sells to C. C takes subject to A's mortgage, even though it was never recorded, because of the reference to it in the O-B deed.

e) Restrictive Covenants—Deeds from Common Grantor

(1) Subdivision Restrictions
Suppose that O, a subdivider, is developing a residential subdivision. She sells lot #1 to A, and the deed provides that lot #1 is restricted to residential use. The deed also provides that "O on behalf of herself, her heirs, and assigns, promises to use her remaining lots (#2, #3, etc.) for residential purposes only." A records the deed. O then sells lot #2 to B. The deed to B contains no restrictions. B wishes to erect a gas station. Is B bound by the restrictions in the O-A deed of which he had no actual notice? The courts are split.

(a) Some charge B with reading ***all*** deeds given by a common grantor, not just the deeds to his particular tract. Hence, B has constructive notice and is bound by the restriction.

(b) However, the ***better view*** is contra; *i.e.*, because the burden of title search would be excessive, deeds to other lots given by a common grantor are not in B's chain of title.

(2) Adjacent Lots
Suppose that O owns lot #1 and lot #2. She grants lot #2 to A with an easement of way over lot #1. The deed to A is indexed as a deed to lot #2; no mention is made of lot #1. Subsequently, O conveys lot #1 to B without mentioning the easement. As with subdivision restrictions, the courts are split as to whether B is required to read O's deeds of adjoining lots.

f) Merchantable Title Act
In about 15 states, a ***search cut-off date*** is established by statute; *e.g.*, defects of title reaching back further than 40 years are barred (a title searcher need only check the chain of title back 40 years). The exact cut-off point varies from state to state.

3) Inquiry Notice
Inquiry notice means that if the subsequent grantee is bound to make reasonable inquiry, she will be held to have knowledge of any facts that such inquiry ***would have revealed*** (even though she made none).

a) Generally No Inquiry from Quitclaim Deed
In a ***majority*** of states, quitclaim grantees are treated under the recording system the same as warranty deed grantees; *i.e.*, they are not charged with inquiry notice from the mere fact that a quitclaim deed was used.

b) Inquiry from References in Recorded Instruments
If a recorded instrument makes reference to an unrecorded transaction, the grantee is bound to make inquiry to discover the nature and character of the unrecorded transaction.

Example: A grants an easement in Blackacre to B, who does not record. A thereafter conveys the fee to C and in the deed states that the property is "subject to an easement." C records. D purchases Blackacre from C without any knowledge of the easement. The reference to the easement in the A-C deed creates a ***duty to inquire*** concerning the easement. If a reasonable inquiry would have informed D of the easement, she has

notice of it even though the deed of the easement was never recorded. (Remember the grantee is charged with constructive knowledge of the fruits of a reasonable inquiry even though she made no inquiry.) Thus, D will take subject to B's unrecorded interest in Blackacre.

c) **Inquiry from Unrecorded Instruments in Chain of Title**
Suppose A, the record owner, conveys a life estate to B by a deed that is not recorded. Thereafter, B purports to convey a fee simple to C, a purchaser for valuable consideration, without actual notice that B merely has a life estate. A would prevail over C with respect to the remainder interest because C is "required" (at her peril) to demand a viewing of B's title documents at the time of the purchase when they are unrecorded.

d) **Inquiry from Possession**
A title search is not complete without an examination of possession. If the possession is unexplained by the record, the subsequent purchaser is obligated to make inquiry. The subsequent purchaser is charged with knowledge of whatever an inspection of the property would have disclosed ***and*** anything that would have been disclosed by inquiring of the possessor.

Example: A, the owner of Blackacre, conveys it to B, who fails to record. However, B goes into possession of Blackacre. Thereafter, A executes an identical conveyance of Blackacre to C, who purchases for valuable consideration and without actual notice of the prior unrecorded conveyance to B. A majority of states hold that C is placed on constructive notice of B's interest. An examination of possession would have revealed B's presence, and B's possession is inconsistent with A's ownership.

Similarly, the physical appearance of the land may give notice of an adverse interest. For example, tire tracks passing over the land to an adjacent parcel may give notice of an easement.

c. **Valuable Consideration**
A person is protected by the recording statute only from the time that valuable consideration was given. Thus, if a deed was delivered before the consideration was paid, the purchaser will not prevail over deeds recorded before the consideration was given. Valuable consideration must be more than merely nominal. A person who claims to be a BFP must prove that ***real*** consideration was paid.

1) **Test—Substantial Pecuniary Value**
The test is different from that of contract law, where any consideration suffices to support a contract. Here, the claimant must show that he is not a donee but a purchaser. The consideration need not be adequate, nor the market value of the property, but it must be of substantial pecuniary value. ("Love and affection" is not valuable consideration.)

2) **Property Received as Security for Antecedent Debts Is Insufficient**
One who receives a deed or mortgage only as security for a preexisting debt has not given valuable consideration.

Example: O becomes indebted to A. O conveys Blackacre to B, who does not record. O then gives A a mortgage on Blackacre to secure the indebtedness, and A records. A did not give valuable consideration, and B prevails over A.

4. **Title Search**
Suppose X has contracted to sell Blackacre to Y. Prior to closing, Y, the buyer, will have a title search performed to assure herself that X really owns Blackacre and to determine if there are any encumbrances on X's title. How will Y's title searcher(s) proceed?

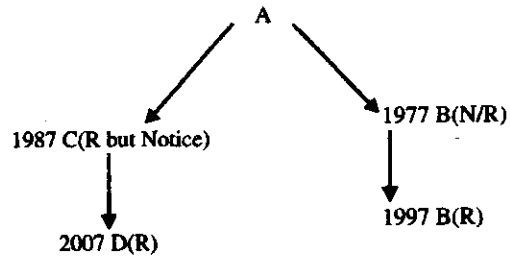
a. **Tract Index Search**
In a tract index jurisdiction, the job is comparatively easy. The searcher looks at the page indexed by block and/or lot describing Blackacre and at a glance can see prior recorded instruments conveying, mortgaging, or otherwise dealing with Blackacre.

b. Grantor and Grantee Index Search

The search is much more complicated in a grantor and grantee index jurisdiction.

Examples: 1) V owned Blackacre in 1930. In 1960, V conveyed Blackacre to W. In 1985, W conveyed Blackacre to X. In 1990, X gave B Bank a mortgage on the property. In 2000, X conveyed Blackacre to O. O contracts to sell the land to A. A's title searcher will look in the ***grantee*** index under O's name from the present back to 2000, when she finds the deed from X, then under X's name from 2000 to 1985, when she finds the deed from W to X, then under W's name from 1985 to 1960, then under V's name from 1960 backward. The searcher will then look in the ***grantor*** index under V's name from 1930 to 1960, under W's name from 1960 to 1985, under X's name from 1985 to 2000, and under O's name from 2000 to the present. In this manner, she will pick up the mortgage to B Bank, which was recorded in 1990 in the grantor index under X's name.

2)



1977 A conveys to B.

1987 A executes an identical conveyance of Blackacre to C. C pays valuable consideration, but C has actual knowledge of the prior unrecorded conveyance to B. C records.

1997 B records.

2007 C conveys his interest in Blackacre to D, who purchases without notice of the conveyance to B and who pays valuable consideration.

In searching the title, D will first look in the grantee index under C's name to discover if his seller, C, ever acquired title. He will find that C acquired title in 1987 from A. Next, he will look in the grantor index under C's name to discover if C made any prior conveyances, and then will look in the grantee index once again, this time under A's name, to discover if A ever acquired title. D will find that A acquired title in 1967. Then he will look in the grantor index under A's name to discover if A made a conveyance prior to his conveyance to C. Under the majority rule, D is required to look under A's name in the grantor index only through 1987. D will find no conveyances. In 1987, D will find the recorded conveyance to C and he need look no further. On this basis, D will not find the recorded conveyance to B because B recorded after 1987. B's recording is "out of the chain of title," and therefore D is not charged with notice.

Under a ***pure notice or race-notice statute,*** as between B and C, B will prevail because C, having knowledge of B's unrecorded conveyance, is not a protected party. However, as between B and D, many courts hold that D should prevail because B's recording is out of the chain of title. The cases are split. Because notice is irrelevant under ***pure race*** statutes, C would prevail over B because C recorded first. Once it is established that C prevails over B, D obviously takes good title.

c. **Other Instruments and Events Affecting Title**
The title searcher's job may be complicated by marriages and divorces (*e.g.*, a woman's name may have changed between her appearance as grantee and her reappearance as grantor) and by the fact that a number of interests in the land may be filed and indexed elsewhere than in the recording office (*e.g.*, judgment liens may appear in the trial court's judgment docket, and tax liens may be filed only in the tax assessor's office). Similarly, discovering whether land has passed by will or intestacy rather than by conveyance may require a search of probate records.

5. **Effect of Recordation**
Proper recordation gives all prospective subsequent grantees constructive notice of the existence and contents of the recorded instruments; *i.e.*, there can be no subsequent BFPs. Recordation also raises ***presumptions*** that the instrument has been validly delivered and that it is authentic. These presumptions are rebuttable, not conclusive.

a. **Does Not Validate Invalid Deed**
As stated earlier, recordation is not necessary for a valid conveyance. Nor does recordation validate an invalid conveyance, such as a forged or undelivered deed.

b. **Does Not Protect Against Interests Arising by Operation of Law**
Furthermore, recordation does not protect a subsequent purchaser against interests that arise by operation of law, rather than from a recordable document (*e.g.*, dower rights; prescriptive and implied easements; title by adverse possession). Because there is no instrument to record in order to perfect such interests, the recording acts do not apply, and subsequent purchasers take subject to the interests. (*Remember:* If the recording act is inapplicable, the common law priority rules apply.)
Example: O is the record owner of Blackacre. X adversely possesses Blackacre for the period of the statute of limitations. O then conveys Blackacre to A, a BFP. Even though X's interest has never been recorded, X prevails against A.

1) **Exception**
A court ***may*** protect a subsequent BFP from an unrecorded ***implied easement*** that is ***not visible*** upon inspection of the premises (*e.g.*, an underground sewer).

c. **Recorder's Mistakes**
An instrument is considered recorded from and after the time it is filed at the recorder's office, irrespective of whether it is actually listed on the indexes. If the recorder's office has made an error in recording, the subsequent purchaser has an action against the recorder's office. There is a strong minority view that protects the searcher.

d. **Effect of Recording Unacknowledged Instrument**
As discussed above, the recording acts require that before an instrument can be recorded, it must be acknowledged by the grantor before a notary. What happens if the recorder, by oversight, records a deed that has not been acknowledged or has been defectively acknowledged?

1) **No Acknowledgment—No Constructive Notice**
Because an unacknowledged deed does not qualify for recordation, it does not give constructive notice to subsequent purchasers. Hence, unless the subsequent purchaser has other notice of the earlier deed, the subsequent purchaser will prevail.
Example: O conveys Blackacre to A by a deed that is not acknowledged, but the recorder nevertheless records it. Later, O conveys to B by an acknowledged deed, which B records. B prevails over A unless B had ***actual*** notice of the deed from O to A (which she might have if she searched the title records) or ***inquiry*** notice (as she would have if A was in possession of Blackacre).

2) **Compare—Defective Acknowledgment**
When a recorded instrument has been acknowledged, but the acknowledgment is defective for some reason ***not apparent on the face*** of the instrument, the better view is that the recordation does impart constructive notice. *Rationale:* A hidden defect in the acknowledgment should not be allowed to destroy the constructive notice that the document otherwise clearly imparts. Purchasers should be entitled to rely on what ***appears*** to be a perfectly recorded document.

Example: A deed bears what appears to be a valid acknowledgment but is in fact invalid because the notary was disqualified to act or because the grantor did not appear personally in front of the notary to acknowledge her signature, as required by law.

F. CONVEYANCE BY WILL

A will is a conveyance that is prepared and executed by the property owner during life, but which does not "speak" or operate until the date of the owner's death. Thus, a will is "ambulatory," meaning that it can be revoked or modified so long as the testator is alive. Some special situations arise when there is a change in the status of the property or beneficiaries between the time the will is executed and the testator's death.

1. Ademption

If property is specifically devised or bequeathed in the testator's will, but the testator no longer owns that property at the time of death, the gift is adeemed. This means that the gift fails and is not replaced by other property. The reason that the property is no longer owned by the testator generally does not matter; *i.e.*, it does not matter whether the testator sold the property or it was accidentally destroyed.

Example: T owns Blackacre and executes a will devising "Blackacre to my daughter Mary." Prior to his death, T sells Blackacre to A and deposits the proceeds of the sale in a bank account. Upon T's death, Mary is not entitled to Blackacre or to its proceeds. Note that if the will had provided for T's executor to sell Blackacre and distribute the proceeds to Mary, she would be entitled to the proceeds even though the sale occurred before T's death.

a. Not Applicable to General Devises

Ademption does not apply unless the gift mentioned specific property. A specific devise or legacy is one that can be satisfied only by the delivery of a particular item; it cannot be satisfied by money. Thus, a bequest of "$10,000," or even of "$10,000 to be paid out of the sale of my IBM stock" cannot be adeemed.

b. Not Applicable to Land Under Executory Contract

If the testator enters into an enforceable contract of sale of property after making a specific devise of it by will, the doctrine of equitable conversion holds that the testator's interest is converted into personal property. Logically, an ademption has occurred, and the proceeds of sale when the closing occurs should not pass to the specific devisee of the property. The traditional case law agrees, but the Uniform Probate Code and statutes in most states have reversed this result. Thus, when property subject to a specific devise is placed under contract of sale before the decedent's death, the proceeds of the sale will pass to the specific devisee.

Example: T owns Blackacre and executes a will devising "Blackacre to my daughter Mary." Prior to his death, T enters into a contract to sell Blackacre to A. After T's death the contract is completed, and A pays the purchase price for the land. Mary is entitled to the purchase price in substitution of the land itself.

1) No Ademption If Decedent Incompetent When Contract Formed

If the decedent is unable to enter into the contract, and instead it is entered into by a guardian, attorney in fact, or other representative, courts usually do not apply the equitable doctrine, and they allow the proceeds of the sale to pass to the specific devisee.

c. Other Proceeds Not Subject to Ademption

When property is damaged or destroyed before the testator's death but the casualty insurance proceeds are not paid until after the testator's death, ademption does not usually apply. The beneficiary of the specific bequest takes the insurance proceeds. Similarly, ademption usually does not apply to property condemned by the government when the taking was before death but the condemnation award was paid after death.

d. Partial Ademption

If the testator specifically devises property and then sells or gives away a part of that property, only that portion is adeemed; the remainder passes to the devisee.

2. Exoneration

If a testator makes a specific devise of real estate that is subject to a mortgage or other lien,

the devisee is entitled to have the land "exonerated" by the payment of the lien from the testator's residuary estate. Thus, the property will pass to the devisee free of encumbrances. There is a growing trend toward abolition of the exoneration doctrine, although it is still the majority view. In states that have abolished it, the property will pass to the devisee subject to a preexisting mortgage or other lien unless the will expressly provides for a payoff of the lien.

3. **Lapse and Anti-Lapse Statutes**
A lapse occurs when the beneficiary of a gift in a will ***dies before the testator***. Under the common law, if a lapse occurred, the gift was void. However, nearly all states now have statutes that prevent lapse by permitting the gift to pass to the predeceasing beneficiary's living descendants under certain circumstances. These statutes vary as to the scope of beneficiaries covered.

a. **Degree of Relationship to Testator**
Many of the anti-lapse statutes apply only when the named beneficiary is a descendant of the testator. Others apply if the beneficiary is more remotely related, such as a descendant of the testator's grandparent. Others apply to any relative, and still others apply to any beneficiary at all.

1) **Descendants Are Substituted**
The anti-lapse statute does not save the gift for the predeceasing beneficiary's estate; rather it substitutes the beneficiary's descendants for the beneficiary. Thus, property will never pass under the anti-lapse statute to a predeceasing beneficiary's spouse. The property passes to the beneficiary's descendants under the method of distribution (*e.g.*, per stirpes, per capita) used by the state's intestate succession (inheritance) statute.

b. **Inapplicable If Beneficiary Dead When Will Executed**
If the beneficiary is already dead when the will is executed, the anti-lapse statute usually does not apply, and the gift will lapse and fail.

c. **Application to Class Gifts**
Ordinarily, if a gift is made by will to a class (*e.g.*, "to my children," or "to the descendants of my brother Bob"), and some members of the class die before the testator, the gift is simply given to the surviving members of the class. However, if class members within the coverage of an anti-lapse statute predecease the testator leaving surviving issue, the statute will apply, and the issue will take the deceased class member's share of the gift.

d. **Anti-Lapse Statute Does Not Apply If Contrary Will Provision**
The anti-lapse statute does not apply if there is a contrary will provision—*i.e.*, if the gift is contingent on the beneficiary's surviving the testator.

G. CROPS (EMBLEMENTS)

The law recognizes two types of crops: ***Fructus naturales*** are crops that grow spontaneously on the land; *i.e.*, they are produced by nature alone and are perennial (they do not require planting). ***Fructus industriales (emblements)*** are annual crops produced through cultivation. Fructus naturales are real property and title to them passes automatically with the land. Fructus industriales are personalty.

1. **Conveyance of Land Includes Crops**
Generally, the owner of the land is presumed to be the owner of both types of crops, and a conveyance of land carries with it all the crops growing on it. This presumption is based on the presumed intent of the parties, but a contrary intent may be shown.

2. **Exception—Harvested Crops**
An exception to the general rule is recognized for crops that have already been harvested or severed from the land. Such crops do not pass with the conveyance of the land, and the former owner has the right to reenter the land to remove them.

a. **Ripened But Unharvested Crops**
Some jurisdictions hold that ripened fructus industriales (annual crops) likewise do not pass with a conveyance of the land. These courts treat the ripened crops as having been "constructively severed" upon ripening, because they no longer need to draw sustenance from the soil.

3. **Exception—Crops Planted by Tenant**
Under the doctrine of emblements, title to crops planted by a tenant during the term of his tenancy remains in the tenant unless there is a contrary provision in the lease. A conveyance of the land by the landlord does not pass title to the tenant's crops. The tenant retains his right to enter upon the property to cultivate, harvest, and remove crops planted prior to the termination of his estate. For this doctrine to apply, the tenancy must have: (i) been for an ***uncertain duration***, and (ii) terminated ***without fault*** on the part of the tenant.

   a. **Compare—Trespasser**
   The doctrine of emblements is limited to tenants. One who planted crops while on the land as a trespasser has no title to the crops and has no right of entry to remove them. Crops planted by an adverse possessor acting under a ***claim of right***, however, are generally held to belong to him.

VII. SECURITY INTERESTS IN REAL ESTATE

A. TYPES OF SECURITY INTERESTS

A security interest in real estate operates to secure some other obligation, usually a promise to repay a loan, which is represented by a promissory note. If the loan is not paid when due, the holder of the security interest can either take title to the real estate or have it sold and use the proceeds to pay the debt with accrued interest and any legal and court costs. Of the five types of security interests, the first three are most important.

1. **Mortgage**
The debtor/notemaker is the mortgagor; he gives the mortgage (along with the note) to the lender, who is the mortgagee. Most states require that a lender realize on the real estate to satisfy the debt only by having a judicial (court-ordered) foreclosure sale conducted by the sheriff.

2. **Deed of Trust**
The debtor/notemaker is the trustor. The trustor gives the deed of trust to a third-party trustee, who is usually closely connected with the lender (*e.g.*, the lender's lawyer, affiliated corporation, or officer). In the event of default, the lender (termed the beneficiary) instructs the trustee to proceed with foreclosing the deed of trust by sale. Many states allow the sale to be either judicial (as with a mortgage) or nonjudicial, under a "power of sale" clause that authorizes the trustee to advertise, give appropriate notices, and conduct the sale personally.

3. **Installment Land Contract**
In an installment land contract, the debtor is the purchaser of the land who signs a contract with the vendor, agreeing to make regular installment payments until the full contract price (including accruing interest) has been paid. Only at that time will the vendor give a deed transferring legal title to the purchaser. In case of default, the contract usually contains a forfeiture clause providing that the vendor may cancel the contract, retain all money paid to date, and retake possession of the land.

4. **Absolute Deed—Equitable Mortgage**
A landowner needing to raise money may "sell" the land to a person who will pay cash and may give the "buyer" an absolute deed rather than a mortgage. This may seem to be safer than a mortgage loan to the creditor and may seem to have tax advantages. However, if the court concludes, by clear and convincing evidence, that the deed was really given for security purposes, they will treat it as an "equitable" mortgage and require that the creditor foreclose it by judicial action, like any other mortgage. This result will be indicated by the following factors: (i) the existence of a debt or promise of payment by the deed's grantor; (ii) the grantee's promise to return the land if the debt is paid; (iii) the fact that the amount advanced to the grantor/debtor was much lower than the value of the property; (iv) the degree of the grantor's financial distress; and (v) the parties' prior negotiations.

5. **Sale-Leaseback**
A landowner needing to raise money may sell her land to another for cash and may then lease the land back for a long period of time. As in the case of the absolute deed, the grantor/lessee may attack such a transaction later as a disguised mortgage. Factors that will lead the court to such a result are: (i) the fact that the regular rent payments on the lease are virtually identical to payments that would be due on a mortgage loan; (ii) the existence of an option

to repurchase by the grantor/lessee; and (iii) the fact that the repurchase option could be exercised for much less than the probable value of the property at that time, so that the repurchase would be very likely to occur.

B. TRANSFERS BY MORTGAGEE AND MORTGAGOR

All parties to a mortgage or deed of trust can transfer their interests. Ordinarily, the mortgagor transfers by deeding the property, while the mortgagee usually transfers by indorsing the note and executing a separate assignment of the mortgage. The note and mortgage must pass to ***the same person*** for the transfer to be complete.

1. Transfer by Mortgagee

a. Transfer of Mortgage Without Note

The case law is divided, with some states holding that the transfer of the mortgage automatically transfers the note as well, unless the mortgagee-transferor expressly reserves the rights to the note (which there would rarely be any reason for the mortgagee to do). In these states, the transferee of the mortgage can then file an equitable action and compel a transfer of the note as well. Other states hold that, because the note is the principal evidence of the debt, a transfer of the mortgage without the note is a nullity and is void.

b. Transfer of Note Without Mortgage

The ***note can be transferred without the mortgage***, but the mortgage will automatically follow the properly transferred note, unless the mortgagee-transferee expressly reserves the rights to the mortgage (which there would rarely be any reason for the mortgagee to do). No separate written assignment of the mortgage is necessary, although it is customary for the transferee to obtain and record an assignment of the mortgage.

1) Methods of Transferring the Note

The note may be transferred either by indorsing it and delivering it to the transferee, or by a separate document of assignment. Only if the former method is used can the transferee become a holder in due course under U.C.C. Article 3.

a) Holder in Due Course Status

To be a holder in due course of the note, the following requirements must be met:

(1) The note must be ***negotiable in form***, which means that it must be payable "to bearer" or "to the order of" the named payee. It must contain a promise to pay a fixed amount of money (although an adjustable interest rate is permitted), and no other promises, except that it may contain an acceleration clause and an attorneys' fee clause.

(2) The original note must be ***indorsed*** (*i.e.*, signed) by the named payee. Indorsement on a photocopy or some other document is not acceptable.

(3) The original note must be ***delivered*** to the transferee. Delivery of a photocopy is not acceptable.

(4) The transferee must take the note in ***good faith*** and must pay ***value*** for it. ("Value" implies an amount that is more than nominal, although it need not be as great as the note's fair market value.) The transferee ***must not have any notice*** that the note is overdue or has been dishonored, or that the maker has any defense to the duty to pay it.

b) Benefits of Holder in Due Course Status

A holder in due course will take the note free of any personal defenses that the maker might raise. "Personal defenses" include failure of consideration, fraud in the inducement, waiver, estoppel, and payment. The holder in due course is, however, still subject to "real" defenses that the maker might raise. These include infancy, other incapacity, duress, illegality, fraud in the execution, forgery, discharge in insolvency, and any other insolvency.

2) Payment to One Without Note Does Not Count

A mortgagor is expected to demand to see the promissory note before making

payment. The note is considered to embody the obligation. If possession of the note has been transferred by the original mortgagee, a payment to the mortgagee will not count, and the holder of the note can still demand payment. This is so even if the mortgagor had no notice that the note had been transferred.

Example: A borrows $50,000 from B and gives B a note for that amount, secured by a mortgage on Blackacre. One year later, B assigns the note and mortgage to C, transferring actual possession of the note to C. Two years thereafter, A, who does not realize that B no longer holds the note, pays $50,000 plus interest to B. This payment is ineffective against C, and C can sue A on the note or foreclose the mortgage on Blackacre.

2. Transfer by Mortgagor—Grantee Takes Subject to Mortgage

If the mortgagor sells the property and conveys a deed, the grantee takes subject to the mortgage, which remains on the land. Unless there is a specific clause in the mortgage, the mortgagee has no power to object to the transfer.

a. Assumption

Often the grantee signs an assumption agreement, promising to pay the mortgage loan. If she does so, she becomes primarily liable to the lender (usually considered a third-party beneficiary), while the original mortgagor becomes secondarily liable as a surety. If the mortgagee and grantee modify the obligation, the original mortgagor is completely discharged of liability.

b. Nonassuming Grantee

A grantee who does not sign an assumption agreement does not become personally liable on the loan. Instead, the original mortgagor remains primarily and personally liable. However, if the grantee does not pay, the mortgage may be foreclosed, thus wiping out the grantee's investment in the land.

c. Due-on-Sale Clauses

Most modern mortgages contain "due-on-sale" clauses, which purport to allow the lender to demand full payment of the loan if the mortgagor transfers any interest in the property without the lender's consent. Such clauses are designed to both: (i) protect the lender from sale by the mortgagor to a poor credit risk or to a person likely to commit waste; and (ii) allow the lender to raise the interest rate or charge an "assumption fee" when the property is sold. Federal law preempts state law and makes due-on-sale clauses enforceable for all types of institutional mortgage lenders on all types of real estate. The preemption does not apply to mortgage loans made by private parties.

C. POSSESSION BEFORE FORECLOSURE

When a mortgagor defaults on his debt, the mortgagee can sue on the debt or foreclose on the mortgage. A mortgagee may wish to take possession of the property, or begin receiving the rents from the property, before foreclosure. This is especially important in states where foreclosure is a lengthy process.

1. Theories of Title

The mortgagee may have a right to take possession before foreclosure, depending on the theory the state follows.

a. The Lien Theory

According to the lien theory, the mortgagee is considered the holder of a ***security interest only*** and the mortgagor is deemed the owner of the land until foreclosure. About half of the states follow this theory, which provides that the mortgagee may not have possession before foreclosure.

b. The Title Theory

Under the title theory, legal ***title is in the mortgagee*** until the mortgage has been satisfied or foreclosed. About 20 states follow this theory, which provides that the mortgagee is entitled to possession upon demand at any time. In practice, this means that as soon as a default occurs, the mortgagee can take possession.

c. The Intermediate Theory

The intermediate theory is a compromise position in which legal ***title is in the mortgagor until default***, and upon default, legal title is in the mortgagee. Only a handful of states follow this theory, which provides that the mortgagee may demand possession

when a default occurs. There is little practical difference between this theory and the title theory.

2. **Mortgagor Consent and Abandonment**
All states agree that the mortgagee may take possession if the mortgagor gives consent to do so, or if the mortgagor abandons the property.

3. **Risks of Mortgagee in Possession**
The mortgagee who takes possession prior to foreclosure can intercept the rents, prevent waste, make repairs, and lease out vacant space. However, despite these advantages, most mortgagees do not wish to take possession because of the liability risks it presents. These risks include a very strict duty to account for all rents received, a duty to manage the property in a careful and prudent manner, and potential liability in tort to anyone injured on the property.

4. **Receiverships**
Instead of becoming a "mortgagee in possession," most mortgagees attempt to intercept the rents before foreclosure by getting a receiver appointed by the court to manage the property. Courts will generally appoint receivers for rental property upon a showing of some combination of three factors: (i) that waste is occurring; (ii) that the value of the property is inadequate to secure the debt; and (iii) that the mortgagor is insolvent.

D. FORECLOSURE

Foreclosure is a process by which the mortgagor's interest in the property is terminated. The property is generally sold to satisfy the debt in whole or in part (foreclosure by sale). Almost all states ***require*** foreclosure by sale. All states allow ***judicial sale***, while about one-half also allow nonjudicial sale under a ***power of sale***. The nonjudicial sale is often permitted with deeds of trust but not with mortgages. Foreclosure sales are conducted by auction, with the highest bidder taking the property. The lender may bid at the sale, and in many cases the lender is the sole bidder. (*Note:* For convenience, the discussion below speaks of mortgagors and mortgagees, but the same principles apply to deed-of-trust trustors and beneficiaries.)

1. Redemption

a. Redemption in Equity

At any time ***prior to the foreclosure sale***, the mortgagor has the right to redeem the land or free it of the mortgage by paying off the amount due, together with any accrued interest. If the mortgagor has defaulted on a mortgage or note that contains an "acceleration clause" permitting the mortgagee to declare the full balance due in the event of default, the full balance must be paid in order to redeem. A mortgagor's right to redeem her own mortgage cannot be waived in the mortgage itself; this is known as "clogging the equity of redemption" and is prohibited. However, the right can be waived later for consideration.

b. Statutory Redemption

About half the states give the mortgagor (and sometimes junior lienors) a statutory right to redeem for some fixed period after the foreclosure sale has occurred; this period is usually six months or one year. The amount to be paid is usually the foreclosure sale price, rather than the amount of the original debt. Be careful to distinguish equitable redemption, which is universally recognized (but only up to the date of the sale), from statutory redemption, which is only recognized by about half the states and applies only ***after*** foreclosure has occurred.

2. Priorities

Generally, the priority of a mortgage is determined by the time it was placed on the property. When a mortgage is foreclosed, the buyer at the sale will take title as it existed when the mortgage was placed on the property. Thus, foreclosure will terminate interests junior to the mortgage being foreclosed but will not affect senior interests.

a. Effect of Foreclosure on Various Interests

1) Junior Interests Destroyed by Foreclosure

Foreclosure destroys all interests junior to the mortgage being foreclosed. In other words, junior mortgages, liens, leases, easements, and all other types of interests will be wiped out. If a lien senior to that of the mortgagee is in default, the junior mortgagee has the right to pay it off (*i.e.*, redeem it) in order to avoid being wiped

out by its foreclosure. Thus, those with interests subordinate to those of the foreclosing party are necessary parties to the foreclosure action. Failure to include a necessary party results in the preservation of that party's interest despite foreclosure and sale.

2) **Senior Interests Not Affected**
Foreclosure does not affect any interest senior to the mortgage being foreclosed. ***The buyer at the sale takes subject to such interest.*** She does not become personally liable on such senior interests, but she will be forced to pay them in order to prevent their foreclosure in the future.

b. Modification of Priority
As noted above, priorities among mortgages on the same real estate are normally determined simply by chronology: the earliest mortgage placed on the property is first in priority, the next mortgage is second, and so on. However, the chronological priority may be changed in the following ways:

1) **Failure to Record**
If the first mortgagee fails to record, and the second mortgagee records, gives value, and takes without notice of the first, the second mortgagee will have priority over the first by virtue of the normal operation of the recording acts.

2) **Subordination Agreement**
A first mortgagee may enter into an agreement with a junior mortgagee, subordinating its priority to the junior mortgagee. Such agreements are generally enforced. However, a broad promise to subordinate to any mortgage (or a vaguely described mortgage) to be placed on the property in the future may be considered too inequitable to enforce.

3) **Purchase Money Mortgages**
A purchase money mortgage ("PMM"), given when the mortgagor buys the property, is considered to have priority over non-PMMs executed at about the same time, even if the other mortgages are recorded first. A PMM is:

(i) A mortgage given to the vendor of the property as a part of the purchase price; or

(ii) A mortgage given to a third-party lender, who is lending the funds to allow the buyer to purchase the property.

As between two PMMs, one to the vendor and one to a third-party lender, the vendor's mortgage is usually given priority over the third-party lender's. If two PMMs are given to two third-party lenders, their priority is determined by the chronological order in which the mortgages were placed on the property, the recording act, and a subordination agreement (if any). Note that in these cases, the recording acts are often of no use because two purchase money mortgagees will almost always know of each other's existence and, thus, have notice.

4) **Modification of Senior Mortgage**
Suppose there are two mortgages on the land. The landowner enters into a modification agreement with the senior mortgagee, raising its interest rate or otherwise making it more burdensome. The junior mortgage will be given ***priority over the modification***. For example, if the first mortgage debt is larger because of the modification, the second mortgage gains priority over the increase in the debt.

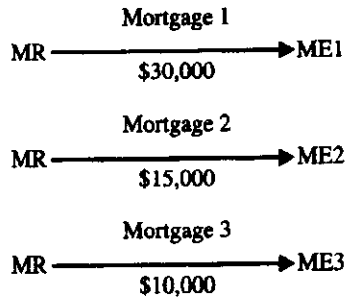
5) **Optional Future Advances**
In general, a mortgage may obligate the lender to make further advances of funds after the mortgage is executed, and such advances will have the same priority as the original mortgage. However, if a junior mortgage is placed on the property and the senior lender later makes an "optional" advance while having notice of the junior lien, the advance will lose priority to the junior lien. An optional advance is one that the senior lender is not contractually bound to make. Numerous states have reversed this rule by statute, but it remains the majority view.

3. Proceeds of Sale
The proceeds of the foreclosure sale are used first to pay expenses of the sale, attorneys' fees, and court costs; then to pay the principal and accrued interest on the loan that was

foreclosed; next to pay off any junior liens or other junior interests in the order of their priority; and finally, any remaining proceeds are distributed to the mortgagor. In many cases, there is no surplus remaining after the principal debt is paid off.

4. **Deficiency Judgments**
If the proceeds of the sale are insufficient to satisfy the mortgage debt, the mortgagee can bring a personal action against the mortgagor/debtor for the deficiency. However, a number of states limit the deficiency that can be recovered to the difference between the debt and the property's fair market value when the fair market value is higher than the foreclosure price. Other states prohibit deficiency judgments entirely on purchase-money mortgages and on deeds of trust that are foreclosed by power of sale.

Examples: 1) Assume that land has a fair market value of $50,000 and is subject to three mortgages executed by its owner, whose name is MR. The mortgages have priorities and secure outstanding debts in the amounts shown below, which are owed to three different creditors, ME1, ME2, and ME3:



Assume that Mortgage 1 is foreclosed, and the bid at the sale is $50,000 (the fair value of the land). How will the funds be distributed?

In an actual case, the funds would first be used to pay any attorneys' fees and expenses of the foreclosure, and then to any accrued interest on Mortgage 1. However, we will assume that these items are zero.

The $50,000 in funds from the sale will then be used to pay off the mortgages in the order of their priority. Thus, $30,000 is applied to fully pay off Mortgage 1. Then, $15,000 is applied to fully pay off Mortgage 2. There is a remaining balance from the foreclosure sale of $5,000, which is applied toward payment of Mortgage 3. Because this is not enough to discharge Mortgage 3 fully, ME3 is left with a deficiency of $5,000, and may sue MR for a personal judgment in this amount unless state anti-deficiency statutes prohibit it.

2) Assume the same facts as above, except that the bid at the sale is $60,000 rather than $50,000. This will allow full payment of Mortgage 1 ($30,000), Mortgage 2 ($15,000), and Mortgage 3 ($10,000), and will leave a surplus of $5,000. Assuming there are no further liens or encumbrances on the property, this $5,000 will be paid over to MR, the mortgagor.

3) Now assume the same facts as in the original problem, except that it is Mortgage 2 that is being foreclosed. Mortgage 1 exists, but it is either not in default or its holder has not yet taken action to foreclose it.

Recall from the outline above that foreclosure does not affect any interest senior to the mortgage being foreclosed. Thus, foreclosure of Mortgage 2 will not affect Mortgage 1, which will continue to exist on the property in the hands of the foreclosure sale purchaser. Such a purchaser will not be personally liable to pay Mortgage 1 off, but as a practical matter, if Mortgage 1 is not paid, sooner or later ME1 will foreclose it. Hence, the buyer at the foreclosure sale of Mortgage 2 will have a strong economic incentive to pay Mortgage 1; otherwise, she will be subjected to the foreclosure action of ME1, and may well lose much or all of her investment in the property.

What will a wise bidder at the foreclosure sale on Mortgage 2 bid? The maximum is $20,000, which is the fair value of the land ($50,000) minus the

amount the successful bidder will subsequently have to pay to discharge Mortgage 1 ($30,000).

If the bid at the foreclosure sale of Mortgage 2 is $20,000, how will the money be distributed? None of it will go to ME1, because he still has his mortgage on the property. $15,000 of the funds will be applied to fully pay off Mortgage 2, and $5,000 will remain to be applied against the $10,000 balance owed on Mortgage 3 (which is, of course, wiped out by the foreclosure of Mortgage 2). ME3 will still have a $5,000 deficiency, as in the first example above.

E. INSTALLMENT LAND CONTRACTS

Installment contracts usually provide for forfeiture rather than foreclosure as the vendor's remedy in the event of default. However, because forfeiture is often a harsh remedy, the courts have tended to resist enforcing forfeiture clauses and in doing so have developed the following theories:

1. **Equity of Redemption**
   Several states allow the contract purchaser who is in default to pay off the accelerated full balance of the contract and to keep the land. In other words, they grant the purchaser a grace period. This is roughly analogous to the equity of redemption in mortgage law. A few states have statutory schedules of grace periods, which often provide for a longer time if a greater percentage of the total price has been paid.

2. **Restitution**
   A number of decisions allow actions by the vendor for forfeiture of the land but require her to refund to the purchaser any amount by which his payments exceed the vendor's damages. The court may measure these damages by the property's fair rental value while the purchaser was in possession or by any drop in market value since the contract was executed.

3. **Treat as a Mortgage**
   A few states, by statute or case law, now treat installment contracts like mortgages, at least for purposes of the vendor's remedies. In effect, the vendor must foreclose the contract by judicial sale in order to realize on the real estate, and she cannot simply reclaim the land.

4. **Waiver**
   Many cases hold that where a vendor has established a pattern of accepting late payments from the purchaser, she cannot suddenly insist on strict on-time payment and declare a forfeiture if such payment is not forthcoming. Such a pattern is said to constitute a waiver of strict performance. To reinstate strict performance, the vendor must send the purchaser a notice of her intention to do so and must allow a reasonable time for the purchaser to make up any late payments and to get back "on stream."

5. **Election of Remedies**
   It is commonly held that the vendor who elects to pursue a forfeiture cannot also bring an action for damages or for specific performance. The vendor must choose only one remedy and forgo all others.

VIII. RIGHTS INCIDENTAL TO OWNERSHIP OF LAND (NATURAL RIGHTS)

A. IN GENERAL

The owner of real property has the exclusive right to use and possess the surface, the airspace, and the soil of the property. This right is subject to restrictions in the chain of title (*e.g.*, easements and covenants), to the law of nuisance, and to any valid laws or regulations that restrict the use of the land (*e.g.*, zoning ordinances).

B. RIGHT TO LATERAL AND SUBJACENT SUPPORT OF LAND

1. **Right to Lateral Support**
   Ownership of land carries with it the right to have the land supported in its ***natural state*** by adjoining land. This normally means a right to have one's land undisturbed by withdrawal of support (*e.g.*, by excavations on adjoining land).

a. Support of Land in Natural State
A landowner is ***strictly liable*** if his excavation causes adjacent land to subside (*i.e.*, slip or cave in). Thus, he will be liable even if he used the utmost care.

b. Support of Buildings on Land
If land is improved by buildings and an adjacent landowner's excavation causes subsidence, the adjacent landowner will be ***strictly liable*** for damages to the buildings caused by the excavation only if it is shown that the land would have collapsed in its natural state (*i.e.*, that it would have collapsed in the absence of the buildings and improvements). Even if the land would not have collapsed in its natural state (*i.e.*, the collapse would not have occurred except for the weight of the buildings), the excavating landowner is liable for loss or damage to the buildings if his excavation is found to have been done ***negligently***. (Tort rules apply here.)

2. Right to Subjacent Support
When a landowner conveys to a grantee the right to take minerals from beneath the land, the grantor retains the right to have the surface supported unless the conveyance expressly includes authority to destroy the surface if "reasonably necessary" to extract the mineral.

a. Support of Land and Buildings
This right of support extends not only to the land in its natural state but also to all buildings existing on the date when the subjacent estate is severed from the surface. However, the underground occupant is liable for damages to subsequently erected buildings only if he was ***negligent***.

b. Interference with Underground Waters
Note that an underground occupant is liable for negligently damaging springs and wells, whereas an adjoining landowner is not liable for interfering with underground percolating waters.

C. WATER RIGHTS

Different rules apply depending on whether the water rights claimed involve (i) water in watercourses (*e.g.*, streams, rivers, and lakes, including underground watercourses); (ii) ground or percolating water (*e.g.*, water normally pumped or drawn from wells); or (iii) surface water (*e.g.*, rainfall, seepage). Exam questions normally concern who has priority to use the water from watercourses and from the ground, and to what extent a landowner may obstruct or divert the flow of surface water.

1. Watercourses
There are two major systems for allocation of water in watercourses: (i) the ***riparian doctrine*** (generally applied in the eastern states where water is or was relatively abundant), and (ii) the ***prior appropriation doctrine*** (generally used in the 17 western states where water is relatively scarce).

a. Riparian Doctrine
Under the riparian doctrine, water does not belong to the public generally or to the state (with certain exceptions) but rather to the "riparian" proprietors who own land bordering on the watercourse. All of these landowners have "riparian rights" and none can use the water so as to deprive the others of these rights.

1) What Land Is Riparian
Under the ***majority rule***, all tracts held under unity of ownership are riparian if the tracts are contiguous and ***any*** of them front on the water. Thus, if a riparian owner purchases a parcel which is contiguous to the riparian parcel, riparian rights attach to the newly acquired parcel. The ***minority rule*** limits riparian rights to the smallest tract of land ever owned abutting the water. Under this view, if a back portion of a riparian tract is sold, it becomes nonriparian and can never regain riparian rights.

a) Riparian Owner
Riparian owners include the fee owner of the abutting land and, to the extent of their title, lessees and easement owners of such land.

b) Doctrine Applies Only to Riparian Parcel
The riparian doctrine permits use of water only in connection with activities

carried out on the riparian parcel. Riparian rights cannot be conveyed for the use of nonriparian land nor can they be lost by nonuse.

2) Nature of Riparian Right

a) Natural Flow Theory
Under the "natural flow" theory, a riparian owner is entitled to the water in the bordering stream or lake subject to the limitation that ***he may not substantially or materially diminish its quantity, quality, or velocity***. Thus, a downstream owner can enjoin an upstream owner's use even though the downstream owner has plenty of water for his own use. No state appears to adhere strictly to this theory because it operates to limit beneficial upstream use and leads to "waste" of the resource.

b) Reasonable Use Theory
Under the more common theory, all riparian owners share the right of "reasonable use." The general idea is that the right of each riparian owner to use the stream (*e.g.*, to divert for irrigation, to pollute, etc.) is subject to a like reasonable right in other riparian owners. ***Each riparian owner must submit to reasonable use*** by other riparian owners, and a downstream owner cannot enjoin such use by an upstream owner unless it substantially interferes with the needs of those who have a like right (*i.e.*, unless actual damage is shown).

(1) Factors to Consider
In determining whether an owner's use of water is "reasonable," courts generally balance the utility of the use against the gravity of the harm. (Note the analogy to nuisance law.) Six factors are helpful in this balancing process: (i) the ***purpose*** of the questioned use; (ii) the ***destination*** to which the water is taken for use; (iii) the ***extent*** of the use; (iv) the ***pollution*** of water by use; (v) whether the use involves an ***alteration*** in the manner of flow; and (vi) ***miscellaneous*** types of conduct that may give rise to litigation. (These factors may be remembered more easily by using the acronym MAPPED.)

c) Natural vs. Artificial Use
Under either of the above theories, water use is categorized as "natural" or "artificial." Natural uses include those necessary for the daily sustenance of human beings (*e.g.*, household consumption, gardening, minimal number of livestock). All other uses, including irrigation and manufacturing, are artificial. ***Natural uses prevail over artificial.*** Upper riparians can take all that they need for natural uses. However, they cannot take for artificial purposes unless there is enough water for the domestic wants of all.

b. Prior Appropriation Doctrine
Under the prior appropriation doctrine, the water belongs initially to the state, but the right to divert and use it can be acquired by an individual whether or not he is a riparian owner. Initially, individual rights were established by actual use; thus, each appropriator acquired a vested property right "to divert a given quantity of water, at given times from a given place, to use at a given place for a given purpose."

1) Factors to Note for Bar Exam
Present day acquisition and governance of rights under this doctrine are largely dealt with under complex state-administered permit systems that are too detailed for coverage here. However, it is sufficient for bar examination purposes to note that: (i) appropriative rights were originally determined simply by priority of beneficial use; (ii) if there is a decrease in stream flow, priority is accorded in terms of time of appropriation (*i.e.*, the junior appropriators in descending order of priority must suffer); (iii) in many states, an appropriative right can be severed from the land it serviced when acquired and transferred (*i.e.*, can be sold to another for use on other land), provided no injury is caused to existing uses; and (iv) an appropriative right (unlike a riparian one) can be lost by abandonment (intent and nonuse).

2. Groundwater
If water comes from an underground watercourse (*e.g.*, a defined stream or river), the riparian

or prior appropriation doctrines apply. However, the presumption is that underground water is percolating (*i.e.*, the water moves through the ground diffusely and is usually withdrawn by wells from the underground water table). There are four different rules for determining rights in underground water.

a. **Absolute Ownership Doctrine**
The absolute ownership doctrine is followed by approximately 12 eastern states. The owner of the land overlying the source basin may extract as much water as she wishes and use it for whatever purpose she desires (including export). There is no firmly established system for allocation among overlying owners.

b. **Reasonable Use Doctrine**
The majority view, followed by about 25 states, allows the surface owner to make "reasonable use" of the groundwater. This rule differs from the absolute ownership rule mainly with respect to exporting water off site: Exporting is allowed only to the extent that it does not harm other owners who have rights in the same aquifer. On the other hand, virtually all beneficial uses of water ***on the land*** are considered reasonable and are allowed.

c. **Correlative Rights Doctrine**
In California, the owners of overlying land own the underground water basin as joint tenants, and each is allowed a reasonable amount for her own use.

d. **Appropriative Rights Doctrine**
In some western states, the prior appropriation doctrine applies to groundwater as well as watercourses. Priority of use determines appropriative rights. In most western states, rights to percolating water are now determined by a state water board which controls annual yield, prohibits water waste, etc.

3. **Surface Waters**
Diffused surface waters are those that have no channel but pass over the surface of the land. The source may be rainfall, melting snow, seepage, etc. A landowner can use surface waters within her boundaries for any purpose she desires. Problems concern the right of a lower owner to restrict a flow that would naturally cross his land (*e.g.*, by dikes) and the right of an upper owner to alter or divert a natural flow onto other lands (*e.g.*, by drains, channels, or sloughs). The acting landowner's liability to other landowners depends upon which doctrine the state follows.

a. **Natural Flow Theory**
Under the natural flow theory, followed by about half the states, a landowner cannot refuse to take natural drainage, cannot divert surface water onto the land of another, and cannot alter the rate or manner of natural flow where such actions would injure others above or below him. Because this theory imposes substantial impediments on development (*e.g.*, no paving, large roofs, culverts, etc.), most states have "softened" the rule to permit ***reasonable*** changes in natural flow. And a few states have held the doctrine inapplicable to urban property (because development would otherwise be hindered).

b. **Common Enemy Theory**
Under the common enemy theory, followed by half the states, surface water is a common enemy and any owner can build dikes or change drainage to get rid of it. However, many courts have modified the doctrine and have held landowners to a standard of ordinary care to avoid unnecessary and negligent injury to the land of others.

c. **Reasonable Use Theory**
The growing trend is to apply the reasonable use doctrine which, as in nuisance and watercourse cases, requires balancing the utility of the use against the gravity of the harm. Judicial mitigation of both the natural flow and common enemy doctrines often results in an approximation of the reasonable use theory.

d. **Compare—Capture of Surface Water**
A landowner can capture (*e.g.*, by dam, rain barrels) as much surface water as he wishes. It can be diverted to any purpose on or off the land. Owners below have no cause of action unless the diversion is malicious.

D. RIGHTS IN AIRSPACE

The right to the airspace above a parcel is not exclusive, but the owner is entitled to freedom from excessive noise and transit by aircraft. If flights are so low as to be unreasonably disturbing, they constitute a trespass or (if the airport is government-owned) a taking by inverse condemnation.

E. RIGHT TO EXCLUDE—REMEDIES OF POSSESSOR

1. Trespass

If the land is invaded by a ***tangible*** physical object that interferes with the right of exclusive possession, there is a trespass.

2. Private Nuisance

If the land is invaded by ***intangibles***, *e.g.*, odors or noises, that substantially and unreasonably interfere with use and possession, the possessor may bring an action for private nuisance.

3. Continuing Trespass

If the land is repeatedly invaded by a trespasser, *e.g.*, the invader repeatedly swings a crane over the property, the possessor may sue for either trespass or nuisance.

4. Law or Equity

If the possessor wants to force the invader to stop the invasion of the property, the remedy is an injunction in equity. If the possessor wants damages, the remedy is an action at law.

a. Ejectment

The remedy at common law to remove a trespasser from the property is ejectment.

b. Unlawful Detainer

In the landlord-tenant situation, the landlord may force the tenant to vacate the premises by the statutory remedy of unlawful detainer. (In some states, the term used to describe this action is forcible detainer or summary ejectment.) The action may be joined with a demand for money damages in rent due.

IX. COOPERATIVES, CONDOMINIUMS, AND ZONING

A. COOPERATIVES

In the most common form of housing cooperative, title to the land and buildings is held by a corporation that leases the individual apartments to its shareholders. Thus, the residents in a cooperative are both tenants of the cooperative (by virtue of their occupancy leases) and owners of the cooperative (by virtue of their stock interests). Stock interests in the cooperative are not transferable apart from the occupancy lease to which they are attached.

1. Restriction on Transfer of Interests

Because the members of a cooperative are tenants, the cooperative may retain the same controls over assignment and sublease of the apartments as may be exercised by any other landlord.

2. Mortgages

Permanent financing is provided through a blanket mortgage on the entire property owned by the cooperative corporation (land and buildings). This mortgage has priority over the occupancy leases. Failure to meet the payments on the blanket mortgage may result in the termination of the leases through foreclosure of the mortgage. Thus, each cooperative tenant is vitally concerned that the other tenants pay their shares of the blanket mortgage.

3. Maintenance Expenses

Ordinarily, cooperative tenants are not personally liable on the note or bond of the blanket mortgage. However, under their occupancy leases, each tenant is liable for her proportionate share of all of the expenses of the cooperative (including payments on the mortgage as well as other operating expenses).

B. CONDOMINIUMS

In a condominium, each owner owns the interior of her individual unit plus an undivided interest in the exterior and common elements.

1. **Restriction on Transfer of Interests**
Because condominium unit ownership is treated as fee ownership, the ordinary rules against restraints on alienation apply. A few jurisdictions (*e.g.*, New York) by statute allow reasonable restraints on transfer of condominium units.

2. **Mortgages**
Each unit owner finances the purchase of her unit by a separate mortgage on her unit. Consequently, unit owners need not be as concerned about defaults by others as they must be in a cooperative.

3. **Maintenance Expenses**
Each unit owner is personally liable on her own mortgage and each pays her own taxes (unlike the cooperative situation, but like any other homeowner). In addition, each unit owner is liable to contribute her proportionate share to the common expenses of maintaining the common elements, including insurance thereon.

C. ZONING

The state may enact statutes to reasonably control the use of land for the protection of the ***health, safety, morals, and welfare*** of its citizens. Zoning is the division of a jurisdiction into districts in which certain uses and developments are permitted or prohibited. The zoning power is based on the state's police power and is limited by the Due Process Clause of the Fourteenth Amendment. Other limitations are imposed by the Equal Protection Clause of the Fourteenth Amendment and the "no taking without just compensation" clause of the Fifth Amendment. (*See* Multistate Constitutional Law outline.) Cities and counties can exercise zoning power only if authorized to do so by state enabling acts. Ordinances that do not conform to such acts are "ultra vires" (beyond the authority of the local body) and void.

1. **Nonconforming Use**
A use that exists at the time of passage of a zoning act and that does not conform to the statute cannot be eliminated at once. Some statutes provide for the gradual elimination of such nonconforming uses (*e.g.*, the use must end in 10 years).

2. **Special Use Permits**
Some unusual uses (*e.g.*, hospitals, funeral homes, etc.) require issuance of a special permit even though the zoning of the particular district (*e.g.*, commercial) allows that type of use.

3. **Variance**
A variance from the literal restrictions of a zoning ordinance may be granted by administrative action. The property owner must show that the ordinance imposes a unique hardship on him and that the variance will not be contrary to the public welfare.

4. **Unconstitutional Takings and Exactions**
A zoning ordinance may so reduce the value of real property that it constitutes a taking under the Fifth and Fourteenth Amendments. If an ordinance constitutes a taking, the local government must pay damages to the landowner equal to the value reduction. If the ordinance regulates activity that would be considered a nuisance under common law principles, it will not be a taking even if it leaves the land with no economic value.

   a. **Denial of *All* Economic Value of Land—Taking**
   If a government regulation denies a landowner ***all*** economic use of his land, the regulation is equivalent to a physical appropriation and is thus a taking (unless the use was prohibited by nuisance or property law when the owner acquired the land). [Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)—state's zoning ordinance, adopted after owner purchased lots, was a taking because it prohibited owner from erecting any permanent structures on the lots]

   b. **Denial of *Nearly All* Economic Value—Balancing Test**
   If a regulation so decreases the value of the property that there is very little economic value, the court will balance the following factors to determine whether there has been a taking:

      (i) The ***social goals*** sought to be promoted;

      (ii) The ***diminution*** in value to the owner; and

      (iii) The owner's ***reasonable expectations*** regarding use of the property.

Generally, the regulation will be found to be a taking only if it ***unjustly*** reduces the economic value of the property (*e.g.*, greatly reduces the property value and only slightly promotes the public welfare). [Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987)]

c. Unconstitutional Exactions

Local governments often demand, in exchange for zoning approval for a new project, that the landowner give up some land for a public purpose, such as street widening. However, such demands are unconstitutional under the Fifth and Fourteenth Amendments unless they meet the tests set out below. [Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)]

1) Essential Nexus

The local government's demand must be ***rationally connected*** to some additional burden that the proposed project will place on public facilities or rights. Thus, a city could demand land for a street widening upon a showing that the proposed project would otherwise increase traffic congestion and pollution along the street in question.

2) Rough Proportionality

Even if the "essential nexus" test above is met, the local government must not demand too much. The required dedication must be ***reasonably related***, both in ***nature*** (the essential nexus) and ***extent*** (the amount of the exaction), to the impact of the proposed development.

3) Burden of Proof

The local government has the burden of showing that both the essential nexus and rough proportionality tests are met.

d. Remedy

If a property owner challenges a regulation and the court determines that there was a taking, the government will be required to either: (i) compensate the owner for the taking, or (ii) terminate the regulation and pay the owner for any damages that occurred while the regulation was in effect. [First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)]

CONCISE HORNBOOKS



PRINCIPLES OF Property Law

SIXTH EDITION

HERBERT HOVENKAMP
SHELDON F. KURTZ

THOMSON
WEST

PRINCIPLES OF PROPERTY LAW

Sixth Edition

By

Herbert Hovenkamp
Ben V. & Dorothy Willie Professor of Law
University of Iowa

Sheldon F. Kurtz
Percy Bordwell Professor of Law and Professor of Surgery
University of Iowa

CONCISE HORNBOOK SERIES®

THOMSON
WEST

Mat #40188384

Chapter 4

RIGHTS OF POSSESSORS OF LAND, INCLUDING ADVERSE POSSESSION

Table of Sections

Sec.

4.1 Possession and Prior Possession.
4.2 The Concept of Adverse Possession.
4.3 The Five Elements of Adverse Possession.
4.4 Burden of Proof.
4.5 Nature of Title Acquired by Adverse Possession.
4.6 When Statute of Limitation Begins to Run.
4.7 Tacking.
4.8 Effect of Disabilities.
4.9 Constructive Adverse Possession.
4.10 Rightful Possession Becoming an Adverse Possession.
4.11 Whose Interests Are Affected.
4.12 Innocent Improver Doctrine.
4.13 Adverse Possession of Chattels.

SUMMARY

§ 4.1 Possession and Prior Possession

1. The possession of real property consists of dominion and control over the property with the intent to exclude others.

2. In order to constitute possession, the acts of dominion and control must reasonably correspond to the size of the tract, its condition and appropriate use. The act must be of a character that usually accompany the ownership of similarly situated land. In other words, the acts must be consistent with how a reasonable owner of similar land might have used it.

3. In controversies concerning possession, it is normally the function of the jury to determine what the physical acts of dominion and control were, and then to determine whether those acts constituted possession in accordance with the legal standard set by the court.

4. The prior possessor of real property has title against the whole world except the rightful owner. As with personal property, the "rightful owner" may be merely a prior peaceful possessor.

5. Generally a possessory interest in real property can be conveyed by deed or devised by will. If the possessor dies without a will, the land passes to the possessor's heirs.

6. A prior possessor sues to recover possession from another person who is in possession of the land. This is sometimes called an action in ejectment. The defendant in this action cannot defeat the plaintiff's claim merely by showing that a third party has a title superior to the plaintiff's title unless the defendant's rights derive from that third party.[1]

7. A possessor is entitled to recover damages from a wrongdoer. Courts are divided whether the amount of damages is limited to the value of the possessor's interest or the value of the land. If land is condemned, the possessor may be entitled to receive compensation for the value of the condemned land.

§ 4.2 The Concept of Adverse Possession

1. The doctrine of adverse possession is based on statutes of limitation for recovery of real property. Statutes of limitation operate to bar one's right to recover real property held adversely by another for a specified period of time. These statutes also vest the adverse possessor with as perfect title as if there had been a conveyance by deed. However, this title is not a matter of public record until a court determines that title has been acquired by adverse possession and the court's judgment is entered on the public records. Common statutes of limitation to recover the possession of real property are 5, 10, 15 or 20 years. The purposes of such statutes of limitation are to suppress dormant claims, to quiet titles, to require diligence on the part of the owner and penalize those who sit on their rights too long, and to reward the economic activities of a possessor who is utilizing land more efficiently than the true owner is. Many cases with similar facts but divergent results can be explained by considering which of these policies weighed more heavily in the decision making process.

Statutes vary considerably as to such matters as adverse possession under color of title and not under color of title, types of disability and the effect of a disability in specific instances, and whether or not the statute of limitation may run against governmental entities.

1. See Tapscott v. Cobbs, 52 Va. (11 Grat.) 172 (1854). The action of ejectment is available even though the plaintiff is not the absolute owner of the land but a mere prior possessor.

§ 4.3 The Five Elements of Adverse Possession

1. In order to acquire a title to real property by adverse possession, the possession throughout the statutory period must be:

a. actual;

b. open, visible and notorious (meaning, not secret or clandestine but occupying as an owner would occupy for all the world to see if the owner cared to look);

c. exclusive (meaning sole physical occupancy or occupancy by another with the permission of the person claiming a title by adverse possession);

d. continuous and peaceable (meaning without abatement, abandonment or suspension in occupancy by the claimant, and also without interruption by either physical eviction or action in court. In other words there must be an unbroken continuity of possession for the statutory period); and

e. hostile and under claim of right (meaning that the possession is held against the whole world including the true owner; that the possessor claims to be the owner whether or not there is any justification for her claim, or whether or not there is "color of title" being a paper or other instrument that does not qualify as an effective legal conveyance but that the claimant may believe is effective).[2]

Possession under a mistaken belief that one is the owner of the land can be adverse under the majority view. Likewise, good faith on the part of the adverse possessor is generally deemed immaterial. Thus, the possessor can prevail with no rightful claim at all if the above five elements exist.

2. The five elements must coexist to enable one to acquire title by adverse possession.

3. Whether each of these elements exists is primarily a question of fact.

§ 4.4 Burden of Proof

The burden of proof to establish a title by adverse possession is on the adverse possessor. Generally, this burden can be met by a preponderance of the evidence or, as some courts say, by "clear and positive evidence." Most courts say that possession is presumed to be in subordination and not adverse to the legal owner.

2. In some jurisdictions, however, color of title may be required or, if present, may operate to reduce the time necessary to acquire a title by adverse possession. See Mich. Comp. Laws Ann. § 600.5801 (1987). Color of title may also be used to acquire constructive adverse possession.

§ 4.5 Nature of Title Acquired by Adverse Possession

1. Once a title is acquired by adverse possession, the quality of that title is the same as a title acquired by deed, will or intestate succession. Such a title is good as against the whole world. Of course, to have that title reflected as a matter of public record, it is necessary for it to be reflected in a court judgement. Thus, the possessor might initiate a "quiet title" action to establish the acquisition of title by adverse possession.

2. An adverse possessor cannot acquire a larger estate or interest in the land than that which was claimed throughout the entire period of his adverse possession. For example, if the possessor has claimed only a life estate she can mature title only to a life estate. Likewise, the possessor can acquire no greater title than the person who had the cause of action had during the period of possession. Thus, if the only person who had the right to sue the possessor had a mere life estate, then at the end of the statutory period the possessor acquires only a life estate.

3. A title acquired by adverse possession relates back to the time of the possessor's entry when the true owner's cause of action accrued. Thus, once the title is acquired, the true owner can have no other causes of action against the possessor for acts relating to the land on which the statute has not yet run. For example, if A possesses Blackacre and cuts its timber for the statutory ten year period, once A has acquired title by adverse possession the true owner loses any action for the taking of the timber during the period of A's possession before the statute had run. By contrast, if the true owner had asserted her right before the full running of the statute, she could have had an action for the wrongful taking of the timber as well as the recovery of the land.

4. The title acquired by adverse possession is an original title and not derived from the dispossessed owner. Thus, the adverse possessor takes the title and estate free of all claims which could have been asserted against the former owner during the statutory period.

§ 4.6 When Statute of Limitation Begins to Run

The statutory period on adverse possession begins to run when a cause of action for possession accrues against the adverse possessor.[3] The time when a cause of action accrues depends upon the facts in a particular case. Typically, the cause accrues and the statute begins to run when a possessor without right enters into clearly visible possession of another's land claiming adversely.

3. Generally, the statute of limitation does not run against the holder of a future interest in existence at the time the adverse possession begins because the holder of the future interest is not presently entitled to possession.

§ 4.7 Tacking

1. The period of adverse possession of one possessor can be tacked to the period of adverse possession of another possessor if the possessors are in privity with each other. Privity exists when the possession is passed from one to the other by deed, will, descent, written contract, oral contract, mere oral consent or permission. A mere parol transfer, however, is not sufficient for tacking periods of constructive adverse possession where color of title is required.

2. If the occupants are in privity with each other, the period within which a cause of action can be brought by one person is tacked to the period the cause of action can be brought by another.

3. Tacking also occurs for those entitled to bring a cause of action against an adverse possessor who are in privity with each other. Privity exists when the right to bring a cause of action passes from one to another by deed, will, descent, written contract, oral contract, mere oral consent or permission.

§ 4.8 Effect of Disabilities

1. If the person with the cause of action is under a disability at the time the cause of action against the adverse possessor accrues, most states extend the time to bring the cause of action to some period beyond the removal of the disability. While state laws differ, disabilities typically include minority, legal incompetence, and imprisonment. State laws must be carefully scrutinized to determine what extension is available.

2. Under some but not all statutes, the protection which is afforded by a disability is wholly personal to the disabled person and is not available to anyone who may be a successor, either as heir, devisee or purchaser. In some states, the protection afforded by a disability ends at death but the personal representative of the estate of the person who had the cause of action is granted a fixed time in which to bring the cause of action against the adverse possessor.

3. The running of the statute on adverse possession is not affected by either an intervening or a supervening disability. Thus the disability must exist when the cause of action first begins.

4. There is no tacking of disabilities, whether of successive disabilities in the same owner or of disabilities in successive owners.

5. If the original owner has two or more disabilities at the time the cause of action accrues, the owner may take advantage of the disability which lasts the longest.

§ 4.9 Constructive Adverse Possession

1. Constructive adverse possession applies only when the adverse possessor enters under color of title. Color of title means a writing which the adverse possessor may believe conveys a good title but really is so defective that it cannot operate as a conveyance.

Constructive possession is a fiction by which an actual possession of a portion of land is extended to include the remaining area of the tract encompassed within the instrument or decree constituting color of title. For constructive adverse possession there must be an actual possession by the claimant of at least a part of the land. The amount of land that can be constructively possessed must be reasonable in size.

2. While the recording statutes have no application to title by adverse possession, some states require the recording of the instrument upon which the claim is based in order to satisfy the requirements of adverse possession under color of title.

§ 4.10 Rightful Possession Becoming an Adverse Possession

Certain relationships, such as that of co-tenants,[4] give rise to a presumption or inference that the possession of one of the parties is with the permission of, and in subordination to, the rights of the other party or parties. However, if the possessor makes an open disclaimer or repudiation of the title or rights of the other parties, and knowledge of such disclaimer is brought home to them or such disclaimer or repudiation is otherwise implied by law, and the possession and disclaimer is continued for the statutory period, then title will vest in the possessor in derogation of the rights of the others.

§ 4.11 Whose Interests Are Affected

1. The adverse possessor's title does not affect the interest of any person unless that person had a cause of action because of the adverse possession. Thus if there is a severance of the surface and sub-surface when adverse possession starts, adverse possession of the surface does not give a cause of action to the owner of coal under the surface. Similarly, if at the time adverse possession begins the estate is divided into present and future interests, adverse possession of the parcel does not give rise to a cause of action in favor of the reversioner or remainderman. In these two instances the adverse possessor would gain title only to the surface

4. Co-tenants are persons who are concurrently entitled to the possession of real estate. Co-tenants may be tenants in common, joint tenants with right of survivorship, or tenants by the entirety.

in the first situation, and only to a possessory interest in the second.

2. An adverse possession that begins when the title is unified is not affected solely by a subsequent division of the title. Thus, if after adverse possession starts, the rightful owner separates the mineral estate, or creates possessory and future interests, the adverse possession continues to run against all parties, with the adverse possessor ultimately getting a fee simple absolute in the whole unless the owner of the sub-surface starts mining operations or otherwise ousts the adverse possessor, or unless the owners of the future interests effectively assert their titles, which may require filing a law suit.

§ 4.12 Innocent Improver Doctrine

1. Under the doctrine of annexation, improvements to real estate made by a wrongdoer belong to the owner of the real estate.

2. However, where the improvements were made by one who mistakenly believed that he or she owned the land on which the improvements were made, principles of unjust enrichment could compel a court of equity to refuse to quiet title in the improvement in the landowner, absent payment of fair consideration to the "good faith" innocent improver.

§ 4.13 Adverse Possession of Chattels

1. Generally, a thief cannot acquire or transfer title to stolen personal property, even to an innocent purchaser.

2. But title to personal property can be lost by adverse possession. Typically statutes of limitation for adverse possession of chattels run from two to six years.

3. At common law, the statute of limitation began to run when possession became hostile, actual, open, exclusive and continuous, rather than at that point that the goods were stolen or the true owner discovered their location. More recently, it has been held that the statute should begin to run when the true owner discovers or should have discovered the whereabouts of the stolen property.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 4.1 Possession and Prior Possession

PROBLEM 4.1: Blackacre is a large peninsula containing about 1,000 acres, surrounded on three sides by a creek, a bay, and a marsh. S repaired an ancient stone wall which crossed the mouth of the peninsula at S's own expense. S also erected a

gate and a gatekeeper's hut. By these actions S controlled land access to Blackacre. S used the peninsula to graze horses. S later deeded the land to R. R continued to use the land for grazing live stock. D entered the land and R brought an action for ejectment. During the pendency of the action, R died and P, as administrator of R's estate, was substituted as plaintiff. During the trial the court charged the jury as follows:

> If the jury is satisfied from the evidence that S entered upon Blackacre in the year 1850, and is further satisfied that S then made a complete enclosure of the same, and that such enclosure was sufficient to turn and protect stock, and that S actually used this enclosure for such purpose up to the time of the alleged conveyance to R, and that S deeded the same to R, and that the land was subsequently used by R for pasturage, and that the land was suitable for pasturage; and that D entered without any claim of right and subsequent to the completion of said enclosure, and while the said land was being so used by said S prior, and, by said R, after said conveyance, you will find for the plaintiff against such defendant, provided such defendant was occupying the premises at the time of the commencement of this suit.

After a judgment for the plaintiff, defendant appealed, assigning the above instruction as error. Should the judgment be reversed for improper instruction?[5]

Applicable Law: Possession of real property requires acts of dominion and control with an intent to possess and exclude others. It is normally the function of the jury to determine what physical acts of dominion and control were exercised and then to apply the legal standard set by the court as to what acts are sufficient to constitute possession.

Answer and Analysis

Yes. The general principle is that the acts of dominion and control which establish possession must correspond in a reasonable degree with the size of the tract, its condition and appropriate use. The acts must be such as usually accompany the ownership of similar land. The jury decides whether or not the acts relied upon by the plaintiff establish possession, considering the size of the

5. Bradshaw v. Ashley, 180 U.S. 59, 21 S.Ct. 297, 45 L.Ed. 423 (1901), restating the rule in ejectment "that the plaintiff must recover upon the strength of his own title and not upon the weakness of the title of the defendant" and held where the plaintiff proved he was in the actual, undisturbed, and quiet possession of the premises, and the defendant thereupon entered and ousted him, the presumption of title arises from the possession, and, unless the defendant proves a better title in himself, the defendant must himself be ousted.

tract, its particular condition and appropriate use. Under the instruction given, the court invaded the province of the jury by instructing it that certain acts were sufficient to constitute possession. The court should have permitted the jury to decide whether such acts of dominion and control which it found to have taken place were sufficient to comply with legal standards of possession as set forth by the court.

This problem, like the next one, involves a conflict between two possessors. In neither case is the plaintiff claiming a title, other than by some right acquired through possession. Each problem raises the question of what is necessary to constitute possession. The task is to distinguish between a series of trespasses and possession. This is normally the function of the jury under proper guidance from the court. Unless none of the facts is in dispute, and the results are so clear that reasonable minds cannot differ, the jury should determine what the physical facts are, and then apply the standard given by the court. Because the court, instead of the jury, in effect decided that certain acts constituted possession, the judgment should be reversed and a new trial ordered.

PROBLEM 4.2: O was the owner of Blackacre in fee simple.[6] He went on a hunting expedition to Africa. While O was gone A took possession of Blackacre and claimed it as if the owner. Later, A died intestate. P was A's only heir. Prior to P's taking actual possession of Blackacre, D took possession. P sues to recover the possession of Blackacre from D who defends on the basis that O is the rightful owner of Blackacre. May P recover possession of Blackacre from D?[7]

Applicable Law: (a) Prior possession is good against the whole world except the rightful owner. (b) A possessory interest in land descends from the possessor to the heir. (c) A prior possessor, even though having no absolute title, can maintain an action in ejectment. (d) A defendant in an ejectment action cannot set up the right of a third person as a defense. (e) A plaintiff in ejectment must rely on the strength of his own title,

6. Generally land that is owned in fee simple gives the owner an estate or interest of potentially infinite duration. Since the owner cannot live that long, the estate or interest continues in the owner's successors because the estate or interest is alienable, devisable, and descendible. An estate in fee simple absolute is the "highest and best" estate (ownership interest) recognized by the common law. Other forms of fee simple estates include the fee simple determinable and the fee simple on condition subsequent. See Ch. 5.

7. Tapscott v. Cobbs, 52 Va. (11 Grat.) 172 (1854). Accord, Bradshaw v. Ashley, 180 U.S. 59, 21 S.Ct. 297, 45 L.Ed. 423 (1901) (plaintiff who was in prior possession was ousted by defendant even though defendant showed that unrelated third party had titled to the land; plaintiff's prior possession creates presumption of title and defendant cannot defeat plaintiff by showing title in another).

but as against a wrongdoer, prior possession is sufficient. This is no more than a recognition that as against a wrongdoer, prior possession is the equivalent of a good title.

Answer and Analysis

Yes. O is not a party to this lawsuit. Rather, the suit is strictly between two possessors. In such a suit the general rule is that prior possession is good against the whole world except the rightful owner. Furthermore, a possessory interest in land descends from the possessor to the possessor's heir if the possessor dies intestate or to the devisee under the possessor's will if the possessor disposes of the possessory interest in the will. Lastly, a defendant in ejectment cannot set up the right of a third person (*jus tertii*) as a defense.

As between A and D, A is the prior possessor. Upon A's death intestate, A's possessory interest descends to P. P acquires whatever rights A had in the land including the right to possession. This right is sufficient to create the fiction that P is in constructive possession, if not actual possession, of the land at the time D enters. This constructive possession is prior to D's actual possession.[8] P, having prior possession which gives P rights against the whole world except the rightful owner, can eject D. Further, D cannot set up the *jus tertii* (the right of a third person) in defense unless D can show that D is holding under the real owner, O, (in which case D is really asserting a superior right) or D can show that P never did have prior possession by showing that O possessed Blackacre continuously right down to the instant when D took possession (in which case D is disputing P's claim of prior possession). Since neither of these propositions is true, the general rule applies and D has no defense. Of course, O, the real owner, can eject P or D.

A similar rule applies if D had merely trespassed upon the land and caused damage. In this case, P could sue D for the amount of damages to the land. D cannot reduce P's damages to the value of P's possessory interest by showing a superior title in O, for the same reasons that D could not defeat P's right to possession. As against the wrongdoer, P's prior possession is as good as an absolute title.[9]

8. If the rule were otherwise, then upon the death of any mere possessor there would be a scramble for the land rather than an orderly descent to a person claiming under the prior, but now deceased, possessor.

9. See, Rogers v. Atlantic, G & P Co., 213 N.Y. 246, 107 N.E. 661 (1915). Contra, Zimmerman v. Shreeve, 59 Md. 357 (1883), where an action was brought by a tenant for life against a trespasser who cut timber, the court held that the measure of damages should have been restricted to the injury done to the estate of the plaintiff by the trespass of the defendant, in this case the possessory

There is another way to analyze the facts and reach the same conclusion. It is commonly asserted that the plaintiff in ejectment must recover on the strength of his own title and not on the weakness of the defendant's title. As a corollary, however, it also is sometimes stated that the defendant can effectively defend by showing that the title is not in the plaintiff but in a third person. However, an exception to that rule exists when the plaintiff is relying not on title as showing a right to possession but simply on his or her rights as a prior peaceful possessor. Under this rationale, the *jus tertii* defense is unavailable as against a prior peaceful possession. The cases generally agree, regardless of how the *jus tertii* rule is stated.

The rationale stated in the first paragraph above is the better approach and is not inconsistent with the rule that the plaintiff in ejectment must recover on the strength of his own title. As against a wrongdoer or trespasser, the prior peaceful possession of a plaintiff in ejectment is a sufficient and superior title. In ejectment, the question at issue is the right to possession, and peaceful possession is a protected interest.

§ 4.2 *The Concept of Adverse Possession*

PROBLEM 4.3: O was the true owner of Blackacre. A took possession of the land as an adverse possessor. While A was in adverse possession, O conveyed all of O's rights in Blackacre to B. Before A had possessed the land for the statutory period to acquire a title by adverse possession, B sues A in ejectment. May B recover?

Applicable Law: The owner of land in the possession of an adverse possessor can convey title to that land. The grantee will have the right to eject the adverse possessor who has not been in possession long enough to acquire a title by adverse possession.

interest of the tenant in the timber, and not include any injury done to the estate of the remainder.

In Winchester v. City of Stevens Point, 58 Wis. 350, 17 N.W. 3 (1883) the defendant municipality defeated the plaintiff-possessor's suit for damages resulting from negligent flooding caused by defendant. Plaintiff pleaded but failed to prove an absolute title. The effect of the holding was to limit plaintiff to damages for the loss of the possessory interest. This result might have been based upon an unstated concern: that if a true owner ever appeared and full damages had been paid to plaintiff, the municipality would have to pay again. However, under the *Winkfield* doctrine, the municipality having paid plaintiff in full could have had a defense in any action by a true owner. *The Winkfield,* [1902] P. 42 (1901); Comment, Bailment: the Winkfield Doctrine, 34 Cornell L.Q. 615 (1949). See also Berger v. 34th Street Garage, 274 App.Div. 414, 84 N.Y.S.2d 348 (1st Dept. 1948) (bailee can recover full value of goods from negligent third party who then has a defense if he is later sued by the bailor).

Answer and Analysis

B can recover possession from A. At early common law there were two reasons why B should not recover. First, A was in possession and claiming a freehold interest in the land. Therefore, A was seised[10] of the land and no one but A could transfer the fee in the land because there had to be livery of seisin. This was the only way by which a freehold could be transferred. Since O was not seized of the land and had only a right of re-entry, O could not convey the land to B by livery of seisin. Therefore, the early common law judges held that O's deed conveyed no interest to B. Second, O had only a right of re-entry which was a "chose in action." Choses in action were not transferable. Transactions involving these were considered contrary to public policy. Thus, the early common law judges had to hold that O's deed did not transfer to B the chose in action which O held to eject A. The most that it could do was to permit or empower B to sue in O's name to eject A. These are the historical reasons for concluding that B cannot sue A for possession.

Today these reasons are completely obsolete and O is free to convey all of his rights in Blackacre to B, even if those rights include a running cause of action against A for possession. Thus, B can maintain an ejectment action against A.[11]

§ 4.3 The Five Elements of Adverse Possession

PROBLEM 4.4: T owned Blackacre which consisted of a block of land in City K with paved streets on all four sides. T built a church on Blackacre and gave Y Church Corporation (Y) permission to occupy Blackacre for church purposes. This was done for many years.

T died leaving an invalid will devising Blackacre to Y. Thus, as a matter of law, T's estate passed to his heir, H. Nonetheless, following T's death, Y continued to occupy and use the church building in all respects as it had before T's death, conducting services in the building and parking cars around the church building, thus covering the entire block on Sunday. All this was done, however, under the devise in the invalid will.

10. The concept of seisin at the early common law contemplated the coupling of a possessory interest with the obligation to perform certain feudal incidences of tenure to one's overlord. For example, if a person was seised of land, that person was possessed of the land but was also obliged to contribute money to ransom an overlord who had been captured by his enemies.

While the word "seisin" continues to find expression in both statutes and cases in the United States, today, it generally means little more than possession.

11. See generally, Powell on Real Property ¶ 882.

H wrote several letters to Y advising it that T's will was invalid and insisted that Y cease using Blackacre for church purposes. In these letter H stated that if Y continued to occupy the property despite H's objections, it did so with H's permission. Y did not answer H's letters and following T's death continued to use the property for church purposes for a period longer than the statute on adverse possession. H sues Y in ejectment. May H recover notwithstanding Y's defense of title by adverse possession?

Applicable Law: A person can acquire title by adverse possession if the person's possession is (a) actual, (b) open and notorious, (c) exclusive, (d) continuous and peaceable, and (e) hostile and under claim of right for the entire statutory period.

Answer and Analysis

H cannot recover if Y's possession was (a) actual, (b) exclusive, (c) open and notorious, (d) continuous and peaceable, and (e) hostile and under claim of right for the entire statutory period. These five elements are discussed in order. If Y, however, fails to satisfy all five elements, then H can recover. The burden of proof to establish a title by adverse possession is on the possessor.

(a) Actual and exclusive possession requires only that the property be occupied and used as the average owner of similar property would occupy and use it[12] and not necessarily that it be occupied every minute of the day and night.[13] Y seems to have occupied Blackacre during its Sunday services and presumably during perhaps one or two evenings of the week as churches usually do. This is fairly typical occupancy for a church No facts indicate the property was being used by an other person. If, then, Y occupied and used the property as a church and no one else shared such possession, then the church's possession was actual and exclusive.[14]

12. Jarvis v. Gillespie, 155 Vt. 633, 587 A.2d 981 (1991) (adverse possessor must act towards land as an average owner would taking into account the nature of the land).

13. Shilts v. Young, 567 P.2d 769 (Alaska 1977) (person who flew over property, occupied it one day per year, and walked around the boundaries did not establish sufficient possession); ITT Rayonier, Inc. v. Bell, 112 Wash.2d 754, 774 P.2d 6 (1989) (houseboat owner who (1) moored his boat to land; (2) partially constructed and then abandoned a sauna; and (3) failed to object when others moored their boats there as well, did not establish sufficient possession to acquire land by adverse possession).

In some jurisdictions statutes may require specific acts of possession. For example, in Van Valkenburgh v. Lutz, 304 N.Y. 95, 106 N.E.2d 28 (1952), the possessor lost because he did not substantially enclose or cultivate the premises as required by local statutes.

If T occupies land with the permission of A, T's possession can be attributed to A for purposes of A asserting a title by adverse possession against the true owner. See, Taffinder v. Thomas, 119 R.I. 545, 381 A.2d 519 (1977).

14. In Nevells v. Carter, 122 Me. 81, 119 A. 62 (1922) the court held that an owner's son acquired title by adverse possession even as against the owner

The concept of actual use does not mean the property must be put to the highest and best use. Thus, suppose the church had been located on the lot adjacent to Blackacre and Y used Blackacre solely for parking cars. That use could be viewed as sufficient actual use. It would not be necessary to successfully claim a title by adverse possession that the possessor have actually built structures on the property.[15] There are numerous cases in which the actuality requirement is satisfied even though no structures were built on the property and the adverse use consisted of acts such as cultivation, grazing, and the like.

There is some dispute whether the exclusivity requirement can be satisfied if the adverse possessor and persons, other than the owner with the cause of action for possession, use the property. For example, suppose the church was located on land adjacent to Blackacre on the east and used Blackacre as a parking lot only on Sundays and Tuesdays. However, B, the owner of land adjacent to Blackacre on the west, without O's or Y's permission, occasionally used Blackacre when changing the oil in his RV. Here, Y uses the lot but so does B. While all courts agree that at a minimum the exclusivity requirement is not met if the owner and the adverse possessor both use the property,[16] they are divided whether the exclusivity requirement can be satisfied if two possessors independently use the property. The better view, at least when seen through the eyes of courts favorably disposed to the concept of adverse possession, is yes, since O failed to sue for possession in a timely manner and Y used the property as a reasonable owner might do.[17]

(b) Apparently Y continued to use the church property in the same manner it did when T was alive. It seems, therefore, that its possession was open and notorious, visible to everyone in the neighborhood including T's heir, H. The concept of openness, however, does not require that the holder of the cause of action actually have witnessed the adverse use. Rather, the element is met so long as a reasonably diligent owner, had he or she taken the opportunity to look, could have ascertained that the property was being adversely possessed.

(c) The facts seem to say specifically that Y "continued" to use the church as a church for the statutory period unless H's acts of

who invalidly conveyed the property to the son and resided on the property with the son. The court concluded that the owner's occupation was with the permission of the son. Therefore, the son met the exclusivity requirement.

15. See Jarvis v. Gillespie, supra note 12; Houston v. United States Gypsum Company, 652 F.2d 467 (5th Cir. 1981).

16. But see Nevells v. Carter, supra note 14.

17. See Peters v. Juneau-Douglas Girl Scout Council, 519 P.2d 826 (Alaska 1974).

writing letters to Y Church constituted an interruption. An occupancy of property is continuous and peaceable if it is not interrupted either by physical eviction by another or by the bringing of an action in court for possession of the property. The interruption must be of a kind that had the occupant been the true owner, the act of interruption would have given him a cause of action. The writing of letters by H to Y would not, had Y been the title holder, given it a cause of action against H. Thus, there was no interruption of the possession as a matter of law. Under these facts, Y's possession was continuous and peaceable. The fact that Y did not use the property daily is irrelevant since its intermittent use during the week is entirely consistent with how a church corporation would occupy the land.[18] On the other hand, if the nature of the possession warranted actual possession on a daily basis, a break in the continuity of that possession would result in a cessation of the statute of limitation and any further possession would result in the statute running anew at least, if during the break period, the land was used by the true owner.[19] The continuity requirement is satisfied, however, even though the possessor goes on vacation if that would be consistent with how the true owner would have used the land.

The purpose of the actual, open, exclusive, and continuous requirements is to assure that an inquiring absentee owner would be able to ascertain that someone was possessing his or her land. It is not important that the owner have had actual knowledge of an adverse possession, but only that the owner could have discovered the possession had he or she taken the opportunity to inquire. On the other hand, where an owner has actual knowledge of an adverse claim and fails to timely sue, courts may be more liberal when looking at facts for the purpose of considering whether the possession was actual and open.[20]

(d) If Y Church's corporate mind was to the effect that it was possessing and using Blackacre as the devisee in T's will, whether justified or otherwise, then it was possessing and using Blackacre in its role as owner and not in subordination to any other title or

18. Similarly, if the nature of the land is to encourage seasonal rather than constant use, seasonal use is sufficient to satisfy the requirements of adverse possession. See, e.g., Howard v. Kunto, 3 Wash.App. 393, 477 P.2d 210 (1970) (summer occupancy sufficient to establish "continuous" element of adverse possession since summer occupancy was consistent with how a true owner would have used resort property).

19. See Mendonca v. Cities Service Oil Co., 354 Mass. 323, 237 N.E.2d 16 (1968) (three cessations of use by a gas station of a 24' strip of land and the use of that land by the true owner broke the continuity of the possessor's use).

20. See Houston v. United States Gypsum Company, supra note 15. (While facts of possession were close, owner's attorney had provided possessor with map showing location of property line and evidencing wrongful possession prior to the running of the statute)

owner. It was occupying and holding Blackacre against the whole world, including T's heir, H. Accordingly, Y's possession would be hostile and under claim of right.[21]

The hostility requirement has often proved the most difficult for the courts to apply. One important question is whether the test of hostility is objective or subjective. The better test is the objective test. That test is "whether ... the claimant acted toward the land as if he owned it. [The claimant's] beliefs as to the true legal ownership of the land, [the claimant's] good faith or bad faith in entering into possession, (i.e, whether he claimed a legal right to enter, or avowed himself a wrongdoer), all are irrelevant."[22] The notion that a claim of adverse possession can be defeated merely because the possessor lacked the requisite intent seems wholly inconsistent with the underlying operation of the statute of limitation as it affects the acquisition of title by adverse possession. If A enters O's land and remains in actual, open, exclusive and continuous possession throughout the statutory period and a court were to conclude that O is still entitled to possession because A lacked the requisite intent even though A has been in such possession more than the statutory period, the effect of that judgment is that the statute did not run against O. But if the statute did not run against O then it must not have commenced to run when A entered the land, a conclusion that is preposterous since it suggests that upon A's entry O had no cause of action for possession. Probably, courts that use a lack of the requisite intent to conclude that an otherwise adverse possession does not ripen into title do so because of an inherent dislike of the concept of adverse possession and a repugnance to the notion that a true owner can lose his or her title as a result of the actions of an interloper.[23]

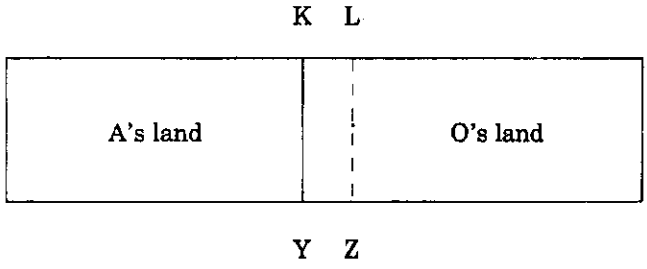
21. The "hostility" requirement is not met if the possessor enters with the permission of the true owner. For example, if a landlord leases property to a tenant, possession of the tenant is not adverse to the landlord because tenant entered with landlord's permission.

Sometimes one who enters *rightfully* remains *wrongfully*. For example, a tenant who remains in possession beyond the term fixed in the lease is a wrongdoer. In this case the landlord may elect to treat the tenant as a holdover or as a wrongdoer (see Ch. 9). If a court were to conclude that the landlord elected to treat the tenant as a wrongdoer and then failed to sue in ejectment prior to the running of the statutory period, the tenant might acquire a title by adverse possession assuming the four other elements were satisfied.

22. Peters v. Juneau–Douglas Girl Scout Council, 519 P.2d 826 (Alaska 1974) (where a claim of adverse possession was made by a 71–year–old Alaskan Tlingit Indian whose possession of property was permissive, the court held his possession was sufficiently hostile under an objective test of hostility); Patterson v. Reigle, 4 Pa. 201 (1846) (affirming title by adverse possession even where the plaintiffs declared that they intended "to leave when the real owner came," but where the statute of limitation expired prior to the owner's appearance).

23. See also Helmholz, Adverse Possession and Subjective Intent, 61 Wash. Univ. L. Q. 331 (1986); Cunningham, Adverse Possession and Subjective Intent: A Reply to Professor Helmholz, 64 Wash. Univ. L. Q. 1 (1986); Helmholz,

PROBLEM 4.5: O owned Blackacre, which was the northeast quarter of a given section of land. A was the owner of the northwest quarter of the same section. These quarter sections had a common boundary line one half mile long determined by the points K and Y, O's land being to the east and A's land being to the west of such line.



By an honest mistake A placed his boundary line fence on a line exactly 6' to the east of the line KY and occupied the strip KLZY strip on O's land for the statutory period. O then had a survey made and discovered that A had wrongfully occupied that strip. A refused to surrender possession of the strip, claiming title by adverse possession. O sued to eject A. At the trial A testified, "I occupied that strip of land because I thought it was mine but I never intended to take the land of anyone else." Following A's testimony, the court directed a verdict for O. Was the court correct?

Applicable Law: One important element of adverse possession is that the possession be hostile and under claim of right. In other words the possessor must have the state of mind to claim against the interest of the true owner. This intention may be proved either by objective acts or by testimony of the adverse possessor as to his subjective intention. Under the better view a possession is adverse although the occupant wrongfully believes that the land is his. In other words, if the actions of the possessor are inconsistent with the rights of the true owner, those actions are sufficient indicia of a hostile intent. There is another view: that the possessor must claim land he or she knows is not his; if the possessor mistakenly believes the land is his or hers and has no intent to claim what is not his or hers, the possessor lacks the requisite hostile intent.[24]

More on Subjective Intent: A Response to Professor Cunningham, id.

24. There are also cases in which the adverse possessor must have a good faith belief that the adversely possessed land was his or her. Absent this good faith belief, title cannot be acquired by adverse possession. See, e.g, Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982);

Answer and Analysis

In most jurisdictions the court would be incorrect[25] although there is a minority view.[26] A possessed the disputed strip honestly, but mistakenly, believing she was in possession of her own land. There is no question that A occupied and used the land as an owner. A's possession was (a) actual, (b) exclusive, (c) open and notorious, and (d) continuous for the statutory period. But did A have the requisite hostility?

Some courts hold that the possessor does not hold adversely unless he intends to hold against the whole world, including the rightful owner, but the really significant fact is that the possessor holds against, and not under or in subordination to, the rights of the legal owner.[27] Under this view the holding is adverse.

A minority of courts following the more subjective test of adverse possession hold that when A testified she did not intend to claim any land but her own, that testimony evidenced that A lacked the requisite hostile intent to claim against O. In many cases of this type the principal issue may be more a question of evidence than of property law. Testimony of the purely subjective intent of the adverse possessor may be circumspect since there is ample motive for coloring the actual intent. The whole case can succeed or fail on a single yes or no to a question as to whether the claimant intended to claim the land irrespective of whether or not it was his. Further, this so-called "Maine" rule creates a heavy incentive to commit perjury, if a (properly briefed) possessor knows that her testimony that she did not intend to claim what was not hers will result in a judgment for the true owner. The Maine rule penalizes the honest, yet mistaken possession, but rewards the possessor who knowingly claims what she knows is not hers. Thus, the view expressed by the Connecticut court is believed the sounder position:

Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952).

25. French v. Pearce, 8 Conn. 439 (1831) (where the owner of land bordering on the land of another, through a mere mistake of the place of the dividing line, occupied and possessed as his own a portion of land beyond that line for more than 15 years, there was adverse possession sufficient to establish a title in the possessor because the occupation was presumptive evidence of the true boundary, and the motive of the possessor in taking and retaining possession was immaterial in determining the adverse character of the possession).

26. Preble v. Maine Cent. R. Co., 85 Me. 260, 27 A. 149 (1893) (where a person by mistake occupied for 20 years land not covered by deed, without any intention to claim title to land beyond his actual boundary, title by adverse possession to land beyond the true line was not established because there was no hostile intent to claim title, which is "an indispensable element of adverse possession.... ").

27. Maas v. Burdetzke, 93 Minn. 295, 101 N.W. 182 (1904). A possessor holds against a true owner even though the possessor realizes that if the true owner sues for possession prior to the running of the statute of limitation the true owner will prevail. Patterson v. Reigle, note 22.

> The possession alone, and the qualities immediately attached to it, are regarded. No intimation is there as to the motive of the possessor. If he intends a wrongful disseisin, his actual possession for fifteen years, gives him a title; or if he occupies what he believes to be his own, a similar possession gives him a title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason: that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor.[28]

Many mistaken boundary line cases involve very small encroachments. For example, A and B may be neighbors and A's garage or driveway may encroach on B's land by 3 inches. In such cases it is difficult or impossible to ascertain whether there have been any encroachments without a costly survey. The difficulty with applying the Connecticut rule in these situations is that facts of possession may not have been sufficiently stark to put the true owner on notice that someone was in wrongful possession of his or her land. Recently one court which had adhered to the Maine rule abandoned that rule in favor of the Connecticut rule. However, the court recognized the unfairness to true owners that could result in applying the Connecticut rule to small encroachments. Therefore, it concluded that:

> Generally, where possession of land is clear and unequivocal and to such an extent as to be immediately visible, the owner must be presumed to have knowledge of the adverse occupancy . . .
>
> However, when the encroachment of an adjoining owner is of a small area and the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey for certain disclosure as in urban sections where the division line is only infrequently delineated by any monuments, natural or artificial, such a presumption is fallacious and unjustified. . . . Accordingly, we hereby hold that no presumption of knowledge arises from a minor encroachment along a common boundary. In such a case, only where the true owner has actual knowledge thereof may it be said that the possession is open and notorious.[29]

28. French v. Pearce, note 25 at 443. See also: Norgard v. Busher, 220 Or. 297, 349 P.2d 490 (1960) ("possession under a mistaken belief of ownership satisfies the element of hostility of adverseness in the application of the doctrine of adverse possession."); Schertz v. Rundles, 48 Ill.App.3d 672, 6 Ill.Dec. 674, 363 N.E.2d 203 (1977) (possession under mistake may be adverse).

29. Mannillo v. Gorski, 54 N.J. 378, 388–89, 255 A.2d 258, 263–64 (1969). See also Penn v. Ivey, 615 P.2d 1 (Alaska 1980) (property owner who built fence and admitted he did not know where the true line was and suspected

In this type of case, as well as others, where the possessor loses by failing to establish satisfaction of all five elements to acquire a title by adverse possession, there is the possibility of potential unjust enrichment by the true owner where the possessor had improved the property whose possession reverts back to the true owner. At common law, either the improvement inured to the true owner's benefit or the adverse possessor was obligated to remove it. Under the so-called "innocent improver" doctrine, however, either the adverse possessor is entitled to compensation for the value of the improvement or the true owner is required to deed the property on which the improvement was mistakenly made to the possessor.[30] Typically, the possessor must have made an "honest mistake" or otherwise be a person whom the courts believe is entitled to equitable relief from the common-law rule.

§ 4.5 Nature of Title Acquired by Adverse Possession

PROBLEM 4.6: O owned Blackacre. A took possession of Blackacre and held it adversely for more than the statutory period. Thereafter O regained possession of the property and after being in possession for about a month, conveyed it to B who traced the record title and found it to be a perfect chain of title down to O. B had no actual notice or knowledge of A's claim and, of course, nothing on the record disclosed A's title acquired by adverse possession. Immediately after B purchased Blackacre and took possession, A sued B in ejectment. May A succeed?

Applicable Law: Once the adverse possessor has complied with all the requirements for adverse possession for the statutory period, the possessor's title is good against all the world. The recording statutes have no application to a title matured by adverse possession. Thus, the fact that A's title is not a matter of public record does not bar A's claim.

Answer and Analysis

A may successfully sue B in ejectment. This set of facts involves two questions: (a) what is the effect of A's adverse possession for the statutory period and (b) assuming B to be a bona fide purchaser, may B rely on the record of title as against an adverse possessor? A title acquired by adverse possession is good against all the world. It is not merely a defensive weapon if the possessor is sued for possession. It is a substantive title as valid as though the possessor had received the title by deed from O. Further, the title

he might be encroaching, nevertheless acquired property by adverse possession, for fence gave constructive notice to neighbor of an adverse claim).

30. See generally, Somerville v. Jacobs, 153 W.Va. 613, 170 S.E.2d 805 (1969).

relates back to the time of entry and will support an action to recover the land. Thus, A can eject any possessor from Blackacre who does not derive title through A or who does not take title from A by adverse possession.

Even though B facially appears to be a bona fide purchaser who relied on the record, the recording acts have no application to a title acquired by adverse possession. Thus, A prevails notwithstanding that B had no actual knowledge or notice of A's claim because A was not in possession, the records showed O to be the record title holder, and O was in actual possession.

Although a title acquired by adverse possession is as good as an original title, it is not a marketable title until such time as the possessor has the title acquired by adverse possession evidenced by some publicly recorded document.

The title acquired by the adverse possessor relates back to the time of the possessor's initial entry on the property. Thus any other causes of action the true owner had against the possessor resulting from the adverse possession are also extinguished. For example, the possessor, during the period of adverse possession, may have cut trees from the property giving the true owner a damage action. This action also is extinguished if that action in not brought before the running of the statute of limitations on the adverse possession claim.

§ 4.6 When Statute of Limitation Begins to Run

PROBLEM 4.7: In 1970 O, who owned Blackacre, conveyed it to B for life. The deed further provided that upon B's death Blackacre should pass to C. In 1975, A wrongfully entered into possession of Blackacre and remained in possession for the statutory period. B then died and C immediately sues A in ejectment. May C recover?

Applicable Law: An adverse possessor cannot mature title against a remainderman because the remainderman has no cause of action against the adverse possessor until the death of the life tenant.

Answer and Analysis

C can recover Blackacre from A. At the time A entered Blackacre, B had a life estate and C had a vested remainder. Since only B was entitled to possession at the time A entered, A trespassed only on B's right of possession, not on the possession of C. Indeed, C had no right to possess Blackacre until B's death. Therefore, C had no cause of action against A and no statutory period began to run against C. At the end of the statutory period A acquired only B's life estate by adverse possession, which estate ended when B died.

This rule also evidences the principle that the adverse possessor can only acquire that title which the person with a cause of action had. C had no right to possess Blackacre until B died and not until then did C have a cause of action for possession as against A. In order for A to acquire a fee simple title to Blackacre, A will have to adversely possess Blackacre for another statutory period beginning at B's death when C's cause of action against A first accrues. While these rules are onerous to the adverse possessor, they arise because of a concern that it is otherwise inappropriate to penalize C who had no cause of action for possession while B was living. However, a better rule might be to allow A to acquire a title by adverse possession as against both B and C as a result of his possessing the property only during B's lifetime and then allowing C to have a cause of action for waste as against B or B's estate.

If A had entered Blackacre prior to 1970 such that O had a running cause of action against A at the time of the conveyance to B for life, with remainder to C, A would acquire title by adverse possession at the end of the statutory period following the date of actual entry. In this case both B and C would have a cause of action against A passing to them from O at the time of the conveyance of the life estate and remainder interest.

§ 4.7 *Tacking*

PROBLEM 4.8: O owned Blackacre. In a jurisdiction where the statutory period to recover the possession of real property was 20 years, A went into adverse possession of Blackacre and remained in possession for 5 years. A then died intestate. H was A's sole heir. H took possession of Blackacre, remained in possession for the next 3 years and then conveyed Blackacre to M. M remained in possession of Blackacre for 2 years and then died. Under M's will Blackacre was bequeathed to P who took possession of Blackacre for 5 years and then orally conveyed the premises to X. X possessed the premises for 3 years and leased it to L for one year. When the lease was terminated X re-possessed Blackacre. Two weeks later X joined the United States Army. Before leaving for military service, X called D and advised him to take over Blackacre and make the most of it and that X would make no further claim to it. D took possession at X's suggestion and remained in possession for 2 months when D was called to another state on account of her father's serious illness. She went and stayed with her father for 3 months and then returned to Blackacre and remained in possession for more than 3 years. D then called O and said to him: "O, I have decided to abandon Blackacre. It is yours if you want it." D then moved off Blackacre with no intent to return. Who owns Blackacre?

Applicable Law: An adverse possessor can abandon his interest in the land at any time before the statute has fully run. However, in common with record title holders of land, an adverse possessor cannot abandon his interest in the land after the statute has run and the possessor has acquired title to the land.

The interest of one adverse possessor may be tacked to that of another if there is privity between the two. Privity exists between adverse possessors if the interest of one is apparently passed to the other by descent, deed, will, written contract, oral contract, oral gift or by mere oral permission. In general, the passing of the interest need not be legally valid, but it must have some validity in the minds of the parties.

Answer and Analysis

D owns the land. One can abandon an adverse possession which has not yet matured title. But one cannot abandon a fee simple title acquired by conveyance or adverse possession. In this case, assuming that the possession of each occupant was adverse, D had acquired the fee simple to Blackacre and could not abandon it, even to the original owner, O.

This problem involves the issue of "tacking" one adverse possession to another. This can be done provided there is privity between the adverse possessors. Privity exists when the possessory interest of an adverse possessor is passed from one to another by descent, deed, will, agreement oral or written, by oral gift or by mere permission. Thus the descent from A to H, the deed from H to M, the devise from M to P, the oral transfer from P to X, the lease from X to L, and the mere permission from X to D to take possession from X, each constituted privity and permitted the tacking of the adverse possession of each to that of his successor to make up the total period of adverse possession. The periods consisting of 5 years for A, 3 years for H, 2 years for M, 5 years for P, 3 years for X, 1 year for L, 2 more weeks for X, and D's subsequent possession of more than 3 years make up successively more than the 20 year period.

Two questions remain. Did the lease to L break the continuity of possession? Did D's three months visit to her father break the continuity of possession. X's lease to L meant nothing more than that L's possession was the possession of his landlord X for the purpose of adverse possession. Thus, during that year X was still legally in possession as against the owner, O.

D's three months visit to her father's bedside had no effect in the absence of her intention to abandon her possession of Blackacre and no such intention appears. She appears still to be occupying the

property as an owner, since owners often are required to be temporarily absent from their property. These adverse possessions, when tacked to each other making more than the 20 year period required by the statute, make D the owner of Blackacre.

§ 4.8 *Effect of Disabilities*

PROBLEM 4.9: O, age 5, owned Blackacre in 1980 when A took possession adversely. The statute of limitation was 20 years with an added provision that, if the person entitled to bring the cause of action for possession was under a disability at the time the cause of action accrued, such person would have 10 years after the removal of the disability in which to bring the action.[31] How long must A continue in adverse possession against O to acquire a title by adverse possession?

Applicable Law: An adverse possessor cannot claim the benefit of the running of the statute of limitation until the statute of limitation has run against the owner of the property who had a cause of action of possession. All state statutes toll the running of the statute if the person entitled to bring the cause of action at the time it accrues is under a disability. Tolling the statute is inconsistent with one of the two policies underlying the doctrine of adverse possession: to reward the possessor for the possessor's utilization of the property. On the other hand, tolling is justified on the ground that it is inappropriate to penalize persons with a disability who fail to bring their cause of action within the statutory period.[32]

Answer and Analysis

A acquires title in the year 2003 if the age of majority is eighteen[33] and if A continues in actual, open, exclusive, continuous and hostile possession for the next 23 years. O was under a disability at the time of the accrual of the cause of action. Disabilities that arise after the cause of action accrues do not result in any tolling of the statute whether the disability is acquired by the owner at the time of entry or the cause of action passes to another

31. The disability cases in this chapter, except as may be otherwise indicated, are based on a statute which is similar to the following:

> . . . but if a person entitled to bring such action, at the time the cause thereof accrues, is within the age of _____ years, or of unsound mind, or imprisoned, such person, after the expiration of _____ years from the time the cause of action accrues, may bring such action within _____ years after such disability is removed.

32. This argument ignores the fact that persons under a disability are likely to have someone available to represent their interests. For example, minors who own real property are likely to have conservators who are in a position to bring the cause of action for possession.

33. The age of majority is a matter of state law, and commonly varies from eighteen to twenty-one.

who is under a disability. O's disability ceases when O reaches 18 or dies before that time. Assuming O reaches age 18 in 1993, O must bring the action for possession within the next ten years. If O fails to bring the action before 2003, A will acquire a title by adverse possession. If O had not been under a disability in 1980 when O's cause of action accrued, A could have acquired a title by adverse possession in the year 2000.

Suppose O had been 15 in 1980 when A entered. In this case O's disability would end in 1983. Since ten years thereafter is within the initial twenty year period within which to bring a cause of action, A does not acquire a title by adverse possession prior to the year 2000. In other words, a disability can operate to extend the statute beyond the time when it otherwise would have run; it never shortens the time of possession to acquire title by adverse possession even though the disability and the extension period end before the regular statute has run.

The conditions or status constituting a disability depend on the terms of the statute. Common disabilities are minority, legal insanity (non compos mentis) and imprisonment. While at one time, there may have been good justification for extending the statutory period to take account of disabilities, that practice today is open to question if the person with a disability can be represented by a conservator who can initiate a suit against the possessor on the person's behalf.

PROBLEM 4.10: O, age 5, owned Blackacre in 1980 when A entered and took possession adversely. O died in 1992 and Blackacre passed by descent to O's sole heir, H who sued A in 2001 in ejectment to oust A from possession of Blackacre. The statute of limitation on adverse possession in the jurisdiction was 20 years, with an added 10 years after the removal of any disability which existed at the time of the accrual of the cause of action. May H eject A?

Applicable Law: The defense of disability under many statutes is wholly personal to the person who is under a disability at the time of the accrual of the cause of action but may be taken advantage of by the person's estate or successor. A successor to the holder of the initial cause of action, however, cannot claim the benefit of a disability which the successor has. Similarly, an intervening disability of the person who initially had a cause of action in most jurisdictions will not stop the running of the statute, which means there is no tacking of disabilities.

Answer and Analysis

H may eject A because H sued within 10 years after O's disability ended. If O had not died, O's disability would have ended

in 1993 and O (or O's estate or successor of the estate) would have until 2003 to bring a suit for possession. In this problem, O died at age 17 in 1992. Death terminates disabilities. Thus O's successor (who can take advantage of the extension on the intestate's disability) has until 2002 to bring suit. Since H sued in 2001, the suit was timely.

Suppose O was age 10 when A entered and O's disability ended in 1988. In this case O would have had until 2000 to sue A. If O died in between 1988 and 2000 and H was under a disability, that disability would not have resulted in any extension in the running of the statute of limitation for two reasons. First, the defense of disability is personal to the person under disability at the time of the accrual of the cause of action. Second, no intervening disability tolls the running of the statute of limitation. Applying the first principle to the facts discloses that O and O alone can take advantage of the 10 year extended period.[34] If the law were otherwise, then a series of intervening disabilities would prolong for an indefinite period the time during which an adverse possessor would have to hold. Of course, if a statute provided for such protection of intervening disabilities, the statute would be applied according to its terms.

PROBLEM 4.11: O, age 2, owned Blackacre in 1980 at the time A entered and took possession adversely. When O was 5 years of age O was injured in an automobile accident which rendered O mentally incompetent. The statute of limitation provided for a period of 20 years but with an added provision of 10 years after the disability was removed for one who was under a disability at the time of the accrual of the cause of action. When could A acquire a title by adverse possession?

Applicable Law: A supervening disability will not toll the running of the statute. Supervening disabilities refer to more than one disability in the same person whereas intervening disabilities refer to disabilities in different persons. There is no tacking of either intervening or supervening disabilities.

Answer and Analysis

A could acquire a title by adverse possession by 2006. O must bring the action to recover possession of Blackacre before he is 28 years of age if the age of majority is 18. O was under one disability, that of minority, when the cause of action accrued. A disability added later to the one existing at the time of the accrual of the cause of action and affecting the same person is a supervening

34. Of course, since O is under a disability O may have to be represented by a guardian or other representative.

disability. A supervening disability does not stop or affect the running of the statute of limitation. The only disability which provides additional time is the one existing when the cause of action accrues against the wrongdoer. Thus, the disability of insanity or mental incompetency has no effect and O must bring his action within ten years after the minority disability is removed: before O's twenty-eighth birthday.

If O had been both mentally incompetent and a minor when A took possession, O would have ten years after the removal of the longer of the two disabilities to bring his action against A.

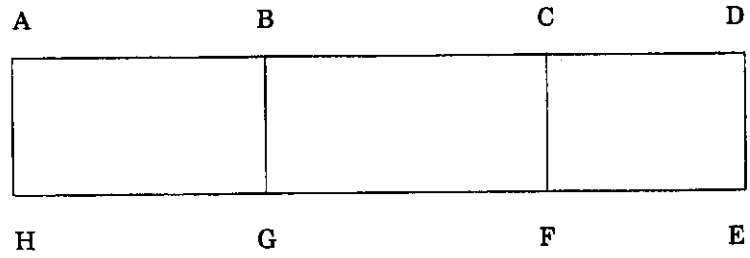
§ 4.9 Constructive Adverse Possession

PROBLEM 4.12: O was the owner of Blackacre, a tract 300' wide and 1,500' long containing approximately 10 acres. O died intestate. X mistakenly thought he was O's sole heir. In fact, H was O's sole heir.

X executed a deed to all of Blackacre to A in fee simple. Under X's deed A took actual possession of the east end of Blackacre comprising an area of 300' by 500'. A built a small house on this property and fenced it. This area is marked "CDEF" on the map below.

Y claimed to own all of Blackacre under an alleged will left by O under which alleged will Y took possession of the west end of Blackacre comprising an area 300' by 500'. This alleged will was invalid and gave Y no title. Y built a small house on this portion of Blackacre and fenced it. This area is marked "ABGH" on the map below.

Between the two areas occupied and claimed by A and Y respectively, was an area 300' by 500' which was the center part of Blackacre. This area is marked "BCFG" on the map below. From this center tract a third person, W, cut a tree. All of these areas are depicted on the following map:



Does either A or Y have a cause of action against W?

Applicable Law: A person who enters under the authority of a written instrument but takes actual possession of only a

portion of the entire area described in that instrument may claim the remainder of the area described in that instrument constructively, if reasonable in size. This is known as constructive adverse possession. Constructive adverse possession must be based on paper title, called color of title, founded on a written instrument. A later constructive adverse possession cannot oust a former constructive adverse possession.

Answer and Analysis

A has a cause of action against W. Y does not have a cause of action against W. It is obvious that upon O's death the title to Blackacre descended to H. This title gave H constructive possession of all of Blackacre.

When A entered Blackacre A trespassed upon H's possession. A entered under a deed which was inoperative for lack of any interest in the property held by the grantor, X. Under a claim based on mere occupancy an adverse possessor can claim no greater area than that which is actually occupied. But under color of title an adverse possessor can claim both the property that is actually occupied as well as the balance of the adjacent property that is described in the instrument that purports to convey title, which is the "color of title" (X's deed in this case), provided this additional area is a "reasonable appendage" to the area actually occupied. Under the doctrine of constructive adverse possession, assuming the obvious, that A's possession is adverse, A took actual possession of the east 3 1/3 acres of Blackacre and took constructive adverse possession of the rest of the tract which was only 6 2/3 acres. This small tract is clearly a "reasonable appendage" to that part that was actually occupied. No definite limitation can be laid down as to the extent of one's constructive adverse possession. This depends on the facts of each case.

When Y took actual possession of the west end of Blackacre covering 300' by 500' and fenced the same, Y ousted A of A's constructive adverse possession of that area. But who possesses the center area from which W cut the tree? The answer is that a subsequent constructive adverse possession cannot oust a former constructive adverse possession. Thus, A's prior constructive adverse possession takes priority over Y's later constructive adverse possession and A not Y constructively possesses the center area of 3 1/3 acres from which W took the tree. W trespassed upon A's land and A, not Y, can recover damages from W.[35]

35. See Ralph v. Bayley, 11 Vt. 521 (1839), where the defendant had actual possession of part of a lot and constructive possession of the whole lot, and the plaintiff chopped timber on that part of the lot in which the defendant had constructive possession while himself claiming constructive possession. The court held that a subsequent constructive pos-

Could A have recovered possession of the westerly portion of Blackacre actually possessed by Y for less than the statutory period on the theory that as the prior constructive adverse possessor A's rights are superior to Y's rights in that land? If A's color of title was sufficient to create a reasonable belief in A's mind that A owned all of Blackacre, it would be inappropriate to penalize A for failure to take actual possession of all of Blackacre which would be the result if Y's rights are superior to A's rights. On the other hand, as between A and Y, the underlying concepts of protecting possessors tends to favor Y. However, if A has sufficient color of title such that, if the true owner (H) were to sue after the running of the statute, a court would conclude that A acquired title by constructive adverse possession, it is hard to hold that color of title insufficient for A to prevail against Y in a suit for possession prior to the running of the statute of limitation. Therefore, it is likely that in a suit between A and Y, A would prevail. If, on the other hand, Y possessed that portion for more than the statutory period, Y would acquire a title to that portion as against all others, including A, by adverse possession.

Of course, any analysis of the respective rights of A and Y would require more information concerning the nature of their respective color of title. For example, if A had only a wild deed[36] but Y claims under the invalid will, a court might conclude that A's claim should be denied. This may be precisely what would happen if the true owner (H) sued A for possession of BCFG after the running of the statute since A's alleged color of title is not sufficiently colorable to sustain a claim for constructive adverse possession.

As noted, to claim constructive adverse possession, the portion of the property not actually possessed must be adjacent to the portion that is actually occupied and both parcels must have the same owner. Suppose O owned three distinct tracts of land, numbered Tracts 1, 2 and 3 and A entered Tract 1 under color of title by an instrument describing Tracts 1 and 3. If Tracts 1 and 3 are separated by Tract 2, A cannot acquire title to Tract 3 by constructive adverse possession. Likewise, if A entered Tract 1 and the deed described adjacent Tracts 2 and 3 but these tracts were owned by O–1 rather than O, A would only acquire title by adverse possession to Tract 1 which A actually possessed. A would not have constructively possessed Tracts 2 and 3 because these tracts were owned by

session cannot defeat a prior constructive possession.

36. A wild deed is a deed from a grantor who has no title or colorable claim to the property described in the deed. For example, if O conveyed the Brooklyn Bridge to B, that would be a wild deed. Likewise, if O owns Blackacre and Y conveys Blackacre to A, that would be a wild deed. See Ch. 17.

O–1 who had no cause of action for possession against A because A possessed no property owned by O–1.

§ 4.11 Whose Interests Are Affected

PROBLEM 4.13: O owned Blackacre in fee simple. O conveyed all the coal beneath Blackacre to B. O gave a mortgage on Blackacre to C, and conveyed to D a right to install and maintain a pipeline through Blackacre three feet beneath the surface. D installed the pipes. A went into adverse possession of Blackacre and held it during the entire statutory period. A sues O, B, C and D to quiet title to Blackacre. Should A succeed as to any of these defendants?

Applicable Law: Title by adverse possession is acquired by a statute of limitation running against a person with a cause of action for possession. Only persons with a possessory interest have a cause of action against an adverse possessor.

Answer and Analysis

A should succeed as against O. A should not succeed as to B, C or D. Prior to the running of the statute of limitation and while A was an adverse possessor, A had title to the surface of Blackacre against the whole world except O. When the statutory period had run, A acquired title against O and O's rights were terminated. Thus, as against O, A has a right to Blackacre.

But did A's adverse possession of the surface of Blackacre give B, C or D a cause of action against A? No. There is no inconsistency between the existence of B's ownership of the coal under the surface and A's occupancy of the surface, nor between the lien of C's mortgage and A's occupancy of the surface, nor between the existence of O's easement involving pipes under the surface and A's occupancy of the surface. If no cause of action accrued in their favor, then no statute of limitation could run against them. Had B's ownership of coal involved surface rights with which A had interfered, had C reduced his mortgage by decree to a right to possess Blackacre before A took possession, or had D's easement involved the use of the surface of the ground and A interfered with such use, then A's adverse possession would have given each of them a cause of action and their respective rights would have been cut off by A's matured title by adverse possession. The test would seem to be whether or not the adverse possession gives the person claiming an interest a cause of action at the time the adverse possession commences.

§ 4.12 Innocent Improver Doctrine

PROBLEM 4:14:

1	2	3	4	5	6

A owned lots 1–3; O owned lots 4–6. A built a building on lot 4 mistakenly believing that it was lot 3. Prior to the running of the statute of limitation, O called A and told A that under the doctrine of annexation[37] O was entitled to Lot 4 as well as the building A mistakenly built on Lot 4. Prior to O filing a suit in ejectment, A brought a suit in equity to seek either the value of the building from O or an order compelling O to convey Lot 4 to A upon A paying O fair consideration for the property. Can A prevail?[38]

Applicable Law: Under the doctrine of annexation, improvements to real estate made by a wrongdoer belong to the owner of the real estate. However, where the improvements were made by one who mistakenly believed that he or she owned the land on which the improvements were made, principles of unjust enrichment could compel a court of equity to refuse to quiet title to the improvement in the landowner absent payment of fair consideration to the "good faith" innocent improver.

Answer and Analysis

If A can establish that A acted in good faith when A erected the building on the wrong lot, either A will be allowed compensation for the value of the building or can compel the true owner of the land on which the building was mistakenly built to convey the land to A upon payment to the true owner of an amount equal to its fair market value unimproved. These alternative remedies are provided A so long as A acted under a reasonable mistake of fact and in good faith. While the building was wrongfully erected by A on O's land, if the building were to pass to O, under the doctrine of annexation O would be unjustly enriched. This is known as the "innocent improver" doctrine.

Of course, if A can compel O to convey Lot 4 to A, then O is forced against O's will to convey the title to A. This amounts to a

37. Under this doctrine, improvements made by a wrongdoer belong to the landowner. See generally, 2 Tiffany, Real Property, § 625.

38. Somerville v. Jacobs, 153 W.Va. 613, 170 S.E.2d 805 (1969) (where the plaintiffs, through a reasonable mistake in fact and in good faith, erected a building on land owned by the defendant, they were entitled to recover the value of the building or could purchase the land for the value of the land minus the building).

condemnation of property by a private party—something that many courts find distasteful.[39] Thus, it is not accepted in all states.

§ 4.13 *Adverse Possession of Chattels*

PROBLEM 4.15: O owned a painting that had been stolen from O's home. O failed to report the theft to the police. For five years O actively searched for the painting but when the search proved unsuccessful, she abandoned it. Twelve years later (17 years after the theft), O learned that the painting had been sold by S to P. S, however, claims that the painting had been in S's family for over 25 years and that throughout that entire period had been claimed to be owned by S's father and then by S. O sues to recover the painting from P. P moves to dismiss on the grounds that if the painting had been stolen, the statute of limitation had expired and that S and S's predecessors had acquired a title by adverse possession to the painting. Should the motion be granted?

Applicable Law: Generally, a thief cannot acquire or transfer title to stolen personal property, even to an innocent purchaser. On the other hand, title to personal property can be lost by adverse possession. Typically statutes of limitation run from two to six years. At common law, the statute of limitation began to run at that time that the possession became hostile, actual, open, exclusive and continuous, rather than at that point in time that the goods were stolen or the true owner discovered their location. More recently, it has been held that the statute should begin to run when the true owner discovers or should have discovered the whereabouts of the stolen property.

Answer and Analysis

Under the common law, it appears the motion should be granted, assuming that for more than the requisite statutory period S and S's predecessor's possession was hostile, actual, exclusive and continuous.

This rule has recently been subject to criticism. Unlike real property, personal property is movable. This makes it difficult for a true owner, who is otherwise diligent, to easily determine who is adverse, or whether someone is claiming title adversely. It also makes it easier for a possessor to conceal the property. Thus, the penalty theory for permitting the acquisition of title by adverse possession is not so easily applied when the subject of the adverse claim is personalty rather than realty.

39. The innocent improver doctrine also is reflected in some state statutes. See Iowa Code ch. 560 (occupying claimants).

The common law as to when the statute runs ignored the diligence of the true owner who actively sought to ascertain the whereabouts of the lost property under what might be difficult circumstances. It is probably for this reason that at least the New Jersey court rejected the common law rule in favor of applying a so-called "discovery rule."[40]

If the true owner is to benefit from the discovery rule, the court should consider the following issues: (1) whether the true owner used due diligence to recover the stolen property at the time it was stolen and thereafter; (2) whether at the time the property was stolen there was an effective method to alert the marketplace that the property had been stolen; and (3) whether the lost property was subject to any form of registration that could put the world on notice of ownership claims. Because personal property can be easily concealed, use of the discovery rule rather than the common law rule makes it easier for true owners to protect their rights so long as they use due diligence in seeking to ascertain the whereabouts of the lost property. Under this rule, so long as the search continues the statute does not begin to run.[41] The statute starts to run when the true owner actually knows or reasonably should know that she has a cause of action, and knows the identity of the possessor.[42]

Under the discovery rule, the true owner has the burden of proving that she has acted with the appropriate due diligence.[43] Diligent pursuit[44] prevents the statute of limitation from running against the true owner.

Other courts have rejected both the common-law rule and the discovery rule in favor and the demand and refusal rule. Under this rule, the statute of limitations runs from the time the true owner demands that the chattel be returned and the possessor refuses. Furthermore, the true owner is not penalized for failing to use reasonable diligence to recover the chattel although lack of dili-

40. O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980).

41. Subsequent transfers of the personal property can affect the application of the discovery rule since each transfer complicates the ability of the true owner in ascertaining the whereabouts of the personal property.

42. *O'Keefe,* note 40

43. Ordinarily the burden is on the possessor to establish that the five elements to acquire a title by adverse possession have been met.

44. In *O'Keefe,* note 40, the court noted that the meaning of diligence would vary depending upon the nature of the personal property and its value. As the court noted, for example, if the lost property is jewelry of moderate value, merely reporting the loss to the police may be sufficient, whereas for an art work of greater value more might be required. But see, Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991) rejecting the discovery rule in favor of the rule that as against a bona fide purchaser the statute begins to run when the true owner makes demand and the person in possession refuses to return the goods.

gence, while not affecting the time with the cause of action accrues, could give the possessor the equitable defense of laches.[45] This rule gives the most protection to the true owners and was adopted in New York apparently as the most desirable rule to protect art owners.

45. Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991).

Chapter 6

CONSTRUCTION OF DEEDS AND WILLS CONCERNING PRESENT POSSESSORY FREEHOLD ESTATES

Table of Sections

Sec.
6.1 Rules of Construction Generally.
6.2 Fee Simple.
6.3 Fee Simple Conditional and Fee Tail.
6.4 Life Estates.
6.5 Concurrent Estates.
a. Joint Tenancy.
b. Tenancy by the Entirety.
c. Tenancy in Common.

SUMMARY

§ 6.1 Rules of Construction Generally

1. The purpose of construing a conveyance or will when its terms are ambiguous is to determine the intention of the parties. All rules of construction are subservient to this purpose. In other words, the first rule of construction is to give effect to the parties' intent.

2. In construing an instrument every part of it should, if possible, be given a meaning in considering the meaning of the instrument as a whole. This rule might be characterized as the "four corners doctrine," meaning that everything within the four corners of the instrument should be considered in its construction.

3. If possible, parts of an instrument should be construed as consistent with each other.

4. A deed is always construed most strongly against the grantor who has used the language.

5. If an instrument contains two clauses which are contradictory, the former governs over the latter. This is part of the old

maxim, "the first deed and the last will shall operate." In a deed, this may take the form of the granting clause and the habendum clause being repugnant to the other. In this case, the granting clause governs. This "rule of repugnant clauses" in modern times will normally not be applied in an arbitrary manner, and it frequently will be rejected in favor of the "four corners doctrine."

6. A deed will be construed to grant a fee simple absolute rather than a fee simple determinable or a fee simple on condition subsequent if the language of the whole instrument makes this interpretation reasonably possible.

7. A provision in a deed or will directing that the transferee of property cannot dispose of the property is void as a disabling restraint on alienation.[1]

§ 6.2 Fee Simple[2]

1. Estates in fee simple are:
   a. fee simple absolute
   b. fee simple defeasible
2. Estates in fee simple defeasible include:
   a. fee simple determinable
   b. fee simple subject to condition subsequent
   c. fee simple subject to executory interest including:
      (1) springing executory interest
      (2) shifting executory interest

3. The only way a fee simple estate could be created at common law was by the use of the words of limitation "and his heirs" or "and their heirs." These magic words were indispensable. Under modern statutes these words of limitation are not necessary to create a fee simple estate. It is presumed that the named grantee takes the entire estate the grantor had unless a lesser estate is described in the governing instrument.

4. Under many modern statutes the fee tail estate is deemed a fee simple estate. In jurisdictions where this is the case there is but one inheritable freehold estate, the fee simple.

5. A fee simple determinable comes to an end automatically upon the occurrence of some specified event or act expressed in the words of limitation. A fee simple subject to a condition subsequent requires both a breach of the specified condition and an affirmative act by the grantor or the grantor's heirs to terminate the estate.

1. This rule does not apply to so-called "spendthrift trusts."

2. See Ch. 5.

6. Any disabling restraint on the power to alienate a fee simple estate is void.

§ 6.3 Fee Simple Conditional and Fee Tail

1. The fee simple conditional estate was the forerunner of the fee tail estate and existed prior to the Statute De Donis Conditionalibus which was passed in 1285. This statute destroyed the fee simple conditional estate.

2. The fee simple conditional was an estate that terminated upon the transferee's death if the transferee had no child. Upon termination, the estate reverted to the grantor who retained a possibility of reverter. Upon birth of a child, however, the grantee had the power to convey a fee simple absolute. Absent a conveyance, the property descended under like terms to the grantee's heir of the body, or absent such a surviving heir, the property reverted to the grantor.

3. The Statute De Donis (1285) created the fee tail estate and made it a substitute for the fee simple conditional estate.

4. The typical words which created the fee simple conditional estate before 1285 and the fee tail estate after 1285 were, "to A and the heirs of his body."

5. The fee tail tenant owned an inheritable freehold estate but with limited powers over the estate. The tenant in tail could use it during his lifetime, but he could make no disposition thereof so as to prevent its descending to his bodily heirs, if any, or if no bodily heirs, he could not prevent its reverting to the grantor who retained a reversion. Each succeeding fee tail tenant had the same rights and limitations upon his estate.

6. Because the fee tail estate restricted the free alienability of land, the courts did not favor it. Fictitious legal proceedings were evolved to enlarge the powers of the fee tail tenant. The fine empowered him to cut off the rights of his bodily heirs. The common recovery[3] empowered him to cut off both the rights of his bodily heirs and the reversion of the donor.

7. A fee simple estate is a larger estate than a fee tail estate. Thus, when a fee simple owner conveys a fee tail estate, there is a reversion left in the donor.

8. Almost all states by statutes have abolished the fee tail estate by transforming it into a fee simple or into a life estate in the first taker with a remainder in fee simple to his issue or lineal descendants.

3. See chap. 5, note 17.

§ 6.4 Life Estates

1. Life estates include: (a) life estate for the life of the tenant, (b) life estate for the life of one other than the tenant (pur autre vie), (c) life estate resulting from a fee tail special tenancy after possibility of issue extinct, (d) life estate by dower, (e) life estate by curtesy, and (f) life estate by and during coverture.

2. A life estate is one in which the duration of the estate is measured by the life or lives of one or more human beings and is not otherwise terminable at a fixed or computable period of time.

3. If an estate may last for a lifetime, it is a life estate, even though it may be extinguished before it runs its natural course. However, if a limitation is made expressly subject to the will of the grantee or lessee, there is a conflict, and the interest created is either a life estate determinable or a tenancy at will depending upon the jurisdiction.

4. If a conveyance identifies the grantee but fails to describe effectively the estate which the grantee takes, then the grantee takes a life estate at common law. Today, the grantee is presumed to take whatever estate the grantor had to convey unless a contrary intent appears in the governing instrument.

5. A life tenant, in addition to his estate for life, may be given a power to convey, sell, appoint, or mortgage the fee. Upon the exercise of this power, the rights of the remaindermen or reversioners are affected accordingly.

6. Under the Rule in Shelley's Case, a conveyance of a remainder to the heirs or the heirs of the body of the life tenant, gives the remainder to the life tenant in fee or in fee tail, as the case may be. This Rule, which is a rule of property law at common law and does not give way (as a rule of construction would) to a contrary intent, defeats the intention of the grantor to create a life estate and a remainder in the life tenant's heirs.

7. A life estate may be measured by resort to a reasonable number of lives. Thus, a conveyance "to B for the lives of B, C, D and E" terminates upon the death of the survivor of the four named lives. On the other hand, a life estate to B to last for her life and for the lives of all the persons of a given state would give B a life estate for her life only.

8. Forfeiture restraints on the power to alienate a life estate, usually phrased so as to make the life estate defeasible on an attempted alienation, are valid. The reasons for upholding these restraints are: (1) life estates are not readily alienable in a commercial sense anyway; and (2) the restraint may have been imposed for the benefit of the reversioner or remainderman.

§ 6.5 Concurrent Estates

a. Joint Tenancy

1. Joint tenancy is always created by deed or by will, never by descent.

2. In joint tenancy there must always be two or more grantees or devisees.

3. O "to B and C and their heirs" are typical words for creating a joint tenancy at common law. Today in the absence of a clearly expressed intent to create a joint tenancy with the right of survivorship, this limitation creates a tenancy in common.

4. At common law a joint tenancy was preferred over a tenancy in common. Under modern statutes tenancy in common is preferred over joint tenancy.

5. At common law, every joint tenancy required the four unities of:

a. time—meaning all tenants take their interest in the premises at the same instant of time.

b. title—meaning all tenants take their interest from the same source, the same deed or the same will.

c. interest—meaning every tenant has the same identical interest in the property as every other tenant, such as fee simple, fee tail, life estate, etc.

d. possession—meaning the possession of one joint tenant is the possession of all the joint tenants and the possession of all the joint tenants is the possession of each joint tenant.

6. Every joint tenant owns the undivided whole of the property; co-tenants do not own a fractional interest.

7. The grand incident or characteristic of joint tenancy is that of survivorship. This means that upon the death of one joint tenant, the survivor or survivors own the whole of the property and nothing passes to the heirs of the decedent.

8. Upon the death of a joint tenant the survivors take nothing from the decedent but take the whole from the original conveyance which created the joint tenancy and which whole they have owned all the time.

9. A severance of the joint tenancy can be made by a conveyance, but not by will, because survivorship is prior to and defeats any purported disposition in the will.

10. If all joint tenants except one die without having severed their interests, the survivor owns the whole property.

11. Joint tenancy is destroyed by severance inter vivos, by partition, or by any act destroying any one of the four unities.

12. Except in those jurisdictions where the joint tenancy has been abolished, husband and wife may, by a clearly expressed intention in the conveyance, take and hold as joint tenants.

b. Tenancy by the Entirety

1. A tenancy by the entirety is a form of concurrent ownership based upon the common law concept of unity of husband and wife.

2. Tenancy by the entirety is a species of joint tenancy and as in joint tenancy each spouse owns the whole estate and not a fractional part thereof.

3. Tenancy by the entirety can exist only between husband and wife.

4. The doctrine of survivorship obtains in tenancy by the entirety—the survivor taking all and the heirs nothing.

5. Five unities are essential in tenancy by the entirety: (a) time, (b) title, (c) interest, (d) possession and (e) person. The first four are the same as in joint tenancy. The fifth involves the common law concept of unity of person in husband and wife.

6. Tenancy by the entirety is created only by deed or will, never by descent.

7. In most jurisdictions that recognize the estate by the entirety, neither spouse can dispose of any interest in the estate owned by the entirety; both must join in the conveyance.[4]

8. In most jurisdictions that recognize the estate by the entirety, a creditor of one spouse cannot levy upon the estate owned by the entirety, nor is a judgment against one spouse a lien against the estate held in the entirety.[5]

4. In some states in a tenancy by the entirety, the husband has the sole right to possession during the joint lives, and a fee simple absolute in all of the estate if he survives the wife. The wife, on the other hand, has no present estate but she does have a fee simple absolute in all of the estate if she survives her husband. The husband can convey his interests subject only to the right of the wife to absolute ownership if she survives; but the wife, during their joint lives, cannot convey her possibility of acquiring the estate. See Powell on Real Property ¶ 623. See D'Ercole v. D'Ercole, 407 F.Supp. 1377 (D.Mass.1976) (where an estranged wife brought suit claiming that the common-law concept of tenancy by the entirety deprived her of due process and equal protection in that it gave her husband the right of possession and control during his lifetime of their home, the court held that since tenancy by the entirety is but one option open to married persons seeking to take title to real estate, it is constitutionally permissible).

5. In those states that preserve the estate by the entirety in all its common law flavor, creditors of the husband can attach and sell under execution all of his interest in an estate by the entirety, but

9. Divorce eliminates the unity of person, destroys the tenancy by the entirety and the divorced persons become tenants in common of the property, or in some states, joint tenants.

10. Neither spouse has a right to partition a tenancy by the entirety, and neither has power, without the consent of the other, to destroy it.

c. Tenancy in Common

1. Tenancy in common may be created by deed, by will, or by operation of law.

2. Under modern statutes, tenancy in common is preferred over joint tenancy. Thus, a conveyance to two or more persons presumptively creates a tenancy in common.

3. Only one unity, that of possession, need be present in tenancy in common.

4. Each tenant owns an undivided fractional part of the property, none owns the whole as in joint tenancy.

5. Each tenant can dispose of his undivided fractional part or any portion thereof, either by deed or by will.

6. Upon the death intestate of a tenant in common her interest descends to her heirs. There is no right of survivorship.

7. Tenancy in common may be destroyed by partition or by merger when the entire title vests in one person, either by purchase or otherwise.

8. If one cotenant ousts the other from possession, the ousted tenant has a cause of action against the possessor to regain possession.

9. There is no real fiduciary relationship between cotenants merely because of the cotenancy, but good faith between cotenants prevents one cotenant from buying up an adverse title and asserting it against cotenants if the other cotenants offer to share their part of the expense of gaining the title. The buyer of the adverse title is made to hold in constructive trust for his cotenants.

separate creditors of the wife cannot reach her interest. See Licker v. Gluskin, 265 Mass. 403, 164 N.E. 613 (1929) (where a husband and wife were tenants by the entirety and a creditor of the wife attached her interest in the land and sought to sell it, the court held that under force of statute the attachment and levy were void because the creditor could not do what the wife could not do); West v. First Agricultural Bank, 382 Mass. 534, 419 N.E.2d 262 (1981) (suggesting that historical inequalities in tenancy by the entirety were now unconstitutional), Powell on Real Property ¶ 623.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 6.2 *Fee Simple*[6]

PROBLEM 6.1: O grants Blackacre[7] "to B." In the jurisdiction where the land is located a statute provides in substance that every grant or conveyance of an estate in land made to a person shall be deemed a fee simple unless a lesser estate is described in the instrument. (a) What estate would B take at common law? (b) What estate would B take under the statute?

Applicable Law: Words of limitation, "and his heirs," were indispensable to the creation of a fee simple estate at common law. Under modern statutes and some cases, the use of these words is usually not necessary and a fee simple estate may be created without the presence of these words.

Answer and Analysis

(a) At common law B took a life estate in Blackacre but under the statute B takes a fee simple estate. At common law no conveyance could pass a fee simple from the grantor to the grantee without the use of the magic words of limitation, "and his heirs." Thus, even a conveyance to "B in fee simple absolute" gave B only a life estate.

(b) Under the statute the named grantee takes a fee simple estate in every conveyance (assuming the grantor had a fee simple) unless by express words in the deed it is stated that the grantee takes an estate less than a fee simple. Thus, under the statute B takes a fee simple even though the phrase "and his heirs" was excluded from the terms of the conveyance. Some jurisdictions hold that B takes a fee simple in such case even without the aid of a statute.

The common law rule mandating the use of "and his heirs" was subject to some important exceptions. These were:

If O conveys to B corporation (whether sole, aggregate, or municipal), the corporation takes a fee simple absolute without the use of words of inheritance. Although corporations are legal "persons," they do not have heirs.

If O conveys to "B as trustee," B takes such estate as is necessary to carry out the trust, including a fee simple, even though the phrase "and his heirs" did not appear in the conveyance.

6. At this point those portions of chapter 5 describing the characteristics of the fee simple absolute and the fee simple subject to limitations should be carefully re-read. In each of the following problems, assume that O owns Blackacre in fee simple absolute unless the problem provides otherwise.

7. Unless the problem otherwise provides, O or T, when conveying or devising Blackacre, owns Blackacre in fee simple absolute.

If O conveyed to the heirs of B (a deceased person), that heir took a fee simple even though the phrase "and his heirs" did not appear in the conveyance. This resulted from the fact that at common law B had but one heir where primogeniture applied; thus, the use of the plural heirs was a substitute for "B's heir and his heirs." Similarly, if O conveys to B for life, remainder to the heirs of C while C is still living, C's heirs took as purchasers and as a class of heirs a contingent remainder in fee simple. If C dies before B, they then take a vested remainder in fee simple without words of inheritance being used in the deed.

Suppose O conveyed Blackacre to A and B and their heirs as joint tenants in fee simple. A releases her interest to B. B now is owner in fee simple in severalty without use of the words of inheritance in the deed. The reason is that B, as well as A, had previously owned the fee in the whole. By contrast, suppose O conveyed to A and B and their heirs as tenants in common. In this case each of them owns an undivided one half of Blackacre in fee simple. If A grants "to B" A's interest in Blackacre, B will only take a life estate in A's undivided half at the common law unless words of inheritance are used. This is because A's estate is wholly separate and distinct from B's fee simple, each having a different interest. Lastly suppose T devises Blackacre to B. B takes a fee simple without the use of words of inheritance if this is the testator's intention.[8]

PROBLEM 6.2: O conveys Blackacre "to my son-in-law, B, and his heirs to have and to hold for his lifetime, and at his death to be equally divided among his heirs, they being my grandchildren then living." What estate does B take under this deed?

Applicable Law: If two clauses in a deed are in conflict but the grantor's intention can be found by a reading of the entire instrument, this intention shall govern.

Answer and Analysis

B has a life estate. There is an inconsistency between the granting clause which gives B a fee simple and the habendum clause which limits B's estate to a life estate. If the rule of construction is that if the granting clause is repugnant to or inconsistent with the habendum clause, the former governs, then, of course, B takes a fee simple estate. This rule, however, is resorted to only when the intention of the parties cannot be ascertained from the entire instrument. In this problem O's intent can be gleaned by reading the entire instrument.

8. See Restatement of Property §§ 29–37; Simes, 181–185.

In analyzing the entire instrument little emphasis should be placed on the order in which the words, phrases, or clauses appear. In the first place, the grantee, B, is the grantor's son-in-law. In the second place, the deed provides for another purchaser upon B's death, namely, B's heirs, who are the grantor's grandchildren. A is providing for a remainder among B's children, A's grandchildren. True, there can be no heirs of a living person and it cannot be foretold who B's heirs will be at the time of B's death. Nonetheless, there is reason to believe that O is using "B's heirs" as synonymous with "B's children." If this is the case, then it is clear that B takes a life estate and there is a contingent remainder to B's children living at B's death.

Furthermore, by taking this view, the words "and his heirs" used in the granting clause might well be read as "and his children." This construction would give effect to every part of the deed and reconcile the granting and the habendum clauses. Under this interpretation, B takes a life estate in Blackacre and his children living at his death take a contingent remainder. O, of course, retains a reversion. From a reading of the entire deed this seems to be O's intention.

PROBLEM 6.3: In State X a statute provides that a conveyance which prior to the enactment of the statute would create a fee tail estate should thereafter create a fee simple estate in the grantee. O is domiciled in State X. O conveys Blackacre "to B and the heirs of his body." What estate does B take under the instrument?

Applicable Law: Under many modern statutes a conveyance which would have created a fee tail estate at common law now creates a fee simple estate.

Answer and Analysis

B takes a fee simple absolute. Prior to the statute and at common law the expression "to B and the heirs of his body" created a fee tail estate in B. This estate was limited to lineal heirs. Many states have statutes which provide that an estate which was at common law a fee tail shall be deemed a fee simple. Under this type of statute B would take a fee simple estate. Thus if B owned the property at the time of his death and died intestate, the property would pass to B's lineal descendants, or if none, among his collateral heirs.[9] This estate is also alienable and devisable.[10]

9. Depending upon state law, these heirs might be ancestors of B or collateral relatives of B.

10. See Restatement of Property § 42, Simes, 196–202.

PROBLEM 6.4: O conveys Blackacre to "B and his heirs so long as Blackacre is used for school purposes." What interest does B have in Blackacre?

Applicable Law: A grant to B and his heirs so long as the land is used for school purposes creates in B a fee simple determinable; the grantor retains an estate called a possibility of reverter.

Answer and Analysis

B has a fee simple determinable. B has a fee because words of inheritance, "and his heirs" were used following the grantee's name (words of purchase), which indicate the estate in B may last forever. However, additional words of limitation appear in the deed. These words tie up the use to which B may put the land. Because of these additional words of limitation, there is the possibility that B's estate will not last forever. If B ceases to use Blackacre for school purposes, then B's estate automatically terminates and Blackacre reverts to O because the very words of the conveyance state that B's estate shall last just that long. Thus, there is no forfeiture involved. Rather, B's estate ends naturally.

In this problem, the future interest retained by the grantor is called a possibility of reverter. This estate becomes possessory upon the natural termination of B's estate.

In some cases a limitation may be void as a matter of public policy. For example, suppose O transfers Blackacre to A so long as A remains single. If A marries, does Blackacre revert to O? In resolving this issue, the reasonableness of the restriction may be relevant. Generally, restraints on the marriage of a surviving spouse are upheld, while restraints on the marriage of the grantor's children or others are not.[11] Likewise, any restraint that violates some independent body of law, such as the law of race or gender discrimination, is invalid or unenforceable. For example, a grant "To A so long as the property is occupied exclusively by white persons" is not enforceable in a court.[12]

PROBLEM 6.5: Within X County O owned Blackacre which comprised an area of several blocks of land. The land was unimproved and undeveloped. O offered to convey one block of this land, Whiteacre, in the center of the tract to X County to be used for courthouse purposes. The proper county officers agreed to receive the property on behalf of the county and to locate the courthouse there. O executed a deed granting "to X

11. See, e.g, Lewis v. Searles, 452 S.W.2d 153 (Mo.1970) (upholding limitation regarding marriage as against a niece because court found testator only intended to provide for niece when she would have no other sources of support).

12. See Ch. 12.

County, all of my right, title, claim, interest and estate in and to Whiteacre, but upon this condition that Whiteacre shall be used forever as the site on which the courthouse of X County shall be erected." The courthouse was built on Whiteacre and remained there and was used as such for more than 100 years, when it was abandoned as a courthouse. When the structure ceased to be used for courthouse purposes, H was the sole heir of O then living. H sues X County for possession of Whiteacre contending that the above deed created in X County either a determinable fee simple or a fee simple on condition subsequent. May H succeed?

Applicable Law: This problem distinguishes a fee simple determinable from a fee simple subject to a condition subsequent. The provisions of a deed will be construed to create a fee simple absolute rather than a fee simple determinable or a fee simple subject to a condition subsequent, if this interpretation is reasonable.

Answer and Analysis

No. A determinable fee is a fee which is created by an instrument of conveyance which provides that such estate shall come to an end automatically upon the happening of some described event. A fee simple subject to a condition subsequent is a fee which is created in an instrument of conveyance which provides that, upon the happening of some certain event, the grantor or his successors in interest shall have the power to enter and terminate the estate of the grantee. The principal difference between the two is this: in the determinable fee the estate automatically comes to an end when the stated event happens, whereas in the fee subject to a condition subsequent the termination of the estate is not automatic but must be terminated by an entry or exercise of the reserved power by the grantor or his successor in interest. The former involves no forfeiture, the latter does. Whether a given deed conveys a fee simple absolute or a determinable fee or fee simple on condition subsequent is a matter of construction of the words used in the instrument.

In the construction of limitations the courts favor unconditional estates rather than conditional ones for the reason that estates once vested should not be uprooted after long periods of time unless it was the intention of the grantor expressed in the deed that this should occur. Applying this principle the deed should be construed in favor of the defendant county unless it is fairly clear that the grantor intended either a determinable fee or a fee simple upon condition subsequent. In the deed O grants to X County, a quasi-municipal corporation, "all of his right, title, claim, interest and estate in and to Whiteacre." Words of inheritance are not only not

required but are quite inappropriate where a public corporation is the grantee. Thus, it is clear that O intended to grant a fee simple estate to X County.

The words following, "but upon this condition that Whiteacre shall be used forever as the site" of the courthouse are the only words on which it can be contended there was either a determinable fee or fee simple upon condition subsequent. These words show no intention whatsoever that the fee simple in X County should automatically revert to O or his heirs. While they limit the use to which Whiteacre shall be put, they put no limit on the time during which the estate shall last. The typical words for creating a determinable fee are "so long as," "during," "until," or "while." None of these or similar expression was used but the use was to be "forever." Thus, it seems there is no expression of intention by O in the deed that there should be a determinable fee simple in X County.

Was there a fee simple on condition subsequent? A fee simple on condition subsequent is generally introduced by such phrases as "provided that," "on condition that," "subject to the condition that," or "but if." An express reverter clause giving the grantor the right to re-enter generally is appended. But these reverter clauses are not absolutely necessary. The fee simple subject to a condition subsequent always involves a forfeiture of a vested interest. The law abhors forfeitures and the courts will not construe the words of a deed to create this future estate unless the language is so clear as to admit of no other interpretation. In this case the deed did say, "upon the condition" that the tract be used "forever" as a courthouse site. But there is not one word in the deed expressing what should happen in case the site were not so used. There is no right of entry or power to terminate the estate reserved in O or O's successors in interest. Without any express reservation of this power, the court ought not to imply such, when the result of that implication would cause a forfeiture of an estate which has lasted for more than a century. Thus, there was no fee simple upon condition subsequent created in X County.[13]

There is a further economic argument in this case which should not be overlooked. It may be that O's grant of Whiteacre to X County was not wholly altruistic. If the county courthouse could be located in the middle of land owned by the grantor, such an institution might enhance the value of the lots surrounding the courthouse. Reading the language of the deed as a whole and considering the conditions under which it was executed, it seems

13. In Mahrenholz v. County Board of School Trustees, 93 Ill.App.3d 366, 48 Ill.Dec. 736, 417 N.E.2d 138 (1981) grantor conveyed to a local school board with the land to be used only for school purposes; "otherwise to revert to the" grantor. The court held this language created a fee simple determinable.

quite correct to conclude that X County took a fee simple absolute estate in Whiteacre and that no defeasible fee simple was intended. Thus, H should not succeed in his action.[14]

In many jurisdictions statutes require holders of retained future interests to periodically file a notice or claim to the effect they intend to enforce their rights if the limitation or condition occurs. If State X had a statute of this type and neither H nor H's predecessors timely filed this notice, then even if a fee simple determinable or a fee simple on condition subsequent were created, H would be barred from reclaiming possession of Whiteacre.

PROBLEM 6.6: O conveys Blackacre "to B and his heirs provided that, if intoxicating liquors are ever sold on the premises, then O reserves the right to enter and terminate B's estate." What estate does B take under this deed?

Applicable Law: A grant to B and his heirs provided that if a specified condition occurs or fails to occur the grantor or his heirs have the right to re-enter and terminate the estate creates in B a fee simple subject to a condition subsequent and leaves in the grantor a right of re-entry for condition broken which today is also called a power of termination.

Answer and Analysis

B has a fee simple subject to a condition subsequent. The older cases used the expression "right of re-entry for condition broken" to describe O's right. The more recent cases describe O's right as a "power of termination." B has a fee simple because words of inheritance "and his heirs" are used to describe the quantum of B's estate. B's estate may last forever provided intoxicating liquors are not sold on the premises. It may also last forever although intoxicating liquors are sold on the premises provided O or his successors in interest do not terminate the estate of B by exercising their power of termination.

The usual words for creating a condition subsequent are, "on condition that," "but if," "on the express condition that," "provided that" or similar expression. The usual expressions for reserving the power to terminate are that the grantor may "re-enter and take the property," "enter and terminate the estate," "in such case cause the title to revert back to the grantor," or other words evincing an intention to take back the property. The power to terminate may even be implied from such expressions as "every

14. See Chouteau v. City of St. Louis, 331 Mo. 781, 55 S.W.2d 299 (1932) (where a deed conveyed all interest in realty on condition that it should be used forever as a courthouse site with no express provision for re-entry, the deed conveyed a fee and not an estate on condition subsequent and hence the grantor's heir had no right to the property after its abandonment as a courthouse site); Restatement of Property §§ 44, 45.

thing herein shall be null and void" or "this deed shall be null and void and the title shall revert to the grantor."

In this problem, both the condition subsequent and the power to terminate are provided for expressly in the deed. The phrase "provided that if intoxicating liquors are ever sold on the premises" describes the condition subsequent. The phrase "then I reserve the right to enter and terminate the estate hereby created" describes the power to terminate or right to make reentry for breach of the condition. It is clear then that O intended to create a fee simple in B and that if a certain event or condition happened, namely, the selling of intoxicating liquor on the premises, then O would have the right or power to enter and put an end to that fee simple. B's estate would not end automatically. It would end only if and when the condition happened and thereafter the grantor or his successors in interest performed the requisite affirmative act of reentry for terminating such estate.[15]

PROBLEM 6.7: O conveys Blackacre "to B and his heirs but upon the express condition that B shall not dispose of or alienate Blackacre for a period of five years after B receives the title." Ten days after the deed was delivered to B, B purports to convey Blackacre to C. What estate does C have in Blackacre?

Applicable Law: A restraint which disables a fee simple owner of land from alienating the property is void and the owner may dispose of the property in fee simple.

Answer and Analysis

C owns Blackacre in fee simple absolute. O purported to convey a fee simple absolute to B and also to impose on B a restraint on B's power to alienate or dispose of the fee simple estate. Is this restraint valid? The answer is an unequivocal no.

The power to dispose of the fee simple estate is an integral part of the fee simple estate. This estate cannot exist apart from the power in its owner to dispose of it. This type of restraint or power to alienate is classified as a disabling restraint and is void in all cases except when connected with spendthrift trusts. Where this restraint appears in a deed, the grantee takes the property free of the restraint and with full power to dispose of the property.[16] This is true whether the restraint refers to real or personal property,

15. See Restatement of Property § 45; Simes, 30.

16. Accord, White v. Brown, 559 S.W.2d 938, 941 (Tenn.1977) (where the testatrix stated in her will that she wished a named person to have her home to live in and that it was not to be sold, the testatrix passed a fee simple absolute in the home to such person, and her attempted restraint on alienation was void as contrary to public policy).

whether it refers to legal or equitable interests (spendthrift trusts excepted), and whether the estate involved is a fee simple, fee tail, life estate, or an estate for years. In other words, there is no power on the part of a grantor or testator to convey a fee simple estate to a person *sui juris* and deny that person the power to dispose of the estate for five years, for one year, for one day or one minute. In this case then, O's attempted restraint on B's power to alienate the estate was void and B took the fee simple absolute in Blackacre. B's estate was alienable. B had both the right and power to convey the fee simple estate to anyone. Since B granted B's estate to C, C took from B the estate which B had which was a fee simple absolute.

The disabling restraint illustrated in this problem is a type of direct restraint on alienation. Other types of direct restraints are the promissory and forfeiture restraints. Unlike the disabling restraint which is generally held invalid except in the case of spendthrift trusts, promissory and forfeiture restraints are generally held valid when imposed on interests less than fees simple.

§ 6.3 Fee Simple Conditional and Fee Tail [Omitted]

§ 6.4 Life Estates[17]

PROBLEM 6.12: T's first wife died. Later T remarried W–1. T later dies and bequeaths Blackacre to "my second wife, W–1, so long as she remains a widow, and then to my child C and his heirs." W–1 later dies and bequeaths her entire estate to her brother X and his heirs. X enters Blackacre. C sues X in ejectment. Who wins?

Applicable Law: A grantor can create a determinable life estate as well as a fee simple determinable. Ordinarily distinguishing the two is easy. However, where the limitation is tied to an event that could only occur during the grantee's lifetime, ambiguities can arise whether the grantor intended to create a determinable life estate or a fee simple determinable.

Answer and Analysis

C probably wins. Whether C or X wins depends on whether W–1 had a determinable life estate or a fee simple determinable. It W–1 had a determinable life estate, then C would have a remainder which would become possessory at W–1's death. A determinable life estate is neither devisable nor descendible. If, on the other hand, W–1 had a fee simple determinable, then W's estate would be devisable and descendible and, given that the limitation could not occur after W–1's death, C's shifting executory interest[18] could never become possessory.

17. On life estates, see Ch. 5, Part I.

18. The fact that C would have a shifting executory interest is an excep-

The proper classification of W–1's interest depends on T's intent. A strong argument can be made that T wanted W–1 to have only personal enjoyment of the property during her widowhood and not a devisable or descendible estate. This argument is particularly strong where as here, C is a child of T's first marriage and construing W–1's estate as a fee simple determinable would permit her to devise the property to strangers.[19]

PROBLEM 6.14: H and W were husband and wife who had five minor children. H devised Blackacre "to my wife, W, for the term of her natural life, remainder to our children share and share alike, but if my wife, W, determines it to be for the welfare of the family to sell Blackacre, then she is hereby empowered to sell the land and pass a fee simple title thereto." W decided that it was for the family welfare to sell Blackacre so she conveyed it to "B and his heirs." W died and the five children sue B for possession of Blackacre. Should they succeed in their action?

Applicable Law: A life tenant can be granted a power to convey a fee simple even if by exercise of that power the interest of the remainderman is defeated.

Answer and Analysis

No. Sometimes an estate is given with a power in someone to cut short or destroy it. Sometimes an estate is given with a power to enlarge it. This case involves both types—a life estate in W with a power to dispose of the fee simple and a remainder in fee simple in the children with power in W to destroy it. By W's conveyance to B in fee simple she exercised that power. This act both enlarged her life estate to a fee simple absolute in her grantee and destroyed the vested remainder in her children. But until the exercise of the power by W, she had only a life estate.

PROBLEM 6.15: O conveys Blackacre "to B for the lives of B, C, D and E and the survivor of them." B conveyed to X all of B's right, title and interest in Blackacre. B then died survived by C, D and E. O sues to eject X from Blackacre and argues that B's death terminated X's interest in the premises. May O succeed?

tion to the classification structure. Logically, C should have a vested remainder since, if it were to ever become possessory, it would do so following the natural termination of W's estate upon the happening of a limitation, not a condition. However, because of the early common law rule that a fee simple could not follow on the heels of a fee simple, C's interest was classified as a shifting executory interest and continues to be so classified today.

19. Compare Dickson v. Alexandria Hospital, Inc., 177 F.2d 876 (4th Cir. 1949)(fee simple determinable) with Mouser v. Srygler, 295 Ky. 490, 174 S.W.2d 756 (1943)(determinable life estate).

Applicable Law: O "to B for the lives of B, C, D and E and the survivor of them," is valid to create a life estate in B until the death of the survivor of the four named persons, B, C, D and E. O "to B for the joint lives of B, C, D and E" is valid and lasts as long as all four live and ends upon the death of the first of the four; O "to B for B's life and the lives of all the people who live in State X and the survivor" is a valid life estate for the life of B only, the provision for the other lives and survivor being void for impracticability of determining the death of the survivor.

Answer and Analysis

No. It should be noted that the life tenant's name, B, is listed among the measuring lives so that this is not wholly an estate pur autre vie. B has a valid estate for the lives of B, C, D and E and the survivor of them. This phrase makes the life of the survivor of the four the maximum term of the estate which B had and which B assigned to X. Thus, O has no right to eject X until all of the four are dead. If B is not the survivor of them, B's estate passes to those persons who are the successors of his estate—his heirs if B dies intestate; the beneficiaries of the interest if B dies testate.

Had the conveyance read, "for the joint lives, of B, C, D and E," then the "joint lives" could only last until the first of the four died and when B died, O could have ejected X. But the deed did not so provide.

Had the measuring lives been "for the life of B and the lives of all the persons now living in the State of South Dakota and the survivor of them," the provision for the lives beyond that of tenant, B, would be void for the reason that it would be impracticable if not impossible to determine the time of death of the survivor, and B would take a life estate for his own life only.[20]

PROBLEM 6.16: T devised Blackacre to her daughter, D, for life. T's will directed that upon D's death Blackacre should be distributed to D's two children, X and Y, and their heirs. The will also provided that Blackacre should not be sold until X and Y reached 45 years of age. Is the provision against sale valid?

Applicable Law: (a) Disabling restraints on alienation (spendthrift trusts excepted)[21] generally are void regardless of the estate to which they are attached. (b) Forfeiture and promissory restraints on life estates and lesser interests generally are

20. See Restatement of Property § 107, illustrations 1, 4, 5.

21. A spendthrift trust is a trust which provides, among other things, that the equitable life estate (and remainder) while held by the trustee are not alienable nor reachable to the creditors of the income beneficiary or remainderman.

valid. (c) All unreasonable restraints on the alienation of fee simple estates are invalid. (d) Life estates are subject to termination by special limitations and powers of termination.

Answer and Analysis

In most states the restraint on alienation is invalid. The provision against sale is a restraint on alienation of the disabling type.

A disabling restraint is a direction in the creating instrument that the estate shall not be alienated. If this restraint were valid, it would create a non-transferable estate. If a disabling restraint were valid, the transferee subject to the restraint could not alienate the property and would not lose his interest in the property even though in violation of the restraint he purported to alienate the property.

The general rule, with the exception of a disabling restraint on the beneficial interest under a spendthrift trust, is that all disabling restraints on alienation are void. This rule applies whether the disabling restraint is attached to a fee simple, life estate, or lesser interest. It also applies whether the restraint is total or partial, limited or unlimited as to duration. The rule is based upon a public policy preference to eliminate impediments to the alienability of land. When tied to a life estate or other estate smaller than a fee simple absolute, the practical effect of the restraint is unclear. All future interests act as impediments to the alienability of land. Thus, in this problem, if the restraint were limited to the life of D, an empirical question arises whether the land would be any more alienable without the restraint as it would be with it since D's children have a future interest. If they do not join in a conveyance, no purchaser from D could acquire a fee simple estate.

When applicable, the rule of invalidity invalidates the illegal restraint on alienation and makes the estate freely alienable. Thus, in most jurisdictions D acquires a life estate which D can alienate, and X and Y can alienate their remainder interests during the lifetime of D. They also can alienate the fee simple after the death of D regardless of whether or not they reach the age of 45.

Forfeiture and promissory restraints on fee simple estates generally have been held invalid. Forfeiture and promissory restraints on life estates and lesser interests generally are held valid. A forfeiture restraint exists when the creating instrument provides that on an attempted alienation the estate created or transferred is forfeited or terminated with a further provision for the estate to pass to another.

A promissory restraint is in the form of a covenant (promise) that the grantee will not alienate the estate. Thus, in this problem,

if the will provided that should D transfer or alienate her life estate, then her estate should end and the entire estate vest in X and Y, the provision would be perfectly valid and enforceable.

Forfeiture restraints on life estates may be justified on two grounds: (1) they may be imposed for the benefit of the reversioner or remainderman; and (2) life estates are somewhat inalienable (at least in a commercial sense) anyway because of the uncertainties surrounding the life expectancy of the life tenant. Because the life tenant may die the next day, no one is willing to pay very much for a life estate. Forfeiture restraints on leaseholds are common and are valid. These restraints customarily take the form of affording the landlord the right to re-enter and terminate the estate if the leasehold is transferred without the landlord's consent. The interest of the landlord in protecting rental income and the reversionary estate are sufficient justification for upholding such restraints.

Life estates also are subject to termination by (1) special limitation, such as "to B for life so long as B does not sell liquor on the premises," or "to W for life for so long as W remains a widow (or until she remarries)," and (2) by the exercise of a power of termination, such as, "to B but if he does not keep the fences in repair, then I reserve the right to re-enter and take back the premises."[22]

The modern trend toward condominium and cluster housing has given rise to increased restrictions on the use and transfer of such housing units. The close interrelationships of the community members, whether controlled by a home owners' association, a condominium or a cooperative association, have resulted in the use of restrictions in order to achieve a community of compatible and financially responsible persons. The restrictions frequently involve not only restrictions on use, i.e., single family residence, no children under a certain age, or no pets, but also restrictions on sale or transfer.

A wholly disabling restraint on sale most likely would not be used, and even if it were, it would most likely be held invalid although limited as to duration. However, provisions are common

22. See McCray v. Caves, 211 Ga. 770, 88 S.E.2d 373 (1955) (where a husband's will devised a tract of land to his wife for life and at her death to the heirs of her body but should she cease "to be the wife or widow" of the husband "then in that event she forfeits her right to the life estate" to her children, the estate divested upon her remarriage); Restatement of Property § 18, Note 2.

that grant the condominium association a right of first refusal. In other words, when an owner wishes to sell, the association may either approve the prospective buyer and sale, or instead, may buy the unit on the terms and conditions offered by the prospective buyer. As long as the association does not have an unreasonably long period of time in which to exercise its purchase option, such provisions have been, and should be upheld as long as the particular terms do not violate the rule against perpetuities.[23]

One court expressed the opinion that a right of first refusal was not a restraint on alienation since the seller in effect had two purchasers instead of one.[24] This reasoning is questionable. If a right of first refusal exists, any prospective purchaser that the seller gets must be prepared and willing to wait until the association decides whether or not to exercise the option. If the association is given too long a period of time to decide, many prospective purchasers will refrain from making an offer because they will not want to be bound for a long time without an assurance that they will get the land. Thus, there will definitely be a restraint on alienation. Reasonable controls, however, are common and even desirable.

In view of these recent developments, statements about direct restraints on alienation should be phrased as follows: reasonable restraints on alienation are upheld, but unreasonable restraints on alienation are invalid.[25]

23. Options in gross may be subject to the common law Rule against Perpetuities, but options to renew or purchase attached to leases are not generally subject to the Rule, because they promote rather than hinder alienability. See Ch. 13. See generally, Ch. 8, §§ 8.4; 8.5.

24. Watergate Corp. v. Reagan, 321 So.2d 133 (Fla. 4th D.C.A. 1975) (action for declaratory judgment; an agreement granting a right of first refusal with respect to the sale of certain property did not violate the Rule against Perpetuities and enhanced alienability because the seller had two potential buyers instead of one).

25. See Coquina Club, Inc. v. Mantz, 342 So.2d 112 (Fla. 2d D.C.A.1977), holding that unit owner must tender a qualified purchaser (here, with no children under 12), before association has duty to purchase or provide another purchaser; Hoover & Morris Dev. Co., Inc. v. Mayfield, 233 Ga. 593, 212 S.E.2d 778 (1975), holding that owner did not comply with declaration requirements concerning notice to the association so as to require exercise of the option or consent, but that there was evidence of a waiver; and Ritchey v. Villa Nueva Condominium Ass'n, 81 Cal.App.3d 688, 146 Cal. Rptr. 695 (1978), holding that age restrictions on occupancy and sale were reasonable and valid, and that coupled with a right of first refusal as provided in the documents would impose on the association the duty within fifteen days to either provide a qualified purchaser, purchase itself, or waive the restriction. See Ch. 13.

FREEHOLD ESTATES COMPARED WITH AND DISTINGUISHED FROM NON-FREEHOLD ESTATES

Freehold estates illustrated	Non-freehold estates illustrated
Case 1. Fee simple A *to B and his heirs*—this gives B a fee simple and leaves nothing in A. B's estate is inheritable by his heirs general, either lineal or collateral.	Case 1. Estate for years A *to B for 10 years*—this gives B an estate for years and leaves a reversionary interest in A. If B dies during the 10-year period the balance of the term passes to B's personal representative, i. e. his executor or administrator, for purposes of administration. In many jurisdictions the rules as to the intestate transmission of real and personal property are the same.
Case 2. Fee tail A *to B and the heirs of his body*—at common law this gave B a fee tail and left a reversion in A. B's estate was inheritable only by B's lineal heirs. Today the nature of the estate created by such a conveyance varies from state to state.	Case 2. Estate from year to year A *to B from year to year*—this gives B an estate from year to year and leaves a reversionary interest in A. If B dies during the period of the lease the balance thereof passes to his personal representative.
Case 3. Life estate A *to B for life*—this gives B an estate for B's life and leaves a reversion in A. B's estate is not inheritable.	Case 3. Tenancy at will A *to B as long as A wishes* (or as long as both A and B agree)—this gives B an estate at will and leaves a reversionary interest in A. B's death (or A's death) during the tenancy terminates the tenancy and A has the right to immediate possession. NOTE, HOWEVER, that if the limitation is from *A to B for as long as B wishes*, there is a conflict of authority and B has either a life estate determinable (believed to be the better view) or a tenancy at will depending upon the jurisdiction.

Freehold estates illustrated	Non-freehold estates illustrated
	Case. 4. Tenancy at sufferance A leases to B for 2 years and after the expiration of the 2-year term, B remains in possession without A's permission—B has a tenancy at sufferance which is really no tenancy at all but is called such. A has the right to eject B. B has a mere naked possession without right.
SIMILARITIES	
1. In each case B has possession of the land.	1. In each case B has possession of the land.
2. In each case B has an estate in the land.	2. In cases 1 and 2 above B has an estate in the land but in cases 3 and 4 B does not have an estate but mere possession.
DISSIMILARITIES	
1. The interest of B is *real property.*	1. In cases 1, 2 and 3 B's interest is *personal property*—called a chattel real. In case 4, B has no interest.
2. B's interest is *inheritable*—that is, passes to B's heir or heirs in cases 1 and 2 but this is *not true as to case* 3 for a life estate measured only by the life of the tenant is not inheritable.	2. In cases 1 and 2 and 3 B's interest *is inheritable* but in cases 3 and 4 it is not.
3. B's interest is of *indefinite* or uncertain duration.	3. B's interest in case 1 is of *definite* duration, in cases 2 and 3 of indefinite duration.
4. B is *seised* which means that he is possessed claiming a freehold interest in the land.	4. B is *not seised* but only possessed—seisin exists only as to freehold estates.
	5. A tenancy at will is a chattel interest in land, of the lowest nature but it is possession at the mutual wills of the land owner and the tenant, and will support trespass or ejectment; death terminates it.

Freehold estates illustrated	Non-freehold estates illustrated
	6. A tenancy at sufferance is no tenancy at all; it is a mere wrongful, naked possession but neither an estate nor property.

§ 6.5 *Concurrent Estates*

a. Joint Tenancy

PROBLEM 6.17: O conveyed Blackacre "to B, C and D and their heirs as joint tenants with right of survivorship in the survivors, and not as tenants in common." Blackacre is located in State Z. State Z law provides that all concurrent tenancies shall be deemed tenancies in common and not joint tenancies unless it is expressly declared that the grantees or devisees shall take as joint tenants. B died testate devising all of his interest in Blackacre to X and his heirs. X immediately took possession of Blackacre. C and D sue X in ejectment. May they succeed?

Applicable Law: Joint tenancy must under many modern statutes be expressly declared to overcome the preference for tenancy in common. A joint tenant can convey his or her undivided interest by deed. A joint tenant cannot convey his or her interest by will.

Answer and Analysis

Yes. Under modern statutes the survivorship feature of co-tenancies is not popular. Many such statutes in express terms prefer tenancy in common over joint tenancy, which is the reverse of the common law. In order to create a joint tenancy under the type of statute given in the problem, there must be a clear expression of intention that the grantor intends the grantees to take as joint tenants. Any doubt is and should be resolved in favor of their taking as tenants in common.[26]

It would seem that O has succeeded in creating a joint tenancy in the grantees. O uses these words, "as joint tenants with right of survivorship and not as tenants in common." Three distinct ideas are expressed: (a) the grantees are called joint tenants; (b) they are to have the right of survivorship; and (c) they are not to be tenants in common. Any one of these expressions by itself may not overcome the preference for tenancy in common. But when all three are

26. In Oregon, common law joint tenancies have been abolished. Ore. Rev. Stat. § 93.180 (1973). However, a right of survivorship can be created in two or more persons without the right to sever that feature. This is accomplished by characterizing language which would have created a joint tenancy as creating a life estates in the grantees, and a contingent remainder in fee in the survivor. See Halleck v. Halleck, 216 Or. 23, 337 P.2d 330 (1959).

put in the conveyance, and it is expressly declared to be joint tenancy as the statute requires, then B, C and D would take as joint tenants. Accordingly, when B died testate or intestate, the survivors, C and D, continue as survivors to hold Blackacre in fee simple in joint tenancy. In order to destroy the joint tenancy by severance the joint tenant must convey his or her interest by deed.[27] A destruction of the joint tenancy occurs even by the conveyance of a lesser interest than the joint tenant has. The joint tenant's interest being in fee simple, a severance occurs by a conveyance of a fee tail, life estate or, according to some cases, by his transfer of a term of years. On the other hand, the will of a joint tenant is wholly ineffective to pass any interest in the jointly owned property; at the instant of death the right of survivorship takes effect and the attempted severance comes too late. Thus, B's devisee, X, takes nothing under the will, has no interest in Blackacre, and can be ejected from the premises by the owners and possessors, C and D.

Suppose during his life, B conveyed all of her interest to Y. That would create a tenancy in common in Y as between Y, and C and D. But the joint tenancy of C and D would not be severed by B's conveyance and upon C's death survived by Y and D, D would own 2/3 and Y 1/3 of Blackacre.

PROBLEM 6.18: T owned a regular section of land, Blackacre, in a given township and effectively devised it to A and B as joint tenants. Later, A executed a deed to X as follows, "I hereby convey all of my right, title and interest in the North East Quarter of Blackacre to X and his heirs." Thereafter, Y, a judgment creditor of A, levied upon and sold to M on execution sale, all of "A's right, title and interest in the South Half of Blackacre." A died intestate leaving W his widow and Z his sole heir at law. Who owns Blackacre?

Applicable Law: A joint tenant owns the whole of the jointly owned property, not a fractional part. The joint tenant can dispose of his or her entire interest and the grantee of that interest takes a fractional part as a tenant in common. A joint tenant may dispose of an interest in a specific part of the jointly owned property. The interest of a joint tenant can be levied upon and sold by his creditors. Upon the death of a joint tenant, the decedent's surviving spouse cannot claim dower and the decedent's heirs have no interest in the property.

27. Riddle v. Harmon, 102 Cal. App.3d 524, 162 Cal.Rptr. 530 (1980) (contrary to the common law, a joint tenant can sever a joint tenancy by conveying to himself as a tenant in common); Swartzbaugh v. Sampson, 11 Cal. App.2d 451, 54 P.2d 73 (1936) (lease by one joint tenant does not sever tenancy). See also, Tenhet v. Boswell, 18 Cal.3d 150, 554 P.2d 330, 133 Cal.Rptr. 10 (1976. As respects mortgages, see Harms v. Sprague, 105 Ill.2d 215, 85 Ill.Dec. 331, 473 N.E.2d 930 (1984); Brant v. Hargrove, 129 Ariz. 475, 632 P.2d 978 (1981); People v. Nogarr, 164 Cal.App.2d 591, 330 P.2d 858 (1958) (all holding that joint tenancy not severed where one joint tenant mortgages his interest where mortgage is not a transfer of title but merely the creation of a lien). In states following the title theory of mortgages, the execution of a mortgage by one joint tenant can sever the joint tenancy.

Answer and Analysis

(1) B and X are tenants in common of the North East Quarter of Blackacre, (2) B and M are tenants in common of the South Half of Blackacre, and (3) B is the owner in severalty of the North West Quarter of Blackacre.

Every joint tenant owns the whole of the jointly owned property and does not own a share or a fractional part thereof. Furthermore, each joint tenant has the right and power to dispose of his or her undivided interest. This means that A and B as a unit owned Blackacre and that A owned Blackacre and B owned Blackacre. It also means that by a conveyance A had the right and power to dispose of an undivided one half interest in Blackacre. If A could dispose of this entire interest in Blackacre, then A could dispose of part of such interest by limiting the conveyance to the North East Quarter of Blackacre. Thus, A's deed to X carved out and vested in X an undivided one half interest in the North East Quarter of Blackacre. But as to that Quarter, X and B are tenants in common because the unities of time and title have been severed by A's deed. X takes title from a different source than did B and X takes title at a different time than did B. Thus, B and X cannot be joint tenants. B and X each own an undivided one half interest as tenants in common in the North East Quarter of Blackacre in fee simple.

Because a joint tenant has the right and power voluntarily to dispose of an interest in the jointly owned property, the joint tenant's creditors have the right and power to take that interest involuntarily. A's judgment creditor, Y, therefore, had the right to levy upon and sell A's interest in the south half of Blackacre. Having done so, when M purchased Blackacre at the execution sale, the unities of time and title were destroyed because M took this interest in Blackacre from a different source and at a different time than did B. The result is that M and B are tenants in common of the south half of Blackacre, each owning an undivided one half interest therein.

The North West Quarter of Blackacre remained unaffected by the conveyances to X and M. A and B remained joint tenants of that quarter until A's death. Survivorship defeats any right which a surviving spouse otherwise might have in the estate of a joint tenant. It also defeats the rights of the heirs of the deceased joint tenant. Therefore, A's widow, W, and his heir, Z, can claim no interest in the North West Quarter of Blackacre. That quarter belongs to B in severalty in fee simple by the doctrine of survivorship.[28]

28. See Klajbor v. Klajbor, 406 Ill. 513, 94 N.E.2d 502 (1950) (joint tenancy may be severed and the estate destroyed by the conveyance of interest of one of the joint tenants and the interest severed is changed into a tenancy at com-

PROBLEM 6.19: T devised Blackacre "to A and B as joint tenants." The property consisted of a 50 foot lot fronting on a very busy street in a city. One half of the 50 foot frontage was covered by a store building. The other half was vacant. The land was worth $16,000. The building was worth $5,000 but needed $1,000 worth of repairs on the roof as an absolute necessity to make it habitable for business purposes. The other half of the lot could be used for store purposes if a building costing $4,000 were built. A asked B to contribute $500 towards repairing the roof of the existing building and $2,000 towards the construction of another store building on the lot for rental purposes. B refused to do anything. A then repaired the roof for $1,000 and built another store building on the lot for $4,000 and, with B's approval, rented both buildings. A then asked B to repay to A one half of the sums A expended in repairs and in building the new store. B refused. A then sued B to partition Blackacre, it being conceded that it was not partitionable in kind but only by making a sale and dividing the proceeds. Under order of the court Blackacre was sold to X for $26,000. The court then ordered the $26,000 divided as follows: $10,500 to B and $15,500 to A. B objects to this division. Was the court correct?

Applicable Law: A joint tenant has no right of contribution against the other joint tenants for repairs or improvements he or she has made, but if a court orders that the property be partitioned, the court in making an equitable division of the proceeds will take into consideration the expenditures made by one tenant for repairs and improvements.

Answer and Analysis

Yes. A partition suit is in equity and an equity court should do equity. At common law A might have had a cause of action to compel B, the other joint tenant, to contribute for the making of repairs which are absolutely necessary, provided he brought the action before the repairs were made. No such action would lie after the repairs were made. Furthermore, one joint tenant has no cause of action against the other joint tenants for contribution for improvements. Under these principles, it is plain that A had no right against B for contribution either for repairs or the improvement.

In a partition suit, however, each joint tenant has the right to have the jointly owned property partitioned. Under the circumstances, by A making and paying for repairs and improvements, A

mon, but severance of joint tenancy must take place before the death of the cotenant and before the other has become owner of the whole by virtue of the right of survivorship).

has enhanced the value of Blackacre by $5,000.[29] By returning to A the $5,000 which A expended in repairing and improving the property, A is made whole and B is not injured. Had there been no repairs or improvements the property would only have been worth $21,000. There is still that sum left after reimbursing A for A's expenditures for repairs and improvements. Thus, it seems the equity court made an equitable partition of the proceeds.[30]

PROBLEM 6.20: H conveys Blackacre to himself and his wife, W, in the following language, "I, H, hereby grant Blackacre to H and W, husband and wife and their heirs forever, in joint tenancy with right of survivorship, and not to them as tenants by the entirety or as tenants in common, it being my intention that all the rights and powers of joint tenants shall accrue to said H and W." H died intestate leaving S as his sole heir at law. In whom is the title to Blackacre?

Applicable Law: A husband and wife can hold real property in joint tenancy. A joint tenancy (or tenancy by the entirety) in most jurisdictions can be created by husband, H, making a grant "to H and W, husband and wife" with clearly expressed intention to that effect.

Answer and Analysis

W owns Blackacre in fee simple absolute. There is no question concerning H's intention. In unmistakable language H expressed an intention that H and W hold Blackacre in joint tenancy. There is no question either (except in those jurisdictions that do not recognize all types of concurrent estates), that a husband and wife may hold real property either as tenants by the entirety, as joint tenants, or as tenants in common, depending on the intention expressed in the conveyance.

The only real question is this: can a grantor grant to himself and another and thereby create a joint tenancy, (or tenancy by the entirety), when such is the grantor's clearly expressed intention? It

29. While an improver cotenant cannot compel other co-tenants to pay for the improvements, the court takes account of the improvement in the partition action. For example, if feasible, the improvement would be included in the portion of the property set aside to the improver. If the property is sold, however, a portion of the proceeds attributable to the improvement would be set off to the improver. See Johnson v. Hendrickson, 71 S.D. 392, 24 N.W.2d 914 (1946).

30. See Calvert v. Aldrich, 99 Mass. 74 (1868) (where two tenants in common owned a machine shop that needed repair after having caught fire and one tenant paid for repairs after the other refused to contribute, the court held that a tenant in common who makes necessary repairs upon common property without the consent of his cotenant cannot maintain an action at law to recover contribution for costs incurred; rather, partition is the usual and natural remedy). See also, Giles v. Sheridan, 179 Neb. 257, 137 N.W.2d 828 (1965)(Co-tenant who pays off mortgage on which co-tenants are equally liable does so for common benefit of the joint tenants and is entitled to contribution).

seems that a proper analysis can bring only an affirmative answer. The cases present at least three distinct views as to the effect of the conveyance.

At common law the husband and wife were one and he was the one. Thus, when the husband granted to himself and wife, he was granting to himself. When one grants to himself, nothing happens. So the conveyance is void. But this concept is an anachronism. Today the wife is a legal person and her personality is no longer merged in that of the husband.

The second view holds that the effect of the conveyance is to create a tenancy in common between the husband and wife, each owning an undivided one half interest in Blackacre. There are two objections to this result. The first is that it does violence to the grantor's clearly expressed intention that H and W shall not take as tenants in common. The second is that it treats H, the grantor, as the same person, as H, the grantee. This view suggests that one part of the conveyance wherein H conveys to H is void and of no effect, and H therefore remains the owner of one half, whereas the other part of the conveyance from H to W affects only an undivided half of Blackacre which H originally owned and therefore W becomes an owner of such other undivided half. Therefore, they are tenants in common.

The third view and the one which is believed to be the correct one is this: Joint means oneness. In joint tenancy when two, three, or a dozen persons are named as grantees, those joint tenants take as a unit, as one juristic person. In this conveyance H is one person and "H and W" constitute in the singular number quite another person. For the purpose of joint tenancy (or tenancy by the entirety) such grantees or devisees take as a unit personage.

Why do all the cases say that when one joint tenant dies, the survivors take nothing from the decedent but take wholly from the original conveyance? Because each owned the whole and they all owned the whole as a unit. When one died the survivors still continued as a unit owning the whole until there was but one survivor. Thus, when H conveyed Blackacre to "H and W" intending them to take as joint tenants, the grantor, H, was one person, and "H and W" was (singular number) another person, and they as a unit took Blackacre as joint tenants. The grantee, "H and W," take title from the same source, at the same time with the same interest and with unity of possession. When H died W held in fee simple by survivorship.

Today, there is much to be said in favor of carrying out the clearly expressed intention of the grantor in the creation of estates,

even though technically all of the so-called four unities may not be present.[31]

PROBLEM 6.21: T devises Blackacre to A, B and C as joint tenants. A then conveys all of his right, title and interest in the premises "to X for the period of his natural life." (a) What is the effect of this conveyance? (b) Who now owns Blackacre?

Applicable Law: A conveyance by a joint tenant constitutes a severance and a destruction of the joint tenancy as to the conveying joint tenant's interest. Thereafter X owns a life estate in one third as tenant in common and A owns the reversion in that same one third; B and C remain fee simple owners in joint tenancy between themselves as to the other two thirds, but as to X they own the two thirds as a tenant in common.

Answers and Analysis

A's conveyance destroys the joint tenancy as to A's interest and X owns a life estate as a tenant in common in an undivided one third interest in Blackacre; A owns the reversionary interest in that same undivided one third interest; B and C own the remaining two thirds interest as joint tenants between themselves but with X as a tenant in common for his life.

Any conveyance by a joint tenant of his entire interest or a freehold interest, or probably of an estate for years, constitutes a complete severance of that joint tenant's interest in the jointly owned property and destroys the joint tenancy as to that interest. Thus, by conveying a life estate to X, A has severed A's entire interest in Blackacre from the joint tenancy. Having carved out of the whole estate an undivided one third portion, and having created in that undivided portion a life estate in X, A has a reversion in such undivided one third in fee simple. A's conveyance destroyed the unities of time, title and interest without which a joint tenancy could not continue.

However, the four unities remain as to the two thirds interest remaining in B and C which was unaffected by A's conveyance to X.[32] As to that undivided two thirds interest B and C remain joint tenants. If one of them should die without having made a conveyance, the survivor of those two would own that undivided two thirds by survivorship. In other words, there are two tenants in common with the one unity of possession: X has an undivided one

31. See also Miller v. Riegler, 243 Ark. 251, 419 S.W.2d 599 (1967) (Intent to create a joint tenancy is sufficient to create a joint tenancy even though four unities test not met).

32. Jackson v. O'Connell, 23 Ill.2d 52, 177 N.E.2d 194 (1961).

third, and B and C as a unit possess the other two thirds. Thus, B and C occupy two roles. Between themselves they are joint tenants of two thirds interest but as to X they, as a single unit, constitute a tenant in common of the two thirds interest.

A, the owner of the reversion in an undivided one third interest, is not called a tenant in common. Rather A owns a future interest in an undivided one third. A is not called a tenant in common because the phrase "concurrent estates," is limited to possessory estates. It involves presently possessory estates owned by two or more persons. Thus, in our case, B, C and X, but not A, have immediate possessory estates in Blackacre and the possession of B or C or X of Blackacre is in law the possession of all three together.

b. Tenancy by the Entirety

PROBLEM 6.22: T devised Blackacre "to H and W, husband and wife, and their heirs forever, jointly." Thereafter H executed to M a mortgage on Blackacre. H then procured a divorce from W and on a later date married W-1. H then died intestate, leaving W-1 his widow, and X as his sole heir. W sues Y and X seeking to quiet in her the title to the whole of Blackacre. May W succeed?

Applicable Law: At common law, there was a presumption that a conveyance to husband and wife jointly creates a tenancy by the entirety. A divorce eliminates the unity of person in tenancy by the entirety, destroys that tenancy and the husband and wife become tenants in common of the property. During the existence of the tenancy by the entirety, in most jurisdictions neither spouse has the right or power to dispose of or encumber the property without the consent of the other.

Answer and Analysis

No. By appropriate language in the conveyance a husband and wife can hold real property as tenants in common, as joint tenants or as tenants by the entirety, where such estate is recognized. But, at common law, there was a presumption that a conveyance to a husband and wife jointly created a tenancy by the entirety. Under this presumption the conveyance in this case would be construed to make H and W tenants by the entirety rather than joint tenants.

Assuming then that H and W are tenants by the entirety, in most jurisdictions recognizing such estates, neither had the right or power to dispose of or encumber such estate without the consent of the other spouse.[33] Therefore, the mortgage which was executed

33. At common law a husband had greater management and administrative authority over tenancy by the entirety property.

alone by H to M was wholly ineffective at that time to create a lien or incumbrance on the land. M's remedy must be limited to his personal action on the debt owed by H to M. Similarly, creditors of one spouse ordinarily cannot reach the tenancy by the entirety property in satisfaction of their claims.[34]

When H procured a divorce from W, the unity of person which is essential to the creation and continued existence of an estate by the entirety was destroyed and with it the tenancy by the entirety was destroyed.[35] H and W, however, continued in some form of concurrent tenancy. Are they joint tenants with right of survivorship or tenants in common? Logically, theirs would be a joint tenancy because of the five unities in tenancy by the entirety, only one, unity of person, was destroyed by the divorce. The other four unities of time, title, interest and possession, remain. But this generally is not the law. H and W after the divorce should be strangers in their property ownership as far as possible. Tenancy in common is more probably in accord with their intent since it is unlikely either would want the survivorship feature preserved. Most cases so hold.[36]

H and W were then each owner of an undivided one half interest in Blackacre when H married W–1. Upon H's death intestate the title to H's undivided one half interest in Blackacre descended to his heir, X, but subject to W–1's right of dower in such half interest, if dower exists. Thus, W and X each own an undivided one half interest in Blackacre as tenant's in common, with X's undivided half interest possibly being subject to the choate right of dower in W–1 widow.

There is also a good possibility that X's undivided one half interest may be encumbered by the mortgage to M as a result of the doctrine of estoppel by deed. Although the mortgage was initially

34. Sawada v. Endo, 57 Hawaii 608, 561 P.2d 1291 (1977); Central National Bank of Cleveland v. Fitzwilliam, 12 Ohio St.3d 51, 465 N.E.2d 408 (1984) (neither spouse can alienate interest in tenancy by the entirety).

35. Porter v. Porter, 472 So.2d 630 (Ala.1985) (divorce decree does not automatically sever a joint tenancy between the former spouses); Mann v. Bradley, 188 Colo. 392, 535 P.2d 213 (1975) (provision in divorce settlement agreement that joint tenancy be sold upon spouse's remarriage or when youngest child attained age 21 constitutes a severance of the joint tenancy). See also, Duncan v. Vassaur, 550 P.2d 929 (Okl. 1976)(husband and wife were joint tenants and wife killed husband; that act severed the joint tenancy causing ½ of the property to pass to husband's estate and ½ to wife.

36. But see, Finn v. Finn, 348 Mass. 443, 204 N.E.2d 293 (1965) (tenants by the entirety who divorce become joint tenants with right of survivorship pursuant to a property settlement agreement incorporated into the divorce decree). A joint tenancy between husband and wife is not affected by divorce absent a specific provision in their property settlement agreement or divorce decree severing the joint tenancy. See generally, Westerlund v. Myrell, 188 Wis. 160, 205 N.W. 817 (1925).

invalid, upon divorce H acquired an undivided one half interest which was freely alienable and mortgageable. Thus, as to this after-acquired severable interest, H can be estopped to deny the effectiveness of M's mortgage in the same way he would be estopped as to previously conveyed or encumbered other after-acquired property. Thus, if estoppel is invoked against H, his second wife, W–1, and his heir, X, take their interests subject to such mortgage.

COMMON LAW CONCURRENT TENANCIES COMPARED*

Kind of tenancy	How created	Typical words in deed or will	Unities present	Interest owned by tenant	Power of disposition	How can disposition be made	Rights on intestacy	How destroyed
Tenancy by the entirety	By act of the parties, *deed or will*	A "to H & W and their heirs."	Time Title Interest Possession Person	Husband and wife as a unit own the whole, *joint ownership*	Both husband and wife must join in conveyance	By deed only and not by will. Survivorship defeats effect of will	Survivor continues to own all but in severalty	Divorce terminates the tenancy and makes them tenants in common
Joint tenancy	By act of the parties, deed or will	A to "B & C and their heirs as joint tenants with the right of survivorship and not as tenants in common."	Time Title Interest Possession	All tenants as a unit own the whole, *joint ownership*	All may join and dispose of whole or each tenant can dispose of share he did not own as such	By deed only and not by will. Survivorship defeats effect of will.	If only one survivor he continues to own but in severalty. If more than one survivor they continue to own in joint tenancy.	1-One tenant conveys his interest. 2-By partition. In kind among tenants. 3-By any act which breaks any unity.
Tenancy in coparcenary	By law of inheritance	A. dies intestate leaving 3 daughters, B, C & D, his only heirs	Title Interest Possession	Each tenant owns an *undivided* portion which portions are not necessarily equal	Each tenant can dispose of his undivided share or part thereof	By deed or by will	Heir or heirs inherits undivided interest of deceased parcener.	1-By partition 2-By conveyance by one parcener 3-By whole descending on vesting in one parcener
Tenancy in common	By act of the parties, deed, will, or by law	A "to B and C and their heirs share & share alike as cotenants."	Possession	Each tenant owns an undivided portion which portions are not necessarily equal	Each tenant can dispose of his undivided share or part thereof	By deed or by will	Heir or heirs inherits undivided interest of deceased owner	1-By partition among tenants 2-By uniting all titles in one tenant in severalty by purchase or otherwise

[C3454]

Chapter 10

SERVITUDES: EASEMENTS, COVENANTS, EQUITABLE SERVITUDES

Table of Sections

Sec.
10.1 Easements and Licenses.
10.1.1 Easements and Profits Defined.
10.1.2 Creation and Extent.
10.1.3 Extinguishment.
10.1.4 Licenses.
10.2 Covenants Running With the Land.
10.3 Equitable Servitudes.
10.4 Public Policy Limitations on the Enforcement of Real Covenants and Equitable Servitudes.

SUMMARY

§ 10.1 Easements and Licenses

§ 10.1.1 Easements and Profits Defined

1. Most generally, an easement is the right of one person to enter land in possession of another for a defined purpose; for example, A may have a legal right to walk across, lay pipes or string wires over Blackacre, which B possesses.

2. A profit (short for *profit a prendre*) is one person's right to enter land possessed by another and take from it either some part of the land itself or some product of the land; for example, A may have a legal right to go onto Blackacre, which B possesses, and remove sand, oil, gravel, marble, stone, grass, trees, shrubbery, or fish.

3. The principal distinction between an easement and a profit is that an easement gives its owner only the right to use the land of another with no right to take anything from such land, while a profit gives its owner the right to take either the soil itself, or a product of the land. In addition, the owner of the profit may use the land to the extent necessary to enable her to enjoy the profit. For

example, A, having the right to take coal and grass from B's Blackacre, has: (a) the right to go onto Blackacre to where the coal and grass are, (b) the right to cut the grass and sever the coal, and (c) the right to carry off the grass and coal after they are severed.

4. In the United States easements and profits are governed by the same principles respecting classification, creation, extinguishment, right of succession, and determination of scope. Some authorities use the term easement to include both easements and profits, differentiating when necessary between easements with a profit and easements without a profit.

5. Easements (or profits) are classified as:

a. easements appurtenant, and

b. easements in gross.

6. An easement (or profit) is appurtenant when it is attached to a piece of land and the benefits run to the owner of such land. For example, A owns Blackacre and B's Whiteacre lies between A's land and the street. B conveys to A a right of way to go across Whiteacre from Blackacre, and this right is intended to benefit A in his use of Blackacre. This right of way over Whiteacre is an "easement appurtenant" to A's Blackacre and can be used only for the benefit of Blackacre.

7. Easement (or profit) appurtenant analyzed:

Every easement appurtenant requires *two pieces of land* which are *owned by two different persons.* The two pieces of land are:

a. the *dominant estate,* which is the land whose owner is benefitted by the easement, and

b. the *servient estate,* which is the land whose owner is burdened by the easement.

c. the owner of the dominant estate is called the *dominant tenant,* while the owner of the servient estate is called the *servient tenant.*

d. it is said that the servient tract serves the dominant tract, but this really means that the owner's use of the dominant tract is enhanced by his being able to use the right of way over the servient tract. Accordingly, the servient tract is burdened by the easement. One ordinarily expects an easement to increase the market value of the dominant tract, and decrease the market value of the servient tract.

8. An easement (or profit) is in gross when in its creation it is not intended to benefit the owner or possessor of land as such, but is intended to exist without a dominant estate. E. g., A owns Blackacre which contains a gravel pit. B is a road contractor who owns no land but who uses gravel. A conveys to B the right to come

onto Blackacre and remove gravel. B owns a profit in gross which exists wholly independently of B's ownership of any land.

9. The Easement (or profit) in gross:

Every easement in gross requires *one piece* of land which is owned by a person other than the owner of the easement in gross. Only one piece of land is involved:

a. the servient estate, which is the land subject to and burdened by the easement,

b. the owner of the servient estate is called the servient tenant,

c. the owner of the easement in gross is called the dominant tenant, and

d. there is no dominant estate.

10. By analogy to estates in land, an easement (or profit) is real property if its period of duration is either: (a) for an indefinite time, as a fee simple estate; or (b) for the life of a human being. An easement is personal property, a chattel real, if its period of duration is either: (c) for a specific time, such as an easement attached to a leasehold; or (d) from period to period like a leasehold from month to month. *An easement is not an estate;* for it is not a possessory interest and will never ripen into a possessory interest. Thus it is *improper* to speak of an "easement in fee simple absolute." Rather, we use the term "easement in perpetuity" or "easement for life," etc.[1]

11. With respect to use, easements are classified as

a. *affirmative easements* which entitle the easement owner to do affirmative acts on the land in the possession of another. For example, A owns a right of way across B's Whiteacre. A is entitled to go onto Whiteacre, move across Whiteacre and may repair and improve the way on Whiteacre. A has an affirmative easement as to the servient estate, Whiteacre.

b. *negative easements* which take from the owner of the servient estate the right to do some things which, were it not for the easement, she would have a right to do on her own land. E. g., B, who owns Whiteacre which is located between A's Blackacre and the ocean, agrees with A that no building will be built on Whiteacre which will in any way interfere with A's view from Blackacre to the ocean. A has a negative easement on Whiteacre. A negative easement is negative in another sense; it does not permit the dominant tenant to do any

1. See Texas Co. v. O'Meara, 377 Ill. 144, 36 N.E.2d 256 (1941) (easement not subject to livery of seisin, but only to grant, and not in fee).

affirmative act on the servient estate. A has no right to do any act on Whiteacre. The effect of such a negative easement is merely to curtail B's rights on Whiteacre and to permit A to enforce the curtailment.

12. The courts prefer an easement appurtenant construction over that of an easement in gross. If there is doubt as to whether an easement is appurtenant or in gross, it is construed as an easement appurtenant.

13. Easements (or profits) are generally alienable either by deed or by will and are descendible.

14. Whether or not an easement (or profit) is apportionable is determined by the intention of the parties as expressed in the instrument if created by deed or will, and by the manner of its creation if it arises by prescription or implication. E.g., B grants to A and her heirs the right to pasture four head of cows on B's Blackacre. A conveys to C and his heirs the right to pasture two head of cows on Blackacre, A reserving her right to pasture two head of cows there. Because A's apportionment of her profit in gross is measurable (i.e., it specifically states *four* head of cows) and will not surcharge or place any additional burden on the servient tract, and because it seems consistent with the intent of the parties to the original conveyance, the profit in gross created in A is apportionable. However, if A had simply reserved the right to pasture "my cattle" on Blackacre, then there would be no limit to the number of cattle that could be pastured, and A could not transfer a fraction of the right to another.[2]

15. An easement (or profit) is an interest in land requiring compliance with the Statute of Frauds. This does not apply to an easement by implication, which is created by law in connection with a conveyance of part of a tract of land. The intention of the parties can be shown by the surrounding circumstances, and these are provable by parol evidence. If in a given jurisdiction an oral lease for one year is valid, then an orally created easement for one year is probably also valid.

§ 10.1.2 Creation and Extent

1. Easements (or profits) are created as follows:
   a. by prescription
   b. by express provision in a deed or will
   c. by implication
   d. by estoppel

2. This is the most important holding of Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938).

e. by eminent domain

In addition, irrevocable relationships amounting to easements (although generally of shorter duration) may be created by:

a. licenses which have become irrevocable, and

b. refusal to enjoin a trespass or nuisance.

Easement by Prescription

2. An easement by prescription arises by adverse use of the servient estate by the dominant tenant for the period of the statute of limitation used for adverse possession. To mature such an easement against a landowner, the use must be:

a. adverse as distinct from permissive; in derogation of right rather than in subordination to the rights of the landowner (but note that the courts have manipulated this requirement so extensively that it is virtually undermined in many jurisdictions);

b. open and notorious;

c. continuous and without interruption; and

d. for the period of prescription.

3. The extent of the rights matured by prescription is determined by the continued use of the servient estate during the period of prescription. Ordinarily adverse use does not run against a future interest holder, but when the adverse use involves taking the corpus of the property and the remainderman has notice, then the prescription is effective against both the remainderman and the possessory interest.

4. Disabilities may extend the period of time for the acquisition of prescriptive easements, in much the same way as they apply to adverse possession.

5. Tacking of successive periods of adverse use to satisfy the time period is permissible in prescription cases. See Cook v. Hartman, 317 Mont. 343, 77 P.3d 231 (2003).

Easement by Implication and Necessity

6. To establish an easement by implication the following must be shown:

a. that at the time of the conveyance one part of the land is being used for the benefit of the other part (a quasi-easement);

b. that the use is apparent;

c. that the use is continuous; and

d. that the use is reasonably necessary to the enjoyment of the quasi-dominant tract.

7. If the implied easement is in favor of the conveyee and is appurtenant to the tract conveyed, it is called an implied grant; if the implied easement is in favor of the conveyor and is appurtenant to the tract retained, it is called an implied reservation.

8. Since an implied easement is created by law, and is not express in the conveyance of land, all the circumstances surrounding the conveyance, including the following, are important and provable by parol evidence if necessary:

a. the language used in the conveyance;

b. whether the easement is claimed by the grantee or grantor;

c. the degree of necessity that the easement exist or the hardship, if any, if it does not exist;

d. whether the easement will, if implied, confer benefits on both parties to the conveyance;

e. the manner in which the property was used before the conveyance; and

f. the knowledge the parties had concerning the use of the property before the conveyance.

9. An easement by necessity arises when property becomes landlocked by virtue of a conveyance. In that case the landowner who can show strict necessity is entitled to a right of way across the severing line that made the property landlocked. E.g., Blackacre is surrounded on all sides by Whiteacre, Greenacre and Brownacre. When Whiteacre and Greenacre are severed, Blackacre still has access to a street across Brownacre, but when Brownacre is severed Blackacre becomes landlocked. In this case the owner of Blackacre is entitled to a way by necessity across Brownacre, but not across the other parcels. At common law a way by necessity lasted only as long as the necessity lasted.

Easement by Grant

10. An easement created by deed arises when the deed is delivered, and an easement created by will arises at the death of the testator. If the easement is in favor of the transferee or grantee, it is created by express grant; if it is in favor of the grantor, it is created by exception or reservation. Courts are divided on the question whether an easement can be created by the grantor in favor of a third party (one who is neither grantor nor grantee). It appears that a majority of states adhere to the common law rule that easements cannot be created in favor of third parties. The main objection—that such a grant splits the chain of title—is

largely solved by modern land records which facilitate accurate title searching.[3]

11. The extent of the rights under an easement created by deed or will is determined by the words of the instrument which describe the easement.

12. Easements can be taken or extinguished by the sovereign under its eminent domain power. However, an easement is an "interest in land," or "property," for which the sovereign will have to pay just compensation.

§ 10.1.3 Extinguishment

1. An easement (or profit) may terminate in either of two ways, (a) by expiration of time determined at the time of its creation, or (b) by extinguishment, which is determined by events subsequent to its creation.

2. The termination of an easement by expiration of time usually presents little difficulty. Some examples:

a. A grants to B the right to come onto A's Blackacre and dig and carry away gravel for a period of ten years. The profit terminates with the expiration of the ten year period.

b. A grants to B the right to pasture any number of B's cattle on A's Blackacre during B's lifetime. Upon B's death the profit terminates.

c. A owns Blackacre and Whiteacre. She leases Whiteacre to B for five years with a right of way over Blackacre appurtenant to Whiteacre during the lease. When the lease expires the right of way terminates.

d. A owns Blackacre on which is a gravel pit. B is a road contractor. A grants to B the right to come onto Blackacre and dig and carry away gravel for B's use in constructing the El Paso Highway only, and when B has completed construction such right is to cease. When the El Paso Highway is completed, the profit terminates.

e. A and B agree to construct a party wall on the boundary line separating their respective lots. The wall is built. A fire destroys both buildings attached to the wall and the wall itself. The cross easements created by a party wall are based on necessity. When the necessity ceases by destruction of the party wall the cross easements are terminated. Any easement

3. See Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal.3d 473, 102 Cal.Rptr. 739, 498 P.2d 987 (1972) (permitting an easement to be created in favor of a third party); Aszmus v. Nelson, 743 P.2d 377 (Alaska 1987) (same). Contra, Estate of Thomson v. Wade, 69 N.Y.2d 570, 574, 516 N.Y.S.2d 614, 615, 509 N.E.2d 309, 310 (1987).

dependent on an artificial structure for its continuance terminates when the artificial structure is destroyed.

3. The termination of an easement (or profit) takes place by extinguishment through operation of law when any of the following events happen:

a. When an easement appurtenant exists and both the dominant and servient estates come under the ownership of the same person.

Example (1). A owns Blackacre in fee simple and B owns Whiteacre in fee simple. A grants to B a right of way over Blackacre appurtenant to Whiteacre. B then conveys Whiteacre in fee simple to A. One cannot have an easement in her own property. The easement is merged into the fee simple ownership in A.

Example (2). A owns Blackacre in fee simple and B owns Whiteacre in fee simple. A grants an easement to B appurtenant to Whiteacre providing B with a right of way to pass over Blackacre. A then leases Blackacre to B for a period of ten years. The easement is extinguished during the ten year lease. This is a partial extinguishment. When the lease expires and A repossesses Blackacre, B has the right to use the right of way over Blackacre.

b. When an easement is appurtenant to another easement and the owner of the dominant estate becomes the owner of the servient estate.

Example: A owns Blackacre in fee simple. B owns Whiteacre in fee simple, which contains valuable timber. C is a lumber merchant. B grants to C the right to come onto Whiteacre and cut timber. A grants to C the right to haul across Blackacre the timber which he cuts on Whiteacre. The easement over Blackacre is appurtenant to the profit on Whiteacre. A conveys Blackacre in fee simple to C. This extinguishes the easement on Blackacre because C's easement on Blackacre is merged into his fee simple ownership of Blackacre.

c. When the owner of an easement in gross becomes the owner of the servient estate on which the easement is a burden.

Example: A owns Blackacre in fee simple and grants to B the right to come onto the premises and take water from a spring for use in B's machinery. A then sells Blackacre to B. The easement is merged into B's fee simple ownership and is extinguished.

d. When the dominant tenant executes either a deed or a will releasing the easement in favor of the owner of the servient estate.

Example: B has a right of way over A's Blackacre. B executes either a deed or a will which provides that B releases to A the right of way over Blackacre. The easement is extinguished by release. A release of an easement must comply with the Statute of Frauds.

e. When the dominant tenant has abandoned the easement and such abandonment is evidenced by conduct showing an intention to relinquish the right. Non-use of an easement without more will not establish abandonment.

Example: B has a right of way over A's Blackacre appurtenant to B's adjoining Whiteacre. Where the way enters Blackacre from Whiteacre, B builds on Whiteacre a permanent cement wall as part of a patio surrounding his house on Whiteacre. B tells A he has given up his right of way over Blackacre. The oral statement of B alone is not sufficient to constitute abandonment of the easement, but it is admissible and combined with the conduct of B in building the wall does constitute an extinguishment of the easement by abandonment.[4]

f. When the servient tenant has used her land continuously and uninterruptedly for the statutory period of prescription in a way inconsistent with and adverse to the easement and without consent of the dominant tenant.[5]

Example: B has a right of way across A's Blackacre. Without B's consent A plows up the road used as the way and continues to cultivate it during the prescriptive period. The easement is extinguished by prescription.

g. When the servient tenant, in reasonable reliance on the conduct of the dominant tenant, uses her servient estate in a manner inconsistent with the existence of the easement and it would be inequitable to permit further use of the easement, the easement is extinguished by estoppel.

Example: B has a right of way over A's Blackacre and tells A she has no intention of ever using the way again and has not used it for several years. A builds a house on Blackacre over

4. Preseault v. United States, 100 F.3d 1525 (1996) (abandonment occurs when the owner of the dominant estate unequivocally manifests intent to relinquish or acts in a manner inconsistent with future use of the easement; when a railroad ceases to use land for train passage and tears up the tracks, the easement is deemed to be abandoned).

5. E.g., Hickerson v. Bender, 500 N.W.2d 169 (Minn.App.1993) (owners of servient estate built visible durable structures obstructing easement; easement owners' failure to object constituted both abandonment and adverse possession).

the space B used as the easement. Each day as the house is being built B watches the progress and could stop it by asserting her right, but she does nothing until the house is completed. B then asserts her right to use the way. B is estopped to deny that the easement is extinguished.

h. Under the recording acts, if an easement (or profit) is created by grant, the deed is not recorded, and the servient estate is conveyed to a bona fide purchaser for value without notice, the easement is extinguished.

Example: A owns Blackacre in fee simple, and grants to B the right to come onto the premises and take any and all coal and sand which she finds. B does not record the deed. A conveys Blackacre to C, a bona fide purchaser who pays A full value for the property and has no actual or constructive notice of B's profit in the land. C takes title to Blackacre without the burden of the profit on the land. The profit is extinguished.

But Note: the recording statutes generally do not apply to easements (or profits) created by prescription. That is, the buyer of land subject to a prescriptive easement takes the estate as servient even though the easement is not recorded.

i. When the sovereign condemns both the servient estate and the easement under its eminent domain power, and pays compensation to the owners of both, the easement is extinguished.[6] If the sovereign files a claim against only the owner of the servient estate, then it will take the estate subject to the easement.

§ 10.1.4 Licenses

1. The term license is often used ambiguously to refer both to the act of giving permission and to the legal effect of the permission given.

2. It would be preferable to define the term license in reference to the legal relationship resulting from the consent given, but this usage is far from universal. To distinguish the legal relationship "license" from the more substantial relationship "easement," license should ordinarily be limited to a revocable relationship. Most, but not all, licenses are revocable.

3. A license may be one of *three classes:*

a. A *license,* or mere license, which *is revocable;*

b. A *license coupled with an interest* which is *irrevocable;*

6. An easement is a property interest for which the sovereign must pay just compensation when it exercises its eminent domain power.

c. An *irrevocable license*, which arises from the special circumstances under which it was created.

4. A *license* simply *permits one person to come onto land in the possession of another without being a trespasser.*

5. A license can be created by either an express or implied agreement.

6. *A license arises from consent* given by the one in possession of land. Consent being given, *no prescriptive right* can arise through a license.

7. A *license* must be *distinguished from a lease.* A licensee never has possession of land, while a lessee does. For example, A, who is fee simple owner of Blackacre, permits B to come onto Blackacre as a tenant at will. B has possession. B is a lessee, even though his tenancy can be terminated at any minute by either A or B. On the other hand, suppose A permits B to come onto Blackacre to use the land but A retains the possession of the land and simply consents to B's presence on the property without being a trespasser. B is a mere licensee whose license is terminable at the will of A. The lessee's right is exclusive, even against the lessor—i.e., even the tenant at will may insist that the lessor leave her property. The licensee's right is ordinarily nonexclusive, and is shared with the owner of any possessory interest.

8. A *license* must be *distinguished from an easement.* An easement is a substantial incorporeal interest in the land of another and is created by a deed of conveyance, which must comply with the Statute of Frauds, or by a validly executed will.

On the other hand, a *mere* license is no such interest in land and requires no formalities for its creation. However, there are fact situations in which a license and an easement are not all that different. For example, suppose A is fee simple owner of Blackacre in a jurisdiction where either a lease for not more than one year or an easement or profit in gross to last for a period not more than one year may be created orally. A permits B to come onto Blackacre for the purpose of fishing in a stream on the land from 2 to 6 p.m. on a specific day. Is this a profit in gross or a license? If the privilege is at the will of the landowner, A, it is a license, but if the right is irrevocable creating an interest in Blackacre for the 4 hour period, then it is a profit in gross.

An easement or a profit cannot exist at the will of the servient tenant whereas *a mere license is revocable* by either licensor or licensee at any time. The question is usually one of fact as to the intent of the landowner, but if the facts are not in dispute or are agreed upon, it is then a question of law. Usually B's right to fish for 4 hours would be considered a license.

9. A *license* must be *distinguished from a contract.* A contract is always based on a consideration. There may or may not be a consideration for a license. Compare:

(1) A permits B to come onto A's Blackacre to fish for 2 hours with no consideration involved and the permission being revocable at any time by A. B has a mere license.

(2) A permits B to come onto A's Blackacre to fish for 2 hours. B pays A $5.00 for the sole purpose of not being considered a trespasser. B has a mere revocable license. If B is wrongfully ejected by A during the 2 hour period, B will have a contract damages action, but probably not an action for specific performance, for she does not have a "property" interest.

10. An attempt to create an easement or profit which fails because the deed of conveyance is defective will result in a license. E. g., A executes a deed granting to B a right to mine coal on property which is not described in the deed. The deed is ineffective for failure to describe the property on which the coal is to be mined. B has a revocable license to go onto the intended land to mine coal.

11. A *mere license is generally personal* and not assignable but such *a license is assignable if the licensor so intends.* E. g., A, a theater operator, issues tickets to his theater. The words "this ticket is transferable" appear on the face of the ticket. B buys such ticket and assigns it to C. The assignment is valid and C has a license to attend the theater.

12. *If one owns personal property on the land of another with a privilege incidental to such personal property, such privilege is a license coupled with an interest and is assignable with the transfer of the personal property.* For example, A sells to B a wheelbarrow which is located on A's Blackacre and tells B to go onto Blackacre and get the wheelbarrow. B has a license coupled with an interest. B, without getting the wheelbarrow from A's Blackacre, sells it to C with the privilege of taking the article from the land. B has assigned the license coupled with an interest by transferring the wheelbarrow to C with the privilege of getting it from A's Blackacre. A has no right to revoke C's license coupled with an interest if it prevents his getting the wheelbarrow. The license is irrevocable at least for a reasonable time.

13. *If a licensee in exercising his license and in reasonable reliance upon representations made by the licensor as to the duration of the license, has made expenditures of capital or labor so that it is inequitable for the license to be discontinued, it is termed an executed license, or an oral license acted upon, and is irrevocable.*

An executed license is based on estoppel and in many cases is equivalent to an easement.[7]

For example, A owns Blackacre, a riparian tract of land on the east fork of Mill Creek. B owns Whiteacre, a riparian tract of land on the west fork of Mill Creek. A wishes to build a mill on Blackacre but the water supply in the east fork of Mill Creek is inadequate to operate the proposed mill. At A's request B gives A permission to divert the water from the west fork of Mill Creek into the channel of the east fork of the Creek so that there will be sufficient water to operate A's proposed mill. In reliance on the permission given, A builds a dam in the west fork, diverts the water therein to the east fork, builds his mill and begins operating it successfully as a commercial venture. In the building of the dam and the mill A expends $85,000.00. A has an executed license which is the equivalent of an easement giving him a right to continue indefinitely the diversion of the water from the west fork of Mill Creek into the east fork, and B has no right to interfere. B is estopped to revoke or terminate the license.

14. Generally, a license is revoked automatically by the licensor's conveyance of the land or by his doing an act inconsistent with the continuance of the license. In the case of a license coupled with an interest, an executed license, or an oral license acted upon, however, the license is not automatically revoked when the licensor conveys his land.

15. The purpose of the rule that a license relating to the undertaking of activities on another's land is revoked by a conveyance of the land is to protect the marketability of titles. Since the protection is for the benefit of the new landowner, only she can invoke the rule.

16. Successors in title take subject to an irrevocable license if they had notice of the license before their purchase.

See Restatement of Property §§ 512–521; Powell, ¶ ¶ 427, 428.

§ 10.2 Covenants Running With the Land

1. A contract ordinarily binds the parties to it and not others. Thus only the promisor is bound to perform the promise and only the promisee has a right to compel performance of the promise. Among the exceptions to this general principle are: (a) a third person for whose benefit a contract is made may, without being a party to the contract, enforce it against the promisor; (b) the promisee assigns the benefit of the contract to an assignee who

7. See Shearer v. Hodnette, 674 So.2d 548 (Ala.Civ.App.1995) (licensee spent monies in developing and maintaining roadway in reliance on representations of licensor).

may, without being a party to the contract, enforce it against the promisor; and (c) covenants running with the land under which one may, without being a party to the contract, and simply by virtue of becoming owner of the estate in the land, enforce the contract or be compelled to perform the contract.

2. Generally the legal effect of an *easement* (or profit) appurtenant is to *bind land to land.* The dominant tenant owns "an interest in the land of another". If she transfers her dominant estate, the easement (or profit) appurtenant to it passes as an incident to the conveyee, and a transfer of the servient estate carries with it the burden of the easement (or profit) appurtenant. The successor in interest to either estate must recognize the easement (or profit) as an interest in the land and not as a personal obligation or right of either tenant.

3. A covenant running with the land is more than a mere personal contract, but it was historically regarded as less than an easement in the sense that it is not "an interest in land." The common law considered it to lie somewhere between a personal contract on one side and "an interest in land" on the other. Thus, for example, all jurisdictions agree that an easement is a "property" interest for which just compensation must be paid when acquired by the sovereign under its eminent domain power. However, some state courts continue to hold that a real covenant is not a "property" interest, and the condemnor need not pay just compensation for the destruction of the benefit of a real covenant by eminent domain.[8]

This attachment or connection between the estate in land and the covenant which "runs" with it is the essential factor differentiating a covenant running with the land from an easement. Such attachment or connection with the estate in the land is called "privity of estate." Historically neither covenants nor contracts could "run with the land" without privity of estate.

4. The running of the covenant with the land means that the burdens or benefits of the covenant pass to those who succeed to the estate of the original contracting parties. The covenant runs because it is attached to the estate in the land as it is conveyed from one to another in the chain of title.

5. **CAVEAT**: It is customary to speak of *covenants* running with the land. However, the *benefit* and *burden* of a covenant are tested separately, and may run independently of each other, or they can both run if all the requirements are satisfied.

8. See Arkansas State Highway Comm'n v. McNeill, 238 Ark. 244, 381 S.W.2d 425 (1964).

6. For a covenant to run with the land at law, the following characteristics must obtain—

a. There *must be a covenant, or contract,* which originally meant a sealed instrument. Today seals have been largely abolished by statute; a writing which is signed and complies with the Statute of Frauds is usually sufficient. Indeed, in the case of a grantee's accepting a deed containing a covenant by the grantee, such grantee is bound by the covenant without even signing the deed.

b. There *must be an intent* that the covenant shall run with the land. If the word "assigns" or the word "successors" is used in the instrument the intention is usually clear that the covenant is intended to run. But it is sufficient if the intention can be gleaned from the terms, the purpose and the circumstances surrounding the making of the writing.

c. The covenant *must be the type which touches and concerns the land.* This means that the effect of the covenant is to increase the use or utility of the land or to make it more valuable in the hands of the covenantee or to curtail the use or utility of the land or make it less valuable in the hands of the covenantor. Frequently if the benefit of the covenant touches and concerns the land of the covenantee, the burden also touches and concerns the land of the covenantor, and vice-versa. However, it is possible for the benefit to touch and concern the land without the burden doing so, and vice-versa. One must treat separately the running of the benefit and the running of the burden. The covenant must affect the legal relations of the parties as landowners and not as members of the community at large.

d. There *must be horizontal privity of estate.* At common law this generally meant either (1) that the two parties had simultaneous legal interests in the same land, as covered by the covenant—e.g., a landlord and a tenant; the holder of a life estate and the holder of a remainder or reversion; co-tenants; the owner of a servient estate and the owner of an easement across that estate; (2) that the parties were grantor and grantee of the affected land, and the covenant came into effect at precisely the same instant as the land was transferred; as a practical matter, this requires that the covenant be contained in the deed, and most are.

e. In addition there must be *vertical* privity between the original promisor or promisee, and successors in interest to that person; privity generally requires an orderly transfer, as by deed or will or court order; but successive squatters do not enjoy vertical privity.

Example: A sells Blackacre to B with a deed containing a covenant that B will not use Blackacre for commercial purposes, for the benefit of A's retained land. B then sells Blackacre to C, who violates the covenant. A can enjoin the violation. Horizontal "grantor-grantee" privity exists between A and B because the covenant was contained in the deed; vertical privity exists as to C because the transfer from B to C was an orderly sale.

7. Because a covenant running with the land encumbers the land and fetters its free alienability there is a tendency to restrict rather than expand the legal effect of the covenant. The "running" is disfavored rather than favored.

§ 10.3 Equitable Servitudes

1. In the late nineteenth century the American population became substantially urban. With this change came a demand for allocation of land restricted solely for residential purposes. The common law of easements and real covenants was too confused and restricted to satisfy this demand. Courts in equity responded with the doctrine of equitable servitudes.

2. In England covenants will not run with land unless there is a landlord-tenant relation. In the United States covenants will run at law with the fee provided there is privity of estate. The meaning of "privity of estate" is hopelessly confused.

3. The real basis for the enforcement of equitable servitudes is the doctrine of notice as recognized in the equity courts: A person who takes land with notice of a restriction cannot in equity be permitted to violate that restriction.

4. An equitable servitude is a restriction on the use of land enforceable in equity. An equitable servitude is more than "a covenant running with the land in equity" because it is an interest in land. The term, equitable servitude, is broader than "equitable easement" because it applies not only to land but also to chattel property such as a business.

5. Similarities and differences between real covenants (law) and equitable servitudes (equity) are:

a. For a covenant to run in equity the following requirements must be satisfied:

(1) Intent

(2) Touch and Concern (although equity courts often use different terminology—for example, the covenant must affect the use of the land in question)

(3) Notice

b. For a covenant to run at law, the following requirements must be satisfied:

(1) Intent

(2) Touch and Concern

(3) Privity of Estate

c. Thus, privity of estate is not required for a covenant to run in equity, and notice is generally not listed as a requirement for a covenant to run at law. However, if a covenant is not properly recorded and a transferee qualifies as a subsequent BFP (bona fide purchaser) without notice, then, under the recording acts, the burden will not be enforced against her even at law. So the most significant difference between equity and law is that privity of estate is not required for equitable enforcement. Since most equitable servitudes are contained in deeds (or leases), the privity of estate requirement is generally met in any event. As a result, the legal importance of the historical distinctions between real covenants and equitable servitudes has diminished, and many courts confuse the two in their analysis.

6. For our purposes, dealing only with real property, an equitable servitude will be considered as the equivalent of an "equitable easement." This serves one of the interests of this chapter, which is to strive for a unified, or single, concept of servitudes.

(1) For example, compare the cross-easements created by a party wall agreement with the equitable servitudes created in a subdivision building scheme.

(a) A party wall is built on the common boundary line between A's Blackacre and B's Whiteacre. A owns the part of the wall on his side of the boundary line. B owns the part of the wall on her side of the boundary line. A as owner of Blackacre has an easement appurtenant to his land which entitles him to use Whiteacre and B's half of the party wall for the support of A's side of the wall and for the purpose of supporting any building joists inserted into the party wall. B has equal rights in Blackacre in her position as owner of Whiteacre. A may enforce such easement by enjoining B from interfering with A's use of the party wall. B may do the same as to A.

(b) X owns Brownacre on the edge of City M. He subdivides it into 100 lots which he numbers from 1 to 100. He places on record a "declaration of restrictions" which restricts each of the 100 lots in Brownacre to use for single-family homes only, and provides that only a single

house shall be built on each lot. X sells all of the lots to 100 persons and in each deed refers to the "declaration of restrictions" by record book and page number, and a provision that the grantee of the lot and his successors are bound to use the lot conveyed only as the declaration of restrictions provides. A, B, C and D are among the buyers of lots in the subdivision. A's lot is a dominant estate as to the lots owned by B, C and D. A may enforce the restriction as to B, C and D or as to a grantee of any one of them. On the other hand, A's lot is also a servient estate as to B's or C's or D's lot, and each of these lot owners can enforce the restriction as to A's lot. The rights of the lot owners are mutual and reciprocal, and on each lot is both a running burden and a running benefit. Each lot owner takes her lot with actual notice of the restrictions by provisions in her deed and with constructive notice of the restrictions as given by the recorded declaration of restrictions.

(2) Now compare the equitable servitudes created in (b) above with the dividing into lots of a dominant estate and its effect on the servient estate when there is a common law easement. A owns Blackacre, a quarter section of land, abutting B's Whiteacre, another quarter section of land. B grants to A an easement appurtenant to Blackacre for a right of way across Whiteacre, which right of way is to serve Blackacre in its present single ownership and also to serve Blackacre and all its parts if and when it is ever divided into smaller pieces including blocks and lots. Thereafter Blackacre is divided into 100 lots of equal size. The easement over Whiteacre still continues and adheres to every part of Blackacre including each of the 100 lots. The number of users of the easement has been increased from one to 100. By this division of the dominant estate the benefit of the easement runs to each of the 100 lots. The burden remains solely on Whiteacre.

In the equitable servitudes case under (b) above, the benefit of the servitude runs in favor of each of the 100 lots as a dominant estate and the burden of the servitude runs to each of the 100 lots as a servient estate, there being mutual and reciprocal cross-servitudes as to each lot in the development or building scheme. From these comparisons one can see the similarity between easements at common law and equitable servitudes as applied to land.

7. An equitable servitude may be created by a writing which complies with the Statute of Frauds and expresses an intention

that such servitude exist. A deed poll[9] accepted by the grantee providing for an equitable servitude will create such a servitude without the signature of the grantee on the deed. The restriction creating a servitude may take the form of a promise, a covenant, a reservation or a condition. But there must be an intention to bind the land to a restricted use, and not merely to bind the person. Of course, the case may be taken out of the Statute of Frauds by either estoppel or part performance.

8. Under modern recording statutes either a common law easement or an equitable servitude can be enforced against one who purchases the servient land with notice of the existence of the easement or the equitable servitude. Conversely, under such statutes a common law easement or an equitable servitude cannot be enforced against a bona fide purchaser who takes the servient land for value and without notice of the easement or the equitable servitude.

9. The intention of the parties determines who may and who may not enforce an equitable servitude. This intention is to be gathered from the terms of the instrument and the circumstances surrounding its execution.

10. The transferees of the original parties to an equitable servitude are bound by the servitude if it is intended to bind the land, and not merely the persons. The benefits and burdens of the servitude are intended to run to the transferees.

11. If the owner of a dominant tract for the benefit of which an equitable servitude exists conveys the dominant tract, the benefit of the servitude passes to the conveyee as an incident.

12. An equitable servitude may be enforced against one of the parties or her transferee with notice, as to land acquired after the creation of the original relationship between the parties.

13. A court of equity may refuse to enforce an equitable servitude: (a) if its purpose is contrary to public policy; (b) the granting of relief would do more harm than good; (c) when the granting of the relief prayed for would be futile; or (d) the plaintiff is guilty of laches or of violating the servitude.

14. Adverse possession of the land subject to an equitable servitude will not extinguish that servitude if the possession is not inconsistent with the rights created by the servitude. E. g., Arthur owns both Blackacre and Whiteacre and conveys Whiteacre to Beatrice, the deed providing that Whiteacre shall not be used for commercial purposes by B or her successors in interest. Charles gains title to Whiteacre by adverse possession. Charles' possession

9. The deed poll is a deed form, almost universally used in the United States, which does not bear the signature of the grantee.

alone and without violating the servitude is quite consistent with the existence of the servitude and does not extinguish it.

15. An equitable servitude may be extinguished by: (a) the doing of an act which violates the servitude and continuing for the period of the statute of limitation, (b) a release by the dominant tenant or tenants, or (c) by the existence of conditions which make the purpose and object of the servitude impossible of achievement, such as change in the character of the neighborhood from a residential to a business area.

16. An equitable servitude is created if two elements co-exist—

a. an instrument which complies with the Statute of Frauds and

b. an intention that there be a restriction on the use of the land involved.

Note that (b) satisfies the intent and touch and concern requirements. Notice becomes important in enforcing the servitude against particular defendants.

17. For the burden of an equitable servitude to run with the land and be enforceable against a transferee of one of the original parties, three elements must co-exist:

a. there must be an instrument which complies with the requirements of the Statute of Frauds;

b. there must be an intention that there be a restriction on the use of the land involved; and

c. the transferee must take the land with either actual or constructive notice of the existence of the servitude.

§ 10.4 Public Policy Limitations on the Enforcement of Real Covenants and Equitable Servitudes

1. Real covenants or equitable servitudes that discriminate on the basis of race have been unenforceable since 1948.[10] In addition the federal Fair Housing Act prohibits the enforcement of real covenants that discriminate against a protected classification in that statute, which includes race, color, religion, gender, familial status, national origin, and handicap.[11] In addition, courts often construe covenants narrowly when they might otherwise conflict with state policy goals—for example, a covenant limiting uses to

10. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

11. E.g., Hill v. Community of Damien of Molokai, 121 N.M. 353, 911 P.2d 861 (1996) (refusing to enforce covenant barring group home for AIDS patients; state public policy as well as federal Fair Housing Act violation).

"single-family houses used for residential purposes" might be construed as to permit a group home for the handicapped. The "single-family house" restriction refers to an architectural style, which does not change depending on who lives there; and a residential group home is clearly being used for "residential purposes." Other courts simply hold that the public policy of the state precludes enforcement of such covenants.[12] Still other states have statutes that prevent such covenants from being enforced.[13]

2. Many states also construe covenants restricting competition narrowly, often holding that they might be enforceable between the original parties, but that they do not run with the land.[14]

PROBLEMS, DISCUSSION AND ANALYSIS

§ 10.1 Easements and Licenses

§ 10.1.1 Easements and Profits Defined

PROBLEM 10.1: Brenda, the fee simple owner of Blackacre, which bears coal reserves, grants "to Jason and his heirs the right to come onto Blackacre and sever and take away any coal he may find, he to have hereby all the right which the grantor Brenda has over such coal." Ten days later while Jason is exploring for coal on Blackacre he finds Brenda there digging and removing coal. Jason brings an action to enjoin any further digging or removal of coal from Blackacre. Should the injunction issue?

Applicable Law: If a conveyance transfers the corpus of the coal under the surface of real property, then the grantor has no interest therein and has no right to appropriate it to her own use. But if a conveyance conveys only the right to take coal, a profit, then the grantor still owns the coal until it is severed and appropriated by the grantee, and may continue to sever and use it. Whether a conveyance transfers the corpus of the coal or only the right to take the coal depends upon the construction of the words of the conveyance. There are two ways of describing the subject of the conveyance—one is to describe the thing itself, such as by metes and bounds; the other is to describe the power and control which the grantee shall have over the property. If a conveyance transfers coal in a

12. E.g., Crane Neck Association, Inc. v. New York City/Long Island County Services Group, 61 N.Y.2d 154, 472 N.Y.S.2d 901, 460 N.E.2d 1336 (1984).

13. E.g., Sussex Community Services Assn. v. Virginia Society for Mentally Retarded Children, 251 Va. 240, 467 S.E.2d 468 (1996); Hall v. Butte Home Health, 60 Cal.App.4th 308, 70 Cal. Rptr.2d 246 (1997).

14. Davidson Bros., Inc. v. D. Katz & Sons, Inc., 121 N.J. 196, 579 A.2d 288 (1990).

particular property, an easement by implication to go onto the land and take the coal is inferred.

Answer and Analysis

The answer is yes. If Brenda's conveyance to Jason transfers the property in the coal as coal, then the corpus of all of the coal under Blackacre belongs to Jason and Brenda no longer has any interest in it. But if Brenda's conveyance transfers to Jason no coal as coal, but only a right to come onto Blackacre and take and carry away coal, then the corpus of the coal still belongs to Brenda until Jason has exercised the right, severs such coal from its natural position, and makes an appropriation of it. In this latter case Jason would have a profit in gross and Brenda could still continue to dig and transport any coal she wishes from Blackacre. A profit, just as an easement, is ordinarily a right to *share* access or some resource with the owner of the servient estate.

To determine whether Jason now owns coal or merely a right to take coal, we must look at the words of the conveyance. The first part of Brenda's conveyance, "granting to Jason and his heirs the right to come onto Blackacre and sever and carry away any or all coal he may find therein or thereunder" is a typical description of a profit. If these words alone described the grant to Jason, it should be construed as a profit in Jason's favor, Brenda would still own the coal, and the injunction should not issue against Jason for digging and transporting his own coal. But when we add to the above quoted words the remaining words in the grant, "he (Jason) to have hereby all the right which the grantor Brenda has over such coal", then it seems clear that the fee simple in the coal has been granted to Jason. The conveyance states that the grantee, Jason, is to have all the rights which the grantor, Brenda, has over such coal. Brenda has a fee simple over the coal as coal. When in doubt, the instrument is construed more strongly against the grantor. The injunction should issue.

But Jason's ownership of coal would be of little value if he could not use the surface of Blackacre as a means by which to discover and remove the discovered coal. Thus Jason owns not only the corpus of the coal in and under Blackacre, but also an easement by implication to a right of way to find and remove such coal. This must have been intended by the parties to the conveyance even though nothing is said about it expressly. We infer from the circumstances an implied easement in favor of Jason. This easement is appurtenant to Jason's fee simple estate in the coal as coal, which is the dominant estate. Blackacre is the servient estate as to such easement. Brenda is the servient tenant and Jason is the

dominant tenant.[15]

Note: Fee Versus Easement Construction

The *Midland* case[16] held that an instrument labelled "Right of Way Deed" conveyed not an easement for railroad purposes but rather a strip of land in fee simple. The operative words were: " ... hereby conveys and warrants ... a strip of land for right of way over and across the following described tract.... "

Although the rationale was bolstered by a statute preferring a fee simple construction unless clearly limited otherwise, the court noted that the deed stated that it "conveys ... a strip of land." In effect, the words "for right of way purposes" were an expression of purpose, motive or use, but the land itself was conveyed.

The question whether a grant is a fee or an easement is important when the land is no longer used for a railroad or other designated purposes: if a fee was conveyed, the narrow strip of land remains with the grantee or his successor; if an easement was conveyed, the land reverts to the grantor or his successor. Careful draftsmanship can avoid the problem. If an easement is intended, the deed should read that it "grants or conveys a right of way for purposes of a railroad right of way across the following parcel ... " If a fee is intended, the deed should simply state that it "conveys the following described parcel: ... "[17]

PROBLEM 10.2: A is the owner of Blackacre, a section of land containing a small lake almost in the center of the tract and which is fed entirely by springs from adjoining hills. Abutting Blackacre on the south is B's quarter section, Whiteacre. B's land is lower than Blackacre and the natural drainage is from north to south, from Blackacre to Whiteacre. B is in the business of supplying water and ice to some of his neighbors and maintains on Whiteacre a large artificial reservoir and an ice house for such purposes. A conveys to B and his heirs forever the right to come onto Blackacre, pipe water from Blackacre into B's reservoir on Whiteacre and the right to take the ice from the lake on Blackacre for storage on Whiteacre. It

15. See Caldwell v. Fulton, 31 Pa. 475, 72 Am.Dec. 760 (1858) (conveyance of "unrestricted right to take ... all the coal" held to be a conveyance of the coal itself, not a mere license or easement).

16. Midland Val. R. Co. v. Arrow Indus. Mfg. Co., 297 P.2d 410 (Okl.1956).

17. See also Consolidated Rail Corp. v. Lewellen, 682 N.E.2d 779 (1997) (deeds that conveyed a "right of way" for a railroad were easement grants); cf. Hawk v. Rice, 325 N.W.2d 97 (Iowa 1982), holding that a deed conveying a "right of way for the railroad" and that "if the described land ceases permanently to be used for railroad purposes, said land shall revert to grantor, his heirs or assigns," created an easement rather than a defeasible fee. See also King County v. Rasmussen, 299 F.3d 1077 (9th Cir. 2002) (land owner conveyed fee and thus had no reversionary interest when railway was abandoned).

is further provided that the right to take the water and ice may be exercised by piping the water to or storing the ice on any other property in case B should dispose of Whiteacre.

B then purchases Greenacre, another quarter section which also abuts A's Blackacre on the south. B then conveys Whiteacre to X and her heirs, it being understood that the conveyance includes none of B's rights to water or ice from the lake on A's Blackacre. B then runs a pipe from the lake on Blackacre to Greenacre and builds an ice house on Greenacre and continues his business of supplying ice and water to his neighbors by contract. B then sells Greenacre and his rights to ice and water from the lake on Blackacre to Y in fee simple absolute. A refuses to permit Y to take any water or ice from the lake on Blackacre. Y sues seeking to enjoin A from interfering with Y's piping water and taking the ice from the lake. Should the injunction issue?

Applicable Law: A right to come onto property and take water is an easement, while a right to come onto property and take ice is historically a profit because ice was considered a product of the soil. If in its creation an easement or a profit is not intended to be attached to or appurtenant to a particular piece of land, the dominant estate, it is an easement or a profit in gross. In England an easement in gross cannot exist but a profit in gross can exist and is transferable. In the United States an easement in gross of a commercial nature is recognized and is alienable like any other property interest. So also is a profit in gross. A conveyance of a dominant estate carries with it all easements and profits appurtenant to it as incidents unless otherwise expressly provided.

Answer and Analysis

Yes. (1) What interests did A convey to B? From an historical perspective, A conveyed to B an easement to take water and a profit to take ice from the lake on Blackacre. The common law held that by its nature water is owned by no one but belongs to everyone, so it is not connected with any particular piece of land and is not considered a product of the soil. Thus a right to take water from the land of another is treated merely as a right to use the land—a mere easement. Historically, the courts also held that when that same water is frozen it has become a product of the soil and the right to take it should be considered a profit. The distinction between profit and easement, however, is no longer important in this country since the rules relating to both are essentially the same.

(2) Are the interests which A conveyed to B appurtenant or in gross? The deed provides that these rights may be exercised by B on any land which he may see fit to use in connection with them. It is evidently not the intention of A and B either to make them appurtenant to Whiteacre or any other land even though at the time of the conveyance B did own Whiteacre, piped the water to it and stored the ice there. The rights are not appurtenant to Whiteacre but belong to B wholly independent of his ownership of any land in particular. They are rights in gross. Blackacre is the servient estate. As to such easement to take water and profit to take ice, B is the dominant tenant and A is the servient tenant.

(3) May B transfer his easement in gross to take water from the lake on Blackacre? Historically this was an important question. In England an easement in gross could not exist, much less be assigned, but the United States has not followed the English rule. An easement in gross which is of a commercial nature can be conveyed like any other property interest. It is treated exactly like a profit in gross which could exist and was alienable in the English common law. Thus, it was lawful in the United States for B to transfer to Y the easement in gross to take water from the lake on Blackacre.

(4) May B transfer his profit in gross to take ice from the lake on Blackacre? A profit in gross has always been considered an interest in land and alienable as such in both the United States and England. Hence, B's conveyance to Y of the right to take ice from Blackacre was effective and Y became the owner of the profit. Had this easement and profit been appurtenant to Whiteacre in their creation, they would have been alienable with the dominant estate, Whiteacre, because an incident passes with the conveyance of the principal thing. *Both in England and in the United States a conveyance of the dominant estate carries with it all easements and profits appurtenant thereto unless it is otherwise expressly provided.* Y is now the owner of the easement in gross to take water from the lake on Blackacre, and also owner of the profit to take ice from the lake on Blackacre, and A has no right to interfere with Y's exercise of those rights. The injunction should issue.

PROBLEM 10.3: Jennifer is the fee simple owner of Blackacre on which is a six story apartment building, the exterior boundaries of which are coextensive with the exterior boundaries of Blackacre. Henry owns Whiteacre, which bounds Blackacre on the east. Henry makes a written agreement for himself, his heirs and assigns, that neither he nor they will build any building on the west 25 feet of Whiteacre abutting Blackacre so long as the apartment building stands on Blackacre and has windows on the east side, such agreement favoring Jennifer and her heirs as owners of Blackacre. Henry threatens to build

a ten story building on Whiteacre contiguous to Jennifer's apartment house, and Jennifer seeks to enjoin it. Should the injunction issue?

Applicable Law: There are two classes of easements with respect to the use of the servient estate by the dominant tenant. One is affirmative and the other negative. An easement is affirmative if the dominant tenant has a right to go onto the servient estate and do any affirmative act on it. An easement is negative if it curtails the servient tenant in the use of his own servient estate and the dominant tenant has no right to do any affirmative act on the servient estate. Easements are also classified as easements appurtenant and easements in gross. An easement appurtenant is attached to a dominant estate and allows the owner, or dominant tenant, to make a limited use of another property, the servient estate, in connection with his use of the dominant estate. It cannot be used in connection with the use of property other than the dominant estate.

Answer and Analysis

Yes. The case is an example of a negative easement because Jennifer, the dominant tenant, has no right to go onto Henry's Whiteacre, the servient estate, and perform any act there. The easement consists simply of an assurance by Henry and his successors that Jennifer, the dominant tenant, shall have a limited use of the west 25 feet of Whiteacre by having light and air without obstruction. Henry has effectively conveyed to Jennifer part of the rights which Henry had over the west 25 feet of Whiteacre. Having made this conveyance, Henry's right to use his property is limited. Henry may still continue to use the 25 feet for parking space, a garden or other uses which will not obstruct Jennifer's light and air.

§ 10.1.2 Creation and Extent

a. By Prescription

PROBLEM 10.4: B is the owner of Blackacre, which contains a marble quarry. A goes onto Blackacre in plain view of B's house and without right removes 15 cubic yards of marble annually for a period of 8 consecutive years. For the next four years he removes 25 cubic yards of marble from Blackacre. The statute of limitation for prescription within this jurisdiction is ten years and for recovery of damages for trespass on real property is three years. B sues A to enjoin any further removal of marble from Blackacre and for damages for all the marble he has removed. (a) Should an injunction issue? (b) Should B recover any damages?

Applicable Law: To acquire an easement (or profit) by prescription the use must be: (a) wrongful; (b) not with the permission of the land owner; (c) open and notorious; (d) continuous; (e) uninterrupted by physical obstruction or legal proceedings; and (f) continued for the prescriptive period. The extent of the right acquired by prescription is determined by the use to which the land has been put by the use during the prescriptive period. When one has acquired an easement by prescription over a piece of land, the owner of the easement is not liable to the servient tenant for any damage done on the servient estate during the acquisition of the prescriptive right if the damage is within the scope of the easement. But the dominant tenant is liable for damages on the servient estate not within the scope of the easement.

Answers and Analysis

The answer to (a) is yes, but the injunction should be limited to the removal of any marble in excess of 15 cubic yards yearly. The answer to (b) is yes, but the damages should be limited to the value of 10 cubic yards for each of the last three years. The first question is whether A has gained any prescriptive right and, second, what is the extent of this right. The facts state that A took marble without right, within sight of B's house. The taking was (a) wrongful, (b) without B's permission, and (c) open and notorious. These acts were carried on for twelve consecutive years so the taking was (d) continuous.[18] Since B did not interfere with A's taking either by physical obstruction or by legal proceedings, A's taking was (e) uninterrupted. Furthermore, A's taking continued (f) during the ten year period of prescription. All of these elements having concurred during the entire period of the statute of limitation, A acquired a profit to take marble from B's Blackacre. Since there is no dominant estate, it must be a profit in gross.

The next question involves the extent of A's prescriptive right. A has the right to continue to take as much marble as he has taken each year during the period of prescription, or 15 cubic yards. During no single year did he take less than that amount. During two of the ten years he took 10 cubic yards in excess of that amount. A's profit is limited to a right to take 15 cubic yards of marble per year. As to that amount he has a right and no decree of the court should interfere with it. However, he has no right to take any more than 15 cubic yards per year. Hence, the decree should enjoin A from taking any marble from Blackacre in excess of 15 cubic yards per year.

18. But see McNeil v. Kingrey, 237 Va. 400, 377 S.E.2d 430 (1989) (sporadic use of driveway plus claim to have the right to use it "any time" insufficient to establish continuity).

On the scope of an easement acquired by prescription, see Aztec Ltd., Inc. v. Creekside Investment Co.: "an easement acquired by prescription is confined to the right as exercised during the prescriptive period. It is limited by the purpose for which it is acquired and the use to which it is put."[19] However, some courts hold that if a person has acquired an easement by prescription, she may do what is reasonably necessary to preserve the usefulness of the easement, even if this act had not been performed during the prescriptive period. For example, Farmer v. Kentucky Utilities Co., held that a utility company could enter the servient estate to cut brush away from a utility line acquired by prescription, even though they had not cut the brush during the prescriptive period. There was a vigorous dissent.[20]

Once the prescriptive period has passed, the landowner may not recover for any marble taken during any of the prescriptive period which is within the minimum taken. However, the landowner can recover damages for trespass to real property for any excess marble taken within the limitation period. Thus when the statute on this action is three years, B has a right to recover damages for the value of 10 cubic yards of marble for each of the last three years or for a total of 30 cubic yards of marble. Had A continued for eight more years to take 25 cubic yards of marble, then he would have acquired a prescriptive right up to 25 cubic yards of marble per annum. See Restatement of Property §§ 457–460, 465, 477, 478.

Note

In prescription cases the courts generally do not apply the statute of limitation for adverse possession, because easements are not themselves possessory interests; thus statutes for the recovery of the possession of land do not apply. Furthermore, since the adverse use is not continuously in possession, the statute of limitation would have to be started repeatedly. Rather, the courts have borrowed the period for prescription from the state's adverse possession statute, even though the doctrine of prescription is, in most cases, judge made. A few states, such as California, have specific statutes covering easements by prescription.

PROBLEM 10.5: Angela is fee simple owner of both Blackacre and Greenacre. Between these two tracts lies Jared's Whiteacre. Each tract contains 80 acres. Tinseltown is located just north of Greenacre, north of Whiteacre. For fifteen years both the public generally and Angela have used a road across Blackacre, Whiteacre and Greenacre which is the shortest way from south of Blackacre to Tinseltown. The period of prescrip-

19. 100 Idaho 566, 568, 602 P.2d 64, 66 (1979).

20. 642 S.W.2d 579 (Ky.1982).

tion in the jurisdiction is ten years. Jared puts a fence across the road and Angela seeks a mandatory injunction compelling Jared to remove the fence. During the trial Angela testifies that she used the way openly and graded it every year for fifteen years, that she has never received permission to use the road across Jared's Whiteacre, and denies that she ever talked to Jared about obtaining permission to use or purchasing a right of way over Whiteacre as Jared testifies. The trial court grants the injunction and Jared appeals. How should the appellate court rule on Jared's appeal?

Applicable Law: Title by adverse possession is a title to corporeal property. Title by prescription is a title to incorporeal property, a right only. Neither of these titles can be gained if the possession or use is with the consent of the landowner. In prescription the adverse use does not have possession of the land—she only uses it, and that use need not be exclusive but may be used in common with the public and the landowner.

There are three distinct views as to the legal effect of a showing that land has been used for the prescriptive period. One view is that it raises a presumption of adverseness. Another is that unless there is specific evidence of adverseness, there is a presumption of permissiveness. The third is that there is no presumption either way and the burden of proof is on the claimant to show all the elements of prescription, including adverseness. If there is evidence to support the fact finder's decision, then the appellate court must affirm the judgment of the trial court.

Answer and Analysis

The judgment should be affirmed. There is a difference between gaining title to land by adverse possession and gaining title to an easement by adverse use, even though both must be gained without the consent of the landowner. Adverse possession requires that the adverse possessor have exclusive possession of the land for the statutory period. The title gained by adverse possession is said to be title to corporeal property. But title gained by prescription is always to incorporeal property—merely a right to use. To gain such title, the adverse claimant does not have possession of the land and very often the use which she makes of the servient estate is not exclusive. An adverse claimant may gain title by prescription to a right of way while the same way is being used both by the public and by the owner of the servient tract. In our case the fact that the public is also using the road over Whiteacre does not prevent Angela's gaining a right of way over the road by prescription. The

facts state that Angela has used the road for fifteen years, which exceeds the statutory period by five years.[21]

There are three possible rules as to the legal effect of the use of a way over the land of another for the prescriptive period: (1) Some cases hold that such use raises a presumption that the use is adverse. (2) Other cases hold that unless there is direct and specific proof that the use has been adverse, then there is a presumption that the use is permissive. (3) The third view is that there is no presumption either in favor of adverseness or permissiveness.

The first view has a great deal of support in recent cases. For example, in Fischer v. Grinsbergs,[22] the court held that even long continued use of a shared driveway created by express agreement of the parties constituted "adverse" use. Under the third view there is usually just one question for the appellate court, and that is whether there is evidence to support the findings of the trier of fact. The claimant of the prescriptive right must prove that the use is adverse, that is, that it is wrongful, not in subordination to the owner of the land claimed to be burdened with the easement, and open and notorious. He must also prove that the use is continuous and uninterrupted for the entire statutory period. In the above facts it appears that Angela used the way for more than the statutory period of ten years. There is evidence that she received no permission to use such way and that she used it openly and notoriously. The question of continuity is for the trier of fact, and there appears no evidence that there was any interruption. The most that can be said concerning Jared's testimony that Angela came to him to buy a right of way across Whiteacre and sought permission to use it, and that Angela thereby recognized Jared's paramount title and attempted to make her acts subordinate to it, is that it raised a conflict in the evidence. Even if that is so, it remained a question of fact, and when the trial court found for the plaintiff, the facts were settled that the use was wrongful, without subordination to Jared or Jared's interests, open and notorious, continuous and uninterrupted for the statutory period.[23]

Note: The "Lost Grant"

One of the greatest inconsistencies in the law of prescriptive easements is the idea of the "lost grant," sometimes used to justify

21. However, the claimant must show that she used the right of way herself for the prescriptive period; she may not predicate her claim on use by the general public for part of the prescriptive period. See Cardenas v. Kurpjuweit, 114 Idaho 79, 753 P.2d 290 (App. 1988) (no prescription where general public used easement in belief that it was a public road).

22. 198 Neb. 329, 252 N.W.2d 619 (1977).

23. Cf. Lunt v. Kitchens, 123 Utah 488, 260 P.2d 535 (1953).

prescription.[24] The Blackstonian view was that evidence of long use of an easement without objection by the owner of the possessory interest raised a presumption that there had once been a grant of the easement, which was now lost. Under this view *acquiescence* tends to establish the easement. This rationale is flatly contrary to the modern rationale requiring a showing of *adverse,* or "hostile," use. The trend is away from the "lost grant" theory and toward the "hostility" theory of easement by prescription,[25] but some courts continue to hold to the "lost grant" theory.[26]

Note: Prescription and the General Public

Problem 10.5 noted that the general public also used a right of way across the affected parcels. Can the "general public" acquire a right of way by prescription? Most cases say no. For example, if the general public sunbathes on A's beach property for the prescriptive period, A will not have given up such a right. The public is not a single entity for the purpose of prescription—or, to look at it another way, the individual members of the public are not in "privity" with one another. If any particular member of the public sunbathes on A's beach for the prescriptive period, that particular member may acquire a prescriptive right, but we cannot simply aggregate various people's use.[27]

On the other hand, if a large group of people are acting as agents for a single entity, their aggregated use may entitle the entity to a prescriptive easement. For example, in MacDonald Properties, Inc. v. Bel–Air Country Club,[28] the court held that golfers who retrieved their balls from a private yard were agents of the country club, and the club itself acquired an easement by prescription preventing the property owner from erecting a fence. And in Zuni Tribe v. Platt the court found that regular periodic use of a roadway by members of an Indian tribe could create an easement by prescription in favor of the tribe.[29]

PROBLEM 10.6: A owns Blackacre, a city lot, on which there is no water supply. B owns Whiteacre abutting Blackacre on which there is a spring with plenty of pure water. A lives on

24. See Dartnell v. Bidwell, 115 Me. 227, 230, 98 A. 743, 745 (1916) (proof of acquiescence is required to raise presumption of lost grant; letter ordering claimant to stop using roadway was sufficient evidence of nonacquiescence).

25. See Masid v. First State Bank, 213 Neb. 431, 329 N.W.2d 560, 563 (1983).

26. See Stoebuck, The Fiction of Presumed Grant, 15 Kan. L. Rev. 17 (1966).

27. See State ex rel. Haman v. Fox, 100 Idaho 140, 594 P.2d 1093 (1979). But see Gion v. City of Santa Cruz, 2 Cal.3d 29, 84 Cal.Rptr. 162, 465 P.2d 50 (1970), suggesting that the citizens of a municipality might collectively acquire bathing rights by prescriptions, provided that the municipality itself had taken some action asserting their rights, such as maintenance or trash collection. *Gion* was subsequently overruled legislatively. See County of Los Angeles v. Berk, 26 Cal.3d 201, 161 Cal.Rptr. 742, 605 P.2d 381 (1980).

28. 72 Cal.App.3d 693, 140 Cal.Rptr. 367 (1977).

29. 730 F.Supp. 318 (D.Ariz.1990).

Blackacre and in 1940 begins to trespass on Whiteacre by going to a spring and bringing home buckets of water for use on Blackacre. In 1942 B notices a path from Blackacre to the spring on Whiteacre and places a sawhorse across the path. A pushes the sawhorse to one side and continues to use the path and take water from the spring on Whiteacre. This state of affairs continues until 1950, when B writes a letter to A telling him in no uncertain terms to stay off Whiteacre and to take no more water from the spring. A pays no attention to the letter and continues to use the path and take water from the spring. During the time from 1940 to 1955 A has continued to take substantially the same amount of water from the spring, 30 gallons per day. The statute on prescription is ten years. In 1955 B sues A both for damages for trespass and to enjoin further trespass on Whiteacre. Should B recover?

Applicable Law: The running of the statute of limitation in prescription may be stopped either by: (a) legal proceedings brought against the wrongdoer; or (b) by such obstruction or interference on the land that, if the easement actually existed, would give the easement owner a cause of action. A physical obstruction placed across a right of way will normally toll the running of the statute of limitation, but oral or written protestations, such as a letter, in most states will not affect the running of the statute. The statute of limitation begins to run in favor of the wrongdoer when a cause of action accrues to the landowner.

Answer and Analysis

The answer is no. For purposes of analysis it may be assumed that A's use of Whiteacre for the years 1940 to 1942 is adverse. To acquire an easement by prescription the use must also be continuous and without interruption. The terms are not synonymous. "Continuous" refers to the behavior of the claimant; "without interruption" refers to the conduct of the potential "servient owners." By 1942 it is clear that B had notice of A's trespasses on Whiteacre and that he placed a physical obstruction in the form of a sawhorse across the path which A was using. This obstruction may interrupt the running of the statute of limitation in A's favor. Either a legal proceeding against the wrongdoer or any interference with the use which, if the right of way or easement actually existed, would give rise to a cause of action, will stop the running of the statute of limitation. Using this test it is clear that had A actually had an easement over Whiteacre to remove water from its spring, B's placing a sawhorse or other physical obstruction across the way would have given A a cause of action against B. Thus, when B put the sawhorse across A's path in 1942, it stopped the running of the

ten year prescriptive period in A's favor. The facts indicate, however, that A simply moved the sawhorse aside and continued to exercise his "easement." His use was not actually interrupted.[30]

But B's *conduct* tends to show non-acquiescence and may be a sufficient interruption. In that case A's adverse use would have to start anew in 1942. In any event, however, A continued to use the path and to take water from the spring. The instant A pushed the sawhorse to one side and continued to trespass, a cause of action accrued in B's favor against A and the statute of limitation began to run again. The statute does not run to protect the wrongdoer but to compel the landowner to be diligent, and if he does not thereafter act within the prescriptive period, the wrongdoer will gain an easement.

What is the effect of B's letter to A in 1950 telling A to keep off Whiteacre? If A actually had an easement over Whiteacre would the writing of such letter by B to A give A a cause of action? Of course not. It would in no way interfere with A's use of his right of way. B's letter to A had no legal effect on the running of the statute of limitation. Note, however, that in some states where acquiescence, consent by silence, is considered an essential element of prescription, such a letter is held to stop the running of the statute because it breaks the silence.[31] This is not the majority rule and is not applied in this case. The statute of limitation kept running in A's favor from 1942, if not from 1940, to the time of the bringing of this action in 1955, more than the ten year statutory period. The injunction should not issue in B's favor.

But should B have damages for the trespass? No. A has taken substantially the same amount of water each day from Whiteacre. The extent of the use in an easement by prescription is determined by the minimum use to which the dominant tenant puts the servient estate during the entire period of prescription. Because such minimum use during the ten year period from 1942 to 1952 was 30 gallons per day, and A did not take more than that number of gallons, B has no right to damages. Once the prescriptive easement has matured, the law considers all damages caused during the entire period as barred from the beginning of the running of the statute. B cannot recover.[32]

PROBLEM 10.7: Madonna, who is ten years old, is the owner of Whiteacre in fee simple. Leroy has a life estate in adjacent Blackacre, and the remainder in fee is in Naomi. Acting with-

30. Cf. Conness v. Pacific Coast Joint Stock Land Bank, 46 Ariz. 338, 50 P.2d 888 (1935) (prescriptive period not interrupted by mere vocal protest).

31. See Dartnell v. Bidwell, 115 Me. 227, 98 A. 743 (1916).

32. See Lehigh Val. R. R. Co. v. McFarlan, 43 N.J.L. 605 (E. & A.1881); Restatement of Property §§ 459, 460, 465, 477.

out legal authority, Leroy builds a road across Whiteacre which he uses in connection with Blackacre. At the age of 25 years Madonna is rendered non compos mentis by an automobile accident and remains in that condition until the age of 45 when she regains her full mental functions. Leroy does not limit his claimed right of way across Whiteacre to the life estate which he has in Blackacre. Rather, he denies that Madonna has a right at any time to prevent either Leroy or his remainderman from using the road on Whiteacre, and characterizes his claim as an easement in perpetuity. Leroy continues without interruption to use the road across Whiteacre until Madonna reaches the age of 35 at which time Madonna, through her guardian, sues Leroy for damages for trespassing on Whiteacre. The period of prescription is twenty years with an additional ten years beyond the removal of any disability existing at the time the cause of action accrues. Leroy wins this suit and dies. Naomi continues to use the road. When Madonna is 36 years old she sues through her guardian to enjoin Naomi from using the road. Should the injunction issue?

Applicable Law: No disability has any effect on the running of the statute of limitation unless it exists when the cause of action accrues. Intervening and supervening disabilities which occur after the cause of action accrues do not affect the running of the statute of limitation. A disability is entirely personal and the only person who is protected by an extension of the statute of limitation is one who is under a disability at the time of the accrual of the cause of action. Disabilities cannot be tacked one to another. In no event can an adverse use mature into a prescriptive right in less time than the period provided for in the statute of limitation.

Normally a prescriptive right will last no longer than the right that is claimed by the adverse use during the period of the statute of limitation. But the claim is not the test. The test for the duration of the easement by prescription is the extent of the denial by the adverse use of the landowner's rights during the period of the statute of limitation. Thus, a life tenant may by prescription create an easement in perpetuity appurtenant to her property which will inure to the benefit of her remainderman.

Answers and Analysis

No. This problem presents two important subjects, (a) disability and (b) the duration of an easement by prescription.

No disability has any legal effect on the running of the statute of limitation unless it exists at the time the cause of action accrues.

No disability occurring after the accrual of the cause of action will toll the statute. Further, disabilities are entirely personal and cannot be tacked. Of course, if there are two or more disabilities existing at the time of the accrual of the cause of action, the longer of the two will govern. In no event, however, will a prescriptive right mature unless the wrong has continued for the minimum period of the statute of limitation. Applying these principles, Madonna's cause of action against Leroy accrued when Madonna was ten years old, and at that time she was laboring under one disability only, infancy. The fact that she was rendered incompetent at age 25 is wholly immaterial and has no legal effect. It is an intervening disability occurring after the disability of infancy has ceased. Madonna's disability of infancy is removed when she comes of age, probably 18 today but formerly 21. Thereafter she has ten more years to bring her action against Leroy which would be no later than her 31st birthday. On the other hand, under no circumstances could Leroy mature a prescriptive right in less than the twenty year statutory period. Madonna did not bring the action until she was 35 years old. The result is that Leroy has gained a prescriptive easement over Whiteacre appurtenant to Blackacre. Leroy was properly awarded judgment against Madonna.

What is the duration of the easement Leroy acquired? One who gains an easement by prescription usually gains no larger interest in point of time than that which he claims during the period of prescription. If Leroy in our case had claimed an easement only for the period of his interest in Blackacre, that is, during his lifetime, he would have had an easement which lasted only that time and it would have ceased upon his death. But the claim of the wrongdoer is not the test. The test is the extent of the denial of rights made by the wrongdoer as to those against whom he claims the easement.[33] In this case Leroy denied that Madonna had any right to prevent either Leroy or the remainderman, Naomi, from using the road over Whiteacre. Thus the denial of rights was for an indefinite period of time and matured in Leroy, appurtenant to Blackacre, an easement in fee simple which can be enjoyed not only by Leroy during his lifetime but by his remainderman in fee simple, Naomi. The injunction should not issue against Naomi.

PROBLEM 10.8: A is fee simple owner of Blackacre which abuts Whiteacre in which B has a life estate and C has the remainder in fee simple. Whiteacre contains a marble quarry which has been used many years. On Blackacre A conducts a business of processing marble for building purposes. A adverse-

33. A growing number of cases hold, however, that the claimant's state of mind is not relevant to the question whether a prescriptive easement has been acquired. E.g., Cardenas v. Kurpjuweit, 116 Idaho 739, 779 P.2d 414 (1989).

ly uses Whiteacre by taking marble from the quarry and using it in his business on Blackacre. B advises C of A's taking of the marble. After such use by A for two years A dies and Blackacre descends to A's son, H, who continues such adverse use of Whiteacre for three years when H's creditor, X, levies upon and sells Blackacre to Y. Y continues the same adverse use of Whiteacre for seven years, at which time B dies. C sues to enjoin Y from further use of the quarry on Whiteacre. The statute of limitation is ten years. Should the injunction issue?

Applicable Law: Periods of adverse use may be tacked to one another if there is privity between the adverse users. Privity may exist whether a conveyance from one adverse user to another is voluntary or involuntary. Adverse use of land in the possession of a life tenant does not ordinarily affect the remainderman, and generally a prescriptive easement is acquired only against the life tenant, because the user does not give the remainderman a cause of action when possession alone is affected. But when the adverse use involves taking the corpus of the property and the remainderman has notice of such use, he has a cause of action against the adverse user and the statute of limitation runs against the remainderman. In such case the profit acquired by prescription is binding on the remainderman. In all cases of profits and easements the servient tenant may use the servient estate in any way he wishes so long as his use does not interfere with the profit or easement of the dominant tenant.

Answer and Analysis

The answer is no. This set of facts raises three questions: (1) May periods of adverse use be tacked to one another to make up the period of prescription? (2) Does adverse use of a piece of land in the possession of a life tenant affect the remainderman? (3) To what extent may a servient tenant use the servient estate?

Periods of adverse use may be tacked to one another provided there is privity between such adverse users. The rule applies whether a conveyance is voluntary or involuntary. In our case there is privity by descent between A and his heir, H. There is likewise privity between H and the purchaser of Blackacre on execution sale, Y, even if such sale is involuntary. Hence, the two years of adverse use by A, the three years of such use by H and the seven years of use continued by Y, may be tacked to make up a continuous period of twelve years. Y matured against B, the life tenant of Whiteacre, a profit appurtenant to Blackacre to use Whiteacre for the quarrying of marble.

But how did these adverse acts on Blackacre affect C, the remainderman? Had the use been such as to affect the possession only, such as using a roadway over Whiteacre, then C would not have been affected in the least for no cause of action would have accrued in his favor. Under such circumstances the death of B would have terminated the easement. However, the acts of A, H and Y were also adverse to C, the remainderman, because the corpus of the soil itself was actually being taken. In such cases the only real question is whether the adverse acts are committed openly and notoriously so that the remainderman has notice. B advised C of the depredations being committed on Whiteacre. Thus, the use was adverse to the remainderman as well as to the life tenant and the injunction should not issue. The prescriptive profit is in perpetuity, is binding on C and constitutes a burden on C's servient estate, Whiteacre, and is a profit appurtenant to Y's dominant estate, Blackacre.

The third question involves the right of the servient tenant to use the servient estate. The servient tenant has a right to use his servient estate as he pleases, so long as his use does not interfere with the easement or profit which burdens the servient property. In our case the profit in Y's favor is not exclusive and the servient tenant, C, may continue to take marble from the quarry to any extent he wishes so long as his operations do not interfere with those of Y. See Restatement of Property §§ 462–464, 481.

PROBLEM 10.9: Ronald is the owner in fee simple of Blackacre which adjoins Whiteacre. Frances owns Whiteacre in fee simple. Ronald maintains a large two story house on Blackacre, and lives there with his wife and four minor children. By adverse use Ronald acquires a right of way to walk across Whiteacre which is used by Ronald and the members of his family. Ronald's children grow to adulthood and leave home. Ronald and his wife occupy the house alone. The neighborhood changes from one occupied by single houses to one of apartment houses. Ronald then remodels his house and makes it into an apartment house for four families. The members of these families all use the way across Whiteacre which Ronald has acquired by prescription. Frances sues to enjoin what she alleges to be excess use. Should the injunction issue?

Applicable Law: The extent or scope of an easement acquired by prescription is determined by the extent of the use during the period of prescription. In determining whether a claimed use is permitted by the easement there must be a comparison of the use made of the servient estate during the prescriptive period with the claimed use after the easement has been established. If the claimed uses are due to the change in the condition of the dominant estate, and such changed condition

is the result of the normal and reasonable evolution and development in the use of the dominant estate, then the servient tenant may be charged with having foreseen such development. One can reasonably say that the matured easement includes the claimed use. On the other hand, if the claimed use in connection with the altered condition of the dominant estate is beyond the normal evolution and development of the dominant estate, then such claimed use should not be allowed.

Answer and Analysis

No. Families and their members change. The character of neighborhoods changes. Social and economic orders change. The use to which a property is put in a neighborhood is never static over time. Such changes are always foreseeable in the aggregate even though not in detail. While the nature and extent of the use during the prescriptive period determine the general extent of the use to be made of the servient tract after the easement is matured, this use is not limited to the use for the benefit of the dominant estate in the condition in which the dominant tract existed during the prescriptive period. Both the adverse user and the servient tenant must be charged with foreseeing the normal, natural and reasonable evolution and development in the use of property in the neighborhood. In this case it seems quite reasonable to charge Frances, during the period of adverse use, with foreseeing the changes that have taken place in the use of Ronald's Blackacre. The physical use of the way over Whiteacre was by a single family during the running of the statute of limitation. Thereafter it is used by four families. Although it is used by a few more people, it would seem that the physical use as to the servient tract remains substantially the same use as during the prescriptive period.

The general purpose of the use during the running of the statutory period is to serve the dominant tract and the dominant tenant in his use of such tract for family dwelling purposes. After the easement is matured the purpose is to serve four families instead of one family. The purpose seems to be the same as during the period of prescription. As for the burden cast on the servient estate by the four-family use instead of the one-family use, the degree of burden does not seem sufficiently different as to say it is unreasonable, especially when balanced with the needs of the dominant estate. Thus, it seems a fair conclusion that the use of the servient estate under the changed conditions under which the dominant estate is being utilized, is a reasonable and normal use which could have been reasonably foreseen by Frances.

Suppose the dominant tract has been transformed into a bicycle shop and the way is used by Ronald, his family and his

customers to support bicycle traffic. This new physical use of the way cannot be justified for it is quite different in kind from the physical use of the way for walking purposes during the maturing of the prescriptive right. Furthermore, the purpose which this new use would serve would be quite different in kind than that during the prescriptive period. Further, the operation of bicycles on the foot path would constitute an additional burden on the servient tract which cannot be justified. Indeed, it might well be assumed that the servient tenant, Frances, would have interrupted the use of the way for bicycles during the prescriptive period although she did not do so for foot traffic. Suppose Ronald has transformed the dominant tract into a cement factory with large truck loads of cement and cement products coming to and leaving the servient tract over the prescriptive foot way. That use would not have been foreseen by Frances in the normal and reasonable evolution and development of the dominant tract and it would be unreasonable to allow such use under the conditions under which the prescriptive easement was gained.[34]

Incidentally, when an easement is taken by prescription, the claimant is not required to compensate the owner of the now servient estate.[35]

Note: Prescription and Negative Easements

Only affirmative easements—the right to enter the land of another—can be created by prescription. Negative easements—the right to have someone refrain from doing something on her own land—generally cannot be. The famous *Fontainebleau* case[36] held that the plaintiff did not acquire an easement by prescription for access to sunlight across the defendant's property. What the plaintiff was in effect requesting was a legal rule that if the defendant did not build on its property for the prescriptive period, during which the plaintiff's property received sunlight over the defendant's property, then the defendant could never build on that property.

The one case that can be regarded as an exception is Prah v. Maretti,[37] which recognized a right of access to light under a nuisance theory rather than a prescriptive easement theory. See Ch. 11.

34. See Glenn v. Poole, 12 Mass.App. 292, 423 N.E.2d 1030 (1981) (prescriptive driveway acquired when the claimant operated a hauling business permitted him later to run a snow plowing business, even though this required the use of heavier vehicles).

35. See Warsaw v. Chicago Metallic Ceilings, Inc. 35 Cal.3d 564, 199 Cal. Rptr. 773, 676 P.2d 584 (1984), discussing compensation but refusing to require it.

36. Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla.App.1959). See also Sher v. Leiderman, 181 Cal.App.3d 867, 226 Cal. Rptr. 698 (1986) (rejecting theory of prescriptive access to sunlight); Mohr v. Midas Realty Corp., 431 N.W.2d 380 (Iowa 1988) (rejecting claimed prescriptive easement for view of plaintiff's business across defendant's land by passing motorists).

37. 108 Wis.2d 223, 321 N.W.2d 182 (1982).

b. By Express Provision in Deed or Will

PROBLEM 10.10: A is the fee simple owner of Blackacre which lies between B's two tracts, Whiteacre and Greenacre. B has a flowing well on Whiteacre and wishes to pipe some of the water across Blackacre to Greenacre. A conveys to B and his heirs a right of way across a strip of land 6 feet wide along the north edge of Blackacre, in which B may bury and maintain a pipe not to exceed 8 inches in diameter and not closer than 2 feet to the surface of the ground, for the purpose of carrying water from Whiteacre to Greenacre. The easement is to be appurtenant both to Whiteacre and Greenacre. The pipe was installed and the surface of the ground made level. Thereafter B objects to A's continued use of the six foot strip for raising crops as A has done before and which use in no way interferes with B's underground pipe. A objects to B's coming on to Blackacre and trampling the crop above the pipe which B did to repair a leak. Then B discovers oil on Whiteacre and uses the pipe for transporting oil from Whiteacre to Greenacre. A sues to enjoin (a) B's use of the pipe for transporting oil and (b) B's coming onto the 6 foot strip of Blackacre to repair the pipe. B counterclaims to enjoin A from raising crops on the 6 foot strip. Should any injunction issue? If so, to whom and for what?

Applicable Law: The extent of an easement created by deed or will is determined by the words of the instrument. The dominant tenant has the right to enter on the servient estate for the purpose of repairing, maintaining and improving the means by which the easement is enjoyed and to make such means effective. The servient tenant has the right to make the maximum use of his servient estate consistent with the rights which he has conveyed to the dominant tenant in creating the easement. In the absence of agreement there is no duty on the part of the servient tenant to do any affirmative act to keep the easement effective.

Answers and Analysis

The answers are these: (1) B should be enjoined from using the pipe for transporting oil. (2) B should not be enjoined from coming onto the 6 foot strip to repair his pipe. (3) A should not be enjoined from using the 6 foot strip for raising crops.

In this case we have an easement created by deed which expressly gives the dominant tenant, B, the privilege of using Blackacre for the purpose of maintaining a pipe under the ground for carrying water from Whiteacre to Greenacre. That pipe is to be used for no other purpose. Had the deed contained a provision that the pipe might be used for transporting water "or for any other lawful purpose," or a similar expression, then the pipe might be so used. When the instrument unambiguously limits the use to the carrying of water by an 8 inch pipe, then any other use is beyond the scope of the created easement. It is quite immaterial that transportation of oil takes no more room in the pipe or in the ground than the transportation of water. The servient tract, Blackacre, belongs to A and he may limit such uses as he wishes. B should be enjoined from transporting oil in the pipe across Blackacre. Of course, the easement for transporting water from the flowing well on Whiteacre to Greenacre still exists in B's favor.

When one has such an affirmative appurtenant easement as B has in this case, the easement carries with it the right to do affirmative acts on the servient tract as are necessary for the enjoyment of the easement. B should not be enjoined from going onto Blackacre and repairing his pipe so long as he does no unnecessary damage to either A's crops or land.[38]

On the other hand, the owner of a servient tract has the right to make the maximum use of his land as long as such use is not inconsistent with the rights which he has granted to the dominant tenant.[39] A has the right to raise crops on the strip of land encasing B's water pipe so long as it does not interfere with B's easement.[40] But A risks having those crops trampled by acts which are necessary to repair the pipe in the ground and under the growing crop. In the absence of agreement, the servient tenant has no duty to do any affirmative act to keep the easement effective. Thus, B is not entitled to an injunction against A, as sought in B's counterclaim.

EASEMENTS IN FAVOR OF THIRD PARTIES

Suppose that O conveys Blackacre to B, reserving on Blackacre "the right of the First Baptist Church to park automobiles on Blackacre on Sunday morning." But O is not the First Baptist Church, which is located on nearby Greenacre, and O owns no ownership interest in Greenacre. Is the easement valid? At common

38. See Farmer v. Kentucky Utilities Co., 642 S.W.2d 579 (Ky.1982).

39. But cf. Thomason v. Kern & Co., Inc., 259 Ga. 119, 376 S.E.2d 872 (1989) (once prescriptive easement was acquired, owner of servient estate could not compel alteration of the path).

40. A corollary is that the owner of the servient estate may grant successive easements involving the same surface, provided that they do not actually interfere with each other. See Rippetoe v. O'Dell, 166 W.Va. 639, 276 S.E.2d 793 (1981).

law a grantor could not reserve or except an easement in favor of a third party (that is, someone who is neither the grantor nor the grantee in the instrument in which the possessory interest is transferred). If O wanted to accomplish this, she would have to (1) convey to the Baptist Church the parking lot easement, and then on a second piece of paper (2) convey the possessory interest to B, subject to the Church's easement. Today, the courts are split on the question whether such easements can be created in favor of third parties, with the majority probably adhering to the common law rule.[41] The one thing that can be said in favor of the common law rule is that such a grant splits the chain of title, and thus makes a careful title search more important. That objection is a small one, however, and it seems that the better rule would be to permit such grants.

PROBLEM 10.11: Leroy is the owner in fee simple of Blackacre, a 5 acre tract, where he lives with his family. Blackacre contains a deep well from which Leroy draws water. Rachael owns Whiteacre, an abutting 5 acre tract, where she and her family live, but which has no water supply. These tracts are within a residential neighborhood. Leroy conveys to Rachael and her heirs the right to come onto Blackacre and draw water for use on Whiteacre. Rachael converts her house into a guest house, and adds several rooms so that the building will accommodate 50 guests. Rachael continues to take water from Leroy's well to supply the guest house. Leroy sues to enjoin this use as excessive. Should the injunction issue?

Applicable Law: When an easement is created by conveyance and the words of the instrument are not complete in describing the future use to be made of the easement, then resort must be had for the meaning of the easement to the circumstances surrounding the execution of the instrument. Parties to such a conveyance must be held to contemplate a normal evolution and development in the use of the dominant estate, and an altered use of the servient tract to accommodate such normal development will be within the scope of the created easement. But when there is such a drastic change in the use of the dominant tract that the change can hardly be contemplated in the normal development of the use of such property, then the use of the servient tract to serve the dominant owner in his altered use of the dominant estate is outside the scope of the created easement.

41. See Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal.3d 473, 102 Cal.Rptr. 739, 498 P.2d 987 (1972) (permitting an easement to be created in favor of a third party). Contra, Estate of Thomson v. Wade, 69 N.Y.2d 570, 574, 516 N.Y.S.2d 614, 615, 509 N.E.2d 309, 310 (1987).

Answer and Analysis

Yes. When an easement is created by a conveyance, the words describing the extent of the use granted are clear and unambiguous, and the scope of the use is easily measured, then the words of the instrument determine the extent of the use under the easement. But when the words are not complete as to the extent of the use when applied to the future development of the dominant estate, then the instrument's meaning must be found in the circumstances surrounding its execution. The parties must be charged with foreseeing normal change and development in the condition of the dominant estate. Had the deed in this case provided that water might be drawn from Leroy's well for use on Whiteacre so long as used for a single family home, or to the extent of 400 gallons per day, then the duration of the use on one hand, or the maximum use on the other, could be readily determined. Had the deed provided that water might be drawn from Leroy's well for use on Whiteacre for any and every purpose irrespective of the condition and use of Whiteacre, then it would be clear that the easement was without limit.

But the deed provided neither of the above. It merely said that water might be taken from Leroy's Blackacre for use on Whiteacre, and one of the important circumstances surrounding the execution of Leroy's deed is that Whiteacre at that time was used exclusively for a single family home, as were the other tracts surrounding it. It would be unfair and unreasonable to say, in the absence of specific provisions, either that the deed and circumstances surrounding its execution conveyed to Rachael an unlimited use of Whiteacre, or a use limited to Whiteacre while it remained strictly in the condition it was in at the time the deed issued.

The fair and reasonable scope of the easement created is somewhere between these two extremes. One must consider what the parties should have contemplated as to the normal development of the dominant estate at the time of the conveyance. This is a question of fact. In general, Leroy and Rachael should contemplate that Rachael's family might grow in numbers and that additional rooms might be added to the house and that more water would be required from the servient estate. If the neighborhood is near the edge of a district in which multiple dwelling units such as duplexes are being built, it would not be unreasonable to assume that Rachael's Whiteacre might be transformed into a duplex. But that is not this case. Here is a single house in a residential area transformed overnight into a guest house. That is probably a change in the condition that human experience would not regard as common, and the parties should probably not be charged with

foreseeing it. This use of Blackacre by Rachael is excessive and should be enjoined.[42]

PROBLEM 10.12: A is the owner of Blackacre in fee simple, a section of land used for agricultural purposes. B owns an abutting section, Whiteacre, also used for farming. A conveys to B and his heirs a right of way appurtenant to Whiteacre over a road through the center of Blackacre. This road has been used by A for the purpose of passing from one part of Blackacre to another in his farming operations. Thereafter B conveys the NE1/4 of Whiteacre to C, the NW1/4 to D, the SE1/4 to E and the SW1/4 to F. These four grantees continue to use the way over Blackacre. A sues to enjoin such use. Should the injunction issue?

Applicable Law: When an easement appurtenant is created by deed it attaches to every part of the dominant estate. Such an easement appurtenant is apportionable upon the subdivision of the dominant estate unless the instrument creating the easement otherwise provides. Such easement becomes an appurtenance to each part of the subdivision and the owner of each part is entitled to use and enjoy such easement as a dominant tenant.

Answer and Analysis

No. When B conveys the quarter sections of Whiteacre to the named grantees, each grantee takes under the conveyance not only the land itself but also all appurtenances thereto, whether or not "appurtenances" are expressly mentioned in the conveyance. Thus, each grantee takes an easement appurtenant to his particular quarter section of Whiteacre, if the easement as originally created in A's deed to B is apportionable.

Easements appurtenant are considered apportionable upon the subdivision of the dominant estate unless the conveyance creating the easement otherwise provides. There are two reasons for this principle. First, the subdivision and sale of land is so common as to be assumed to be within the contemplation of the parties when they create easements appurtenant. Second, usually the subdivision of the dominant estate and the apportionment of the easement cast a relatively slight additional burden on the servient estate when compared with the benefit and enjoyment which the easement adds to the dominant estates. So apportionment of such easements is socially efficient: i.e., the likely increase in benefit exceeds the likely increase in burden. We may assume that A and B contemplated at the time of the creation of the easement that the dominant tract, Whiteacre, would not always remain in a single ownership, and that

42. See Restatement of Property § 484.

the easement would attach to every part of Whiteacre if and when it was subdivided. C, D, E and F all have easements over Blackacre which are appurtenant to their respective quarters of Whiteacre.[43]

PROBLEM 10.13: Ozzie, a private detective, uses an airplane in his business. Ozzie lives in Texas and concludes that if he had the use of a private airport in Illinois, he could carry on his business more effectively. Ozzie's brother Alexander owns Blackacre, a level section of land in central Illinois, in one corner of which is a meadow used solely for raising wild grass. This land is worth $200 per acre for such purposes. Along the edge of Blackacre on the meadow Ozzie stakes out a strip of land 80 feet wide, containing about 5 acres, and pays Alexander $1000 for a deed granting Ozzie for life the privilege of using such strip of land for the purpose of an airport for his detective business. Ozzie establishes a gasoline pump on the strip, improves it, and uses it for a period of five years at which time Ozzie becomes ill and retires. He sells his detective business to Charles, an effective and trusted employee, including his airplane and an assignment of his interest in Blackacre. Alexander seeks to enjoin Charles's use of the strip. Should the injunction issue?

Applicable Law: An easement in gross is of a commercial nature when its principal purpose is to benefit the easement owner economically or financially. Such an easement is alienable as a matter of law. An easement in gross which mainly benefits its owner personally is noncommercial in nature. Whether or not such an easement is alienable depends upon the manner and nature of use by which it is created when acquired by prescription, and on the terms of the conveying instrument and the surrounding circumstances if created by deed or will. An easement in gross of a commercial nature may be transferred like a life estate in property and the transferee will then have an easement pur autre vie.

Answer and Analysis

No. When Alexander granted to Ozzie a right to use the strip on Blackacre as an airstrip for his detective business, he created an easement in gross in Blackacre for the period of Ozzie's life. Easements in gross which are of a commercial nature are alienable as a matter of law unless the manner in which they are created or the terms of the conveying instrument establish otherwise. On the other hand an easement in gross of a noncommercial nature may or

43. See Restatement of Property § 488; Martin v. Music, 254 S.W.2d 701 (Ky.1953).

may not be alienable depending on the terms of the conveyance or the manner of its creation.

The fact that the grant is for Ozzie's life is, of course, some evidence that only Ozzie was to use the easement. However, the grant was made for the primary purpose of enhancing Ozzie's capacity to carry on his detective business more effectively. Just as a life estate may be conveyed to another who then has an estate *pur autre vie,* so a commercial easement in gross for life may be so conveyed. Properly construed, the grant from Alexander to Ozzie seems to convey a commercial easement in gross which is alienable by the grantee. That being true, Charles is the owner of this easement by the assignment from Ozzie and has a right to continue the use of the strip on Blackacre during Ozzie's lifetime. The injunction should not issue.[44]

PROBLEM 10.14: A owns Blackacre, a quarter section of land containing a sand pit. B is a road contractor who uses a substantial amount of sand in performing his road contracts. A grants to B for ten years the right to come onto Blackacre and take sand, together with right of ingress and egress. B is to pay for the sand as it is removed from Blackacre at a specific rate per cubic yard. B digs sand for about a year and then assigns his right to take sand from Blackacre to C, D and E, individual contractors, each to have a right to take sand from the premises wholly independently of the acts of any other. Each of the three assignees comes onto Blackacre with trucks and other machinery and starts digging and removing sand. A sues to enjoin their removal of any sand. Should the injunction issue?

Applicable Law: Three concepts should be differentiated. (1) A landowner may convey the corpus of sand on his land leaving him no interest in the sand. (2) A landowner may convey the exclusive right to come onto his land and take the sand. Only the grantee can exercise the right to take the sand but until the appropriation of the sand the servient tenant owns the corpus of the sand. (3) A landowner may convey a non-exclusive right to come onto the land and take sand. In such case the grantor still has the right to use the sand from the land and he has a right to convey a similar right to others.

In the case of an exclusive easement or profit in gross there is an inference that it is apportionable. In the case of a nonexclusive easement or profit in gross it is considered unap-

44. See Restatement of Property §§ 489–492; Standard Oil Co. v. Buchi, 72 N.J.Eq. 492, 66 A. 427 (Ch. 1907) (commercial easement in gross for pipeline could be assigned). In fact, the doctrine that *non*commercial easements in gross cannot be transferred is rarely applied and makes little sense. See Note, The Easement in Gross Revisited: Transferability and Divisibility Since 1945, 39 Vand. L. Rev. 109 (1986).

portionable unless by the terms of the conveyance or the manner of its creation it clearly appears that it is apportionable. At common law, when one has a nonexclusive profit in gross which is not apportionable and conveys it to two or more persons independently as individuals, the profit in gross is destroyed.

Answer and Analysis

Yes. The corpus of the sand on Blackacre was not granted to B. A right merely to come onto land and take sand does not describe sand as sand, but merely an incorporeal right to take sand. Granting that A has conveyed to B only a right to take sand from Blackacre, is the right exclusive or nonexclusive? An easement or profit is construed as a nonexclusive right unless the contrary clearly appears either by the words of the instrument or because of the nature of the right conveyed. For example, a right of way granted to a railroad to be used as a road bed or as a depot site would necessarily have to be exclusive. But such is not the case when it involves the taking of sand or the mining of minerals. In these cases there is nothing inconsistent in the grantor's having the right to make use of his soil or its products at the same time the grantee is using the soil or taking some of it. In the problem, no words in the conveying instrument indicate an intention to transfer to B an exclusive right to take sand. Thus, the grantor, A, still has the right to take sand from Blackacre. B's right is a nonexclusive, commercial profit in gross. It is a profit because it involves a right to take some of the corpus of the soil. It is in gross because B's right to take and use the sand is not appurtenant to any other property as a dominant estate. Indeed, so far as the facts appear, B does not own any other property which could be a dominant estate. It is commercial because it benefits B economically and financially in his business as a contractor. Such a commercial profit in gross is alienable.

Because an easement or a profit is alienable does not mean it is divisible or apportionable. If an easement or a profit is exclusive, we can infer an intent that it should be apportionable.[45] Suppose M conveys to N and his assigns the exclusive right to mine copper on M's Blackacre. N assigns to X the right to mine copper on the north half and to Y the right to mine copper on the south half of Blackacre. In this case M has created an apportionable profit in N whose assignments to X and Y are valid. X and Y may mine the

45. E.g., Henley v. Continental Cablevision, 692 S.W.2d 825 (Mo.App.1985) (inferring from the fact that a utility easement was exclusive that it was also apportionable). Cf. Marcus Cable Assocs. v. Krohn, 90 S.W.3d 697 (Tex. 2002) (easement for construction and maintenance of electric transmission line did not extend to cable television).

copper. This accords with M's intention and does not overburden M's Blackacre. But if apportionability of the exclusive right will result in overburdening or surcharging the servient estate to an extent which could not have been intended by the terms of the conveying instrument, or in the manner of use during a prescriptive period, then such excessive use may be enjoined.

When the right is nonexclusive, as it is in the problem, the easement or profit is not apportionable unless the terms of the instrument or manner of its creation clearly indicate to the contrary. When the grantee has an easement or a profit which is nonexclusive, it means that the grantor himself has a right to make a similar use of the servient estate, or the grantor may convey to others the same or similar right. If the grantee is permitted to divide or apportion his nonexclusive right, he is being permitted to create rights in his assignees which are inconsistent with the rights reserved by the grantor in the servient estate. And if the assignees of the owner of the nonexclusive easement or profit are permitted individually to use the servient property, then they are empowered to make use of more than one right when the original grantor created only one.

In our case, B has the right to alienate his profit in gross. He can transfer it to a single person or to two or more persons *jointly*. By transferring a single right to "X, Y and Z jointly", the right remains intact because "jointly" means that X, Y and Z take as a unit, as a single aggregate person. As a unit these persons may exercise the right of taking sand from the servient estate. But they must operate the right as a "common stock." They cannot exercise the right individually and independently of each other. And that is exactly what is provided for in B's assignment to C, D and E: "each to have a right to dig and take sand independently from Blackacre". This constituted a division of an indivisible right.[46]

The common law rule on the apportioning of easements and profits in gross was developed long before the rise of the modern business corporation. When the rule was developed, individual entrepreneurs and firms were relatively small, and a transfer of an easement or profit from one to another generally did not have a dramatic impact on the servient estate. This explains the common law rule permitting transfer but prohibiting division. Division, unlike transfer, could result in substantially enlarged use of the easement or profit. But suppose today that someone with a nonexclusive right to take sand and gravel from Blackacre should assign

46. See Restatement of Property § 493; Stanton v. T. L. Herbert & Sons, 141 Tenn. 440, 211 S.W. 353 (1919) (nonexclusive right to take sand and gravel cannot be divided); Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938) (swimming and boating rights; same).

her right to Bechtel Corp., the world's largest private construction firm. Bechtel is a single legal "person," so the common law would permit the transfer; however, Bechtel's use might be 10,000 times greater than the use of the previous owner. There is no substitute for clear drafting by the grantor concerning the scope of an easement or profit.

Note

A owns Blackacre in fee simple to which is appurtenant a right of way over B's Whiteacre. A conveys Blackacre to C and in the conveyance reserves to herself personally the right of way across Whiteacre. May A use the right of way? No. This is an attempt by A to convert an easement appurtenant into an easement in gross. When the easement appurtenant is severed from the dominant estate it is extinguished. However, if in this case the deed to A granting the easement provides that the easement may be severed from the dominant estate and used by A as an easement in gross, then it may be so severed and used in gross. As a general principle the severance of an easement appurtenant from the dominant estate extinguishes the easement unless the manner or terms of its creation evinces an intention to the contrary.[47]

PROBLEM 10.15: Hassan is the owner of Blackacre which abuts Ariel's Whiteacre. Hassan acquires a prescriptive right of way over Whiteacre to carry water through a ditch from Whiteacre to Blackacre. Ariel finds the location of the ditch on Whiteacre inconvenient for some uses she wishes to make of her property. Ariel changes the location of the open ditch by moving it 6 feet south and enclosing the running water in a cement tile pipe which carries the same amount of water as the open ditch and delivers it at the same place on Blackacre. Hassan seeks a mandatory injunction compelling Ariel to open the ditch exactly where it was when the prescriptive right matured, and to permit the water to run through it as before without further obstruction by Ariel. Should the injunction issue?

Applicable Law: When an easement appurtenant is created either by prescription or by conveyance over a servient estate the boundaries and extent of such easement become fixed and are binding on both the servient and dominant tenants. Neither such tenant has any more right to change the location of such easement than he has to change the boundaries of the physical servient or dominant estate.

Answer and Analysis

Yes. When Hassan matures by prescription a right to maintain the ditch over Whiteacre appurtenant to Blackacre, he has an

47. Cadwalader v. Bailey, 17 R.I. 495, 23 A. 20, 14 L.R.A. 300 (1891).

incorporeal right in Whiteacre. It is real property and the right is fixed in its location as definitely as are the boundaries of the physical tract. Neither party has a right to change the boundaries or location of the ditch unilaterally, regardless of how inconvenient it may be. This is true whether the easement was created by prescription or by conveyance.[48]

PROBLEM 10.16: A owns Blackacre, a city lot 50 feet by 150 feet. B owns Whiteacre which is a city lot 50 feet by 150 feet abutting Blackacre on a 150 foot line. A and B in writing agree to build a party wall on their common boundary line, which is to be 16 inches wide, two stories high and extend along the common boundary line from the front of the lots toward the rear for a distance of 100 feet. Half of the wall is to be on Blackacre and half on Whiteacre. Nothing is said in the agreement concerning their respective rights in the use of the party wall.

A builds a two story building on Blackacre and extends his joists which support his floors and roof into the party wall only to the center thereof which is exactly above the common boundary line. Thus A is using only the party wall on his side of the common boundary to support his joists. B then begins building a two story building on Whiteacre and extends his joists through the party wall so that his joists rest on the entire thickness of the party wall. A objects to B's using that part of the party wall which is on A's side of the common boundary line extended upwards. B completes his building using the entire party wall to support his joists. Thereafter B raises the party wall at his own expense to a height of three stories and adds a third story to his building on Whiteacre. A then decides to add a third story to his building on Blackacre but refuses to pay B for his proportionate cost of the added height of the party wall. B seeks to enjoin A's use of the third story portion of the party wall until A has paid for his share of such part of the wall. (a) Should the injunction issue? (b) Is A's objection to B's use of the entire party wall to support his joists justified?

Applicable Law: In the absence of express agreement to the contrary, the owners of a party wall, bisected by the common boundary line extended vertically upward, have equal and reciprocal rights to the use of the party wall, and each has an easement on the other's half of the wall for the support of his building and his half of the party wall. The general American view is that each party wall owner has the right to use the

48. See Sakansky v. Wein, 86 N.H. 337, 169 A. 1 (1933) (owner of servient estate may not obstruct original easement and compel owners of dominant estate to use a different location, no matter how great the hardship on the owner of the servient estate).

entire thickness of the party wall to support his building joists. Each party wall owner has a right to extend the party wall upward or lengthwise at his own expense with no right of contribution from the other party wall owner until the other undertakes to use the extension of the wall. When the non-builder of the extension does use or undertake to use the extended wall, then he is bound to make payment for the reasonable value of his share of the wall.

Answers and Analysis

The answer to (a) is yes, to (b) is no

First, on (b), there are three distinct views concerning the rights of abutting owners in a party wall when the wall is bisected by the common boundary extended vertically upward through the center of the party wall. (1) One view is that the abutting owners are tenants in common of the party wall with each having the right to use the entire wall. This is the common English view. (2) Another view is that each abutting owner owns the party wall only to its center which represents the common boundary line and can use only that part of the wall which is on the owner's side of the common boundary line for support of his building joists. This is A's claim in our case. (3) A third view is that each abutting owner owns the wall only to the common boundary line, that is, he owns only the half of the wall on his side of the common boundary line, but has an easement to use the entire thickness of the wall for the support of his building joists. This is the common American view and will be applied in this case. In all three views there are cross-easements under which each abutting owner has the right to have his building and his half of the party wall supported by the half of the party wall on the land of the abutting owner. In this case taking view number (3) above, B has the right to use the entire thickness of the party wall for the support of his joists and A cannot object when B extends such joists completely through but not one particle beyond the thickness of the party wall. Under this view A's objection to B's using the entire wall for the support of his joists is not well taken.

On (a), it may be said that every party wall owner has a right at his own expense to increase either the height or the length of the party wall provided the foundation will support it. The party wall owner who does extend the party wall either in height or length has no right to contribution for such extension from the other party wall owner until such time that the other party wall owner undertakes to use the extended wall. But when such party wall owner does use or undertake to use such extended wall which has been fully paid for by the one who built it, then a right to have contribution accrues to the one who built and paid for the exten-

sion. The non-builder has no right to use the extension until he has paid for the reasonable value of his share of the wall as it then exists. Thus A has no right to attach his proposed third story joists to the party wall until he has made proper payment to B and the injunction should issue against A until such payment has been made. In a party wall, each owner, in the absence of express agreement to the contrary, has equal and reciprocal rights with the owner of the other part of the wall. Neither has a right which is denied to the other. For example, one owner may not monopolize the top of the party wall exclusively for the maintenance of an advertising sign, for the wall must at all times be available to both parties for extension or construction.[49]

c. By Implication

PROBLEM 10.17: Louise owns an apartment house, Blackacre. She shows a 4th story apartment to Dave, a prospective tenant. They ride in the elevator from the street floor to the 4th floor and Louise points out the stairway leading to the 4th floor for use when the elevator may not be working. In the jurisdiction an oral lease is valid if for one year or less. Louise orally leases the 4th story apartment to Dave for 3 months at a rent of $300 per month. Dave pays Louise the rent for the first month and moves into the apartment. During the negotiations, nothing is said concerning the use of either the elevator or the entrance to Blackacre, or the lobby of the building on the ground floor. Louise objects to Dave's using the elevator in connection with his apartment for the reason that the agreement conveys no such right. May Dave use the elevator?

Applicable Law: An implied easement is created and proved not by the words of the conveyance, but by all the circumstances surrounding the execution of the conveyance. It is based on the intention of the parties as inferred from those surrounding circumstances. There are 5 prerequisites to the creation of an implied easement. (1) There must be a quasi-easement. (2) There must be a conveyance of one part of the property and a retention of another part of the property by the grantor. (3) The quasi-easement must be apparent at the time of the conveyance. (4) The quasi-easement must be continuous, meaning that the quasi-servient estate is permanently adapted to serve the quasi-dominant estate. (5) The quasi-easement must be (a) *reasonably necessary* to the enjoyment of the quasi-dominant estate if that tract is conveyed, and (b) *strictly*

49. See Varriale v. Brooklyn Edison Co., 252 N.Y. 222, 169 N.E. 284 (1929) (sign covering entire party wall was a trespass entitling adjacent landowner to injunction).

necessary if the quasi-dominant estate is retained by the grantor.

Answer and Analysis

Yes. Dave has an implied easement for the period of his lease. Usually an easement is created by grant in a deed. An implied easement is created and proved not by the words of the deed or conveyance but by the circumstances surrounding the execution of the deed or conveyance. The circumstances surrounding the making of the lease described in the problem certainly indicate an intention sufficient to create an implied easement in Dave's favor.

There are five distinct requirements for the existence of an implied easement:

(1) *There must be two properties owned by one person who uses one of the pieces of property to serve the other piece of property.* One cannot have an easement in her own property, so when she uses one piece to serve another piece a *quasi-easement* is said to exist. Before any lease was made, Louise owned the 4th story apartment and used the elevator, stairway and lobby of the building for its benefit. The 4th story apartment is then a quasi-dominant estate and the lobby, elevator and stairway are the quasi-servient estate.

(2) *There must be a conveyance of one part of the property to another person, the other part being retained by the conveyor.* The creation of a lease constitutes a conveyance. When Louise conveyed to Dave the 4th story apartment for 3 months and retained the rest of Blackacre, there is the requisite conveyance of one part of Louise's property and the retention of the other part, that is, the lobby, the stairway and the elevator.

(3) *The quasi-easement must be apparent at the time of the conveyance.* This does not mean that the use made by the grantor prior to the conveyance is necessarily visible. The word "apparent" is a broader term than visible and includes such knowledge as would have been gained at the time of the conveyance by a reasonably prudent investigation or inspection of the premises. This meaning becomes important when the quasi-easement involves the use of underground pipes, sewers and drainage facilities. In our facts this item is simple because the elevator and lobby were actually used by both Louise and Dave at the time the lease was executed, and the stairway was pointed out by Louise to Dave. Thus, they were all actually visible and known to the purchaser and lessee, Dave, at the time of the lease or conveyance.

(4) *The quasi-easement must be continuous, which means that the use of the quasi-servient estate must be permanently adapted to serve the needs of the quasi-dominant estate.* If the use of the quasi-servient estate is permanently adapted to serve the quasi-dominant

estate, then it is continuous as required for an implied easement. It is obvious in our set of facts that the lobby, stairway and elevator are permanently adapted to serving the 4th story apartment and that the quasi-easement is therefore continuous as required for an implied easement in Dave's favor.

(5) *The quasi-easement must be (a) "reasonably necessary" to the convenient enjoyment of the quasi-dominant estate if that tract is the property conveyed to the grantee, and (b) "strictly necessary" to the enjoyment of the quasi-dominant estate if that tract is retained by the grantor.*[50] Most, but not all, courts require a greater degree of necessity for an implied easement in favor of the grantor than for one in favor of the grantee. The grantor usually draws the deed, and when she grants the quasi-servient estate to the grantee and then claims an easement on such property, she is considered as derogating from her grant. Thus, one must consider whether the grantor conveys to the grantee the quasi-servient or the quasi-dominant estate. In the problem case Louise conveys to Dave the quasi-dominant estate, the 4th story apartment and retains the quasi-servient estate, the elevator, stairway and lobby. Thus, Dave is claiming an implied easement by implied grant. In such case he needs to show only that the quasi-easement is reasonably necessary to the enjoyment of the quasi-dominant estate. It seems clear that the use of the elevator, stairway and lobby are reasonably necessary to the comfortable enjoyment of the 4th story apartment. That being the case, Dave has by implied grant an implied easement to use the elevator. It is often said that the grantee has an implied easement to use the quasi-servient estate retained by the grantor if the use merely adds to the convenience in the enjoyment of the quasi-dominant estate.[51]

PROBLEM 10.18: A is the owner of Blackacre and Whiteacre, two city lots each 50 feet wide and 150 feet long having a common boundary line of 150 feet. A builds a house on each lot, and runs a common sewer pipe six feet underground from Whiteacre to and across Blackacre, to the main sewer in the street along the side of Blackacre. This common sewer pipe runs behind each house, about 100 feet from the front of the lots and about 50 feet from the rear of the lots. There is no main sewer in the street in front of the two lots, and there is no alley in the rear of the lots. Both the street in front of the

50. Most courts require the necessity to be determined as of the time of the severance, not as of the time of the subsequent legal claim. E.g., Bromley v. Lambert and Son, Inc., 752 P.2d 595 (Colo.App.1988), which recognized the easement even though subsequently a street was built that provided alternative access.

51. See Romanchuk v. Plotkin, 215 Minn. 156, 9 N.W.2d 421 (1943) (recognizing an implied sewer line easement in favor of the grantee). Restatement of Property § 476.

lots and the street along the side of Blackacre are paved with reinforced concrete about 8 inches thick. Unless the common sewer pipe carrying sewage from Whiteacre over Blackacre is used, the only way of disposing of the sewage on Whiteacre is by installing a pipe from the rear of the house to the front of Whiteacre and then under the pavement in front of both lots to the main sewer in the street. A sells Blackacre to B without reserving in the deed a right of way for the sewer pipe across Blackacre. B does not know of the existence of the sewer pipe from Whiteacre across Blackacre, and A forgets about it at the time of the conveyance. B plugs up the sewer pipe at the boundary line between Blackacre and Whiteacre and A sues to enjoin such obstruction. Should the injunction issue?

Applicable Law: For purposes of creating an implied easement by implied reservation in favor the grantor, the quasi-easement (which becomes a true easement by implication) is apparent if it would have been disclosed by a reasonably prudent investigation and inspection of the quasi-servient estate. For the grantor to have an implied easement by implied reservation the use of the quasi-servient estate must be strictly necessary to the enjoyment of the quasi-dominant estate retained by the grantor. The meaning of "strictly necessary" lies somewhere between "reasonably necessary" and "absolutely necessary." What constitutes "strict" necessity is subject to wide difference of opinion.

Answer and Analysis

Yes. By an implied reservation A has an implied easement for his sewer pipe from Whiteacre across Blackacre. (1) Before the conveyance from A to B there is a quasi-easement as to A's two properties, under which Blackacre is the quasi-servient estate and Whiteacre the quasi-dominant estate. (2) One of the properties, Blackacre, is sold to B and the other retained by the grantor. (3) The quasi-easement is continuous because the sewer pipe running through Blackacre is permanently adapted to use in the service of Whiteacre. The two problems presented by this case are: (4) whether the quasi-easement is apparent; and (5) whether the claimed easement is strictly necessary to the grantor's enjoyment of Whiteacre.

A sewer pipe six feet under the soil is not visible. But it may be "apparent" if that word includes such information that a reasonably prudent inspection of Blackacre would disclose. Indeed, it is possible that the investigation would have required no more than asking A about the sewage disposal system from the two tracts.[52]

52. Some courts assess a stricter apparency requirement if the claimant of the easement is the grantor. The theory is that a "bona fide purchaser" should

But is such quasi-easement strictly necessary to the enjoyment of the retained quasi-dominant estate by the grantor, A? A likely majority of cases say that in case of an implied grant in favor of the grantee there must be reasonable necessity, and in case of an implied reservation in favor of the grantor there must be strict necessity for the existence of the implied easement. But the expressions, "reasonably necessary" and "strictly necessary" are not self-defining. Implication of an easement must be the result of an inference of the intention of the parties drawn from all the circumstances surrounding the conveyance.

The Restatement of Property, § 476, lists the following as important in determining when an easement should be implied in favor of a grantor: the terms of the conveyance; the consideration given; whether there are reciprocal benefits to both parties; the manner of use of the property under the quasi-easement; and the extent of the parties' knowledge as to the prior use. This list is not intended to be complete. Generally the expression, "strictly necessary" to the enjoyment of the quasi-dominant estate retained by the grantor, does not require the claimant to show that the quasi-dominant estate could not be used at all by its owner.[53] And surely it does mean that the continued use of the quasi-easement is more than a mere convenience in the use of the quasi-dominant estate. And it means more than "reasonably necessary." The burden of the underground sewer pipe on Blackacre is probably relatively slight. On the other hand, the extent of the burden on A if the quasi-easement is not to continue, is evidence of the necessity for its continuance. It will compel A to run a sewer line around the rear of his house on Whiteacre, then extend it 100 feet to the front of such lot, then dig through the 8 inch thick reinforced concrete in front of both Whiteacre and Blackacre, and continue such under the street which runs along the side of Blackacre to the main sewer. A continuance of the quasi-easement will avoid this labor, capital investment, use of additional materials and tearing up of the concrete pavement in the public streets. In the field of degree of necessity, which takes such efficiency considerations into account, the continuance of the quasi-easement over Blackacre seems "strictly" necessary to the use and enjoyment of Whiteacre. Since all the elements necessary to create an easement by implication are present, the grantor, A, has by implied reservation an implied easement appurtenant to Whiteacre through the servient tract, Blackacre. B should be enjoined from obstructing such easement.[54]

not be obligated to an easement of which he has "no actual or constructive notice." Mitchell v. Castellaw, 151 Tex. 56, 246 S.W.2d 163 (1952) (strict necessity required where claimant is grantor).

53. E.g., Bowers v. Andrews, 557 A.2d 606 (Me.1989).

54. See Van Sandt v. Royster, 148 Kan. 495, 83 P.2d 698 (1938) (finding

Note: The Easement by Necessity

An easement by implication, whether an implied grant in favor of the grantee or an implied reservation in favor of the grantor, is a true easement having permanence of duration, and should be distinguished from a "way of necessity," which lasts only as long as the necessity continues. E.g., A owns Blackacre which is completely surrounded by lands owned by other persons, and there is no way for A to enter or leave Blackacre without trespassing on the land of another. The shortest way from Blackacre to a highway, and the way which will do the least damage, is across a narrow strip of land 200 feet wide owned by B, the grantor of Blackacre. A may have a way of necessity over B's 200 foot strip. Later A buys another piece of land which gives him access to another highway but is far less convenient than the use of B's strip. The way of necessity ceases when A has access to the highway regardless of how inconvenient it may be. A real way of necessity is quite rare.[55]

Courts almost universally require that the claimed dominant tract and the claimed servient tract were once owned by a common grantor,[56] and that the severance that causes the property to become landlocked be the determinant of the servient estate. For example, Oscar owns adjacent tracts A, B and C. In 1980 Oscar sells A and B to Jill. In 1986 Jill sells B to Kathy and, by virtue of this severance, B becomes landlocked. Kathy will now have a claim for an easement by necessity across A, but not across C, even though C is also adjacent land and placing the easement there may be more convenient. The severance of A from B caused B to become landlocked, not the severance of C from B.[57]

Some courts have been reluctant to recognize easements by necessity, and have even held that statutes providing for them can constitute unconstitutional takings of property for a private use or without just compensation (if the statute fails to provide for compensation).[58]

§ 10.1.3 Extinguishment

PROBLEM 10.19: Randy owns Blackacre in fee simple and Jill owns adjoining Whiteacre in fee simple, Whiteacre being

easement by implication in sewerline for grantor; fact that sewerline was hidden did not defeat the easement if the grantee had a reasonable opportunity to learn of it).

55. See Pike v. Wyllie, 100 Or.App. 120, 785 P.2d 764 (1990) (necessity requirement not met when claimants had enforceable right to easement across other property).

56. See Hurlocker v. Medina, 118 N.M. 30, 878 P.2d 348 (1994) (unity of title requirement met even though there were multiple lots owned by the same person).

57. E.g., Daetsch v. Taber, 149 A.D.2d 864, 540 N.Y.S.2d 554 (1989) (common grantor required).

58. See Brown v. McAnally, 97 Wash.2d 360, 644 P.2d 1153 (1982) (interpreting state constitutional provision permitting private condemnation of ways by necessity as abrogating traditional common law doctrine giving the easement without compensation).

the lower tract. Jill grants to Randy the right to construct and maintain a drain across Whiteacre to drain excess water from Blackacre. A small stream flows from Blackacre to and over Whiteacre. After procuring the easement from Jill, it occurs to Randy that he might accomplish the drainage of Blackacre by deepening the bed of the natural stream, which he does. Forty years after the easement is granted, Catherine offers to buy Whiteacre from Jill, but Catherine does not want the property burdened with the easement. For the purpose of making the sale to Catherine free from the easement, Jill brings an action against Randy to quiet title to Whiteacre and thereby clear it from the burden of the easement. Jill contends that since Randy has not acted on the granted right for a period of 40 years, he has thereby abandoned it. The case is tried to the court without a jury; the court finds no evidence of Randy's intention to abandon the easement, and denies the decree quieting title. Jill appeals. Outcome?

Applicable Law: An easement (or profit) is an incorporeal right in real property and comes within the purview of the Statute of Frauds. It cannot be created, transferred or released without a writing. It generally cannot be abandoned by mere oral declarations. But an easement (or profit) can be extinguished by abandonment by the dominant tenant provided his intention to abandon the use of the easement is evidenced by conduct evincing such intention. Non-use of an easement, however long continued, standing alone, cannot constitute abandonment of an easement. When there are other facts indicating an intention to abandon an easement, then evidence of non-use is admissible on the question of intention.

Answer and Analysis

The judgment below should be affirmed and the appeal dismissed. An easement is an incorporeal right in real property which comes within the purview of the Statute of Frauds. It cannot be created, transferred or released without a writing. Neither can it be abandoned by mere oral declarations. It can be abandoned if the dominant tenant intends to abandon it, and such intention is evidenced by conduct (usually physical acts) on either the dominant or servient estate. Whether or not there is an abandonment of an easement or profit is a question of fact. However, non-use of an easement or profit, no matter how long continued, cannot by itself constitute abandonment. When other facts indicate an intention to abandon an easement, then evidence of non-use is admissible on the question of intention.[59] But in this case there is no evidence on

59. See Iorfida v. Mary Robert Realty Co., Inc., 372 Pa.Super. 170, 539 A.2d 383 (1988).

the part of the dominant tenant, Randy, that he intended to abandon the easement or the use of it. The deepening of the stream which temporarily drained Blackacre might not in the future be an adequate means of drainage, in which case Randy might wish to use his easement on Whiteacre. In our case the lower court found as a fact that Randy had not intended to abandon the easement. No facts appearing to the contrary, the lower court was right in refusing to quiet title in Jill.[60]

PROBLEM 10.20: Greenacre, Blackacre and Whiteacre are three business lots abutting each other with Blackacre between the other two lots. A owns Blackacre in fee simple and lives there. He has a driveway easement across Whiteacre, appurtenant to Blackacre, for the use of traffic by foot, bicycle or automobile. B owns Whiteacre. C owns Greenacre and conveys it to A in fee simple. A builds a 20 story office building covering Greenacre and Blackacre which houses 8,000 people during working hours each day. These people use the way over Whiteacre, and A uses the way for trucking as many as 20 loads of coal per day to the building situated on Blackacre and Greenacre. B brings suit seeking to enjoin any use of Whiteacre by A or any of the 8,000 persons who work in A's office building and argues that the easement is extinguished. **(a)** Is the easement extinguished? **(b)** Should the injunction issue?

Applicable Law: Excessive use of an easement does not forfeit or extinguish the easement. In such a case the servient tenant may enjoin the dominant tenant's excessive use of the easement but the dominant tenant may still use the easement within the scope or extent as created. The dominant tenant of an easement appurtenant has no right to use the servient estate in connection with a tract of land which is not part of the dominant estate. If the use of the dominant estate is so integrated with the use of another piece of land which is no part of the dominant estate that the use of one is the use of the other, then the dominant tenant has no right to make any use of the easement over the servient estate in connection with these integrated properties.

Answers and Analysis

The answer to (a) is no. The answer to (b) is yes.

(a) Mere excessive use of an easement (or profit) does not forfeit or extinguish the easement. In the case of excessive use, the owner of the easement is simply making use of the servient estate beyond the scope or extent of the use permitted by the easement in

60. Richardson v. Tumbridge, 111 Conn. 90, 149 A. 241 (1930).

its creation. The easement as originally created still exists. But use in excess of the scope of the easement can be enjoined and damages obtained for injury caused by the excess use.

(b) Then why is B entitled to an injunction forbidding any use of Whiteacre by A or the 8,000 persons who work in the office building? In this case there are two quite distinct factors which contribute to the excess use of the easement over Whiteacre. First, the condition of the dominant estate Blackacre has been materially altered. Second, by building the office building on both Greenacre and Blackacre, these two lots have been integrated into a common unit, one a dominant estate as to Whiteacre and the other having no legal relation to Whiteacre. As to the change in the condition of the dominant tract, Blackacre, if such could be separated from Greenacre, B might well have a decree enjoining the excess use of the easement over Whiteacre, but this decree would still permit A and his family to use the way over Whiteacre for walking, riding bicycles and driving automobiles. However, the facts of the instant case do not permit this solution.

The use of the office building as a unit makes it impossible to separate the use A is making of Whiteacre in his role as owner of Blackacre, the dominant estate, from the use A is making of Whiteacre in his role as owner of Greenacre, the non-dominant tract. Some of the use that A is making of Whiteacre in connection with the use of Blackacre may be proper, but some is excessive. Any use at all which A is making of Whiteacre to benefit Greenacre is not merely excessive, it is wholly unauthorized. When the lawful use of the servient estate is inextricably integrated with the illegal use of such tract, then the dominant tenant has no right to make any use at all of the servient tract until the lawful use can be separated from the improper use. Therefore, although the easement is not extinguished, it is wholly suspended and no use can be made of it by the dominant estate while the present condition obtains. Thus, the injunction should prohibit any use of Whiteacre by A or any of the persons who work in the office building.[61]

The common law was even stricter, generally extinguishing an easement appurtenant when its owner attempted to use it for the benefit of lands other than the dominant estate. But several American courts have blanched at the rule that unauthorized enlargement of the dominant estate extinguishes the easement. The court in Brown v. Voss developed a complex rule under which if the injury to the servient estate resulting from the enlarged estate was minimal and the enlargement of the dominant estate socially valu-

61. See McCullough v. Broad Exchange Co., 101 App.Div. 566, 92 N.Y.S. 533, 16 N.Y.Ann.Cas. 51 (1905) (injunction granted against use of easement for alley where office building was built on both dominant and nondominant estates).

able, the owner of the servient estate might be entitled to damages only, rather than equitable relief.[62]

Note: Termination by Merger

When (1) the owner of the dominant estate acquires the servient estate, (2) the owner of the servient estate acquires the dominant estate, or (3) the same third party acquires both estates, the easement is extinguished. One caveat, however, the interest in the servient estate must have a minimum duration at least as long as the duration of the easement. For example, if A, the owner of the dominant estate, acquired a life estate in the servient estate, but the easement was one in perpetuity, the easement would survive A's death.[63]

§ 10.1.4 Licenses

PROBLEM 10.21: Norman is the fee simple owner of Blackacre which adjoins Rena's Whiteacre. Rena gives Norman permission to build an irrigation ditch across one edge of Whiteacre for the purpose of carrying water to Blackacre for irrigation. The ditch is to be a half mile long, lined with concrete and will cost about $2,000. All of this is known to Rena at the time she gives permission. Relying on her permission and with reasonable belief that the right will continue indefinitely, Norman enters Whiteacre, builds the proposed ditch, irrigates Blackacre and raises several crops on it until Rena obstructs the flow of water through the ditch, leaving Norman without water. When Rena gave Norman permission to build the ditch she received no consideration and she gave Norman no deed or writing. Norman brings suit to enjoin Rena from obstructing the flow of water through the ditch across Whiteacre. Should the injunction issue?

Applicable Law: When a licensor (a) permits a licensee to come onto the licensor's land, and (b) in pursuance of such license the licensee makes substantial expenditures of labor or capital, and (c) such is foreseen and understood by the licensor, and (d) the licensee proceeds on the reasonable belief that such license will not be terminated; then it becomes inequitable for the licensor to revoke the license, and there is an executed

62. Brown v. Voss, 105 Wash.2d 366, 715 P.2d 514 (en banc, 1986); Penn Bowling Recreation Center v. Hot Shoppes, 179 F.2d 64 (D.C.Cir.1949). Cf. Abington Ltd. Partnership v. Heublein, 257 Conn. 570, 778 A.2d 885 (2001) (easement encompassed after-acquired but contiguous property).

63. See Dority v. Dunning 78 Me. 381, 6 A. 6 (1886) (merger of undivided fee simple absolute in servient estate and one-half interest in 999 year lease in dominant estate did not terminate easement). See also Mularoni v. Bing, 306 Mont. 405, 34 P.3d 497 (2001) (merger of servient estate and part of dominant estate did not extinguish easement).

license which is irrevocable. The licensor is estopped to terminate the license, and the licensee has an interest in the licensor's land which is the equivalent of an easement even though no consideration is given for the privilege, and even though the license is oral.

Answer and Analysis

Yes. There are cases which state that every license, executed or unexecuted, is in its very nature revocable, and that when a licensee expends money and labor in pursuance of a license which, contrary to his expectations, is revoked by the licensor, it is simply a misfortune the burden of which falls on the licensee.[64] That holding suggests that (a) the licensee should not have relied on and had no right to put reliance on a mere license for protection, and (b) the licensee should have procured a grant by deed or a writing under the Statute of Frauds if he expected the law to protect him in his expenditure of labor or capital on the land of the licensor. Most of the cases recognize an executed license as the equivalent of an easement, or at least something similar.

Rena knew when she gave Norman permission to construct an irrigation ditch over Whiteacre that the project would involve a large outlay of capital and labor. She knew that a revocation of the permission would result in a complete loss and waste of the capital and labor expended. She knew that the returns expected to be realized on the investment would fail if the permission were terminated. She knew or should have known that such expenditure would not be made but for the permission given. But Norman has relied on Rena's permission and has made the expected expenditures which both parties had foreseen.

Norman's executed license is the equivalent of an easement for a ditch across Whiteacre appurtenant to Blackacre, and Rena has no right to interfere with such executed license which has become a right in the land of Rena. Thus, the injunction should issue prohibiting Rena from obstructing the flow of water through the ditch over Whiteacre. In this case its effect is to give Norman a right in Rena's land without the legal requirement of a deed or writing as provided by law or statute.[65]

PROBLEM 10.22: A maintains a football stadium, and B pays $25 for a general admission ticket to a football game. When the game is less than half played, A comes to B and orders her to leave the premises. B objects to such treatment but being

64. See Henry v. Dalton, 89 R.I. 150, 151 A.2d 362 (1959), relying on the public policy of "burdening of lands with restrictions founded upon oral agreements...."

65. See Restatement of Property § 519.

assured that if she does not leave voluntarily she will be physically ejected, leaves the premises. During B's stay in the stadium her conduct is unobjectionable. A's sole reason for ordering B from the stadium is simply that A does not want B there. Upon B's leaving the stadium A offers to return the $25 which B has paid for admission. B refuses to accept and sues A for damages. May B recover?

Applicable Law: When a ticket is purchased for a public event the question of whether the consideration paid is intended as the basis of a contract to permit the ticket holder to remain on the premises for the entire period of the entertainment, or is intended merely to enable the ticket holder to come onto the premises without being treated as a trespasser, in which case there is only a license, is one of fact.

Answer and Analysis

The answer in some jurisdictions is no. Had B paid no consideration for the ticket to the football game there would have been a mere license, which is revocable. It is just as clear that the transaction between A and B does not constitute a lease because the ticket is for general admission and gives B no right to sit in any particular seat in the stadium. A lease transfers to the tenant the right to possession of a particularly described area. Thus, it is always arguable in the case of a reserved seat that there may be a lease of a specific seat or space for a definite period of time, the duration of the spectacle. The fact that a consideration is paid in this case does not necessarily take it out of the category of mere license.

Whether the $25 payment is solely to permit B to come onto A's stadium without being treated as a trespasser by A, in which case there is a mere license, or is for an implied promise by A to permit B to remain in the stadium during the entire period of the football game, in which case there is a personal contract between A and B, or whether it is to be for both not being treated as a trespasser and for an implied promise, is usually a fact question. A license as such deals solely with the privilege of being on the land of another with the possessor's permission, whereas a contract deals solely with the personal relationship between the contracting parties and has nothing to do with land as land. In such a case the landowner may have a right to eject one from his land as far as the license by itself is concerned, but if such eviction from the land results in a breach of his contract, he may be liable for breach of the contract although not liable for revocation of the license. In such case it is the breach of the personal contract that imposes the liability and not the eviction from the land.[66]

66. See Feldt v. Marriott Corp., 322 A.2d 913 (D.C.App.1974) (woman who bought food in restaurant but who was in violation of its dress code did not have

PROBLEM 10.23: Joel is the owner of Blackacre, a section of agricultural land containing a barn with a large roof visible to travelers on a highway passing in either direction. Beverly is an advertising agent. Joel executes an instrument providing "I hereby grant to Beverly a license to paint a sign 20 feet by 30 feet on the roof of my barn on Blackacre and to maintain such painted sign for one year from this date, Dec. 1, 1965, for $250 with right to renew such license at Beverly's option for four more years at $250 per year." At the head of the instrument is the word "Lease." Beverly pays Joel $250 for the first year. Later Joel notifies Beverly by letter that he revokes the license, enclosing a $250 check. Beverly goes to Blackacre to paint the sign on Joel's barn and Joel refuses to permit her to do so. Beverly brings suit to enjoin Joel's interference with placing the sign on Joel's barn. Should the injunction issue?

Applicable Law: In construing an instrument, the intention of the parties must be gleaned by taking the instrument as a whole. The fact that an instrument is called a "lease" or a "license" or an "easement" is not conclusive that such name is a proper description of the legal effect of the instrument. An instrument which is designated a "lease" and "grants" a "license" may actually constitute a grant of an easement. In a lease the lessee is given exclusive possession of the land. In a license the licensor retains possession of the land on which the privilege is to be exercised.

Answer and Analysis

Yes. The first thing to determine on this set of facts is the effect of the instrument signed by Joel. The distinction between a lease and a license is clear, although in some cases it is difficult to determine whether a particular instrument creates one or the other. In a lease the lessee is given exclusive possession of the real property. In a license the licensor retains possession of the real property on which the privilege may be exercised. In this case it is clear that Joel did not intend to give up possession of the roof of his barn. Thus, even though the word "Lease" appears at the top of the instrument signed by Joel, it is not a lease. Simply because an instrument is signed and acknowledged and there is a consideration paid does not necessarily prevent its being a revocable license if that is the intention of the parties. But the fact that the word "license" is used in the instrument is not at all conclusive.

Is the instrument merely a contract between Joel and Beverly? If so, Beverly's remedy may be limited to damages. On the other

an irrevocable license to stay long enough to eat; her action, if any, was for breach of contract).

hand, if it is a conveyance of an interest in land, it may ordinarily be enforced by specific performance. Taking the instrument as a whole there seems to be an intention to create more than just a personal relationship between Joel and Beverly. There is a "grant" in the present tense to Beverly to use the roof of Joel's barn. Consideration was paid and accepted. It seems that the words, "lease" and "license" as used in the instrument are misdescriptions of the concepts sought to be created. To call the instrument a contract seems to fall short of its primary purpose which is to give Beverly a right in the use of the roof. The intention of the parties is to create in Beverly a right in the use of the barn as an accession to the real property on which it is located. The instrument has created an easement in gross in Blackacre for one year, with a specifically enforceable contract obligation on Joel's part at Beverly's option to grant an easement in gross for four more years. Therefore Joel should be enjoined from interfering with Beverly's painting the sign on the roof of Joel's barn.[67]

PROBLEM 10.24: In 1957 A Railroad signed an agreement with B City giving the City a license to construct and maintain a sewer upon the railroad's right of way. The agreement provided that B City would indemnify the railroad for liability for any injury resulting from the maintenance of the sewer. In 1972 A Railroad conveyed certain assets including the right of way involved here to C Railroad. Subsequent to this conveyance, an employee of C Railroad was injured by the lid of one of the manholes constructed on the railroad's right of way. C Railroad paid the injured employee in settlement of a claim under the Federal Employee's Liability Act (FELA). C Railroad then sued the City for indemnification pursuant to the 1957 license agreement. B City denied liability on the ground that the 1957 license agreement was revoked by the 1972 conveyance of the right of way involved. Should B City indemnify C Railroad for the loss?

Applicable Law: A license is usually revoked by a conveyance of the land subject to the license. The rule, however, is for the benefit of the owner of the land subject to the license; and if the new owner has notice of an "irrevocable" license at time of purchase, or if she consents to the continuation of the license, then the license is not revoked upon conveyance.

Answer and Analysis

Yes. Generally, a license is revocable upon the conveyance of property. The purpose of this rule is to protect the marketability of

67. Baseball Pub. Co. v. Bruton, 302 Mass. 54, 18 N.E.2d 362, 119 A.L.R. 1518 (1938).

titles. However, after the conveyance to it in 1972, and knowing of the existence of the license, C Railroad continued to allow the City to use its license to maintain the sewer on the property. Under the circumstances, the conveyance of 1972 did not operate automatically as a revocation of the license or of B City's agreement to indemnify C Railroad. Since the rule that a conveyance generally revokes a license is only for the benefit of the new landowner, only the new landowner can invoke the rule.[68]

Note: Duration of Irrevocable License

Restatement of Property § 519 provides that one receiving an irrevocable license "is privileged to continue the use permitted by the license to the extent reasonably necessary to realize upon his expenditures." Not all courts follow the Restatement.[69]

§ 10.2 Covenants Running With the Land

PROBLEM 10.25: A is the fee simple owner of Blackacre, the NW1/4 of Section 18. B is the fee simple owner of Whiteacre, the NE1/4 of Section 18. By a deed poll A grants to B and his heirs a right of way along the northernmost six feet of Blackacre for an irrigation ditch to carry water across Blackacre for use on Whiteacre. B accepts the deed from A. In the deed grantee B covenants to build and maintain in perpetuity a barbed wire fence of definite specifications along each side of the six-foot strip in which the irrigation ditch is located. B constructs the ditch and the fences. Then A dies intestate, leaving H his sole heir. Thereafter both fences become dilapidated. H demands that B fix the fences, but B refuses. H sues B in damages for breach of contract. May he recover?

Applicable Law: The legal effect of a covenant that runs with land is to make an assignee of the land either benefit from or be burdened by the covenant without being a party to the contract. For a covenant to run with the land at law there must be: (1) a covenant; (2) an intention that the covenant run with the land; (3) a covenant which touches and concerns the land; and (4) privity of estate. A deed poll accepted by the grantee and containing a promise by the grantee constitutes a covenant by the grantee. A covenant touches and concerns the

68. The general rule that a conveyance revokes a license is subject to the exception that successors in title take subject to an *irrevocable* license if they had notice of the license before purchase. Chicago & North Western Transp. Co. v. Winthrop, 257 N.W.2d 302 (Minn.1977).

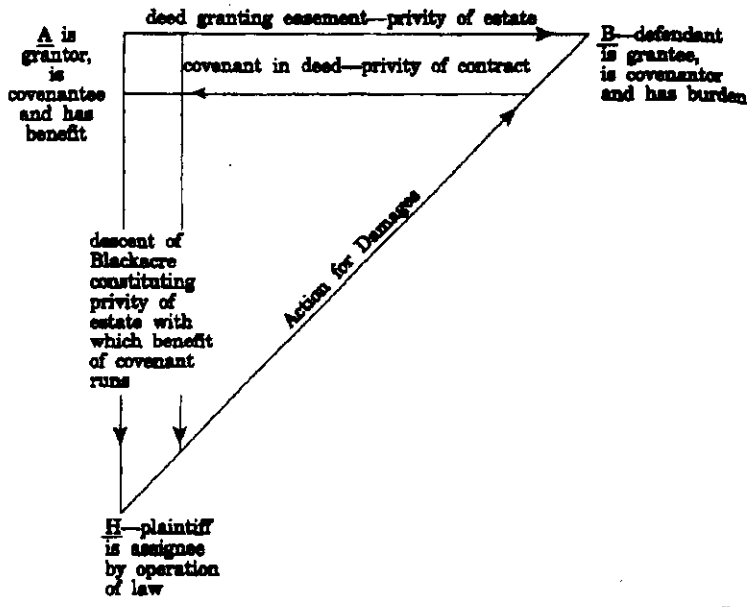
69. For example, see Shearer v. Hodnette, 674 So.2d 548 (Ala.Civ.App.1995) (irrevocable license is personal and lasts for life of licensee); Camp v. Milam, 291 Ala. 12, 277 So.2d 95 (1973) (similar).

land if it makes the land in the hands of its owner either more usable and more valuable or less usable and less valuable. Privity of estate usually refers to the succession to the interest in the land of one of the covenanting parties. An assignee of the benefit end of a covenant which runs with the land may recover damages from the covenantor for breach of the covenant.

Answer and Analysis

Yes. This conclusion presupposes that the covenant runs with the land. Figure 1 below discloses an analysis of the facts and the position of the parties.

FIGURE 1



[1A]

For a covenant to run with the land at law four elements must co-exist. (1) There must be a covenant. (2) There must be an intention that the covenant run with the land. (3) The covenant must touch and concern the land. (4) There must be privity of estate.

(1) The covenant. At common law a covenant meant an instrument in writing under seal. Today, seals have been all but abolished. In general today an instrument which is in writing and which is signed by the party to be charged as required by the Statute of Frauds may for practical purposes be considered a covenant for the purpose of running with the land. Covenants that

run with land are often called *real* covenants to distinguish them from purely *personal* covenants which bind only the person. In this case the covenant is contained in a deed poll—an instrument signed by the grantor only and not by the grantee. It is now settled that a grantee, by accepting the deed, becomes bound by any covenants contained therein even though he does not actually sign the instrument. Therefore, B is bound by the covenant.

(2) Intent. Early cases said that no covenant could run with land unless the word "assigns" was used to express the intention that the covenant run. When the word "assigns" or the word "successors" is used the intention that the covenant should run is clear. But intent of the parties may be determined by other methods. If the terms, purpose and circumstances surrounding the making of a covenant disclose the intention of the parties, it is immaterial whether or not any particular words have been used in the body of the instrument.[70] In our facts neither the word "assigns" nor the word "successors" has been used in the deed. But it seems quite clear that A and B did not covenant for the fencing of the irrigation ditch solely for the benefit of A personally. The covenant was designed to benefit A not merely personally, but also as the owner and possessor of Blackacre. It is provided that the fences on both sides of the irrigation ditch should be maintained, not merely during A's lifetime, but in perpetuity because it was intended that such maintenance should continue beyond the lifetime of A and for the benefit of those who succeed to A's interest in Blackacre. The original covenanting parties intended that the covenant run with the land. The second required element is present.

(3) The covenant must touch and concern the land. Neither cases nor commentators present an exact test for determining whether or not a particular covenant touches or concerns land. If the effect of a given covenant is to enhance or increase the use or the utility of the land or make it more valuable in the hands of the covenantee, then it is said that the *benefit* of the covenant touches and concerns the land. If the effect of a covenant is to curtail the utility of the land or make it less valuable, then the *burden* of the covenant touches and concerns the land. In applying these principles, the easement granted by A to B for the irrigation ditch should be carefully distinguished from the covenant made by B to A concerning the building and maintenance of the fences on both sides of that ditch. As to the easement, A is the grantor and B is the grantee. As to the covenant, B is the covenantor and A is the covenantee. The benefit of the covenant is in favor of A. The burden of the covenant is to be performed by B. These appear in

70. See, e.g., Moseley v. Bishop, 470 N.E.2d 773 (Ind.App.1984) (agreement to "permanently maintain" a drainage tile manifested sufficient intent to bind successors).

graphic form in *Figure 1* above. Without the covenant, B, the dominant tenant as to Blackacre, has the right to come onto the land for the purpose of constructing the irrigation ditch and keeping it in proper repair for carrying water to Whiteacre. But he has no obligation to build and maintain a fence on either side of the ditch without the covenant. The fences on either side of the irrigation ditch give privacy and protection to A in his use of Blackacre. The property is more valuable in A's hands merely because the fence is there, and is maintained by B without expenditures on the part of A as the owner of Blackacre. It seems clear then that the benefit end of the covenant touches and concerns Blackacre.

The other end of the covenant seems clearly to touch and concern Whiteacre and the easement appurtenant to it, because it alters in some respect B's relationship to the land. For our purposes here the easement as well as Whiteacre is considered as land. Without the covenant B could use and enjoy the appurtenant easement without building or maintaining the fences. With the covenant his use of the easement in connection with Whiteacre is curtailed to the extent that it is necessary for him to build the fences and from time to time repair them. The use and utility of Whiteacre and its appurtenant easement are less valuable to B because that covenant is contained in the deed poll which B accepts from A. It is not material that the fences may also be beneficial to B in keeping live stock from obstructing the ditch. The effect of the covenant is to burden Whiteacre and the easement and make them less valuable in the hands of their owner, B. Such a covenant therefore touches and concerns Whiteacre and the easement appurtenant to it.

(4) There must be privity of estate. Referring to the deed from A to B containing the covenant and to Figure 1 above it should be noticed, (1) that the covenant itself creates a contractual privity between the original parties, A and B, (2) that the conveyance of the easement for the irrigation ditch creates privity of estate between the covenantor and covenantee, and (3) that the covenant concerns the easement.

Privity of estate as used here means that one of the contracting parties succeeds to an interest in the land of the other party. Here, B succeeds to an interest (the easement) in Blackacre and by the deed is made the dominant tenant. It means that the benefit end of the covenant is connected with or "touches and concerns" Blackacre and that the burden end of the covenant is connected with, or "touches and concerns," Whiteacre and its easement appurtenant. When A dies intestate, Blackacre goes to his heir, H. In such cases there is no distinction between a voluntary assignment and one by operation of law. Since H succeeds to A's interest or estate in

Blackacre, there is privity of estate between A and H. To this privity of estate the benefit end of the covenant is annexed and passes to H with the estate. There being privity of estate between the covenanting parties, A and B, by virtue of A's deed to B, and there being privity of estate between A and H by virtue of descent, the privity requirement is met.

Legal effect of the running of the covenant. The legal effect of a covenant that runs with land is either to benefit or to burden a person who is not a party to the making of the contract. This effect comes about through no other reason than that the person has become the owner of an interest in the land involved. A and B were the only parties to the original covenant in A's deed to B. Ordinarily in the field of contracts no one other than A or B would have any rights or liabilities under the contract. But because the covenant runs with the land, either its benefit or its burden, or both, in case of assignment of the interest in the land, will affect the assignee. When H inherits A's land, the benefit of the covenant runs with Blackacre to H, and he is empowered to sue for its breach in the same way and to the same extent as A had a right to do.[71]

Note: Public Policy and the Touch and Concern Requirement

Courts often manipulate the touch and concern requirement in order to give effect to the judiciary's (or the state's) ideas about what kinds of land use restrictions should be enforced against successors in interest, and what kinds should not be enforced. The effect is to "deprivatize" to a certain degree the law of servitudes. For example, a court might find that a noncompetition covenant does not "touch and concern" the land, thereby giving effect to a state policy favoring free competition.

PROBLEM 10.26: A is the fee simple owner of Blackacre, the NW1/4 of Section 18. B is the fee simple owner of Whiteacre, the NE1/4 of Section 18. A grants to B and her heirs a right of way along the northernmost six feet of Blackacre for the purpose of an irrigation ditch which will carry water across Blackacre for use on Whiteacre. B accepts the deed from A. In the deed B covenants to build and maintain in perpetuity a barbed wire fence of definite specifications along each side of the six-foot strip in which the irrigation ditch is located. B constructs the ditch and the fences. B later dies intestate leaving H as her sole heir. Thereafter H permits the fences to fall into disrepair. A demands that H repair the fences and H refuses. A sues H in damages for breach of contract. May he recover?

71. Morse v. Aldrich, 36 Mass. (19 Pick.) 449 (1837).

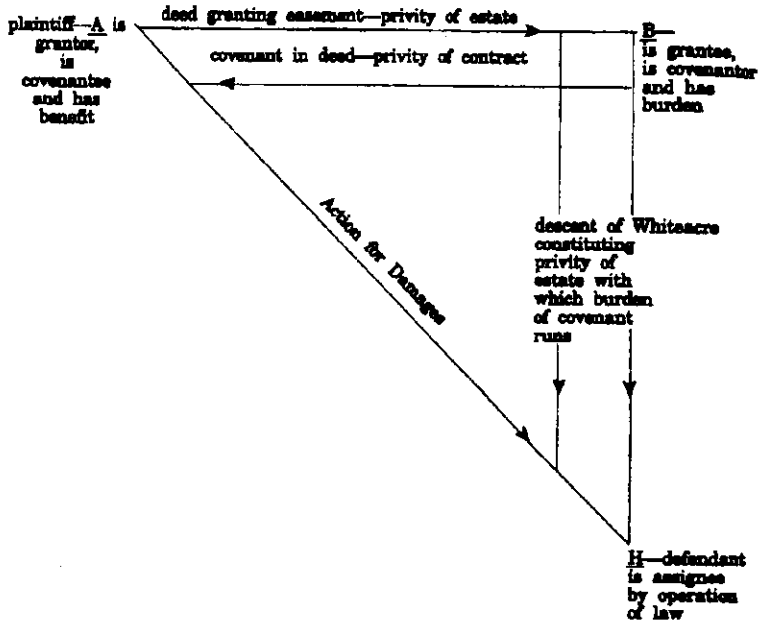
Note: This set of facts is identical with those in the preceding case with a few exceptions. Here the covenantor, B, dies. The heir is the defendant. The question involves the running of the burden rather than the benefit end of the covenant. (Compare *Figures 1* and *2*.)

Applicable Law: An assignee of the burden of a covenant which runs with the land is personally liable to the covenantee in damages for breach of the covenant. This is true even when the covenant comes to the assignee by descent by operation of law and he has neither the right nor the power to reject it.

Answer and Analysis

The answer is yes. This conclusion presupposes a determination that the covenant set forth in the instrument runs with the land. *Figure 2* below discloses an analysis of the facts and the position of the parties.

FIGURE 2



[3A]

One item deserves attention. In the preceding Problem the benefit of the covenant ran with the descent of Blackacre. In this Problem the burden runs with the descent of Whiteacre and the easement appurtenant to it. If an assignment is voluntary, the assignee has the power to refuse to receive the property. At

common law the heir could not prevent the vesting of the title in him. This is not objectionable when a benefit is conferred. But in this case by the descent of Whiteacre together with the burden end of the covenant. H finds himself personally liable on a covenant he never made and which has come to him without power to prevent it. The common law made no distinction between a voluntary assignment and one by operation of law and at common law there was nothing H could do to escape the personal liability imposed on him by this set of facts. Today, most states have statutes that enable the heir at law to reject title by descent to property if he or she decides that the burdens of ownership exceed the benefits.

PROBLEM 10.27: A is the fee simple owner of Blackacre, the NW1/4 in Section 18. B is the fee simple owner of Whiteacre, the NE1/4 in Section 18. A grants to B and his heirs a right of way along the northernmost six feet of Blackacre for the purpose of an irrigation ditch which will carry water across Blackacre for use on Whiteacre. B accepts the deed from A. In the deed B, the grantee, covenants to build and maintain in perpetuity a barbed wire fence of definite specifications along each side of the six-foot strip in which the irrigation ditch is located. B constructs the ditch and the fences. A dies intestate leaving H as his sole heir. B dies intestate leaving X as his sole heir. X lets the fences fall into disrepair. H demands that X repair the fences and X refuses to do so. H sues X in damages for breach of the contract. May he recover?

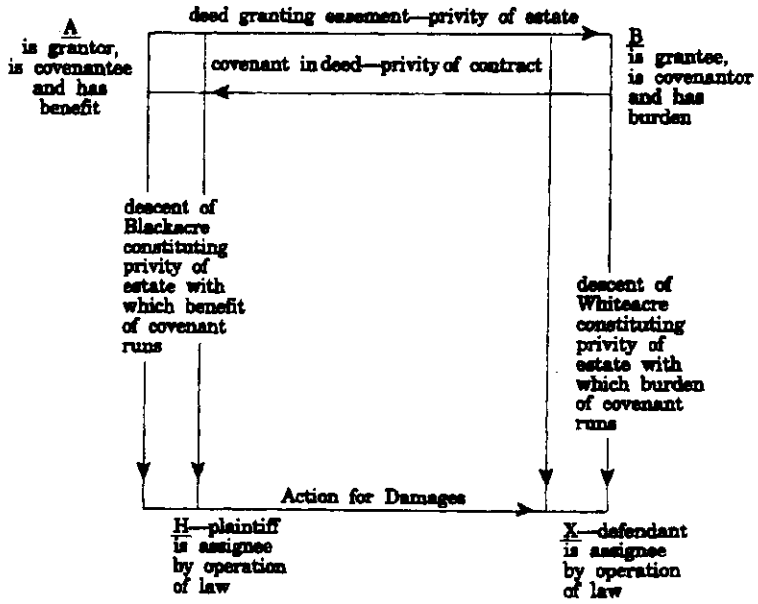
Note: This set of facts is identical with those in the two preceding cases, except here both covenantor and covenantee die. One heir is suing another heir. The question involves the running of both the benefit and the burden of the covenant. Compare *Figures 1, 2* and *3*.

Applicable Law: If both the benefit end and the burden end of a covenant run with the land and both covenantee and covenantor assign their interests in the land, then the assignee of the covenantor is personally liable to the assignee of the covenantee for breach of the covenant.

Answer and Analysis

The answer is yes. This conclusion presupposes a determination that the covenant given in the instrument runs with the land. Figure 3 below discloses an analysis of the facts and the position of the parties.

FIGURE 3



[8A]

What was said in the two preceding Problems applies here as well. In those Problems there was only one transfer of the land, but here there are two, one by the covenantor and one by the covenantee. The result is that both ends of the covenant run: the assignee of the covenantee is suing the assignee of the covenantor. Because both the benefit and burden run with the land, the assignee of the covenantee, H, may recover damages for breach of the covenant from the assignee of the covenantor, X.

Figure 3 discloses five factors concerning privity of estate: (1) A conveys an easement to B which constitutes successive privity of estate between the original covenanting parties. (2) A and B own interests simultaneously in Blackacre, A owning Blackacre as a servient estate and B owning an easement. (3) The descent of Blackacre to H constitutes successive privity of estate between A and H, the assignee. (4) The descent of Whiteacre and the appurtenant easement to X constitutes successive privity of estate between B and X, the assignee. (5) H and X own interests simultaneously in Blackacre, H owning Blackacre as a servient estate and X owning an easement.[72]

72. See Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 390 N.E.2d 243 (1979).

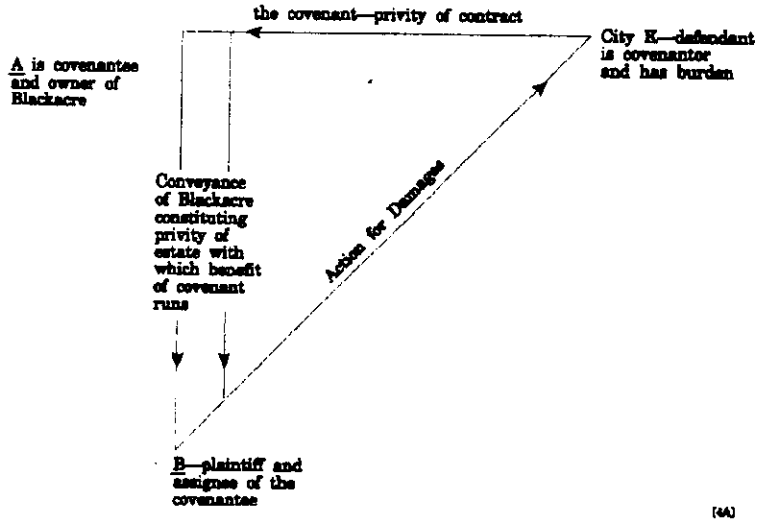
PROBLEM 10.28: A is the owner of Blackacre in fee simple on which he operates a mill which is powered by the water of River Y which flows through Blackacre and is fed from Lake M. The principal value of Blackacre is the mill. City K has riparian water rights in Lake M and is taking water out of the lake to supply the inhabitants of City K. The quantity of water which City K takes from Lake M increases with the growth of the City, and finally reaches a point that the level of the lake is so low that there is insufficient flow from Lake M through River Y to run A's mill. A threatens to sue City K for wrongful interference with A's water supply. To prevent the suit and settle A's claim amicably, City K and A execute a written acknowledged agreement by which A covenants not to sue City K and City K covenants to desist from taking any water from Lake M which will interfere with A's mill on Blackacre, and covenants not to take water out of Lake M which will lower the surface of the water in Lake M below a specific level. Thereafter A conveys Blackacre to B and assigns with it the covenant made with City K. City K violates the covenant by taking so much water from Lake M that it causes B's mill to shut down for lack of sufficient water. B sues City K for damages for breach of the covenant. May B recover?

Applicable Law: There are two types of privity of estate, "tenurial" and "grantor-grantee." Co-owners of land, or of simultaneous interests in it represent mutual privity of estate; when X conveys his land to Y there is successive privity of estate because Y succeeds to X's estate in the land. The majority of the cases state that there must be privity of estate between the original contracting parties, which is "horizontal" privity, before a covenant will run with the land.

Answer and Analysis

Yes. This answer presupposes a determination that the covenant runs with Blackacre into the hands of B, the assignee of A, the original covenantee. See Figure 4 below which discloses an analysis of the facts and the position of the parties.

FIGURE 4



Before the covenant will run with the land: (1) there must be a covenant; (2) there must be an intention that the covenant run with the land; (3) the covenant must touch and concern the land; and (4) there must be privity of estate.

(1) The covenant. This item presents no difficulty on the facts. A written, acknowledged agreement executed by both parties constitutes a covenant which can run with land.

(2) The intention. While it does not appear that the word assigns or the word successors is used in the covenant, it seems quite clear that A did not require the execution of the agreement by City K merely to benefit A personally. The purpose of the agreement is to benefit A in his ownership of Blackacre. We can hardly ascribe to A an intention that the covenant is to benefit the ownership of Blackacre only during A's lifetime for we are told that the principal value of Blackacre is in the value of the mill. And the value of the mill is saved only by saving the water level in Lake M as provided for in the covenant.

(3) The covenant must touch and concern the land. The sole purpose of the covenant is to make Blackacre more usable and valuable. Without the covenant Blackacre cannot be used for the mill. The covenant clearly touches and concerns the land.

(4) There must be privity of estate. This item raises the only truly important issue in the problem. Privity of estate may simultaneous (tenurial) or successive (grantor-grantee). If X and Y are co-owners of land mutual privity of estate exists between them.

If X owns land and conveys it to Y there is said to be successive ("grantor-grantee") privity of estate between them because Y succeeds to X's interest in the land.

Before a covenant will run, there must be both *horizontal* and *vertical* privity of estate. Horizontal privity exists between the covenantor and covenantee, and can be either mutual ("tenurial") or successive ("grantor-grantee"). Vertical privity exists between *either* the covenantor and the covenantor's successor in interest; or between the covenantee and the covenantee's successor in interest. The cases seem to agree that if there is: (1) privity of estate between the original covenanting parties; and (2) privity of estate between either of the covenanting parties and her assignee, then the covenant will run with the land. Further, privity of estate between the original covenant parties will be found if they either had mutual legal interests in the affected piece of land at the time the covenant was executed (mutual, or tenurial, privity) or the covenant was contained in a deed that passed title from the original covenantor to the original covenantee, or vice-versa (successive, or grantor-grantee, privity).

In the preceding Problems on this subject all of the above mentioned elements were present. But in this case it should be noticed that there is no horizontal privity of estate, either mutual or successive, between the original covenanting parties, A and City K. A simply owns Blackacre and City K has no interest therein either as a co-owner or as a conveyee of an interest. Between A and City K there is simply the covenant which constitutes privity of contract.[73] Dicta in the great majority of cases would require privity of estate between the original covenanting parties as a condition prerequisite to the running of the covenant with the land. But there seems to be neither logical nor historical basis for this requirement. Privity of contract between the original parties seems sufficient, provided there is privity of estate in the assignment of the interest in the land with which either the burden or the benefit of the covenant can run. In our case there is vertical privity of estate between A, the covenantee, and B, the assignee. When A conveys Blackacre to B there is successive privity of estate because B succeeds to the interest or estate which A has in the land. To this privity of estate the benefit of the covenant can adhere and therefore runs with it. When the conveyance of Blackacre is made to B and the covenant is also assigned to B, the necessary privity of estate for the running of the benefit of the covenant is present and B, the assignee, can recover damages from the covenantor, City K,

73. See, e.g., Wheeler v. Schad, 7 Nev. 204 (1871) (conveyance of property occurred and agreement to maintain a dam executed six days later; no horizontal privity for the parties were neither tenurial nor grantor-grantee).

for its breach of the covenant. Furthermore, the result does no more than carry out the intention of the parties.[74]

Note: Broad and Narrow Views of Privity

There is considerable controversy as to the requirement of privity of estate. Some courts assess a broader privity requirement for the running of the burden of a covenant than for the running of a benefit. The Restatement of Property generally permits a benefit to run even if the covenantor and covenantee were adjoining land owners with no legal interests in one another's land, and the covenant was contained in a mere contract. Under similar circumstances, however, the Restatement would not permit the burden to run, but would require either "simultaneous interests" in the same land, or a succession of interests ("grantor-grantee") between the promising parties.[75]

As the problem notes, the requirement of horizontal privity can generally be satisfied in two ways. First is so called "simultaneous interest" privity, in which the original contracting parties have an ongoing, simultaneous interest in the land (e.g., landlord-tenant covenants always satisfy this requirement, because the covenants last only for the duration of the lease, and during that time the landlord and tenant both have an interest in the land). However, a covenant between the owners of the dominant and servient estates respecting an easement appurtenant would also have this kind of privity, as would co-tenants or the owner of a present estate and a future estate in the same land. Second, nearly all states recognize "grantor-grantee" privity. That is, there is privity of estate between the grantor and grantee of the property, *provided* that the covenant is created in the same instrument as that which transfers the property. Most real covenants on fee interests establish horizontal privity this way. One or two states may not recognize "grantor-grantee" privity. The often given exception is Massachusetts; but in Whitinsville Plaza, Inc. v. Kotseas,[76] the court enforced a covenant in which there seems to have been only grantor-grantee privity.

§ 10.3 Equitable Servitudes

PROBLEM 10.29: Bert is the owner of two adjoining city lots, Blackacre and Whiteacre. He conveys Whiteacre to Eucebia by a deed containing the following provision, " ... with this express reservation, that no building is to be erected by the said Eucebia, her heirs or assigns, upon the land conveyed."

74. See Shaber v. St. Paul Water Co., 30 Minn. 179, 14 N.W. 874 (1883).

75. See City of Reno v. Matley, 79 Nev. 49, 378 P.2d 256 (1963) (not requiring privity of estate for running of benefit, because permitting them to run has less effect on alienability of land).

76. 378 Mass. 85, 390 N.E.2d 243 (1979).

Any building on Whiteacre will destroy a view of the ocean from Blackacre. Eucebia conveys Whiteacre to Jack by a deed which refers to the restriction in the deed from Bert to Eucebia. Jack then conveys to Trudy who has no actual knowledge of the restriction, the deed to Trudy making no reference to the restriction, and Trudy makes no examination of the records concerning Whiteacre. Bert then conveys Blackacre to Rodney. All deeds in the chain of title are properly recorded immediately following execution. Before Trudy begins building on Whiteacre Rodney notifies her of the restriction and warns her not to build. Trudy starts to build on Whiteacre and Rodney brings suit to enjoin her. Should the injunction issue?

Applicable Law: An equitable servitude may be created by (a) an instrument which complies with the Statute of Frauds, and (b) an intention that there be a restriction on the use of the land involved. A deed providing for a restriction on the use of the land conveyed and accepted by the grantee may create an equitable servitude without the grantee's signature. The intention to create an equitable servitude may be determined by the words of the instrument and the circumstances under which it is executed. There must be an intention that the land be bound. An equitable servitude may be enforced against any person who takes land with either actual or constructive notice that such land is burdened with a restriction on its use. Such a servitude cannot be enforced against a bona fide purchaser who takes land for value and without notice of the restriction on its use. Whether or not a particular person can enforce an equitable servitude is determined by the intention of the parties. If land, and not merely its owner personally, is to be benefitted by the servitude, then a transferee of the land for the benefit of which the servitude exists may enforce the restriction.

Answer and Analysis

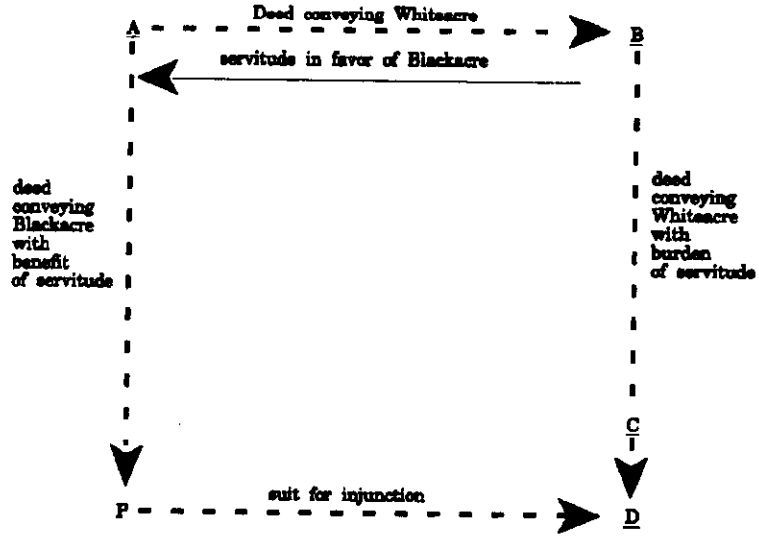
Yes, for the promise is an equitable servitude and the benefit and burden will run. Figure 5 below discloses an analysis of the facts and the position of the parties.

An equitable servitude requires: (a) an instrument which complies with the Statute of Frauds; (b) an intention that there be a restriction on the use of the land involved; (c) actual or constructive notice upon the party against whom enforcement is sought.

(a) The instrument. The deed conveying Whiteacre to Eucebia is in writing and signed by the grantor. Although the deed is not signed by Eucebia she is the party to be charged or the party against whom the burden of the servitude is to run. But when

Eucebia accepts the deed she is bound by the provisions of the deed even though she did not sign it.

FIGURE 5



[BA]

(b) Intent. No particular words are essential to the creation of an equitable servitude provided that an intention to bind the land and not merely the parties to the transaction can be found from the instrument and the circumstances surrounding its execution.[77] In this case the words of the deed are in the form of a reservation, namely, "with this express reservation, that no building is to be erected by the said Eucebia, her heirs or assigns, upon the land conveyed." The circumstances clarify the expressed meaning, for it appears that any building built on Whiteacre will destroy the view to the ocean from Blackacre, the land retained by the grantor. The reservation in the deed and the circumstances make it clear that the land conveyed, Whiteacre, is to be bound, and not merely Eucebia personally, and that the purpose of the restriction on Whiteacre is for the protection of Blackacre. Further, it is not difficult to find the intention concerning the duration of such restriction. Not only Eucebia but "her heirs or assigns" are not to build on Whiteacre.

77. See Friedlander v. Hiram Ricker & Sons, Inc., 485 A.2d 965 (Me.1984), holding that a servitude saying nothing about binding successors in interest was nevertheless enforceable against them, on the basis of affidavits submitted by the defendants' grantor that their intent was to make it run with the land. There was a vigorous dissent.

(c) Notice. For an equitable servitude to run with the land there must be actual or constructive notice to those against whom enforcement is sought.

An equitable servitude is enforceable against any person who takes land with either actual or constructive notice that the land is burdened with a restriction on its use. But a servitude cannot be enforced against someone who gives value and has no notice of the existence of the servitude—i.e., a bona fide purchaser. What is the position of Trudy, the person against whom enforcement is sought? The facts state that she has no actual notice of the servitude at the time she purchased Blackacre. Further, there is no reference in her deed from Jack that such restriction exists. In addition she purchases Whiteacre for the very purpose of doing an act which will be a violation of the servitude, namely, erecting a building on Whiteacre. None of these facts determines the question of notice or of Trudy's rights. When Trudy purchased Whiteacre she did not examine the records in the chain of title to Whiteacre. Every purchaser of land is bound by notice of the contents of the deeds and other instruments which are on record and are a part of her chain of title. The deed from Bert to Eucebia is an essential link in Trudy's chain of title to Whiteacre and imparts constructive notice to Trudy of its contents. Part of those contents is the reservation that neither Eucebia nor her "assigns" shall erect a building on Whiteacre. Therefore, when Trudy purchased Whiteacre from Jack she took Whiteacre with constructive notice from the records that she has no right to build on such land. Hence, the burden of this equitable servitude is enforceable against her.

(d) The running of the benefit of the servitude. The intention of the parties determines who may and may not enforce an equitable servitude. The fact that Blackacre is retained by Bert and that any building on Whiteacre would cut off the view to the ocean from Blackacre, makes it plain that the servitude created in the reservation of the deed to Eucebia is intended not merely to benefit Bert personally but is intended to benefit Blackacre and preserve to it an unrestricted view of the ocean. It is intended then that such servitude shall redound to the benefit of any successive owner of Blackacre, which includes Bert's grantee, Rodney. Nothing suggests that the deed from Bert to Rodney expressly granted or assigned to Rodney the benefit of the servitude. But such servitude is merely an incident to Blackacre, the land for the benefit of which it is created. Therefore, when Blackacre is conveyed to Rodney, the incidental servitude passes without express mention. So Rodney can enforce the equitable servitude against Trudy and the injunction should issue in his favor.

(e) Dicta. The servitude created in this case might also satisfy the requirements for a negative easement appurtenant to Blackacre

as the dominant estate with Whiteacre as the servient estate, or the requirements of a covenant running with the land at law. There is an instrument containing a covenant; an intention that the covenant run with the land; the covenant touches and concerns the land because it restricts the use of Whiteacre; and there is successive privity of estate between the original parties, between Eucebia and Trudy as to the burden on Whiteacre, and between Bert and Rodney as to the benefit which runs with Blackacre. Servitudes often have multiple classifications. The concepts of easements, covenants running with the land at law and equitable servitudes matured at different times in our legal history. The person seeking enforcement need establish only that a covenant can be enforced as either an easement, a real covenant or an equitable servitude. The person avoiding enforcement must prove that it fails under all three sets of rules.[78]

Note: Affirmative Covenants

A few older courts held that "affirmative" covenants or equitable servitudes—that is, covenants requiring the owner of the burdened estate to do something actively for the enjoyment of the benefitted estate—are disfavored. These courts have either construed such covenants narrowly or refused to enforce them.[79] But the weight of authority is that affirmative covenants will run under more-or-less the same conditions as negative covenants.[80]

PROBLEM 10.30: A is the fee simple owner of Blackacre, a 40 acre tract which she subdivides, exclusive of streets, a park and alleys, into 240 lots numbered 1 to 240. She records a signed and acknowledged plat of the area and a declaration of restrictions covering all the lots in the tract, which disclose a complete scheme of development for the subdivision. The restrictions are declared to be "covenants running with the land constituting equitable servitudes upon the lots lying within Blackacre" and include the following:

78. See Tulk v. Moxhay, 2 Phillips 774, 41 Eng. Rep. 1143 (English Chancery 1848) (purchaser of a park-like piece of land containing statue, who knew of existing covenant to preserve the land's character and maintain the statue, was bound to uphold the covenant, even though his own deed contained no such obligation).

79. Nicholson v. 300 Broadway Realty Corp., 7 N.Y.2d 240, 196 N.Y.S.2d 945, 164 N.E.2d 832 (1959) (enforcing covenant to provide heat, but stating the concern); Eagle Enterprises, Inc. v. Gross, 39 N.Y.2d 505, 384 N.Y.S.2d 717, 349 N.E.2d 816 (1976) (refusing to enforce covenant to supply water).

80. The leading decision is Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938) (enforcing covenant to pay annual maintenance fee); see also Regency Homes Assn. v. Egermayer, 243 Neb. 286, 498 N.W.2d 783 (1993) (same).

1. All lots shall be used for residence purposes only except Lots 5, 7 and 9 in Block 3 and Lots 6, 8 and 10 in Block 15 and Lots 3, 5 and 7 in Block 9.

2. No part of said Blackacre or any building thereon, except Lot 7 in Block 9 shall be used directly or indirectly for the sale or manufacture of intoxicating liquor of any kind.

3. All adobe and tile buildings shall be plastered on the exterior surface and all frame buildings shall be painted.

4. No temporary residence shall be built upon the front half of any lot.

5. Garages may be built only on the rear half of the lot.

6. No residence shall cost less than $100,000.00.

7. No residence shall be built within 25 feet of the front property line or within 5 feet of the side line.

8. No business building shall be built within 10 feet of the front property line.

9. Any lot may have a separate garage.

10. Not more than a single house shall be built on any one lot.

11. No part of said property shall be sold, conveyed, rented or leased to or be used by any person who is not a caucasian.

A sells 150 of the 240 lots. Each deed contains a reference to the recorded declaration of restrictions with a statement to the effect that the grantor, the grantee and their heirs and assigns and successors are bound by each of the restrictions. P is the purchaser and owner of Lot 7 in Block 9 in Blackacre where he operates a bar and sells liquor. D is the purchaser and owner of Lot 3 in Block 9 in the subdivision and operates a drug store on her lot. She has purchased fixtures, has procured a license from the State to sell liquor on Lot 3 and is making arrangements to sell liquor in her drug store on Lot 3 in Block 9 of Blackacre. It appears that there have been violations of the above restrictions as follows: (a) 3 residences have been used for religious meetings; (b) 9 residences made of adobe are not plastered on the exterior; (c) one house owner has sold a few chairs and a few stoves, and in a limited way has used his residence as a used furniture store; and (d) 4 frame houses have not been painted. There are 125 small houses on the tract. P sues D to enjoin his selling liquor on Lot 3 in Block 9 of Blackacre. The owners of 10 residential lots in the subdivision join with P as party plaintiffs. Should the injunction issue?

Applicable Law: A declaration of restrictions which is signed, acknowledged and recorded, evincing an intention to restrict the use of the lots in a subdivision to residential purposes only, and disclosing an intention to set forth a comprehensive development scheme for the subdivision, is competent to create an equitable servitude on each lot within the tract and each lot owner is bound by the restrictions. There being an intention that such servitudes shall run with the land, any lot owner or his assignee may enforce such restrictions and such restrictions are enforceable against any assignee. Restrictions which prohibit either the ownership or the use of real property on the ground that a person belongs to a particular race are not enforceable in the courts. Every valid restriction on the use of land constitutes a separate and independent servitude and can be enforced for its own purpose. This is true even though other restrictions have been violated and the dominant lot owners have acquiesced in such violations. However, if a subdivision is restricted to residential purposes only and the neighborhood has so changed that the purpose of the restrictions can no longer be accomplished, then the servitude is extinguished.

Answer and Analysis

Yes. The restrictions constitute equitable servitudes. The declaration of restrictions and reference to them in each of the deeds to the lot owners comply with the Statute of Frauds. The declaration of restrictions and the deed to each lot owner expressly disclose an intention that such restrictions shall bind not only grantor and grantee but also their heirs, assigns and successors. Further, they provide that these restrictions shall run with the land and constitute "equitable servitudes upon the lots" in the subdivision. In addition, the surrounding circumstances disclose a general scheme or plan for developing the subdivision. The fact that the plat of the subdivision and the declaration of restrictions are signed, acknowledged and recorded, and that the deed to each lot owner refers to the declaration of restrictions, gives each lot owner notice of the existence of the servitudes. The three requisites for the existence and enforceability of the equitable servitudes obtain—namely, an instrument, intention and notice. Alternatively, the requirements for a covenant to run in equity are satisfied: there is a covenant or instrument, intent, touch and concern, and notice. Then each of the restrictions contained in the declaration of restrictions is enforceable unless it is invalid on policy grounds, or it has been waived or abandoned.

(1) The validity of the restrictions. In general, the restrictions are typical of the kind found in general schemes for the development and protection of a residential area. All are valid

except one. Restriction number 11 is an unenforceable racially restrictive covenant. In Shelley v. Kraemer the Supreme Court held that judicial enforcement of such covenants constituted impermissible "state action" supporting race discrimination.[81] The covenant also violates the Fair Housing Act.[82]

(2) Waiver or abandonment of the restrictions. Several principles may be considered at this point.

(a) A plaintiff who is guilty of laches is not entitled to relief in equity. There is nothing in this case which indicates delay, reasonable or otherwise. The action is commenced even before any liquor is actually sold on Lot 3 of Blackacre so it appears there is prompt action on the part of the plaintiffs.

(b) If an area is restricted to use for residential purposes only and the entire neighborhood has become so affected or used or surrounded by business or industry that the purpose and object of the restrictions can no longer be realized, then the burden of the servitude is extinguished and cannot be enforced.[83] But this principle does not apply to our facts. Here are 240 lots with 125 houses in the area protected by equitable servitudes. Inevitably there will be some violation, great or small, of rigidly worded restrictions. The violations listed, if indeed they are real violations, are relatively minor when considered in the light of the values protected by the servitudes as they are applied to all of the lots and all of the lot owners in Blackacre. Simply because there are a few unpainted and unplastered houses, some chairs and stoves are sold from a residence, and a few houses are used for religious meetings, does not mean that the residential character of the neighborhood has been changed.[84]

(c) Each valid and enforceable restriction is a separate and independent servitude placing a benefit and a reciprocal burden on each lot within the development scheme. And because one restriction has been violated and nothing done about it does not mean that there is universal waiver, abandonment or acquiescence in the violation of another restriction. The restriction concerning the sale of liquor is different from the other restrictions. Its desirability, its value and its purpose to each lot owner in the subdivision are quite distinct from the desirability, the value and purpose of any other

81. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

82. See § 12.4.

83. See, e.g., Fink v. Miller, 896 P.2d 649 (Utah App.), cert. denied, 910 P.2d 425 (Utah 1995) (after 23 out of 81 houses violated restriction requiring wood shingles, it could no longer be enforced).

84. Contrast El Di, Inc. v. Town of Bethany Beach, 477 A.2d 1066 (Del. 1984) (long-standing practice of "brown-bagging," or permitting restaurant customers to bring their own wine to a restaurant, indicated that conditions had changed, thus rendering old covenants prohibiting sale of alcoholic beverages in an entire town unenforceable).

restriction covering the tract. It can be enforced for its own purpose without regard to the other restrictions. Further, it cannot be maintained that there has been any waiver or abandonment of such liquor servitude on Lot 3 in Block 9 of Blackacre. The fact that the defendant has procured a liquor license from the State is totally immaterial. The servitude governs. The fact that the defendant may have invested heavily in trade fixtures and liquor is totally immaterial. The servitude governs. She bought her lot with notice of the restriction which governs its use and is bound by it.

(3) Who may enforce the restrictions? The intention of the parties determines who may enforce an equitable servitude. Here, both the benefits and the burdens of the restrictions are made expressly to run with the land and in favor of the grantor, the grantees, their heirs, assigns and successors. In addition, the subdivision development scheme evinces a clear intention that every lot and its owner has the right and a reciprocal duty concerning the preservation of that plan. The servitudes may be enforced by every person who owns a lot in the subdivision whether the grantor or his successor or a grantee or her successor. This includes the plaintiffs in this action. Therefore, the injunction should issue prohibiting the defendant from selling intoxicating liquor on her lot.[85]

Note: Race Discrimination and Private Servitudes

Prior to Shelley v. Kraemer,[86] racially discriminatory covenants on use and occupancy were considered to be simply private agreements and therefore valid. The Fourteenth Amendment was thought inapplicable since it prohibited only states from discrimination and not private parties. But *Shelley* held that if the state enforced such covenants, there was state action within the prohibition of the Fourteenth Amendment.

Courts have also considered the problem of race discrimination achieved by use of the fee simple determinable or other limitation in which the estate would automatically revert to the grantor if the land should be occupied by someone of the designated race. In Charlotte Park & Recreation Com'n v. Barringer,[87] the Supreme Court of North Carolina upheld such a reverter provision as to land conveyed by private grantors to be used as a golf course for white persons only. In Evans v. Abney,[88] the upheld a reversion to the heirs of a devisor who

85. Condos v. Home Development Co., 77 Ariz. 129, 267 P.2d 1069 (1954) (permitting enforcement against landowner who purchased liquor license and sold liquor in knowing violation of a restrictive covenant forbidding it, despite the fact that other restrictive covenants in the neighborhood had been broken).

86. 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

87. 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied 350 U.S. 983, 76 S.Ct. 469, 100 L.Ed. 851 (1956).

88. 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970).

had devised the land in trust for a municipal park for white persons only. When the purpose of the trust failed, the Georgia Supreme Court decided that the property reverted, and this decision was upheld by a majority of the Supreme Court, noting that the decision eliminated all discrimination since the whites as well as the blacks were now prevented from using the land as a park. The state court had decided that the *cy pres* doctrine (changing the terms of the trust to carry out as nearly as possible the intent of the settlor), could not be utilized to alter the will of the testator.

Much of the law of race restrictions in private servitudes has been effectively superseded by the Fair Housing Act, the 1866 Civil Rights, and various state fair housing provisions. These are discussed in § 12.4 on discrimination.

Recently courts have struck down other than race-based restrictions, either under federal or state constitutions, or else under a more general "public policy" rationale. The courts have become particularly concerned about covenants restricting the placement of group homes for the mentally or vocationally handicapped, and have denied enforcement for a number of reasons.[89] Most states have enforced age restrictions in private covenants.[90]

In 1988 Congress added "family status" and "handicap" as protected classifications under the Fair Housing Act.[91] These provisions forbid (1) restrictions barring the occupancy by persons because of a physical or mental handicap; or (2) restrictions barring occupancy by parents with children. The provisions are discussed more fully in Chapter 12, § 12.4.

In Hill v. Community of Damien of Molokai, the court found two rationales for refusing to enforce a restriction so as to exclude a group home for AIDS patients. First the court held that a restriction limiting use to "single family residence purposes" did not exclude the group home, for the people who lived there were using it for residential purposes and were living as a family. Second, the restriction violated the handicap provision of the federal Fair Housing Act.[92]

89. See Park Redlands Covenant Control Committee v. Simon, 181 Cal. App.3d 87, 226 Cal.Rptr. 199 (1986) (covenants restricting occupancy to three persons violated state constitutional right to privacy); Crane Neck Ass'n, Inc. v. New York City/Long Island County Services Group, 61 N.Y.2d, 154, 472 N.Y.S.2d 901, 460 N.E.2d 1336 (1984) (refusing to enforce a covenant interpreted as excluding a group home for the mentally disabled, under state public policy concerns).

90. See White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979) (upholding age restriction); Covered Bridge Condominium Ass'n, Inc. v. Chambliss, 705 S.W.2d 211 (Tex.App. 1985) (upholding age restriction found not to be unreasonable or arbitrary); Riley v. Stoves, 22 Ariz.App. 223, 526 P.2d 747 (1974) (upholding covenant limiting occupancy to persons at least 21 years old).

91. 42 U.S.C.A. § 3601 et seq.

92. 121 N.M. 353, 911 P.2d 861 (1996). Cf. Martellini v. Little Angels Day Care, Inc., 847 A.2d 838 (R.I. 2004) (covenant limiting uses to "single family private residence purposes" excluded day care center). Accord D & M Country Estates Homeowners Ass'n v. Romriell, 138 Idaho 160, 59 P.3d 965 (2002) (group home for elderly).

PROBLEM 10.31: A, B and C each own 48 lots in a tract three blocks square and containing 9 blocks. The lots of each are scattered throughout the entire area. The three own all of the 144 lots within the subdivision. A, B and C join in signing, acknowledging and recording a map of this subdivision and designate it Fairview. There is no general declaration of restrictions and no agreement among the owners concerning restrictions to govern the area involved. Each owner is interested in selling all of his lots and in getting the maximum price for each. A sells his 48 lots to 48 persons over a period of time including one to D and in each deed he provides as follows: "Fairview is an attractive residential subdivision. Only one single house may be built on any lot and must cost not less than $120,000 and the house must be set back at least 30 feet from the front property line. These restrictions shall run with the land and shall continue as long as the grantor or his heirs own any lot in Fairview. Any violation of one of the restrictions shall cause the lot to revert to the grantor or his heirs." B sells his 48 lots to various persons including two lots to D and provides in each deed: "Only one single house may be built on any lot and must cost not less than $120,000. These restrictions shall run with the land as long as the grantor or his heirs own any lot in Fairview. The violation of any restriction may be enjoined by the grantor or his heirs." C sells his 48 lots to 48 different persons and there is no restriction placed in any of his deeds. P is the owner of three lots in Fairview, having purchased one lot from each of the three original owners. The three lots which D purchased from A and B are adjoining lots and D makes plans for building a large store building on the three lots. P seeks to enjoin such construction on the ground that each of the three lots is subject to a restriction for one house on each. Should the injunction issue?

Applicable Law: There are three types of schemes for subdivision development: (a) one in which a common owner records a declaration of restrictions setting forth the general scheme and binds all his grantees to adhere to such restrictions; (b) one in which all the owners of an unrestricted area join in a formal agreement creating equitable servitudes on their respective lots; and (c) one in which an owner of a subdivision places restrictions on all lots in the tract but such restrictions are for the sole benefit of the remaining lots owned by the owner in the tract. In schemes (a) and (b) the servitudes are to continue indefinitely and are enforceable by and against remote grantees and assignees of the original parties. In scheme (c) such servitudes are intended to endure only while the grantor continues

to own a lot in the tract and they are enforceable only during that period and only by the grantor or his heirs. Equitable servitudes may be extinguished in the same way as easements or profits. But a plaintiff seeking to enforce an equitable servitude may be denied relief on equitable grounds, such as laches or hardship. If and when the purpose of a servitude in a development scheme is impossible of attainment, the servitude should be extinguished and damages should not be permitted for breach. A development scheme which is not universal and applicable to all lots in the subdivision is not reciprocal, and if reciprocity is not required the plan must fail because its effectiveness must be based on the intention to benefit all lots in the tract. If some lots are restricted in one way, others in another way, and some lots not restricted at all the scheme must generally fail.

Answer and Analysis

The answer is no, for several reasons.

(1) Methods of imposing equitable servitudes in subdivision schemes; ascertainment of benefit and duration. There are three general types of subdivision schemes by which equitable servitudes are imposed:

(a) In one plan there is a common owner or grantor who executes and records a declaration of restrictions setting forth a general scheme of building and development in the subdivision. Each deed issued to a lot in the tract binds the grantee to adhere to the restrictions contained in the recorded declaration. In such cases the servitudes created are made to run with the land and are enforceable by and against the assignees and remote grantees of the original parties.

(b) In another plan all of the owners of lots in an unrestricted subdivision get together and draw up and execute a formal agreement in writing, subjecting their respective lots to restrictions for residential purposes only and providing that each lot owner may enforce such restrictions against the owner of every other lot in the subdivision, including remote assignees and grantees. These agreements should be recorded to constitute constructive notice to all subsequent purchasers. The legal effects are the same as in type (a) above.

(c) Then there are the cases in which the owners of lots in a particular subdivision exact restrictive covenants from all of their grantees for the benefit only of the remaining lots which the owners hold in the tract. In such cases only the grantors or their heirs can enforce the restrictions and then only so long as they continue to own a lot in the tract. The servitudes are intended to

benefit only the grantors as owners of the remaining lots. The servitudes are intended to endure only during the time the grantor or his heirs still own part of the tract. The servitude is intended to protect the sale value of the grantor's remaining lots. Therefore, it is made to run with the land until the grantors' last lot is sold and is not merely a personal contract. In such case no one except the grantors or their heirs can enforce the covenant.

As far as endurance and enforcement are concerned, the problem involves restrictions of type (c). C placed no restrictions on the use of the lots he sold. A subjected his sold lots to servitudes, but expressly provided that such servitudes should endure only until his last lot was sold. The same is true as to B. But at the time P brings his suit against D, all of the original owners of lots in the subdivision have disposed of all of their lots. Therefore, because it was so intended in the original grants, all of the servitudes have been extinguished by the expiration of the time during which they were to endure. This is enough to support the conclusion that the injunction should be denied. But there are other reasons.

(2) Who may enforce an equitable servitude? Whether or not a particular person may enforce an equitable servitude is determined by the intention of the parties. In our case it was intended that the grantor or his heirs and no one else may enforce the restrictions. The plaintiff, P, is not one of these and therefore cannot maintain his action against D.[93]

(3) Extinguishment of equitable servitudes. As a general principle equitable servitudes may be extinguished in the same way as easements or profits. This includes release, merger, abandonment and so on. In addition, the granting of equitable relief is said to be a matter of grace and not of right. If a plaintiff is guilty of laches or of violating the very restriction she seeks to enforce it may be quite inequitable to give her the relief prayed for. Also if the granting of an injunction would work great hardship on the defendant with small benefit to the plaintiff, the relief may be denied. Furthermore, when conditions work such a change in a neighborhood that the purpose of the restrictions are impossible to achieve, then the servitude is extinguished. The problem case presents an apparent attempt by three owners to develop a residential subdivision. Two owners place restrictions, but of different

93. But see Snow v. Van Dam, 291 Mass. 477, 197 N.E. 224 (1935), permitting residents in a group of lots developed earlier to enforce restrictions on a group of lots developed later, and holding further that intent to permit this enforcement could be *inferred* from the physical situation. In this case, the lots upon which enforcement was sought lay at the gate of the development, and the plaintiffs had been given the impression when they first purchased that the entire area would be residential. The court suggested that the purchasers of the earlier lots were third-party beneficiaries of contracts entered into between the developer and purchasers of the later group of lots.

types. The third owner places no restrictions at all. There can be no effective general scheme of restrictions covering a subdivision unless the restrictions are substantially uniform, cover the entire tract and apply to all lots of like character brought within the total scheme.[94] The reason is that such a scheme presupposes a benefit to all. If only some lots are benefitted without burden and some lots carry all the onus of the restrictions without reciprocal benefit, then the intended purpose of the scheme cannot be attained. For this reason P should be denied the injunction. Suppose A or B still owned lots in the subdivision and one or the other or both brought suit against D. They should be denied the injunction as well. Some cases seem to permit recovery of damages at law in such situations, but if the burden of the servitude has ceased, then damages ought not to be allowed, because the benefit of the servitude is not intended to be merely personal.

Note: The "General Scheme" and the Statute of Frauds

Many jurisdictions permit equitable servitudes to be implied from the physical appearance of a developed area itself, even though there is no sufficient writing recorded in the chain of title of a particular lot. The theory is that in certain cases a physical examination of the premises and the surrounding area will suggest that the land must be subject to servitudes; the prospective buyer is put on notice of these servitudes as well as any that might be recorded in his chain of title.[95] There are conflicting opinions about what implication of servitudes requires. The easiest case for implication is where there is clearly a restriction and it fairly clearly covers lot X, but the restriction is recorded in a different chain of title. Then physical evidence of the restriction puts a prospective purchaser of lot X on notice that he should look elsewhere than the title chain of lot X to find evidence of a restriction. The harder case occurs where the physical evidence makes the existence of a restriction likely, but the written record is ambiguous. See, e.g., Mid–State Equipment Co., Inc. v. Bell,[96] where three lots on the edge of a subdivision were unrestricted in the filed plat map, and the restriction was recognized merely on the fact that adjoining lots in the subdivision were restricted.

94. See O'Malley v. Central Methodist Church, 67 Ariz. 245, 194 P.2d 444 (1948) (injunction against church in a residential area denied, where many neighboring lots had been sold without similar restrictions); Harbour v. Northwest Land Co., Inc., 284 Ark. 286, 681 S.W.2d 384 (1984) (restrictions unenforceable where deeds of similarly situated neighboring lots were inconsistent). But see Hammons v. Table Mountain Ranches Owners Ass'n, Inc., 72 P.3d 1153 (Wyo. 2003) (fact that an architectural review committee had waived restriction on prefabricated homes in the past did not mean they lost the right to disapprove them in the future).

95. See Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925) (purchaser placed on constructive notice based on observation of neighboring properties of residence only requirement).

96. 217 Va. 133, 225 S.E.2d 877 (1976).

California courts have traditionally held that the general policy of the Statute of Frauds prevents a court from implying restrictions in the absence of a properly drafted written and recorded document.[97] However, the California Supreme Court took an abrupt turn in Citizens for Covenant Compliance v. Anderson,[98] which enforced restrictions that were declared and recorded in a subdivision plat map but not included in any subsequent deeds from the developer. The court held:

> ... if the restrictions are recorded before the sale, the later purchaser is deemed to agree to them. The purchase of property knowing of the restrictions evinces the buyer's intent to accept their burdens and benefits ... even if there is no additional reference to them in the deed.

In any event, most—but not all—courts hold that if a lot is bound by a written, recorded restriction, enforcement will not be denied *merely* because the restrictions are not reciprocal—i.e., they do not apply identically to all lots. However, a few courts refuse to enforce written restrictions that: (1) do not apply to all lots in a subdivision, particularly if (2) the differential application seems irrational.[99] Courts have also refused to enforce a covenant for payment of assessments where the amount of payment varied irrationally from lot to lot, or not all lots enjoyed the privileges paid for by the assessments.[100]

Note: The Problem of Discretion in Enforcement

Restrictive covenant schemes often authorize the creation of homeowners' associations or other committees with authority to make and administer by-laws. The by-laws themselves can be enforced against individual owners, even though they are not part of the original restrictions, and sometimes were passed after a particular owner purchased her home. In general, courts enforce such by-laws unless they are found to be arbitrary.[101]

Occasionally a court will refuse to enforce equitable servitudes if the servitudes themselves give so much discretion to other property owners or the developer that notice of exactly what is required becomes problematic. For example, in Davis v. Huey[102] the plaintiffs tried to

97. Werner v. Graham, 181 Cal. 174, 183 P. 945 (1919).

98. 12 Cal.4th 345, 906 P.2d 1314, 47 Cal.Rptr.2d 898 (1995).

99. Harbour v. Northwest Land Co., Inc., 284 Ark. 286, 681 S.W.2d 384 (1984) (covenants unenforceable because inconsistencies appeared in the restrictions on similar lots, thus upsetting any general plan).

100. Kell v. Bella Vista Village Property Owners Assn., 258 Ark. 757, 528 S.W.2d 651 (1975); Petersen v. Beekmere, Inc., 117 N.J.Super. 155, 283 A.2d 911 (Ch.Div.1971).

101. E.g., Nahrstedt v. Lakeside Village Condominium Assn., 8 Cal.4th 361, 33 Cal.Rptr.2d 63, 878 P.2d 1275 (In Bank, 1994) (upholding pet restriction); Bernardo Villas Management Corp. Number Two v. Black, 190 Cal.App.3d 153, 235 Cal.Rptr. 509 (1987) (refusing to uphold as unreasonable a by-law against parking trucks, campers or boats on the parking lot).

102. 620 S.W.2d 561 (Tex.1981).

enjoin the defendant from building a home that violated the standards adopted under an architectural review covenant. The Texas Supreme Court held that the defendant would be bound by such standards only if the standards themselves had become part of a general scheme, since the standards themselves were not part of the recorded restrictions.

Several courts hold that a covenant permitting a majority of owners to change a restriction by majority vote must be interpreted so as to prevent arbitrary outcomes. For example, in Walton v. Jaskiewicz,[103] the court refused to permit the majority to amend a no-subdivision restriction so as to permit subdivision of a single lot. While the no-subdivision restriction could be amended, it must be amended so as to permit subdivision by any lot in the subdivision. Other courts have held that a restriction cannot be amended so as to be more onerous to a property owner who relied on the existing restriction when she purchased.[104]

Courts also generally uphold covenants giving developers some flexibility to change restrictions on future lots in response to market demand, provided that they are reasonable and do not give the developer substantial power to undermine the expectation of previous purchasers. However, if the restriction is unreasonable or ambiguous it will not be enforced.[105]

PUDs and HOAs

Modern housing development often encompasses large areas and many units, and frequently the project encompasses different uses, or restrictions on uses, in different portions of the development. The developer may resort to various techniques and different types of housing to accomplish her goals. Whenever restrictions on use are imposed, the heart of the concept is the equitable servitude or covenant running with the land. This note briefly explains some of the commonly used techniques for creating a controlled and compatible community.

The PUD, or Planned Unit Development, generally refers to a subdivision which provides for a mixture of land uses—residential, commercial, service, industrial—all in a single district but segregated so as to provide close-in recreational, service, and work facilities, and at the same time maintain quiet and peaceful residential sections.

An important characteristic of the PUD is flexibility. Portions of the subdivision may be developed as condominiums, cooperatives,

103. 317 Md. 264, 563 A.2d 382 (1989).

104. McMillan v. Iserman, 120 Mich. App. 785, 327 N.W.2d 559 (1982) (could not amend restriction so as to exclude group home for developmentally disabled).

105. See Schmidt v. Ladner Const. Co., 370 So.2d 970 (Ala.1979) (developer could not act on covenant permitting him to lower minimum home size restrictions, because it was unreasonable and ambiguous).

or single family ownership. There also may be a combination of apartment, town houses, closely located single family homes, and areas of widely separated single family homes. Today many states have passed PUD enabling acts, which permit municipalities or other governmental subdivisions to authorize such forms of housing.[106]

The HOA, or Home Owners' Association, is commonly used in connection with individual ownership of separate parcels. As a result of a Declaration of Restrictions, each parcel owner may be compelled to be a member of the association and to pay assessments levied by the association. Commonly owned areas, parks, possibly streets, club house, swimming pools, and the like, are usually owned by the association, and the various members pay for the operating expenses via assessment. The association is frequently accorded a lien on the member's property for unpaid assessments. The association may also be given wide powers over such things as approving building and renovation plans so as to preserve not only the residential character of the neighborhood but also its architectural compatibility.

Note: Termination of Servitudes

Termination by Merger or Operation of Law. Both real covenants and equitable servitudes are terminated by merger when one person comes into ownership of all the affected lands. The rules are the same as those applying to termination of easements, discussed *supra*, this chapter.

Equitable servitudes can also be terminated under the doctrine of "changed conditions" when changes in the nature of the land *outside* the affected subdivision are so substantial that virtually no one inside continues to profit from the restrictions. In Lebo v. Johnson,[107] the court refused to apply the doctrine of changed conditions so as to relieve people on the edge of a subdivision from "residence only" restrictions, simply because nearby property had been converted to commercial uses. The court noted that in such circumstances the outer tier of lots acts as a buffer between the residential lots within the subdivision and the commercial development outside. One state, Massachusetts, has passed a statute requiring a person seeking to enforce a servitude to show that the restriction actually benefits her. Further, even if she can show such a benefit, the remedy is limited to money damages in many circumstances.[108]

106. See Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968), upholding a PUD ordinance.

107. 349 S.W.2d 744 (Tex.Civ.App. 1961).

108. The statute was upheld in Blakeley v. Gorin, 365 Mass. 590, 313 N.E.2d 903 (1974).

Chapter 14

VENDOR AND PURCHASER: THE LAND SALE CONTRACT

Table of Sections

Sec.

14.1 Brokers' Contracts.
14.2 Statute of Frauds.
14.3 Partial Performance.
14.4 Equitable Conversion and Risk of Loss.
14.5 Time of Performance.
14.6 Marketable Title.
14.7 Marketable Record Title Acts.
14.8 Remedies for Breach of the Land Sale Contract.
14.9 Liability for Defective Structures: Builder, Vendor, Broker, Lender.

SUMMARY

§ 14.1 Brokers' Contracts

1. Traditionally, a real estate broker's contract has been regarded as one for the performance of services rather than for the sale of an interest in land. Such a contract was not within the usual Statute of Frauds and was enforceable although oral. While many states have abandoned that rule,[1] others have not.[2]

2. Many states have a statutory requirement that precludes recovery of a real estate commission unless there is a written contract or authorization signed by the seller or party to be charged for the commission.[3]

1. Marathon Realty Corp. v. Gavin, 224 Neb. 458, 398 N.W.2d 689 (1987) (requiring brokerage contract to comply with Statute of Frauds). Many decisions refuse to award the commission unless the ready, willing and able purchaser actually got as far as signing a binding agreement to purchase. In practice this means that the broker is entitled to her commission whenever the buyer is entitled to specific performance. Hallmark & Johnson Properties, Ltd. v. Taylor, 201 Ill.App.3d 512, 147 Ill.Dec. 141, 559 N.E.2d 141 (1990).

2. E.g., Pardoe & Graham Real Estate v. Schulz Homes, 259 Va. 398, 525 S.E.2d 284 (2000) (brokerage contract with home builder enforceable even though oral).

3. See, e. g., Seaman v. King Arthur Court, Inc., 35 Conn.Sup. 220, 404 A.2d 908 (1979).

3. Under a nonexclusive or ordinary listing contract, a real estate broker earns her commission when she has produced a purchaser who is *ready, willing and able* to buy the property on the terms and conditions set by the vendor. A sale need not actually be consummated under this traditional view.[4]

4. But several states have abandoned the traditional rule and hold that the broker under an ordinary listing contract is not entitled to a commission unless he or she produces a purchaser ready, willing and able to buy on the terms fixed by the owner; the purchaser enters into a binding contract with the owner to do so, and the purchaser completes the transaction. In other words, under this view, there is no right to a commission if the contract is not consummated because of the buyer's financial inability or because of any default of the buyer. However, if the failure to consummate the contract results from the wrongful act or interference of the seller, the broker's claim is valid and must be paid.[5] In any event, explicit provisions in the contract regarding when the commission is due will ordinarily be enforced.[6]

5. A broker may properly fill in blanks on forms of commonly used earnest money contracts or offers to purchase, when such activity involves merely the supplying of simple factual data, such as the names of the parties, the time for closing, the amount of the sales price, and how it shall be paid. However, in most states a broker who is not an attorney is not allowed to fill in blanks on deeds, mortgages, and other legal instruments subsequently executed in relation to the sales transaction.

6. The broker and seller may enter into any one of several types of agreements relating to the sale of realty:

a. nonexclusive, open or ordinary listing, where the broker is entitled to a commission only if he is the first to procure a purchaser; if the property is sold by the seller himself, or by someone else, the broker has no claim;

b. exclusive listing or agency agreement, in which the broker is entitled to a commission if he or any other broker sells the property, but he is not entitled to a commission if the owner himself sells the property; exclusive listing frequently

4. E. g., Judd Realty, Inc. v. Tedesco, 400 A.2d 952 (R.I.1979).

5. Tristram's Landing, Inc. v. Wait, 367 Mass. 622, 327 N.E.2d 727 (1975); Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967). But see Sparks v. Fidelity Nat. Title Ins. Co., 294 F.3d 259 (1st Cir. 2002), which denied a broker's recovery even when the vendors made misrepresentations and failed to provide broker with full information about the rights of third parties.

6. E.g., Chamberlain v. Porter, 562 A.2d 675 (Me.1989) (listing contract providing that brokers commission was to be paid from "proceeds at closing" meant that no commission was due when sale fell through owing to title defects).

becomes multiple listing with the members of a local real estate board who agree to divide the commission if one other than the listing broker effects the sale; and

c. exclusive right to sell agreement whereby the broker is entitled to a commission if the property is sold by anybody, even the owner himself, during the term of the agreement.

7. A common type of listing agreement provides that the broker's commission will be a designated percentage of the sales price. Another possibility is a net agreement whereby the owner/seller agrees to accept a specified price for the realty with the broker being entitled to anything for which the property is sold above that price.

§ 14.2 Statute of Frauds

1. All states have a Statute of Frauds relating to the enforceability of contracts for the sale of interests in land.

2. These statutes are based on an English predecessor and are similar in substance although quite diverse in style.

3. The English Statute provides that no action shall be brought upon real estate contracts or upon any agreement not to be performed within one year unless the agreement or some memorandum of it shall be in writing and signed by the person sought to be charged, or by his lawfully authorized agent.

4. The contract provisions of the Statute are applicable only to executory obligations. If the contract is executory on both sides, then the promises of both the buyer and seller are equally within the statute. If the buyer pays the full purchase price, the executory contract of the seller to convey is still within the statute; but if the seller conveys and the buyer does not pay, the buyer's promise is simply to pay a sum certain and is not within the statute.

5. The statute is satisfied if a sufficient memorandum is in writing and signed by the person sought to be charged.

6. What constitutes a "sufficient memorandum" varies widely. Basically, however, the writing or memorandum must contain: (a) an identification of the parties; (b) a sufficient description or identification of the land to be conveyed; (c) the purchase price and the manner of payment; and (d) the promises on both sides.

7. The writing must be signed. In most states the required signature is of the person sought to be charged or of his authorized agent. The person sought to be charged is the person against whom the contract is attempted to be enforced, either the seller or the buyer as the case may be. However, in some states, either by construction or by express statutory provisions, the writing or memorandum must be signed by the vendor or grantor.

8. The memorandum may consist of several writings if they are sufficiently connected and are signed by the party to be charged.

§ 14.3 Partial Performance

1. The doctrine of part performance permits an oral contract for the sale of land to be enforced specifically in equity.[7]

2. There is considerable diversity among the states as to the kind and amount of part performance which is necessary in order to permit the contract to be enforced in equity. The acts of performance commonly relied on are: (a) payment of all or part of the consideration or purchase price; (b) delivery of possession to the vendee; (c) construction of permanent and valuable improvements by the vendee, or in the absence of these, proof of such facts as would make the transaction a fraud on the purchaser if the contract were not enforced.

3. A very small minority of states may hold that payment of all or a very substantial portion of the purchase price is sufficient part performance.

4. A minority of states hold that delivery of possession to the purchaser may be sufficient part performance, but the continuance of a prior possession by the purchaser is generally held insufficient.

5. Most jurisdictions require either a combination of payment plus possession, or possession plus improvements in order to permit the oral contract to be enforced specifically. The more strict jurisdictions require a combination of all three types of part performance specified in no. 2 supra in order to permit the contract to be enforced in equity.

§ 14.4 Equitable Conversion and Risk of Loss

1. The doctrine of equitable conversion treats interests in land as if the land had already been converted into personal property.

2. Equitable conversion is based on the maxim that equity regards as done that which ought to be done.

3. Equitable conversion applies when there is an enforceable obligation to sell land. The obligation may be created by will, court order or contract. The discussion here is limited to equitable conversion as a result of a contract to convey land.

7. All but a very few states permit an oral contract to be specifically enforced when there is sufficient part performance. See 3 Am. L. Prop. 41, 1952—76 Supp., n. 13 to p.27, § 11.7.

4. For equitable conversion to apply, the contract must be specifically enforceable.

5. Under equitable conversion, the purchaser is regarded as the owner of the land for many purposes, and the vendor, although she still owns the legal title, is regarded as the beneficial owner of personal property, primarily the right to the purchase price and to impose a security interest on the legal title to enforce the payment of the purchase money.

6. When the vendor dies during the existence of a specifically enforceable contract, the beneficial interest descends as personal property and the heir gets only a bare legal title which he must convey to the purchaser when the purchaser performs.

7. When the purchaser dies during the existence of an enforceable contract, the right to receive the land goes to her heir but the duty to pay the purchase price is imposed upon the personal representative or estate.

8. In the absence of a contract provision to the contrary, the traditional view applies the equitable conversion doctrine and puts the risk of loss on the buyer for casualty losses which occur without the fault of either party during the existence of the vendor-vendee relationship. A minority view imposes the risk on the vendor, and two Uniform Acts in effect place the risk of loss on the one in possession.

9. In the absence of a contract provision to the contrary, equitable conversion does not give the purchaser the right to possession before the contract is consummated and a deed executed. Accordingly, the vendor is normally entitled to possession and to rents or profits during the existence of the relationship.

10. In the absence of a contract provision to the contrary, the obligation to pay taxes is usually imposed on the party in possession.

11. The granting of specific performance rests in the judicial discretion of the court. Specific performance will not be granted if the contract is deemed grossly unfair or unconscionable, or if its enforcement would entail undue hardship on the defendant or a third party.

12. Both the vendor and the purchaser have an insurable interest while the contract is executory.

§ 14.5 Time of Performance

1. In equity, time is not of the essence in a contract for the sale of land unless

a. the contract specifically so provides; or

b. special circumstances surrounding the execution of the contract so require.

2. Where time is not of essence, equity will allow a reasonable time for performance.[8]

3. The parties to a contract for the sale of land may make time of the essence by specific provision to that effect.

4. Although time is made of the essence, the parties may waive that provision of the contract.

5. Although time is not originally made an essential part of the contract, it may later be made of the essence by the party not in default serving on the other a proper notice and specifying a reasonable date for performance.

6. If the contract does not specify that time is of the essence, either party may give notice to the other setting a time for performance, provided that the interval allowed is reasonably sufficient to enable the other party to perform.[9]

§ 14.6 Marketable Title

1. The concept of marketability generally denotes a title that is reasonably free from doubtful questions of law or fact, or a title not likely to result in litigation.

2. The terms "good" and "marketable" and the terms "bad" and "unmarketable" generally designate titles a court of equity will or will not compel a purchaser to accept in a suit for specific performance.

3. In the absence of an agreement to the contrary, there is an implied undertaking in the contract that the vendor has a marketable title. The contract usually provides that on failure of the vendor to deliver a marketable title, the vendee may rescind and be entitled to his money.

4. Unless otherwise specified, a fee simple is the type of title or estate required.

5. If a deed is delivered and it contains no warranty of title, the vendee has no redress, since the deed supersedes the contract, which is no longer in effect. To the rule that the contract merges

8. See Hochard v. Deiter, 219 Kan. 738, 549 P.2d 970 (1976) (three years a reasonable time, where seller was curing defect in title); Kasten Construction Co. v. Maple Ridge Construction Co., 245 Md. 373, 226 A.2d 341 (1967) (buyer's tender of payment after the date stipulated in the contract was reasonable, where neither party seemed to be in a particular hurry to perform).

9. See Mazzaferro v. Kings Park Butcher Shop, Inc., 121 App. Div.2d 434, 503 N.Y.S.2d 134 (1986) (where time of performance was not made of the essence and date specified had been waived, a party could fix a date for performance by a "clear, distinct, and unequivocal notice fixing a reasonable time for performance" served on the other party in a timely fashion).

into the deed, there is an exception as to those provisions which the parties obviously did not intend to merge. For example, if the contract provides that possession will be delivered one month after closing, then the provision as to possession will continue to regulate the rights of the parties for one month after the deed is delivered. Likewise, if in the contract the seller promises to repair the roof, the promise generally survives delivery of the deed. Such a promise does not concern title at all, and one does not ordinarily find in deeds statements about the quality of the roof. Such promises are said to be "collateral" to the deed.

6. The vendor is obligated only to tender a "good" and "marketable" title on the date when the conveyance is to be executed and a purchaser may not rescind a land sale contract before the time for performance.

a. Knowledge by the purchaser of the vendor's lack of title at the time she entered into the contract is immaterial, since she has a right to rely upon the vendor either having a title, or procuring it so as to carry out his agreement.[10]

b. A vendor may lack title at the time of entering the contract—e.g., in a situation where the vendor is herself a vendee under a contract with the owner, without being in default prior to the time for performance.

7. The real estate sales contract may expressly stipulate that the vendor furnish an "abstract" showing his title to be good and marketable. This is equivalent to a marketable title of record. Marketability in this instance must be deduced from the public records or abstract entries and resort to parol evidence is not permissible.

8. Title to land acquired by accretion or adverse possession does not constitute merchantable title *of record* because there must be resort to both matters outside the record and abstracts in order to establish such a title.[11]

9. If, either by express provision or by construction, the vendor is required to have only a marketable title as distinguished from a marketable title of record, then a vendor may sometimes rely on matters outside the record to establish her title. In such

10. However, the courts distinguish defects known to the buyer and that the parties presumably assumed would not be cured. See, e.g., Sinks v. Karleskint, 130 Ill.App.3d 527, 85 Ill.Dec. 807, 474 N.E.2d 767 (1985) (buyer knowingly purchased landlocked property; could not thereafter claim unmarketable title).

11. Gaines v. Dillard, 545 S.W.2d 845 (Tex.Civ.App.1976) (since title by accretion could be established only by parole evidence, abstracts did not show marketable title with respect to such land).

cases even a title by adverse possession or accretion may be marketable.[12]

10. Common defects which may render land titles unmarketable include variations in names of grantors and grantees in the chain of title, breaks in the chain of title, outstanding dower interests, outstanding mortgages, defectively executed instruments in the chain of title, defective judicial or tax sales in the chain of title, and incompetency of grantors in the chain of title.

a. The existence of restrictive covenants not acknowledged in the contract generally renders the title unmarketable. There is an exception in favor of reasonable restrictions imposed by governmental authority. Even if a restrictive covenant is acknowledged in the contract, *violation* of the covenant, if substantial, can render the title unmarketable.[13]

b. Outstanding reverter rights render the title unmarketable.

c. An encumbrance which the vendor cannot or will not remove and which the vendee cannot remove by application of the purchase money is such a defect that renders the title unmarketable.

d. As a general rule an easement upon any appreciable part of a city lot constitutes an incumbrance and renders the title unmarketable.

e. If a vendor places a mortgage on the land without prepayment privilege, and such mortgage makes it impossible for him to convey a marketable title free of the mortgage on the due date, then the vendee is entitled to rescission without waiting until the date of performance. This rule applies where the term of the mortgage is to expire beyond the date fixed for conveyance to the vendee.

f. If vendor's title is only slightly imperfect, equity may not rescind the contract but may require a reduction in the purchase price.

11. Many states have passed "curative" acts which operate on defective instruments or bar claims which otherwise might be asserted because of defects. Typical examples of curative legislation include statutes which: validate tax or other deeds which have been on record for twenty or other specified number of years; cure deeds

12. E.g., Taccone v. DiRenzi, 92 Misc.2d 786, 793, 401 N.Y.S.2d 722, 727 (1978).

13. See Lohmeyer v. Bower, 170 Kan. 442, 227 P.2d 102 (1951) (violation of zoning ordinance and of restrictive covenant limiting houses to one story rendered title unmarketable); Hebb v. Severson, 32 Wash.2d 159, 201 P.2d 156 (1948) (setback violation rendered title unmarketable).

defective for want of witnesses or a seal after a lapse of seven, ten or other specified number of years after recording; and those which impose a statute of limitation on the enforcement of mechanics liens and mortgages.

12. Courts differ as to whether a provision for conveyance by quitclaim deed is sufficient to dispense with the requirement of a marketable title. That a marketable title is still necessary appears to be the sounder view.

13. The fact that a title is insurable merely means that it is capable of being insured, and not that it is also marketable.

§ 14.7 Marketable Record Title Acts

1. Marketable Record Title Acts are designed to reduce the period of title search, to limit the period of title examination, and to clear titles from ancient and outmoded encumbrances.

2. Marketable Record Title Acts combine the essential features of statutes of limitations, curative acts, and recording acts.

3. A Marketable Record Title Act is a statute of limitation in that the filing of a notice is a prerequisite to preserve a right of action against the real estate founded upon any transaction which occurred prior to the period specified in the act. The filing of such a claim is necessary whether the claim or interest is mature or immature and whether it is vested or contingent.

4. Such an act is "curative" in that it may operate to correct certain defects which have arisen in the execution of instruments in the chain of title.

5. A Marketable Record Title Act is also a recording act in that it requires notice to be given to the public of the existence of conditions and restrictions, whether such interests be vested or contingent, growing out of ancient records which fetter the marketability of titles.

6. The period specified for a marketable record title under such acts is commonly thirty or forty years.

7. The purpose of such an act is to extinguish all claims in existence for the statutory period or more which conflict with a record chain of title which is at least that old. This is accomplished by declaring as marketable record title any estate or interest reflected by the recorded chain of title for the statutory period. All interests older than the root of title, subject to certain designated exceptions, are extinguished.

8. Under such an act, a root of title is a conveyance or other title transaction in the claimant's chain of title purporting to create the interest claimed by such person, such transaction being the

most recent to be recorded as of a date prior to the statutory number of years before the time marketability is being determined.

9. A statutory marketable record title is made subject to certain enumerated exceptions, common examples of which are:

a. interests and estates, easements and use restrictions disclosed by, and defects inherent in the muniments of title;

b. interests preserved by the filing of a proper notice;

c. rights of any persons in possession;

d. interests arising out of a title transaction recorded subsequent to the effective date of the root of title;

e. rights of variously described easement holders;

f. interests of the federal or state governments; and

g. rights of persons to whom the land has been assessed for taxation within a designated recent period of time.

10. Subject to the exemptions designated, a marketable record title under such an act is freed from all claims and charges which predate the effective date of the root of title. All such pre-root claims are declared null and void.

11. A marketable record title under such an act does not necessarily mean a marketable title in a commercial sense. However, the extinction of old claims is expected to increase marketability in a commercial sense. Nevertheless, under many marketable record title acts, it would be possible to have, for example, a marketable record fee simple determinable title which would not be marketable in a commercial sense.

12. Marketable record title acts operate against persons under a disability as well as against persons *sui juris,* and they invalidate future interests as well as present interests.

13. A pure quitclaim deed can probably not be a root of title under most marketable record title acts.[14]

§ 14.8 Remedies for Breach of the Land Sale Contract

1. The traditional doctrines of equitable conversion, uniqueness of real property, and mutuality of remedies gave specific performance by the buyer against a defaulting seller; and by the seller against a defaulting buyer. However, the buyer could obtain specific performance against the seller only if the seller was legally capable of performing. If the seller owned a smaller interest than

14. See Simes & Taylor, Improvement of Conveyancing by Legislation (1960).

promised in the contract, the buyer could demand specific performance of that part which the seller owned.

2. In the alternative, the buyer may sue for damages. About half of American jurisdictions hold, however, that if the failure of title is not the fault of the seller and the seller was acting in good faith, the buyer's damages will be limited to loss of expense and recovery of earnest money. The other half of the states permit loss of bargain damages (i.e., the difference between the market price and the contract price) as well. Nearly all states permit loss of bargain damages for bad faith failure of title.[15]

§ 14.9 Liability for Defective Structures: Builder, Vendor, Broker, Lender

1. Although at common law there was no implied warranty that a structure was free from defects, many states imply such a warranty against the builder today, particularly with respect to residential structures. A growing number are willing to imply this warranty in favor of second or subsequent purchasers as well as the original purchaser.

2. At common law, a nonbuilder seller was liable only for common law fraud,[16] which generally required an affirmative misrepresentation of fact. Increasingly, however, either courts or state or local legislation imply a duty to disclose known defects, as well as other information affecting the value of the property.[17]

3. Brokers are generally held to a higher standard than nonbroker or nonbuilder sellers. Today a broker can be liable for both fraud and for failure to disclose a known defect.[18] But a small number of states additionally impose a duty to inspect and disclose the results of the inspection.[19]

4. Some states hold that mortgage or construction lenders may also be held liable for defects in construction, but in most such cases the lender performed promotional or developmental services in addition to the lending of the money, and thus could be said to be an active participant in the construction process itself; in other

15. See Beard v. S/E Joint Venture, 321 Md. 126, 581 A.2d 1275 (1990) (awarding loss of bargain damages where seller could have performed but did not).

16. See Harding v. Willie, 458 N.W.2d 612 (Iowa App.1990) (buyer inquired about crack in ceiling and seller said there was "no problem"—later inquiry found a leak; granting recision).

17. See Alexander v. McKnight, 7 Cal.App.4th 973, 9 Cal.Rptr.2d 453 (1992) (state statute required disclosure of neighborhood noise attending late night basketball games).

18. E.g., Kubinsky v. Van Zandt Realtors, 811 S.W.2d 711 (Tex. App. 1991) (broker has duty to disclose known latent defects, but has no duty to inspect for unknown ones).

19. Easton v. Strassburger, 152 Cal. App.3d 90, 199 Cal.Rptr. 383, 46 A.L.R.4th 521 (1984).

cases finding liability the lender knew or should have known of the defects.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 14.1 Brokers' Contracts

PROBLEM 14.1: Benny Broker is a licensed real estate broker who, in connection with his business and as a service to his clients, prepares offers to purchase real estate, draws contracts of purchase and sale, prepares deeds and other instruments necessary to clear or transfer title, and supervises the closing of the transaction. No separate fee is charged for these services, his compensation consisting solely of brokerage commissions. The local bar association files a complaint against Benny Broker alleging that he is engaged in the unauthorized practice of law, and seeks to enjoin him from carrying on such activity. Will the injunction be granted?

Applicable Law: In most states real estate brokers and salesmen may fill in the blanks on printed sales contracts when such activity involves simply the supplying of factual data. They may insert the names of the parties, the time for closing, the sales price, and the method of payment. Brokers and salesmen may not draft or complete deeds, mortgages and similar legal instruments as those documents should be prepared by attorneys.

Answer and Analysis

The answer varies from state to state, but is generally no as to sales contracts and yes as to deeds, mortgages and other legal instruments. The broker will not be enjoined from properly filling in the blanks on a form of an earnest money contract or offer to purchase where such activity involves merely the supplying of simple factual data, such as the names of the parties, the time for closing, the sales price, and the method of payment. However, after he has completed the form by the insertion of the data and has secured the necessary signatures, he has fully performed his obligation as broker. The preparation of or filling in blanks on deeds, mortgages, and other legal instruments subsequently executed constitutes the practice of law. "Such instruments are often muniments of title and become matters of permanent record. They are not ordinarily executed and delivered until after title has been examined and approved by the attorney for the purchaser. Their preparation is not incidental to the performance of brokerage services but falls outside the scope of the broker's function."[20] In

20. Chicago Bar Ass'n v. Quinlan and Tyson, Inc., 34 Ill.2d 116, 214 N.E.2d 771 (1966). See also State v. Buyers Service Co., 292 S.C. 426, 357

general, if a nonlawyer real estate professional prepares a legal document negligently, the nonlawyer will be held to the same standard of care as a lawyer in a malpractice action.[21]

The organized bar has traditionally taken the position that each participant to a land sale transaction must be represented by an attorney. No state requires this. Quite commonly today, neither the buyer nor the seller of an ordinary home is immediately represented by an attorney. Also quite commonly, one lawyer may represent both sides. In such a case, however, the lawyer must notify each side of its representation of the other, and must withdraw if an actual legal conflict arises between the parties.[22]

§ 14.2 Statute of Frauds

PROBLEM 14.2: Ozzie and Harriet entered into an oral contract for the sale of Ozzie's real estate. Harriet gave Ozzie $500 at the time they entered into the agreement, and Ozzie gave Harriet a receipt as follows:

March 21, 1999

For the sum of twenty thousand dollars ($20,000.00), I, the undersigned, agree to sell my property, located at the corner of Black and White Streets and known as 120 Black Street. Received as earnest money five hundred dollars ($500.00).

Ozzie

One month later Harriet tendered nineteen thousand five hundred dollars ($19,500.00) to Ozzie and demanded a deed. Ozzie refused saying that he changed his mind and offered to return the five hundred dollars ($500.00) deposit. Harriet refused to accept the return of the money and thereafter filed a suit for specific performance. May Harriet recover?

Applicable Law: To be sufficient under the Statute of Frauds a memorandum must: (a) identify the parties to the contract; (b) describe the land to be conveyed; (c) contain the sales price and the essential terms of the agreement; and (d) state the promises to be performed on each side. The writing need not

S.E.2d 15 (1987) (broker may prepare a simple real estate contract, but it should not include provisions requiring legal expertise; actions constituting the practice of law include the preparation of instruments, the preparation of title abstracts, real estate closings, and recording of instruments).

21. See Norman I. Krug Real Estate Invest., Inc. v. Praszker, 220 Cal.App.3d 35, 269 Cal.Rptr. 228 (1990) (broker liable for failing to advise creditor that his mortgage instrument should be recorded).

22. See In re Lanza, 65 N.J. 347, 322 A.2d 445 (1974) (disciplining an attorney for continuing to represent both buyer and seller after a dispute arose).

contain all the details of the agreement since some items such as the quality of the vendor's title, the type of deed to be delivered, and the allocation of incidental costs can be inferred from the general customs of the community, and parol evidence can be used to make certain some of the essential terms which otherwise might be indefinite.

Answer and Analysis

No. The Statute of Frauds requires a writing for a contract for the sale of real estate to be enforceable. The Statute does not require that the entire contract be reduced to writing, but it does require a sufficient memorandum signed by the party sought to be charged. The only memorandum in the instant case is the receipt set out above. The memorandum is deficient in that it does not identify the parties to the contract. The *purchaser* is in no place referred to nor identified in the instrument. Since the purchaser is the one bringing the action, it is not necessary that the purchaser sign the memorandum. The person sought to be charged in this case is Ozzie, and Ozzie did sign the writing. Although Ozzie promised to convey his land, he nowhere promised to convey it to any particular party. Thus, the memo is insufficient.

Is the instrument otherwise sufficient? The property is identified by street number and located at the intersection of two streets. There is no mention of any city, state or county, however. If the city were sufficiently identified, the description by street number is probably adequate, as parol evidence can be used to supply the exact dimensions or boundaries. Perhaps if there were an averment that Ozzie owned only one such parcel of real estate which satisfied the street description and that such parcel was located in a particular city and state, the description might be considered satisfactory.[23]

Another matter to consider is the purchase price and manner of payment, or the terms and condition of sale. The receipt states the down payment and the total purchase price. It does not state how the balance is to be paid or when the sale shall be completed. Although financing is an important factor in most sales today, an all cash transaction, at least as far as the vendor is concerned, is not uncommon. Thus, if there is nothing specified as to the manner of payment, it might be inferred that an all cash transaction is intended. Further, in this case the purchaser is tendering cash. Therefore, if the other requirements of the memorandum were sufficient, the absence of provisions as to the manner of payment could be immaterial as an all cash transaction might be inferred.

23. Cf. Barker v. Francis, 741 P.2d 548 (Utah App.1987) (contract that permits buyer to select forty acres out of a larger tract is sufficiently definite); Pullar v. Huelle, 73 P.3d 1038 (Wyo. 2003) (contract describing real estate only as a "parcel of land" too indefinite to be enforced).

Likewise, the price must be stated with some specificity, and many courts have held that a promise to purchase property at its "appraised value" is not sufficient.[24]

Similarly, the lack of a date specified for consummating the transaction is not fatal since in the absence of an agreement to the contrary, a reasonable time can be inferred.

The receipt, however, in addition to not identifying the purchaser, contains no promise on his part. The seller promises to convey, but no buyer is identified and no one promises to buy. Other matters, such as the quality of the vendor's title, need not be specified, for the law fills them in. In the absence of a provision to the contrary, the requirement of a marketable title will be inferred. Likewise, the custom in the community can supply such missing items as to who pays what taxes, documentary stamps if any, the costs of preparing instruments, the type of deed to be given, and other incidental matters.

PROBLEM 14.3: Vendors, a hospitalized mother and two daughters, one of whom was out of state and contacted by telephone, generally agreed with purchaser on terms for the sale of 160 acres. Immediately following the discussion the daughter who was present wrote out an agreement in longhand in the presence of purchaser. It was decided at the time the agreement was signed that the parties would meet that same afternoon in the office of purchaser's attorney where a formal contract would be executed. The lawyer was unable to draft the contract immediately, and when it was later drawn, the sellers objected to certain provisions and the formal written contract was never signed by the vendors. The vendors, instead, entered into a formal sales contract with another party. The deposit had been left with the purchaser's attorney and never delivered to the sellers. The purchaser sues for specific performance. Will he prevail?

Applicable Law: A memorandum or informal writing, even if possibly otherwise sufficient to satisfy the Statute of Frauds, will be effective to obligate the parties to carry out a land sales agreement only if the parties so intend at the time the writing is signed. If the facts and circumstances indicate that the parties understand that all the terms are not agreed upon, and that a formal document or contract encompassing all the

24. See Wiley v. Tom Howell & Associates, Inc., 154 Ga.App. 235, 267 S.E.2d 816 (1980), holding that a contract between a broker and seller under which the broker apparently promised to purchase the house at the "appraised" value (the contract read "w/option to accept appraised in 60 days.") if it did not sell within sixty days was invalid because the science of appraisal is so inexact that a sufficiently precise purchase price could not be determined on that basis.

details will be drafted and signed, then either party may withdraw from the transaction prior to the approval and signing of such a formal contract.

Answer and Analysis

No. Whether parties to an informal agreement become bound prior to the drafting and executing of a formal writing is largely a question of intent of the parties as determined by the surrounding facts and circumstances. The fact that the parties contemplate execution of a final document is some evidence, not in itself conclusive, that they intend not to be bound until it is executed. Under the facts and circumstances here, no binding contract was made by the parties. The informal agreement was executed by only one of the three owners of the property. The earnest money provided for in the informal agreement was never paid to the vendors. The intent of the parties was clear that they were negotiating with the understanding that the terms of the contract were not fully agreed upon and a written formal agreement was to be executed. Since the vendors rejected the terms set out in the formal contract, no enforceable contract was made.[25]

§ 14.3 Partial Performance

PROBLEM 14.4: Molly, by oral agreement, on April 5, 2001, leased from Kurt a house for a term of one year beginning May 1, 2001, at a rental of $1000 per month. Kurt also gave Molly an option (definite as to terms), to purchase the property at the expiration of the lease with the provision that Molly be allowed credit for the total rent paid. Molly then entered into possession, and before the expiration of the lease notified Kurt that she wished to exercise the option. Kurt stated at that time that he did not have time to draw the contract, but that he would do so later. Molly stayed in possession beyond the stipulated lease date, but Kurt refused to honor Molly's option. Molly now brings an action against Kurt for specific performance of the contract. Should the court grant Molly's request for specific performance?

Applicable Law: An oral lease for one year to commence in the future cannot be performed within one year and is thus within the Statute of Frauds. When an option to purchase is appended to such an oral lease under circumstances showing that the parties intended a vendor-vendee relationship from the beginning and that the lease was only incidental, then when the option is accepted part performance consisting of the delivery of possession and acceptance of part of the purchase

25. King v. Wenger, 219 Kan. 668, 549 P.2d 986 (1976).

price is sufficient in many jurisdictions to permit the contract to be enforced specifically.

Answer and Analysis

The answer is yes in many jurisdictions. The option, prior to its acceptance, is, of course, simply a continuing offer to sell and conveys no interest in the land. It merely vests in the optionee a right to buy at his election. An oral lease of real estate for a term of one year to commence in the future is, however, within the Statute of Frauds. The oral lease in the instant case was not capable of performance within one year from the date of its inception on April 5, 2001, and would be subject to the Statute of Frauds unless removed or performed.

In most jurisdictions the acts of taking possession and of making part payment in reliance upon, and with unequivocal reference to, the vendor-vendee relationship, is sufficient to avoid the Statute of Frauds.

Molly was in possession of the land, and Kurt's conduct and statements were consistent with that of a vendee-vendor relationship because of his unequivocal reference to the oral contract. This is illustrated by Kurt's statement that he did not presently have time to draw the contract, but would do so later. The evidence is clear that the parties intended a vendor-vendee relationship from the beginning, and that the landlord-tenant relationship was only incidental. Thus, Molly's possession and part payment under the rental agreement is in furtherance of the contract to convey. Accordingly, Molly is entitled to specific performance of the oral contract because of part performance.[26]

Several states hold that the vendee's possession following the execution of a sale agreement in violation of the Statute of Frauds may be sufficient to take the agreement out of the statute. However, the possession must be "exclusively referable" to the sales agreement. For example, if A promised under an oral agreement to sell Blackacre to B, and B was already a tenant of Blackacre under an oral lease, B's possession would not be sufficient to take the sale contract out of the statute, for it was not "exclusively referable" to that agreement.[27]

PROBLEM 14.5: In June, 1999, James Halsey, an aged widower, told A that if he gave up his business and cared for him that the house, lot, and furniture belonging to Halsey would belong to A upon Halsey's death. No writing of the agreement

26. See Shaughnessy v. Eidsmo, 222 Minn. 141, 23 N.W.2d 362 (1946).

27. See Coleman v. Dillman, 624 P.2d 713 (Utah 1981) (specific performance refused where documents plus possession was consistent with mere rental).

was made. A accepted the offer, moved in, and attended to Halsey until Halsey's death five months later. No deed, will, or memorandum of the agreement signed by Halsey was ever found. A now brings an action for specific performance to enforce the agreement. The defense is the Statute of Frauds. Should A's request for specific performance be granted?

Applicable Law: Whether the rendition of services is sufficient to remove from the Statute of Frauds, a promise to convey or devise land depends upon the jurisdiction and the theory there employed as to part performance. Under the so called unequivocal reference theory, services rendered are not sufficient, whereas under the injurious reliance theory, the rendition of such services as ordinarily cannot be given a monetary value are sufficient.

Answer and Analysis

It depends on the jurisdiction and whether the services rendered can ordinarily be obtained by hiring someone else. In jurisdictions holding that the acts of part performance must have unequivocal reference to a contract for the sale of land, the answer is no. Under this theory the acts done must supply the key to what is promised. Rendition of services alone may justify recovery of the value of the services, but such services of themselves are not significant of ownership, either present or prospective. What is needed is occupancy as owner and acts, such as improvements, which clearly indicate that a conveyance will be made.[28]

In the instant case, the plaintiff did not even have possession during the life of Halsey. The possession was that of Halsey and the occupancy of A was that of a servant or guest. Presumably Halsey could have dismissed him at any time. There might be an inference of a reward, but not necessarily that of a conveyance of the land. Accordingly, under this view, the acts of part performance are not solely and unequivocally referable to a contract for the sale of land, and A therefore is not entitled to specific performance.

§ 14.4 *Equitable Conversion and Risk of Loss*

PROBLEM 14.6: Ellen contracted to sell to Louise a certain piece of land which was to be used as a storage plant for ice cream and frozen fruits. However, between the time the contract of sale was made and the time for delivery of the deed, the city council rezoned the lot so that it could be used only for residential purposes. The rezoning reduced the land's value

28. Burns v. McCormick, 233 N.Y. 230, 135 N.E. 273 (1922) (refusing to enforce oral promise to convey property when plaintiffs were in possession because they had agreed to care for the seller for the balance of his life and, to that end, live on the premises).

substantially, and Louise refused to honor the contract. Ellen now brings an action for specific performance, arguing that the doctrine of equitable conversion places the loss on the buyer. Louise argues that to enforce the contract would be harsh and oppressive to her. Should Ellen recover?

Applicable Law: Specific performance will not be granted when to do so would result in undue hardship or oppressiveness. The denial of specific performance in such cases, however, does not mean that the non-defaulting party will be denied damages at law. Specific performance has been denied to the vendor when there was a contract for the sale of land to be used for commercial purposes and a change of zoning prevented such use.

Answer and Analysis

No. The doctrine of equitable conversion states that when the sales contract is made, equity then considers the vendee as the owner of the land and the vendor as the owner of the purchase money.[29] But this rule is limited to cases where the intention of the parties will not produce an inequitable result, and where nothing has intervened which ought to prevent a performance. Ellen's intent was to sell Louise a lot usable for the erection of a storage plant. The intent was defeated by the supervening act of the city council. Under these circumstances the granting of specific performance would be unduly harsh and oppressive to Louise. Of course, the parties could have contracted in reference to this particular event. The refusal to grant specific performance is not the same as rescission. The contract remains in effect; it is not terminated as it would be if rescission were granted. The denial of specific performance does not end the matter in this case, but, instead, the vendor may proceed against purchaser Louise in a suit at law.[30]

PROBLEM 14.7: In October, 1997, Alfred contracted to purchase from Prufrock for $150,000 certain property on which was erected a hotel. The contract required Alfred to pay Prufrock in installments, and to pay a sum in escrow out of which all taxes and fire insurance premiums were to be paid.

29. For example, under the doctrine of equitable conversion, most courts hold, the buyer is entitled to specific performance even if the vendor dies or becomes legally incapacitated during the executory period. See Griggs Land Co. v. Smith, 46 Wash. 185, 89 P. 477 (1907).

30. See Clay v. Landreth, 187 Va. 169, 45 S.E.2d 875, 175 A.L.R. 1047 (1948). But see DiDonato v. Reliance Standard Life Ins. Co., 433 Pa. 221, 249 A.2d 327 (1969), holding that a loss resulting from zoning changes should be treated the same as a casualty loss. Under the traditional rule, the casualty loss would fall on the buyer, and the seller could enforce by specific performance. See also Hauben v. Harmon, 605 F.2d 920 (5th Cir.1979), applying the traditional risk of loss rule to a loss caused by eminent domain proceedings.

Alfred then entered into possession. In December, 2000, a fire occurred on the property causing significant damage. At this time a substantial balance was still owed on the purchase price. Payment by the insurance company was insufficient to restore the building, and Alfred vacated the premises. Alfred now claims that all money paid by him pursuant to the installment contract should be repaid since Prufrock cannot now deliver a sufficient building as contracted. Prufrock claims that under the doctrine of equitable conversion, the loss should fall upon the vendee. May Alfred rescind the transaction and recover the payments made?

Applicable Law: Under the doctrine of equitable conversion, the risk of loss from casualty and other fortuitous events is normally placed on the purchaser in the absence of controlling provisions in the contract. A minority of jurisdictions, however, place such risk on the vendor, and those jurisdictions that have adopted the Uniform Vendor And Purchaser Risk Act place the loss on the one in possession. Thus, when the premises are destroyed by fire and the risk is placed on the vendee, the vendee is not entitled to rescission and, conversely, the vendor may still obtain specific performance.

Answer and Analysis

No. An executory contract for the sale of land requiring the seller to execute a deed conveying legal title upon payment of the full purchase price, works an equitable conversion so as to make the purchaser the equitable owner of the land and the seller the equitable owner of the purchase money. The result is that the purchaser, the equitable owner of the land, takes the benefit of all subsequent increases in value and, at the same time, becomes subject to all losses not occasioned by the fault of the seller. This is the rule in most jurisdictions. Some jurisdictions, however, place loss from fortuitous destruction upon the purchaser in an installment situation only if at the time of entry into the contract the purchaser is put into possession of the land and thereafter exercises full rights of control. Under either view, Alfred must bear the loss and may not recover payments made to date. In fact, the vendor is entitled to specific performance.

Under the common law rule, the purchaser, to protect herself, either must procure her own insurance or negotiate a contract provision shifting the risk to the seller. Consequently, some jurisdictions have attempted to ameliorate the possible inequities in the doctrine of equitable conversion by the adoption of the Uniform Vendor and Purchaser Risk Act. This act provides that, unless provided otherwise in the contract of sale, the vendor may not enforce the contract if property is destroyed by no fault of the

purchaser or is taken by eminent domain, if neither legal title nor possession has been transferred to the purchaser.[31] A minority of jurisdictions reverse the common law rule and place the risk of loss on the vendor.[32] In any event, risk of loss will stay with the vendor if: (1) the loss was a result of the vendor's negligence; or (2) the vendor is not capable of conveying the title promised in the contract.[33]

PROBLEM 14.8: Vendor and Purchaser entered into a contract for the sale of improved realty. Purchaser went into possession and acquired a fire insurance policy in the face amount of $100,000. At a time when Purchaser's total expenditures pursuant to the contract and building repairs was approximately $20,000, the building was damaged by fire to the extent of $9,000. Outstanding title defects were also discovered. The fire insurer offers to pay Purchaser only $20,000, but Purchaser insists that he should recover $90,000. Should Purchaser be entitled to recover $90,000 when the risk of casualty loss rests on the vendor because of a contract provision between the parties?

Applicable Law: In many states the vendee under a sales contract has an insurable interest and may recover up to the policy limits the full extent of casualty damages without regard to actual out of pocket expenses. Such recovery is permitted although the risk of casualty loss is placed on the vendor. The case did not decide whether such proceeds should ultimately inure to the benefit of the vendor on whom the risk of loss was placed, nor did it decide whether the result would be different if the title were so defective that the vendor could never convey a good title.

Answers and Analysis

The court held yes. Both vendor and purchaser have insurable interests in the property irrespective of the party on whom the risk

31. Uniform Vendor and Purchaser Risk Act:

"1. Any contract ... for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

(a) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid;

(b) If, when either the legal title or the possesaion of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid...."

32. E.g., Anderson v. Yaworski, 120 Conn. 390, 181 A. 205 (1935).

33. Sharbono v. Darden, 220 Mont. 320, 715 P.2d 433 (1986).

of loss is placed. It is always possible that the other party may be uninsured and without sufficient assets to cover the loss. In the instant case, the Purchaser is both in possession and is regarded as the equitable owner. The court held that the Purchaser could recover the amount of the fire loss and was not limited to his actual expenditures. There was no evidence in regard to the title defects that the Purchaser would be unable to ever acquire title, and since the vendor was not a party to the litigation, it could not be decided whether recovery by the vendee might otherwise inure to the benefit of the vendor via a constructive trust theory. On this latter point, see Note following.[34]

Note: The Liability Insurance Contract

The above case illustrates an erosion of the basic principle that casualty insurance is strictly a personal contract of indemnity to reimburse the insured for actual losses sustained. Some jurisdictions hold that when the parties agree that the vendor will carry insurance on the property until the exchange of possession and/or title is transferred, under the doctrine of equitable conversion, the purchaser is entitled to the benefit of insurance proceeds paid to the vendor for damage loss occasioned by fire or other casualty. The proceeds are held by the vendor as trustee for the purchaser. A practical approach to the insurance problem in an ordinary executory contract situation, and one that should result in substantial justice, would be for the vendor pursuant to an agreement with the purchaser to have his policy endorsed "payable to the vendor or vendee as their interests shall appear."[35]

Finally, consider the important decision in Skelly Oil Co. v. Ashmore,[36] holding that when the building was destroyed by fire during the executory period, the purchaser was *entitled* (not required) to purchase the property, and to have the purchase price abated by the amount of the casualty insurance collected by the vendors, even though the purchaser intended to tear the building down anyway, once the purchase had been completed. The court applied the minority rule placing risk of loss on the seller, but it is unclear that this rule affected the outcome. Had risk of loss been on

34. Cooke v. Firemen's Ins. Co., 119 N.J.Super. 248, 291 A.2d 24 (1972).

35. Raplee v. Piper, 3 N.Y.2d 179, 164 N.Y.S.2d 732, 143 N.E.2d 919, 64 A.L.R.2d 1397 (1957) (buyer paid insurance premium during contract period, with seller as beneficiary; after property was damaged, court ordered buyer to pay balance on contract with an abatement of the amount equal to the insurance proceeds paid to the seller).

36. 365 S.W.2d 582 (Mo.1963). See also Gilles v. Sprout, 293 Minn. 53, 196 N.W.2d 612 (1972) (vendee, in possession of building destroyed by fire, entitled to insurance proceeds on policy purchased by vendor, to be applied to price even though contract for sale was silent with respect to the insurance obligation).

the purchaser, it still would have been entitled to purchase, and most courts would hold that the fire insurance in that case would inure to the vendee's benefit. That the vendee intended to tear the building down may mean that it is getting a windfall, but that seems legally irrelevant.

§ 14.6 *Marketable Title*

PROBLEM 14.9: During an unstable period in the real estate market A entered into negotiations to buy land from B, receiving from B an instrument which said: "Title to prove good or no sale, and this deposit to be returned." No time was specified within which such examination should be made nor was any mention made that the condition of the title should be ascertained from any particular abstract. A received a letter saying the title was imperfect. Thereafter A commenced an action against B to rescind the sale. Will A prevail?

Applicable Law: In every executory contract for the sale of land, there is an implied condition that the title of the vendor is good and marketable, and that he will transfer to the vendee, by his deed of conveyance, a title unencumbered and without defect so far as can be ascertained. If no time is specified within which such examination should be made, a reasonable time is implied. Also, if no mention is made for the seller to furnish an abstract, the buyer must provide it for himself and examine the title. The burden is on the vendee to point out defects in the title.

Answer and Analysis

No. Since no time was specified within which such examination should be made, a reasonable time is therefore implied. Also, since no mention was made that B would furnish an abstract, it was incumbent upon A to search the records or to procure an abstract and to satisfy himself as to the condition of the title. A could not pronounce the title defective without examination. If, upon examination, it appeared that the title was defective, it then became his duty to report to B the defects and allow B a reasonable time to correct them. If the seller fails to remedy the defects, the purchaser, in an action to recover the deposit, is limited to asserting such defects as were then pointed out.

In every executory contract for the sale of land, there is an implied condition that the title of the vendor is good and marketable, and that she will transfer to the vendee a title apparently unencumbered and without defect.[37] In addition, a vendee may maintain an action to rescind an agreement on the ground that the

37. See Dwight v. Cutler, 3 Mich. 566 (1855).

vendor at the time of entering into the agreement knew that she could not make the conveyance, or that she fraudulently represented herself as the owner of the premises. Also, if the vendor subsequently voluntarily puts it out of his power to complete the contract, as if he should sell the land to another during the existence of the agreement—the vendee may treat the contract as rescinded, and bring his action for the deposit. In these cases, the ground for the rescission is fraud of the vendor, either at the time of entering into the contract or by his subsequent acts. In the present case there is no indication of fraud or misrepresentation. Thus, the principles delineated in the first paragraph apply. The acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other.[38]

Note: Known Encumbrances

Suppose that a land sale contract fails to except a certain incumbrance, but the buyer knew of the encumbrance in any event, or else the encumbrance was plainly visible for anyone to see. In *Alcan Aluminum* the court concluded that a land sale contract could be enforced notwithstanding that it failed to except a utility easement, where the utility lines were visible on the property.[39] But the defect must be extremely clear. In *Bethurem* the court refused the seller's defense that (1) it had told the buyers about an encroachment of a building onto city property; and (2) market the building with two pieces of string on a fence.[40] The oral statements were outside the written contract and the court rejected them; the string, standing alone, was not evidence of any kind of encroachment.

PROBLEM 14.10: A entered into a contract with B to purchase a parcel of real property. A deposit was made, and the balance was to be paid in monthly installments for eight years. B is to deliver a deed when the contract has been fully performed. Two years after entering into the contract, A learns that an adverse claim has been asserted against B and that the outcome is uncertain. A brings an action to be relieved from paying further installments pending the outcome of B's litigation. Will A succeed?

Applicable Law: There can be no rescission of an executory contract of sale merely because of lack of title in the vendor prior to the date when performance is due. Neither can a vendee place the vendor in default by tendering payment and

38. See Easton v. Montgomery, 90 Cal. 307, 27 P. 280 (1891).

39. Alcan Aluminum Corp. v. Carlsberg Financial Corp., 689 F.2d 815, 817 (9th Cir.1982).

40. See Bethurem v. Hammett, 736 P.2d 1128 (Wyo.1987).

demanding a deed in advance of the time and under circumstances not contemplated by the contract, unless the contract so provides.

Answer and Analysis

No. There can be no rescission by A of an executory contract of sale merely because of lack of title in the vendor prior to the date when performance is due. Neither can A place B in default by tendering payment and demanding a deed in advance of the time and under circumstances not contemplated by the contract.[41]

PROBLEM 14.11: A, interested in buying land from B, is told by B that the property has extensive shore lines, and included within its boundaries is a trout creek. A and B enter into an agreement under which B agreed to sell the property and supply an abstract showing the title to be good and marketable. A discovered from a survey that the description included considerably less area than that which had been pointed out. B claims that he occupied this area for more than the statutory period for adverse possession and refuses to set aside the transaction. May A rescind?

Applicable Law: Title established through adverse possession is free from encumbrance and of a character to assure quiet and peaceful enjoyment of the property by the vendee, but it is not a marketable title of record until there has been a judicial determination of such title. To show a record title by adverse possession requires a suit and the recording of a decree. Even though a court may determine vendor had title by adverse possession, the vendee did not bargain for that kind of title when the contract required a marketable title "of record." A transaction, although consummated, may be rescinded because of mutual mistake as to the location of the boundaries.

Answer and Analysis

Yes. By the terms of the agreement B was required to convey to A a good and marketable title *as shown by the abstract.* Title established through adverse possession is free from encumbrance and of a character to assure quiet and peaceful enjoyment of the property.[42] However, it is not a marketable title *of record* until there has been a judicial determination of such title. To show a record title by adverse possession requires a suit and the recording of a decree. B has not quieted title to the property through statutory proceedings; hence, there is nothing on public record

41. See Luette v. Bank of Italy Nat. Trust & Sav. Ass'n, 42 F.2d 9 (9th Cir. 1930), cert. denied 282 U.S. 884, 51 S.Ct. 87, 75 L.Ed. 779 (1930).

42. Conklin v. Davi, 76 N.J. 468, 388 A.2d 598 (1978).

which could be placed in an abstract to indicate defendant's ownership of the property outside of the boundaries established by survey. Although a court may determine that B had title by adverse possession, A did not bargain for that kind of title. Accordingly, A may rescind.[43]

PROBLEM 14.12: A entered into a contract of sale for certain designated land, which provided that upon receipt of the price, B would execute a "quitclaim deed of said premises." The contract said nothing as to the quality of the title to be conveyed. On the closing date A refused to take the deed because of the existence of an encumbrance. A sued to recover the deposit and the reasonable expense of examining the title. Will A be successful?

Applicable Law: There is a split of authority as to whether a purchaser may recover his deposit and rescind when the contract provides for a quitclaim deed and the title is not good or marketable. The weight of authority would hold that knowledge by the vendee of the vendor's lack of title at the time he entered into the contract is immaterial since he has a right to rely upon the vendor either having a title or procuring it so as to carry out his agreement. The agreement of the vendee to accept a quitclaim deed as the means of transfer is not a waiver of the requirement of a marketable title according to the better view.

Answer and Analysis

The answer is probably yes. There is a split of authority as to whether a purchaser may recover when the contract calls for a quitclaim deed and the title is not good or marketable. There is authority to the effect that if it clearly appears from the contract itself that the parties contemplated and bargained for nothing more than a conveyance which would pass such rights as the vendor may have, whether defective or not, then that is all the vendee can claim or insist upon.

However, the weight of authority would hold that a contract provision for conveyance by quitclaim is not of itself a waiver of the implication of the required marketable title. Even knowledge by the vendee of the vendor's lack of title at the time he entered into the contract is immaterial, since he has a right to rely upon the vendor either having a title, or procuring it, so as to carry out his agreement. The agreement of the vendee to accept a quitclaim deed as the means of transfer is not a waiver of any defects. A quitclaim

43. Escher v. Bender, 338 Mich. 1, 61 N.W.2d 143, 147, 46 A.L.R.2d 539 (1953).

deed is as effective as any other to convey all the title the grantor has, and a deed with all the covenants cannot strengthen a defective title, but can only provide a remedy by legal action against the vendor for breach of covenant because of the defective title.[44]

§ 14.7 Marketable Record Title Acts

PROBLEM 14.13: The patentee of Blackacre conveyed the land to Edith and James by a metes and bounds description in 1892. A small portion of Blackacre was not included in the conveyance, and it is this parcel which is now in dispute. Edith died intestate leaving James and Leslie as her sole heirs. In 1912 Leslie conveyed to James, via a quitclaim deed, all interest which Leslie had to the whole of Blackacre, the deed describing the entire parcel including that portion of Blackacre not conveyed to Edith and James by the patentee. The 1912 quitclaim deed provided:

> The grantor does release and quitclaim all the right, title, interest, claim and demand which the grantor has in and to Blackacre.

James died intestate leaving A and B as his sole heirs. A then died, devising all of her property to B. By warranty deed in 1943, B purported to convey Blackacre to C.

D brings an action against C for that portion of Blackacre not included in the conveyance by the patentee to Edith and James. The sole basis of D's claim is his ancestor's patent and his proof of heirship. C relies on the 1912 quitclaim deed as a valid root of title under the recording act although it is a wild deed with respect to the parcel of Blackacre here in question.

May C prevail, and is the wild quitclaim deed of 1912 a valid root of title under the Marketable Record Title Act?

Applicable Law: A pure quitclaim deed which does not purport to convey any particular estate cannot be a root of title under the Marketable Record Title Act. To be a root of title the deed or other title transaction must purport to convey some particular estate or interest.

Answer and Analysis

Both answers are no. The Act, as a marketable title act, is not concerned with the quality of the title conveyed by the root of title *so long as the root purports to convey the estate claimed.*

44. See Wallach v. Riverside Bank, 206 N.Y. 434, 100 N.E. 50 (1912), holding that a purchaser under a contract that calls for a quitclaim deed is nevertheless entitled to marketable title, and may refuse to accept the quitclaim deed if the title is shown to be defective.

Here, it cannot be determined from the face of the instrument exactly what interest the deed purports to convey. If the deed evidenced an intent to convey an identifiable interest in Blackacre, it would suffice as a valid root of title under the recording act. For example, if the deed in question stated:

> The grantor quitclaims all the right, title, interest, claim and demand, *which consists of a fee simple interest,* that the grantor has in and to Blackacre,

the deed would be a valid root of title under the recording act. In the instant case it is impossible to determine from the face of the instrument what interest the deed purports to convey. Therefore C cannot prevail on the basis of the Marketable Record Title Act, and D, being heir of the patentee of land which was never conveyed, is entitled to recover.[45]

PROBLEM 14.14: In 1899 Blackacre was conveyed to A by deed, and the deed was recorded that year. A conveyed to B by deed dated November 4, 1965, which deed was recorded November 19, 1965. By mesne conveyances title passed to C, through and under whom D claims Blackacre. This chain of title originates with a grant from the United States. E, through his grantors, held a record chain of title for over forty (40) years (the period required under the applicable Marketable Record Title Act), prior to 1965 (the year A conveyed to B), but E's chain originated subsequent to D's chain (i. e. after 1899). E's defense to D's claim to Blackacre is the Marketable Record Title Act. No one in D's chain of title filed any claim to Blackacre within forty (40) years after his interest arose as is provided in the act. Is E's title, based on a deed which is foreign to D's title, entitled to the protection of the Marketable Record Title Act and therefore superior to D's?

Applicable Law: One state supreme court has held that state's marketable title act inapplicable to a situation involving two independent chains of title each more than 40 years old, and left the resolution of the controversy as to the ownership of the land to more traditional property concepts.

Answer and Analysis

The answer is no according to the Supreme Court of Illinois in applying their marketable record title act to the above problem. However, there is considerable diversity in phraseology and in the exceptions delineated in the various acts; hence, it is difficult to

45. See Wilson v. Kelley, 226 So.2d 123 (Fla.Dist.Ct.App.1969) (quitclaim deed could not constitute a root of title because it did not purport to convey any particular interest).

proclaim a general proposition which would be applicable to such facts in most states having similar legislation.

In analyzing the problem, it is seen that A acquired the title in 1899 and simply held on to it until 1965, when he conveyed, and that such title eventually lodged in D. This chain of title was based on a grant from the United States, and therefore would appear to be the better paper title. E is claiming a recorded chain of title more than 40 years old at the time A conveyed to B in 1965, and during such 40 year period A did not record his title so as to preserve it under the provisions of the act. E's source of title, however, is entirely different from that of D's, and as to D, E's root of title is a wild one. As the problem is presented, there is no evidence of possession by either party, payment of taxes, or other circumstances which would specifically preserve D's rights under the marketable record title act. Thus is presented the question whether a chain of title based on a wild deed can divest a senior chain of title simply because the senior chain had no title activity for the period specified in the act.

The policy of permitting such a wild chain to divest a senior chain was significant in the Illinois decision. The court pointed out that to so hold could result in the grantee of a complete and even fraudulent stranger to the title divesting the title of a record owner.[46] This could happen although the record owner may have satisfied the usual responsibilities of ownership, such as paying taxes simply because he did not re-record his title or claim in order to preserve his interest. The court concluded that the act contemplated the existence of only one chain of title since its purpose was stated as that of "simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title." Thus, since the act did not contemplate the problem of two chains and purport to solve the enigma, the court concluded that the act was not controlling and that the title dispute would have to be solved by traditional doctrines.[47]

PROBLEM 14.15: The Atlantic Beach Company originally acquired title to property in 1913. In 1923 a majority stockholder of the company, Matthew Marshall, died. His widow had no knowledge of her deceased husband's interest in the company. In 1924 Terry, pretending to be president of the Company, falsely signed the minutes of a purported stockholder meeting authorizing the conveyance of the assets of the company to Terry. The forged deed was recorded on February 15, 1924. On February 14, 1924, Terry executed a deed to Hollywood Realty

46. Many Acts solve this problem by protecting the party *in possession* even though there has been no title activity during the statutory period.

47. See Exchange Nat. Bank of Chicago v. Lawndale Nat. Bank of Chicago, 41 Ill.2d 316, 243 N.E.2d 193 (1968).

Company, which deed was recorded on April 11, 1924. On August 6, 1924, a deed was then executed by Hollywood Realty Company to Homeseekers Realty Company and recorded on August 22, 1924.

On April 25, 1929, the Highway Construction Company obtained a judgment against Homeseekers Realty Company. Following a levy and a sheriff's sale, a sheriff's deed to the Highway Construction Company was recorded on December 30, 1930. This deed purported to convey substantially all of the real property involved in this litigation. On February 21, 1931, the Highway Construction Company conveyed the subject property to the defendant, Hollywood, Inc., and the deed was duly recorded.

The administrator of Matthew Marshall's estate brought suit in 1966 to have a trustee appointed to convey the legal title to the property to the heirs of the deceased on the ground that the deed executed in the name of the Atlantic Beach Company by Terry to himself in 1924 was void as a forgery. Should the Marshall estate recover title to the subject property?

Applicable Law: A Marketable Record Title Act may validate a chain of title originating in a forged or void deed. Possibly the forged deed itself could not constitute a root of title because of the inherent defects therein, but a subsequent deed in the chain, and even a "wild" deed can constitute a root of title. Title will be perfected in the remote grantee under the "invalid" chain of title if there is no recorded activity for the statutory period under the otherwise superior chain of title.

Answer and Analysis

No. The purpose of Marketable Title Acts is to simplify and facilitate land transactions by permitting people to rely on a record title. The Florida statute reads:

> Any person having the legal capacity to own land in this state, who, alone or together with his predecessors in title, has been vested with any estate in land of record for thirty years or more, shall have a marketable record title to such estate in said land.... [48]

The question then is whether the Act confers marketability to a chain of title arising out of a forged deed, so long as the strict requirements of the Act are met. The Florida Court held that the Marketable Title Act may be applied to validate a record title based

48. West's Fla. Stat. Ann. § 712.02.

on a forged or void deed, although the forged deed itself perhaps could not constitute a root of title.[49]

Note: Rerecording and Other Limitation Statutes

Some states have developed simpler devices than Marketable Record Title Acts for clearing land titles. One of the more common is a statute requiring that certain kinds of interests (generally nonpossessory) will simply "lapse," or become invalid unless they are periodically rerecorded. In Texaco, Inc. v. Short,[50] the Supreme Court upheld an Indiana statute requiring that dormant mineral interests (i.e., mineral interests where no production is occurring) lapse unless the owner files a statement of claim at twenty year intervals. The statute gave a two year grace period for interests created before the statute was passed, but no notice to nonresident owners of Indiana mineral interests. The Court rejected the argument that this deprived owners of an interest in property without notice.[51]

§ 14.8 Remedies for Breach of the Land Sale Contract

PROBLEM 14.16: In 2001 James agreed by contract to sell Blackacre to Diane, closing and delivery of the deed, plus an abstract showing marketable title, to occur three months after the signing of the contract. James found, to his horror, that he owned only half of Blackacre, the other half belonging to his ex-wife, who refused to execute the deed. Diane sues. May she obtain: (a) specific performance (i.e., delivery of a deed) as to all of Blackacre? (b) specific performance as to James's undivided one-half interest in Blackacre? (c) damages; and, if so, in what amount?

Applicable Law: The traditional doctrines of equitable conversion, uniqueness of real property, and mutuality of remedies gave specific performance by the buyer against a defaulting seller; and by the seller against a defaulting buyer. However, the buyer could obtain specific performance against the seller only if the seller was legally capable of performing. If the seller owned a smaller interest than promised in the contract, the buyer could demand specific performance of that part which

49. Marshall v. Hollywood, Inc., 236 So.2d 114 (Fla.1970), cert. denied 400 U.S. 964, 91 S.Ct. 366, 27 L.Ed.2d 384 (1970). See also City of Miami v. St. Joe Paper Co., 364 So.2d 439 (Fla.1978), appeal dismissed 441 U.S. 939, 99 S.Ct. 2153, 60 L.Ed.2d 1040 (1979), holding specifically that a wild deed may constitute a root of title.

50. 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982).

51. See Pindar, marketability of Titles—Effect of Texaco, Inc. v. Short, 34 Mercer L. Rev. 1005 (1983). See also West's Ann.Cal. Civ. Code §§ 885.020, 885.030, requiring that future interests in the nature of possibilities of reverter must be rerecorded every thirty years or they will lapse.

the seller owned. In the alternative, the buyer may sue for damages. About half of American jurisdictions hold, however, that if the failure of title was not the fault of the seller and the seller was acting in good faith, the buyer's damages will be limited to loss of expense and recovery of earnest money. The other half of the states permit loss of bargain damages as well. Nearly all states permit loss of bargain damages for bad faith failure of title.

Answer and Analysis

The answers are (a) no, (b) yes, and (c) yes, she may get damages, but the amount generally depends upon whether James had been acting in good faith.

In general, Diane is not entitled to specific performance (i.e., delivery of the deed, as the contract specifies) with respect to *all* of Blackacre because James is legally incapable of performing. He owns only an undivided one-half interest, and that is all he has the legal power to sell. James's ex-wife was not a party to the bargain and cannot be made to sell her interest against her will.

In most states, however, James can be held to specific performance with respect to the interest that he has.[52] Although the basic breach of contract remedy is damages, courts generally award specific performance of contracts for the sale of land, on the theory that land is unique. This rule is generally reciprocal. That is, it may be enforced by a buyer against a defaulting seller; or by a seller against a defaulting buyer. There may be a narrow exception for housing such as condominiums, which courts may treat more like "commodities."[53] In addition, a seller's promise to build a structure on the purchased property may not in and of itself be a promise to sell land, and may be governed by ordinary damage rules.[54]

Sellers may generally contract out of specific performance by providing that damages (actual or liquidated) will be the only remedy in case of default.

52. See Sanders v. Knapp, 674 P.2d 385 (Colo.App.1983) (where husband, who held property jointly with spouse, purported to convey the whole, purchaser was entitled to one-half interest with abatement of the purchase price). An exception to this rule may be the situation where the subject matter of the transaction is community property and the seller is found to have no authority to sell his or her interest without the consent of the spouse. See Andrade Development Co. v. Martin, 138 Cal.App.3d 330, 187 Cal.Rptr. 863 (1982) (refusing specific performance). In such a case the buyer might be limited to a damage action.

53. See Centex Homes Corp. v. Boag, 128 N.J.Super. 385, 320 A.2d 194 (Ch. Div. 1974) (permitting only damages against *buyer* who defaulted on contract to purchase a condominium). But see Giannini v. First National Bank of Des Plaines, 136 Ill.App.3d 971, 91 Ill.Dec. 438, 483 N.E.2d 924 (1985) (granting specific performance to condominium buyer).

54. E.g., Petry v. Tanglwood Lakes, Inc., 514 Pa. 51, 522 A.2d 1053 (1987) (developer's promise to build a lake on demised premises not specifically enforceable).

A person in Diane's position in the Problem may not want specific performance with respect to an undivided one half interest in Blackacre, and may prefer a damage action. The rule in about half of American courts in such cases is that if James had been acting in good faith, Diane will be entitled to her out of pocket expenses and return of a deposit, or earnest money, but she will not be entitled to loss of bargain (contract-market price differential).[55] However, virtually all states will award the contract-market price differential, or loss of bargain, in addition if the failure of title was the result of bad faith, or if the failure of title was the result of the seller's own actions.

§ 14.9 Liability for Defective Structures: Builder, Vendor, Broker, Lender

PROBLEM 14.17: In 2000 A, a contractor, built a house without properly checking the soil beneath the foundation. As a result some settling occurred over a two-year period, and in 2002 a large crack began to form from one end of the house to the other. Meanwhile, however, A had sold the house to B, its first occupant. B moved into the house before the crack appeared, lived in it, and put it up for sale early in 2002. B's broker, C, inspected the house and first noticed the crack in the basement. C asked B about the crack, but B said he hadn't seen it before. C later showed the house and sold it to D. Through the course of the negotiations D never asked either C or B about any defects, and no agreement between D and either C or B contained any express warranties that the house was free from defects. Almost immediately upon moving in, however, D noticed the crack. D called a structural engineer who, after inspecting the house, told D that there was a substantial structural problem that would cost $125,000 to fix. D sues A (builder), B (previous owner) and C (broker) for damages. Can he recover from any or all of them?

Applicable Law: Although at common law there was no implied warranty that a structure was free from defects, many states imply such a warranty against the builder today, particularly with respect to residential structures. A growing number are willing to imply this warranty to second or subsequent purchasers as well as the original purchaser. Likewise, at common law a nonbuilder seller was liable only for common

55. See Kramer v. Mobley, 309 Ky. 143, 216 S.W.2d 930 (1949). For the rule awarding full benefit of the bargain damages even against good faith sellers, see Smith v. Warr, 564 P.2d 771 (Utah 1977) ("benefit of the bargain damages are to be awarded for breach of contract for the sale of real estate, regardless of the good faith of the party in breach"). Cf. Beard v. S/E Joint Venture, 321 Md. 126, 581 A.2d 1275 (1990) (awarding benefit of the bargain damages where seller could have performed but did not).

law fraud, which generally required an affirmative misrepresentation of fact. Increasingly, however, courts are implying a duty to disclose known defects. Brokers are generally held to a higher standard than nonbroker or nonbuilder sellers. Today a broker can be liable for both fraud and for failure to disclose a known defect. But a small number of states additionally impose a duty to inspect and disclose the results of the inspection.

Answer and Analysis

The answer depends on the jurisdiction. In some jurisdictions he could recover from all three.

Builder's Liability. The common law rule was that a builder of a structure on real property made no implied warranty as to the fitness of the structure unless the structure had been under a contract calling it to be used for a particular purpose, in which case there was a warranty that the structure be usable for that purpose. The rule eroded very substantially as to landlord-tenant relationships in the 1960's and even earlier (see Ch. 9), although it persisted longer with respect to housing sales. In Humber v. Morton,[56] however, the Texas Supreme Court held that a builder could be liable to an *immediate* purchaser for a defect in the structure. Since that time many states have followed this rule, and a growing number have expressly held that a builder can also be liable to a *second or subsequent* purchaser, even though there is no privity of contract between the builder and the second purchaser.[57]

Seller's Liability. The seller's liability has traditionally been governed only by the common law of fraud. This means that generally a seller who knows nothing about the defect has no liability. Even a seller who has knowledge of the defect has no liability unless he is found to be under a special duty to disclose, or has made a material misrepresentation of fact, knowing it to be false at the time he made it (if, for example, the seller said that there were no cracks in the basement floor, knowing at the time he made the statement that in fact there was such a crack).[58] A

56. 426 S.W.2d 554 (Tex.1968) (applying tort theory).

57. Decisions finding builder's liability as to a subsequent purchaser include Lempke v. Dagenais, 130 N.H. 782, 547 A.2d 290 (1988) (permitting recovery on implied warranty, absence of privity of contract notwithstanding, but no recovery in tort for purely economic loss); Redarowicz v. Ohlendorf, 92 Ill.2d 171, 65 Ill.Dec. 411, 441 N.E.2d 324 (1982) (same); Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427 (1984) (same, recovery for breach of implied warranty).

58. See Johnson v. Davis, 480 So.2d 625 (Fla.1985), noting that an action for fraud against the seller requires a showing of "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation."

growing number of courts are requiring an affirmative duty to disclose known defects.[59]

Importantly, the doctrine of merger—that a land sale contract merges into the deed and cannot be sued upon once the deed has been delivered—is generally held not to apply to contract actions for defective premises. Express or implied statements in a contract, respecting the quality of the structures, are generally considered to be "collateral" to the deed—i.e., the sort of thing one would not ordinarily expect to find in a deed. As a result, actions against sellers on such promises survive even after delivery of the deed.[60]

Broker's Liability. At common law the broker's liability was roughly akin to the seller's liability. He or she could be held liable only for fraud. But a growing number of courts have imposed on brokers a duty to disclose known defects, and a few have even required brokers to conduct a reasonable inspection of the premises and disclose any defects thus found.[61]

Lender's Liability. Some states hold that mortgage or construction lenders may also be held liable for defects in construction. Such cases generally require one of these two additional findings: (1) that the lender knew or should have known of the defects; or (2), that the lender performed promotional or developmental services in addition to the lending of the money, and thus could be said to be an active participant in the construction process itself.[62]

59. Johnson v. Davis, supra; Hill v. Jones, 151 Ariz. 81, 725 P.2d 1115 (App. 1986) (seller of used home who had affirmative knowledge of termite damage had duty to disclose; nondisclosure the same as fraud); Posner v. Davis, 76 Ill. App.3d 638, 32 Ill.Dec. 186, 395 N.E.2d 133 (1979) (seller was under duty to disclose known but concealed defects, in this case basement flooding and roof leakage).

60. Redarowicz v. Ohlendorf, 92 Ill.2d 171, 65 Ill.Dec. 411, 441 N.E.2d 324 (1982) ("While a warranty of habitability has roots in the execution of the contract for sale, we emphasize that it exists independently."); Mallin v. Good, 93 Ill.App.3d 843, 49 Ill.Dec. 168, 417 N.E.2d 858 (1981) (same).

61. See Ditcharo v. Stepanek, 538 So.2d 309 (La.App.1989), writ denied 541 So.2d 858 (1989) (broker could be held liable for failing to disclose known termite infestation); Johnson v. Geer Real Estate Co., 239 Kan. 324, 720 P.2d 660 (1986) (broker liable for failing to disclose that house used septic tank rather than sewer system); Easton v. Strassburger, 152 Cal.App.3d 90, 199 Cal.Rptr. 383, 46 A.L.R.4th 521 (1984) (broker liable for not disclosing past history of soil problems).

62. E.g., Jeminson v. Montgomery Real Estate & Co., 396 Mich. 106, 240 N.W.2d 205 (1976) (buyer stated cause of action in complaint alleging that mortgage institution knew or should have known that builder was notorious for its deceptive practices); Connor v. Great Western Savings & Loan Ass'n, 69 Cal.2d 850, 73 Cal.Rptr. 369, 447 P.2d 609 (1968) (mortgagee participated heavily in promotion and sale). See West's Ann.Cal. Civil Code § 3434, clarifying that *Connor*'s rule of lender's liability applied only when the lender acted "outside the scope of the activities of a lender of money or unless the lender has been a party to misrepresentations with respect to such real or personal property."

Chapter 15

THE EVOLUTION OF THE MODERN DEED

SUMMARY: CONVEYANCES UNDER MODERN STATUTES

1. Every American state has nearly exclusive jurisdiction over the land within its borders.

2. Each state has the power to prescribe the form which a conveyance of real property shall take and the power to determine the legal effect of a conveyance, subject only to federal law.

3. Whether the form prescribed by a statute is to operate as a common law "grant," under the Statute of Uses, or independently of both, is determined by construing the words of the particular statute.

4. In most states the Statute of Uses, 1535, being in force in England at the time of the American Revolution, and being a statute of general application, is considered part of the "common law."

PROBLEMS, DISCUSSION AND ANALYSIS

15.1 Common Law Conveyances

a. Feoffment

The ceremony of feoffment consisted of: (a) livery of seisin in which the feoffor, A, picked up a twig or piece of turf symbolizing the land itself, and handed it to the feoffee, B, with appropriate words such as, "I hereby enfeoff you and your heirs of Blackacre"; and (b) A's walking off the land leaving B in possession claiming the freehold estate in such land, that is, B claimed either a life estate, a fee tail or a fee simple. B was then seised of the land. A feoffment always transferred the physical possession of corporeal property. It is said to "lie in livery" because the possession of the land could be physically handed over to the feoffee.[1]

1. See A. W. B. Simpson, A History of the Land Law (2d ed. 1986). W. Holdsworth, 3 A History of English Law 3–275 (2d ed. 1937); 7 id. at 3–400 (5th ed. 1942); T. Plucknett, A Concise History of the Common Law 610–623 (1956); Patton, 1 Land Titles 1–8 (2d ed. 1957).

b. Grant

Incorporeal property interests such as reversions, remainders or easements were not subject to physical possession and were therefore said to "lie in grant," which meant they could be transferred only by a deed.

c. Lease and Release

By this transaction A leased to B Blackacre for a week. After B took possession A made to B a deed releasing to B and his heirs A's reversionary interest in Blackacre. The purpose of this conveyance was to save the owner, A, the burden of having to go onto the land to make a feoffment. By first making a lease to B, B was in possession and A now had a reversion. The reversion, an incorporeal interest, could be transferred by deed. When the landlord conveys his reversion to his tenant it is called a release. B is then the owner in fee simple.

d. Surrender

When the landlord conveys her reversion to the tenant it is a release. When the tenant transfers his leasehold estate to the landlord it is a surrender. Two types of surrender, by agreement and by operation of law, are explained in Problem 15.1 below.

e. Dedication

Example, A, fee owner of Blackacre, which consists of 9 blocks or squares of land in the form of a square area, three blocks long and three blocks wide, decides that he can sell the property better if he makes the center block a park. He orally declares his intention by telling his neighbors that he hereby dedicates such block for use of the public as a park. Thereafter people in the community use this block for picnics, playground and recreation. A has dedicated the block. Dedication at common law required no particular form and could be made by words, conduct or writing. When it is accepted by the public by using it as a park, there is a conveyance of an easement for such public use as a park, the fee remaining in A, the dedicator. See Chapter 10.

15.2 Conveyances Under the Statute of Uses of 1535

a. What is a Use?—Brief Historical Sketch

(1) Example: A enfeoffs "B and his heirs for the use of C and his heirs."

The purpose was to give B the legal title only and to give C the possession and enjoyment. These conveyances were common in feudal England before the Statute of Uses.

(2) Why a Use?

There were many advantages or reasons for creating uses, but among the most important were the avoidance of such feudal incidents of tenure as primer seisin, wardship and marriage.

(3) Enforcement of Uses

By Whom? After uses became common, they were enforced by the chancellor, the keeper of the King's conscience. The stated reasons were spiritual: (a) a person should be bound by his promise, or (b) to prevent unjust enrichment, i. e., the feofee to uses would be unjustly enriched if he did not recognize the beneficial interest of the cestui que use.

How? The method of enforcement was characteristic of equity jurisprudence: by injunction, fine or imprisonment against the defendant.

Against Whom? The use was enforced against four different categories of persons: the feofee to uses (analogous to the modern trustee); the feofee's heir; a donee of the feofee; and also a purchaser from the feofee if the purchaser had knowledge of the use. All of these persons would be unjustly benefitted if the use were not enforced against them.

Not Against Whom? There were also four categories of persons against whom the use was not enforced: a bona fide purchaser from the feofee if the purchaser had no notice of the use; the overlord if he obtained the land by escheat, the dower right of the feofee's wife, and a disseisor. The good faith purchaser would acquire both the legal title and an equity from his purchase, and this prevailed over the prior equity of the cestui que use. The overlord had a superior interest and logically the land would escheat free of the use; the dower of the feofee's wife was conferred by law but it is difficult to see how she could get a beneficial estate when her husband had none; and the disseisor, of course, acquired a new and independent title as a result of his own actions and operation of law.

(4) The Statute of Uses—Effect

The Statute of Uses, 1535, converted the use estate into a legal estate. Thus in our example under (1) above, after the Statute of Uses, C acquired a legal fee simple absolute and B had nothing.

b. Political Background

Why was the Statute of Uses passed? It was forced upon an unwilling Parliament by a strong willed monarch, Henry VIII, for the purpose of enhancing the depleted royal revenues. This depletion resulted largely from the fact that perhaps four-fifths of all land in England was held to uses to avoid the heavy burdens of a dying feudal system of land tenures. Much of the royal revenues were gained from the burdens of wardship and marriage in the feudal system.

To illustrate the incidents of wardship and marriage, suppose A is an elderly person who owns Blackacre in fee simple and has a son, B, ten years old. If A should die while B is still a minor, then A's overlord would have the right to the profits of the land until B became of age and would also have the right to determine whom B should marry. These were rights which brought the overlord a substantial income. To avoid such results, A could enfeoff a young man, M, of Blackacre for the use of A's son B. Then A's death would not affect M's rights at all for M is of age. Nor would M's overlord have any rights of wardship or marriage concerning B. Further, M would then hold Blackacre for the benefit and profit of B, and would accumulate the net profits for B till B became of age. Under the modern equivalent: A has set up a trust with M as trustee and B as beneficiary.

The King, being the one lord who was not also a tenant in the system, was most directly affected by the fact that land was held to uses. He introduced and forced the passage of the Statute of Uses for the purpose of eliminating uses. He succeeded as to passive uses.[2]

c. Three Periods of Development

The law of uses developed through three distinct periods: (1) the "law period" between 1066 and about 1433, during which the law courts did not recognize a use as giving any rights; (2) the "equity period" from 1433 to 1535 when the Statute of Uses was passed, during which equity emerged and began to recognize a use as being an enforceable right; and (3) after the Statute of Uses was in force, during which period the passive use was automatically executed into a legal estate.

d. Uses Illustrated

2. See 1 Am. L. Prop. 31 et seq. (Casner ed. 1952).

(1) Uses executed on a feoffment on transmutation of possession (i.e., delivery of possession from feoffor to feoffee):

(a) Use expressly declared by the feoffor at the ceremony of feoffment: example: A enfeoffs B and his heirs of Blackacre *to the use of* C and his heirs

(i) In the law period A had no rights, B had the fee simple and C had no rights at all because the law did not recognize a use. C could merely entreat B to hold the land for C.

(ii) In the equity period A had no rights, B had the fee simple and C could bring a suit in equity and petition the court for a decree ordering B to hold the land for C. The court would issue the decree and B would have to do as ordered or be in contempt of court. This carried out A's expressed intention that the feoffment was for the use of C.

(iii) After the Statute of Uses, A would have no rights, B would have no rights and the legal title in fee simple would be in C. The Statute executed the use by carrying the legal title from B to C in fee simple. This was automatic because the Statute so provided, whereas under (ii) above, before the statute, the use was enforced by proceedings in court.

Note: Resulting Use

In the previous example the reversion in fee simple is in A. Because equity would not raise a use unless there was consideration for the conveyance or a use expressed, it became customary to imply a resulting use in favor of the grantor when the entire beneficial estate was not otherwise disposed of. After the Statute of Uses this resulting use was also executed so that the grantor, A, in the above example, would have a legal reversion in fee simple.

This principle of resulting uses has a modern counterpart in the law of trusts, the usual rule being that the trustee acquires a legal estate just large enough to accomplish the purposes of the trust, and the trustee takes no beneficial interest unless such an intent is clearly expressed.

* * *

(b) Use raised on consideration actually paid at the ceremony of feoffment: example: A enfeoffed B and his heirs of Blackacre, A not stating that it was for the use of C, but C actually pays money to A at the time.

Here the rights of the parties are identical with those given under (a) next above, to wit:

(i) In the law period A had no rights, B had the fee simple by the feoffment and C had no rights because, while the payment of consideration by C raised a use in him, the law courts did not recognize the use or any rights in the cestui que use, that is, C.

(ii) In the equity period A had no rights, B had the fee simple because of the feoffment, but C, whose use was raised by the consideration paid by C, could petition the equity court for a decree ordering B to hold Blackacre for the use and benefit of C. The decree would issue and B would obey or be jailed for contempt of court.

(iii) After the Statute of Uses, A had no rights, B would have no rights and the legal title in fee simple would be in C. The Statute of Uses executed the use by carrying the legal title from B to C in fee simple. This was automatic because the Statute expressly so provided that if one (B in this case) were seised to the use of another (C in this case), then the seisin would be deemed and adjudged in the one who had the use, which was C in this case.

(2) Uses *executed* without transmutation of possession, that is, without a feoffment in which possession is delivered by feoffor to feoffee.

Note

The examples given above involved a feoffment, the common law conveyance in which physical possession was delivered to the feoffee by the feoffor on the land. At common law that was the only way a present freehold estate could be transferred in a single transaction. Then came the revolutionary method of conveying freehold estates in land without making such delivery of possession. The new method, which is codified in modern statutes, eliminates the inconvenience of going onto the land to be conveyed. The conveyance is made by merely executing a deed in the lawyer's office. This was made possible by the Statute of Uses.

(a) Bargain and sale deed: example: A, the fee simple owner of Blackacre, executes and delivers his bargain and sale deed to B. The deed recites, "for and in consideration of $1.00 and other valuable considerations, the receipt of which is hereby acknowledged, I, grantor, A, hereby bargain, sell and convey Blackacre to B and his heirs . . . ," and the deed is signed and sealed by A. What was the legal effect of this transaction in each of the three periods mentioned above?

(i) In the law period this deed had no effect at all. This was not a feoffment, and the ceremony of feoffment with livery of seisin or delivery of possession of the land from feoffor to feoffee was the only method by which A could convey

Blackacre in fee simple to B at common law. Hence, A remained the fee simple owner of Blackacre, and B had nothing and no right in Blackacre because the deed could give him none.

(ii) In the equity period the equity courts recognized that the recital of the $1.00 consideration in the deed raised a use in B. It was immaterial whether or not the $1.00 was paid, because the recital of such payment in an instrument under seal could not be rebutted. Now A, who was seised before the execution of the deed, is still seised because he has not made livery of seisin to any other person. The result was that B, having the use, could petition the equity court for a decree ordering A to let B occupy the land or otherwise use the land for B's benefit. The court would make the order and if A did not obey, he would be punished for contempt of court. But the point is that the equity court before the Statute of Uses in 1535, did enforce the use in B's favor, such use being raised by the recital of the consideration in the bargain and sale deed.

(iii) After the Statute of Uses, A had no further interest in Blackacre, and B was the owner in fee simple. By the recital of the consideration in the deed, the use was raised in the grantee, B. Then A was seised to the use of B. That is the exact situation to which the Statute of Uses applies. In substance it says, when one is seised to the use of another (A seised to the use of B), then he who is seised (A) shall lose such seisin to the other (B). Why did it work that way? Because A had the fee simple before the deed was executed. The deed itself did not transfer the seisin or possession. Neither did A make livery of seisin or deliver possession of Blackacre to anyone. But the deed by its recital of consideration did raise the use in B. *Thus, the Statute of Uses carries the legal title from A who is seised, to the grantee, B, who has the use.*

Note: Historical Elements of Bargain and Sale Deed

Historically, to be effective as a bargain and sale deed three elements were essential. To be a deed it must be under seal. To be a bargain and sale deed the deed must recite a valuable consideration, and it must be delivered, which means it must be intended by the grantor to take effect as a conveyance.

(b) Covenant to stand seised: example: A, owner in fee simple of Blackacre, executes and delivers to B an instrument under seal which provides, "For the love and affection which I have for my son (or son-in-law) B, I hereby covenant to stand seised of Blackacre for the use of B and his heirs" or "For the love and affection which I have for my son (or son-in-law) B, I hereby convey my

Blackacre to B and his heirs." What are the rights of A and B in each of the three periods set forth above?

(i) In the law period, 1066 to 1433, A.D., A remained fee simple owner and B had no rights at all for the reason that at common law only a feoffment could convey a freehold estate, of which the fee simple is one. The law courts did not recognize a use.

(ii) In the period of equity between 1433 and 1535 when the Statute of Uses was passed, A still held the seisin because he had made no transfer of possession by the ceremony of feoffment. However, this sealed instrument raised a use in B which B could, by petition in equity, have enforced by decree against A. In equity the relationship by blood or marriage of the covenantor and covenantee was sufficient to raise a use in the covenantee. On the face of the instrument it appears that B is the son (related by blood, or son-in-law, related by marriage to A) of A. Hence, a use was raised in B so that thereafter A was seised to the use of B. This permitted B to procure a decree in equity ordering A to let B occupy or otherwise use Blackacre for the benefit of B.

(iii) After the Statute of Uses in 1535, which provided that one who was seised to the use of another should lose that seisin to the other, A had no rights in Blackacre and B was the owner in fee simple. This is another example of a modern conveyance without the inconvenience of physical transfer of possession by feoffment out on the land.

Modern statutes on conveyancing are codifications of bargain and sale deeds or covenants to stand seised, both of which grew out of the effects of the Statute of Uses. The Statute of Uses executed the use raised by the instrument of conveyance into a legal title in the grantee or covenantee.

e. Effect of Statute of Uses on Modern Law

(1) *Conveyancing.* Land became transferable by a single written deed; livery of seisin is no longer necessary.

(2) *Estates.*

(a) Executory interests, i. e., springing and shifting legal interests, became possible.

(b) The Rule against perpetuities was formulated to prevent indestructible future interests from unduly cluttering titles.

(3) *Trusts.* The modern law of trusts developed.

15.3 Conveyances Under Modern Statutes

PROBLEM 15.1: In some states a simple form of conveyance of real property is set forth as follows:

"For the consideration of _____, I hereby convey to A. B. the following real property (describing it)."

Audrey owns Blackacre in such a state in fee simple. She signs, acknowledges and delivers a deed in the above form to A. B. She properly describes the property and fills in $1.00 as the consideration. On what theory would this deed operate as a conveyance in State X?

Applicable Law: A conveyance under a modern statutory form may be effective on any one of three theories: (a) as a common law grant; (b) under the Statute of Uses; or (c) merely as a prescribed form set by the legislature.

Answer and Analysis

Assuming the acknowledged instrument to be the equivalent of a common law deed with seal, this deed could operate as a conveyance on any one of three theories:

(a) The deed could be a common law "grant." At common law only incorporeal rights or hereditaments lay in grant, that is, could be transferred by deed. Such rights having no physical existence, they could not be delivered over to the grantee. Only physical property was subject to livery of seisin and required delivery of possession by feoffment. If the legislature of State X intended, by prescribing the above form of conveyance, to say that corporeal real property lay in grant as well as in livery, then such a deed can operate as a conveyance equivalent to a common law "grant."

(b) The deed could be valid under the Statute of Uses. The recital of the $1.00 consideration in the deed raises a use in the grantee, A. B. Then the grantor is seised to the use of A. B. The Statute of Uses then automatically carries the legal title from grantor to A. B., grantee. This statute seems to be a codification of the doctrine of conveyances under the Statute of Uses by bargain and sale deed, for the prescribed instrument contains a recital of consideration.

(c) This statutorily prescribed form can operate as a conveyance wholly independently of the past methods of transfer of real property, whether common law, equity or under the Statute of Uses, simply because the legislature of State X has so declared. The local statute gives this form the efficacy of a conveyance, and no reasons are needed beyond the fact that the legislature has power to prescribe forms of conveyance and this is the form so prescribed.

Note: The Statute of Uses and the Statute of Frauds

The Statute of Uses (1536) made the modern conveyance by written instrument a practical alternative to the ceremony of feoffment

by livery of seisin. Not until after the Statute of Frauds was passed in 1677, however, did courts *require* a writing to give effect to the conveyance of a freehold. In 1845 Parliament provided that a feoffment should be void unless it were evidenced by a written deed.[3]

PROBLEM 15.2: In California the legislature declared that a grant of an estate in real property may be made in substance as follows:

> **"I, AB, grant to CD all that real property situated in JJ county, State of California, bounded or described as follows: (here insert boundaries or description by name as 'The Norris Ranch'). (date) (signed) AB."**[4]

The statute then defined "transfer" as an act of the parties by which title to real property is conveyed from one person to another. It continued by saying that a written transfer is a grant and can be explained by circumstances under which it is made, and that a fee simple is presumed to pass in a conveyance unless a lesser estate is intended.

M owned Blackacre in California. She wrote several letters to her son, Sam, in a distant state requesting him to leave his job there, go to California to live, and take care of Blackacre and other property. In her letters, dated and signed by her, she wrote, "Blackacre is your property" and "I have written you several times that the little place with the garden, Blackacre, is your property." M was a citizen of Germany and lived there. Sam was a United States citizen and lived in the United States. Sam then left his job, traveled to California, moved his family onto Blackacre, and claims the property as his own. Is his claim valid?

Applicable Law: Mere informal letters from the conveyor to the conveyee may constitute an effective conveyance of real property under a modern statute which defines a "transfer" as an act of the parties by which title to real property is conveyed from one person to another.

Answer and Analysis

Yes. There are two questions involved in this problem, the intention of the legislature and the intention of M. It is obvious that the California statute did not intend to require any definite formula of words to constitute a conveyance. No consideration is required. It appears that a mere writing signed and dated by the property owner would constitute a conveyance if that were the

3. 8 & 9 Vict. ch. 3, § 1 (1845). See Goodwin, Before the Statute of Frauds, Must an Agreement to Stand Seised Have Been in Writing?, 7 Harv. L. Rev. 464 (1894).

4. Cal. Civil Code § 1092.

intention of the owner. The statute providing that a fee simple is presumed unless a lesser estate is intended is also typical. It makes unnecessary the common law requirement that words of inheritance "and his (or her) heirs" be used with the name of the grantee.

M's intent seems clear. She wrote, "The property is yours." These informal letters constituted a compliance with the statutory requirements, and conveyed Blackacre to Sam. The State has power to prescribe methods of conveying real property. If it prescribes merely a signed and dated writing, then compliance with such statutes will convey land wholly without reference to technical requirements of the common law or former statutes.[5]

PROBLEM 15.3: H and W were husband and wife. H owned Blackacre and executed, acknowledged, delivered and recorded a deed to Blackacre in favor of W. The deed provided, "This deed is not to take effect and operate as a conveyance until my death, and in case I shall survive my said wife, this deed is not to operate as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife if she shall survive me, and if she shall survive me then and in that event only, shall it be operative to convey to my said wife said premises in fee simple." It named the wife specifically as grantee and recited a consideration of $1.00 as paid. The statute provided, "a person owning real estate and having a right of entry into it, whether seised of it or not, may convey it, or all his interest in it, by a deed to be acknowledged and recorded as hereinafter provided." Other statutes provided how the acknowledgment and recordation should be made and that such deed should be effective as a conveyance. No specific provision dealt with the time when a conveyance should take effect. H then cut down trees on the premises, and W sues him for damages for waste. May she recover?

Applicable Law: Estates to commence in futuro may be created under modern statutes. This could not be done at common law.

Answer and Analysis

No. There are two reasons why a common law conveyance could not take effect in the future. One is that there had to be livery of seisin which had to be made on the land as evidence of change of possession then or not at all. The other was that seisin could not be in abeyance, for the feudal overlord had to know who was seised at all times so that he would know on whom to call for the feudal services. Under such rule this deed could not operate as

5. Metzger v. Miller, 291 Fed. 780 (N.D.Cal.1923).

a common law conveyance, even though the reasons for the rule have long since disappeared. Under the doctrine of *springing uses*, a valid conveyance could be made to commence in futuro. There being in this instrument of conveyance a recital of consideration, in addition to the love and affection for a spouse, a use would spring up in the grantee, and the Statute of Uses would execute the use into a legal estate. The executed use will be a legal springing executory interest. It will become possessory at the moment of H's death if W survives him. Should W not survive H, W's interest will cease and terminate. And what interest, if any, does W have in Blackacre during the lives of H and W? The answer is that W has an irrevocable assurance that the land will be hers if she survives H, but in the interim she has no interest in the land which will support an action for waste.

Another view may be taken, namely, that the local statute makes the deed effective as a conveyance wholly independent of the Statute of Uses. By analogy the Maine Supreme Court took the view that the publicity and notoriety which livery of seisin gave a common law conveyance, the acknowledgment and recording of a deed gives to this statutory conveyance: "Our law now says to a party having such an interest in real estate as is mentioned in [the statute quoted above,] you may convey that interest or any part thereof in any manner herein prescribed with such limitations as you see fit, provided you violate no rule of public policy, and place what you do on record so that all may see how the ownership stands." The court also concluded that deeds "executed in accordance with the provisions of our statutes and deriving their validity therefrom may be upheld thereby, as well as under the statute of uses, notwithstanding they purport to convey freeholds to commence at a future day." It continued, "The mere technicalities of ancient law are dispensed with upon compliance with statute requirements. The acknowledgment and recording are accepted in place of livery of seisin.... "[6]

6. See Abbott v. Holway, 72 Me. 298 (1881).

Chapter 16

CONVEYANCING BY DEED

Table of Sections

Sec.
16.1 The Written Deed.
16.2 Description and Boundaries.
16.3 Exceptions and Reservations.
16.4 Delivery, Escrow and Acceptance.

SUMMARY

§ 16.1 The Written Deed

1. The common law ceremony of feoffment by which a freehold estate was conveyed was oral and no writing was required.

2. Today the Statute of Frauds requires a writing and a signature by the conveyor of an interest in real property, excluding short term leases.

§ 16.2 Description and Boundaries

1. To be effective as a conveyance of land the deed must describe the land sufficiently so as to identify it.

2. A deed which fails to describe a specific divided part of a larger tract but describes a distinct fractional part of it is occasionally upheld as a conveyance of an *undivided* part (even though this was probably not the grantor's intent)—e.g., a conveyance of "one half of Blackacre" may be held to create an undivided half interest, rather than exclusive ownership in one half.

3. If a deed, in describing the land to be conveyed, refers to a particular map or plat, that map or plat is part of the deed for the purpose of identifying the land conveyed.

4. A metes and bounds description is the oldest known method of describing land. Literally, the term means "measurements and boundaries." This method describes the tract by using compass directions and distances from an ascertainable starting point. Monuments, when applicable, are frequently included, as, for example, " . . . then proceed N. 30 degrees E. for 200 ft. to the South side of

Utopia Avenue." In this case, Utopia Avenue is a "monument," or physical object located in a definite place on the land.

5. In a metes and bounds description, two things are vital: (1) the description must begin at some readily identifiable known point of a substantial character so that it can be relocated if the marker is removed; and (2) the description must close, that is, if the courses and distances are followed step by step, one will return to the place of beginning.

6. When a deed describes the boundaries of the land to be conveyed by reference to monuments, natural or artificial, *the intent of the parties is the controlling factor* and all rules of construction are mere aids in determining such intent.

7. In a description of land, a monument is any object on the ground which helps to identify the land conveyed. It may be either natural or artificial. Such things as a tree, a stone, a stake, a river, a lake, a highway, a wall, a house, a ditch, a graveyard, an ocean, a farm, and a mining claim have been found effective as monuments.

8. The "course" of a line in a description means the direction it takes across the country, and is usually determined by its angle with some other known line.

9. The "distance" means the length of a line from one point to another point, and the "contents" means the area of a tract of land.

10. When the terms of a deed conflict, then generally: (a) monuments, either natural or artificial, govern over courses and distances; (b) courses govern over distances; (c) a specific description will govern over a general description; and (d) any of these will govern over an estimated "contents" or area. These are rules of construction only, not rules of law, and different priorities will prevail if there is evidence of such an intent.

11. Parol evidence is not admissible to determine the identity of land described in a deed unless it is first found that the description is ambiguous. Even then it is not admissible to alter, but only to explain the ambiguity, unless the suit is in equity for reformation.

12. When the description of land in a deed carries it "to," "by," "from" or "along" a street, road, alley, way, highway, creek, stream or similar monument, the common law rule is that the grantee takes title to the land to the center of such monument, assuming, of course, that the grantor owned to the center of such monument.

13. If the description of land in a deed carries it to or from *a point on the side of a street,* stream, road or similar monument, *and along such monument,* still the grantee should take title to the

center of such monument under the common law rule, but there are contrary cases.

14. If the description of land in a deed carries it to or from *a point on the side of a street,* stream, road or similar monument and *along the line on the side* of such monument, still the grantee should take title to the land to the center of such monument under the common law rule unless it is expressly excluded from the grant.

15. An oral agreement made between adjoining owners of land settling an uncertain boundary line or one in dispute is valid and binding and does not come within the Statute of Frauds.

A related but not necessarily identical doctrine is that of acquiescence, under which a boundary can be established by a long period of tacit acquiescence, without an explicit agreement.[1]

16. When the boundary of a tract of land is the thread or center line of a stream of water, such boundary is a variable and changes with the thread of the stream.

17. Title to the land under the waters of a non-navigable stream belongs to the abutting riparian owners, while title to the land under the waters of a navigable stream belongs to the state.

18. When a landowner owns to the water of a stream, lake, pond or ocean, but owns no land under the water, his boundary line and land area may be extended by the imperceptibly slow addition of soil by the action of the water, called accretion, or by the land rising and water receding, called reliction. The newly made land is called alluvion.

19. Alluvion belongs to the owner of the land abutting the water for three reasons: (a) she is the only person who is in a position to use it advantageously and make it produce; (b) such owner runs the risk of losing his land by erosion and should have a corresponding right to the gain by water deposits; and (c) her access to the water as a littoral (i.e., by a lake) or riparian (i.e., by a river) owner should be preserved.[2]

20. When a river by sudden and violent change (called avulsion) alters its course and overflows privately owned land, the title to such lands is not changed.

1. See Ault v. Holden, 44 P.3d 781 (Utah 2002) (requiring 20 continuous years of mutual acquiescence); Day, Validation of Erroneously Located Boundaries by Adverse Possession and Related Doctrines, 10 U.Fla.L.Rev. 245, 263–264 (1957); Browder, The Practical Location of Boundaries, 56 Mich. L. Rev. 487 (1958); Halladay v. Cluff, 685 P.2d 500 (Utah 1984) (noting that doctrine of boundary by acquiescence required a long period of tacit acquiescence but not an agreement, while the doctrine of boundary by agreement required evidence of a parol agreement, but not the long period of acquiescence).

2. See Gifford v. Yarborough, 5 Bing. 163, 130 Eng. Rep. 1023 (1828) (land gradually added to adjoining lands from water dissipation belongs to adjacent land owner, for it would be of no use to the king but the landowner could use it).

21. In the United States private ownership as to tidal lands stops at the high water mark.

22. An exception is an exclusion from the operation of a deed of some part of the corporeal property described in it. The excepted portion is wholly unaffected by the deed and remains in the grantor. E. g., A conveys Section 14 to B and his heirs "except the northeast quarter thereof."

23. A reservation in the United States today is the creation of a new right in the land conveyed for the benefit of land retained by the grantor. E. g., A conveys Blackacre to B and his heirs but reserves an easement across such tract in favor of A's Whiteacre.

24. In the United States the word "reservation" is sometimes construed as an exception, and the word "exception" is sometimes construed as a reservation. The intent of the grantor is the important consideration.

§ 16.3 Exceptions and Reservations

1. An exception in a deed merely subtracts from the entire tract described in the deed some corporeal portion which is not to pass to the grantee, but is to remain in the grantor wholly unaffected by the deed or conveyance.

2. Historically, a reservation created a right or incorporeal interest which had not existed previously, and which issued out of the land as a feudal service. The grantor was considered to have conveyed the entire property to the grantee free from any burden, then the grantee in the same deed "regranted" the interest reserved to the grantor.

§ 16.4 Delivery, Escrow and Acceptance

1. Delivery of a deed means a grantor's intent that it shall operate or take effect as a conveyance.

2. There must be in existence a physical deed duly executed by the grantor before delivery is possible.

3. If the grantor intends the deed to be effective, delivery takes place irrespective of whether the physical paper is in the possession of the grantee, the grantor or a third person.

4. Delivery is primarily a question of fact, and what the grantor does with the physical deed may be some evidence of his intent concerning its taking effect.

5. If the grantor hands the deed to the grantee with no intent that it operate as a conveyance, it is ineffective and there is no delivery; if she keeps possession of the deed but intends that it operate as a conveyance in favor of the grantee, there is a delivery.

6. Delivery, being the state of mind of the grantor, is wholly dehors (external to) the deed, and the parol evidence rule should not apply. That is, delivery must be established by evidence not appearing on the face of the instrument.

7. Delivery to a third person to be delivered to the grantee upon the occurrence of an event or the performance of a condition is commonly referred to as a delivery in escrow. Nevertheless, a distinction between the commercial transaction and a donative transaction is helpful in analyzing the cases and arriving at the correct solution.

8. In a commercial escrow transaction, the delivery is truly conditional. The condition may be the payment of the balance of the purchase price, the obtaining of certain quitclaim deeds, the satisfaction of mortgages or other incumbrances, or the performance of other acts or conditions which may or may not take place. In all of these cases, however, the performance of the condition is beyond the control of the grantor. Control is vested either in the grantee or in third parties.

9. A delivery in escrow in a typical commercial transaction is a valid delivery.

10. There cannot be an escrow or conditional delivery to the grantee under the traditional view. Conditional delivery to the grantee, the grantor retaining no other control over the instrument, takes effect immediately.[3]

11. A true escrow requires the grantor to give up all control over the operation of the deed, subject only to the performance of the condition or the happening of the event which is involved. It vests in the grantee the power to become the owner upon either the performance of the condition or the happening of the event.

12. The delivery in escrow or conditional delivery must be to a third person, and requires the manual handing over of the deed to the escrow depositary.

13. The escrow depositary is neither an agent nor a trustee of either the grantor or grantee; its duty is merely to carry out its instructions.

14. In a commercial escrow, the title to the property passes to the grantee upon the performance of the condition or upon the happening of the event, that is, from the so-called "second delivery." In case of death of the grantor, however, or his becoming *non compos mentis*, title relates back or passes from the date of the

3. But see Chillemi v. Chillemi, 197 Md. 257, 78 A.2d 750 (1951), discussed below.

"first delivery," that is, from the time when the grantor hands the deed to the escrow depositary.

15. When the grantor makes a commercial escrow delivery of a deed, it is irrevocable and she loses all control over the operation of the instrument as a conveyance subject only to the failure of the grantee to perform or failure of the other conditions. There is authority that a commercial escrow delivery is revocable unless there is an ancillary underlying enforceable contract to convey. But there is conflicting authority that the question at this stage of the transaction is not whether there is an enforceable contract to convey, but whether the grantor has sufficiently divested herself of control over the deed and title.

16. In a donative escrow transaction, the grantor delivers the deed to a depositary to be delivered to the grantee upon the occurrence of an event or condition. Depending upon the amount of control relinquished by the grantor, the delivery may be either valid or invalid.

17. In a donative escrow transaction where the delivery to the grantee is to occur on the death of the grantor whenever and however that occurs, there is a valid delivery, because:

a. The death of the grantor is a certainty; the only contingency is when.

b. The grantor in this case gives up all control.

c. When necessary to determine the rights of the parties before the death of the grantor, the analogy to a fee simple and executory interest or life estate and remainder is employed.

d. The deed in this case takes effect on the initial deposit with the depositary. However, it does not then vest the entire estate in the grantee; rather it vests presently a valid future interest.

18. In a donative escrow transaction where the depositary is subject to further instructions and control by the grantor, there is no delivery at all. Such a transaction is illustrated by a direction to the depositary to "deliver this deed to the grantee on my death if I don't recall it before then." In this case it is clear that the grantor reserves the right to control the deed in the hands of the depositary; thus, the depositary is his agent, and there is no delivery.

19. In the case of a donative transaction where the deed is to become effective upon the occurrence of an event within the control of neither the grantor nor the grantee, there are conflicting decisions. This situation may be illustrated by the direction to "deliver this deed if I die before the grantee, but if she dies before me, then return it." It is clear that the grantor does intend to retain (or get back) the entire title if one contingency happens, but to divest

himself completely of the title if another contingency happens. The more logical view is that such a delivery is valid and that the grantee will acquire title if the specified event occurs. The analogy to the commercial escrow situation seems appropriate.

20. An instrument of conveyance may, and usually does, arise out of a preexisting contract, and it may include within its terms a contract such as a warranty of title, but it is not a contract.

21. Logically, because a conveyance is merely a transfer of title from grantor to grantee, like a gift from donor to donee in personal property, no express acceptance is required. The law presumes one will accept that which is to her financial benefit or advantage. The deed poll, the most commonly used deed form in the United States, does not have a space for the grantee's signature; so evidence of the grantee's acceptance is not ordinarily apparent on the face of the instrument.[4]

22. At common law, an heir could not prevent title coming to him by descent by operation of law, although most states now have statutes permitting such refusal. In any event, a conveyance cannot be forced upon a purchaser against his will; every grantee in a conveyance has the right to make disclaimer and cast the title back upon the grantor.

23. Assuming delivery by the grantor, she who says title does not vest in the grantee has the burden of showing affirmative disclaimer by such grantee.

24. Many American cases assert, but fewer cases actually hold, that acceptance of a deed by the grantee is essential to an inter vivos conveyance.

25. All cases agree that infants and persons *non compos mentis* may hold title by purchase even though they have no capacity to accept contractual responsibility.

26. In the absence of evidence to the contrary, a valid delivery to one of several co-grantees serves as a delivery to all of them.[5]

PROBLEMS, DISCUSSION AND ANALYSIS

§ 16.1 The Written Deed

The common law ceremony of feoffment by which a freehold estate was conveyed was oral and no writing was required. The

4. English law required an acceptance, but held that such an acceptance could be presumed if the grant was beneficial to the grantee and there was no evidence of nonacceptance. Thompson v. Leach, 2 Vent. 198, 86 Eng. Rep. 391 (1691).

5. Arwe v. White, 117 N.H. 1025, 381 A.2d 737 (1977) (one co-grantee rejected his share; others not precluded from taking interest conveyed to them); LeMehaute v. LeMehaute, 585 S.W.2d 276 (Mo.App.1979) (delivery to one grantee operates as delivery to all).

common law "grant" conveying such incorporeal interests as remainders, reversions, easements and profits was a deed and had to be under seal. The Statute of Frauds required a writing and a signature by the conveyor of an interest in real property, excluding short term leases.[6] Covenants to stand seised and bargain and sale deeds under the Statute of Uses were required to be under seal. No general statement concerning the requirements of conveying instruments in the United States can have widespread, much less, universal application. The Statute of Frauds and the statute on conveyancing in each state should be consulted. In most states a seal is no longer required for the validity of a deed.[7]

§ 16.2 *Description and Boundaries*

Note: The Federal Survey

In 1796 Congress adopted the rectangular system of surveys as the official method of land measurement in the United States. The principal units of this system used in land descriptions are townships, ranges, sections and subdivisions. Each regular township is six miles square and contains 36 sections. Each section is one mile square and contains 640 acres. Chart 1 below shows how the system is used in locating townships in any given state. Chart 2 shows the method of numbering the sections within any given township. Chart 3 shows how each section may be subdivided and the number of acres in each subdivision, and is followed by a description of such subdivisions. Federal survey lines are generally given the highest priority in cases of inconsistencies in deed descriptions.[8]

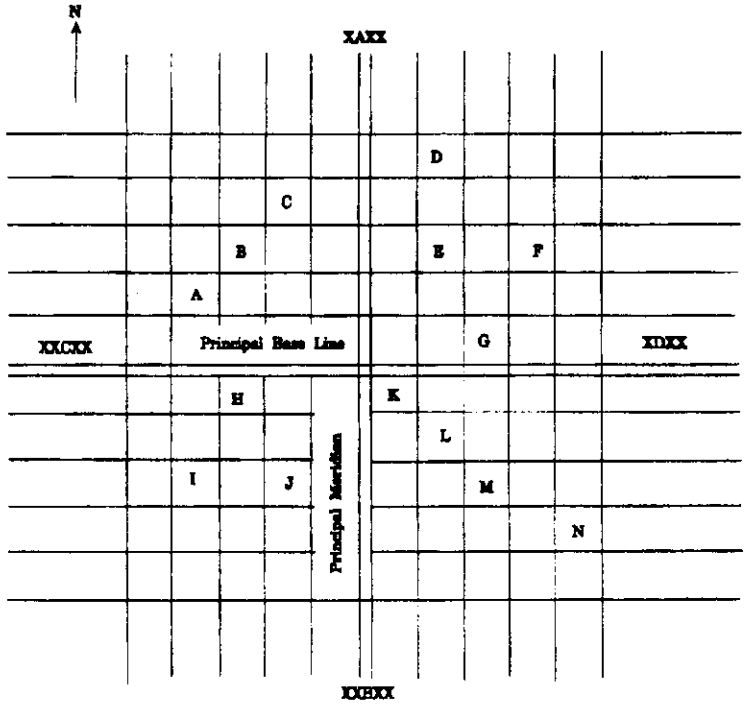
6. E.g., Beazley v. Turgeon, 772 S.W.2d 53 (Tenn.App.1988) (deed with forged signature violated Statute of Frauds).

7. North Carolina (at least as of 1978), is an exception. See Garrison v. Blakeney, 37 N.C.App. 73, 246 S.E.2d 144, 147–148 (1978), where the court states that a seal is necessary in North Carolina and then relates the history of the seal.

8. E.g., Rivers v. Lozeau, 539 So.2d 1147 (Fla.App.1989).

CHART 1

SHOWING "PRINCIPAL BASE LINE" AND "PRINCIPAL MERIDIAN" BY WHICH TOWNSHIPS AND RANGES IN LAND DESCRIPTIONS ARE MEASURED



In each state using the rectangular system of surveys there are drawn arbitrary lines perpendicular to each other, one called the "principal base line" running east and west and the other called the "principal meridian" running north and south. Townships are measured north and south of the principal base line and ranges are measured east and west of the principal meridian. Each of the squares indicated in the above chart lettered from A to N indicates a township six miles square.

[5A]

Some of these squares will be described as they would appear in a land description: the square indicated by letter A would be described as "Twp. 2 N, Rn. 4 W." By counting north from the Principal Base Line we find A in the second tier and by counting west from the Principal Meridian we find A in the fourth tier: thus the description given above. Continuing, square B would be "Twp. 3 N, Rn. 3 W"; square F would be "Twp. 3 N, Rn. 4 E"; square J would be "Twp. 3 5, Rn. 2 W" and square N would be "Twp. 4 S, Rn. 5 E," etc. The abbreviation "Twp." means township and the abbreviation "Rn." means range. In land descriptions, the township always precedes the range.

CHART II

TOWNSHIP MAP SHOWING SECTION NUMBERS

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

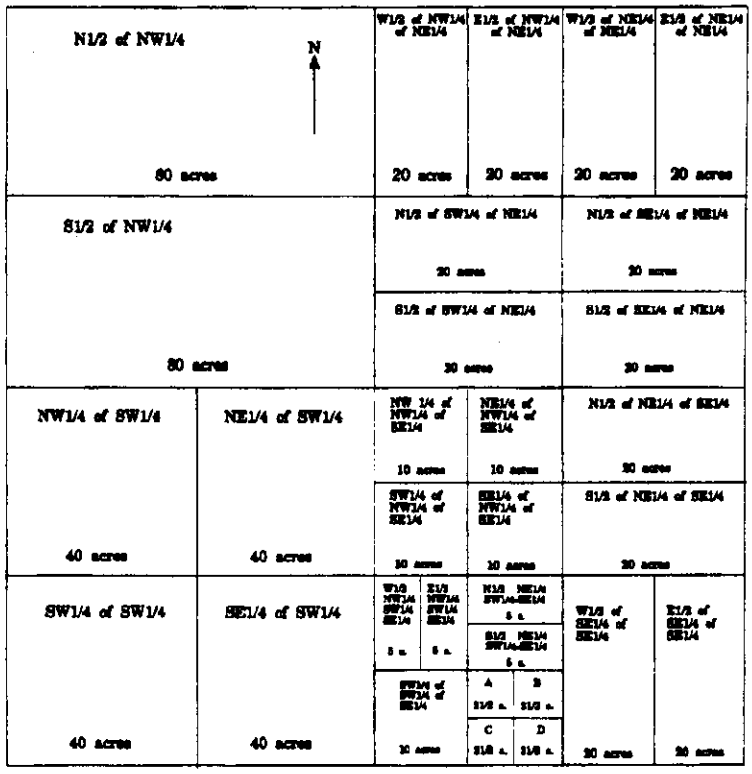
N
A
S

The method of numbering the sections within a township should be carefully studied even though it is a simple process. Beginning with section number 1 in the northeast corner of the township, the sections are numbered to the left from 1 to 6 in the top tier of sections, then down one tier and the counting is to the right to section 12, then down one tier and to the left, then down one tier and to the right, then down another tier and to the left and down one tier and to the right, ending with section 36 in the lower right hand corner of the township.

(7A)

CHART III

SECTION MAP SHOWING SUBDIVISIONS THEREOF



Tract A is the NW1/4 of SE1/4 of SW1/4 of SE1/4
Tract B is the NE1/4 of SE1/4 of SW1/4 of SE1/4
Tract C is the SW1/4 of SE1/4 of SW1/4 of SE1/4
Tract D is the SE1/4 of SE1/4 of SW1/4 of SE1/4

MAI

PROBLEM 16.1: Arthur, owner of Blackacre in fee simple, borrowed $500 from Doris. To secure this indebtedness Arthur executed a mortgage to Doris describing the mortgaged land as: "That certain tract of land, gristmill and storehouse, said tract to contain three acres and within my forty-acre farm." Thereafter Arthur gave a mortgage to Catherine covering Arthur's forty-acre farm and properly describing it. This was the same farm referred to in Doris's mortgage. Doris was about to sell the land under foreclosure proceedings when Catherine brought suit to enjoin the sale on the ground that Doris's mortgage was void for want of description identifying any specific land. Should the injunction issue?

Applicable Law: No conveyance is valid unless the description of the land sought to be conveyed is sufficient to identify the land.

Answer and Analysis

Yes. No deed or mortgage is valid unless the description of the land sought to be conveyed or mortgaged is sufficient to identify such land. What land is identified in Arthur's mortgage to Doris? The tract is three acres. But where is it? It is some place within a 40 acre tract. But no words locate it at any particular place within the 40 acres, and no words describe the shape of the three acres. Even if the buildings are intended to be within the three acres, a specific shape and location is lacking. Neither do the words used refer to any map or plat from which the three acre tract can be located. No monuments, no lines and no points give any indication of how to identify the land intended to be mortgaged to Doris. Hence, Doris's mortgage is void and the injunction should issue at the instance of the mortgagee, Catherine, whose mortgage appears to be valid.[9]

PROBLEM 16.2: A, being owner in fee simple of Blackacre, executed a deed in favor of B as grantee in which she used the following language, "I hereby grant to B and his heirs that certain piece of land, it being one half of my Blackacre." What are the rights of the parties?

Applicable Law: The courts will give effect to the language of the instrument of conveyance if possible, *even making the parties tenants in common,* when an undescribed "piece" of land is mentioned but which was to be a distinct fractional part of the whole tract.

Answer and Analysis

The answer is probably that A and B are tenants in common of Blackacre, even though this was not likely the grantor's intent. The parties to this transaction intended that something should be conveyed by the deed. If possible the courts give effect to the language used. It is obvious that the words in the deed describe no specific "certain piece" or a divided part of Blackacre. Hence, the deed would fail if it were to be applied to any specific piece of land. On the other hand, the language "it being one half of Blackacre" does describe that which can be the subject matter of a conveyance, an undivided half. Hence, the deed should be construed as transferring an undivided half interest in Blackacre to B, thus making A and B tenants in common of Blackacre. If, on the other hand, such a deed had attempted but had failed to describe a distinct piece of

9. See Harris v. Woodard, 130 N.C. 580, 41 S.E. 790 (1902).

Blackacre, and if it were clear that the grantor intended to convey a divided portion of the tract, and the words, "it being one half of my Blackacre" were meant to describe merely the area of the piece intended to be conveyed, then the deed would fail for lack of description.[10]

PROBLEM 16.3: Florence, owner in fee simple of Blackacre, executed a deed in the following language to Frances as grantee, "I hereby grant to Frances and her heirs that certain Lot 1, Block 1 of Veterans Addition to the City of Tucson, State of Arizona, according to that certain map on page 66 of Book 5 of Maps and Plats filed in the Office of the County Recorder of Pima County, State of Arizona." This described Blackacre. Frances paid full value for the lot and recorded the deed. Then Florence borrowed money from Diana and executed a mortgage on several pieces of land to secure the payment of this debt. Blackacre was included in the mortgage to Diana. Diana foreclosed the mortgage and was about to sell Blackacre. Frances seeks to enjoin this sale, and Diana contends that the description in Frances's deed is insufficient to pass title. In the trial Frances seeks to introduce in evidence the map and plat of Lot 1 Block 1 as it appears on page 66 of Book 5 of Maps and Plats in the Recorder's Office. Is such evidence admissible?

Applicable Law: If a deed in its description of the land to be conveyed refers to a map or plat, that reference makes the map or plat a part of the deed for the purpose of identifying the land.

Answer and Analysis

Yes. If a deed in its description of the land to be conveyed refers to a map or plat, the reference makes the map or plat a part of the deed for the purpose of identifying the land. It is obvious in the facts given that the description of the land as Lot 1, Block 1, etc., does not describe any land or locate any property which could be the subject of the conveyance apart from the map or plat. But by construing the deed and the map or plat together, there is a piece of land with specific and accurate dimensions which is located on the terrain in reference to other pieces of land which bound it. In fact, with the map or plat the deed is complete; without it the deed is incomplete and void. Thus the courts carry out the expressed intent of the grantor by treating the deed and map or plat as one for purpose of making the conveyance complete. Hence, the evidence is admissible and Frances is the title holder of Blackacre.[11]

10. See Morehead v. Hall, 126 N.C. 213, 35 S.E. 428 (1900) (conveyance of unspecified "one half of a tract of land" could not convey a divided portion but was sufficient to create undivided one-half interest).

11. See Deery v. Cray, 77 U.S. (10 Wall.) 263, 19 L.Ed. 887 (1869).

PROBLEM 16.4: A owned Blackacre in fee simple. Blackacre was a lot 80 feet wide and 200 feet long. The front 40 feet of Blackacre was subject to an easement for street purposes, and was not usable by the owner as long as Market Street was used over such area. Market Street was 80 feet wide and the south line of Blackacre formed the center line of such Street for a distance of 80 feet. The long sides of Blackacre extended due north and south and were perpendicular to Market Street which extended due east and west. A executed a deed to B of such property using the following language, "I hereby grant to B the following described property to wit: Beginning at a steel stake in the north side line of Market Street exactly 100 feet west of the intersection of said north side line of Market Street with the west side line of Spruce Street, in the City of Dover, State of Arisota; thence due north at right angles to the north side line of Market Street 160 feet to another steel stake; thence due west and at right angles to the line just drawn 80 feet to another steel stake; thence due *north* and at right angles to the line just drawn 160 feet to Market Street; thence along Market Street to the place of beginning." (a) Is this deed valid to transfer to B any part of Blackacre? (b) If so, does B take title to the 40 feet of the lot which is covered by Market Street?

Applicable Law: (a) If, in the description in a deed there is a conflict between the calls of a deed as to courses and distances on the one hand, and monuments, natural or artificial, on the other, the monuments will govern over the courses and distances. (b) When the description in a deed carries it "to," "by," "from" or "along" a street, road, alley, way, highway, creek, stream or similar monument, the common law rule is that the grantee takes title to the center of such street, road, alley, way, highway, creek, stream or similar monument, provided the grantor owns to the center of such monument. (c) Courses govern over distances.

Answers and Analysis

The answers are (a) the deed is valid and passes title to B, and (b) title to the 40 feet covered by Market Street passes to B. Question (a) raises a very important rule of construction: when there is a conflict in a deed description between the calls of a deed as to courses and distances on one hand and monuments natural or artificial on the other, *the monuments will govern over courses and distances.*[12] The reason for the rule is that human experience

12. Some courts apply this rule even when it is clear that the monuments were improperly placed. E.g., DD & L, Inc. v. Burgess, 51 Wash.App. 329, 753

suggests that one is much more apt to be correct when referring to a monument than when turning off an angle for the direction of a line (a course) or in measuring a distance. The description in the problem started at a monument, a stake specifically located in the north line of Market Street. The first course went north to another monument, a stake; the second course went west to another monument, a stake. Thus far the courses and distances and monuments coincide. Next comes the parting of the ways. The course turns due north but the monument, Market Street, is south. If the course is followed, there will be no land enclosed and the deed will fail for the courses describe only a broken line. If the monument governs, then the course will be carried not due north as the words indicate, but due south where the monument is located on the ground. Furthermore, by carrying the third course to the monument, Market Street, it will be possible, by following the fourth course, "along Market Street to the place of beginning," to enclose a piece of land which could be the subject matter of the conveyance. By using the rule of construction that monuments govern over courses and distances, the deed with its calls enclose an area of ground and will be valid. Thus, the third course runs "due south" to Market Street, the monument, and not "due north" as the deed states in words, and the deed is valid to pass title to B.[13]

Question (b) involves another very important common law principle of construction: when the description of land in a deed carries it "to," "by," "from" or "along" a street, road, alley, way, highway, creek, stream or similar monument, the grantee takes title to the land to the *center* of such monument, provided the grantor owns to the center. In our case the calls of the deed start from a point on the side line of Market Street and take a northerly direction "from" such point or Street. When the calls return to the monument, Market Street, they run "along" Market Street to the place of beginning. If the view is taken that the stake in the north side line of Market Street indicates an intent on the part of the grantor that the land conveyed shall be no further south than that point, then it can be argued that the grantee takes only to the north side line of Market Street, the tract which B gets is only 80 ft. by 160 ft., and no part of the lot under Market Street passes to B. But the general rule stated above should ordinarily apply and the stake on the north side line of Market Street is but a measuring

P.2d 561 (1988). See also Doman v. Brogan, 405 Pa.Super. 254, 592 A.2d 104 (1991) (where property description divided a building by reference to a "center wall," which was inconsistent with the given metes and bounds description, court divides property along wall currently in place closest to center, even though it may not have been the historical wall referenced in the deed; significantly, the metes and bounds description would have divided the property down the center of a room).

13. See Providence Properties, Inc. v. United Virginia Bank, 219 Va. 735, 251 S.E.2d 474 (1979).

point from which the area to be conveyed is to be identified. The location of that stake does not, in the absence of other factors, constitute a basis for determining the grantor's intent as to the area to be conveyed. The reason for the rule is that the only purpose which the retention in the grantor of a narrow strip of land in a street can possibly serve is to be the subject of future litigation. This possibility is eliminated by construing the deed in B's favor.[14]

Note

Another rule of construction is that *courses govern over distances* in the calls of a deed when the two are in conflict. To illustrate, suppose the third call in a deed is from a point to a given line on the side of a road south of said point. The deed reads, "then south to the road a distance of 66 feet, such line forming a right angle with the line on the north side of said road." The fact is that a line between the point and the line and forming a right angle with it will be exactly 60 feet long. If the line is to be 66 feet, then it will do one of three things as it swings in an arc: it will go 6 feet past the line; or it will form either an acute or an obtuse angle with such line. In such case the *course,* the direction of the line from the point to the road and making a right angle therewith, will govern over the length of the line, the *distance,* and the deed will be so construed that the line will be 60 instead of 66 feet in length.[15] Suppose the lengths of two lines in a deed cannot both be correct. One or the other must be in error. In that case there is an ambiguity and parol evidence is admissible to explain what was actually done on the ground.[16] In Temple v. Benson,[17] the court permitted a remote grantor to testify to the boundaries as they were marked out on the ground.

14. See Hoban v. Cable, 102 Mich. 206, 60 N.W. 466 (1894); Low v. Tibbetts, 72 Me. 92 (1881).

15. See Hall v. Eaton, 139 Mass. 217, 29 N.E. 660 (1885).

16. See Walters v. Tucker, 281 S.W.2d 843, 847 (Mo.1955):

> The law is clear that when there is no inconsistency on the face of a deed and, on application of the description to the ground, no inconsistency appears, parol evidence is not admissible to show that the parties intended to convey either more or less or different ground from that described. But where there are conflicting calls in a deed, or the description may be made to apply to two or more parcels, and there is nothing in the deed to show which is meant, then parol evidence is admissible to show the true meaning of the words used.... Such evidence must not contradict the deed, or make a description of other land than that described in the deed.

17. 213 Mass. 128, 100 N.E. 63 (1912). Accord Riley v. Griffin, 16 Ga. 141 (1854), where a witness was permitted to testify concerning his recollection as to where surveyor's marks on trees were located, even though the trees had been cut down many years earlier.

One should distinguish the case where surveyors or other experts are brought in to testify as to the meaning or interpretation of certain terms of art. Cf. Philpot v. State, 843 So.2d 122 (Ala. 2002) (permitting surveyor to testify, even though dead was not found to be ambiguous).

PROBLEM 16.5: Marion owns Blackacre, a quarter section of land which abuts Lincoln Highway, a road 80 feet wide. The south 40 feet of Blackacre is covered by the pavement of Lincoln Highway. In her deed to Fried as grantee, Marion uses this language, "thence south to a point on the north side line of Lincoln Highway, thence along the north side line of said Highway to the place of beginning, being a steel stake in the north side line of said Highway." The rest of the description was accurate as to Blackacre lying north of Lincoln Highway. Lincoln Highway was then abandoned, and Fried took possession of and struck oil on the 40 feet of Blackacre which had been used as part of said Highway. Marion sues to eject Fried from said 40 foot strip. May Marion recover?

Applicable Law: If the description in a deed is carried to two points constituting a line or the "side line" of a street, road, alley, way, highway, creek, stream or similar monument, still the grantee takes title to the center of such monument unless in express words the grantor excludes any part of such monument from the operation of the deed. This is the better rule, but some cases disagree.

Answer and Analysis

The dominant, but not uniform, answer is no. When the description in the deed describes two points or a line which constitutes one side of a monument, such as a road, street, highway, stream, alley or the like, and the grantor owns to the center of the monument, does the description carry title to the center of the monument, or does the grantor retain the strip between the side line and the center of the monument? To be sure, two points determine a line and a line determines a boundary. The grantor has described the boundary line of the land conveyed as the "side line" of the Highway. This suggests that no part of the Highway passes to the grantee. The result is that the strip in the highway still belongs to Marion, and Marion can eject Fried.

The better view is that when a description carries the boundary of land conveyed to a monument such as a street, stream, road and the like, the general rule that the land goes to the center of the monument should apply unless the strip between the center and the side line is expressly excluded. This view seeks to avoid litigation which may arise by the grantor's retention of narrow strips of land. Such litigation is just about the only purpose which such retention of title can serve, for until the street is abandoned the grantor is in no position to use it beneficially. What of the grantor's intent? The parties usually do not think of the strip under the monument when the deed is delivered. Of course, the grantor has the right to retain the strip, and also the grantee would have the

right to reject the deal if the strip were retained. However, it is not inconsistent with the general rule allowing title to the center of the monument to pass to the grantee, to treat the two points, or the line on the side of the highway where it is more convenient to place stakes than in the road, not as a boundary line as such, but merely as the measuring points from which to identify the land conveyed, and indicating the side of the road on which the land lies.[18]

PROBLEM 16.6: A owned Blackacre in fee simple, which consisted of a tract 180 feet square and bounded on the north by the line AB, on the east by the line DA, on the south by the line CD and on the west by the line BC. Monument A was at the northeast corner, Monument B at the northwest corner, Monument C at the southwest corner and Monument D at the southeast corner. A executed his deed to a portion of Blackacre to B, using the following language: "I grant to B that certain portion of Blackacre bounded on the east by the line AD, on the north by the line AM which is the easterly 100 feet of the line AB, on the south by the line DN which is the easterly 100 feet of the line DC and on the west by the line joining the two points M and N, which enclosed tract is the easterly one half of my Blackacre." B fenced in the easterly 100 feet of Blackacre, which left the westerly 80 feet in A's possession. A sues B to eject him from the westerly 10 feet within B's fence. May A succeed?

Applicable Law: When there is a conflict in the description in a deed between a specific description or description by metes and bounds on the one hand, and a general description by fractional part or area on the other, the clear specific description will govern over the general description.

Answer and Analysis

No. It is obvious that the first part of the description in the deed defines with particularity the boundary lines of the east 100 feet of Blackacre. It is just as obvious that the east 100 feet of such tract is more than half by an excess of 10 feet in width. Consequently, if B owns such 100 feet to the east, then A has only 80 feet to the west and has retained less than half of Blackacre. Here then is a conflict between a specific description or description by metes and bounds on the one hand, and a general description by fractional part or area on the other. In such case the rule is well settled that the clear specific description governs over an inconsistent general description. Title to the east 100 feet of Blackacre passes to B, and

18. See Salter v. Jonas, 39 N.J.L. 469 (E. & A.1877) ("nothing short of an intention expressed in ipsis verbis, to 'exclude' the soil of the highway, can exclude it"). See also Safwenberg v. Marquez, 50 Cal.App.3d 301, 123 Cal. Rptr. 405 (1975) (grantee takes to center).

A's general description that such property conveyed was one-half of Blackacre has no effect.[19]

§ 16.3 Exceptions and Reservations

PROBLEM 16.7: Greg, fee simple owner of Blackacre, used the following language in his deed to Sara as grantee: "I hereby grant to Sara and her heirs Blackacre except the east half thereof, and except the standing timber on Blackacre, and except the coal under Blackacre." What interest did Sara take under the deed?

Applicable Law: An exception in a deed merely subtracts from the entire tract described in the deed some corporeal portion which is not to pass to the grantee, but is to remain in the grantor wholly unaffected by the deed or conveyance. Such portion must be sufficiently described so that it can be identified.

Answer and Analysis

Sara took the west half of Blackacre minus the standing timber and the coal. An exception merely subtracts from the entire tract described in a deed, some corporeal portion which is not to pass to the grantee. Of course the portion excepted must be clearly described so that it can be identified. The deed given describes Blackacre. It then, by exception, subtracts the east half, all the standing timber on the whole tract, and all the coal under the entire tract. All three subjects of exception, the east half, the standing timber and the coal, are corporeal property. The grantor can dispose of such excepted property by deed or by will, or it will descend by intestacy.

PROBLEM 16.8: A, being fee simple owner of Whiteacre and Blackacre which abutted each other, and there being a visible roadway from a highway to the house on Whiteacre running across Blackacre (a quasi-easement), executed to B a deed to Blackacre, using these words: "I hereby grant Blackacre to B and his heirs, reserving to me and my heirs an easement from my house on Whiteacre to the highway along our usual roadway;" (a) What interest was conveyed to B? (b) What interest, if any, was retained by A in Blackacre?

Applicable Law: This case distinguishes exceptions and reservations as they existed at common law, the former applying only to corporeal property which remained in the grantor wholly unaffected by the conveyance, and a reservation being

19. See Morse v. Kelley, 305 Mass. 504, 26 N.E.2d 326, 127 A.L.R. 1037 (1940).

limited to incorporeal rights newly created by the deed and issuing out of the land. In the United States today, both easements and profits may be created by "reserving" such to the grantor if this is her intent. Indeed, the intent of the grantor will govern whether the word "exception" or "reservation" is used. Words of inheritance never had to be used in cases of an exception. Such words must be used in creating a reservation to last longer than the grantor's lifetime unless a statute dispenses with such in the creation of a fee simple estate.

Answers and Analysis

The answers are as follows: (a) B received Blackacre in fee simple burdened with an easement appurtenant in favor of Whiteacre, and (b) A retained in Blackacre an easement appurtenant to Whiteacre running from the house on Whiteacre across Blackacre to the highway over the road which had been the usual way of passage.

In the common law field of exceptions and reservations, history has played an important role and cannot be ignored. In England, a reservation created a right or incorporeal interest which had not existed previously, and which issued out of the land as a feudal service. It was created as a "regrant." The grantor was considered to have conveyed the entire property to the grantee free from any burden, then the grantee in the same deed "regranted" the interest reserved to the grantor. This was possible in England where both grantor and grantee signed or sealed the deed. But the theory did not seem to work in this country where only the grantor usually signed the deed. How, then, did our courts reach the result given in the answer above? They solved the case given as though it were an exception rather than a reservation. Because exceptions applied only to presently existing interests, the concept could not be applied to an easement or profit which was to be newly created by the deed and which did not exist before. So the courts simply took the view that a "quasi-easement" (case in which the grantor had two properties and used one to serve the other, which, of course, in law, was no easement at all), constituted a sufficiently existing "present interest" to be the subject of an exception. By so treating the matter in our case, the grantor, A, simply excepted his "quasi-easement" over Blackacre, and it became an actual easement over the now servient estate, Blackacre, in favor of the dominant estate, Whiteacre, which was retained by A.

Suppose, however, that Blackacre had never been used by A to serve Whiteacre when she owned both Blackacre and Whiteacre. The same fiction obtained and the same result achieved, and A was considered the owner of an easement over Blackacre without any

previously existing quasi-easement. If a "quasi-easement" can be made into an easement just by calling it such, the courts had no difficulty in saying a (non-existing) "quasi-easement" is an easement, if the grantor so intended. The result is that the word reservation may now actually create a new incorporeal interest in the grantor in the land conveyed, whether it be easement or profit, which was not a feudal service and which did not issue out of the land.

Notice that the set of facts given uses words of inheritance, "reserving to me *and my heirs*" an easement, etc. Words of inheritance were never necessary in an exception because exceptions were simply unaffected by the conveyance. But on the theory of a regrant in a reservation, only an easement or profit for life of the grantor could be created unless words of inheritance were used. Some cases held such reservation lasted only for the lifetime of the grantor and could not be claimed by his heirs. Of course, in a jurisdiction which has a statute dispensing with words of inheritance to create an estate of inheritance (fee simple or fee tail), the easement or profit reserved to the grantor without using the words "and his heirs" could last beyond his lifetime.[20]

PROBLEM 16.9: Amy owned Blackacre in fee simple. Millie owned adjacent Whiteacre in fee simple. A road over Blackacre would be a great convenience to Whiteacre as a much shorter way to travel to and from a nearby small town, Ionia. Amy executed a deed to Blackacre using the following language, "I hereby grant Blackacre to Missie and her heirs, reserving to Millie and her heirs a way across Blackacre in favor of Whiteacre to Ionia, such way to be over a 10 foot strip along the east edge of Blackacre." The deed was delivered to Missie. Millie starts to use the road described in the deed. Missie seeks to enjoin Millie's use. Should the injunction issue?

Applicable Law: Although courts are divided on the issue, they increasingly hold that a reservation of an easement made in favor of a third party to the deed should be valid if such be the intent of the parties.

Answer and Analysis

The answer is no. Missie's suit is based on the traditional proposition that a reservation must be wholly and solely for the benefit of the grantor or conveyor. In this case the reservation is in favor of Millie, a third party to the deed. Historically, an exception or a reservation could be in favor of the grantor only. Obviously the way attempted to be created in favor of Millie cannot be an exception, for it was not in existence before the deed. It seems fair

20. See Restatement of Property §§ 472, 473.

to assume from the very words of the instrument taken as a whole, that the grantor Amy intended to create in Millie an easement appurtenant to Whiteacre. There is no logical reason why a grantor cannot in the same deed create a possessory estate in one person and an easement in another. No one could question Amy's power to create such interests had Amy used two instruments, first, one to Millie granting the easement, and second, one to Missie creating the fee. It should make no difference that two interests, one possessory and the other nonpossessory, are created in the same instrument if such be the intent. If these propositions be true, then the fact that Amy used the word "reserving" instead of "granting," or "I hereby grant" should be immaterial, provided Amy intended to create in Millie an easement over Blackacre.[21]

§ 16.4 Delivery, Escrow and Acceptance

PROBLEM 16.10: A, owner of Blackacre in fee simple, was negotiating with B for a sale of the premises for cash. A made out a complete deed to the land, named B as grantee and acknowledged it before a notary public. When B came to A's house to talk further about the possible deal, A handed B the deed with these words, "If we make this deal and you pay me the $5,000.00 cash, this is the deed which I will give to you." B replied, "I'll take the deed home and show it to my spouse. We may buy the property tomorrow." B left with the deed, recorded it in the proper county office and now sues to eject A from Blackacre. Should she succeed?

Applicable Law: Delivery of a deed to real property means that the grantor intends that the deed shall operate as a conveyance. To effectuate such a conveyance there must be a physical deed and an intent on the part of the grantor that it take effect as a conveyance. It is not material where the physical deed is.

Answer and Analysis

No. A can convey title by deed by doing two things: (a) making a deed; and (b) delivering it to the intended grantee. In this case he made out the deed. He did not make delivery. It is true, A handed over the deed physically to the named grantee, B. B had physical

21. See Restatement of Property §§ 572, 573. See also Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal.3d 473, 102 Cal.Rptr. 739, 498 P.2d 987 (1972), upholding a reservation in favor of a third party. The deed to X contained a provision "subject to an easement ... for parking purposes ... for the benefit of [Y] Church." The court repudiated the old rule of no reservation in favor of a third party, and gave effect to the intent of the parties. Some courts cling to the historical rule forbidding such reservations. E.g., Estate of Thomson v. Wade, 69 N.Y.2d 570, 574, 516 N.Y.S.2d 614, 615, 509 N.E.2d 309, 310 (1987) (declining to follow *Willard*).

possession of the deed with no wrongdoing on her part. *But delivery is a question of the intent of the grantor that the instrument shall operate as a conveyance,* and that it shall pass title to the grantee. The grantor must intend to relinquish all control over the instrument as an effective transfer of title. Giving up control over the mere physical piece of paper on which the writing or printing appears is insufficient. Such intent is in the mind of the grantor and is usually a question of fact. In this case it is probably so clear that reasonable people could not differ as to A's intent. The grantor's words were, "If we make this deal ... I will give it to you...." This indicates no present but a future time when A intends to give efficacy to the deed, and on a condition. The words of the named grantee likewise show no misunderstanding. She too understood that, while A did intend to hand over physical control of the deed, he did not intend to relinquish control of the deed as a transfer of title to Blackacre.[22] Hence, there was no delivery and as between A and B, A is still the owner of Blackacre.[23]

PROBLEM 16.11: Roselle, owner in fee simple of Blackacre, makes out a completed deed to Michael. Roselle puts the deed in the drawer of her office desk. Michael, who has been negotiating with Roselle for the purchase of Blackacre, hands Roselle the agreed price of $50,000.00 which Roselle accepts and says to Michael: "Blackacre is yours." Thereafter, Roselle having refused to turn over the physical deed to Michael, Michael sues Roselle in ejectment. Roselle answers that Blackacre is still hers because there has been no delivery. How should the court rule on Roselle's defense?

Applicable Law: Title will pass to the grantee if there is a physical deed and the grantor intends it to operate as a conveyance, even though the grantor retains possession of the physical paper on which the deed is written.

Answer and Analysis

The court should reject Roselle's defense. The alleged facts constitute delivery as a matter of law. The deed being made and delivery being a question of the grantor's intent, it is clear that the words of the grantor, "Blackacre is yours," meant that she intended the deed to operate as a transfer of title to Michael. It is important that Michael have possession of the physical deed so that he can record it as evidence of his title. But he need not have the

22. See Rosengrant v. Rosengrant, 629 P.2d 800 (Okl.App. 1981) (brief handing of deed to boy by banker, acting as grantor's agent, was not a delivery).

23. See Martinez v. Martinez, 101 N.M. 88, 678 P.2d 1163 (1984) (grantor instructed grantee to place deed in escrow awaiting for delivery contingent on mortgage payment; grantee recorded it immediately; no delivery).

physical piece of paper or deed in order to have the title as against Roselle when it is established that there is such a physical deed, and that Roselle intended it to be operative as a legal conveyance of title from Roselle to Michael.[24]

Note: Delivery and the Language of the Deed

Delivery is a physical act entirely distinct from the drafting of a deed, and quite independent of any language that the deed might contain. For example, a deed that says "O unequivocally, absolutely and unconditionally hereby grants Blackacre to A" nevertheless transfers no interest if it is not delivered. As a general rule courts hold that the fact of delivery must be established "*dehors* the instrument"—or by evidence entirely independent of the language of the deed itself. A few courts, perhaps inadvertently, have suggested that the fact of delivery could be inferred (or negated) by the language of the deed. Such reasoning is generally incorrect.[25]

The other side of the coin is that you should distinguish the *delivery* question from the issue of conditional language in the deed itself. For example, although courts hold that a conditional delivery of a deed passes no title, because it reveals that the grantor did not intend to depart with dominion and control, many courts hold that *conditional language in the deed itself,* entitling the grantor to revoke, is valid. If such a deed is properly delivered, both the grant and the power to revoke are valid in a plurality of jurisdictions.[26] Some courts hold that such deeds are really will substitutes and do not validly convey any property interest as deeds, although they may as wills.[27] Of course, a will can be revoked by the testator any time until her death, while a deed, once delivered, cannot be. A few courts hold that the grant is valid, but the reserving condition is not; so the conveyance is absolute.[28]

24. See Kanawell v. Miller, 262 Pa. 9, 104 A. 861 (1918).

25. For example, see State, by Pai v. Thom, 58 Haw. 8, 563 P.2d 982 (1977), which found delivery, in part because the granting language of the deed was "absolute and unconditional." In this case the words "grant, bargain, sell, transfer and deliver unto Grantee" showed "the present intention of the appellants to grant their interest.... We find no clauses or conditions in the deed limiting or qualifying the estate conveyed." Compare Erbach v. Brauer, 188 Wis. 312, 206 N.W. 62 (1925), finding no delivery because "the deed itself contains no language expressive of a delivery or of an intention of delivery."

26. See, e.g., St. Louis County National Bank v. Fielder, 364 Mo. 207, 260 S.W.2d 483 (1953), where the deed conveyed decedent's home, but reserved a "life estate with power to sell, rent, lease, mortgage or otherwise dispose of property during [decedent's] life." The court held that the deed created a defeasible fee subject to a life estate. Since the life estate had expired, the grantee had absolute title.

27. E.g., Peebles v. Rodgers, 211 Miss. 8, 50 So.2d 632 (1951) (deed providing that grantor was to live on, control and possess property during his lifetime, and to take effect upon his death, was testamentary, and inoperative).

28. See Newell v. McMillan, 139 Kan. 94, 30 P.2d 126 (1934), where the deed gave a fee simple subject to life estate in grantor, but also gave grantor

PROBLEM 16.12: A, being owner in fee simple of Blackacre, makes and delivers a deed to B as grantee. B initially takes the deed and puts it in his pocket but later decides that he does not want to be indebted to the grantor. He gives it back, saying "Here is your deed back again. Thanks, anyway!" B handed the deed to A and A tore it up and threw it in the stove where it was totally destroyed by the fire. Who is the owner of Blackacre?

Applicable Law: Once title has lodged in the grantee, he cannot abandon such title. Title can leave him only by his act by deed or will, or by another taking from him by adverse possession. Once title has lodged in the grantee without his disclaimer, he cannot reconvey to the grantor by returning to the grantor the same deed which the grantor delivered to the grantee. He can reconvey only by drafting a new deed.

Answer and Analysis

B is the owner of Blackacre. The facts state that A "delivers" his deed to B. That means that he intended such deed to pass title to B. It transferred title to B, subject only to B's disclaimer which would cast title back on A *ab initio*. But B did not disclaim. So title was in B. When B later changed his mind, such change of mind did not change the title which was in B. There are only two ways by which B can be divested of the title to Blackacre: (1) by a deed or will voluntarily executed by B as grantor to another and; (2) by some other person taking it from B involuntarily by adverse possession. When B returned the deed to A, he was returning A's voluntary conveyance or deed. It was not B's deed to A. B had not executed a deed of his own and delivered it to A. Title had vested in B, and a voluntary conveyance executed by B was essential to reconvey the property to A. All that A destroyed was evidence. This is fundamental to one's understanding of the nature of a conveyance. The fact that such facts may be difficult or impossible to prove is totally immaterial here because the facts are stipulated.

This problem should be distinguished from one in which the grantee immediately states that he does not want the property, or his first reaction upon hearing that he has received property is to reject it.[29]

the right to mortgage, sell or otherwise dispose of the property. The court found the reservation of the powers to mortgage, sell or dispose void. "A clause in a deed which is at variance with the grant is a nullity." Only the life estate was validly reserved.

29. See Hood v. Hood, 384 A.2d 706 (Me.1978) (finding no delivery where a son immediately told his mother that he "wanted no part" of the property).

PROBLEM 16.13: John, owner in fee simple of Blackacre, made a deed to Nancy as grantee and placed it in his safe deposit box in the bank where it was found upon John's death. John's will did not mention Blackacre but disposed of all the rest of his property. A dispute arose between Nancy and John's heirs as to who was the owner of Blackacre. Who owns Blackacre?

Applicable Law: (a) Delivery is a question of intent and intent is a fact question to be determined by the trier of fact. (b) Delivery is in the mind of the grantor and wholly *dehors* the deed. (c) The burden is on the one who says there was a delivery to prove it.

Answer and Analysis

This question cannot be given a yes or no answer in its present form because it merely raises an issue of fact. The answer depends upon whether or not John made a delivery of the deed during his lifetime. If, during John's lifetime, he intended that deed to be effective to convey title to Nancy, then Nancy is the owner of Blackacre. If, during John's lifetime, he had no intent that the deed convey title to Nancy, then the heirs of John are the owners of Blackacre. No deed can be effective unless delivered during the lifetime of the grantor for the simple reason that there can be no intent in one who is deceased. Only a will can take effect the instant following death. The fact that John made a deed to Blackacre is no evidence of and raises no presumption of delivery. The fact of delivery is wholly outside of and extrinsic to the instrument itself. Delivery must be proved as an independent fact, and the burden is on the person claiming delivery. In this case the burden would be on Nancy to show by a preponderance of evidence that during his lifetime John intended the deed to be effective. Whether he did or did not so intend would be a question for the trier of fact.[30] Possession of the deed by the grantee creates a presumption that it has been delivered.[31]

PROBLEM 16.14: A, fee simple owner of Blackacre, made a complete deed to Blackacre in favor of B, the named grantee. A authorized C to record the deed. When the deed was recorded it was mailed to C who returned it to A. A remained in possession of Blackacre. B died and D was his sole heir. A now brings suit

30. See Erbach v. Brauer, 188 Wis. 312, 206 N.W. 62 (1925). See also Lenhart v. Desmond, 705 P.2d 338 (Wyo. 1985), holding that when the grantor placed a warranty deed in his safety deposit box and gave grantee access to the box, no delivery occurred. The grantor's intent was apparently to pass title upon his death, not before. Grantee's taking the deed from the box and recording it without grantor's knowledge did not create a presumption of delivery.

31. Walls v. Click, 209 W.Va. 627, 550 S.E.2d 605 (2001).

against D to remove the cloud which the recorded deed casts upon his title. The only evidence adduced at the trial on the question of delivery were C's statement that A told C to record the deed, and A's bald assertions that the physical deed was never in B's possession and that he, A, had never "delivered" the deed to B. The trial court, sitting without a jury, found for and gave judgment to the defendant and A appeals. How should the appellate court rule?

Applicable Law: When the grantor makes out a deed and has it recorded in favor of the grantee, there is a presumption of delivery and the burden is on the grantor to overcome such presumption.

Answer and Analysis

The appellate court should affirm the decision of the lower court. Here again the question of delivery is a question of fact. But when a grantor records his deed in favor of a grantee, there is a presumption that she intends to deliver the deed, and that it shall pass title to the grantee. The burden of overcoming the presumption is then on the grantor. A mere assertion by the grantor that he did not intend to deliver the deed is ordinarily not sufficient to overcome the presumption of delivery. He must prove no delivery by clear and positive proof. In this case he might have done so by showing clearly that C was not authorized by A to record the deed. This was not accomplished by merely saying he did not deliver the deed. In any event the question of delivery was a question of fact, and the trial court found the question in favor of the defendant with plenty of evidence to sustain the finding.[32]

PROBLEM 16.15: A, owner in fee simple of Blackacre, made a complete deed in favor of grantee, B. A handed the deed to B with this admonition, "I'm going on a dangerous mission. If during this mission I am killed, record this deed." A returned safely from the mission, but during A's absence B had recorded the deed and claimed the property. May A set aside the deed?

Applicable Law: A grantee cannot be an escrow depositary. A conditional delivery cannot be made to the grantee; the deed either takes effect at once or not at all.

Answer and Analysis

No, but this holding is anomalous. There is no reason in logic why, if delivery is a matter of the grantor's intent, a deed cannot be

32. See Stiegelmann v. Ackman, 351 Pa. 592, 41 A.2d 679 (1945) (grantor's mere assertion that he had no intent to deliver was insufficient to overcome presumption arising from recordation). Accord Estate of Dykes v. Estate of Williams, 864 So.2d 926 (Miss. 2003).

handed to the grantee to take effect on a condition. But the great majority of the cases hold that if the grantor hands the deed to the grantee with the intent that it be a conditional delivery, then it is an absolute delivery. The grantee cannot be an escrow depositary. If effective delivery means what the cases hold, that the grantor intends to give up all control over the operation of the deed as a conveyance, it should be wholly immaterial whether the physical deed is in the hands of the grantor, the grantee or a third person. But in this instance where the grantor hands the paper to the grantee to be effective on a condition which may or may not happen, the shades of the past which treat the deed like a feoffment which must take effect presently or not at all, continue to govern the more enlightened view on the subject.[33]

In an important decision to the contrary, H and W, husband and wife, owned Blackacre in fee simple as tenants by the entirety. H was ordered by the government to perform a dangerous mission in Korea and Japan. He made a deed to W of his interest in Blackacre and handed it to her on the conditions (a) that she would not record the deed until such time as he "should be reported missing, killed or had failed to return," and (b) that if he should return, the deed would be returned and destroyed. W recorded the deed contrary to the condition and refused to return it to H upon his return. H sued to have the deed annulled.

The court found that the deed had been conditionally delivered by H to the grantee, W, and that it should be annulled, saying:

> there is actually no logical reason why a deed should not be held in escrow by the grantee as well as by any other person. The ancient rule is not adapted to present-day conditions and is entirely unnecessary for the protection of the rights of litigants. After all, conditional delivery is purely a question of intent, and it is immaterial whether the instrument, pending the satisfaction of the condition, is in the hands of the grantor, the grantee or a third person. After the condition is satisfied, there is an operative conveyance which is considered as having been delivered, although the ownership does not pass until satisfaction of the conditions. We therefore *hold* that it is the intent of the grantor of a deed that determines whether the

33. See Wipfler v. Wipfler, 153 Mich. 18, 116 N.W. 544 (1908) ("a delivery of a deed by a grantor to a grantee in escrow or upon condition is effectual to pass title presently" and "Nor do we know of any authority which goes to the extent of holding that a deed delivered to a grantee with an intention on the part of the grantor that it shall be subject to a future condition, but with no express provision for recall by the grantor and requiring for its validity no additional act on the part of the grantor or any third person, can be defeated by parol proof of such condition."). Of course, one must distinguish between conditions stated in the deed itself and conditions upon its delivery. See Valley Honey Co., LLC v. Graves, 666 N.W.2d 453 (N.D. 2003).

delivery of the deed is absolute or conditional, although the delivery is made directly to the grantee.

The court concluded that

> [t]he ancient rule that the mere transfer of a deed from the grantor to the grantee overrides the grantor's explicit declaration of intent that the deed shall not become operative immediately is a relic of the primitive formalism which attached some peculiar efficacy to the physical transfer of the deed as a symbolical transfer of the land.... In England in ancient times there could be no change of possession of land until a livery of seisin had taken place. A knife was produced and a piece of turf was cut, and the turf was handed over to the new owner. Later, under the Roman influence, the written document came into use. These documents, which few people had the art to manufacture, were regarded with mystical awe. Just as the sod had been taken up from the ground to be delivered, so the document was laid on the ground and then solemnly lifted and delivered as a symbol of ownership. In this way the principle developed that the delivery of the deed was the mark of finality.

The court then explained that the first sign of breaking away from this strict formalism was the recognition that there could be a conditional delivery to a third person in escrow. But such conditional delivery was not allowed when the deed was handed to the grantee.[34]

In any event, if a condition is *stated in the deed* itself, this is quite a different matter than if the condition is extrinsic to the language of the deed. For example, if a deed says "Blackacre to A, to take effect only upon A's marriage," the question is not of delivery but merely of the nature of the interest granted. In this case, the deed creates a springing executory interest which is valid, assuming that the deed itself was properly delivered.

PROBLEM 16.16: A, owner in fee simple of Blackacre, executed a specifically enforceable contract to sell Blackacre to B. He also executed a deed in B's favor as grantee and placed it in the hands of X bank, an escrow depositary, with written instructions to X that X should hand the deed to B when B paid the full purchase price to X. Thereafter B paid the full purchase price to X. A then instructed X not to hand the deed to B. X refused to give the deed to B. B sues for possession of the deed. May he recover?

Applicable Law: A delivery in escrow is a conditional delivery. When the condition is fulfilled or the event happens on

34. Chillemi v. Chillemi, 197 Md. 257, 78 A.2d 750 (1951).

which the delivery depends, then title passes to the grantee even when the physical deed is retained wrongfully by the escrow depositary, and the grantee has the right to the possession of the physical deed as evidence of his title. There must be a physical deed and it must be handed over to the escrow depositary who is not an agent of either party but has merely the duty to carry out his instructions.

Answer and Analysis

Yes. Such commercial escrow transactions generally produce little difficulty. The rights of the parties are clear. When the specifically enforceable contract was executed, equitable conversion took place whereby B became the equitable owner of Blackacre and A retained the legal title as security for the payment of the purchase price. Had there been no escrow, B, having performed in full, could have sued for specific performance and compelled A to execute to him a deed to Blackacre. These are the rights of the parties under the contract.

Under the escrow transaction it was clearly intended that title should remain in A until B had fully performed his contractual obligations. Conversely, it was just as clear that the deed should take effect as an operative conveyance when B had fully performed. Hence, when B paid the full purchase price to X, the deed became effective and title passed to B irrespective of whether the physical paper were handed over to the grantee, B, because such was A's intent and delivery is merely a question of intent of the grantor that the deed operate as a conveyance. Consequently, B had the right to the possession of the physical deed for the purpose of evidence and to place it of record.

The following principles should be carefully noted in connection with this and every escrow transaction. (a) There must be a deed. (b) It must be delivered to a third person. (c) Title remains in the grantor until the occurrence of an event or performance of the condition. (d) Title passes to the grantee upon the occurrence of the event or performance of the condition irrespective of who holds the physical deed. (e) The escrow depositary has merely the duty to carry out his instructions or perform his contract if there is one. (f) The escrow depositary *is not an agent for either party* nor trustee for either; if he is, then he is not an escrow depositary. In this case when A delivered the deed to X, the escrow depositary, (called the *first* delivery) A invested B with power to become the owner of Blackacre by performing his obligation. Thereafter A had no control over the deed or its operation unless B failed to perform. Neither did A have any control over the escrow depositary X, and X's

refusal to make the *second* delivery to B was without authority. Such is the nature of a true escrow.[35]

PROBLEM 16.17: A, owner in fee simple of Blackacre, *orally* agreed to sell Blackacre to B. A executed a deed to B and placed the deed in the hands of X bank as escrow depositary with oral instructions to deliver the deed to B when B paid the full purchase price, which was to be paid in five installments of $1,000 each. B paid four installments. A then instructed X to return the deed to A, which X refused to do. B then paid the last installment to X, making full payment of $5,000 according to the original oral agreement, and demanded the deed from X which X refused. A offered to repay to B the entire $5,000 which B refused. Who owns Blackacre?

Applicable Law: A conveyance is not a contract. In an escrow transaction the grantor invests the grantee with power to become the owner of the land represented by the deed, and such power is irrevocable as to the grantor who loses all control over the operation of the instrument as a conveyance subject only to the failure of the grantee to perform. Under the better-reasoned cases, the Statute of Frauds has no application, and an oral placing of the deed in escrow is enforceable by the grantee who performs. A specifically enforceable contract is not essential to a valid escrow under this view.

Answer and Analysis

In most jurisdictions B owns Blackacre and has the right to the deed, but there is contrary authority. The answer requires a presupposition as to the very nature of an escrow transaction. If a conveyance is not a contract, and it is not, and if delivery is merely a question of the grantor's intent, and it is, then it would appear that a grantor has the power and right to invest a grantee named in a deed with a power to become the owner of property by performance of a condition, or, or by an act of payment of money. Further, it would appear that he could make such power in the grantee irrevocable as to the grantor, subject only to the performance by the grantee. If such be the case, then the Statute of Frauds has no application to the case and the grantor is bound by his irrevocable delivery to the escrow depositary subject to performance by the grantee. Such seems to be the true nature of an escrow transaction and gives to it great practical utilitarian value in the field of conveyancing. To require in such case a specifically enforceable contract is to thwart the intent of the grantor at the time of

35. See Ferguson v. Caspar, 359 A.2d 17 (D.C.App.1976) (holding that the escrow's duty is merely to fulfill her instructions; if one party attempts unilaterally to change the terms of the transaction, the escrow's duty is to stop the transaction).

establishing of the escrow and permit him to change his mind to the detriment of the grantee, and at the same time to detract materially from the value of escrows as a practical method of carrying on conveyancing business. Surely the grantor intended more than an oral contract for the sale of Blackacre when he executed a deed and placed it in escrow.

Further, delivery is a requirement in addition to the requisite formalities pertaining to the execution of sales contracts and deeds of conveyances. Since it is possible to have a fully completed delivery when there was no ancillary contract at all, then it should also be possible to show that there was a conditional delivery when there was either no contract or only an unenforceable one. The question is not whether there was an enforceable ancillary contract, but whether the grantor had either completely effectuated the conveyance by delivery or had gone so far in that direction as to put it beyond his power to revoke. A conditional delivery in escrow should be irrevocable except for the non-performance of the condition although there is no enforceable ancillary contract. There are cases to the contrary.[36]

PROBLEM 16.18: A, owner in fee simple of Blackacre, executes his deed in favor of B and hands it to X bank with instructions to deliver said deed to B upon A's death. A dies and his heirs or devisees claim Blackacre. Who is the owner of Blackacre?

Applicable Law: A delivery in escrow in a donative transaction in which the deed is to be delivered on the death of the donor whenever and however that occurs, is a valid delivery. When necessary, the relationship of the parties prior to the occurrence of the certain event is analogized to that of a fee simple and executory interest, or life estate and remainder. If the grantor makes the depositary his agent subject to further control, there is no delivery. In donative escrow transactions where the event or condition is not certain to occur, the cases are divided as to whether there is a valid delivery.

Answer and Analysis

B is the owner. Here it should be noted that there is no contract at all; merely an event to happen. This is a donative transaction in which the grantor gave up all control over the operation of the deed as a conveyance, subject only to the occurrence of an event.

The event in this case is certain to happen since death is inevitable. Thus, construing A's instructions as manifesting an intent to deliver the deed whenever and however A dies, the only

36. See generally 3 A.L.P. 323; Campbell v. Thomas, 42 Wis. 437 (1877).

contingency is time. A has thus given up all control over the title's eventually vesting completely in B; thus there is a valid delivery. This should be contrasted with the situation where the grantor and the escrow have an understanding that the grantor can reclaim the deed whenever he pleases. In that case, the death escrow is ineffectual to transfer the interest, even if the grantor in fact never does reclaim the deed.[37]

In the instant case no controversy arose before A's death; so the only question to be decided was whether there was a delivery, and whether B now has title to Blackacre. Suppose, however, a dispute should arise as to the rights of the parties after the initial deposit and before the death of A, as, for example, if B should learn of the deed and bring ejectment against A, or creditors of B should attempt to levy on Blackacre, or B should sue A for waste. What is the status of the parties during the interim? In donative cases of this type, it is frequently held that the deed takes effect on the initial deposit or it does not take effect at all. It is not necessary, however, that the deed take effect initially to convey an entire fee simple; it can take effect presently to convey a future interest. The analogy in this case to the creation of a springing executory interest with A retaining the fee simple subject thereto, or A vesting in B a remainder with the reservation of a life estate, is rather striking and often construed accordingly.[38] Likewise, B should not be able to eject A during his lifetime; and B's creditors could reach only his future interest in Blackacre; further, B should not be able to recover for waste.

Note: Conditional Escrows

If, on depositing the deed with the third party, the grantor evidences an intent to control the deed and title, as, for example, he states that unless he should give contrary instructions or ask for the deed back, then the depositary should deliver the deed on the death of the grantor, the depositary is simply an agent of the grantor and there is no delivery. The transaction is testamentary and fails for lack of compliance with the statute of wills.[39]

37. See Rosengrant v. Rosengrant, 629 P.2d 800 (Okl.App. 1981) (fact that names of both grantor and grantee were on envelope left at bank, the escrow, indicated that either could have retrieved it; thus grantor did not give up control and there was no delivery upon his death).

38. See Osborn v. Osborn, 42 Cal.2d 358, 362–63, 267 P.2d 333, 335 (1954):

> It has long been established in this state that the deposit of a deed granting an estate in fee simple, with instructions that it be transmitted to the grantee upon the death of the grantor, conveys a remainder interest in fee simple with a life estate reserved in the grantor, if the grantor intended the deposit to be irrevocable.... The result is the same as if the grantor delivered to the grantee a deed reserving a life estate and granting a remainder in fee.

39. Cf. Estate of Dittus, 497 N.W.2d 415 (N.D.1993), where the grantor gave the grantee one key to a safe deposit box containing the deed but the retained the

The most troublesome cases are donative transactions in which the deed is to become fully effective on the occurrence of an event within the control of neither party and not certain to occur. An example might be the death of the grantor before the grantee. By analogy to the commercial escrow situation, the delivery should be sustained because the grantor has put beyond his control whether or not the title will fully vest in the grantee. On the other hand, he has not irrevocably parted with title, and he will recover full ownership when the condition or event fails to occur. The cases are divided with probably the majority finding no delivery.[40]

PROBLEM 16.19: A, owner in fee simple of Blackacre, executed his deed in B's favor as grantee and delivered it to X bank as escrow depositary with instructions to deliver the deed to B when B paid the full purchase price to X in installments. Before all payments were made and without the knowledge or consent of A, X let B have the deed. B recorded the deed and sold Blackacre to C, a bona fide purchaser, who knew nothing of the escrow transaction. Blackacre is undeveloped land and no one is in possession. A sues B and C to cancel the deeds and to quiet title. May A succeed?

Applicable Law: When the escrow depositary wrongfully hands the deed over to the grantee before the grantee has performed or has a right to the deed, and the grantee records such deed and sells to a bona fide purchaser, the grantor is not estopped to deny the efficacy of his deed, and the bona fide purchaser is not protected unless the grantee is let into possession, the grantor knows of the delivery of the deed and takes no action to revoke, or for other reasons the grantor is estopped. If the grantor retains any control over the operation of the deed it is not a true escrow.

Answers and Analysis

Most courts say yes. A owned Blackacre and placed the deed to B in escrow. Until B had performed the condition of making full payment, no title could pass from A to B. X is not A's agent so as to bind A by his act contrary to his instructions. A is just as innocent as the bona fide purchaser, C. Title being in A, he has the right to quiet title against C, and the recording acts do not change this

other. The court indicated that delivery of *both* keys would have been sufficient evidence of delivery, but the grantor's retention of one key was sufficient to suggest that he did not intend immediately to give up control.

40. See Kenney v. Parks, 125 Cal. 146, 57 P. 772 (1899) (no delivery, where grantor's instruction was to give deed to grantee if grantor died before grantee); Atchison v. Atchison, 198 Okl. 98, 175 P.2d 309 (1946) (no delivery); Videon v. Cowart, 241 So.2d 434 (Fla.App.1970), cert. denied 245 So.2d 88 (Fla.1971) (finding delivery, where deed given on condition that son renounce claim to remaining part of grantor's estate).

result. The recording acts invalidate unrecorded instruments as against subsequent bona fide purchasers for value without notice. They have absolutely nothing to do with recorded but void deeds, and the fact that the deed may be void because of forgery, nondelivery, or for other reasons is entirely immaterial. Thus, the nondelivered deed is invalid and the innocent purchaser relying on the recording act is unprotected.

In the event that the grantor lets the escrow grantee into possession, then the grantor, in the case of a wrongfully procured deed, has in effect permitted the grantee to be clothed with a double indicia of title—both possession and deed. If the grantor remains in possession, then his possession constitutes notice of his interest, and there can be no bona fide purchaser without notice. If nobody is in possession, then the equities should be regarded as equal and the law, holding no title passed, should prevail since the recording acts do not deal with recorded but undelivered deeds. In case the grantor learns of an improperly delivered deed and takes no action to invalidate such a deed, then the grantor should likewise be subordinated to the rights of the bona fide purchaser.[41]

PROBLEM 16.20: A, owner in fee simple of Blackacre, executed a deed to B and placed it in the hands of X bank as escrow depositary with instructions to X that the deed should be handed to B upon B's payment of the last installment of the purchase price. Before the last installment was paid by B, the grantor, A, died. Thereafter B paid to X the last installment and demanded possession of A's deed. In whom is the title to Blackacre?

Applicable Law: The deed in escrow takes effect to pass title on the so-called "second delivery" with the following exceptions: (a) when the grantor dies between the "first" and "second" delivery; (b) when during that time the grantor becomes non compos mentis; or (c) justice requires it—by relation back in these cases the title passes as of the first delivery, that is, when the deed was handed to the escrow depositary.

Answer and Analysis

The title is in B and he has the right to the deed. The courts speak of "first" and "second" deliveries in escrow cases. The first is the handing over by the grantor of his deed to the escrow depositary, and the second is the handing over of the deed to the grantee by the escrow depositary. Of course, the first is not a technical

41. See Mays v. Shields, 117 Ga. 814, 45 S.E. 68 (1903). Everts v. Agnes, 4 Wis. 343, 65 Am.Dec. 314 (1855), indicated that a bona fide purchaser from a grantee of a wrongfully procured deed from an escrow agent would get no title.

delivery for the grantor does not intend title to pass to the grantee at that time. If it is a true escrow, the first delivery merely makes the grantor's deed irrevocable and empowers the grantee, by fulfilling the condition or by the occurrence of the event, to become the owner of the property. Further, upon the fulfilling of the condition or occurrence of the event, the deed operates to pass title even without any handing over of the deed to the grantee because that is the grantor's intent. However, there can be no intent of a deceased grantor. The rule that a deed in escrow takes effect at the "second" delivery cannot apply when the grantor has predeceased the time when the condition is fulfilled. By relation back, the deed is made effective as of the date of the first delivery by the grantor to the escrow depositary.[42]

42. Fuqua v. Fuqua, 528 S.W.2d 896 (Tex.Civ.App.1975), writ refused n.r.e. . . (enforcing sale contract where grantor executed deed, placed it in escrow, but died before delivery to grantee).

Chapter 17

ASSURANCE OF TITLE

Table of Sections

Sec.

17.1 Deed Covenants for Title.

17.2 Estoppel by Deed.

17.3 Priorities and Recording.

a. Common Law Priorities.

b. The Recording Acts.

1. Types of Acts.
2. Constructive Notice.
3. Purchaser and Subsequent Purchaser.
4. Recorder's Errors.
5. "Duly Recorded".
6. Void Instruments.
7. Adverse Possession.
8. Chain of Title Problems.
9. Persons Protected; The Bona Fide Purchaser.
10. Hazards Not Covered by the Recording Acts.
11. Indices.

17.4 Title Insurance.

SUMMARY

§ 17.1 Deed Covenants for Title

1. There are six covenants for title to real property:

a. Three of these are in the present and are breached, if at all, when the deed is delivered:

(1) Covenant of seisin

(2) Covenant of the right to convey

(3) Covenant against encumbrances.

b. Three covenants cover breaches that occur after the deed is delivered, that is, in the future:

(4) Covenant of quiet enjoyment

(5) Covenant of general warranty

(6) Covenant for further assurances.

2. A deed providing for "usual covenants" includes the first five covenants, and a deed providing for "full covenants" contains all six.

3. Covenants for seisin and of the right to convey are usually construed as identical, and guarantee to the grantee that the grantor owns the estate that the deed purports to convey. Note, however, that a grantor conveying under a power of attorney could have a right to convey without being seised of an estate; and if in a particular jurisdiction seisin is construed as meaning only being in possession and claiming title, then an owner when the land is in the adverse possession of another may have a right to convey without being seised, and similarly, an adverse possessor would be seised without a right to convey a fee.

4. The covenant against encumbrances is a guarantee to the grantee that the property conveyed is not subject to outstanding rights or interests that would diminish the value of the land, examples of which are mortgages, liens, land use restrictions, easements, or profits.

The existence of zoning restrictions does not constitute a breach of the covenant against encumbrances, but the existence of a violation of zoning or building restrictions may constitute such a breach.

5. Covenants of quiet enjoyment and general warranty are construed to have the same legal effect. They undertake to defend the grantee-covenantee against all lawful claims of the grantor himself or of third persons who would evict the grantee-covenantee, actually or constructively.

6. The covenant for further assurance (of relatively little importance in the United States today) is an undertaking on the grantor's part to do such further necessary acts within her power to perfect the grantee's title.

7. None of these covenants protects the grantee against the trespass or aggression of a mere wrongdoer.

8. The construction of these covenants, which may vary with the language used in each case, are governed by contract law principles.

9. Under the traditional view, the first three covenants cannot run with the land because they become personal choses in action when they are breached at the instant the deed is delivered.

10. The last three covenants are covenants that run with the land and can be enforced by remote grantees who take through the covenantee.

11. More than one remote grantee may enforce a given covenant that runs with the land. E. g., A conveys to B in fee with covenant of general warranty. B conveys the east half of the property to C and the west half to D. Each is evicted by O, who has paramount title. Both C and D may hold A on his covenant.

12. Covenants for title are in their nature contracts of indemnity, and damage must be shown as a condition precedent to recovery for breach; it is not enough merely that there has been a breach.

13. The maximum recovery for breach of title covenants in a large majority of jurisdictions is the purchase price paid plus interest.

Interest is usually allowed only when the grantee has not had possession or the benefits of rents or profits from the land, or has had to surrender them to the holder of the paramount title. Additionally, the grantee can usually recover the costs of his unsuccessful defense of the title.

14. In case of a total breach of the covenant of seisin or right to convey, the measure of damages is the purchase price paid plus interest. These covenants are breached, if at all, on delivery of the deed. In the case of a partial breach, recovery is for a proportionate part of the purchase price plus interest.

15. For breach of the covenant against encumbrances, the measure of damages is the cost of removing the incumbrance when that is possible, and the amount by which such incumbrance reduces the value of the land when removal is not possible.

16. For a breach of the covenants of quiet enjoyment and warranty, the measure of damages is the value of the land at the time of breach (eviction), but not to exceed the purchase price paid by the plaintiff-grantee. For a partial breach, recovery is based on the amount expended by the plaintiff to perfect his title, or on the value of the land lost to the superior title.

17. When a covenant for title runs with the land, an intermediate grantee often occupies a dual role. She is a covenantor as to subsequent grantees if she included the covenant in the deed when she conveyed, and she is a covenantee as to prior grantees. For such an intermediate grantee to maintain an action against the original covenantor, or a prior covenantor, she must show both (a) a breach of the covenant and (b) damage to herself.

For example, A conveys to B with covenant of general warranty or quiet enjoyment. B conveys to C with a similar covenant. C conveys to D with like covenant. X, holding paramount title, evicts D. B sues A for the breach. B cannot maintain the action by merely showing the breach by D's eviction. She must show in addition that

D or C has sued her, and that B has been made (or will be made) to pay damages.

18. Each remote grantee has a right to judgment on a covenant running with the land against each and all of the preceding covenantors when the covenant is breached, but such remote grantee has a right to but one full recovery. For example, A conveys to B with covenant of general warranty or quiet enjoyment. B conveys to C with like covenant. C conveys to D with like covenant. D is evicted by X who has paramount title. D sues and takes judgment for $10,000.00 damage against C, B and A. C pays D in full. C then has a claim against B and A. B pays C in full. B then has a claim against A.

19. Payment in full made by the original covenantor to the evicted *last* covenantee—grantee for his damage, constitutes a good defense to such original covenantor to any action by an intermediate covenantee—grantee.

For example, A conveys to B with covenant of general warranty or quiet enjoyment. B conveys to C. C conveys to D. D is evicted by X who has paramount title. A pays D in full for D's injury. B then sues A for breach. A's payment to D is a complete defense to B's action. But suppose B has also paid D in full for D's injury. If such payment was after A's payment to D, then A's payment is still a good defense and B's remedy is against D for overpayment for money had and received. If B's payment was made to D before A's payment, then it would seem B's action may be maintained against A, and A must look to D for reimbursement.

20. Historically, no warranties were implied in a conveyance of real property, and covenants had to be specifically inserted to be effective. Today, "short-forms" are almost universally permitted by statute. These statutory deeds incorporate by reference the covenants designated in the statute.

21. The historical rule not implying covenants in deeds refers to covenants for title. But increasingly courts have implied a covenant of fitness in the sale of homes. See Ch. 14.

22. Title covenants can be modified so as to exclude certain mortgages, restrictive covenants, or other outstanding interests. When the land is conveyed specifically subject to certain interests, as for example, an outstanding mortgage in accordance with the understanding of the parties, the title covenants should be construed as warranting only the estate granted, that is, subject to the mortgage. This construction should apply whether or not the covenants are expressly so modified, but there are some cases to the contrary, especially older ones.

23. The type of deed to be conveyed, if not stipulated in the sales contract, is determined by state or local law or custom.

§ 17.2 Estoppel by Deed

1. Estoppel by deed is a doctrine by which if a person executes a deed purporting to convey an estate which she does not have or which is larger than she has, and such person at a later date acquires such estate in that land, then the subsequently acquired estate will, by estoppel, pass to the grantee.

2. This doctrine is based on the intention of the parties as expressed in the deed—the grantor intends to transfer the estate described in the deed, and the grantee intends to receive the estate described in the deed.

3. The doctrine is an outgrowth of the common law rules relating to warranty of title, but covenants for title are not necessary today for the doctrine to apply.

4. Whether or not the doctrine operates in a given case is wholly dependent on the language which is used in the deed and appears on the face of the instrument.

5. By the better rule, the doctrine may be invoked in favor of a stranger to the deed and is not limited to the parties to the deed and their privies.

6. The doctrine will operate in favor of the grantee even though the deed contains neither a misrepresentation nor a covenant of title.

7. There are two distinct theories on which the doctrine is claimed to operate:

a. the deed having been given and the estate having been subsequently acquired by the grantor, then as a matter of law, the estoppel operates on the estate itself and passes it to the grantee—it is objective and wholly impersonal and the grantee takes even as against a bona fide purchaser of the after-acquired title from the grantor.

b. the deed having been given and the estate having been subsequently acquired by the grantor, then the grantor is only personally estopped to deny that she owned the estate at the time the deed was given, or she is personally estopped to deny the estate has passed to the grantee, but the estate itself is not affected, and the grantor is bound to convey to the grantee the after-acquired title or estate. Under this theory, the estoppel is personal, and a bona fide purchaser from the grantor of the after-acquired title would have priority over the original grantee.

8. Under either theory, if there is a covenant of title in the deed, the grantee cannot be compelled to accept the after-acquired title either in partial or total satisfaction of the covenant. Instead, the grantee has an election either to sue for damages for the breach or to accept the after-acquired title.

9. In most jurisdictions, the doctrine has no application to the case in which the grantor in her deed undertakes merely to convey whatever right, title or interest, if any, she may have at the time of the deed (the general characteristics of a "quitclaim" deed).

10. Note carefully these three cases:

a. A, having no interest in Blackacre, but not knowing whether or not he has an interest, makes a deed to B as follows: "I hereby convey to B all of my right, title and interest in Blackacre, and hereby warrant to the said B any interest which I presently own in such property." Thereafter A inherits the fee simple estate in Blackacre. Here no estoppel applies, for the deed purports to convey and warrants no particular estate in Blackacre, but undertakes merely to convey whatever interest A has at the time of the making of the deed.

b. A, having no interest in Blackacre, and not knowing whether or not he has an interest, makes a deed to B as follows: "I hereby convey to B and his heirs the fee simple estate in Blackacre and hereby warrant such title in him and covenant to defend such against the whole world." Later A inherits the fee simple estate in Blackacre. A's deed contains a granting clause purporting to convey the fee simple. It also contains a clause warranting such title in the grantee. The doctrine of estoppel by deed clearly applies because A intended to convey and B intended to receive the fee simple title in Blackacre. This would be true under either theory of estoppel.

c. A, having no interest in Blackacre, and not knowing whether or not she has an interest, makes a deed to B as follows: "I hereby convey to B and his heirs the fee simple estate in Blackacre." Later A inherits the fee simple estate in Blackacre. A's deed contains a granting clause purporting clearly to convey the fee simple estate in Blackacre. The doctrine of estoppel applies. The deed contains no misrepresentation of fact and contains no covenant of warranty, but it does contain a clearly expressed intent to convey a fee simple estate which the grantor, A, did not have. Later, A acquired the very estate which his deed purported to convey to B, and which B intended to receive from A. These two items, then: (1) an expressed intent in the deed to convey an estate larger than the grantor has; and (2) later acquisition by the grantor of such

estate, are sufficient to support the doctrine of estoppel by deed.

11. If the grantor later acquires a larger estate than he owned at the time of the conveyance, but smaller than he purported to convey, the doctrine of estoppel will apply to such a conveyance. E.g., O, having only a life estate, purports to convey a fee simple absolute to A. Later, O acquires a fee simple on condition subsequent. A will immediately acquire the fee simple on condition subsequent by estoppel.

§ 17.3 Priorities and Recording

a. Common Law Priorities

1. At common law the question of priority of title was usually simply one of time: first in time is first in right. E. g., A, owner of Blackacre in fee simple, conveys to B in fee simple. A then conveys the same Blackacre to C in fee simple. B is the owner merely because there was no interest left in A to convey to C.

This rule of priority applied both to competition between equitable interests and also to competition between legal interests. Further, a prior legal interest prevailed over a subsequent equitable interest.

2. There is one exception to the rule of priority based on time. A bona fide purchaser for value without notice takes priority over a former equity or equitable interest. For example, A, being fee simple owner of Blackacre, declares himself trustee of the property for B. A then conveys the legal title in Blackacre to C in fee simple. C pays full value for the property and has no knowledge of the declaration of trust in B's favor. C owns Blackacre in fee simple and B's equity, even though earlier in time, is cut off.

The above example is an illustration of the common law rule that a subsequent equity, when combined with the legal title, prevails over a prior equity. Thus, in the above illustration, C acquires the legal title as a result of the conveyance and he also acquires an equity from his status as a bona fide purchaser without notice. He accordingly prevails over B.

3. Two early English statutes provided that conveyances made for the purpose of defrauding creditors or subsequent purchasers should be null and void. For example, (a) A, fee simple owner, owes creditor, C. To prevent C's being able to collect the debt A fraudulently conveys to B as a donee, B giving no consideration for the deed and knowing the purpose of the conveyance. C may have such deed set aside as null and void. (b) A, fee simple owner, conveys to C as donee, C paying nothing for the deed. A,

intending to defraud B, conveys to B who pays full price for the property and is given no notice of the prior conveyance to C and buys bona fide. B may have the conveyance to C set aside as null and void.

4. The above common law rules as to priority still prevail when the controversy is not governed by an applicable recording act.

b. The Recording Acts

1. TYPES OF ACTS

Although the language of the recording acts of the several states varies considerably, there are four basic types of recording acts in the United States:

a. *Notice:* An unrecorded conveyance or other instrument is invalid as against a subsequent bona fide purchaser (creditor or mortgagee if the statute so provides) for value and without notice.

Under a notice statute the subsequent bona fide purchaser prevails over the prior unrecorded interest whether the subsequent purchaser records or not. Insofar as the subsequent purchaser is concerned, there is no premium on her race to the recorder's office; her priority is determined upon her status at the time she acquires her deed or mortgage. Of course she should record to protect herself from the possibility of a still later subsequent bona fide purchaser.

b. *Race:* No conveyance or other instrument is valid as against (lien creditors or other specified parties and) purchasers for a valuable consideration until after it is recorded.

Under a race statute, the first to record wins, and a subsequent purchaser need not be bona fide and without notice, since she will prevail if she records first. Priority is determined simply by who wins the race to the recording office.

c. *Race-Notice:* An unrecorded conveyance or other instrument is invalid as against a subsequent bona fide purchaser for value without notice (and possibly other designated parties such as mortgagees and creditors), who first records.

This statute combines the essential features of both the notice and race type recording statutes. In order for a subsequent party to prevail in a race-notice jurisdiction, he must be both a bona fide purchaser for value without notice of the prior interest and record first.

d. *Period of Grace:* A period of grace statute is usually coupled with the features of a notice statute.

Under such a statute, the prior grantee (or holder of other interest) is allowed a period of grace (e. g. 15 days) in which to record his instrument in order to preserve his priority. If a prior grantee does not record within the period of grace, then a subsequent bona fide purchaser will prevail.

Notice and race-notice are the most common types of recording statutes, with only a few jurisdictions having a pure race or period of grace statute.

2. CONSTRUCTIVE NOTICE

a. Under the recording acts in England, a recorded instrument of conveyance *does not* give constructive notice of its contents to subsequent purchasers and incumbrancers.

b. Under the recording acts in the United States, a recorded instrument of conveyance, usually a deed or mortgage, *does give* constructive notice of its contents to subsequent purchasers and incumbrancers. Constructive notice is notice implied by law and is not dependent on actual notice or notice of facts from which knowledge of an unrecorded instrument would be implied, or on whether or not the buyer actually conducted a title search. Constructive notice is a rule of law.

c. Such constructive notice prevents a subsequent purchaser or incumbrancer from being a bona fide purchaser. For example, A conveys Blackacre to B who records his deed. A then executes a deed to Blackacre in fee simple to C as grantee. C pays full value in good faith for the property and has no actual notice of the former deed to B. C is not a bona fide purchaser as a matter of law because she is bound to examine the records and is *construed* to have notice of B's recorded deed whether or not she actually knows about it or actually searched the title.

d. Constructive notice applies whether the interest conveyed by the recorded instrument is a legal or an equitable interest. E. g., A, owner of Blackacre, declares himself trustee of Blackacre for B and records the declaration of trust. Later A makes a deed to C covering the fee simple in Blackacre. C is charged with notice of what appears on the record in the declaration of trust, and takes his deed subject to B's prior equitable interest in the property. C cannot be a bona fide purchaser.

3. PURCHASER AND SUBSEQUENT PURCHASER

The term purchaser as used in the recording acts generally refers to a purchaser of the legal interest, i. e., a grantee for value, mortgagee, or other person who acquires a legal estate or interest in the property. In some jurisdictions, however, either by decision or statute, a subsequent purchaser of an equitable interest, e. g. a vendee under a contract for sale, is protected by the recording act.

4. RECORDER'S ERRORS

A subsequent purchaser or incumbrancer, acting in good faith and with no actual knowledge of a former conveyance, is normally entitled to rely on what appears on the records.

For example, A conveys to B and B does not record. Then A conveys to C who is a bona fide purchaser. C prevails in a notice jurisdiction whether or not C records before B. C prevails in a pure race and a race-notice jurisdiction only if he records ahead of B. In a period of grace jurisdiction, C prevails if B fails to record within the period of grace allowed by the statute.

In the event that B delivers the deed to the proper office for recordation before A's conveyance to C, and the recorder fails to record the deed at all, or the recorder makes a mistake in recording B's deed (such as failing to index it, or misindexing it), then there is a split of authority as to whether C gains priority over B. Under one view, C should be protected on the theory that it was B's responsibility not only:

a. to see that the deed was recorded but also

b. to see that the recordation was accurately made.

Under the other view, which protects B, B's instrument is constructive notice of its actual contents as soon as it is deposited in the proper office. Any mistake as to actual recording or copying of it into the record having no effect on constructive notice.

5. "DULY RECORDED"

To be "duly recorded" and thus constitute constructive notice, the instrument must be properly executed, acknowledged in most jurisdictions, and within the chain of title as a condition precedent to being properly recorded. Some decisions have held that the actual physical recording of an improperly executed instrument does not impart constructive notice to a subsequent purchaser or incumbrancer, the legal effect being the same as though no record had in fact been made. However, if one sees such an improperly executed deed or mortgage, or actually knows about it, then she is

charged with at least inquiry notice, and is held to have knowledge of facts that a reasonable inquiry would have disclosed.

6. VOID INSTRUMENTS

An instrument of conveyance that is void for reasons such as forgery or lack of delivery is ineffective for any purpose, and recording it has no legal effect. For example, A is fee owner of Blackacre. B forges A's name to a deed to Blackacre in which deed B is the grantee. B then mortgages the property to C who lends the money in good faith and without notice of the forgery except as it appears on the record. The mortgage is wholly ineffective as to A, and gives C no interest in Blackacre.

7. ADVERSE POSSESSION

The recording statutes have no application to a title procured by adverse possession or prescription; they apply only to title procured by instruments of conveyance which can be recorded.

8. CHAIN OF TITLE PROBLEMS

a. The chain of title to a piece of land means the regular series of recorded instruments from the patent from the United States Government, or former sovereign, down to and including the instrument through which the party claims ownership, each instrument representing a regular link in the chain. E. g., United States makes patent to A; A deeds to B; B deeds to C; C deeds to D; D mortgages to X; D deeds to E subject to X's mortgage; X executes a satisfaction of the mortgage; E deeds to F; etc., each grantee becoming the subsequent grantor.

b. Every subsequent purchaser or incumbrancer takes its interest in the property conveyed subject to prior interests properly recorded, which proper recording means either:

(1) an instrument in the direct chain of title, or

(2) a recital in an instrument in such direct chain of title. E. g., A, who is grantee in a deed in the direct chain of title, gives to B a mortgage on the property, which mortgage is not recorded. A then gives a deed to C which deed recites, "subject to a mortgage given to B on said property." This recital, being properly recorded gives C constructive, or at least inquiry notice of the mortgage to B and prevents C from being a bona fide purchaser.

c. An instrument which does not constitute a regular link in the chain of title or which is not identified by a recital in an

instrument in such chain, is not considered properly recorded and does not give constructive notice to subsequent purchasers or incumbrancers.

For example, A is a grantee in a deed which is a regular link in the chain of title. A makes a deed to B but B does not record it. B's failure to record breaks the chain of title subsequent to the deed in which A is the grantee. B then deeds to C. B, not having appeared as a grantee in any former instrument of record, is now an interloper and a deed by him is not part of the regular chain of title. Then A makes a deed to the same property to D. D records. The deed of B to C, being no part of the regular chain of title, imparts no constructive notice to D. Hence, D is the owner of the property as against B and C, provided in other respects he is a bona fide purchaser.

9. PERSONS PROTECTED; THE BONA FIDE PURCHASER

a. The recording statutes are construed to give protection to two persons only, (a) a bona fide purchaser or incumbrancer, or (b) one who claims through such a bona fide purchaser or incumbrancer.

b. In order to be a bona fide purchaser protected under the recording act, one must

(1) be subsequent,

(2) pay value,

(3) be without notice, (the value must have actually been paid before notice), and

(4) be of good faith.

c. Recording statutes generally do not protect a subsequent claimant who has not paid more than a nominal consideration; nor one who takes with either actual or constructive notice of a prior interest; to be protected he must acquire his interest both (a) for value and (b) in good faith, which means without actual or constructive notice of prior inconsistent claims.

d. One who takes a mortgage to secure a pre-existing debt without at the same time relinquishing any right or claim as a consideration for the mortgage is not a purchaser for value. But if the mortgagee surrenders other security for the debt or extends the time of payment by a binding contract, he is regarded as a purchaser for value.

With respect to one who takes an absolute conveyance of land in satisfaction of an antecedent debt, the cases are divided on the question whether he is a purchaser for value, but since the debt is

canceled instead of being secured, the position that he does qualify as a purchaser seems sound.

e. If a person is in possession of land, then any person taking an interest in that land is charged with notice of the interest which the possessor claims in the land. This rule is most properly confined to possession inconsistent with record title.

f. A subsequent purchaser who takes under a quitclaim deed, under the better view, is protected by the recording statutes.[1]

g. A mortgagee, although not specifically mentioned in a recording act, is considered a purchaser to the extent of his interest, and is protected by the recording act if he otherwise qualifies as a subsequent bona fide purchaser for value without notice.

10. HAZARDS NOT COVERED BY THE RECORDING ACTS

The recording acts generally afford purchasers and other subsequent parties either no or inadequate protection against the following interests:

a. forged and other void deeds or instruments;

b. deeds by incompetents;

c. fraudulent statements in the instruments as to marital status;

d. claims of undisclosed and pretermitted heirs;

e. falsification of records;

f. undelivered but recorded deeds;

g. false personation of record owner; and

h. adverse possession, prescription, or equivalent property interests acquired by operation of law and without a recordable instrument.

In addition, some statutes afford no protection against:

i. recording mistakes;

j. indexing mistakes; and

k. possibly other undisclosed interests.

1. E.g., Miller v. Hennen, 438 N.W.2d 366 (Minn.1989) (purchaser who paid value and recorded first protected, even though he received quitclaim deed). In some transactions quitclaim deeds plus title insurance are used to effectively transfer risk of unknown defects from the grantor to the title insurer. In that case the use of the quitclaim deed should raise no presumption that the buyer is on notice of a title defect.

11. INDICES

Many of the problems of determining chain of title result from use of the traditional grantor-grantee index. Many of these problems are eliminated when tract indices are used since then all recorded instruments pertaining to a particular tract or parcel will generally be discovered despite "gaps," out of turn recording, and "wild" instruments. Most professional title companies do in fact use their own tract indices (or indices which they share with other companies), regardless of the official index.

Note

Because the provisions of recording statutes vary greatly, the cases construing them often reach opposite results. The statutes and cases of each state should be consulted. In the main, the statements above present the general principles.

§ 17.4 Title Insurance

1. In a title insurance policy the insurer promises to indemnify the insured for any injury if the title to land is less than that described in the policy. Title insurers typically do title searches before writing a title insurance policy. Increasingly, the title insurer also acts as commercial escrow agent and may assist in the preparation of transfer documents.

2. Unlike many other forms of insurance (such as medical or casualty insurance) that require periodic payments, title insurance usually is paid for with a single premium paid at the time of the sale.

3. The title policy typically contains exceptions and exclusions for defects of title not shown by the public record, zoning restrictions, defects that could be disclosed by a survey or other inspection of the property, or rights of parties in possession.[2]

4. A title insurer, unlike the grantor of a warranty deed, is generally obligated by the policy to provide a legal defense of title claims arguably covered by the policy.

5. The title insurer's liability is generally limited to the face amount of the policy, which is generally the whole or some fraction of the purchase price. In addition, the policy typically insures only against title defects that arose before the effective date of the policy, not against defects that come into existence after the policy issues.

2. See, e.g., Panciocco v. Lawyers Title Ins. Corp., 147 N.H. 610, 794 A.2d 810 (2002) (exclusion for "parties in possession" excused insurer from paying for property loss resulting from neighbor's visible adverse possession at time of conveyance).

6. Title insurance contracts are normally construed against the insurer.[3]

PROBLEMS, DISCUSSION AND ANALYSIS

§ 17.1 Deed Covenants for Title.

PROBLEM 17.1: Henry executed a deed conveying Blackacre in fee simple to Priscilla. The deed covenanted that "Henry is lawfully seised in fee simple of such premises; that he has good right and lawful authority to sell the same." This deed was delivered in April 1990. In October 2002 Priscilla sued Henry alleging that "Henry's covenants are not true; that Henry was not seised of Blackacre and had no good right or authority to convey the same." Henry raises the statute of limitation as a defense. Has the statute run?

Applicable Law: Covenants of seisin and right to convey are synonymous in most instances. They covenant that the grantor owns the land when the deed is executed and delivered. If he does not own the land these covenants are breached immediately and a cause of action accrues at the time of the delivery of the deed.

Answer and Analysis

Yes. The plaintiff alleges that defendant has broken the covenants of seisin and of right to convey. These two covenants are identical, and constitute a guarantee by grantor Henry that he owns the land when the deed is executed and delivered. If Henry did not own the land when he made the conveyance, these covenants were immediately broken in April 1990.[4] Since more than 10 years have elapsed between the breach and the time the action was brought, the statute of limitation has run and constitutes a bar.[5]

3. Boel v. Stewart Title Guar. Co., 137 Idaho 9, 43 P.3d 768 (2002) (where government owned strip of land being used as a ditch but insurance policy had exclusion only for damages arising from use of a "ditch," insurer liability remained for claim of the strip itself:

> The United States, as the fee holder of the strip, could have utilized the fee strip for any purpose for which any other landholder might have used it. The fact that the federal government coincidentally utilized its fee strip for the construction and maintenance of the ditch does not mean that the Boels' damages, related to the existence of the deed, in any way "arise" or "result" from the existence of the ditch.)

4. That is, these covenants do not require that the purchaser actually be ousted from the land by someone claiming under paramount title; but merely that there is a substantial defect in the title, whether or not anyone is ready to make a conflicting claim. E.g., Hilliker v. Rueger, 228 N.Y. 11, 126 N.E. 266 (1920).

5. Brown v. Lober, 75 Ill.2d 547, 27 Ill.Dec. 780, 389 N.E.2d 1188 (1979) (plaintiff, having failed to bring a timely action for breach of the covenant of seisin, sought unsuccessfully to bring the action under the covenant of quiet enjoyment).

PROBLEM 17.2: Theodore owned Blackacre in fee simple, which he devised in his will to William. Theodore died and it was discovered that one of the two required witnesses on the will was not qualified. Hence, the will was invalid and Blackacre descended to Theodore's heir, Harriet. In the meantime and after Theodore's death, William had conveyed Blackacre to Paula for $4,000 with a covenant of quiet enjoyment and of general warranty. Paula is in possession of Blackacre and is threatened with eviction by Harriet. Paula pays Harriet $5,000 for a deed in fee simple to Blackacre and sues William for damages for breach of covenants. May she recover, and if so how much?

Applicable Law: The covenants for quiet enjoyment and of general warranty are generally construed to mean the same thing. They bind the covenantor to defend the grantee-covenantee against eviction, actual or constructive, by anyone under paramount title, including the covenantor. These covenants are breached when the covenantee is disturbed in her enjoyment of the premises conveyed. Actual eviction need not take place. If a valid paramount title is asserted and the grantee is compelled, in order to avoid actual eviction, to buy title from the holder of the paramount title, then there is a constructive eviction which will support a claim for breach of the covenants. Damages recoverable are usually the value at the time of the purchase, measured by the price paid, plus interest from the time of the eviction.

Answers and Analysis

Yes, Paula may recover. These two covenants are construed to mean substantially the same thing, and bind the covenantor to defend the grantee against eviction, actual or constructive, by anyone under paramount title, including the covenantor. They are breached when the covenantee is disturbed in her enjoyment of the premises conveyed. In this case Harriet held paramount title to William. It is also clear that had Harriet ejected Paula either by legal action or self-help, Paula would have had a cause of action against William for breach of the covenants made. Actual eviction is not necessary to a claim. Constructive eviction is sufficient. In this case the assertion of paramount title by Harriet and Paula's paying her for a release of Harriet's claim, is constructive eviction which will support a claim for breach of the covenants made in William's deed. Of course, in a suit against the covenantor for damages, the plaintiff-covenantee must prove that she was evicted by one having paramount title.[6]

6. See Northeast Petroleum Corp. of New Hampshire v. State, Agency of Transportation, 143 Vt. 339, 466 A.2d 1164 (1983) (third party's assertion of

The damage which Paula can recover is usually the consideration paid, which in this case is $4,000 and not the value of the land at the time of the eviction.[7] When there are legal proceedings to evict the grantee, if such grantee would bind or estop the covenantor by the judgment itself, she must give the covenantor notice of the proceedings and request that he defend the action. Even without such notice to the covenantor, if the grantee-covenantee is evicted, she may still recover from the covenantor, but he has a heavier burden in having to prove that the party who evicted him had a paramount title. As to the measure of damages, Paula can recover the value of the land, measured by the consideration paid at the time of the conveyance, which is $4,000 with interest, not from the time of its payment but from the time of the eviction. The covenantee should not have both interest on the money and use of the land; and she has had the latter until eviction.[8]

If the breach of the covenant upsets title to only a portion of the land, then damages are assessed as a proportion of the value or acreage that is lost.[9] However, a person who takes land described by defined boundaries has no claim if the land is as described, even though it may have less acreage than he thought he was receiving.[10]

PROBLEM 17.3: A owned Blackacre, worth $10,000, in fee simple. She executed to X a mortgage of $5,000. A then conveyed Blackacre to B in fee simple with a covenant against encumbrances that did not except the mortgage. X threatened foreclosure, and B paid off the mortgage with interest. B now sues A for breach of the covenant. May he recover?

Applicable Law: If an owner of land conveys it with a covenant against encumbrances and there is at the time a mortgage on the premises, the covenant is breached at the time the deed is given. On foreclosure of the mortgage the covenan-

option to purchase constituted a constructive eviction); Foley v. Smith, 14 Wash.App. 285, 539 P.2d 874 (1975) (judgment of different court recognizing third party's paramount title constituted constructive eviction).

7. MGIC Financial Corp. v. H.A. Briggs Co., 24 Wash.App. 1, 600 P.2d 573 (1979) (the "remedy for breach of the covenant against encumbrances is limited to the price paid for the property, plus interest.").

8. See Foley v. Smith, 14 Wash.App. 285, 539 P.2d 874 (1975).

9. See Hillsboro Cove, Inc. v. Archibald, 322 So.2d 585 (Fla.App.1975) (damages limited to proportionate value of the lost portion of larger parcel at the time of conveyance); Maxwell v. Redd, 209 Kan. 264, 496 P.2d 1320 (1972) ("a party contracting on an acreage basis for a specified tract at an agreed price per acre is entitled to recover the difference between the purchase price and the actual acreage times the price per acre.").

10. Ibid. See also Knudson v. Weeks, 394 F.Supp. 963 (W.D.Okl.1975), where part of the house purchased by the plaintiff encroached on adjoining land, necessitating either moving of the house, tearing it down, or acquisition of additional land; the court held that the cost of one of these alternatives should be the measure of damages.

tee who pays such incumbrance is entitled to recover from the covenantor the amount of money paid in principal and interest, plus interest from the date of such payment. If the incumbrance is an easement, a profit or a lease, the damage is the difference between the value of the land with and without the incumbrance.

Answer and Analysis

Yes. First, it is clear that A's covenant against encumbrances was breached the very instant she conveyed to B because the incumbrance of the mortgage burdened Blackacre at that time. Second, the recovery by B on the covenant should be the loss which the breach has caused B. In this case it would be the amount which B has been compelled to pay X in principal and interest, with interest from the time of such payment. But suppose the mortgagee never forecloses or threatens to foreclose and B is never called upon to pay off the incumbrance. Then there is a breach of covenant but no actual damage, and B can recover merely nominal damages. If the statute of limitation is 6 years on the covenant and 10 years on the right of foreclosure, it would be possible for the mortgagee to wait so long to foreclose that the covenantee would actually be limited to his cause for nominal damages. If the incumbrance is not one measured in money like the note and mortgage given, but one such as an easement, restrictive covenant or a lease, then the measure of damages is the difference between the value of the land with and without the incumbrance.[11]

Note: Covenants and Visible Encumbrances

Courts are divided on the issue whether a purchaser who takes land obviously subject to a visible easement or servitude may later claim a violation of the covenant against encumbrances when that visible encumbrance is not excepted in the deed.[12] The traditional rule, which permits the grantee to enforce the covenant, seems to be the better one. Although the buyer may see the encumbrance itself, she has little idea about its legal status. For example, the seller is in a better position to know (1) whether a right of way has been asserted long enough to ripen into a prescriptive easement; or (2) whether the conditions for an irrevocable license have been met. What if the

11. See In re Meehan's Estate, 30 Wis.2d 428, 141 N.W.2d 218 (1966) (indicating that substantial encroachment would be an encumbrance but finding no damages).

12. See Merchandising Corp. v. Marine National Exchange Bank, 12 Wis.2d 79, 84, 106 N.W.2d 317, 320 (1960), holding that a grantor did not need to warrant against an open and notorious prescriptive easement. But see Leach v. Gunnarson, 290 Or. 31, 619 P.2d 263 (1980), stating the traditional rule, and holding that a covenant against encumbrances gave protection against an open and notorious irrevocable license.

encumbrance is not visible, but it is in the chain of title. In Blissett v. Riley,[13] the grantor gave a general warranty deed that neglected to except a restrictive covenant limiting the owner's use of construction materials, but the encumbrance was recorded. The court held that the seller was liable on the covenant. In such a case the grantee who does a title search probably is in a position to know about the legal status of the covenant.

PROBLEM 17.4: Oprah owned Blackacre in fee simple. Phil, who was in possession of Blackacre, conveyed the land to Johnnie with "the usual covenants" of title. Johnnie paid Phil $4,000 for the property and took possession. Johnnie conveyed the property to Joan for $4,000, and Joan took possession. Oprah ejects Joan from the land, and Joan brings suit against Phil for breach of covenants in the deed. May she recover?

Applicable Law: A remote grantee can recover against a covenantor only when the covenant sued upon runs with the land. The expression "with usual covenants" includes: (a) covenant of seisin; (b) covenant of right to convey; (c) covenant against encumbrances; (d) covenant of quiet enjoyment; and (e) covenant of general warranty. Under the majority view, the first three of these cannot run with the land because they are breached, if at all, at the time of the delivery of the deed. The covenants of quiet enjoyment and of general warranty are breached, if at all, after the deed is delivered, and they run with the land. Hence, a remote grantee can sue the original grantor on these covenants.

Answer and Analysis

The answer is yes, but not on all of the covenants. Phil's "usual covenants" include: (a) covenant of seisin; (b) covenant of right to convey; (c) covenant against encumbrances; (d) covenant of quiet enjoyment; and (e) covenant of general warranty. Of course, Phil is liable on his covenants, but to whom? He made them to Johnnie. Johnnie's assignee, not Johnnie, is suing Phil. The assignee, Joan, was no party to the covenants and cannot be unless the covenants "run" with the land conveyed to her. So which, if any, of the five covenants runs with the land? The answer is that the first two covenants were breached the instant the deed was delivered from Phil to Johnnie, and at that instant became choses in action which Johnnie held against Phil personally. Such a chose cannot run with the land because it is no longer a covenant and because it was not expressly assigned by Johnnie to Joan. (Some contrary cases hold either that the covenant runs, or that the deed itself constitutes an assignment of the chose in action, so as to permit the

13. 667 So.2d 1335 (Ala. 1995).

grantee, Joan, to hold Phil liable.) Hence, in most jurisdictions Joan cannot maintain the action against Phil on the first two covenants. One can hardly say that the third covenant, the one against encumbrances, is involved when Phil had no title at all to Blackacre. But, if it were, it would be breached at once and would not run with the land to Joan.

The fourth and fifth covenants can be breached only after the delivery of the deed. These were breached when Oprah evicted Joan. At that time Joan had a cause of action if, and only if, such covenants "ran" with the estate which Johnnie conveyed to Joan. If the benefit of these covenants was attached to the land as it passed from Johnnie to Joan, then Joan can enforce it against Phil. For such covenants to run there must be an intention not only that the covenant shall protect the immediate covenantee, but also any of his successors, heirs, grantees and assignees who take the land from the covenantee and who may be evicted by paramount title such as Oprah held in this case. There must also be privity of estate, which seems in this connection to mean no more than that the person attempting to enforce the covenant has succeeded to the interest of the covenantee. In this case it would seem clear that Phil's fourth and fifth covenants were intended to protect anyone who took through Phil's deed containing the covenants if such covenants are to be given their ordinary meaning and the owners of the land, including remote grantees, were to be given full protection. And, of course, there was privity of estate between the covenantee, Johnnie, and Joan, the plaintiff. Consequently, Joan can recover against Phil on the covenants of quiet enjoyment and general warranty, but not on those of seisin, of right to convey and against encumbrances.[14] In any event, even if a covenant runs with the land, thus permitting a lawsuit against several persons in the chain of title (the immediate grantor plus remote grantors), the plaintiff is entitled to only one recovery.[15]

Note

The answer in the previous problem is called the American view, and is followed by the great majority of cases. But it is worthwhile looking at the opposite side of that holding. A conveys to B with covenant of seisin which means that A covenants that he is seised of the property at the time he gives the deed. In fact, he is not seised at all and has no interest in the property. Then B conveys to C and the

14. See Solberg v. Robinson, 34 S.D. 55, 147 N.W. 87 (1914) (allowing recovery by remote grantee).

15. Taylor v. Wallace, 20 Colo. 211, 37 P. 963 (1894) ("A remote grantee may simultaneously sue his immediate grantor and all previous covenantors, and recover several judgments against each of them, although entitled to but one satisfaction.... ")

real owner, X, evicts C. C has paid B full value for the land. C now sues A for breach of the covenant. The purpose of the covenant is to give security to the grantee, immediate or remote. Today, many technicalities have been erased from our real property law and choses in action are readily assignable. This covenant is no good to B after he has conveyed for full value to C. The only one needing the security of the covenant is the last owner who has been evicted by paramount title, or C. Chancellor Kent called the doctrine that the covenant could not run with the land because it was breached at the instant the deed was given, a mere "technical scruple." It prevents justice and takes the indemnity from C, the very person who should have it. The deed should be considered as an assignment of the chose in action from B to C, and C should have an action against the covenantor, A, because C alone has suffered from the breach.[16]

§ 17.2 Estoppel by Deed[17]

PROBLEM 17.5: A owns Blackacre in fee simple. B, having no interest in Blackacre, executes to C a 5 year lease on Blackacre, the term to begin March 1, 2001. Shortly thereafter A executes to B a 20 year lease on Blackacre to begin March 1, 2001. B subleases to D for 5 years to begin March 1, 2001, stating orally to D at the time of the sublease, "I made a 5 year lease to C for the same period but of course I had no interest in the land at the time so C's lease is no good." D takes possession of Blackacre on March 1, 2001. C demands possession, and D refuses. C sues to eject D. May he succeed?

Applicable Law: The doctrine of estoppel by deed is that when a person executes an instrument conveying a larger estate than he has and subsequently acquires this larger estate, it inures by estoppel to the benefit of the grantee. If the conveyor transfers his after-acquired interest to one who is not a bona fide purchaser, then this conveyee is also bound by the doctrine of estoppel by deed and takes title subject to the prior right of the original grantee.

Answer and Analysis

Yes. The doctrine of estoppel by deed is as applicable to leases as to other estates in land. When B made the lease to C for 5 years, C received no interest in Blackacre when B, his lessor, had none. However, when the owner of the land, A, leased to B for 20 years, B immediately had a 20 year term in such land and by estoppel this after-acquired estate inured to the benefit of B's lessee, C. But it is D who is in possession of the land. D is a privy of B, the lessor of C.

16. See Schofield v. Iowa Homestead Co., 32 Iowa 317, 7 Am. Rep. 197 (1871) which follows the English rule in principle.

17. Sometimes called the "after-acquired title" doctrine, or the doctrine of "shooting title."

Both the grantors and their privies are bound by the doctrine of estoppel by deed. D cannot claim to be a bona fide purchaser because he was told by B of B's prior lease to C. So whether we take the theory that the doctrine of estoppel operates as a matter of law on the estate, which does not protect bona fide purchasers, or that the doctrine operates only against the grantor or lessor personally and does not affect the estate, D is bound by the doctrine because he is not a bona fide purchaser from B. The result is that C has a right to eject D from Blackacre and to hold possession under his lease.[18]

PROBLEM 17.6: A, being fee simple owner of an undivided one half interest in Blackacre, conveys "to B and his heirs the fee simple estate in the whole of Blackacre and agrees to warrant and defend this title in B against the whole world." Thereafter D took possession from B as an adverse possessor and is presently possessed, but the statute of limitation has not yet run. A inherits the fee simple in the undivided half of Blackacre which he did not own when he conveyed to B. A dies intestate and P is his heir. P sues D in ejectment. May he succeed in ejecting D?

Applicable Law: Under the theory that the doctrine of estoppel by deed operates in rem and actually conveys the after-acquired estate of the grantor to the grantee, the doctrine will protect a stranger to the original deed as well as the parties to it and their privies; but if the doctrine operates only on persons, and does not affect the estate, it is available only to the parties to the original deed and those in privity with them.

Answer and Analysis

No. When A owned only an undivided one half interest in Blackacre and executed to B a deed which on its face purported to convey a fee simple estate in the whole property, his deed covered a larger estate than he owned in the property. When A later acquired by inheritance the very estate which his deed purported to convey to B, the benefit of the subsequent acquisition inures to B. Had B been the defendant in this case, he could have claimed the benefit of such doctrine for he was a party to the original deed in which A both granted to B and warranted in him the fee simple in all of

18. See Robben v. Obering, 279 F.2d 381 (7th Cir.1960) (applying the doctrine to an oil and gas lease); Poultney v. Emerson, 117 Md. 655, 658, 84 A. 53, 54 (1912) ("It is a well-recognized rule that if a lease is made by one who has no present interest in the demised property, but acquires an interest during the term, the lease will operate upon his estate as if vested at the time of its execution."). Of course the after-acquired title must itself be formally valid. See Reece v. Smith, 276 Ga. 404, 577 S.E.2d 583 (2003) (estoppel by deed did not apply when the transfer claimed to be an after-acquired title was in fact an oral promise not satisfying the Statute of Frauds).

Blackacre. Such doctrine operates in favor of both the parties to the original transaction and in favor of their privies who claim by consent through them. In other words, had D been a grantee of B, there would be no doubt that he would have the benefit of the doctrine.

Here D is not claiming through B by privity of estate, but as an adverse possessor. Hence, D is not in privity with B in any sense. However, taking the position that the doctrine of estoppel by deed does not merely bind the parties and their privies, but that it operates objectively in rem on the estate itself and as a matter of law, then when the grantor, A, inherited the fee simple estate in the undivided one half interest in Blackacre, which he did not own when he gave his deed to B, the title to that undivided half passed *eo instante* to B and is presently vested in B. In an action of ejectment, the plaintiff must recover on the strength of his own title and not on the weakness of his adversary's title. But the adversary can show that the plaintiff has no title at all. In this case then, the defendant adverse possessor, D, can show that estoppel by deed passed A's inherited title to B, and that A had no title or interest in Blackacre at the time of his death. Thus P received no interest therein by being the heir of A. Therefore, D, a stranger to the original deed from A to B, and not in privity with either party, is permitted to set up estoppel by deed as a defense.

On the other hand, if we take the view that estoppel by deed does not pass the estate by operating in rem, but operates only on persons, then D, a stranger to the original deed between A and B, and not being in privity with either, could not claim the protection of the doctrine. Under that approach, the title would still be in A or his heir P, although A or his heir, as against B would be estopped from denying B's title. Under this theory, the after-acquired title would still be in A if he were alive and in P, his heir, if A is dead. However, A or his privies would be prevented from denying that the title is in B or from denying A had title when he gave the deed to B. Under this theory, the estoppel is only a rule of evidence and does not effectuate an actual passing of title. A or his heir, P, would not be estopped as to wrongdoer D, and P should win the ejectment suit.[19]

PROBLEM 17.7: Audrey, having at least an estate *pur autre vie*[20] for the life of Ben in Blackacre, but being quite uncertain of any further interest, conveyed to Phyllis "all of my right, title and interest in Blackacre and hereby warrant and agree to defend such title to Phyllis in the premises." The fee simple in

19. See Perkins v. Coleman, 90 Ky. 611, 14 S.W. 640 (1890), applying the first theory.

20. That is, a life estate measured by the life of another, as often occurs when a life estate is transferred.

Blackacre later came to Audrey by inheritance. Ben died and Audrey demanded from Phyllis the possession of Blackacre. Phyllis refused. Audrey sues to eject Phyllis from the premises. May Audrey succeed?

Applicable Law: If when a deed is made it purports to convey only the interest which the grantor presently owns in the property, and the covenants of warranty do not enlarge the estate described in the granting clause, the doctrine of estoppel by deed has no application, and any after-acquired estate which comes to the grantor may be kept by her free from the operation of the doctrine. The doctrine must be based solely on the language used which appears on the face of the instrument and the construction placed on it.

Answer and Analysis

Yes. Phyllis's only defense must be estoppel by deed against Audrey. Whether that doctrine applies in any given case depends upon the language actually used in the deed. Generally the granting clause in a deed determines the estate which is intended to be conveyed, and any covenant of warranty thereafter does not enlarge upon the estate granted but merely warrants that the estate described in the granting clause is to be defended. In the facts given there is no doubt but that the granting clause describing the estate conveyed as "all of my right, title and interest in Blackacre" purports only to convey whatever interest Phyllis owned at the time of the deed. Does the covenant of warranty which follows the granting clause enlarge the estate described in the granting clause? Such covenant says, "warrant and agree to defend *such title.*" The expression "such title" must refer to the "right, title and interest" described in the granting clause, no more. Clearly, the covenant of warranty does not in any way enlarge the estate described in and purported to be conveyed by the granting clause. Thus, the effect of Audrey's deed was merely to convey to Phyllis any interest which Audrey owned when the deed was made. It was the intention of the parties, as appears on the face of the deed, that Audrey was conveying and Phyllis was receiving only the interest in Blackacre which Audrey owned when the deed was delivered to Phyllis. The doctrine of estoppel by deed does not apply, and any after-acquired estate which comes to the grantor belongs to the grantor free from such doctrine. The result is that Phyllis's estate in Blackacre came to an end with the death of Ben. Thereafter by virtue of Audrey's inherited fee simple, Audrey has the right to immediate possession of the property and the right to eject Phyllis.[21]

21. See Brown v. Harvey Coal Corp., 49 F.2d 434 (E.D.Ky.1931).

The typical quitclaim deed conveys all the grantor's then-existing interest in Blackacre, and typically does not purport to convey a particular estate. As a result, interests that the quitclaim grantor deed acquires later do not ordinarily pass through to the grantee.[22]

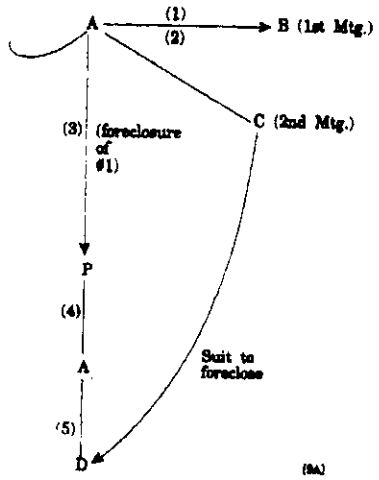
PROBLEM 17.8: A, fee simple owner of Blackacre, gave to B a first mortgage on the property. He then executed a second mortgage to C which contained the following language, "this mortgage is given subject to the first mortgage hereinafter described, and I do hereby covenant with the mortgagee herein that I am seised in fee simple of Blackacre, and that said Blackacre is free of all encumbrances and I will warrant and defend said fee simple title to said mortgagee against all claims whatsoever." Thereafter B foreclosed the first mortgage, making A and C parties defendant in the action. A then purchased Blackacre from the purchaser at the foreclosure sale. Both mortgages and the deed to A following the foreclosure were recorded immediately. A then conveyed to D by a deed purporting to convey the fee simple estate in Blackacre. D paid full price for the property and knew nothing about the above transactions except what appeared on the records. C now seeks to foreclose his mortgage, making both A and D parties defendant. May C succeed?

22. Ellingstad v. State of Alaska, 979 P.2d 1000 (Alaska 1999); see also Webster Oil Co. v. McLean Hotels, 878 S.W.2d 892 (Mo.App.1994), where the quitclaim deed at issue contained this habendum clause:

> TO HAVE AND TO HOLD THE SAME, with all the rights, immunities, privileges and appurtenances, thereto belonging; unto the said party of the second part [Webster Oil Company] and assigns forever; so that neither the said party of the first part [Mid-America Motor Lodges, Inc.], nor any other person or persons, for it or in its name or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises or any part thereof, but they and each of them shall, by these presents, be excluded and forever barred.

The court concluded that, notwithstanding this language, an after-acquired title did not pass through to the grantee.

The facts may be illustrated as follows:



Applicable Law: The doctrine of estoppel by deed does not require that there be any misrepresentation of fact on the face of the deed. It requires only that the representations on the face of the deed concerning title be made good whether such representations be in the form of a grant or a covenant or both. In some jurisdictions, however, the scope of title covenants may be construed as modified in terms of the estate granted. Under the recording statutes the general rule is that a subsequent purchaser is not charged with notice of a recorded instrument of conveyance by a person in the chain of title unless such record was made at a time later than the records disclose this person to have acquired such title. This means the record must show a conveyor to be a grantee before he can be a grantor. While some cases treat title through estoppel by deed as an exception to such general rule, the better rule is that it is governed by the general rule and that the subsequent purchaser has priority over the one who claims the benefit of the doctrine, but through an instrument which is outside the chain of title. This is the only holding in harmony with the purpose of the recording acts.

Answer and Analysis

The answer should be no. When B foreclosed his first mortgage there is no doubt that such proceedings effectively cut off all rights which the original mortgagor, A, and the second mortgagee, C, had in Blackacre. Indeed, that is the very purpose and effect of such foreclosure proceedings. On the records, neither A nor C appears to have any interest in Blackacre. But A's general covenant of warranty still appears in the second mortgage to C. The question whether

C might hold A liable for damages for the breach of such covenant of warranty is not relevant. C is seeking to gain title to Blackacre through the doctrine of estoppel by deed and foreclosure. Does the doctrine apply? The mortgage to C states "this mortgage is given subject to the first mortgage," etc. There was as to such first mortgage then no misrepresentation of fact. But the mortgage continues, "said Blackacre is free of all encumbrances and I will warrant and defend said fee simple title to said mortgagee against all claims whatsoever." When all of this quoted language is read as a whole it may be construed as saying, "Blackacre is subject to a first mortgage but I hereby warrant it to be free from all encumbrances and will defend in the second mortgagee a clear fee simple title."

The doctrine of estoppel by deed does not require that there be a misrepresentation of fact. It is a technical doctrine requiring merely that the covenant or representation which is made in the deed concerning title be made good. Under the foregoing interpretation, the language in this case shows that the mortgagor, A, intended the mortgagee to have a fee simple title for the subject of his mortgage and that the mortgagee intended to receive such. The recital of the existence of the first mortgage does not prevent the assumption by the mortgagor by his covenant that he hereby estops himself from denying the fact of such prior mortgage.

A different interpretation is not only possible but more reasonable. Applying the principle that a document should be considered in its entirety in order to arrive at its proper construction, then when the instrument itself shows that the land is conveyed or mortgaged subject to an outstanding interest, and this granting clause is followed by a covenant for title, the title covenant should be construed as warranting *only the estate granted or mortgaged in the preceding clause.* In effect, the title covenant is construed as if it stated, " . . . warrant and defend the title against the claims of all persons *except as above noted."* Under this interpretation the grantor, A in the instant case, is not estopped to assert his after-acquired title.

Assuming, however, a jurisdiction that would follow the earlier interpretation and would construe the title covenant most strictly against the grantor and without modification, then we would find that C's mortgage with its covenant of warranty is a conveyance by A of a larger interest than he had in the property at the time it was given. After B's foreclosure, A had no interest in the property because it had been completely cut off by B's foreclosure action. Thereafter, A acquires by purchase the fee simple in the property. At the instant of reacquisition, the benefit inures to C under estoppel by deed. The doctrine is binding both on A, a party to the original second mortgage, and on those who take through him, D in

our case. This is true whether or not D is a bona fide purchaser. Such was the common law rule, and were we to stop at this point the answer to our question would be yes, and C could foreclose his mortgage. In other words, if this case were to be determined wholly on the doctrine of estoppel by deed, then C should have the benefit of A's after-acquired property.

In the event that estoppel by deed would apply to this situation, the further effect of the recording act should be considered. Although there is a conflict of authority, it is believed that the better view is that estoppel by deed is modified by the recording acts, and that a *bona fide* purchaser (purchaser in good faith; hereinafter BFP) under the recording acts takes free of the rights of the grantee under the estoppel deed. To illustrate, assume that A in this case had executed two warranty deeds, one first to B and then one to C. C's deed, of course, was ineffective to convey any title since A had already conveyed it to B. When A later reacquired title by another conveyance and then conveyed to D, the question of D's status as a BFP becomes important. D, in checking the chain of title, would normally disregard A after finding the recorded deed from A to B, and would pick up A again after finding the recorded deed back to him from the subsequent purchaser. Thus, D would not normally find the deed from A to C which was executed at a time when A did not have title. Therefore, D would be a BFP relying on record title, and to give full effect to the policy behind the recording act, D should prevail over the estoppel grantee, C. Of course, the recording act in so many words pertains only to unrecorded instruments, but to give full effect to the policy of the act, instruments recorded *out of the chain of title* should be regarded as not recorded.

This theory of protecting the bona fide purchaser as against the grantee of the estoppel deed was not applied to the mortgage situation in the principal case.[23] If applied to the mortgages in such a situation, the application would be subject to criticism for the following reason: it is difficult to see how D can become a BFP under the recording act. A purchaser in D's position in checking title is not justified in disregarding A after A executes a first mortgage, because A still retains a substantial interest which is subject to further mortgage and conveyance. Further, the second mortgage was recorded and C was made a party to the foreclosure suit. D should necessarily check the foreclosure proceedings, and is charged with notice of everything that would be revealed by a search of the records. Thus, he should be charged with constructive notice of C's mortgage and of the covenant of title it contains.

23. Ayer v. Philadelphia & Boston Face Brick Co., 159 Mass. 84, 34 N.E. 177 (1893).

Under such circumstances it would not be unjust to let the estoppel grantee, C, prevail over D who is charged with notice of his rights.

In conclusion, the result should be that D prevails over C because A's title covenant should be considered modified by the recital in the deed that it was a second mortgage. Thus, estoppel by deed should not apply, but there are cases to the contrary. If estoppel by deed does apply, there are conflicting decisions as to whether the doctrine is modified by the recording acts.[24]

§ 17.3 Priorities and Recording

b. The Recording Acts

PROBLEM 17.9: A, owner of Blackacre in fee simple, conveys it to B. B does not record. A then executes a deed to C purporting to convey Blackacre to C. C, having no notice of the deed to B, pays full value of the property to A. B then records his deed, after which C records his deed. At the time C receives his deed, B is not in possession of Blackacre, but later C finds B already in possession. The recording statute in the jurisdiction provides, "Every conveyance of real property shall be void as to subsequent purchasers and incumbrancers who give value and take without notice, unless such conveyance is duly recorded before such subsequent purchase or incumbrance." C sues to eject B. May C succeed in the action?

Applicable Law: The recording statutes are intended to protect subsequent purchasers and incumbrancers who give value and take title in good faith without notice of a prior claim. Under notice statutes bona fide purchasers or incumbrancers have priority over prior purchasers who do not record their deeds until after such subsequent purchasers have expended their money and taken their deeds in good faith.

Answer and Analysis

The answer is yes. The legislature of a state has power to determine the form, effect and priorities of conveyances of land within the borders of the state. In this case the legislature by its recording statute has undertaken to make void a conveyance as to "subsequent purchasers and incumbrancers ... unless ... duly recorded before such subsequent purchase or incumbrance." This is a *notice* statute which protects the subsequent BFP from claims arising under a prior unrecorded instrument. A's deed to B is a

24. See Breen v. Morehead, 104 Tex. 254, 136 S.W. 1047 (1911), holding for the BFP (subsequent purchaser). See also Sabo v. Horvath, 559 P.2d 1038 (Alaska 1976), holding for the BFP under a federal statute that had the same effect as the doctrine of estoppel by deed.

conveyance of real property which was not recorded. C is a subsequent purchaser who gave full value and had no notice of B's deed. C's purchase preceded in time the recording of B's deed. Every item of the statute specifically applies to C's claim and by the very words of the statute, B's deed is made "void" as to C's purchase. The fact that B's deed was recorded before C's deed is immaterial, for the statute does not consider or make any provision for priority of recording, as some statutes do. Hence, C having purchased for value and in good faith subsequent to B's deed and B having failed to record his deed before C's purchase, B's deed is void as to C and C has priority under the recording statute. B's failure to record his deed has made it possible for C to be injured, which is the very reason for the statute.

However, the provisions of such a statute can work a similar injustice on B. Suppose that B receives his deed late in the evening when the registry of deeds is closed. Immediately following his transaction with B, A sells the same property to C. When the recording office opens the following morning B is there and presents his deed for recordation. Shortly thereafter C records his deed. Under a statute as quoted in our Problem, C has priority. And yet B has been as diligent as it is possible for a person to be. Such a case has led some legislatures to give priority to the grantee who first records his deed. But legislatures promulgate statutes and courts merely interpret them. In this case, C must be given priority over B and may eject B from Blackacre.[25]

Note: The "Mother Hubbard" Grant

Suppose a deed purports to convey Blackacre in addition to "all the grantor's property in Linn County." Such conveyances are sometimes convenient for grantor's on their deathbeds who do not have time to determine exactly what they own. The deed is presumably recorded in such a way as to reveal it as a conveyance of Blackacre—but does its recordation provide notice to subsequent purchasers of parcels other than Blackacre that may have been conveyed in the "Mother Hubbard" clause?[26]

PROBLEM 17.10: A, being fee simple owner of Blackacre, conveys it to B, for which B pays A $200,000.00. B records his

25. See Parks v. Stepp, 277 Ga. 704, 594 S.E.2d 364 (2004); Randall v. Hamilton, 156 Ga. 661, 119 S.E. 595 (1923); Craig v. Osborn, 134 Miss. 323, 98 So. 598 (1924).

26. See Luthi v. Evans, 223 Kan. 622, 576 P.2d 1064 (1978), holding that the Kansas recording statutes required land to be described with sufficient specificity that it could be identified, or else the recorded deed would not effectively give notice to subsequent BFPs. The court additionally noted that the basic "Mother Hubbard" clause was valid to convey, and would be good against anyone with actual knowledge that a particular parcel was covered.

deed and takes possession of Blackacre. C goes to A and expresses a desire to purchase Blackacre. A advises C that he has already sold the property to B. C hands A $1.00 and asks A to execute to him a deed to Blackacre in fee simple which A does. C records his deed and brings an action against B to eject him from Blackacre. In this jurisdiction the recording statute provides that any conveyance or incumbrance of real property shall be void as to subsequent purchasers or incumbrancers for value and without notice unless the instrument is duly recorded. May C eject B?

Applicable Law: To be a bona fide purchaser entitled to protection under the recording statutes one must give a value which is more than nominal and he must take without notice of a prior claim or interest in the land. One cannot be in good faith if: (a) he takes with constructive notice given by a properly recorded instrument of conveyance; or if (b) he takes with actual notice of a prior claim or interest; or if (c) there is an actual physical possession of the land by one who has a prior interest even though such possessor's deed is not recorded. When one buys land the law charges him with notice of any interest claimed by one in possession of the land, but possession consistent with the record title does not constitute notice of the possessor's inconsistent claims in many jurisdictions, except in the case of tenants.

Answer and Analysis

No. There are four reasons why C cannot eject B from Blackacre, any one of which would give B a good defense. (1) The recording statute is of the notice type intended to protect bona fide purchasers and incumbrancers. To be a bona fide purchaser or incumbrancer one must both (a) give value and (b) take without notice of a prior claim. In this case the subsequent purchaser, C, gave the sum of $1.00 for what appears to be a piece of property worth $200,000.00. Such a nominal consideration does not make one a purchaser for value. Therefore, C is not a bona fide purchaser who is protected by the recording statute. (2) B's recording of his deed from A did two things, it made inapplicable the recording statute making his deed void as to subsequent purchasers and incumbrancers for the deed was "duly recorded," and prevented C's being a bona fide purchaser because such deed on record gave C constructive notice of B's prior claim regardless of whether C had actual knowledge of such. (3) When C sought to buy Blackacre from A, he was told by A that the property had been sold to B. Such actual knowledge prevents C from being a bona fide purchaser. Even had B's deed not been recorded, such actual notice would have prevented C's obtaining any protection under the recording

statute given. B's deed would have been perfectly valid as to C simply because C took his deed with notice of B's prior deed or title. (4) If we assume that B did not record his deed, that C gave full value for Blackacre and that A had not told C of his deed to B, still C would not be a bona fide purchaser and could not eject B. The reason is that B is in actual physical possession of Blackacre at the time A delivered the deed to C. When C makes such a purchase the law puts the purchaser out on the land and charges him with notice of what appears there, and it is immaterial whether or not the purchaser actually inspects the land.[27] C is charged with seeing B in possession of Blackacre, and that places C on inquiry of B to learn just what B's interest in or claim to Blackacre actually is.

However, there are some instances in which possession of the land may give the subsequent purchaser no notice of any adverse or inconsistent claim, in which case the doctrine of inquiry notice does not apply. For example, suppose A and B are on the record as equal cotenants of Blackacre. A conveys his undivided one half interest in the property to B. B does not record his deed. A then gives a deed to C of an undivided one half interest in Blackacre. C records his deed. B's possession would not give C notice that B claimed more than an undivided one half interest because his possession as a co-owner would be entirely consistent with the record (each cotenant is entitled to possess the whole). There is authority, however, that possession of a tenant, although consistent with record title, may constitute notice of an inconsistent claim because of the fairly common practice of landlords and tenants entering into supplemental agreements and arrangements.[28]

PROBLEM 17.11: A, owner in fee simple of Blackacre, conveys it by deed to B. This deed is recorded. B executes to A a purchase money mortgage dated June 1, 1995. This mortgage is not recorded until June 1, 2001. B conveys to C by a deed which states "subject to the mortgage given to A." This deed is dated June 1, 1996 and is not recorded. C gives a mortgage on the premises to D on January 1, 2001 which is recorded January 2, 2001. A brings an action to foreclose his mortgage in which D contends that his mortgage is prior to that of A's. May A have a decree of foreclosure?

Applicable Law: A purchaser of land must use diligence both in searching the records and in inspecting the land respecting

27. As a general matter, a subsequent purchaser is also said to be on notice of easements, covenants or other servitudes that can be discovered by physical inspection of the premises. See Otero v. Pacheco, 94 N.M. 524, 612 P.2d 1335 (Ct.App.1980), cert. denied 94 N.M. 674, 615 P.2d 991 (1980), finding that a buried sewer line was sufficiently "visible" to put purchasers on notice of its existence.

28. See Galley v. Ward, 60 N.H. 331 (1880).

prior interests which may be claimed by others. If either the record or an inspection of the land discloses a circumstance which puts him upon inquiry he must pursue such inquiry to the point that he has used due diligence and is bound by such notice which due diligence would disclose. A subsequent purchaser is charged with constructive notice of every recorded instrument of conveyance which is a link in his chain of title. He is also charged with constructive notice of recitals in a recorded instrument which is a link in his chain of title, which recitals may refer to unrecorded instruments. Finally, he is charged with constructive notice of recitals in an unrecorded instrument of conveyance which is an essential link in his chain of title and through such an unrecorded instrument his own claim must be made.

Answer and Analysis

Yes. For a party to prevail under most of the recording acts, she must at least satisfy the requirements of being a subsequent bona fide purchaser or mortgagee for value without notice, and the prior interest must not be recorded at the time the subsequent party obtains his interest. The chronology of events in the above set of facts is as follows: (1) A conveys to B. (2) B's deed is recorded. (3) B mortgages to A. (4) B conveys to C "subject to the mortgage." (5) C's deed is not recorded. (6) C mortgages to D. (7) D's mortgage is recorded Jan. 2, 2001. (8) A's mortgage is recorded June 1, 2001. From this set of facts the record alone shows (a) B owns Blackacre, (b) C mortgages to D and (c) B mortgages to A.

Any priority which D claims must be based on her taking as a subsequent incumbrancer without notice. So the question is—does D take with or without constructive notice of A's mortgage? It is quite obvious that had B's deed to C been recorded prior to D's mortgage, D would have been given constructive notice by such recordation because C's deed is an essential link in D's chain of title, and a subsequent purchaser takes with notice either (a) of a deed on record which is a part of her chain of title or (b) of a recital in an instrument which is a part of her chain of title. So if C's deed had been recorded, D would have taken with notice of A's mortgage, whether or not that mortgage was recorded, because C's deed recited that it was "subject to the mortgage given A." But on the face of the record C seems an interloper. The record discloses no interest in C prior to her giving the mortgage to D. This should have put D on inquiry to learn the source of C's title, if any. Either there is such a source or there is not. If there is none, then D has no interest under C's mortgage. If there is such a source, D should have discovered it, and in the absence of such discovery she should be charged with notice of the contents of that source whether or

not it is recorded. Thus D is charged with constructive notice of the recital in C's deed that it is given "subject to the mortgage given to A." Hence, A's mortgage from B is prior to that of D who takes with constructive notice and thus is not a bona fide purchaser from C as to A's mortgage.

In the cases involving priorities of instruments of conveyance, the underlying principle should be constantly kept in mind. It is this—one is protected by the recording statutes if she is diligent but not if she is negligent. The purchaser of real property is duty bound to make diligent search of the records for prior claims, and a diligent inspection of the property for possible claims by possessors. If (a) the record gives the purchaser constructive notice, or (b) the record is such as to leave her in doubt, or (c) someone is in possession of the land that is inconsistent with the record, or (d) the possession of the land leaves the purchaser in doubt; in all of these cases the purchaser is charged with notice and cannot be a bona fide purchaser entitled to protection under the recording statutes.[29]

PROBLEM 17.12: In 2001 O gives an oil and gas lease to Blackacre to A; A does not produce oil and gas and there is no evidence of the existence of the lease on Blackacre itself. A does not record the lease. In 2002 O sells the F.S.A. in Blackacre to B by a deed which says "subject to an oil & gas lease in A." B records. In 2004 B conveys F.S.A. in Blackacre to C, by a deed making no reference to the oil & gas lease. Does C take free of the lease or subject to the lease.

Applicable Law: In either a notice or race-notice jurisdiction one is obligated not merely to locate the documents in a chain of title, but also to read their contents, and takes subject to any interest referred to in an earlier document, provided that the interest can be readily identified.

Answer and Analysis

In either a notice or race-notice jurisdiction C will take subject to the oil and gas lease. Under the doctrine of "muniments of title," a purchaser takes with constructive notice not merely of recorded conveyances, but also of unrecorded conveyances referred to in recorded conveyances. The title searcher therefore has a duty to read the contents of each document in the title chain. In this case

29. See Baker v. Mather, 25 Mich. 51 (1872). See also Cohen v. Thomas & Son Transfer Line, Inc., 196 Colo. 386, 586 P.2d 39 (1978), holding that a purchaser who saw tenants on the property had a duty to inquire as to the nature of their unrecorded lease, and thus took subject to a right of first refusal (i.e., a right to purchase the property by matching any offer made by another prospective purchaser).

the oil and gas lease was unrecorded. However, a careful reading of the deed from O to B would reveal that O's interest was subject to the outstanding oil and gas lease.[30]

The doctrine of muniments of title is problematic, however. Although a recorded instrument might refer to an unrecorded instrument, the reference might be so vague that it really does not give a title searcher notice of anything. For example, suppose a title search reveals a fifty-year old deed with a statement that the conveyance is "subject to a mineral lease," but says nothing about (a) the identity of the lessee; (b) the duration of the lease or any requirement that minerals actually be produced; or (c) the identity of the minerals that the lessee has the right to take.[31] A compromise position is to permit the doctrine to be used only when the reference contained in the recorded instrument is sufficiently specific to enable the title searcher to find it.[32]

PROBLEM 17.13: A, fee simple owner of Blackacre, conveys it to X. X does not record. X conveys to Y. Y records. Then A executes a deed to B. B records. B executes a deed to C. C records. Neither B nor C knew of the deeds to X and to Y. Blackacre is vacant land with no one actually in physical possession. Y then moves onto the premises and C sues to eject her. May C succeed?

Applicable Law: Under the recording statutes, priority in right often depends upon the constructive notice imparted by recordation of instruments rather than on the common law rule, priority in time is priority in right. The chain of title means the unbroken continuity of title with every link in the chain being present from the patent to the claimant. A recorded instrument of conveyance outside the chain of title does not impart constructive notice to a subsequent purchaser or incumbrancer. If a grantor appears as a grantor in an instrument on the record without appearing on the record as a grantee, the instrument is a wild deed and not in the chain of title. A subsequent bona fide purchaser takes priority over a grantee in a recorded instrument which is outside the chain of title.

30. See Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 P. 949 (1923) (recorded option mentioning unrecorded oil & gas lease constituted notice of the lease); Harper v. Paradise, 233 Ga. 194, 210 S.E.2d 710 (1974) (reference to lost deed contained in a later deed gave notice of the lost deed).

31. See L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 101–102 (1960), concluding that the doctrine unreasonably burdens title searchers.

32. See Richardson v. Lee Realty Corp., 364 Mass. 632, 635, 307 N.E.2d 570, 573 (1974) (no notice if a reference that is "at most ambiguous concerning some possible impropriety" in the title).

Answer and Analysis

Yes.[33] Of course if this were a case at common law where priority in time is priority in right, Y would be the title holder of Blackacre and have the right to possession because after A's deed to X there would be no interest in A to convey to B. But under the recording statutes the common law rule does not always prevail and the question of priority often depends, as in this case, upon the recordation of instruments and the constructive notice which such recordation imparts. When we are told that A is a fee simple owner, such conclusion presupposes a perfect recorded chain of title from the patent of the United States Government, or other former sovereign, down to and including A. It presupposes no break in the recorded chain and that every link properly binds the links preceding and succeeding it. Then A conveys to X but X does not record his deed. Thus the title in X is good between the parties, A and X. But on the record the chain is not complete without the last link. Then X conveys to Y. Y records his deed. But the record discloses a good chain with all links there down to A. But there is no link on the record between A and Y. Y now appears to be an interloper, a stranger to the chain of title because there is no link connecting him with A, the last link in the chain connected with the original source of title. Now A conveys to B and B to C. Both deeds are recorded. Now the chain of title *on the record* is perfect from the patent down to and including C. So the question is whether the subsequent purchasers B and C are bound by any constructive notice imparted to them by Y's recorded deed from X when X, and therefore Y, are *strangers to the chain of title?*

The general rule answers this question in the negative. A subsequent purchaser or incumbrancer is not bound by constructive notice of any recorded instrument of conveyance unless such instrument constitutes an essential link in the chain of title. No recorded instrument of conveyance gives constructive notice to a subsequent purchaser or incumbrancer unless that recorded instrument is made after the time when some other recorded instrument shows the grantor to have obtained the title. In short, *on the record the grantor must first appear as a grantee before he can be a*

33. The answer should be the same under any of the four types of recording statutes, but the reasons would be somewhat different. (1) Under a notice statute both B and C are subsequent BFP's because the X-Y deed is outside the chain of title and doesn't constitute constructive notice. (2) Under a race statute, recording should be construed as meaning the recording of a complete chain of title; therefore the non-recording of the A–X deed precludes Y from claiming a prior recording, and the entire competing chain—A to B to C—is recorded first. (3) In a race-notice jurisdiction, both B and C can qualify as subsequent BFPs whose conveyance were first recorded insofar as Y is concerned because of the reasoning under (1) and (2) supra. (4) In a period of grace statute if the period of grace for X's recording has expired, the result is the same as in a notice jurisdiction, and C will prevail.

grantor. Applying this rule to our facts, X is a complete stranger to the chain of title. He does not appear on the record as a grantee at all, much less before he appears as a grantor. On the other hand C's chain of title is perfect and complete. As a subsequent purchaser C is bound by constructive notice only of the instruments in his chain of title. This does not include the instrument from X to Y. Hence, C holds priority as a bona fide purchaser under the recording statutes and can eject Y from Blackacre. Importantly, B took his interest without notice of any interest in Y, C took whatever interest B had, and notice to C would be immaterial. In other words if B, a subsequent purchaser, takes without notice, then he is empowered to transfer his interest to another who does or does not have notice of the prior claim. Of course, this does not mean that one who holds with notice can improve his position by selling to a bona fide purchaser and buying back again.[34]

Note 1

A literal application of the recording act might suggest a different result in the above problem. Take a typical notice statute which provides, in effect, that no deed shall be valid until recorded as against a subsequent bona fide purchaser for value and without notice. In the instant case Y recorded his deed before A conveyed to B, and B in turn conveyed to C. Thus, it could be argued that Y did record his instrument before B entered the picture; so the recording act has no application, and the common law rule of first in time governs. However, the break in the chain of title from A to X affords such persons as B and C no opportunity to find the conveyances to X and Y. Thus, in order to give effect to the policy behind the recording act, the concept of recording should be construed to mean the recordation of a complete chain of title. Under such an interpretation, Y's deed is not recorded within the intent of the act when it is a wild deed unconnected with a prior deed of record in the chain of title. Thus, the result is the same as previously indicated.[35]

Note 2

If the jurisdiction had an official tract index in which all instruments were recorded in reference to the legal description of the land instead of in reference to grantors and grantees, then the chain of title concept would be inapplicable, and B and C in the above problem would have no difficulty in finding the recorded deed to Y and they would be charged with notice.

34. See Board of Educ. of City of Minneapolis v. Hughes, 118 Minn. 404, 136 N.W. 1095 (1912).

35. See Salt Lake County v. Metro West Ready Mix, Inc., 89 P.3d 155 (Utah 2004).

PROBLEM 17.14: A, having no interest in Blackacre, mortgages the property to X. X assigns the mortgage to Y. Both the mortgage and the assignment are recorded. Thereafter A acquires title to Blackacre and executes a deed for full value to B who conveys to C who conveys to D. All these deeds are duly recorded. Y seeks to foreclose its mortgage against all of the above parties and all resist his effort to foreclose. May Y succeed?

Applicable Law: An instrument of conveyance which operates by way of estoppel by deed is outside the chain of title and does not give constructive notice to subsequent purchasers and conveyancers according to the better view. Hence, the general rule, that a subsequent purchaser or incumbrancer of the after-acquired property takes priority over the grantee or mortgagee in an earlier recorded instrument of conveyance which is outside the chain of title, applies to the ordinary case of estoppel by deed when the recording statutes are involved.

Answer and Analysis

The best answer is no. Both at common law and under modern conveyances the doctrine of estoppel by deed will operate in favor of a grantee and against a grantor as to after-acquired property, and such doctrine extends to the successors in interest of these parties. However, the doctrine of after-acquired title is affected by the recording statutes. When A mortgaged to X and when X assigned the mortgage to Y, A had no interest in Blackacre. His mortgage, therefore, was completely outside the chain of title. He had by such mortgage become on the record a conveyor before any record showed him to be a grantee or a conveyee.

Most courts hold that subsequent purchasers or incumbrancers are not bound by such recorded instruments, because such recordation gives no constructive notice to bona fide subsequent purchasers and incumbrancers. Indeed, when X and Y took A's mortgage they did not carry out their duty of due care with respect to searching the record of the chain of title because the exercise of such diligence would have disclosed that A was not a grantee in the chain of title of Blackacre. Applying the general rule, the purchasers from A after A acquired the title to Blackacre were subsequent purchasers without notice of the mortgage to X and assigned to Y, because such mortgage was outside the chain of title. B and his successors, C and D, are therefore entitled to protection under the recording statutes as subsequent purchasers and take their title free from the encumbrance of Y's mortgage. This is the only holding which complies with the purpose and the spirit of the recording statutes.

There are many cases holding to the contrary, thus making the passing of title by estoppel by deed an exception to the general rule that an instrument of conveyance not in the chain of title does not give constructive notice to subsequent purchasers and incumbrancers. The exception seems unjustified in view of the fact that the one claiming the benefit of the exception is either himself guilty of negligence in searching the record, or he holds through one who is negligent and the record discloses such. Of course, as between parties who are unaffected by the recording statutes, the doctrine of estoppel by deed still continues to operate.[36]

PROBLEM 17.15: A, the owner of Blackacre in fee simple, conveys it to B. B bring his deed to the registry for recording and pays the fee. The clerk misplaces the deed among other papers and it is never recorded. A then deeds Blackacre to C who promptly records. Blackacre is vacant land and C has no knowledge of A's former deed to B. C takes possession of the land and B sues to eject him therefrom. May B succeed?

Applicable Law: Subsequent purchasers and incumbrancers are entitled to rely on the title records. If a holder of a deed presents it for recordation and the officer fails to record it, the loss or injury under one view must fall on the one who presents such instrument for record and not on a bona fide subsequent purchaser. Likewise, if the officer records the instrument but makes an error in its recordation, the loss or injury under this view must fall on the one who had the instrument recorded and not on a subsequent purchaser or incumbrancer. Under this position the duty lies on the holder of an instrument of conveyance not only to see that the instrument is recorded when he presents it for record, but also to see that it is correctly recorded. Under the contrary position, the loss falls on the subsequent purchaser when the recorder makes a mistake. The reason is that the holder of the instrument does all that is required of him when he deposits such instrument for recordation.

Answer and Analysis

The answer is no in many jurisdictions, but there is contrary authority. The rationale for putting the loss on B is as follows: Under the recording acts it seems the better rule to require the holder of an instrument of conveyance not only to present a deed

36. See Breen v. Morehead, 104 Tex. 254, 136 S.W. 1047 (1911), holding for the BFP (subsequent purchaser). See also Sabo v. Horvath, 559 P.2d 1038 (Alaska 1976) (applying the rule to a federal statute operating similarly to estoppel by deed); but see Ayer v. Philadelphia & Boston Face Brick Co., 159 Mass. 84, 34 N.E. 177 (1893) (holding for the earlier purchaser, who received title by estoppel).

for recordation but also to see that the instrument is properly recorded. The holder can more easily return to make sure that a *known* instrument is recorded than a subsequent purchaser can search for an *unknown* instrument. The public should be able to rely on a public servant or official to do his duty. But a public servant or officer is human and may make errors. Only B could have prevented the injury because he alone had complete control of the situation at the time of the attempted recordation. There is no way imaginable by which C, who could only act as a result of what B did or did not do, could protect himself. To require C to do more than examine the record with care and diligence would be a determination that the public or subsequent purchasers cannot rely on the public records as to titles. Hence, it seems proper in carrying out the purpose and intent of the recording statutes to require B to use due diligence not only in presenting his instrument for recordation, but also to require him to see that such recordation is made. This principle applies not only where no record at all is made but also when a record is made but it is erroneously made. For example, suppose in our case the owner A had made a first mortgage on Blackacre for $5,000 to B. B takes the mortgage for recordation. By an error the record shows the mortgage for only $500. Then A gives a second mortgage for $2,500 to C. B sues to foreclose his $5,000 mortgage. C is made a party defendant and agrees that B has the right to foreclose for $500 but not for $5,000. Here again B is bound to see that his mortgage is correctly recorded and, as to C, he can foreclose only as to $500. Such doctrine is the only one which gives full effect to the principle that subsequent purchasers and incumbrancers are entitled to rely on what they find on the title records.[37]

The alternative rationale for protecting B and putting the loss on C is that B has done all that is required under the recording act when she files her instrument for record with the proper official. Further, some delay will occur between the deposit of the instrument in the registry and spreading it on the records, and even further delay in compiling the index. Unless the deed is deemed recorded from the time it is deposited in the registry and not from the time it is spread on the record and then indexed, there is a possibility that a person in B's position above will be defeated by a subsequent bona fide purchaser from the original grantor in spite of the fact that B has done all that pragmatically is within her power to do. An ordinary layperson cannot literally perform the recorder's job for him, and it is essential that the deed or other

37. What if the deed is improperly indexed or not indexed at all, owing to no fault of the purchaser? The courts are divided. See Haner v. Bruce, 146 Vt. 262, 499 A.2d 792 (1985), holding that a misindexed deed nevertheless gave notice to a subsequent purchaser, who thus took subject to it. Cf. Mortensen v. Lingo, 99 F.Supp. 585 (D.Alaska 1951) (recordation without indexing does not impart constructive notice).

instrument be deemed recorded from the moment of its deposit in the registry. Thus, although it is hard for an innocent purchaser to suffer a loss as a result of the recorder's mistake, it is equally hard for an innocent owner to suffer such a loss. Under such circumstances there is no more reason to protect the subsequent purchaser than the owner. Such errors in recording, like forged and other void instruments, are simply matters against which the recording act offers no protection. The remedy of the innocent purchaser in such cases should be against the recorder.[38]

PROBLEM 17.16: A, fee simple owner of Blackacre, was negotiating with B for the sale of the property to B. B requested A to make out a deed to B, saying he would be back the following day to examine it. The day following B returned to A's house and A handed to B for examination the deed which A had signed and acknowledged as B had requested. B examined the deed and pronounced it satisfactory but stated that he would have to think over the matter a little longer. B returned the deed to A who put it in his pocket. Without A's knowledge or consent and without negligence on the part of A, B clandestinely picked the deed from A's pocket, recorded it, and sold Blackacre to C. Blackacre was vacant property and C had no knowledge other than the record. C took possession of Blackacre and A sues to eject him. May A succeed?

Applicable Law: A forged or an undelivered deed is a nullity and no one can claim any interest through such. Placing such a deed on record does not add any legal efficacy to such a forged or undelivered instrument. The recording statutes are not intended to be a means of conveyance nor are they intended for the purpose of assisting wrongdoers, tort-feasors, criminals and forgers in depriving innocent owners of their real property. The original owner continues his ownership even over one who claims even as an innocent purchaser through a forged or an undelivered deed.

Answer and Analysis

Yes. A did not deliver the deed to B. Further, A was not negligent in respect to B's gaining possession of the instrument

38. However, the recorder may not be liable. See Siefkes v. Watertown Title Co., 437 N.W.2d 190 (S.D.1989) (doctrine of sovereign immunity barred damages action against county registry of deeds for negligent indexing). Contra Terrell v. Andrew County, 44 Mo. 309 (1869). See also 70 A.L.R. 603–608.

Suppose that a grantee changes his or her name before reselling the property, and the records do not reveal that the two different names belong to the same person? See First Financial Bank, F.S.B. v. Johnson, 477 So.2d 1267 (La.App. 1985), holding that a searcher has no duty to search for variations in name, at least where the contest was between the searcher and an earlier grantee who had negligently misspelled the grantor's name.

which he recorded. Hence, estoppel cannot be used against A. There being no delivery of the deed by the owner and he having been guilty of no conduct which could estop him from denying delivery, A is still the owner with the right to possess Blackacre unless the recording acts preclude him from recovery.

The recording acts are intended to protect bona fide subsequent purchasers. Clearly C should be so classified. We may assume that he examined the records and found a deed properly signed and acknowledged by A and that he paid full value for Blackacre. The recording statutes are intended to protect the innocent and when two persons are equally innocent and one is no more to be blamed than the other for their predicament, then the statutes will have no application and the title will remain where the law would recognize it to be. In our case the title was in A. An undelivered deed is a nullity and leaves the title in the owner. C will have to be content with his personal action against B. Why doesn't the record assist C? Because the recording statutes presuppose a valid delivery of the instrument in order that they have any application. There is no such delivery in our case. The same would be true in case B forged A's name to a deed and placed it on record. It would have no legal effect and anyone who claimed through it would have no interest. Nor is an owner bound to examine the records from time to time to see if anyone has placed a forged or an undelivered instrument of conveyance on record. In short, the recording acts protect subsequent parties against prior otherwise valid and delivered but unrecorded instruments; they have no application whatsoever to recorded but void deeds.[39]

In the disturbing *Messersmith* decision[40] the court held that an improperly acknowledged (i.e., improperly notarized) but otherwise valid deed did not give notice to subsequent purchasers because the recording statute, as many recording statutes, required instruments to be acknowledged before they could be recorded. Thus, even though the deed was valid as between the parties and present for any title searcher to see in the chain of title, it did not provide "notice" in the recording act sense. As a result, a purchaser from the person receiving the unacknowledged instrument was not entitled to rely on the record and lost title to an earlier grantee under an unrecorded quitclaim deed.

39. See Stone v. French, 37 Kan. 145, 14 P. 530, 1 Am.St.Rep. 237 (1887) (no protection given by recorded but undelivered deed). But see Hauck v. Crawford, 75 S.D. 202, 62 N.W.2d 92 (1953), holding that if the grantor's signature is obtained by fraud (in this case the grantor was told he was signing a lease instead of a deed), but it is nevertheless the grantor's signature, then even though the deed might be set aside by the grantor himself in an action against the grantee, or even though the grantee might be charged with fraud, the deed should be good as against a subsequent BFP relying on the record.

40. Messersmith v. Smith, 60 N.W.2d 276 (N.D.1953).

PROBLEM 17.17: O conveyed Blackacre, which is vacant land, to A. A did not then record the deed. Later, O conveyed the land to B who had notice of the earlier deed. B recorded. Sometime later, A recorded his deed, and still later, B conveyed the same land to C. C had no notice of the deed to A. A brings suit to quiet title against C. Will he succeed?

Applicable Law: A subsequent purchaser is not charged with notice of a prior deed or other instrument which is out of the chain of title although it may be placed on record. A prior deed recorded after a second deed to the same property from the same grantor is out of the chain of title. If a purchaser finds a conveyance from the owner to his grantor which gives him a perfect record title, he is entitled to rely thereon and is not obliged to search the records further to see if there were any prior deeds recorded out of sequence.

Answer and Analysis

The answer is no according to the better view. For C to prevail in either a notice or race-notice jurisdiction he must, of course, qualify as a BFP without notice of A's deed. If the contest were between A and B, A would clearly win since B had notice of A's deed. But B recorded before A, and then conveyed to C. At the time C entered the picture, A's deed was filed for record. Looking at the recording statute literally, it might appear that A would be preferred since at the time C entered the picture the prior deed to A had been placed on record, and A had not been divested by the conveyance to B, who took with notice.

However, the realities of tracing title through grantor-grantee indices suggest that C should win. The recording of A's deed out of turn puts it out of the chain of title, since a subsequent purchaser such as C would not be likely to find it in tracing title from O. In checking such title, C would find first the conveyance to B. If thereafter C ignored O on the reasonable assumption that O having conveyed once would have no further title to convey, C would never find the prior deed to A. Thus, C does qualify as a subsequent BFP without notice of the prior deed to A, which is outside the chain of title.

This rule gives due consideration to the practicalities of tracing title. It has also been applied to successive mortgages in the above situation, but the rationale as to mortgages is less sustainable. For example, after O mortgages to A, O still has a substantial interest in Blackacre which is subject to further mortgage or conveyance. Hence, a subsequent person such as C would not be as justified in ignoring O after he finds first the recorded mortgage to B. Of course, C, in taking an assignment of the mortgage from B is

primarily interested in getting a first mortgage and not a junior one. Hence, it is logical to say that he can disregard O after finding the recorded mortgage to B since C is interested only in getting a first mortgage. Having found that B was the first mortgagee, all that concerns C is to be sure that B did not assign the mortgage to someone else. The leading case of Morse v. Curtis[41] did apply the doctrine of chain of title to mortgages in this situation. There is a little authority to the contrary, which regards such out of turn recordings as within the chain of title.[42] This position can be criticized because it imposes a great burden on the title examiner.

The obverse of the situation in problem 17.17 is this one: O sells Blackacre to A; A does not record. O then sells Blackacre to B, a BFP who records promptly. B would thus prevail against A. However, thereafter B sells to C who has actual knowledge of A's interest. This case is governed by the so-called "shelter" rule that once a bona fide purchaser has acquired a title protected under the recording acts, that person is entitled to pass his title on to others. Thus, C will prevail because C's grantor was B, and B would have prevailed over A in a title dispute.[43]

Incidentally, many courts hold that a subsequent purchaser is entitled to protection under the recording acts only if the previous documents in the chain of title were recorded. For example, suppose that O gives A a mortgage on Blackacre. A does not record. Then O sells Blackacre to B by a deed not excepting the mortgage. B does not record either. Now B sells to C who records promptly. Then A records the mortgage and thereafter B records his deed. Who wins in a dispute between A, the mortgagee and C?

In a race-notice jurisdiction A wins because a title search by C at the appropriate time would have revealed that B had no record title. As a result C is not really a BFP "without notice," and he is protected, if at all, only by the recording acts. Thus we revert to common law priorities and A wins.[44]

In a pure notice jurisdiction the outcome might be different, for A's interest would lose to B the instant B purchased, whether or not B recorded first. Under the "shelter" rule B could pass his title on to C; or, to look at it another way, once B acquired his interest A had nothing left to record.

41. 140 Mass. 112, 2 N.E. 929 (1885).

42. E.g., Woods v. Garnett, 72 Miss. 78, 16 So. 390 (1894).

43. Corey v. United Savings Bank, 52 Or.App. 263, 628 P.2d 739 (1981) (even though the defendant had actual notice of an unrecorded access easement, the defendant's grantor was a BFP without notice; D was sheltered by his grantor's protection). See Cross, The Record "Chain of Title" Hypocrisy, 57 Col. L. Rev. 787 (1957).

44. See Zimmer v. Sundell, 237 Wis. 270, 296 N.W. 589 (1941) (one who purchases from a stranger to the title not protected by recording statute).

PROBLEM 17.18: L owned 2 parcels of adjoining land. She conveyed one parcel to M, covenanting that she would not convey the other parcel unless the grantee entered into a covenant similar to that contained in the deed from L to M with respect to certain building restrictions. L's heirs conveyed the other parcel to G without inserting the covenant. The deed to M was duly recorded. G had no actual knowledge of any restrictions upon the land conveyed to him. G brings an action for breach of covenant for title against L's heirs. Will he succeed?

Applicable Law: There is a conflict of authority as to whether the term subsequent purchaser as used in the recording acts means only subsequent purchaser of the same land or whether it means subsequent purchaser from the same grantor. Under the latter view, the subsequent purchaser is charged with notice of servitudes or encumbrances contained in deeds out by a common grantor when such encumbrances affect the land he is purchasing. Under the former view, the subsequent purchaser is charged with notice of encumbrances which appear only in recorded documents pertaining to direct chain of title, i. e., the very land he is purchasing.

Answer and Analysis

The answer depends upon the jurisdiction. Of course, for G to be obligated to observe the building restrictions, he must take with notice of the restriction in the deed from L to M. Since G had no actual notice, the question is whether he is charged with constructive notice under the recording act of the covenant in the deed from L to M. Under one line of authority he is charged with such notice.[45] Under this view, G must not only check to see that his grantor had not conveyed the very parcel of land which he is acquiring, but also must check deeds out from the common grantor to see that in conveying such neighboring land the grantor did not impose a covenant or servitude which affects the remaining land and which is ultimately conveyed to him. Thus, under this view, G takes with notice of the prior servitude. Therefore, his land is so incumbered, and he does have an action against his grantors for breach of the covenant against encumbrances.

Under the other view, G is charged with notice only of those things appearing in his direct chain of title.[46] Under this view, G

45. E.g., Guillette v. Daly Dry Wall, Inc., 367 Mass. 355, 325 N.E.2d 572 (1975) (requiring the purchaser to search both chains); Stegall v. Robinson, 81 N.C.App. 617, 344 S.E.2d 803 (1986) (same; subdivision covenant).

46. E.g., Puchalski v. Wedemeyer, 185 A.D.2d 563, 586 N.Y.S.2d 387 (App. Div.1992) (refusing to require the purchaser to search both chains of title); Witter v. Taggart, 78 N.Y.2d 234, 573 N.Y.S.2d 146, 577 N.E.2d 338 (1991) (same).

need only check prior recorded deeds of his grantor to see that the land he is purchasing has not been previously conveyed. He need not check the contents of the other deeds out by a common grantor. Under this view since G did not have actual notice of the servitude, he takes free therefrom. Thus, the grantors did not breach the covenant against encumbrances, and G has no action.

The question presented in this problem is sometimes stated in terms of the meaning of "subsequent purchaser" under the recording act. Does the term refer to a subsequent purchaser from the same grantor or simply to a subsequent purchaser of the same land? As indicated previously, the courts take different positions, some thinking that the burden is too great to require a purchaser to examine prior deeds out by a common grantor; others take the contrary viewpoint.

CHART COMPARING RECORDING ACTS

Hypothetical I:

1. O, owner of Blackacre, executes and delivers to A a deed conveying Blackacre to A. A does not record.

2. O, then executes and delivers to B a deed of the same land and at that time B knows of A's prior unrecorded deed.

3. B records his deed.

4. B executes and delivers to C a deed of the land and C does not know of A's prior unrecorded deed.

5. A then records.

6. C then records.

At the end of each numbered transaction the location of title would be as follows under the various recording acts:

Steps	1	2	3	4	5	6
Notice	A	A	A	C	C	C
Reason	Rec'd not necessary between the parties	B not a BFP	B not a BFP	C is a subseq. BFP	C is a subseq. BPF	C is a subseq BFP
Race	A	A	B	C	C	C
Reason	Same as above	B did not record	B recorded first	Because B had title-chain of title concept	Because B had title-chain of title concept	Because B had title
Race-Notice	A	A	A	C	C	C
Reason	Same as above	Both of the above	B not a BFP	Subseq. BFP who can rely on B's record	Subseq. BFP who can rely on B's record	Subseq. BFP who can rely on B's record

Hypothetical II:

1. O, owner of Blackacre, executes and delivers to A a deed conveying Blackacre to A. A does not record.
2. O then executes and delivers to B a deed of the same land. B does not know of A's prior unrecorded deed. B does not record.
3. A then records his deed.
4. B then executes and delivers to C a deed to Blackacre. C does not record.
5. A then deeds Blackacre to D who does not know of either B or C. D does not record.
6. B then records.
7. C then records.
8. D then records.

At the end of each numbered transaction the location of title would be as follows under the various recording acts:

Steps	1	2	3	4	5	6	7	8
Notice	A	B	B	C	D	D	D	D
Reason	Rec'd not necessary between the parties	He is a subseq BFP	B was a subseq BFP	C gets B's title	Most subseq BFP	Need not record as to prior parties	He had already divested C's title	was subseq BFP and has now recorded
Race	A	A	A	A	D	D	D	D
Reason	Same as above	Neither recorded so A wins as before	A recorded 1st	A recorded 1st	He gets A's record title	B & C had been divested by A's record	same as — and chain of title concept	same as — and D has now recorded
Race-Notice	A	A	A	A	D	D	D	D
Reason	Same as above	Although B is a subseq BFP, he did not record	B did not record 1st	C had constr. notice of A's title. A recorded 1st	D is subseq BFP & can use A's recording	Same as —	Same as —	D is subseq BFP and has chain of title traced b/d B & C's

§ 17.4 *Title Insurance*

PROBLEM 17.19: A purchased Blackacre in 1994 for $100,000 and took out a title insurance policy in the amount of a mortgage, $60,000. The policy was designed to cover defects in the title or failure of title, but it contained an exception for "easements, liens or encumbrances not shown by the public records." Thereafter, A finds that the land is subject to a prescriptive easement that reduces its value from $100,000 to $30,000. Can he recover? If so, how much?

Applicable Law: Title insurance policies are contractual in nature. Although most courts indulge the presumption that they are to be strictly construed against the insurer, they generally insure only what they say they insure (subject to state regulation, which may require them to insure against certain kinds of losses).

Answer and Analysis

The answer in most states is that A will not recover anything. Although title failed, the defect was not "shown by the public records."[47] A may, of course, have a claim against his grantor or even a prior grantor under a deed covenant (See § 17.1), but not under this particular title policy.

Suppose that the easement was in fact recorded and thus covered by the policy? Would A be any better off with the title insurance policy than he would be with a general warranty deed? In some respects, yes. First of all, the title company is generally under a duty to defend the insured from claims arguably covered by the policy. Thus, if the claim is based on a recorded easement, probably covered by the policy, it would be the insurer's obligation to defend. If the claim were based on a prescriptive easement, not covered by the policy, the insurer would probably not have an obligation to defend.

Damages measurement, just as other elements of the policy, is usually contractual.[48] As a general matter the limit of the insurer's liability is the face amount of the policy; so the insurer in the Problem will not have to pay more than $60,000, even though the policy holder's loss was $70,000. One general exception to this rule is that if an insurer unreasonably refuses to defend a claim and title subsequently fails, the insurer will be liable for any amount,

47. See also Ryczkowski v. Chelsea Title & Guaranty Co., 85 Nev. 37, 449 P.2d 261 (1969), holding that a deed recorded outside the chain of title was not satisfactorily within the public record to be covered by the title insurance policy. The decision has been criticized because title insurers as a general matter do not rely on grantor-grantee indexes but on records contained in their own private "title plants," which are almost always tract indexes. As a result, a "wild" deed is ordinarily easy to discover.

48. But see Jarchow v. Transamerica Title Ins. Co., 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (1975), holding that a title insurer that breached its duty to defend was liable not only for the title loss but also in tort for emotional distress caused by its negligent and bad faith refusal to defend. Jarchow was later overruled insofar as it gave emotional distress damages for a merely negligent refusal to defend: Soto v. Royal Globe Ins. Co., 184 Cal.App.3d 420, 229 Cal.Rptr. 192 (1986) (requiring bad faith and not mere negligence). Other states have refused to follow *Jarchow's* general recognition of tort liability in addition to contract liability. E.g., Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho, 115 Idaho 56, 764 P.2d 423 (1988) (statute requiring search and examination of title did not create tort duty). See generally Palomar, Title Insurance Companies' Liability for Failure to Search Title and Disclose Record Title, 20 Creighton L. Rev. 455 (1987).

even if it exceeds policy limits. If title fails and an earlier grantor is liable, the title insurer that pays a claim is generally subrogated to any cause of action that the insured had, and may sue for its losses.[49]

Computation of damages is likewise problematic. Is the insurer liable for the full loss up to the limit of the policy, or is it liable only for a percentage of the loss equal to the percentage of coverage that the policy owner purchased? Some courts have held that, for example, if the policy purchaser bought a policy whose face value is only 60% of the purchase price, then the insured should be liable for only 60% of any resulting loss.[50]

49. E.g., Safeco Title Ins. Co. v. Citizens & Southern National Bank, 190 Ga.App. 809, 380 S.E.2d 477 (1989).

50. See Southwest Title Ins. Co. v. Plemons, 554 S.W.2d 734 (Tex.Civ.App. 1977); Southern Title Guaranty Co., Inc. v. Prendergast, 494 S.W.2d 154 (Tex. 1973) (amount recoverable bears same ratio to policy amount as value of outstanding interest to value of fully insured title).