

PROPERTY

I. THE PRESENT ESTATES

a. **The fee simple absolute**

- i. How to create
 1. To A or To A and his heirs
- ii. Distinguishing characteristics
 1. This is absolute ownership of potentially infinite duration.
 2. Freely devisable, descendible, alienable.
- iii. No accompanying future interest.

b. **The fee tail**

- i. How to create
 1. To A and the heirs of his body
- ii. Distinguishing characteristics
 1. Virtually abolished in the US today.
 2. Historically, it would pass directly to grantee's lineal blood descendants no matter what.
 3. Today, an attempted creation of a fee tail creates instead a FSA.
- iii. Accompanying future interest
 1. Reversion if in the grantor
 2. Remainder if in a third party

c. **The defeasible fees**

i. **The fee simple determinable**

- How to create
 - a. To A for so long as, during, while, until
 - b. Grantor must use clear durational language.
 - c. If stated condition is violated, forfeiture is automatic.
2. Distinguishing characteristics
 - a. Like all defeasible fees, it is devisable, descendible and alienable, but ***always subject to the condition.***
 - b. You may convey less, but never more, than what you started with.
3. Accompanying future interest
 - Possibility of reverter in the grantor

ii. **The fee simple subject to condition subsequent**

1. How to create
 - a. To A, but if X event occurs, grantor reserves the right to reenter and retake.
 - b. Grantor must use clear durational language and carve out the right to reenter.
2. Distinguishing characteristics
 - a. This estate is NOT automatically terminated, but it can be cut short at the grantor's option, if the stated condition occurs.

3. Accompanying future interest
 - a. Power of termination/right of reentry
- iii. **The fee simple subject to an executory limitation**
 1. How to create
 - a. To A, but if X event occurs, then to B.
 2. Distinguishing characteristics
 - a. This estate is just like the FSD only now, if the condition is broken, the estate is automatically forfeited in favor of someone other than the grantor.
 3. Accompanying future interest
 - a. Shifting executory interest

d. **As concern the defeasible fees, note 2 important rules of construction:**

- i. *Words of mere desire, hope, or intention are insufficient to create a defeasible fee.*
 1. Courts disfavor restrictions on free use of land
 2. Thus, courts will not find a defeasible fee unless clear disjunctive language is used.
- ii. *Absolute restraints on alienation are void.*
 1. An absolute restraint on alienation is an absolute ban on the power to sell or transfer, that is not linked to reasonable time linked purpose.

e. **The life estate**

- i. How to create
 1. This is an estate that must be measured in explicit lifetime terms and NEVER in terms of years.
- ii. The life estate can only exist
 1. A life measured by a life other than the grantee's
- iii. Distinguishing characteristics
 1. **The life tenant's entitlements are rooted in the important doctrine of waste**
 - a. Two general rules:
 - i. *The life tenant is entitled to all ordinary uses and profits from the land*
 - ii. *The life tenant must not commit waste; do anything to harm the future interest holders*
 - b. There are 3 species of waste.
 - i. *Voluntary or affirmative waste*
 1. This is overt conduct that causes a decrease in value
 2. *Voluntary waste and natural resources*
 - a. **GR:** life tenant must not consume or exploit natural resources on the property unless one of 4 exceptions applies, remembered by PURGE:
 - i. **PU:** prior use, meaning that prior to the grant, the land was used for exploitation. Here, life tenant may continue to exploit, unless otherwise agreed.
 - ii. Note: *prior use and open mines doctrine:* if mining was done on the land before the life estate began: life tenant may continue to mine but is limited to the mines already open.

- iii. **R:** reasonable repairs. The tenant may consume natural resources for reasonable repairs and maintenance.
- iv. **G:** grant. The life tenant may exploit if granted the right.
- v. **E:** exploitation, meaning land suitable only to exploit.

ii. *Permissive waste or neglect*

- 1. This occurs when land is allowed to fall into disrepair.
 - a. Permissive waste and the obligation to repair: the life tenant must simply maintain the premises in reasonably good repair.
 - b. Permissive waste and the obligation to pay all ordinary taxes: the life tenant is obligated to pay all ordinary taxes on the land, to the extent of income or profits from the land. If there is no income or profit, the life tenant is required to pay all ordinary taxes to the extent of the premises' fair rental value.

iii. *Ameliorative waste*

- 1. The life tenant must not engage in acts that will enhance the property's value unless all of the future interest holders are known and consent.
- iv. The life estate's accompanying future interest is a reversion if held by the grantor or a remainder if held by a third party.

II. FUTURE INTERESTS

a. Future interests capable of creation in the grantor

i. The possibility of reverter

- 1. It accompanies the FSD.

ii. The right of entry, power of termination

- 1. It accompanies the FSSCS

iii. The reversion

- 1. A reversion is the future interest that arises in a grantor who transfers an estate of lesser quantum than she started with, other than a FSD or a FSSCS.

b. Future interests in transferees

i. If our future interest is held by someone other than the grantor, it has to be either:

- 1. A vested remainder
- 2. A contingent remainder
- 3. An executory interest

ii. The difference between vested remainders and contingent remainders:

- 1. *A remainder is a future interest created in a grantee that is capable of becoming possessory upon the natural expiration of a prior possessory estate created in the same conveyance in which the remainder is created.*
 - a. A remainder always accompanies a preceding estate of known fixed duration. That preceding estate is usually a life estate or a term of years.
 - b. Remainderman never follows a defeasible fee.
 - c. Remainderman cannot cut short or divest a prior transferee..

iii. Remainders are either vested or contingent

1. A remainder is vested if it is both created in an ascertained person and is not subject to any condition precedent.
2. A remainder is contingent if it is created in an unascertained person or is subject to a condition precedent, or both.
 - a. A condition is a condition precedent when it appears *before* the language creating the remainder or is woven into the grant to remainderman.
3. Contingent remainders and:
 - a. The rule of destructibility of contingent remainders
 - i. At common law, a contingent remainder was destroyed if it was still contingent at the time the preceding estate ended.
 1. To A for life, and if B has reached the age of 21, to B. Now A has died, leaving behind B who is only 19.
 - a. At common law, B's contingent remainder is destroyed → O or O's heirs would take in FSA.
 - b. Today, the destructibility rule has been abolished. Thus, if B is still under 21 when A dies, O or O's heirs hold the estate subject to B's springing executory interest. Once B reaches 21, B takes.
 - b. The rule in Shelley's case
 - i. O conveys to A for life, then on A's death, to A's heirs. A IS ALIVE.
 1. Historically, the present and future interests would merge, giving A a FSA.
 - a. The rule in Shelley's case is a rule of law, not of construction, so it would apply even in the face of contrary grantor intent.
 2. Today, the rule in Shelley's case has been virtually abolished. Thus, today when O conveys to A for life, then to A's heirs, A has a life estate and A's as yet unknown heirs have a contingent remainder. O has a reversion since A could die without heirs.
 - c. The doctrine of worthier title
 - i. This doctrine is still viable in most states today. It applies when O, who is alive, tries to create a future interest in his heirs.
 - ii. O, who is alive, conveys to A for life, then to O's heirs.
 1. If the doctrine did NOT apply, A has a life estate and O's heirs have a CR because O is still alive and a living person has no heirs.
 2. Because of the doctrine, the CR in O's heirs is VOID. Thus, A has a life estate and O has a reversion.
 - iii. The doctrine endeavors to promote the free transfer of land.
 - iv. It's a rule of construction, so if grantor clearly intends to create a CR in his heirs, that intent is BINDING.
 - c. Distinguish the 3 kinds of vested remainders:
 - i. The indefeasibly vested remainder
 1. *The holder of this remainder is certain to acquire an estate in the future, with no conditions attached.*
 - ii. The vested remainder subject to complete defeasance/total divestment

1. Here, remainderman exists. His taking is NOT subject to any condition precedent. However, *his right to possession could be cut short because of a condition subsequent.*

iii. The vested remainder subject to open

1. Here, a remainder is *vested in a group of takers*, at least one of whom is qualified to take.
2. But each class member's share is subject to partial diminution because additional takers can still qualify as class members.
3. A class is either open or closed
 - a. A class is open if it's possible for others to enter
 - b. A class is closed when its maximum membership has been set
 - i. The class closes whenever any member can demand possession.

d. Distinguish remainders from executory interests:

- i. An executory interest is a future interest created in a transferee, a third party, which is not a remainder and which takes effect by either cutting short some interest in another person (shifting) or in the grantor or his heirs (springing).
 1. Shifting executory interest
 - a. It always follows a defeasible fee and cuts short someone other than O, the grantor.
 2. Springing executory interest
 - a. Cuts short O, the grantor

III. THE RULE AGAINST PERPETUITIES

a. The rule

- i. *Certain kinds of future interests are void if there is any possibility, however remote, that the given interest may vest more than 21 years after the death of a measuring life.*

b. 4-step technique for assessing potential RAP problems

- i. Determine which future interests have been created by the conveyance. The RAP potentially applies ONLY to contingent remainders, executory interests, and certain vested remainders subject to open.
- ii. Identify the conditions precedent to the vesting of the suspect future interest.
- iii. Find a measuring life. Look for a person alive at the date of the conveyance and ask whether that person's life or death is relevant to the condition's occurrence.
- iv. Ask: will we know, with certainty, within 21 years of the death of our measuring life, if our future interest holder can or cannot take? If so, the conveyance is good.

c. 2 bright line rules of common law RAP

- i. *A gift to an open class that is conditioned on the members surviving to an age beyond 21 violates the common law RAP.*
 1. Bad as to one, bad as to all. To be valid, it must be shown that the condition precedent to every class member's taking will occur within the perpetuities period. If it is possible that a disposition might vest too remotely with respect to any member of the class, the entire class gift is void.
- ii. *Many shifting executory interests violate the RAP. An executory interest with no limit on the time within which it must vest violates the RAP.*
 1. The charity to charity exception
 - a. A gift from one charity to another does not violate the RAP.

d. Reform of the RAP

i. The wait and see or second look doctrine

1. Under this majority reform effort, the validity of any suspect future interest is determined on the basis of the facts as they now exist, at the end of our measuring life.
2. This eliminates the what if or anything is possible line of inquiry.

ii. The uniform statutory rule against perpetuities (USRAP)

1. Codifies the common law RAP and, in addition, provides for an alternative 9-year vesting period.

iii. Both the wait and see and USRAP reforms embrace

1. The cy pres doctrine: as near as possible
 - a. If given disposition violates the rule, a court may reform it in a way that most closely matches grantor's intent while still complying with the RAP.
2. The reduction of any offensive age contingency to 21 years.

IV. CONCURRENT ESTATES

a. The joint tenancy

- i. 2 or more own with the right of survivorship
- ii. When 1 JT dies, his share goes automatically to surviving JTs.
- iii. JT's interest is alienable, not devisible or descendible.

iv. Creation

1. **The four unities (T-TIP).** JTs must take their interests:
 - a. T: at the same time
 - b. T: by the same title
 - c. I: with identical, equal interests
 - d. P: identical rights to possess the whole
2. **Grantor must clearly express the right of survivorship**

v. Severance of a JT

1. SPAM: sale, partition, and mortgage
2. **Severance and sale**
 - a. A JT can sell or transfer her interest during her lifetime.
 - i. She may do so secretly without others' knowledge or consent.
 - ii. One JT's sale severs the JT as to the seller's interest because it disrupts the 4 unities.
 - iii. Thus, buyer is a tenant in common.
 - b. To the extent that we started with more than 2 JTs in the first place, JT remains intact as between the other, non-transferring JTs.
 - c. In equity, a JT's mere act of entering into a K for the sale of her share will sever the JT as to the contracting party's interest.
 - i. This is because of the doctrine of equitable conversion, which provides that equity regards as done that which ought to be done.
3. **Severance and partition**
 - a. By voluntary agreement
 - i. A peaceful way to end the relationship
 - b. Partition in kind
 - i. A ct action for physical division of Blackacre if in best interests of all.
 - c. Forced sale

- i. A ct action if in best interests of all where land is sold and sale proceeds divided up proportionately.

4. *Severance and mortgage*

- a. One JT's execution of a mortgage or a lien on his or her share will sever the JT as to that now encumbered share only in the minority of states that follow the TITLE THEORY of mortgages.
- b. Majority of states follow the LIEN THEORY of mortgages whereby a JT's execution of a mortgage on his or her interest will not sever the JT.

b. The tenancy by the entirety

- i. Marital interest with right of survivorship. In those states to recognize the tenancy by the entirety, it arises presumptively: in any conveyance to husband and wife, unless clearly stated otherwise.
- ii. This is a very protected form of co-ownership. **CAN'T TOUCH THIS.**
 1. Creditors of only 1 spouse can't touch this tenancy.
 2. Unilateral conveyance: neither tenant, acting alone, can defeat the right of survivorship by a unilateral conveyance to a third party.

c. The tenancy in common

- i. Each co-tenant owns an individual part and each has a right to possess the whole.
- ii. Each interest is descendible, devisable and alienable. There are no survivorship rights.
- iii. The presumption favors the tenancy in common.

d. Rights and duties of co-tenants

i. Possession

1. Each co-tenant is entitled to enjoy the whole.
2. If one co-tenant wrongfully excludes another co-tenant from possession of the whole or any part, he has committed wrongful ouster.

ii. Rent from co-tenant in exclusive possession

1. Absent ouster, a co-tenant in exclusive possession is not liable to others for rent.

iii. Rent from third parties

1. A co-tenant who leases all or part of the premises to a third party must account to the other co-tenants providing them their fair share of the rental income.

iv. Adverse possession

1. Unless he has ousted the other co-tenants, one co-tenant in exclusive possession for the statutory adverse possession period cannot acquire title to exclusion of the others.

v. Carrying costs

1. Each co-tenant is responsible for his or her fair share of carrying costs, such as taxes and mortgage interest payments, based upon the undivided share that he holds.

vi. Repairs

1. The repairing co-tenant enjoys a right to contribution for reasonable and necessary repairs provided that she has told the other of the need for the repairs.

vii. Improvements

1. During the life of the co-tenancy, there is no right to contribution for so-called improvements.
2. However, at partition, the improving co-tenant is entitled to a credit equal to any increase in value caused by her efforts.

3. At partition, the so-called improver bears full liability for any drop in value caused by her efforts.

viii. Waste

1. A co-tenant must not commit waste.
2. A co-tenant can bring an action for waste during the life of the co-tenancy.

ix. Partition

1. A JT or tenant in common has a right to bring an action for partition.

V. LANDLORD/TENANT LAW

a. The 4 leasehold or nonfreehold estates

i. The tenancy for years

1. This is a lease for a fixed period of time. It could be 1 day, 40 years, etc.
2. When you know the termination date from the start, you have a tenancy for years.
3. Because a term of years states from the outset when it will terminate, no notice is needed to terminate.
4. A term of years greater than 1 year must be in writing to be enforceable because of the SoF.

ii. The periodic tenancy

1. This is a lease which continues for successive intervals until L or T give proper notice to terminate.
2. The periodic tenancy can be created expressly. For example, L conveys to T for month to month, year to year, week to week.
3. It can also arise by implication, in any 1 of 3 ways:

a. Land is leased with no mention of duration, but provision is made for the payment of rent at set intervals.

An oral term of years in violation of the SoF creates an implied periodic tenancy measured by the way rent is tendered.

c. The holdover: in a residential lease, if L elects to holdover a T who has wrongfully stayed on past the conclusion of the original lease, an implied periodic tenancy arises measured by the way rent is now tendered.

4. How to terminate a periodic tenancy:
 - a. Notice, usually written, must be given.
 - b. At common law, notice must be at least equal to the length of the period itself unless otherwise agreed.
 - i. Exception: if tenancy for year to year or greater, only 6 months notice.
 - ii. Note: by private agreement, the parties may lengthen or shorten these common-law prescribed notice provisions.
 - iii. Note: the periodic tenancy must end at the conclusion of a natural lease period.

iii. The tenancy at will

1. This is a tenancy for no fixed duration
2. Unless the parties expressly agree to a tenancy at will, the payment of regular rent will cause a ct to treat the tenancy as an implied periodic tenancy.
3. The tenancy at will may be terminated by either party at any time.
4. A reasonable demand to vacate is typically required.

iv. The tenancy at sufferance

1. It is created when T has wrongfully held over past the expiration of the lease.
2. Lasts only until L either evicts T or elects to hold T to a new tenancy.

b. Tenant's duties

i. T's liability to 3rd parties

1. T is responsible for keeping the premises in reasonably good repair.
2. T is liable for injuries sustained by 3rd parties T invited, even when L promised to make all repairs.

ii. T's duty to repair

1. T's duty to repair when lease is silent

- a. The standard: T must maintain the premises and make ordinary repairs
- b. T must not commit waste
- c. The law of fixtures
 - i. When a tenant removes a fixture, he commits voluntary waste.
 - ii. A fixture is a once movable chattel that, by virtue of its annexation to realty, objectively shows the intent to permanently improve the realty.
 - iii. Common examples: furnace, heating system, custom storm windows, certain lighting installation.
 - iv. T MUST NOT REMOVE A FIXTURE, NO MATTER THAT SHE INSTALLED. FIXTURES PASS WITH OWNERSHIP OF THE LAND.
 - v. How to tell when a tenant installation qualifies as a fixture:
 1. Express agreement controls
 2. In the absence of agreement, T may remove a chattel that she has installed so long as removal doesn't cause substantial harm to the premises.
 3. If removal will cause substantial damage, then in objective judgment T has shown the intent to install a fixture. The fixture stays put.

2. T's duty to repair when T has expressly covenanted in the lease to maintain the property in good condition for the duration of the lease

- a. At common law, historically, T was liable for any loss to the property, including loss due to the force of nature.
- b. Today, the majority view is that T may terminate the lease when the premises are destroyed without T's fault.

iii. T's duty to pay rent

1. T breaches this duty and is in possession of the premises

- a. The landlord's only options are to evict through the courts or continue the relationship and sue for rent due. If the landlord moves to evict, she is nonetheless entitled to rent from the tenant until the tenant, who is now a tenant at sufferance, vacates.
- b. Landlord must not engage in self-help, such as changing locks, forcibly removing T, or removing any of T's possessions.
- c. Self-help is outlawed and is punishable civilly and criminally.

2. T breaches this duty but is out of possession

- a. For example, T wrongfully vacates with time left on a term of years.
- b. Remember SIR:

i. *Surrender*

1. L could choose to treat T's abandonment as an implicit offer to surrender, which L accepts.

2. If the unexpired term is greater than 1 year, surrender must be in writing to meet the SoF.
- ii. **Ignore** the abandonment and hold T responsible for unpaid rent, just as if T was still there.
- iii. **Re-let** the premises on the wrongdoer tenant's behalf and hold him or her liable for any deficiency.

c. **Landlord's duties**

i. **Duty to deliver possession**

1. The majority rule requires that L put T in actual physical possession of the premises. Thus, if at the start of T's lease a prior landlord still in possession, L has breached and the new T gets damages.

ii. **The implied covenant of quiet enjoyment**

1. Applies to both residential and commercial leases.
2. T has a right to quiet use and enjoyment of the premises without interference from L.
3. **Breach by actual wrongful eviction**
 - a. This occurs when L wrongfully evicts T or excludes T from the premises.
4. **Breach by constructive eviction (SING)**
 - a. **Substantial interference**
 - i. Due to L's actions or failure to act – look for a chronic problem.
 - b. **Notice**
 - i. T must tell L about the problem and L must fail to act meaningfully.
 - c. **Constructive**
 - i. T must vacate within a reasonable time after L fails to fix the problem.
 - ii. Is landlord liable for acts of other tenants?
 1. General rule: no.
 2. 2 exceptions:
 - a. L must not permit a nuisance on the premises.
 - b. L must control common areas.

iii. **The implied warranty of habitability**

1. ***Applies only to residential leases***
2. It is non-waivable
3. **The standard**
 - a. Premises must be fit for basic human dwelling. Bare living requirements must be met.
 - b. The appropriate standard may be supplied by local housing code or independent court conclusion.
 - c. The sorts of problems to trigger breach of the implied warranty of habitability include: no heat in winter, no plumbing, no running water.
4. **T's entitlements when the implied warranty of habitability is breached:**
 - a. Move out and terminate lease
 - b. Repair and deduct, allowable by statute in a growing number of jdx. T may make reasonable repairs and deduct their cost from future rent.
 - c. Reduce rent or withhold all rent until the ct determines fair rental value. Typically, T must place withheld rent into escrow to show her good faith.
 - d. Remain in possession, pay rent and affirmatively seek money damages.

iv. **Retaliatory eviction**

1. If T lawfully reports L for housing code violations, L is barred from penalizing T, by, for example, raising rent, or ending the lease, or harassing the T, or taking other reappraisals.

d. The assignment versus the sublease

- i. In the absence of some prohibition in the lease, a T may freely transfer his or her interest in whole, thereby accomplishing an assignment, or in part (thereby accomplishing a sublease).
- ii. In the lease, L can prohibit T from assigning or subletting without L's prior written approval.
- iii. However, once L consents to one transfer by T, L waives the right to object to future transfers by that T, unless L expressly reserves the right.

iv. The assignment

1. L and T2 are in privity of estate
 - a. This means that L and T2 are liable to each other for all the covenants in the original lease that run with the land (common ex: promise to pay rent, paint, repair)
2. L and T2 are not in privity of K unless T2 assumed all promises in the original lease.
3. L and T1 are no longer in privity of estate, but they remain in privity of K.
 - a. Thus, L and T1 are secondarily liable to each other.

v. The sublease

1. L and sublessee are in neither privity of estate nor privity of K.

e. Landlord's tort liability

- i. The common law of caveat lessee (let buyer beware).
- ii. The 5 most important exceptions to the common law (C.A.P.S.):
 1. Common areas
 - a. L must maintain all common areas.
 2. Latent defects rule
 - a. L must warn T of hidden defects of which L has knowledge or reason to know.
 3. Assumption of repairs
 - a. T who voluntarily makes repairs must complete them with reasonable care.
 4. Public use rule
 - a. L who leases public space and who should know, because of nature of the defect and length of the lease, that T will not repair is liable for any defects on the premises.
 5. Short term lease of furnished dwelling
 - a. L is liable for any defects which harm T.

Form of servitude	Method of creation	Parties bound	Remedy
Affirmative easements	I-N-G P – prescription (use that is continuous, open and notorious, actual under a claim of right that is hostile for	Easement appurtenant is transferred automatically with dominant tenement. Easement in gross for commercial purposes is assignable.	Injunction or damages

	<p>statutory period)</p> <p>I – implication (implied from prior use; at time land is severed, a use of one part existed from which it can be inferred that an easement permitting its continuation was intended)</p> <p>N – necessity (division of a tract deprives one lot of means of access out)</p> <p>G – grant (writing signed by grantor)</p>		
Negative easements (L-A-S-S: light, air, support, streamwater)	Can be created only by writing signed by grantor		Injunction or damages
Real covenants	Writing signed by grantor	<p>Burden of promise will run to successor of burdened lot if W/THN requirements are satisfied: writing, intent, touch and concern, horizontal and vertical privity, and notice.</p> <p>Benefit of promise will run to successor of benefited lot if W/TV: writing, intent, touch and concern, and vertical privity.</p>	Damages
Equitable servitudes	Writing signed by grantor (unless implied by general scheme doctrine)	Successors bound if WITNeS: writing, intent, touch and concern, notice.	Injunction
Reciprocal negative servitudes (general scheme doctrine)	According to majority, in a subdivision, residential restriction contained in prior deeds conveyed by common grantor will bind subsequent grantees whose deeds contain no such	Where common scheme exists, subsequent purchasers with notice are bound	Injunction

	restriction if: at start of subdividing, grantor had (i) common scheme and (ii) unrestricted lot holders had notice. Minority rule will not bind subsequent grantees unless their lots are expressly restricted in writing.		
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VI. SERVITUDES

a. Easements

i. *Defined: the grant of a nonpossessory property interest that entitles its holder to some form of use or enjoyment of another's land, called the servient tenement.*

ii. *Easements can be affirmative or negative.*

1. Most easements are affirmative → the right to do something on servient land.
2. Negative easements: the negative easement entitles its holder to prevent the servient landowner from doing something that would otherwise be permissible. Negative easements are generally recognized in only 4 categories:

- a. Light
 - b. Air
 - c. Support
 - d. Stream water from an artificial flow
- Scenic view (in minority of states, including CA)

3. Negative easements can only be created expressly by writing signed by the grantor. There is no natural or automatic right to a negative easement.

iii. *An easement is either appurtenant to land or it is held in gross.*

1. The easement is appurtenant when it benefits its holder in his physical use or enjoyment of his property.
 - a. Dominant land, which reaps the benefit
 - b. Servient land, which bears the burden
2. The easement is in gross if it confers upon its holder only some personal or pecuniary advantage that is not related to his use or enjoyment of his land.
 - a. Here, servient land is burdened. However, there is no benefited or dominant tenement.

iv. *The easement and transferability*

1. The appurtenant easement passes automatically with the dominant tenement, regardless of whether it is even mentioned in the conveyance.
 - a. Note that the burden of the easement appurtenant also passes automatically with the servient estate unless the new owner is a BFP without notice of the easement.
2. An easement in gross is not transferable unless it is for commercial purposes.

v. *Creation of an affirmative easement (PING)*

1. By grant

- a. An easement to endure for more than 1 year must be in a writing that complies with the formal elements of a deed.
- b. This is because of the SoF. The writing to evidence the easement is called a deed of easement.

2. By implication (also known as the easement implied from existing use)
 - a. The previous use was apparent and
 - b. The parties expected that it would survive division because it is reasonably necessary to the dominant land's use
 3. By necessity
 - a. The landlocked setting. An easement of right of way will be implied by necessity if grantor conveys a portion of his land with no way out except over some part of grantor's remaining land.
 4. By prescription
 - a. An easement may be acquired by satisfying the elements of adverse possession (COAH)
 - i. Continuous use for statutory period
 - ii. Open and notorious use
 - iii. Actual use
 - iv. Hostile use
- vi. Scope of an easement is determined by terms of the grant or conditions that created it.*
- vii. Termination of an easement (END CRAMP)*
1. Estoppel
 - a. Here, the servient owner materially changes his or her position in reasonable reliance on the easement holder's assurances that the easement will not be enforced
 2. Necessity
 - a. Easements created by necessity expire as soon as the need ends. However, if the easement, attributable to necessity, was nonetheless created by express grant: it does not end automatically once the need ends.
 3. Devolution of the servient land, other than through the willful conduct of the servient owner will end the easement
 4. Condemnation of the servient estate will end the easement
 5. Release
 - a. A written release, given by the easement holder to the servient owner
 6. Abandonment
 - a. The easement holder must demonstrate by physical action the intent to never use the easement again
 7. Merge doctrine (unity of ownership)
 - a. The easement is extinguished when title to easement and title to servient land become vested in the same person.
 8. Prescription
 - a. The servient owner may extinguish the easement by interfering with it in accordance with the elements of adverse possession.
- b. The license**
- i. Definition: license is a mere privilege to enter another's land for some delineated purpose*
 - ii. Licenses are not subject to the SoF.*
 1. Thus, you do not need a writing to create a license.
 - iii. Licenses are freely revocable, at the will of the licensor, unless estoppel applies to bar revocation.*
 - iv. The classic license cases*
 1. The ticket cases
 - a. Tickets create freely revocable licenses.

2. Neighbors talking by fence
 - a. An oral easement creates instead a freely revocable license
3. Estoppel will apply to bar revocation only when the licensee has invested substantial money, or labor, or both

c. **The profit**

- i. The profit entitles its holder to enter the servient land and take from it the soil or some substance of the soil.
- ii. The profit shares all the rules of easements.

d. **The covenant**

- i. *Defined: the covenant is a promise to do or not do something related to land. It is UNLIKE the easement because it is not the grant of a property interest but rather a contractual limitation or promise regarding land.*
- ii. *Covenants can be negative or affirmative*
 1. Negative covenants, known as restrictive covenants, are promises to refrain from doing something related to land.
 2. The affirmative covenant is a promise to do something related to land.
- iii. *How to know whether to construe the given promise as a covenant or as an equitable servitude*
 1. On the basis of the remedy that your P seeks. If P seeks money damages, construe as a covenant. If injunction, equitable servitude.
- iv. *When will the covenant run with the land?*
 1. A sells burdened parcel to A-1. B sells benefited parcel to B-1.
 - a. Always analyze the BURDEN side first. Harder for burdens to run.
 - i. Remember **WITIN**:
 1. Writing
 - a. Original promise between A and B must have been in writing.
 2. Intent
 - a. A and B intended that the promise would run
 - b. Courts are generous in finding the requisite intent
 3. Touch and concern the land
 - a. The promise must affect the parties' legal relations as landowners, and not simply as members of the community at large.
 - b. Covenants to pay money to be used in connection with the land, such as homeowners' association fees, and covenants not to compete do touch and concern the land.
 - ii. Horizontal and vertical privity: both needed for burden to run
 - a. Horizontal privity refers to the nexus between the original promising parties (A and B). It requires that they be in succession of estate, meaning that they were in a grantor-grantee or landlord-tenant or mortgagor-mortgagee relationship.
 - b. Vertical privity refers to the nexus between A and A1. It simply requires some non-hostile nexus, such as K, devise, descent. The only time that vertical

privity will be absent is if A-1 acquired her interest through adverse possession.

5. Notice

a. A-1 had notice of the promise when she took.

b. Second, does the benefit of A's promise to B run from B to B-1?

i. Remember **WITV**:

1. Writing

a. Original promise between A and B was in writing

2. Intent

a. Original parties intended that the benefit would run

3. Touch and concern

a. Promise affects parties as landowners

4. Vertical privity

a. Some non-hostile nexus between B and B-1

b. Horizontal privity is NOT required for the benefit to run.

e. Equitable servitudes

i. *Defined: the equitable servitude is a promise that equity will enforce against successors. It is accompanied by injunctive relief.*

ii. *To create an equitable servitude that will bind successors:*

1. Remember **WITN(ES)**.

a. Writing

i. Generally, but not always, original promise was in writing

b. Intent

i. Parties intended that the promise would bind successors

c. Touch and concern

i. Promise affects parties as landowners

d. Notice

i. The successors of the burdened land had notice of the promise

e. Note: privity is not required to bind successors.

iii. *The implied equitable servitude – the general or common scheme doctrine:*

a. A subdivides her land into 50 lots. She sells lots 1 through 45 through deeds that contain covenants restricting use to residential purposes. A then sells one of the remaining lots to a commercial entity, B, by deed containing no such covenant. B now seeks to build a convenience store on his lot. Can he be enjoined from doing so?

i. Yes, if the 2 elements of the general or common scheme doctrine apply. Under the common scheme doctrine, the ct will imply a reciprocal negative servitude to hold the unrestricted lot holder to the restrictive covenant.

ii. The 2 elements of the general or common scheme doctrine:

1. When the sales began, the subdivider had a general scheme of residential development, which included D's lot.

2. D lot holder had notice of the promise contained in these prior deeds.

a. There are 3 forms of notice potentially imputed to D (AIR):

- i. Actual notice, meaning D had literal knowledge of the promises in the prior deeds.
- ii. Inquiry notice, meaning the neighborhood conforms to the common restriction (the lay of the land).
- iii. Record notice, meaning the form of notice sometimes imputed to buyers on the basis of the publicly recorded documents.
- iv. With respect to record notice, the acts are split. Some take the view that a subsequent buyer is on record notice of the contents of prior deeds transferred to others by a common grantor. The better view, taken by other acts, is that the subsequent buyer does NOT have record notice of the contents of those prior deeds transferred to others by the common grantor.

iv. *Equitable defenses to enforcement of an equitable servitude*

- 1. Changed conditions
 - a. The changed circumstances alleged by the party seeking release from the terms of an equitable servitude must be so pervasive that the entire area has changed.
 - b. What is NEVER good enough? Mere pockets of limited change.

VII. ADVERSE POSSESSION

a. The basic concept

- i. Possession for a statutorily prescribed period of time can, if certain elements are met, ripen into title.
- ii. The elements of adverse possession (COAH):
 - 1. Continuous, uninterrupted use for given statutory period
 - 2. Open and notorious use: sort of possession that usual owner would make given the circumstances
 - 3. Actual use: the entry cannot be symbolic
 - 4. Hostile use: possessor does not have true owner's consent to be there

b. Tacking

- i. One adverse possessor may tack on to his time with the land his predecessor's time, so long as there is privity, which is satisfied by any non-hostile nexus, such as blood, K, deed, will.
- ii. Tacking is not allowed when there has been an ouster.

c. Disabilities

- i. The SoG will not run against a true owner who is afflicted by a disability at the inception of the adverse possession.
- ii. Common disabilities include insanity, infancy, imprisonment.

VIII. LAND CONVEYANCING: THE PURCHASE AND SALE OF REAL ESTATE

- a. Every conveyance of real estate consists of a two-step process.
 - i. Step I: the land K, which endures until step II.
 - ii. Step II: the closing, where the deed becomes our operative document.

b. The land contract

i. The land K and the SoF

1. K must be in writing signed by the party to be bound. It must describe the land and must state some consideration.
2. When the amount of land recited in the land K is more than the actual size of the parcel, buyer's remedy is specific performance with a pro rata reduction in purchase price.
3. *Exception to SoF*
 - a. The doctrine of part performance
 - i. If, on your facts, you have 2 of the following 3, the doctrine is satisfied and equity will decree specific performance of an oral K for the sale of land:
 1. B takes possession
 2. B pays all/part of the purchase price
 3. B makes substantial improvements

ii. The problem of risk of loss

1. Apply the doctrine of equitable conversion.
 - a. Thus, in equity, once the K is signed, B owns the land subject to the condition that he pay the purchase price at closing.
 - b. One important result flows from this: destruction.
 - i. If, in the interim between K and closing, Blackacre is destroyed through no fault of either party, B bears the risk of loss unless the K says otherwise.

iii. Two implied promises in every land K

1. Seller promises to provide marketable title at closing

The standard: title free from reasonable doubt, free from lawsuits and the threat of litigation

 - a. Three circumstances will render title unmarketable
 - i. **Adverse possession**: if even a part of the title rests on adverse possession, it is unmarketable. Seller must be able to provide good record title.
 - ii. **Encumbrances**: marketable title means an unencumbered fee simple. Thus, servitudes and mortgages render title unmarketable, unless the buyer has waived them.
 - iii. **Zoning violations**: title is unmarketable if Blackacre violates a zoning ordinance.
2. Seller promises not to make any false statements of material fact
 - a. The majority of states now also hold seller liable for failure to disclose latent material defects.
 - i. Seller is liable for his material omissions.
 - b. If the K contains a general disclaimer of liability, disclaimer will NOT excuse seller from liability for fraud or failure to disclose.

iv. The land K contain no implied warranties of fitness or habitability

1. The common law norm is caveat emptor (let buyer beware).
2. One exception: the implied warranty of fitness and workmanlike construction applies to the sale of a new home by a builder-vendor.

c. The closing

- i. Our controlling document is now the deed → passes legal title from seller to buyer.
- ii. How does the deed pass legal title from seller to buyer? It must be **LEAD**:

1. **Lawful execution of a deed**

a. The standard

- i. Must be in writing, signed by grantor
- ii. Note: the deed need not recite consideration, nor must consideration pass to make a deed valid.

b. The description of the land

- i. It does not have to be perfect.
- ii. Law requires only an unambiguous description and a good lead.

2. **The delivery requirement**

- a. The delivery requirement could be satisfied when grantor physically or manually transfers deed to grantee.
- b. It is permissible here to use the mail, or an agent, or a messenger.
- c. However, the delivery does not necessarily require actual physical transfer of the instrument itself.
 - i. The standard for delivery is a legal standard and is a test solely of present intent.
 - ii. Ask: did grantor have the *present intent* to be immediately bound irrespective of whether or not the deed itself was literally handed over.
- d. Recipient's rejection of the deed defeats delivery.
- e. If a deed, absolute on its face, is transferred to grantee with an oral condition, the oral condition drops out: NOT provable and delivery is DONE.
- f. Delivery by escrow is OK.
 - i. Grantor may deliver an executed deed to a third party, known as an escrow agent, with instructions that the deed be delivered to grantee once certain conditions are met. Once the conditions are met, title passes automatically to grantee.
 - ii. The advantage of escrow if grantor dies or becomes incompetent or is otherwise unavailable before the express conditions are met, title will still pass from escrow agent to grantee once conditions are met.

3. **Covenants for title and the 3 types of deed:**

a. The quitclaim

- i. It contains NO covenants. Grantor isn't even promising that he has title to convey. This is the worst deed buyer could hope for.
- ii. Seller does implicitly promise in the land K to provide marketable title at the closing.

b. The general warranty deed

- i. The best deed a buyer could hope for.
- ii. Warrants against ALL defects in title, including those attributable to grantor's predecessors.
- iii. Typically contains all 6 of the following covenants. The first 3 are present covenants, meaning: a present covenant is breached, if ever, at the time of delivery. Thus, the SoL for breach of a present covenant begins to run from the instant of delivery. The SoL for breach of a future covenant will not begin to run until the future date when grantee is, if ever, disturbed in possession.

1. The covenant of seisin

- a. Grantor promises that he owns the estate he now claims to convey.
2. The covenant of right to convey
 - a. Grantor promises he has the power to make this transfer.
 - b. Grantor is under no disability and no temporary restraint on grantor's capacity to sell.
3. The covenant against encumbrances
 - a. Grantor promises there are no servitudes or liens on the land.
4. The covenant for quiet enjoyment
 - a. Grantor promises grantee won't be disturbed in possession by a third party's lawful claim of title.
5. The covenant of warranty
 - a. Grantor promises to defend grantee should there be lawful claims of title asserted by others.
6. The covenant of further assurance
 - a. Grantor promises to do whatever future acts are reasonably necessary to perfect the title if it later turns out to be imperfect.
- c. **The statutory special warranty deed**
 - i. Provided for by statute in many states, this deed contains 2 promises that grantor makes only on behalf of himself:
 1. Grantor promises that he hasn't conveyed Blackacre to anyone other than the grantee; and
 2. Blackacre is free from encumbrances made by grantor.
- d. **The recording system**
 - i. O conveys Blackacre to A. Later, O conveys Blackacre to the same parcel to B. O, the double dealer, has skipped town. In the battle of A vs. B, who wins?
 - ii. **Two brightline rules:**
 1. *If B is a BFP and we are in a notice jdx, B wins, regardless of whether or not she records before A does.*
 2. *If B is a BFP and we are in a race-notice jdx, B wins if she records properly before A does.*
 - iii. Recording acts exist to protect only BFPs and mortgagees (creditors).
 - iv. **A BFP is one who:**
 1. *Purchases Blackacre for value; and*
 2. *Without notice that someone else got there first.*
 - v. **Two routine value questions:**
 1. *The bargain/benefit sale:* B paid 50k for Blackacre when its FMV is 100k. B is still a purchaser for value.
 2. *The case of the doomed donee:* recording statutes don't protect donees, heirs, or devisees unless the shelter rule applies.
 - vi. **The 3 forms of notice that a buyer may potentially be charged with are (AIR):**
 1. **Actual**
 - a. Prior to B's closing, B gets literal knowledge of A's existence.
 2. **Inquiry**
 - a. Whether he looks or not, B is on inquiry notice of whatever an exam of the land would show. The buyer of real estate has a duty to inspect before transfer of title to see, for example, whether anyone else is in possession.

- b. If another is in possession, B is on inquiry notice, regardless of whether buyer actually bothered to inspect or not.
- c. If a recorded instrument makes reference to an unrecorded transaction, grantee is on inquiry notice of whatever a reasonable follow up would show.

3. Record

- a. B is on record notice of A's deed if at the time B takes, A's deed was recorded properly.

vii. The recording statutes

1. The notice statute

- a. A conveyance of an interest in land shall not be valid against any subsequent purchaser for value, without notice thereof, unless the conveyance is recorded.
- b. If, at the time B takes, he is a BFP, he wins. It won't matter that A may ultimately record first, before B does. It won't matter in the A vs. B contest that B never records.

2. The race notice statute

- a. Any conveyance of an interest in land shall not be valid against any subsequent purchaser for value, without notice thereof, whose conveyance is first recorded.
 - b. To prevail, B must be a BFP and B must win the race to record.
3. In either a notice or race notice jurisdiction, B's status as a subsequent BFP will be defeated if A had promptly and properly recorded before B takes. In other words, A's proper recordation places later buyers on record notice, thereby defeating their status as BFPs.
4. To give record notice to subsequent takers, the deed must be recorded properly, within the chain of title, which refers to that sequence of recorded docs capable of giving record notice to later takers. In most states, the chain of title is established through a title search of the grantor-grantee index.

viii. Three concrete chain of title problems:

1. The Shelter Rule

- a. One who takes from a BFP will prevail against any entity that the transferor-BFP would have prevailed against. In other words, the transferee takes shelter in the status of her transferor, and thereby steps into the shoes of the BFP even though she otherwise fails to meet the requirements of BFP status.

2. The Problem of the Wild Deed

- a. O sells Blackacre to A, who does not record. Then, A sells to B. B records the A to B deed.
- b. The A to B deed, even though recorded, is not connected to the chain of title because it contains a missing grantor. O to A link is missing from the records, so the A to B deed is a wild deed.
- c. The rule → if a deed, entered on the records (A to B), has a grantor unconnected to the chain of title (O to A), the deed is a wild deed. It is incapable of giving record notice of its existence.
- d. O, our initial double dealer and grantor, then sells Blackacre to C. Assume C has not actual or inquiry knowledge of the O to A or A to B conveyance. C records.
 - i. B vs. C, who prevails?

1. C wins, in both a notice and race-notice state. C wins in a notice state because at the time C takes she is a BFP.
2. C wins in a race-notice because she is first to record who is a BFP.

3. **Estoppel by deed**

- a. One who conveys realty in which he has no interest is estopped from denying the validity of that conveyance if he later acquires the previously transferred interest.

IX. MORTGAGES

- a. C is a creditor who is thinking of lending O 50K. O offers Blackacre as collateral.

i. **How does one create a mortgage?**

1. A mortgage is the conveyance of a security interest in land, intended by the parties to be collateral.
2. **A mortgage is the union of 2 elements:**
 - a. **A debt**
 - b. **A voluntary lien in debtor's land to secure the debt**
3. Debtor is mortgagor; creditor is mortgagee.
4. The mortgage typically must be in writing to satisfy the SoF. This is the legal mortgage.

ii. **The equitable mortgage**

1. O owns Blackacre. Creditor lends C money. The parties understand that Blackacre is the collateral for the debt. However, instead of executing a note or mortgage deed, O hands creditor a deed to Blackacre that is absolute on its face. This is called an equitable mortgage.
2. As between C and creditor: parol evidence is inadmissible to show the parties' intent.
3. If creditor proceeds to sell Blackacre to a BFP, the BFP owns the land. O's only recourse is to sue creditor for fraud and the sale proceeds.

iii. **Once a mortgage has been created, what are the parties' rights?**

1. Unless and until foreclosure, debtor/mortgagor has title and right to possess.
2. Creditor/mortgagee has a lien.

iv. **All parties to a mortgage can transfer their interests.**

1. The mortgage automatically transfers a properly transferred note.

v. **The creditor-mortgagee can transfer his interest by:**

1. **Endorsing note and delivering it to transferee; OR**
2. **Executing a separate document of assignment.**
3. If the note is endorsed and delivered, the transferee is eligible to become **a holder in due course**. This means that he takes the note free of any personal defenses that could have been raised against the original mortgagee.
4. Personal defenses include:
 - a. Lack of consideration
 - b. Fraud in the inducement
 - c. Unconscionability
 - d. Waiver
 - e. Estoppel
5. Thus, the holder in due course may foreclose the mortgage despite any such personal defense. By contrast, the holder in due course is still subject to REAL defenses that the maker might raise.
6. **MAD FIFI(4), the REAL defenses:**

- a. Material;
 - b. Alternation
 - c. Duress
 - d. F
 - e. I
 - f. Fraud in the factum (a lie about the instrument)
 - g. Incapacity
 - h. Illegality
 - i. Infancy
 - j. Insolvency
7. To be a holder in due course of the note, the following criteria must be met:
- a. *The note must be negotiable, made payable to the named mortgagee*
 - b. *The original note must be indorsed, signed by the named mortgagee*
 - c. *The original note must be delivered to the transferee. A photocopy is unacceptable*
 - d. *The transferee must take the note in good faith without notice of any illegality*
 - e. *The transferee must pay value for the note, meaning some amount that is more than nominal.*
- vi. *If O, our debtor-mortgagor, sells Blackacre, which is now mortgaged, the lien remains on the land so long as the mortgage was properly recorded.*
1. On Jan 10, Madge took out a 50k mortgage on Blackacre with First Bank. First Bank promptly and properly recorded its interest on Jan 10. Thereafter, on Jan 15, Madge sold Blackacre to Buyer. Buyer had no actual knowledge of the lien. Buyer promptly and properly recorded its deed.
 2. Does Buyer hold subject to the mortgage? **YES!** All recording statutes apply to mortgages as well as deeds. **Thus, a later buyer takes subject to a properly recorded lien.**
- vii. *Who is personally liable on the debt if O sells Blackacre to B?*
1. **If B has assumed the mortgage, then both O and B are personally liable.**
 - a. B is primarily liable.
 - b. O remains secondarily liable.
 2. **If B takes subject to the mortgage, B assumes no personal liability.**
 - a. Only O is personally liable.
 - b. But, if recorded, the mortgage sticks with the land.
 - c. Thus, if O doesn't pay, the mortgage may be foreclosed.
- b. Foreclosure**
- Assuming that our mortgagee-creditor must look to the land for satisfaction, how must he proceed?
- i. The mortgagee must foreclose by proper judicial action. At foreclosure, the land is sold. The sale proceeds go to satisfying the debt.
 - ii. If the proceeds from the sale of Blackacre are less than the amount owed, mortgagee brings a deficiency action against debtor.
 - iii. If there is a surplus, junior liens are paid in order of their priority. Remaining surplus goes back to debtor.
 - iv. Blackacre has a FMV of 50k and is subject to 3 mortgages executed by its owner, Madge. First Bank, with first priority, is owed 30k. Second Bank, with second priority, is owed 15k. Third Bank, with third priority, is owed 10k. Assume that First Bank's mortgage is foreclosed, and that Blackacre is sold for 50k. How will the funds be distributed?
 1. Attorney's fees, foreclosure expenses, any accrued interest on First Bank's lien.

2. The sale proceeds are then used to pay off the mortgages in the order of their priority. Each claimant is entitled to satisfaction in full before a subordinate lienholder may take. Thus, First Bank takes 30k, Second Bank takes 15k. Remaining balance is applied to 3rd bank → 5k. Third Bank should be able to proceed for a deficiency judgment.

c. **Effect of foreclosure on various interests**

i. ***Foreclosure will terminate interests junior to the mortgage being foreclosed but will not affect senior interests.***

1. This means that junior lienholders will be paid in descending order with the proceeds from the sale, assuming funds are leftover after full satisfaction of superior claims. Junior lienholders should be able to proceed for a deficiency judgment. But once foreclosure of a superior claim has occurred, with the proceeds distributed appropriately, junior lienholders can no longer look to Blackacre for satisfaction.
2. Those with interests subordinate to those of the foreclosing party are necessary parties to the foreclosure action.
3. The debtor-mortgagor is also considered a necessary party and must be joined particularly if creditor wishes to proceed against debtor for a personal deficiency judgment.
4. Failure to include a necessary party results in the preservation of that party's claim despite the foreclosure and sale. Thus, if a necessary party is not joined, his mortgage remains on the land.

ii. ***Foreclosure does not affect any interest senior to the mortgage being foreclosed. The buyer at the sale takes subject to such interest.*** This means that the buyer is NOT personally liable on senior debt, but as a practical matter, if the senior mortgage is not paid, soon or later senior creditor will foreclose against the land.

1. Back to hypo above but now it's Second Bank's mortgage that is being foreclosed. First Bank's mortgage exists, but it's either not in default or its holder has not yet taken action to foreclose it.

a. ***Foreclosure does not affect any interest senior to the mortgage being foreclosed.***

b. Thus, foreclosure of Second Bank's mortgage won't affect First Bank's mortgage. First Bank's mortgage will continue on Blackacre in the hands of the foreclosure buyer.

c. The foreclosure buyer is not personally liable to First Bank, but if senior debt is not paid up, First Bank can foreclose on the land. The foreclosure sale buyer has a strong incentive to pay off First Bank.

d. How is bidding apt to proceed at the foreclosure sale brought by Second Bank?

i. Buyer should bid up to 20k, which is the land's FMV minus the amount Buyer has to pay to discharge First Bank's mortgage.

e. How will the proceeds from the sale be distributed?

- i. 15k to Second Bank
- ii. 5k to Third Bank (try for a deficiency action)
- iii. Buyer then pays off 30k owed to First Bank

d. **Priorities**

- i. As a creditor, you must record. No priority until you properly record.
- ii. Once recorded, priority is determined by the norm of first in time first in right.
- iii. ***The purchase money mortgage*** → a mortgage given to secure a loan that enables the debtor to acquire the encumbered land.

1. C lends O 100k so O can purchase Blackacre. C takes as collateral a security interest in Blackacre. C is a purchase money mortgagee. If C properly records, he has first priority as to the parcel he financed.
- iv. **The purchase money mortgagee's superpriority**
 1. C1 lends 200k to O, taking a security interest in all of O's real estate holdings, whether now owned or hereafter acquired. This clause is called *an after-acquired collateral clause* and is permissible.
 2. C1 records the mortgage note. 6 months later, C2 lends O 50k to enable O to acquire a parcel known as Blueacre, taking back a security interest in Blueacre and recording it. Subsequently, O defaults on all outstanding obligations. All that he has left is Blueacre. Who has first priority in Blueacre, C1 or C2?
 - a. C2 has priority as to the parcel it financed, assuming proper recording.
- v. **Subordination agreements are OK. A senior creditor may agree to subordinate its priority to a junior creditor.**
- e. **Redemption**
 - i. **Redemption in equity**
 1. Equitable redemption is universally recognized up to the date of sale. At any time prior to the foreclosure sale, debtor can try to redeem the land.
 2. Once a valid foreclosure has taken place, the right to equitable redemption is gone.
 3. The right of equitable redemption is exercised by paying off missed payments plus interest and costs.
 4. If the mortgage contains an acceleration clause, the full balance plus accrued interest and costs must be paid.
 5. **A debtor-mortgagor may NOT waive the right to redeem in the mortgage itself. This is known as clogging the equity of redemption.**
 - ii. **Statutory redemption**
 1. Recognized in half the states, this gives the debtor-mortgagor a statutory right to redeem for some fixed period after the foreclosure sale has occurred (typically 6 months to one year). Where recognized, statutory redemption applies after foreclosure. The amount to be paid is usually the foreclosure sale price rather than the amount of the original debt.
 2. In most states that recognize this, the mortgagor will have the right to possess Blackacre during the statutory period. When a mortgagor redeems, the effect is to nullify the foreclosure sale.

X. LATERAL SUPPORT

- a. If land is improved by buildings and an adjacent landowner's excavation causes that improved land to cave in, the excavator will be liable **ONLY** if he was **NEGLIGENT**.
- b. Strict liability does not attach to the excavator's actions unless P shows that, because of D's action, its improved land would have collapsed in its natural state.

XI. WATER RIGHTS

a. The 2 major systems for determining the allocation of water in water-courses, such as streams, rivers and lakes:

i. *The riparian doctrine*

1. The water belongs to those who own the land bordering the watercourse.
2. These people are known as riparians, who share the right of reasonable use of the water.

3. Thus, one riparian will be liable if his or her use unreasonably interferes with the other's use.

ii. The prior appropriation doctrine

1. The water belongs initially to the state, but the right to divert it and use it can be acquired by an individual, regardless of whether or not he happens to be a riparian owner.
2. Rights are determined by **priority of beneficial use**. The norm for allocation is **first in time first in right**. Thus, a person can acquire the right to divert and use water from a watercourse merely by being the first to do so. Any productive or beneficial use of the water, including use for agriculture, is sufficient to create the appropriation right.

b. Groundwater, also known as percolating water: water beneath the surface of the earth that is not confined to a known channel

- i. The surface owner is entitled to make reasonable use. However, the use must not be wasteful.

c. Surface waters: those which come from rain, springs or melting snow, and which have not yet reached a natural watercourse or basin

i. The common enemy rule

1. A landowner may change drainage or make any other changes/improvements on his land to combat the flow of surface water. Many states have modified the common enemy rule to prohibit unnecessary harm to other's land.

XII. POSSESSOR'S RIGHTS

a. The possessor of land has the right to be free from trespass and nuisance.

i. Trespass

1. Invasion of land by a tangible physical object.
2. To remove a trespasser, you bring an action for ejectment.

ii. Private nuisance

1. Substantial and unreasonable interference with another's use and enjoyment of land.
2. Unlike trespass, nuisance does not require tangible physical invasion. Thus, odors and noise could give rise to a nuisance, but not a trespass.

XIII. EMINENT DOMAIN

- a. Government's 5th Amend. power to take private property for public use in exchange for just compensation.

b. Explicit takings: acts of governmental condemnation

- i. For example, the government condemns your land to make way for a public highway.

c. Implicit or regulatory takings: a governmental regulation that, although not intended to be a taking, has the same effect (economic wipeout).

d. The remedy for a regulatory taking:

- i. Gov't must either compensate the owner; OR
- ii. Terminate the regulation and pay owner for damages that occurred while it was in effect.

XIV. ZONING

- a. Pursuant to its police powers, government may enact statutes to reasonably control land use.

b. Variance

- i. The principal means to achieve flexibility in zoning. Must show:
 1. Undue hardship

- 2. Variance won't decrease neighboring property values
 - ii. The variance is granted or denied by administrative action.
- c. *The nonconforming use*
 - i. A once lawful, existing use now deemed nonconforming by a new zoning ordinance. It cannot be eliminated all at once unless just compensation is paid.
 - ii. Otherwise, it could be deemed an unconstitutional taking.
- d. *Unconstitutional exactions*
 - i. Exactions are those amenities gov't seeks in exchange for granting permission to build.
 - ii. To pass constitutional scrutiny, exactions must be reasonably related in nature and scope to the impact of the proposed development.

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