

Property Outline

Landlord and Tenant

→ No estate of freehold can commence in the future b/c it can't be created without livery of seisin or corporal possession of the land. Livery of seisin or corporal possession cannot be given when the estate is not to commence now.

Lease

- Transfer of possession and is a right to possession
 - Grant or contract to transfer the right to possession.
 - Typically for a definite term. It is a non-freehold estate
 - There is a reversion to the grantor b/c he does not pass title, rights or interests in the property
 - No particular words of art are necessary to create a lease
- A lease is both a contract b/w the LL and the tenant and a conveyance of an estate from the LL to the tenant
- Nutshell- Lease of land conveys an interest in the land and requires a writing to comply with the SOF and transfers possession

Types of Leases

- 1) A term for years- Tenancy that arises from a lease or rental agreement and that must expire at the end of a certain period
 - a. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery of the lease
 - b. This could occur at a future time. It does not have to start when the lease is executed or delivered
 - c. Term for years must recite the length of the term
 - d. No notice needs to be given for the expiration of the term for years (lease), the lease itself is indicative of the expiration.
- 2) License (**right to use**) - an authorization from the owner to enter premises without liability for trespass
 - a. It is revocable by the licensor
 - b. Conveys no interest in land
 - c. Maybe contracted for orally or expressly
 - d. Cannot be assigned
- 3) Period Tenancy- One that can only be terminated by notice effective at the end of the period specified in the lease.
 - a. Day to day, week to week, month to month etc

- b. Express notice is required to end this type of tenancy.
- c. May be created by express agreement
- d. May also be implied (such as when tenant stays over and LL still collects rent)
- 4) Tenancy at will- not transferable, continues only by mutual agreement and ends at the death of either party
 - a. A tenant in possession under a lease that is void b/c it does not comply with the SOF is a tenant at will
 - b. Ex- a lease where a friend lets another stay rent free
 - c. If there is a notice to terminate- creates a periodic tenancy
 - d. A lease that fails SOF will become a tenancy at will
- 5) Tenancy at sufferance (hold over)- tenant entered into a valid lease but has now held over
 - Ejectment and not trespass is the proper action to regain possession b/c the tenant had rightfully entered at one point
 - a. LL can treat him as a trespasser, evict him and recover damages, or consent to the tenant's continued possession and hold him for a similar term
 - i. For the election to take place, LL must have demanded possession → Hold over must be voluntary on part of the person holding over
 - ii. A tenant can leave the property on the premises so long as what is left does not interfere with the LL's possession.
 - iii. A delay in vacating by the LL excuses the holdover
 - b. If the LL chooses to treat him as a trespasser- does not need to give notice to the tenant and can oust him at any time
 - i. The tenancy has no definite term and can be terminated at the will of either party.
 - ii. Once the LL elects to treat the tenant as a trespasser, the LL cannot change the election once made and communicated to the tenant
 - c. If the LL elects to treat the tenant as having renewed, then must decide the length of the term.
 - i. Most courts will likely to hold the tenant over for only a year.

The election is not an automatic one

→ The LL must exercise the election by accepting rent, or suing for rent, or with a notice that clearly indicates an intent to establish a new lease.

English and American Rules

English Rule

- Requires that the LL deliver actual possession to the tenant
 - a. It only extends to the period beyond the day when the lessee's term begins.
 - a. If a stranger comes on the second day, then the tenant has a COA against the stranger and not the LL at that point.

Lessee can also protect oneself by having his lessor expressly covenant to put him in possession at a specified time in which case, the lessor would be liable.

Advantages of this rule:

- a. Conforms to most tenant's expectations b/c otherwise, LL might take advantage of the tenant's ignorance of the law
- b. Requires that the LL bargain for any variation in the rule rather than the tenant
- c. Requires the LL to use his legal expertise to evict the hold over
- d. It construes the lease against the LL

American Rule

→ Requires that the LL only deliver the right to possession and not actual possession to the tenant at the beginning of the lease

- a. If the LL wants to grant the tenant additional rights then the parties should bargain over such matters.
- b. Remedy is limited to damages rather than specific performance of the covenant
- c. LL is not responsible in this case b/c LL had not covenanted against the wrongful acts of another and should not be held responsible for a tort unless he has expressly contracted to it

Once either rule is adopted, tenant still has the option to either:

- 1) Not rent and pay for the time he has been denied actual possession and sue the LL and/or the third party holdover for damages
- 2) Reject the lease and sue for damages

→ Danger- when rejecting lease, lawyers should avoid language (communications to the LL that indicate the tenant is attempting to terminate the lease and then later suing for damages)

- Lawyers should advise that the tenant intends to rescind the lease (rescission tends to put the parties back in the position prior to the execution of the lease- expectation damages might be appropriate b/c the prior position for the tenant would have been an expectation of renting the lease at the contract tent)

Transfers of the Lease

- A. Privity of contract- Privity is a relationship existing between both parties to a contract. Both the LL and the tenant have an immediate, simultaneous existing relation to each other b/c of the lease. It is the rights and obligations of the LL and tenant arising out of such express lease covenants. Ex- rental payments and maintaining the premises
- B. Privity of Estate- Both the LL and the tenant have a mutual, immediate, and simultaneous interest in the title to the leased premises (the tenant having the right to possession for a term and the LL having the reversion after the term). This is the rights and obligations of the LL and tenant growing out of the conveyance.

- a. Privity of estate permits a LL to collect rent from the tenant's assignee, even though there is no direct contract b/w them.

→ Landlord and tenant relationship from the outset involves both privity of estate and privity of contract

Assignments and Subleases

→ Certain rights and obligations created by express stipulation b/w original LL and tenant directly affect the land or the estate and are thus deemed to be so intimately connected to the leasehold estate that they are said to "run with the land."

Ex- Promises to pay rent, make repairs, maintain common areas, refrain from waste, and to make certain uses of the premises

→ A relationship based on privity of estate incorporates those covenants created by the original LL and tenant's contract that run with the land

- An assignee of the original tenant is in privity of estate with the original LL and is bound by the original tenant's contractual promise to maintain the premises despite the fact that the assignee never makes any specific promises to the LL.
- A. **Assignment**- Transfer of the whole of the unexpired term, along with the whole estate or interest of the tenant for that term. Transfers the original tenant's leasehold estate to the assignee who becomes the new owner of the original leasehold
 - a. It does not have to be a transfer of all of the premises
 - b. Since the original tenant no longer owns any leasehold estate in the property, privity of estate b/w the original LL and the tenant are destroyed
 - c. There is still privity of contract
- B. **Sublease**- It is a partial transfer of the unexpired term.
 - a. It is an independent transaction creating a wholly new landlord-tenant relationship with the sublessor and sublessee
 - b. It creates a new and distinct leasehold estate in the sublease b/w the original tenant and the subtenant.
 - i. There is a privity of estate and privity of contract b/w the two
 - ii. The original LL and tenant are still in privity of estate and privity of contract with each other

Distinguish b/w assignment and a sublease

- A. **If the original tenant retained an interest or estate in the premises- Sublease**
 - a. Retention of a right of re-entry or a possibility of reverter by the original tenant signifies sublease
 - b. Tenant's right to re-enter the premises for a breach of particular covenants in the original lease in order to preserve that lease would likely be held as a sub lease
- B. **If the original tenant did not retain an interest or estate in the premises- assignment**
- C. Also look at the parties' intentions as evidenced by the totality of the factors and circumstances surrounding the transfer.

- a. These circumstances include the duration of the transfer, the title and form of the document of transfer, and the existence of new or different covenants in the transfer.

→ Privity of contract exists b/w the tenant and the LL even after the tenant transfers the lease (by assignment or subleasing) unless the LL expressly agrees to substitute the transferee for the tenant

Assumption and Novation

Assumption- The assignee is not otherwise bound by the terms of the lease b/w the original LL and the transferring tenant unless there is an assumption by the assignee of the tenant's contractual obligations to the LL under the lease.

- To the extent to which the assignee assumes any or all of the tenant's contractual obligations, privity of contract exists b/w the LL and the assignee.
- The assignment of a lease by the tenant to an assignee creates privity of estate b/w the LL and the assignee who is now in possession.
 - i. The assignee is liable only for those duties arising out of the estate those of the original tenant's covenants that are regarded as attaching to and running with the estate.

→ For an assumption to occur, the assignee must expressly agree to be bound by the tenant's lease.

- Even after an assumption by the assignee, the tenant and LL remain in privity of contract.
 - Since the LL is in privity of contract with both the assignee and tenant, he can sue either party in contract to enforce the lease provisions.
 - The mere acceptance of an assignment is not an assumption. Every assignment requires acceptance, yet an assignee, who does not assume the performance of the covenants of the lease holds the lease merely under a privity of estate.
 - Before there is privity of contract b/w the assignee and the lessor, there must be an actual assumption of the lease.

Novation- When the LL expressly releases the tenant from his contractual obligations under the lease and substitutes the assuming assignee in the tenant's place.

- This extinguishes privity of contract b/w the LL and the tenant
- Novation needs to be expressly created

→ As a result of the assumption by the assignee and the novation by the LL, the assignee completely takes the place of the original tenant and is exclusively in privity of estate and contract with the LL.

Real Covenants

“Run with the land.”

3 Legal factors arise to create a liability running from the assignee of a leasehold to the lessor

- a) Privity of estate
- b) Covenants in the lease running with the land
- c) Actual assumption of the covenants of the lease by the assignee.
 - a. An assignee is bound by privity of estate to perform the express covenants which run with the land but in the absence of express agreement on his part, he is liable only on such covenants as run with the land and only during such time as he holds the term.

→ Real covenants are those obligations or burdens that attach to the estate of interest of its promisor

- a. A real covenant will bind any successor of the promisor for the period of time he or she holds the estate of the promisor.
- b. The promisee's successors also have the right to enforce the benefit of the covenant.

Requirements for ascertaining whether the covenants are real or personal involve:

- 1) The intention of the original promisor and promisee that they bind the successors to the interests
- 2) Privity of estate (always present with a chain of assignments b/w original LL and any later assignee in possession)
- 3) The subject of the covenant must touch and concern the land
 - a. A use restriction imposed in the lease generally touches and concerns the land

LL's Consent to a Sublease or Assignment

- A tenant has the right to alienate his or her interest in the estate absent a provision in the lease to the contrary
 - i. The tenant's right to sublet or assign may be restricted by an express provision of the lease, so long as the provision embodies a reasonable restriction of transfer.

Waste, Repair and Destruction of Leased Premises

Action for waste- usually involves a change in the physical identity of the premises

Two principal types of waste:

A. Voluntary and intentional- Direct, willful, or intentional injury to the premises.

- ◆ Voluntary waste is a use of the premises sufficient to injure the LL's reversion.
- ◆ Absent a lease provision to the contrary, a tenant may make temporary changes in the premises when
 - a) they are consistent with the tenant's use of those premises
 - b) can be paid back over the remaining term of the lease

- c) the changes do not affect the walls, foundation or roof and
- d) the premises are restored to their original condition w/o material damage.

→ The tenant may make temporary, non material changes to the premises w/o incurring liability for waste

- Material changes, even if improvements, are considered to be waste- meliorating waste

B. Permissive- Result of neglect or omission.

- ◆ Removal of fixtures could be permissive waste
 - If removal substantially injures the premises, it is permissive waste
- A tenant's liability for permissive waste turns on the LL's establishing a duty to repair and substantial injury caused by the breach of that duty.
 - Failing to establish the duty is grounds for dismissal of a LL's complaint.

→ Tenant has a duty not to injure the landlord's reversion

C. Innocent Waste- An injury through accident or acts of a third party when it cannot be said that there was any act or negligence on the part of the tenant

Covenants v Conditions

- A. **Conditions**- Affects the title. Go to the beneficial enjoyment, the right of exclusive possession, the enjoyment of the estate in real property.
- a. If someone does or fails to do this condition, then the estate can be commenced, enlarged or defeated
 - b. If you want a condition, you must make it clear. The best way to do this is to make it in a separate document.

C. **Covenants**- Affects the use. They do not restrict an estate. They are simply contracts of a special nature and extrinsic obligations giving rise to rights and remedies extraneous to the substance with which leases, rental agreements and tenancies deal

Illegality and Frustration of Purpose

A. Illegality

→ A lease may be illegal at its inception b/c it is executed in contravention of public policy

B. Frustration

→ Where the purpose of the contract is completely frustrated and rendered impossible of performance by a supervening event or circumstance, the contract will be discharged.

3 elements to determine frustration:

- 1) Whether the intervening act was reasonably foreseeable (so the parties could and should have protected themselves)
 - Courts have held that if the parties could have reasonably foreseen the event, then they were obligated to make provisions in their contract protecting themselves against it.
- 2) Whether the act was an exercise of sovereign power- whether the act was one by a superior force. Was it by their doing or was it by some unforeseen force.
- 3) Whether the parties were instrumental- was it the parties themselves or some other force took control.
 - There must be no value to the lessee anymore

→ Frustration is not a form of impossibility

- Here, performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed
- Doctrine of frustration has been limited to cases of extreme hardship

Courts have required a promisor seeking to excuse himself from performance of his obligations must show that:

- 1) The risk of the frustrating event was not reasonably foreseeable
- 2) The value of the counter performance is totally or nearly totally destroyed

The Covenant of Quiet Enjoyment

→ The tenant's right to quiet, peaceful and enjoyable use of the premises.

- The law implies a covenant of quiet enjoyment which obligates the LL to refrain from interferences with the tenant's possession during the tenancy.

The LL's conduct and not his intentions are controlling

- Courts have found a constructive eviction where the LL fails to perform a lease covenant, fails to perform statutory obligations, or fails to perform a duty that is implied from the circumstances
- A. Constructive eviction is an affirmative defense.
 - It is not an actual eviction. No actual physical deprivation takes place
 - A constructive eviction occurs when the LL so deprives the tenant of beneficial use or enjoyment of the property that the action is tantamount to depriving the tenant of physical possession.
 - There has to be some interference less than an actual eviction by the landlord

Elements of constructive construction:

- 1) Must be an offending situation**
 - 2) Must result in substantial interferences to the use and interferences of lease**
 - 3) Within the LL's power to remedy the situation**
- The basis of constructive eviction is the covenant of quiet enjoyment
 - The LL's general breach of the covenant of quiet enjoyment, even if not substantial enough to constitute a constructive eviction, still entitles the tenant to damages
- B. Partial Actual Eviction- occurs when the LL deprives the tenant of physical possession of some portion of the leased property, including denial of access to the leased premises
- C. The covenant of quiet enjoyment- A breach of the covenant of quiet enjoyment occurs when the LL substantially interferes with the tenant's beneficial use or enjoyment of the premises

Covenant to Repair

Traditional Rule- Absent a covenant or statute imposing a duty to repair, the LL has no duty to repair premises

- ◆ Exception to this rule exists for common areas of multi-unit premises,
 - A. A tenant has a duty to make such repairs as will avoid liability for waste of the premises
 - B. Avoiding waste often means making minor repairs
 - C. Law of waste is often seen as the basis for tenant's duty to repair

→ Courts will look to the intention of the parties as created in the lease.

- ◆ If a word such as fire is written in there, then that will be construed to mean fire caused intentionally, accidentally or even through natural causes.
 - i. If want to avoid this liability, then expressly contract out of it while creating the lease

The general obligation of the lessee to repair and his covenants to do so are not to be enlarged beyond their fair intent, and the tenant should not be held responsible for any damages in case of injury or destruction not anticipated, contemplated or intended when the lease was made, and the usual and commonly accepted meaning of the words used in ordinary transactions of life should be given to the language used in the covenant.

The Implied Covenant of Habitability

- Traditionally, a tenant's covenant to pay rent and the LL's covenant to repair the premises have been regarded as independent covenants.
- This has been adopted in many J's to protect the tenants as the party in the less advantageous bargaining position

- ◆ The LL will not be liable for defects caused by the tenant.
- ◆ The LL must have a reasonable time to repair material defects before a breach can be established
- ◆ The LL does not have to maintain the premises in perfect condition.

→ **The warranty of habitability requires that the LL maintain “bare living requirements” and make sure that the premises are fit for human occupation.**

- ◆ The deficiencies must be something major and not just minor deficiencies
 - Only a significant breach of a covenant material to the purpose for which the lease was consummated justifies a lessee in abating rent.
 - Temporary or minor breaches of routine covenants by a lessor do not.
- Substantial compliance with building and housing code standards will generally serve as evidence of the fulfillment of a LL’s duty to provide habitable premises
- Evidence of a violations of health and safety will often sustain a tenant’s claim for relief
 - A code violation is not necessary to establish a breach so long as the claimed defect has an impact on the health or safety of the tenant

The payment of rent by the tenant and the LL’s duty to provide habitable premises are dependant covenants.

Once the LL has breached his duty to provide habitable condition, there are 2 ways the tenant can treat the duty to pay rent.

- 1) Tenant can continue to pay rent- can keep paying the full rent and then can bring an affirmative action to establish the breach and receive a reimbursement for excess rent paid
- 2) Tenant can withhold rent- this motivates the LL to repair the damages

Damages

-Special damages may be recovered when, as a foreseeable result of the LL’s breach, the tenant suffers personal injury, property damage, relocation expenses, or other similar injuries

Measuring damages- Fair rental value of the premises as warranted less their fair rental value in the unrepaired condition.

Percentage Diminution Approach- the tenant’s recovery reflects the percentage by which the tenant’s use and enjoyment of the premises has been reduced by the uninhabitable conditions.

- ◆ The tenant’s use of the warranty is contingent on affording the LL notice of the defects on the premises and a reasonable time to repair them

- A. The lease of a residential dwelling creates a contractual relationship b/w the landlord and the tenant → The standard contract remedies of rescission, reformation and damages are available to the tenant when suing for breach of implied warranty of habitability

1. The measure of damages shall be the difference b/w the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition
2. In determining the fair rental value of the dwelling as warranted, the court may look to the agreed upon rent as evidence on this issue

B. Damages should also be allowed for tenant's discomfort and annoyance arising from the LL's breach of the implied warranty of habitability

- C. The covenant to pay rent under a commercial lease is dependant on the lessor's compliance with those covenants necessary to provide the lessee with the benefits that were the essence of the bargain as reflected in the lease

When withholding rent, the tenant must show that:

- 1) The LL had notice of the previously unknown defect and failed, within a reasonable time, to repair it
- 2) The defect, affecting habitability, existed during the time for which the rent was withheld
 - a. Once the LL corrects the defect, the tenant must start to pay the rent again

- D. When the LL is notified of a defect but fails to repair within a reasonable time, and the tenant subsequently repairs the defect, the tenant may deduct the expense of the repair from future rent

Landlord's Tort Liability

- ◆ LL is not liable for personal injury to a tenant's personal property that results from dangerous conditions on the premises
 - **Except-** for those conditions known to the LL and not obvious to the tenant upon a reasonable inspection of the premises.

→ A LL's breach of an express covenant to repair, or of an implied warranty of covenant to repair uninhabitable conditions may give rise to the liability for consequential damages including:

- ◆ Personal Injuries resulting from dangerous and uninhabitable conditions.

Modern case law limits the liability of a LL for injuries arising from a defective condition existing at the time of the lease to 6 recognized exceptions:

- 1) Undisclosed dangerous conditions known to lessor and unknown to the lessee.
 - a. A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, if

- i. The lessee does not know or have reason to know of the condition or the risk involved and
 - ii. The lessor knows or has reason to know of the condition and realizes or should realize the risk involved and has reason to expect that the lessee will not discover the condition or realize the risk.
 - b. If the lessor actively conceals the condition, the liability stated in subsection (1) continues until the lessee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions
- 2) Conditions dangerous to persons outside of the premises.
 - a. A lessor of land who transfers its possession in a condition which he realizes or should realize will involve unreasonable risk of physical harm to others outside of the land, is subject to the same liability for physical harm subsequently caused to them by the condition as though he had remained in possession
- 3) Premises leased for admission of the public.
 - a. This arises when the land is used to admit the public
 - b. The lessor is under an affirmative duty to exercise reasonable care to inspect and repair the premises before possession is transferred to prevent any unreasonable risk or harm to the public who may enter
 - i. A lessor who leases land for a purpose which involves the admission of the public is subject to liability for physical harm caused to persons who enter the land for that purpose by a condition of the land existing when the lessee takes possession if the lessor
 - 1. knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons and
 - 2. has reason to expect that the lessee will admit them before the land is put in safe condition for their reception and
 - 3. fails to exercise reasonable care to discover or to remedy the condition or otherwise to protect such persons against it

4. Parts of land retained in lessor's control which the lessee is entitled to use

a. When different parts of a building, such as an office building or an apartment house, are leased to several tenants, the approaches and common passageways normally do not pass to the tenant but remain in the possession of the LL. Hence, the lessor is under an affirmative duty to exercise reasonable care to inspect and repair those parts of the premises for the protection of the lessee, members of his family, his employees, his guests, invitees and others on the land in right of the tenant

5. Where the lessor contracts to repair

a. A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if

- 1) the lessor has contracted by a covenant in the lease or otherwise to keep the land in repair and
- 2) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented and
- 3) the lessor fails to exercise reasonable care to perform his contract

6. Negligence by lessor in making repairs

a. When the lessor does in fact attempt to make repairs, whether he is bound by a covenant to do so or not, and fails to exercise reasonable care, he is held liable for injuries to the tenant or others on the premises in his right, if the tenant neither knows nor should know that the repairs have been negligently made

b. If the lessee knows or should know that the repairs have not been made or have been negligently made, then the lessor is not liable under this exception

Transfer Restrictions

The interests of the LL and of the tenant in the leased property are freely transferable unless

- 1) A tenancy at will is involved
- 2) The lease requires significant personal services from either party and a transfer of the party's interest would substantially impair the other party's chances of obtaining those services or
- 3) The parties to the lease validly agree otherwise

→ A restraint on alienation w/o consent of LL of the tenant's interest in the leased property is valid, but the LL's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the LL an absolute right to withhold consent.

- Modern trend is to impose the reasonableness standard on the LL withholding consent to a sublease unless the lease expressly states otherwise

Silent Consent- When one can't sublease or assign without the LL's consent. Here there is no standard governing the LL's decision. Courts must insert a standard.

- Public policy demands that LL should act reasonably and the courts should not imply a right to act arbitrarily.
- If two interpretations can be made, then public policy would favor the interpretation that is the least restrictive of the right to alienate freely.
- o If want the LL to act arbitrarily, then must say so expressly in the silent consent leases

Some factors that can be looked at to decide what is reasonable:

- 1) The proposed assignee's financial responsibility
- 2) The suitability of the proposed use
- 3) The need for alteration of the premises
- 4) The nature of the occupancy

→ A LL may withhold consent if he is to be at an economic disadvantage such as when the proposed transfer would reduce the benefits the LL bargained for in the original lease.

- The LL cannot withhold consent in order to improve his economic position such as by securing a benefit that he did not bargain for in the original lease.
 - i. A refusal to specify reasons for withholding consent and failure to act on a request for consent within a reasonable time constitute an unreasonable withholding of consent.
 - ii. When faced with an unreasonable withholding of consent, tenant may proceed to transfer her leasehold interest without consent but she has the burden of proving the unreasonableness of the withholding

→ If a tenant wrongfully transfers w/o the required consent of the LL, the transfer is valid.

- The LL is limited to an action for damages. To avoid this, LL may want to couple a consent provision with a clause that gives him the power to terminate the leasehold and capture possession of the premises if the tenant or her transferee attempts a transfer without his consent

Rule in Dumpsor's Case

Provides that when a LL consents to an assignment, the lease clause prohibiting an assignment w/o LL's consent is extinguished from that point on.

- An assignee can then freely reassign w/o LL's consent

The rule does not apply to:

- a) Prohibitions against subleasing
 - b) Lease provisions that do not expressly bind assigns or
 - c) Cases where the LL expressly conditions his consent on the need to obtain his consent again for any further assignment
- When a person other than the lessee is in possession of leased premises paying rent to the lessor, there is a presumption that the lease has been assigned to the person in possession.
 - The occupation of the premises and the payment of the rent should be sufficient to take the case out of the SOF
 - If the covenant is binding on an assignee, it should make no difference whether the assignment is express or implied
 - To bind the assignee of a leasehold, the covenant must "touch and concern" the land

How to determine when something “touches and concerns the land”

- a) If the promisor’s legal relations in respect to the land in question are lessened, his legal interest as owner are rendered less valuable by the promise,
- b) If the promisor’s legal relations in respect to that land are increased, his legal interest rendered more valuable by the promise
 - a. A covenant to pay rent touches and concerns the land

*****If the covenant effects the legal relations, then it must touch and concern the land*****

One is more likely to find that a covenant is real when it attaches to a lease.

Elements of a real covenant are:

- 1) Parties must have the intent that the covenant is real and that the remote parties be bound
 - a. If the covenant is a real one then it binds remote parties.
- 2) There must be privity of estate

****If the head lease is terminated, then the sublease is terminated****

Bankruptcy:

- a) Unexpired leasehold interests, including subleases, constitute property of the bankrupt estate
- b) If action taken against the non-bankrupt party would have an adverse effect on property of the bankrupt estate, then such action should be barred by the automatic stay.

Termination

A. Notice of termination

- a) An estate or term for years ends without further notice at the time agreed in the lease. In some states, further notice is required not to end the lease
- b) Notice is required for terminating a periodic tenancy
- c) If the notice to terminate the lease is given during the same month in which the quit is to take place, it will be effective as of the end of the month following the month in which the short notice was given
 - i. The requirement of a month’s notice is intended to give the LL a reasonable opportunity to secure another tenant
- d) Tenancy at will may be ended by either party w/o advance notice, and by operation of law when either party dies or the LL’s or the tenant’s title or interest is assigned
 - i. The tenant’s interest ends when the tenant commits waste
- e) Tenancy at sufferance- there is no tenancy end notice that needs to be given.
 - i. Usually the holdover tenant must give a 30 day notice

B. Surrender and Abandonment

→ When a tenant surrenders possession of the premises or abandons the property, LL in a majority of the states has an election to make

- 1) Treat the lease as terminated, retaking possession for the LL's account and ending further liability of the tenant
- 2) Retake possession for the tenant's account and as the tenant's agent, hold the tenant liable for the difference b/w the agreed rent and what the LL is able to recover in good faith from a new tenant or
- 3) Do nothing, holding the tenant liable for the rent as it falls due

Upon the tenant's abandonment or surrender, LL has a duty to mitigate the tenant's damages and should make a good faith effort to re-let the premises on substantially the same terms and conditions for the remaining portion of the term.

→ Ground for anticipatory repudiation is a clear statement on behalf of the breaching party to terminate.

- A partial breach + a positive statement of repudiation gives the right to collect the rent all together (Sagamore case, where the tenant says he will not pay any rent)
 - The way to get around the collection by installment issue is to put something in the lease that says that upon breach will collect the entire rent
- a) Also, if the LL enters and re-let and the lease is silent on this issue, the LL is then presumed to have made a new deal and he can forget about getting the difference money from the tenant
 - i. Here, he would have been presumed to have accepted the surrender of the lease
- b) If the market is rising, then the LL may not want to sit around and wait to collect rent.
- c) The covenant to pay rent at fixed installments is a contract to pay in installments and the failure to pay any installment of rent as it falls due would constitute a partial breach of the lessee's contract
 - i. But when such a partial breach is accompanied by a repudiation of the entire contract, the promise may treat it as a total breach.
 - ii. To avoid the rent installment problem, LL typically insert an acceleration covenant- this declares that upon a specified default, or any default of the payment, the entire rent for the remainder of the term is immediately due and payable.
 - iii. A minority of the states hold that the LL has no duty to mitigate the damages when a tenant abandons the property.

LL has a duty to make reasonable efforts to mitigate damages upon tenant's abandonment only if:

- 1) **LL actually re-enters**

- 2) **The lease allows the LL to re-enter the premises w/o accepting surrender, forfeiting the lease, or being construed as evicting the tenant.**
 - a. **A suit for anticipatory repudiation, an actual re-entry, or a contractual right of re-entry subject to the above conditions will give rise to the LL's duty to mitigate damages upon the tenant's breach and abandonment.**
- a) The LL is not required to simply fill the premises with anyone, the replacement must be a suitable one.
 - b) The LL's failure to use reasonable efforts to mitigate damages bars the LL's recovery against the breaching tenant only to the extent that damages reasonably could have been avoided
 - c) The amount of damages that the LL actually avoided by releasing the premises will reduce the LL's recovery

→ Requiring mitigation in the LL-tenant context discourages economic waste and encourages productive use of the property. It also helps prevent destruction or vandalism of the unoccupied property.

- 1) Anytime a tenant abandons, privity of estate is destroyed.
- 2) If destroy privity of estate, then may not have destroyed covenant to pay rent b/c that runs with the land
- 3) Acceptance of surrender terminates privity of estate b/w the parties while leaving privity of contract unaffected (if the LL has made a reasonable effort to mitigate the damages. If not then his recovery would be less that would have happened if he had done that)

Surrender- requires the consent of both the LL and the tenant. If the LL elected to accept the surrender of the premises upon abandonment then the lease was terminated and there was no obligation to pay rent. The LL must indicate that he does not accept the surrender

- The LL could also decline this and continue to hold the tenant liable for rent.
- Surrender can be express or by operation of law.

Holdover Tenant

→ A tenant at sufferance who came legally but overstayed.

- The tenant remains in possession until the LL makes an election
 - Can reject the tenant as a trespasser- can recover damages by holding over
 - Can accept the tenant for additional term (does not have to be identical term)
 - A constructive acceptance is evidenced by the LL's acceptance of rent when it is due
 - An election is irrevocable
 - Once the LL makes his election, new tenancy arises irrespective of consent, intentions of tenant
 - Law says that for involuntary holding over- when the tenant wants to vacate but is prevented from doing so b/c of things beyond control, she is excused

- The usual measure of damages for the LL is the reasonable rental value for the duration of the holdover.
- LL must make the election within reasonable amount of time

Self-Help

- a) No LL is authorized to use force to regain possession
- b) Majority of states hold that LL is granted a remedy of self help for retaking of possession when the LL 1) has a right to possession and 2) the LL's exercise of the remedy is peaceful.

Retaliatory Eviction

→ LL must prove by clear and convincing evidence that the action taken is not retaliatory

- LL can't evict people b/c they complained about a housing code violation etc.
- The LL should be given a reasonable time to make the repairs

Security Deposits

→ Usually meant to secure performance of a rental agreement

- a) LL shall return within one month after termination of a lease etc the full security deposit unless it specifies a longer period but no more than 60 days.
- b) No security deposit may be retained for normal wear and tear
- c) When retaining money, should give in writing what the reasons are
- d) A LL who foresees a dispute with a tenant about a deposit may tender a refund check with restrictive language above the endorsement line on the back stating that the endorsement is full settlement of any dispute and evidence of satisfaction of the LL's statutory or contractual obligations
- e) Be careful of the difference b/c security deposits and reservation deposits (Mountain Queen)

Land Conveyancing

4 steps for land sales:

- 1) Landowner retains the services of a real estate agent
 - a. The agent can facilitate sale by marketing the property, negotiating the sale agreement, arranging for a title examination, and providing other services
- 2) Once a buyer is found, the buyer and the seller into a contract of sale
 - a. Usually the sale occurs a few months after in order to give the buyer to get a loan etc
 - b. Both sides agree on a purchase price

- c. Buyer may need to sell his home
- 3) Sale is closed when the conditions in the contract for sale have been satisfied
 - a. At the closing, the seller conveys the title to the property to the buyer by deed and the buyer gives some consideration for it
- 4) The deed is recorded in the property records for the county.

Real Estate Agents

→ The major services of the real estate agents are:

- a) Bringing buyers and sellers together
- b) Assisting them to make informed decisions on whether or not to enter into the sales contract
- c) Assisting them with the terms of any such agreement
- d) They also provide educational roles to the parties since the parties may not be aware of property and its process

Real estate brokers may also provide:

- a) sales of property or casualty insurance as agents of insurance companies
- b) Real estate appraisal
- c) Leasing and management of rental properties
- d) The closing of real estate transactions

→ They are usually paid on commission. Commission is only earned if the buyer is found, a contract purchase is entered into, or the sales transaction is closed and a deed is delivered

MLS idea:

- 1) Pooled marketing arrangement where listing of properties for sale made with any participating broker are circulated to all other brokers participating in the scheme.
- 2) If a listed property is sold, the commission is split half b/w the listing broker (the one with whom the property was originally listed) and the selling broker (one who finds a buyer)
- 3) Participating MLS brokers require exclusive right to sell listings from their clients with the further understanding that the exclusive right extends to sales efforts by all other brokers participating in the MLS scheme.

→ General rule regarding whether a broker is entitled to a commission from one attempting to produce a customer ready, able, and willing to buy upon the terms and for the price given the broker by the owner.

- Usually this has meant that once a customer is produced and offer is accepted by the seller, the commission has been earned even if the sale is not consummated.
 - i. The owner can help himself out of this by expressly saying that will not earn commission until the customer actually takes a conveyance and pays for it

1. In Tristman case, court found language, “special agreement” and “on sale” to act as condition precedents for broker to earn commission.

Get commission when find buyer, agree to sell and when the sale is actually consummated. If the sale is not consummated b/c of a lack of financial ability on part of the buyer there is not right to commission. But, if the failure of completion results from wrongful interference of the seller then the buyer is entitled to commission

- This rule can easily be avoided if there is language to the contrary.

3 types of listing agreements are commonly used:

- 1) Exclusive right to sell
- 2) Exclusive agency
- 3) Open listing

→ Listing agreements are not subject to the SOF b/c they do not convey a property interest. However, many require some form of writing. To satisfy this writing, the agreement must include a legal description of the property and the seller’s and the agent’s signatures

- All other terms can be made out by the reasonableness standard but of course it would help to have things as integrated as possible

Contracts of Sale

→ The execution of a contract of sale for the purchase and sale of real property starts the executory period.

- Here, buyer arranges for the money
- Buyer investigates the property
- Buyer will investigate the seller’ title rights

SOF says that a contract for sale must be in writing and this writing must be signed by the party to be charged or by that party’s agent.

- A contract that will not be closed within one year must be in writing and must be signed to be enforceable.

The writing requirement can be satisfied in 2 ways. The writing must either:

- 1) Specify the parties to the transaction, the legal description to the property and the consideration of the transaction or
- 2) Include all the material terms of the transaction

→ The writing must establish the essential terms to the contract w/o resorting to the parol evidence rule

- Must say with certainty what land it is that needs to be conveyed. The description cannot be vague. It must be said with definiteness and certainty

Equitable Conversion

- Traditional Rule in most states and it applies as soon as the seller and buyer execute a contract of sale
 - i. Unless the contract expressly provides otherwise, the doctrine creates an equitable interest in the property in the buyer.
 - ii. The seller is treated merely as holding the title to the land in trust for the buyer.

Doctrine has 2 functions:

- 1) Accounts for the death of one of the parties to the contract (shows that one of the parties meant to deal)
- 2) To transfer the risk of loss of the property to the buyer
 - a. In minority of states, risk of loss falls on the vendor
 - i. If the property is destroyed by fire etc, the risk of loss falls on the buyer unless the vendor caused the damage
 - ii. If the property is adversely affected by zoning laws etc, loss falls on the buyer.
 - iii. This risk is a surprise to most buyers and many are not aware that they need insurance and stuff
 1. In order to avoid this, can allocate the risk of loss for fire etc before the actual transfer of the legal title

“As is” clauses-

→ This is generally intended to negate the existence of any warranty as to the particular fitness or condition of the property.

- This type of clause simply means that the purchaser must take the premises covered in the real estate sales contract in its present condition as of the date of the contract
 - i. This means that the purchaser must take the property at closing if it is in the same condition as when the parties executed the contract of sale.

Damages:

Where a contract places the risk of loss on the vendor and insubstantial damage to the property occurs without the fault of either party, the purchaser may recover his down payment where the vendor refuses to repair the damage or to give an abatement in the purchase price

- a) Where the risk of loss is on the vendor and the damage is not big, the purchaser can sue for specific performance and the purchase price is abated to the extent the property was damaged.

- b) Where the risk of loss is on the vendor and there is substantial damage to the property, the appropriate remedy is to terminate the contract and return the down payment.

Contract Contingencies

- A contract for sale is rarely completely performed at the moment of its execution.
- It is usually complete with contingency clauses that require the parties to perform a variety of additional actions.

Disclosures about the property

- ***If the vendor and the real estate agent know about a material defect in the property, they have a common law duty in many states to disclose the defect to the purchaser if it is not known by the purchaser and is not reasonably discoverable.***

Time for performance of the contract

- If the contract is silent concerning the closing date or the time to satisfy a condition, the law implies a reasonable time.
 - i. Unless the delay is unreasonably long (if there is a delay), or is the result of bad faith, both parties can still enforce the contract in equity with an action for specific performance.
- When the contract makes time the essence for the closing or for the performance of a condition, timely performance becomes a condition rather than a mere covenant.

Express “Subject to Financing” Contract Terms

These clauses have been construed as constituting a condition precedent to the buyer’s performance

- Many courts use the reasonableness standard to determine the scope of the purchaser’s duties under this clause.
 - Within a reasonable time, taking into the closing date, the purchaser is required to make a reasonable, good faith effort to secure financing from lenders.
 - The contract should specify the loan term, the interest rate, and the loan amount.
- The intent of the financing clause is to protect the buyer from involuntary breach.
- Where the condition precedent of financing is first satisfied, but then fails b/c of some action voluntarily undertaken by the buyer, the risk of the failure of the transaction is properly imposed on the party who so acts, and not upon the innocent seller.

Implied Contract Terms

- A) Implied warranty of habitability is usually implied in every contract for sale
- This extends to the land as well as the improvements on it b/c unsuitable soil can affect the improvements as well as the lots on it.
- B) Implied covenant of marketable title is usually implied in every contract for sale as well
- This means that the title is reasonably free of encumbrances and other title defects and free of the risk of litigation

→ As long as the title is marketable, a person can be compelled in a specific performance act.

Titles become unmarketable in three ways:

- 1) A title is unmarketable if the vendor had title but lost it in an action or proceeding.
- 2) A title is unmarketable if the vendor never acquired title because of a flaw in the chain of title
- 3) A title is unmarketable if there is an encumbrance on the title.
 - a. An encumbrance is a lien or other non possessory interest or a non freehold possessory interest.
 - i. Ex- an encumbrance can be mortgage, mechanic's lien or a judgment lien all of which relate to a monetary claim.
 - ii. Encumbrances can also be easements, irrevocable license, lease, party wall agreement, restrictive covenant, and the rights of cotenants all of which effect the use or possession of the land.

→ The vendor need not have a marketable title until the closing.

- A. When the purchaser or her agent learns that the vendor's title is not marketable before they examine the result of the title search, the purchaser cannot rescind the contract
- This is the case b/c a necessary component of the marketable title covenant is that the vendor must have a title search performed and must present the search results to the purchaser.
 - a. When a time is not specified for the title search to be done, it must be done within a reasonable time.
- C. Majority rule is that the purchaser's agreement to accept a quitclaim deed does not waive the marketable title covenant.
- a) The quitclaim conveys whatever the vendor has

Breaks in the Chain of Title

- A gap in the chain of title caused by adverse possession should be deemed to render the title unmarketable

→ In the absence of clear evidence of adverse possession, a title is unmarketable.

Express Title Standards in Contracts

A purchaser should not rely on the implied covenant of marketable title.

- Instead, the purchaser should provide in the contract that the vendor must present a marketable title “of record.”
 - This provision is satisfied only by a title for which each successive owner recorded the deed or other document by which it acquired its interest in the property.
 - Each link in the chain of title must be documented in the public records.
 - Including the words, “of record” in the contract of sale is important if the purchaser intends to obtain a mortgage loan to acquire or to develop the property

→ An insurable title is generally equivalent to a marketable title.

- A title insurance company will insure over encumbrances for an extra premium.

Contract Remedies

Damages:

→ The traditional measure of damages is nominal- recovery of out of pocket costs

- A. When a vendor’s actions indicate not just ignorance of the status of the title but a total misrepresentation of ownership, the vendor’s bad faith provides a basis for a damage rewards measured by the lost benefit of the bargain
- B. In half the states, consequential or benefit of the bargain damages may be awarded.
 - a. These damages are measured by the difference b/w the contract price and the fair market value of the property on the date of the breach (This is known as “difference money damages”
 - i. When the current market value is higher than the contract price, this remedy provides nothing to the vendor b/c a sale will recoup the loss.
 - ii. The purchaser will recover no damages if the contract price exceeds the current market value b/c the purchaser is out of a bad deal
- C. When the purchaser defaults, in majority of the states, the vendor is entitled to retain a down payment.
- D. Courts will grant specific performance only if the contract of sale is legally binding.
 - a. To be legally binding, the contract must have definitive terms and must be supported by adequate, as opposed to fair, consideration.
 - b. The contract must be mutually binding on the parties, and damages must be an inadequate remedy.
- E. Rescission- cancellation of a contract.
 - a. Grounds for rescission include mutual mistake of fact, failure of consideration, fraud, intentional misrepresentation, undue influence and duress.
 - b. A person seeking rescission must restore or offer to restore all that he received under the contract.

Installment Land Sale Contracts

→ Usually used as a method of seller financing for the sale of land.

- This is good b/c the seller may agree to accept the purchase price in installments over time with interest.
- These are often used when the buyer can't qualify for a loan.
- The vendor maintains title until the last installment is paid.
- Here, the buyer gets possession as soon as the contract is signed.
- ****Buyer should record the installment land contract in the public records since the risk of loss is on the buyer****

Modern Conveyancing

Different types of deeds are characterized by the amount of protection they provide a grantee against title defects.

A. General warranty deed provides the most protection. It includes title covenants for any defect in the title, whether created before or during the grantor's period of ownership. Some of these covenants are covenants of:

- 1) Seisin- warrants that the grantor owns the title that he deed purports to convey.
- 2) Right to convey- Warrants that the grantor has the right to convey the property interest described in the deed.
- 3) Against encumbrances- It warrants against the existence of incorporeal interests such as easements and real covenants and of monetary charges against the land such as mortgages, judgment liens and mechanics' liens
- 4) Warranty and Quiet Enjoyment- They protect against the same types of title defects as the covenants of seisin and against encumbrances.
 - a. The adverse interest holder must assert its rights in the land and this must amount to the level of an actual or constructive eviction
- 5) Further Assurances- Requires the grantor to execute any additional document or take such other action as is necessary to perfect the grantee's interest.

B. Special Warranty Deed- These 6 covenants may or may not be included here.

→ Any limitation on the warranties included in a general warranty deed causes the deed to become a limited warranty deed (special warranty deed).

D. Quitclaim deed- The least desirable type of deed b/c it includes no title covenants

- a) It transfers whatever interest, if any, the grantor has in the property
- b) The grantee has no recourse against the grantor even if he had no interest in the property.

→ Whatever type of deed the parties use, it must be in writing to satisfy the SOF.

- When a writing is required, it must include at least the grantor's and grantee's names, a legal description of the land (must not be vague), words reflecting the grantor's intent to convey the property, and the grantor's signature.

→ Condition subsequents are not favored by courts, and the promise or obligation of the grantee will be construed as a covenant unless an intention to create a conditional estate is clearly revealed by the language of the instrument.

- Where the particular circumstances impose on a person a duty to speak and he deliberately remains silent, his silence is equivalent to a false representation
 - Fraud may exist where there is a concealment of a material fact that should be divulged as well as where there is a positive misrepresentation of a material fact.

→ An equitable cause of action for rescission or cancellation is generally considered to survive the death of the person in whose favor or against whom the cause of action has accrued; and the right to maintain such a suit ordinarily passes to the heirs or to the devisees of the grantor.

- After the death of a person who was a party to a conveyance and who had a cause of action for its cancellation, his devisees under a will admitted to probate disposing of the property in Q would be the proper parties plaintiff in a suit for cancellation of the conveyance

Statutory Short Form Deeds

The common law form includes a habendum clause.

Habendum clause meant to serve two purposes:

- 1) Includes words of inheritance necessary to convey FSA or if less than fee simple, it limited the estate.
- 2) It specifies which title covenants the deed includes

→ Modern law has obviated the need for the habendum clause.

- A deed is now presumed to convey FSA unless it expressly provides otherwise

Deed Covenants

1) Present covenants: Don't run with the land, can't be assigned.

- a) Seisin
- b) Right to Convey
- c) Covenant against encumbrances

2) Future Covenants: Run with the land, descend to heirs and are made transferable to the assignee

- a) Covenants of warranty
- b) Quiet Enjoyment- breached when there is an actual or constructive eviction (until someone with paramount title (as in the case with the 1/3 interest in coal mines) does not interfere with person's possession, there is no actual or constructive eviction
- c) Further Assurances

Present covenants are breached at the moment the deed becomes effective and the SOL begins to run immediately even if the grantee is unaware of the breach.

Future covenants are breached by an actual or constructive eviction.

- 1) Actual eviction- this occurs when a paramount interest holder uses self-help or judicial action to disturb the grantor's possession
 - a. Actual eviction also occurs when the paramount interest holder already has possession of the property when the deed is delivered to the grantee
- 2) Constructive eviction- does not require actual interference with the grantee's possession.
 - a. It does require that the paramount interest holder has asserted its right.
 - Covenant against encumbrances is personal b/w the grantor and the grantee. The remedy for a remote grantee, when the encumbrance has not been removed from the property, is against his immediate grantor, whose recourse is against his grantor and so forth back up the chain of title to the original grantor whose conveyance breached the warranty against encumbrances.

** When a covenant of title runs with the land, all grantors, back to and including the original grantor-covenantor, become liable upon a breach of the covenant to the assignee or grantee in possession or entitled to be in possession at the time, and the latter may sue the original or remote grantor, regardless of whether he has taken from the immediate grantor with a warranty.*

→ Even if a deed is void, if someone gives covenants, those covenants survive by themselves. Even if deed is void, the covenants are independent.

Legal Descriptions

→ Identifies the parcel of land being conveyed by the deed. **The description must be accurately described.**

- The deed does not have to include the complete description.
 - It can incorporate other documents by reference to complete the description

→ Need the legal description at the time of the contract

3 main methods of land description are used: **Page 569**

- 1) The government survey system
- 2) Metes and bounds and
- 3) Recorded Subdivision plat

Government Survey System

- 1) First divided by "principal meridians" which run north-south, and "base lines" which run east-west

- 2) These areas are then subdivided at six mile intervals → The north south lines which run parallel to the principal meridian are called ranges and the east-west lines which run parallel to the base lines are called townships
- 3) Townships also refer to the parcels of land formed by intersections of the range and township lines
- 4) Each 36 mile township is further subdivided into 36 sections.
- 5) A section is a mile on each side and includes 640 acres of land
- 6) The sections are numbered in the northeast, continue to the northwest, then wind east to west

→ This description works well for farms and ranches but it is not well suited to describing irregularly shaped or small lots, such as lots in a residential subdivision.

- It can still be good b/c it provides a fixed public point of reference.

Metes and Bounds

- 1) Starts by identifying a point of beginning at one corner of the property being described
 - a. This point should be established by reference to a relatively permanent and identifiable source (Ex- government survey system, or the intersection of rights-of-way of two streets)
- 2) After identifying the point of beginning, a metes and bounds description gives the call for a boundary line that begins at that point
- 3) The description continues with the call for each successive boundary until the last call closes the legal description back at the point of beginning

Recorded subdivision Plat

→ Usually when someone wants to subdivide a parcel of land into parcels, must comply with the J's subdivision regulation

- 1) They show a plat map with all the proposed locations and boundary lines etc.
- 2) A well drafted legal description will include the recording information for the subdivision plat, so that it can be readily located in the public records.

→ This is commonly used in the metropolitan areas and other areas of significant growth

- There is a strong tendency for the courts to sustain the deed and stick to the 4 corners of the deed b/c it is apparent that the parties intended it that way or else they would not have been involved in the transaction
 - 1) The construction prevails which is most favorable to the grantee- ex the language of the deed is construed against the grantor.
 - i. If the deed contains two descriptions, the grantee can select that which is most favorable to him.
 1. The courts use this b/c they believe that the grantor drafted the deed and if there is an ambiguity, he is to blame himself.
 - 2) If the deed contains two descriptions, one ambiguous and the other unambiguous, then the latter prevails

- 3) Extrinsic evidence will be allowed to explain a latent (not apparent to the parties) ambiguity but a patent (apparent on the face of the document) ambiguity must be resolved within the four corners of the deed.
- 4) Useless or contradictory words may be disregarded as mere surplusage
- 5) Particular descriptions control over general descriptions, although a false particular may be disregarded to give effect to a true general description
- 6) A description insufficient in itself may be made certain through incorporation by reference
- 7) If an exception in a deed is erroneously described, the conveyance is good for the whole tract and title to all of the land passes
- 8) When a tract of land is bound by a monument which has width, such as a highway or a stream, the boundary line extends to the center, provided that the grantor owns that far, unless the deed manifests an intention to the contrary
- 9) A description in a deed includes appurtenances to the tract even though they are not specifically mentioned in the deed. Normally, only that portion of the land passes that is mentioned in the deed. However, there are some interests in the land which are appurtenant to the described tract in such a way that they have no existence apart from their attachment to the host premises.
 - i. If A owns blackacre and has an access road across whiteacre, a conveyance of blackacre to B will include the appurtenant easement even though it is not described in the conveyance

Intent, Delivery and Acceptance

A deed is effective only if:

- 1) The grantor had a present intent to convey a property interest to the grantee
- 2) The grantor delivered the deed to the grantee and
- 3) The grantee accepted the conveyance

****It is essential to a deed that there be a delivery****

- The essential fact to render delivery effective is that the deed itself has left control of the grantor who has reserved no right to recall it and it has passed to the grantee
 1. No words of art are necessary to constitute delivery of the deed; anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient
 - a. Recordation of a deed generally presumes delivery.

→ Courts also look at the intention of the parties. Look to see if the grantor intended a delivery. Whether or not the grantor parted dominion over the instrument with the intention of relinquishing all dominion over it

- The deed does not have to actually be handed over to the grantee or to another person of the grantee. There may be a delivery despite the fact that the deed remains with the grantor

1. If a valid delivery takes place, it is not rendered ineffectual by the act of the grantee in giving the deed into the custody of the grantor for safekeeping → It is a question of the intention of the parties which may be manifested by words or actions or both
 - a. If a deed, although acknowledged, is not recorded and is in the grantor's possession at the time of his death, those circumstances, unless explained, are deemed conclusive that the parties did not intend a complete transfer

****The evidentiary standard is by clear and convincing evidence to upset the deed once delivered****

→ The burden is on the party asserting delivery to establish it by a preponderance of the evidence

- Some J require a physical delivery of the deed to make it an effective conveyance

****An oral condition on a deed, once delivered, is invalid****

A. Conditional Delivery-It is subject to a condition and it is in its nature as final as an absolute delivery.

- 1) The manual transfer of a conditional delivery must be to a third person, a person other than the grantee. (If the grantor handed it to the grantee then that would be an absolute delivery)
 - i. Thus, a grantor that wants to make a conditional delivery of a deed should give it to a third party with instructions to deliver it to the grantee only when the condition has been satisfied
 1. The agent is an independent agent or an escrow agent
- 2) After making the conditional delivery, without expressly retaining any right of control, the grantor cannot prevent the instrument from becoming operative upon the satisfaction of the condition, and there is no reason why he should be allowed to retain a right of control by an express statement to that effect while making a delivery.
- 3) When deciding whether the instrument is to be conditionally delivered, it is determined with reference to the language used by the grantor, construed in light of all the circumstances as showing by the grantor's intention
- 4) Conditional delivery, or delivery in escrow, is the same as any other delivery except that it is subject to the satisfaction of a condition.
 - i. After the condition has been satisfied, that is when the actual delivery takes place- doctrine of relation back. It is the establishment of the escrow that determines the priority of interest (page 591 case)

****As absolute delivery is a question of the grantor's intention, so is conditional delivery****

Delivery of a deed is necessary to pass title.

(In the case of where Gus tore up deed and never recorded it (593) and his remainderman wanted the deed. Court said that since the intention of the grantor controls, if the grantor really intended to give the remainderman a deed, she would have given them something anyway or given them something at the time she gave Gus a life estate)

Delivery of a deed to a life tenant is a sufficient delivery for the benefit of the remainderman

Recording Acts

- 1) Must record the documents
- 2) Accurate indexing of the records is also essential of the recording system is to have any practical effect
 - i. Index provides the only way to search a property title
 1. 2 basis systems
 - a. Grantor-Grantee indexing system
 - b. Tract index

3 Types of recording statutes:

- 1) Race Statute- “First to record, first in right.” The good or bad faith of the person does not matter (Only 3 states use this)
- 2) Notice Statute- Subsequent purchaser takes the deed without notice of any conflicting claims and records first (About half the states)
- 3) Race-Notice Statute- The person must be the first to record and must record in good faith (About half the states)
- 4) Common law- “First in time is first in right.”

Common things:

- a) Take the deed and make sure it is recorded right. Make sure it is not misindexed or misfiled
- b) When searching, look at the grantor’s index- look at grantor’s encumbrances that were made for each grantor and each title
- c) Date, title, parties and conditions must be noted for each link for title
- d) The customary method of title search is still the grantor/grantee search
- e) Purchasers should make sure that their deed is recorded within the chain of title

Indexes:

→ Recording system must also include an index so that a title examiner can locate the documents

- Once the records are properly indexed, a title examiner can determine the identity of each current and past owner of the property, with each period of ownership constituting a link in the chain of title.

- 1) Grantor-grantee Index- Consists of two indexes
 - a. One index is arranged alphabetically by the name of the grantor of each recorded instrument
 - b. One index is arranged alphabetically by the name of the grantee
 - i. When a document is filed, it is entered in both indexes
 1. Check the grantor index for the name of each current and former owner to discover all the other interests that they conveyed, including mortgages, leases, and restrictive covenants.
 2. Also check the grantor index for the name of each owner of any such interest to determine whether the interest has been transferred or released.
 - a. A purchaser cannot only rely on the grantor-grantee index and must also examine the records kept in other government offices
- 2) Tract Index- Each parcel of land is assigned an index page that lists every recorded document affecting title to that parcel

Bona Fide Purchasers

To qualify for bfp status, a purchaser

- 1) Must not have had notice of the conflicting claim when it acquired its interest in the property and
- 2) Must have given consideration for the conveyance

A.Lack of Notice

→ Actual notice is not the only type of notice that will destroy a purchaser's ability to qualify for bfp status

- a) Actual notice- when person has information in regard to a fact, or information as to circumstances an investigation of which would lead him to information of such fact
 - a. Actual notice involves mental operations on the person sought to be charged
- b) Constructive notice- when person is charged with notice by a statute or rule of law, irrespective of any information which he might have
 - a. Constructive notice is being independent of any mental operation on his part
- c) Inquiry notice- follows from the duty of a purchaser, when he has actual or constructive knowledge of facts which would lead a prudent person to suspect that another person might have an interest in the property, to conduct a further investigation into the facts.

If a deed is properly recorded, all future purchasers have constructive knowledge of the deed
 (To hold otherwise would be to have people purposely not do this and then claim BFP status)

Examples:

- 1) A subsequent purchaser has actual notice when he knows of the existence of a prior, unrecorded deed
- 2) He has constructive notice (whether or not he has actual notice) of a prior deed if that deed is properly recorded and
- 3) He has both actual and constructive notice if he knows of the existence of a properly recorded deed

→ When a deed is defective, it does not provide constructive notice

Majority rule- When an instrument is defective b/c it lacks a signature, b/c it is not signed by an appropriate number of witnesses, or b/c it is not properly acknowledged, although recorded, the instrument does not impart constructive notice

Minority rule- (In re Barnacle) Even if something not properly signed etc, if recorded then will still put another on constructive notice.

→ Recording of something also puts lessors and lessees of constructive notice and not just subsequent purchasers.

- A. Lis pendens notice- provides notice of a title claim to the D's land during a lawsuit's pendency
- B. Judgment lien- encumbers the D's land after judgment is entered for the P
 - a. Are creatures of state statute
 - b. They attach to all lands owned by the D in the county where the judgment is docketed
 - c. Lien enables the judgment creditor to force a sale of the encumbered land and to use the sale proceeds to satisfy the judgment
 - d. B/c the lien is a matter of public record, a purchaser of land is deemed to have notice of the lien and takes title subject to it

→ The intention to create a servitude must be clear on the face of the instrument; ambiguities are resolved in favor of use of land free of easements (However, if know of knowledge of some facts which may create easements etc, then have inquiry notice and should investigate further and if you don't then you are put on constructive notice)

Payment of consideration

- A mortgage for a pre-existing debt does not give value
- Mortgagee does not become a BFP just by recording when there is no independent consideration for the mortgage
 - If a mortgage is taken for a pre-existing debt and the creditor *at the time* agrees to extend the time of payment, this additional consideration will entitle the mortgagee to protection as a purchaser for value
 1. Even an extension of time for payment can be sufficient consideration under a recording statute.
- a) No person who has acquired title as a mere volunteer, whether by gift, devise, inheritance, postnuptial settlement of wife or child or otherwise can be a bfp.
- a. Valuable consideration means and necessarily requires under every form and kind of purchase, something of actual value, capable in estimation of the law of pecuniary measurement; parting with money or money's worth or an actual change of the purchaser's legal position for the worse

Bona Fide Purchaser Filter

- Generally, the BFP purchaser of property which was subject to a prior outstanding unrecorded interest may pass title free of the unrecorded interest to a subsequent purchaser who otherwise would not qualify as a BFP under the recording act
- Protects the alienability of property. Without this rule, the BFP would be deprived of the full benefit of the purchase- the right to transfer good title to a subsequent purchaser
 - Exception- this rule prevents the grantor or former owner of the property, who held the property subject to a prior equity, from acquiring the rights of a BFP

Recording and Indexing

- Required to protect real property interests and avoid conflicting claims
- A) Majority rule (Frank v Storer)- An unindexed instrument still provides notice so long as it has been recorded
- a. Requires that the purchaser of the property goes back to see that it is not misindexed and that the property has been properly recorded
 - i. When you give nicknames on the index and recording parts, you provide no constructive notice
 - ii. Whether mistake in index or failure to index, it does not matter.
 - iii. Some courts have said that if the name has been misspelled but if the misspelling sounds close to the real name then the misspelled index is valid against a BFP
- B) Minority rule- An unindexed document does not provide notice (Better rule according to Burke)

- a. This is the case b/c the party who gives it for recording can readily ascertain the if the instrument was properly recorded.
- b. If not indexed, places undue burden on subsequent purchasers to search the voluminous records

→ If proceeds of a sale not enough to satisfy the debt, you will still be liable for the deficiency

- Foreclosure property is usually taken as is and where is
 - Have to search the records in the usual and customary way
 - Can't completely rely on the computerized records b/c any mistakes made during this are the responsibility of the searcher (Skelton v Martin)
 - Have to refer to the grantor-grantee index
 - There is no present statutory right to accurate government information on the internet

Most state recording acts specify that the grantor-grantee index is the official index. If a document is indexed in the grantor-grantee index, future purchasers will have constructive notice of it even if they relied on the tract index to perform the title evaluation.

- Many people use the tract index b/c it is easier but have to realize that rely on this at own peril

→ Recording acts only apply to documents and if your title is vested in possession or adverse possession, then the records don't apply.

- 1) Recording acts don't include all types of property interests or methods of acquiring an interest.
 - a. Ex- marital property rights, and implied easements, like interests acquired by adverse possession, do not require a written document and therefore are not subject to the operation of the recording act
 - i. A majority of J don't require short term leases to be in writing. Therefore, a purchaser takes subject to these types of interests even without any notice of their existence
- 2) Some interests that are not subject to the terms of the recording act are statutorily created.
 - a. Ex- every state has a law that provides a mechanic lien for people who provide material or labor for improvement on their land.
 - i. Most statutes provide that the lien's priority relate back to a time that may substantially precede the recording of the lien such as the date when the work began on the land
 1. A property owner who was unaware that work was performed on the property may hold title subject to a mechanic's lien recorded *after* the purchaser recorded the deed by which it acquired title to the property
- 3) B/c not all property interests are documented in the public records a prospective buyer must attempt to discover this in other ways.

- a. A buyer should inspect the property to determine whether there are short term tenancies, recently completed improvements, encroachments, or other evidence of potential property interests.
 - i. Buyers also commonly require the seller to give a certified statement called the “owner’s affidavit” or a “seller’s affidavit” concerning the title
 - ii. The affidavit includes representations by the seller about matters that may affect the property title that are undiscoverable from the public records such as adverse possessors.
 1. These records are only as reliable as the seller but atleast this way there is some recourse against the seller if any of the representations are true

→ A conveyance of the record title to a BFP will not extinguish a title acquired by adverse possession. Instead recording acts relate exclusively to written titles. This is true even if the subsequent purchaser is not put on constructive notice b/c the adverse possessor’s interest is not apparent from looking at the property. (*Mugaas v Smith*)

A record of a deed is constructive notice only to those who are bound to search for it

- A contractor is not bound to search for it

Title Insurance

→ The risk being insured against is that to make sure that the title to the property is not different from the title described in the insurance policy

- Usually are only insured against title defects.
 - Depending on the policy, the insured may also be insured against additional risks such as lack of access to the property or unmarketability to the title.

There are two standard forms of title insurance:

- 1) Owners- indemnifies the owner against title defects
- 2) Loan- insures a lender that holds a mortgage, deed of trust, or similar security interest in the property. Also insures the validity and priority of the security interest
 - a. This does not provide any protection to the owner even though the lender usually requires the owner to pay the premium for the policy
 - i. The owner should purchase both an owner’s insurance in addition to the loan policy
 - ii. Loan policy is transferable (unlike an owner’s policy) to a purchaser of the lender’s security interest

→ Based on the title report, the buyer can notify the seller of any objections to the state of title

- If required to do so by the purchase agreement, the seller must correct any defect in the title.
 - The seller’s refusal to do so constitutes a breach of the purchase agreement and authorizes the buyer to refuse to buy the land.

Title insurance companies base their premiums on two factors:

- 1) Cost of examining the title to the property (if the insurance company paid for the exam) and
- 2) The risk associated with insuring the title

→ A title insurance does not secure you against future events. It just looks into the past, does a title search and insures that the title that they searched was good

In order to recover from the title insurance company:

- Must show that suffered actual loss

An insurance company's liability on an owner's policy is limited to the amount specified in Schedule A which is typically the property's purchase price.

- If the owner improves land after acquiring it or if the land otherwise increases in value, the policy amount may be inadequate to compensate the owner in full for a loss of title
 - The insured can increase the amount of coverage after the land's value has increased by paying an additional premium.

If you lose your property b/c of a foreclosure due to a refusal of a loan b/c the title company didn't accurately eliminate liens:

- 1) Are entitled to damages which is the difference of the property price with and without the lien.
- 2) Liability is measured by the diminution in the value of the property caused by a defect in the title as of the date of the discovery of the defect

Title commitment- A document that describes the property as the title insurer is willing to insure it and contains the same exclusions and general and specific exceptions as later appear in the title insurance policy.

Greenburg v. Stewart Little

- a) Failure to perform a contract does not give rise to tort duties unless the company has voluntarily assumed a duty to conduct a reasonable search in addition to the mere contract to insure title
- b) There must be a duty existing independently of the performance of the contract for a cause of action in tort to exist.
 - a. One is just insured of being indemnified and there is no obligation to search
- c) Issuance of a title commitment is not an assumption of an independent duty to search
- d) The insured's expectation is that in exchange for that premium it will insure against certain risks subject to the terms of the policy

- a. If the title company fails to conduct a reasonable title examination or, having conducted such an examination, fails to disclose the results to the insured, then it runs the risk of liability under the policy
- e) An agent of an insurance company owes a duty only to the insurance company

Closings and Escrows

Closing- when the seller and the buyer consummate the sale

Title to the land passes to the buyer (the sale is closed) when the last condition of the sale is satisfied. (Normally, this means that the buyer acquires title when the seller has delivered the deed and the buyer has paid the purchase price)

- When buyers and sellers have express escrow instructions, they often specify that title will transfer to the buyer when the documents are recorded
 - After the title has been transferred, subsequent claims against the seller cannot affect the land

Escrow agreement- Is created in a formal contract b/w the parties, setting forth the conditions and contingencies under which the instruments deposited in escrow are to be delivered and to take effect.

- a) No precise form of words is necessary to create an escrow but it must appear from all the facts and circumstances surrounding the execution and delivery of the instruments that they were not to take effect until certain conditions are performed
- b) In an escrow agreement, the escrow holder is the dual agent of both parties until the performance of the conditions of the escrow agreement, where he becomes the agent of each of the parties to the transaction in respect to those things placed in escrow to which each party has thus become entitled.
 - a. Thus, when the conditions specified in the escrow agreement have been fully performed, the title to the premises passes to the purchaser and title to the purchase money passes to the seller.
 - i. There, the escrow holder becomes the agent of the purchaser as to the deed and of the seller as to the money.

For an escrow agreement:

- 1) There must be a contract b/w seller and buyer agreeing to the conditions of a deposit
- 2) There must be delivery of the items on deposit to the escrow agent
- 3) The agent must agree to perform the function of receiving and dispersing the items.

→ The agreement by the seller and buyer to all terms of the escrow instructions and the acceptance by the escrow agent of the position of depository create the escrow

Where a deed is deposited as an escrow, title does not pass to the grantee unless and until the condition of its delivery is performed.

→ To sustain the right to specific performance of their contract, the purchasers must show that they have performed or have offered to perform all of the obligations required of them by the contract.

→ A tender of performance by the purchaser which contains conditions other than those specified in the contract b/w the parties is ineffectual, and a tender of payment by the purchaser is ineffective where the purchaser has made arbitrary deductions therefrom for unliquidated claims against the seller.

(Ferguson v Caspar- The Appellants were not willing to perform in accordance with the terms of the agreement and that their effort to impose conditions other than those specified in the contract resulted in a breach of their contractual duty and a forfeiture of their right to specific performance).

Perfect Tender rule- A party to a contract of sale for land does not have a COA for breach unless he tenders his own performance at the time and place specified for the closing.

- The seller's obligation to tender title to the land and the buyer's obligation to tender the purchase price are treated as concurrent conditions
- a) Escrow Closing- Usually occurs in the west. The seller and buyer don't meet at a specified time and place to close the sale.
 - a. Before the contractually specified closing date, they separately deliver to a neutral third party (the escrow agent) executed documents, money and other items needed to close the sale, such as the seller's proof of title
 - b. The seller and buyer also deliver to the agent a set of escrow instructions
 - i. These instructions specify when the agent should deliver the purchase price to the seller and deliver the deed to the buyer or to the county recording office.
 - c. The agent also typically performs the usual functions of a closing agent, such as distributing funds to pay off mortgages on the property and to pay the title insurance company and other service providers.

→ This system is good b.c the buyer and the seller don't have to be present at the closing which is good when the two live far apart.

- Also, the agent's delivery of the deed to the grantee is deemed to relate back to the date when the grantor placed the deed in escrow.
 - This is good when the grantor has died or has become incompetent while the deed is in escrow.

An escrow agent is a fiduciary for the seller and the buyer and is liable to them for negligence and for breach of instructions.

→ When an escrow agent absconds with money he is holding in his capacity as depository, the loss must fall upon the person as whose agent he is holding the money at the time.

(If all the conditions have been satisfied, loss falls on the seller b/c the money is now the seller's but if all the conditions have not been satisfied then the loss falls on the purchaser b/c the money still belongs to the purchaser at this point).

- A deposit in escrow amounts to a conditional delivery

Easements and Covenants

→ Can't convey easements on one's own property

Easement- along with restrictive covenants and equitable servitudes are interests one person has in another person's property. It is a non possessory interest in the land of another

- Creation of easements requires a written instrument or memo, typically a deed.
- The easement holder and the landowner both may use the same area of land but the landowner's use may not unreasonably interfere with the easement holder's use
- A grant which creates any interest or estate in land is not a license – Such a grant creates an easement

a) Easement in gross- One benefiting a person whether or not the person owns a specific property or any at all (benefit persons who are not necessarily owners of adjoining property)

→ This is transferred from holder to holder unless by its terms it is personal to the holder

- a. Unless assignable, this easement ends at the grantor's death.
- b. Easement in gross must be clear from the express grant or from surrounding circumstances
- c. Not assignable for residential but may be for commercial

b) Easement appurtenant- Benefits the owner or possessor of a particular parcel of land (benefit the owners of adjacent land)

→ When the estate is transferred, the easement passes along with it even w/o an express grant

- a. This easement passes with the property it benefits
- b. It has the potential to continue indefinitely
- c. **Courts usually have a preference for easement appurtenant**
- d. Assignable
- e. Easement appurtenant affects two parcels of land
 - i. The owner of one parcel has an easement over the other parcel of land

1) Servient estate- The property burdened by the easement

2) Dominant estate- The land benefited by the easement

- There is a tendency in the courts to construe towards appurtenancy if it is possible or if the grant is ambiguous and this is because it is a good thing the law thinks to restrict easements to neighbors because they will get along better when problems arise and they will know what is necessary b/c they know the facts on the ground and this is efficient in some sense

License- When a landowner permits another to use the property but the permission is revocable at the owner's will

- The main attribute of a license is that it is revocable or terminable at will
- It excuses acts done by one on land in possession of another that without the license, would be trespass
- This conveys no interest in land and may be contracted for orally
- *Cannot be assigned as it is personal between the licensor and the licensee*

Affirmative Easement-Gives the holder a right to go onto the servient estate for a specific purpose (allows you to do something)

- Courts have a tendency to construe towards an affirmative easement

Negative Easement-Gives the holder the right to prevent the possessor of the servient estate from doing some act on the servient estate (Prevents you from doing something)

- Negative easements and affirmative easements are not absolute rights of ownership but usually arise by contract and deeds b/w the parties.

→ Most easements result from an express grant or express reservation and this must be in writing to satisfy the SOF

- a) Stranger to the deed rule- reserving in favor of a third party (page 706)
 - a. A deed with a reservation or exception by the grantor in favor of a third party, a stranger to the deed, does not create a valid interest in favor of that third party
 - i. This frustration can be avoided by the direct conveyance of an easement of record from the grantor to a third party
 1. Thomson v wade (Any right of way reserved to the P's predecessor in interest in the D's deed was ineffective to create an express easement in P's favor).
- b) Reservation- a grant of the property to a purchaser and a regrant of the easement back to the original grantor
- c) Exception- a statement that the property might be subject to an outstanding easement

→ Majority of the states hold that a deed with a reservation or exception by the grantor in favor of a third party does not create a valid interest in favor of that third party

- E. Only a minority of states recognize an interest reserved or excepted in favor of a stranger to the deed if such was the clearly discernible intent of the grantor.

Easements implied by necessity

** The standard for imposing an easement of necessity is whether such an easement is required in order to provide reasonable access to the property. Absolute necessity is not required**

Elements for easements implied by necessity:

- 1) Prior common ownership of the dominant and servient estates
- 2) Transfer of one of the estates by the common grantor creating the lack of access and

3) Necessity of the easement for making use of the transferred estate

Easements implied by past use (“Quasi Easements”)

→ Come into existence when property owners make use of one part of their property for the benefit of another part (Their creation is inferred as a matter of intent b/w the parties to past transactions)

Requirements for establishment of such easements are:

- 1) Prior common ownership of the dominant and servient estates
- 2) Transfer of one of the estates
- 3) Continuous and apparent use of the quasi easement and
- 4) Reasonable necessity for enjoyment of the dominant estate

→ To see if such an easement was actually intended by the grantor, don't look at the subjective intent but look at the objective intent of the grantor and grantee based on the circumstances of the conveyance.

- a) It has long been recognized that an implied easement might arise out of a taking of property for non-payment of taxes.
 - a. Other types of involuntary conveyances have been held to result in the creation of implied easements.
 - i. **It may be however, the degree of necessity required must be greater than in the case of a voluntary conveyance.**

Prescriptive Easements

Prescriptive right cannot arise if have permission to use land from the owner

→ Same requirements as those for Adverse Possession

- Once a party claiming a prescriptive easement demonstrates that the use was open and notorious, continuous and uninterrupted for the prescriptive period, a presumption arises that such use was adverse and the burden is on the servient landowner to prove that the use was by permission or license.
 - i. A mere claim of neighborly accommodation is not proof of permission (and evidence that the predecessor erected a barricade on one occasion negates an implication of permission)

*****With adverse possession, one would have to show exclusivity. Don't have to do this with an easement since more than one person could be using the easement*****

What can a LL do to prevent this use from becoming an easement?

→ Can give notice in writing of his intention to dispute.

Few general rules:

- a) General public can't acquire prescriptive rights to private property
- b) One individual's prescriptive use cannot inure to the benefit of anyone else
 - a. Personal prescriptive rights are confined to the actual adverse user and are limited to the use exercised during the prescriptive period.
- c) Intention to dedicate part of the property must be plainly manifested
- d) Permissiveness would interrupt continuity.
- e) A party claiming a right by dedication bears the burden of proof on every issue.
 - a. The intent of the owner to dedicate his land to public use must be clearly and unequivocally shown and must never be presumed
 - b. Custom- established via the English rule- said that the public could , after many years of unrestricted common usage, acquire rights over private property. The elements for establishing custom are:
 - i. Time immemorial- have existed for a time beyond human memory
 - ii. Use must be uninterrupted
 - iii. Use must be made as a right
 - iv. Use must be certain as to the place
 - v. Use must be certain as to the persons
 - vi. Use must be certain and reasonable as to the subject matter or rights created
 - vii. Not be inconsistent with or repugnant to other laws and customs.
 - viii. Be peaceable and free from dispute
- f) Public trust- gives public a right of access to the public in certain resources
 - a. It is unalienable unless you get some form of compensation for it

Scope of the Easement

** An easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels of land owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant**

- Brown v Voss- court held that even though this was the rule, they still found for the P and let them use the easement b/c this was an equity claim (injunctive relief) and it did not burden the D, otherwise the P would not be able to make reasonable use of the property
 - i. **A holder of the dominant estate may not unreasonably increase the burden on the servient estate.**

→ When an easement is created by grant or reservation, and the instrument creating the easement does not limit the use to be made of it, the easement may be used for any purpose to which the dominant estate may then, or in the future, reasonably be devoted,

- No use may be made of the easement which is different from that established at the time of its creation and which imposes an additional burden upon the servient estate

Some notes:

- 1) Owner of the dominant estate has a duty to maintain the easement
- 2) Owner of a dominant estate has the right to make reasonable improvements to an easement so long as the improvement does not unreasonably increase the burden upon the servient estate
- 3) Construe the terms of the easement to how it was meant at the creation of the easement
- 4) **Unless contrary to the terms of the easement, an appurtenant easement is transferred by the dominant owner even when it is not mentioned in the deed.**
- 5) Usually easements in gross are not transferred unless the easement has a commercial use.
- 6) The dominant estate may be divided or partitioned and the owner of each part may claim the right to enjoy the easement, if no additional burden is placed upon the servient estate

Termination of Easements

Easements may come to an end in many ways:

- 1) Expiration
- 2) Merger- occurs when the servient and dominant estates come into the same hands
 - a. The easement then does not come into existence if there is a severance of the land
- 3) Release
- 4) Abandonment
 - a. This requires the showing of some affirmative act of showing abandonment
 - b. **Abandonment is a question of intention.**
 - i. **A person entitled to a right of way or other easement in land may abandon and extinguish such rights by acts in pais**
 - ii. **A cessation of use coupled with acts or circumstances clearly showing an intention to abandon the right will be as effective as an express release of the right**
 1. *Mere non-user of an easement for a period of however long will not amount to abandonment*
 - a. *To the non-user, there must be acts or circumstances clearly manifesting an intention to abandon*
 - i. *Nor is a right of way extinguished by the habitual use by its owner of another equally convenient way unless there is an intentional abandonment of the former way*
 1. The burden of proof to show the abandonment is upon the party claiming it
- 5) Forfeiture for misuse
- 6) Changed conditions
- 7) Laches
- 8) Adverse Possession
- 9) Easements by necessity usually terminate once the necessity that caused the creation is removed.

→ Traditional rule is that one party can't unilaterally relocate the easement and in *Lindsay v Clark*, the court has done just that as a way of bringing peace to the parties of the suit (This is the exception to the general rule)

Real covenants

→ These covenants run with the land and are usually expressly created but can also be implied.

- Each of these agreements restricts the landowner's freedom of enjoyment as does an easement

Ex- when real covenant may be implied

- When, in a residential subdivision, most deeds to the lots restrict the use of the lot to residential uses, but one or more of the deeds from the common grantor or developer is silent on the matter, covenants in the silent deeds may arise by implication.

A covenant will run with the land when these elements are met:

- 1) The covenant must be in writing
- 2) The parties must intend that the covenant run with the land
 - a. Intent can be implied or expressed
 - b. Intent can also be shown by extraneous circumstances
 - i. In some instances, the promises are so intimately connected with the land as to require the conclusion that the necessary intention for the running of the benefit is present absent language clearly negating that intent.
- 3) The covenant must touch and concern both the land to be benefited and the land to be burdened
 - a. Increase the value of one and decrease the value of another
- 4) There must be privity of estate b/w the parties both vertical and horizontal
 - a. B/w the party claiming the benefit of the covenant and the right to enforce it and the promisor or party who rests under the burden of the covenant
 - b. Vertical privity- privity b/w the original parties to the covenant and the present disputants
 - c. Horizontal privity- b/w original parties

→ A covenant which runs with the land must affect the legal relations-the advantages and the burdens-of the parties of the covenant, as owners of particular parcels of land and not merely as members of the community in general such as taxpayers or owners of other land

- A covenant also runs with the land if it binds not only the person who entered into it, but also later owners and assigns who did not personally enter into it

Reciprocal negative easement

→ if the owner of two or more lots, so situated to bear the relation to a general scheme of development, sells one with an easement of benefit to the land retained, the servitude becomes mutual and during the period of restraint, the owner of the lots retained can do nothing forbidden to the owner of the lot sold

- This reciprocal negative easement runs with the land by virtue of the express burden placed upon it and abides with the land retained until loosened by expiration of its period of service or by events working its destruction.
 - i. It is not personal to the owner but operative upon the use of the land by any owner having actual and constructive notice thereof

Reciprocal negative servitudes in which a restrictive covenant will be implied in a silent deed are when certain conditions are met:

- 1) Common owner subdivides property into a number of lots for sale
- 2) The common owner has a general scheme of development for the property as a whole in which the use of the property will be restricted
- 3) The vast majority of subdivided lots contain restrictive covenants which reflect the general scheme
- 4) The property against which application of an implied covenant is sought is part of the general scheme of development and
- 5) The purchaser of the lot in question has notice, actual or constructive of the restriction.

→ If an equity is attached to the property of an owner, no one purchasing with notice of that equity can stand in a different position from that of the party from whom he purchased

- Equitable servitudes must meet the same touch and concern the land requirement that is applied to running covenants

→ The SOF prevents the enforcement against the vendor, or any purchaser from him of a lot not expressly restricted, of any implied or oral agreement that the vendor's remaining land shall be bound by restrictions similar to those imposed upon lots conveyed.

- Only where the vendor binds his remaining land by writing can reciprocity of restriction b/w vendor and the vendee be enforced.

General common scheme of things:

If a declaration establishing a common plan for the ownership of property in a subdivision containing restrictions upon the use of the property as part of the common plan, is recorded before the execution of the contract of sale, describes the property it is to govern, and states that it is to bind all purchasers and their successors, subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend to agree to be bound by, and to accept the benefits of, the common plan; the restrictions, therefore, are not unenforceable merely b/c they are not additionally cited in a deed or other document.

- 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 benefit.
 - i. Thus, the mutual servitudes are created at the time of the conveyance even if there is no additional reference to them in the deed.

→ Merely recording the restrictions does not create mutual servitudes.

- They spring into existence only when an actual conveyance subject to them is made.

Termination of Covenants

Covenants may be terminated in many ways:

- 1) According to their terms- as when they have a definite term or are subject to a condition subsequent and
- 2) By the same means that easements come to an end.

Doctrine of changed conditions:

→ There must be a change in the character of the neighborhood sufficient enough to make it impossible to secure a substantial degree the benefits sought to be realized by the restrictions.

- The change must be such as to render the restriction valueless to owners of the benefited land and oppressive or unreasonable to the owner of the burdened land.

6 factors that the court will consider whether or not to give an injunction:

- 1) extent of the violation, use (in a big setting won't be as offensive as in a smaller setting)
 - 2) The number of people (If the number of people effected is large, if there has been more individual reliance then courts are leary about binding changed conditions)
 - 3) Location of the changed condition
 - 4) Traditions of the chancellor
 - 5) Intent of the original developer of grantor and whether the original grantor or developer is around to determine their intention
 - 6) Time remaining
- All these factors go into calculation

Law Of Neighbors

Adverse Possession

→Traditionally AP has two theories to support it. 1) Want to punish the sleeping owner 2) Want to reward the person who makes productive use of the land

Relation-back doctrine- Once the SOL has run, the adverse possessor's title is treated as though it had existed from the moment his possession began

- Under this, the holder of the record title has no claim to damages to the land during the period of the adverse possession even though the SOL for injury to the property may not have run

Elements of adverse possession:

****In order to be an AP must have all of these elements****

- 1) Actual
 - a. Actual occupancy is not limited to structural encroachment which is common but is not the only physical characteristic of possession.
 - b. Actual occupancy means the ordinary use to which the land is capable and such as an owner would make of it.
 - i. Any actual visible means, which gives notice of exclusion from property to the true owner or to the public and of the D's dominion over it is sufficient
- 2) Continuous
- 3) Exclusive
 - a. In order to be exclusive, it is not necessary that all use to the public be prevented
- 4) Hostile
 - a. Hostility arises from the intention of the AP to claim exclusive ownership of the property occupied. There does not have to be violence or even any actual dispute
 - b. Paying taxes may provide evidence of hostility
 - i. No specific intent directed towards the owner of the property is required.
 - ii. Hostile intent is to be determined not only from declarations of the parties but from reasonable deductions from the facts as well
- 5) Open and Notorious
 - a. The possession has to be so open in the community and generate such notoriety that the community starts to regard the adverse possessor as the owner and the true owner is given notice of the adverse possessor's rights
 - i. They could be trashing the place as a way to provide for the open and notoriety

→ The disability has to be in place at the time of the adverse possessor's entry and cannot arise later.

- The AP can lose rights through some later change in the title. AP enters running the statute against life tenant and life tenant dies the AP has to run the statute again against the remainder b/c the remainderman had no right to bring a COA in trespass until a remainder becomes possessory
- All AP enter with a risk that their running the statute might have some restriction on their title
- If person is a life tenant then AP cannot get any higher than the life tenancy

In a claim of AP, the intention is the controlling factor. The intention to hold must be clear, distinct and unequivocal.

Under American law, except as where permitted by statute, title to land held by federal or state governments cannot be acquired by AP

→ Persons who claim land adversely under a paper title relating to certain areas and who fence in or cultivate an area beyond that which is described in the paper title, but who do not pay any

taxes on the additional area, can secure good title by AP only to the portion of the land described by the deed, decree, or other written instrument of record.

- Policy reasons for AP (that of encouraging efficient use of the land) is no longer the same. It may be different considering the situation presently (overcrowding etc) we want to encourage leaving land undeveloped and unused since it is so scarce
 - This is probably not a majority rule and this may not even be the rule in FL anymore. Rather, the case's significance is to show what might be the future of AP.

Rights of Lateral and Subjacent Support

- A) Landowners are entitled to **lateral support** for their soil, in its natural condition, by nearby neighbors or adjacent owners.
 - a. There is also a correlative duty for all owners to provide the same support for neighboring and adjacent soils.
- B) **Subjacent support** is the support that the surface of the land receives from underlying strata.
 - a. It arises when the title to the land surface is severed from that underlying strata, ex- when the strata contains minerals

→ Generally, the rules that apply to lateral support also apply to subjacent support.

- There is a duty for lateral support but not for structures on the land.

The traditional rule is that the removal of either lateral or subjacent support results in absolute or strict liability in the excavator, miner or other defendant

- 1) While an adjacent landowner has an obligation only to support his neighbor's property in its raw and natural condition, if the support for the land in its raw, natural condition is insufficient and the land slips, the adjacent landowner is liable for both the damage to the land and the damage to any buildings that might be on the land
- 2) Support is lateral when the supported and supporting lands are divided by a vertical plane
 - a. The withdrawal of lateral support may subject the landowner withdrawing support to strict liability or to liability for negligence
- 3) A landowner is entitled to lateral support in the adjacent land for his soil.
- 4) An excavation made by an adjacent owner, so as to take away the lateral support, afforded to his neighbor's ground, by the earth so removed, and cause it, of its own weight to fall, slide or break away, makes the former liable for injury, no matter how carefully he may have excavated. Such right of support is a property right and absolute.
- 5) An adjacent landowner is strictly liable for acts of commission and omission on his part that result in the withdrawal of lateral support to his neighbor's property
 - a. This Strict liability is limited to land in its natural state; there is no obligation to support the added weight of buildings or other structures that land cannot naturally support.
 - i. However, the majority of J hold that if the land, in its natural state, would be capable of supporting the weight of a building or other structure, and such building or other structure is damaged b/c of the subsidence of the

land itself, then the owner of the land on which the building or structure is constructed can recover damages for both the injury to his land and the injury to his building or structure

- ii. Converse of this is also true. Where an adjacent landowner provides sufficient support to sustain the weight of land in its natural state, but the land slips as a direct result of the additional weight of a building or other structure, then in the absence of negligence on the part of the adjoining landowner, there is no COA against such adjoining landowner for damage either to the land, the building or the structure
 - iii. If, as a result of the additional weight, so much strain is placed upon existing natural or artificial lateral support that the support will no longer hold, then in the absence of negligence, there is no liability whatsoever on the part of an adjoining landowner.
- 6) Should notify neighbors when making excavations that would harm their structures.
 - a. The owner making the excavation is required to exercise reasonable precautions to minimize the risk of harm to the neighbor
 - 7) While an adjoining landowner has no obligation to support the buildings and other structures on his neighbor's land, nonetheless, if those structures are actually being supported, a neighbor who withdraws such support must do it in a non-negligent way.
 - 8) ***If there are no structures on the land at the time of the excavation, the excavator owes no further duty than to refrain from removing the lateral support for the soil, or to substitute artificial support for that which is removed***

Subjacent Support

A. Subsidence- any movement of soil from its natural position. This movement may be of surface or subsurface soil. A shifting, falling, slipping, seeping or oozing of the soil is a subsidence

The right to mine is subservient to the right of the surface owners to have the surface maintained in its natural state free from subsidence or partings of the soil, and this right of support is absolute and not dependant upon any Q's of negligence

- If coal is taken from under the property of person and a subsidence had been caused thereby, one would be responsible for the resulting damage, regardless of whether the mining operation had been conducted negligently or otherwise

B. When does the right to support, either the lateral or subjacent arise?

2. It arises with the mining, and accrues when there is subsidence

C. If subsidence has not yet occurred, but is only threatened, the excavator or miner must furnish artificial support such as a retaining wall under the surface owner's house. An injunction is available in these instances.

3. If the right to subjacent support arises with mining, but the subsidence occurs or is discovered much later, then an intervening transfer of ownership of the mine should not alter the duty of support

- E. Multiple severances are permitted with the result that each strata or substance might belong to a different grantee.
 - a. In such instances, the surface owed support may be for an overlying strata.
 - A. A duty to support the surface can be complicated by multiple severances if separate underlying strata, as for ex- when several separate seams of coal run under the surface or where coal and natural gas both underlie the surface.

Water Rights

Water disputes were resolved using these two doctrines:

- 1) Common enemy rule- Held that landowners had an unlimited privilege to deal with the surface water on their land as they pleased without regard to the harm which may be caused by others
- 2) Civil law rule- Recognized that higher elevation tracts had an easement or servitude over lower tracts for all surface water that naturally flowed downhill
 - a. However, anyone who increased or interfered with the natural flow of surface waters so as to cause invasion of another's interests was subject to liability to the other

Later developed the:

- 3) Reasonable use rule- A possessor of land is not unqualifiedly entitled to deal with surface waters as he pleases nor is he absolutely prohibited from increasing or interfering with the natural flow of surface waters to the detriment of others.
 - a. Each possessor is legally privileged to make reasonable use of the land even though the flow of surface waters is altered thereby and causes some harm to others.
 - i. *Person incurs liability only when his harmful interference with the flow of surface waters is unreasonable.*

→ General rule today is that upper owners may improve and enhance the natural drainage if his land so long as he acts reasonably and does not divert the flow and the lower owner is subject to an easement for such flow as the upper owner is allowed to cast upon him.

- This principle also applies to land in its natural state. However, when any party improves his land, thereby causing surface waters to damage his neighbor's property, the reasonable use rule shall be applied in order to settle the controversy.

→ A landowner is required to make a reasonable use of the percolating water under his land (can't just have an injunction causing another not to use his property. Try and reach a reasonable solution)

Riparian and Littoral Rights

Two separate and distinct theories or doctrines regarding the right to use water are recognized.

- 1) Appropriation doctrine- Some governmental agency apportions water to contesting claimants and the use is not limited to riparian land owners
- 2) Riparian Doctrine- Gives owners of land bordering streams the right to use the water for certain purposes.
 - a. It accorded the landowners the right to have the water maintained at its normal level subject to use strictly for domestic purposes

Out of this came two theories:

- 1) Natural flow theory- a riparian owner can take water for domestic purposes only, such as water for family or stock and gardening and he is entitled to have the water in the stream or lake upon which he borders kept at the normal level
- 2) Reasonable use theory- Recognizes that there is no sound reason for maintaining our lakes and streams at a normal level when the water can be beneficially used w/o causing unreasonable damage to other riparian owners.
 - a. The use of the stream etc is limited to what is reasonable, having due regard for the rights of others
 - i. Each riparian owner has an equal right to make a reasonable use of waters subject to the equal rights of other owners to make reasonable use.

Appropriation has 5 elements:

- 1) A qualified person must acquire the right.
 - a. Person is not confined to natural persons but extends to different types of legal entities such as corporations
- 2) The person must establish that he or she is the first to appropriate the water
 - a. The priority of this right is determined by the filing and pursuing of an appropriation permit plus an actual appropriation with an intent to appropriate.
- 3) Involves the water appropriated: The statutes define what waters and water courses are subject to the prior appropriation doctrine.
- 4) Requires that the water appropriated be put to actual beneficial use
- 5) Element of priority- being the first in right