

[Note: Numbers in brackets refer to the printed pages of [Understanding Property Law](#) by John G. Sprankling where the topic is discussed.]

LexisNexis Capsule Summary Property Law

PART I: INTRODUCTION

Chapter 1 WHAT IS PROPERTY?

§ 1.01 An “Unanswerable” Question? [1-2]

The term *property* is extraordinarily difficult to define. The ordinary person defines property as things that are owned by people. However, the law defines property as *rights* among people that concern *things*.

§ 1.02 Property and Law [2-4]

[A] Legal Positivism

The dominant view in the United States is that property rights arise only through government; this view is known as *legal positivism*. For example, in *Johnson v. M’Intosh*, [21 U.S. 543](#) (1823), the Supreme Court stressed that in deciding land claims based on Native American rights, it could only rely on laws adopted by the federal government, not on natural law or abstract justice.

[B] Natural Law Theory

Natural law theory, in contrast, posits that rights arise in nature as a matter of fundamental justice, independent of government. The Declaration of Independence is the high-water mark of this theory in the United States.

§ 1.03 Defining Property: What Types of “Rights” Among People? [4-7]

[A] Scope of Property Rights

Under our legal system, property rights are limited, not absolute. They exist only to the extent that they serve a socially useful justification.

[B] Property as a “Bundle of Rights”

It is common to describe property as a “bundle of rights” in relation to things. The most important rights in this metaphorical bundle are: (1) the right to exclude; (2) the right to transfer; and (3) the right to use and possess.

§ 1.04 Defining Property: Rights in What “Things”? [7-9]

Real property consists of rights in land and anything attached to the land (e.g., buildings, signs, fences, or trees). *Personal property* consists of rights in things other than land. There are two main types of personal property: *chattels* (tangible, visible personal property such as jewelry, livestock, cars, and books) and *intangible personal property* (invisible, intangible things such as stocks, bonds, patents, debts, and other contract rights).

Chapter 2 JURISPRUDENTIAL FOUNDATIONS OF PROPERTY LAW

§ 2.01 Why Recognize Private Property? [11-12]

What is the justification for private property? The answer to this question is crucial because the *justification* for private property must necessarily affect the *substance* of property law. American property law is based on a subtle blend of different—and somewhat conflicting—theories.

§ 2.02 First Occupancy (aka First Possession) [12-14]

First occupancy theory reflects the familiar concept of first-in-time: the first person to take occupancy or possession of something owns it. This theory is a fundamental part of American property law today, often blended with other theories. One major drawback of this theory is that while it helps *explain* how property rights evolved, it does not adequately *justify* the existence of private property.

§ 2.03 Labor-Desert Theory [14-16]

The labor-desert theory posits that people are entitled to the property that is produced by their labor. Strong traces of this theory linger in American property law, sometimes mixed with first occupancy theory. There are several notable objections to this theory, one of which is that the theory assumes an infinite supply of natural resources.

§ 2.04 Utilitarianism: Traditional Theory [16-17]

Under the traditional utilitarian theory, property exists to maximize the overall happiness or “utility” of all citizens. Accordingly, property rights are allocated and defined in the manner that best promotes the general welfare of society. This is the dominant theory underlying American property law.

§ 2.05 Utilitarianism: Law and Economics Approach [17-19]

The law and economics approach incorporates economic principles into utilitarian theory. This view essentially assumes that human happiness can be measured in dollars. Under this view, private property exists to maximize the overall wealth of society. Critics question the assumption that social value can be appropriately measured only by examining one’s willingness to pay.

§ 2.06 Liberty or Civil Republican Theory [19-20]

Liberty theory argues that the ownership of private property is necessary for democratic self-government. However, the influence of liberty theory has waned due to changing economic, political, and social conditions.

§ 2.07 Personhood Theory [20-21]

Personhood theory justifies private property as essential to the full development of the individual. Under this approach, some items are seen as so closely connected to a person's emotional and psychological well-being that they virtually become part of the person, thereby justifying broad property rights over such items.

PART II: RIGHTS IN PERSONAL PROPERTY

Chapter 3 PROPERTY RIGHTS IN WILD ANIMALS

§ 3.01 The Origin of Property Rights [23-24]

Property courses sometimes begin with the ownership of wild animals because this subject helps answer a key question: how do property rights begin? Because wild animals in nature are unowned, the rules governing their acquisition help us understand the policies that influenced American property law.

§ 3.02 The Capture Rule in General [24-28]

[A] Basic Rule

No one owns wild animals in their natural habitats. Under the common law *capture rule*, property rights in such animals are acquired only through physical possession. The first person to kill or capture a wild animal acquires title to it.

[B] Defining “Capture:” *Pierson v. Post*

The leading case interpreting the capture rule is *Pierson v. Post*, [3 Cai. R. 175](#) (N.Y. 1805). Post, a hunter, found and pursued a fox over vacant land. Pierson, fully aware that Post was chasing the fox, killed it himself. When Post sued Pierson for the value of the fox, the court held that Pierson was the true owner, because he had been the first to actually kill or capture the fox, however rude his action may have been.

[C] Release or Escape After Capture

In general, ownership rights end when a wild animal escapes or is released into the wild. However, if a captured wild animal is tamed such that it has the habit of returning from the wild to its captor, it is still owned by the captor.

§ 3.03 Evaluation of the Capture Rule [28-29]

Today the capture rule is condemned by legal scholars for the same reason that once supported it: it encourages the destruction of wild animals.

§ 3.04 Rights of Landowners [29-30]

English law held that the owner of land was in *constructive possession* of the wild animals on the land. American courts reject this view; here, a landowner owns no rights in wild animals on her land. However, because an owner may bar hunters and others

from trespassing on her land, this gives an American landowner the exclusive opportunity to capture wild animals on the land, subject of course to hunting laws.

§ 3.05 Regulation by Government [30-31]

Modern game laws and other government restrictions have substantially eroded—though not erased—the capture rule. Despite the breadth of these regulations, however, state and federal governments do not “own” wild animals in a proprietary sense.

Chapter 4 FINDERS OF PERSONAL PROPERTY

§ 4.01 Finders as Owners [33-34]

The law of finders is more complicated than the pithy rules that courts often espouse. Three factors dominate the analysis of finders' rights: (1) the presumed intent of the original owner; (2) the identity of the competing claimants; and (3) the location where the item is found.

§ 4.02 Who is a "Finder"? [34-35]

The first person to take possession of lost or unclaimed personal property is a *finder*. Possession requires both (1) an intent to control the property and (2) an act of control.

§ 4.03 Categories of "Found" Property [35-37]

[A] Four Traditional Categories

The rights of a finder and other claimants turn in large part on which of the four traditional categories the "found" object fits into: abandoned property, lost property, mislaid property, or treasure trove.

[B] Abandoned Property

Property is *abandoned* when the owner intentionally and voluntarily relinquishes all right, title, and interest in it.

[C] Lost Property

Property is deemed *lost* when the owner unintentionally and involuntarily parts with it through neglect or inadvertence and does not know where it is.

[D] Mislaid Property

Property is considered *mislaid* when the owner voluntarily puts it in a particular place, intending to retain ownership, but then fails to reclaim it or forgets where it is.

[E] Treasure Trove

Finally, English law recognized a category called *treasure trove*, consisting of gold, silver, currency, or the like intentionally concealed in the distant past by an unknown owner for safekeeping in a secret location.

§ 4.04 Rights of Finder Against Original Owner [37-38]

As a general rule, an owner retains title to lost or mislaid property found by another. In contrast, the first person who takes possession of abandoned property acquires title that is valid against the world, including the prior owner.

§ 4.05 Rights of Finder Against Third Persons Generally [38-39]

The finder acquires title to lost property that is superior to the claims of all other persons, except (1) the true owner and (2) sometimes the landowner. For example, in *Amory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722), a “chimney sweeper’s boy” found a jewel and took it to a goldsmith, who refused to return it; the court concluded that the boy had title to the jewel, not the goldsmith.

§ 4.06 Rights of Finder Against Landowner [39-42]

[A] Rights to Objects Found on Private Land

Lost objects found either within a house or embedded in the soil are generally awarded to the landowner, not the finder. The status of the finder is sometimes relevant here. A long-term tenant who finds an object will often prevail over the landowner, while a finder who is merely the landowner’s employee will not.

[B] Rights to Treasure Trove

American courts differ on how to handle treasure trove. Although some older courts award title to the finder, the modern view is to award it to the landowner.

[C] Rights to Objects Found in Public Places

A valuable object left in a public place is considered mislaid property and awarded to the owner or occupant of the premises, not the finder.

§ 4.07 Statutes Defining Rights of Finders [42-43]

In many states, statutes governing rights in “found” property supercede the confusing common law. The typical statute requires the finder to turn over the item to the local police department; the find is then advertised and the true owner has a set period (ranging from 90 days to one year) to file a claim. If no claim is made within this period, the item belongs to the finder. If the true owner makes a timely claim, some jurisdictions require that she pay a reward to the finder.

§ 4.08 Special Issue: Native American Artifacts [43-44]

Special rules govern ownership of Native American artifacts that are discovered on or under the land surface. Perhaps the most common approach is to treat the entire tribe as the original owner of such artifacts, such that newly-discovered artifacts always have a current owner whose rights will supercede the finder's claim.

Chapter 5 GIFTS OF PERSONAL PROPERTY

§ 5.01 Gifts in Context [45-46]

The right to transfer property by gift is uniformly recognized as a fundamental right. The rules governing gifts—once remarkably rigid—have been in transition for several decades.

§ 5.02 What Is a Gift? [46]

A *gift* is a voluntary, immediate transfer of property without consideration from one person (the *donor*) to another person (the *donee*). The law recognizes two categories of gifts: the *gift inter vivos* and the *gift causa mortis*.

§ 5.03 Gifts Inter Vivos [46-52]

[A] Intent

There are three requirements for a valid gift inter vivos: *intent*, *delivery*, and *acceptance*. Turning to the first requirement, the donor must intend to make an immediate transfer of ownership to the donee. *See, e.g., Gruen v. Gruen*, [496 N.E.2d 869](#) (N.Y. 1986). The statements and actions of the donor usually provide the best evidence of intent. But if the donor intends the gift to take effect in the future, it is ineffective.

[B] Delivery

There are three main methods of delivery. Traditionally, “delivery” connoted *manual delivery*, that is, the physical transfer of possession of the item to the donee. Manual delivery is often impossible or impractical, however; all jurisdictions allow constructive delivery in this event. *Constructive delivery* occurs when the donor physically transfers to the donee the means of obtaining access to and control over the object, most commonly by handing over a key. Finally, *symbolic delivery*—physically transferring to the donee an object that represents or symbolizes the object—is permitted in many jurisdictions if manual delivery is difficult.

[C] Acceptance

Finally, the donee must accept the gift. Courts presume acceptance of a gift that is unconditional and valuable to the donee.

§ 5.04 Gifts Causa Mortis [52-53]

A gift causa mortis is a gift of personal property in anticipation of the donor's imminently approaching death. It requires all three gift inter vivos elements, plus a fourth element: the donor's anticipation of imminent death.

§ 5.05 Restrictions On Donor's Autonomy [53-54]

In general, a donor is free to give his property away to anyone he chooses. Statutory exceptions have eroded this rule in extreme situations. For instance, most states restrict lifetime gifts by one spouse that are intended to nullify the property rights that the law accords to a surviving spouse.

Chapter 6 PROPERTY RIGHTS IN HUMAN BODIES

§ 6.01 The Controversy [55-56]

Can property rights exist in human bodies or body parts? While the law does not permit people to sell themselves into slavery, it has traditionally allowed them to sell certain replenishable body parts (e.g., hair). Advances in medical technology raise the question of whether body organs such as kidneys or human genetic material can be sold.

§ 6.02 Rights in Body Parts Generally [56-60]

The law generally acknowledges the authority of all persons to control the destiny of their body parts, yet restrictions exist. For example, in *Moore v. Regents of the University of California*, [793 P.2d 479](#) (Cal. 1990), the California Supreme Court held that a patient whose cells were removed during an operation and later cultivated into a patented cell line without his knowledge, had no property-based claim against his physicians.

§ 6.03 Rights in Human Eggs, Sperm, and Embryos [60-62]

Commentators have suggested three alternative legal approaches to genetic material: treating it as property, treating it as life, or according it the middle status of special respect. The most challenging issues involve the destruction of human embryos, where courts have taken a variety of approaches.

§ 6.04 Surrogate Parenting: The Sale of Babies? [62-63]

In *In re Baby M*, [537 A.2d 1227](#) (N.J. 1988) the New Jersey Supreme Court refused to enforce a surrogate parenting contract when the surrogate mother objected; the court ruled that it violated both the statutory provisions governing adoption and the strong public policy that adoption decisions be based on the best interests of the child.

Chapter 7 OTHER PERSONAL PROPERTY RULES

§ 7.01 Accession [66-67]

Under the doctrine of *accession*, one who in good faith applies labor to another's property acquires title to the resulting project if this process (1) transforms the original item into a fundamentally different article or (2) greatly increases the value of the item.

§ 7.02 Adverse Possession of Personal Property [67-68]

Most courts hold that one whose possession of a chattel owned by another is actual, adverse, hostile, exclusive, open and notorious, and continuous for the requisite period obtains title to it through adverse possession, by analogy to the rules governing real property.

§ 7.03 Bailments [69-71]

A *bailment* is the rightful possession of a chattel by someone other than the owner, e.g., where A borrows B's book. In most states, the bailee's duty of care for the chattel is governed by the ordinary negligence standard. However, a bailee who delivers the chattel to the wrong person is usually held strictly liable.

§ 7.04 Bona Fide Purchasers [72-73]

As a general rule, a seller of personal property cannot pass on better title than he possesses, even to a bona fide purchaser. However, there are several exceptions that protect the title of a bona fide purchaser under limited circumstances.

§ 7.05 Intellectual Property [73-77]

[A] Common Law Rule

The common law provided no protection for intellectual property. The inventor owned the chattel that embodied the invention, but not the design of the invention. Today, exceptions have largely swallowed the common law rule.

[B] Copyrights

Federal copyright law protects rights in original books, articles, songs, paintings, and related artistic creations that are original and "fixed" in tangible, physical form. New works receive copyright protection for the author's life, plus 70 years after her death. However, there are a number of exceptions to the scope of copyright protection.

[C] Patents

Exclusive property rights in certain types of inventions may be secured under a federal patent. A person who invents or discovers any new and useful process, machine, or other invention and meets other statutory requirements can receive a patent which is effective for 20 years from the application date.

[D] Trademarks

A trademark is a word, name, symbol, or device used to identify and distinguish the products of a particular manufacturer or retailer. Statutory trademark protection is obtained by registering the mark with a federal agency and using the mark in interstate commerce.

[E] Rights of Publicity

In most jurisdictions, a celebrity has a property right to the exclusive use of his name and likeness for financial gain.

PART III: ESTATES AND FUTURE INTERESTS

Chapter 8 HISTORY OF THE ESTATES IN LAND SYSTEM

§ 8.01 The Estates System [79-80]

In law, a person does not “own” land; rather, she owns certain legally-enforceable rights concerning the land, either in the form of an estate or a future interest.

§ 8.02 Defining “Estate” and “Future Interest” [80]

A *present estate* (usually abbreviated as *estate*) is a legal interest that entitles its owner to the immediate possession of real or personal property. A *future interest* is a legal interest that does not currently entitle its owner to immediate possession, but that may become a present estate in the future.

§ 8.03 Property Law in Feudal England [80-85]

[A] The Feudal Foundation

The English property law system can be traced to the Norman Conquest of 1066. When William the Conqueror became the King of England, he redistributed land to his supporters in order to protect his reign from foreign and domestic opposition.

[B] Feudal Tenures

Over time, the system imposed by King William resulted in two types of landholdings: *free tenures* (held by the nobles and upper classes) and *unfree tenures* (held by peasants). The free tenures were by far the more important category, and formed the foundation for the modern system of land ownership. One who held land from the king in a free tenure owed both *service* and *incidents* in return. The required service might be to provide a specified number of knights on demand, to make an annual payment, or to perform another action. The incidents were specific rights; for example, the incident of *wardship* allowed the king to take possession of the land after the holder’s death until the orphaned son reached age 21.

[C] Subinfeudation

Each person or *tenant* holding from the king could create subtenures with others through *subinfeudation*. Thus, one parcel of land could be the subject of many different tenures. Over time, as services became less valuable (e.g., knights were rendered obsolete by changes in war technology), the feudal incidents became much more important. However, the tenant could circumvent the incidents through subinfeudation. The

resulting pressure produced the 1290 Statute of Quia Emptores, which abolished subinfeudation but, in return, authorized each tenant to substitute another in his stead without the overlord's consent. Accordingly, it became possible to freely transfer land ownership to others.

§ 8.04 Property Law in Post-Feudal England [85-88]

As feudalism declined, the system of free tenures gradually evolved into private ownership of land, in the form of three key estates: the life estate, the fee tail, and the fee simple, discussed in Chapter 9. But to what extent could an owner burden an estate with future interests? Between 1500 and 1700, a series of common law restrictions were adopted that curtailed future interests, discussed in Chapter 14.

§ 8.05 Estates in Land in the Early United States [88-89]

Upon independence, the states largely adopted the English rules governing estates and future interests, but only to the extent consistent with local American conditions. Over time, this led to major alternations in the English system, including the abolition of fee tail.

§ 8.06 Trends in Modern Law Governing Estates in Land [90]

Today most land in the United States is held in the most basic estate, fee simple absolute. The other estates, and the future interests that accompanied them under English law, are increasingly irrelevant.

Chapter 9 PRESENT ESTATES

§ 9.01 A Byzantine System [92]

American property law was long dominated by a byzantine system of estates and future interests. Precise, elaborate, and sometimes arbitrary rules were created to classify estates and future interests into various categories. Although this system has decreasing relevance today, it is still important to understand its basic structure.

§ 9.02 Creation of Estates [92-93]

Estates and future interests originate in two main sources: deeds and wills. They can arise from a trust as well, but either a deed or will is normally used to transfer the property into the trust.

§ 9.03 Classifying Estates [93]

The main problem that estates present is classification. Three main variables are used in classifying an estate: (1) freehold or nonfreehold? (2) absolute or defeasible? and (3) legal or equitable?

§ 9.04 Estates: Freehold or Nonfreehold? [93-94]

The law traditionally recognized six basic types of estates: three *freehold* estates (fee simple, life estate, fee tail) and three *nonfreehold* estates (term of years tenancy, periodic tenancy, and tenancy at will). Today we view freehold estates as forms of “owning” land, while nonfreehold estates are merely forms of “leasing” land.

§ 9.05 Basic Categories of Freehold Estates [94-103]

[A] Fee Simple

The distinction between the three freehold estates is based on duration. *Fee simple* is a freehold estate whose duration is potentially infinite. It roughly corresponds to the layperson’s understanding of “ownership.” The most common form is fee simple absolute, the largest aggregation of property rights recognized under American law. At one time, it was necessary to use special language to create a fee simple (e.g., “to A and his heirs”), but today informal language such as “to A” will suffice in most states.

[B] Fee Tail

The *fee tail* is a largely-obsolete freehold estate whose duration is measured by the lives of the lineal descendants of a designated person. For example, if O granted Greenacre

“to A and the heirs of his body,” this created an estate that would endure as long as A’s bloodline continued.

[C] Life Estate

The *life estate* is a freehold estate whose duration is measured by the lives of one or more specified persons. For example, a grant “to A for A’s life” creates a life estate in A for as long as he lives. Alternatively, the duration may be measured by the life of a person other than the grantee (e.g., “to A for B’s life”); this is called a life estate *pur autre vie*.

§ 9.06 Freehold Estates: Absolute or Defeasible? [103-110]

[A] Basic Distinction

Each freehold estate is either *absolute* or *defeasible*. Most estates are absolute, meaning that their duration is restricted only by the standard limit that defines that category of estate. For example, if O conveys Greenacre “to A,” then A owns a fee simple absolute. This estate may endure forever, consistent with the basic definition, and will end—if at all—only by escheat. A defeasible estate is subject to a special provision that may end the estate prematurely, if a particular event occurs, e.g., “to A, but if A ever smokes cigars, then to B.”

[B] Types of Defeasible Estates

There are three types of defeasible fee simple estates. The *fee simple determinable* automatically expires at a stated time, immediately giving the holder the right to possession. For example, if O grants land “to A for so long as used as a park,” and the park use ceases, then title immediately reverts in O. The *fee simple subject to a condition subsequent* does not automatically expire when the triggering condition occurs; rather, the future interest holder must take affirmative action to end the estate. For instance, if O grants land “to A, but if not used as a park, then the land shall return to me,” and the park use ceases, O must take action to end A’s estate, such as by filing suit against A. Finally, the *fee simple subject to an executory limitation* automatically expires when a stated event occurs, but gives the right to possession to a transferee (e.g., “to A, but if the land is not used as a park, then to B”). Defeasible life estates may also be created, but are less common.

§ 9.07 Freehold Estates: Legal or Equitable? [110]

Each estate and future interest can also be created in trust. If O grants land “to T in trust for L, and then for R,” then T holds legal title to the land, but L has an equitable life estate and R has an equitable vested remainder in fee simple absolute.

§ 9.08 Restrictions on Transfer: Rule Against Restraints on Alienation [111-112]

Any total or “absolute” restraint on alienation of a fee simple is null and void. For example, if O conveys land “to A, but if A ever attempts to sell the land, then to B,” a court would find the restraint void; thus, A owns fee simple absolute and B has no interest. Partial restraints on alienation of a fee simple may be allowed if reasonable in nature, purpose, and duration.

§ 9.09 Restriction on Use: Waste [112-114]

A person who holds an estate subject to a future interest may not commit *waste*. *Affirmative waste* occurs when the voluntary acts of the present estate owner significantly reduce the value of the property (e.g., destroying a valuable house). *Permissive waste* stems from inaction: the failure of the estate owner to exercise reasonable care to protect the estate (e.g., failing to fix a leaky roof).

Chapter 10 CONCURRENT OWNERSHIP

§ 10.01 The Nature of Concurrent Ownership [116]

A present estate in real or personal property can be simultaneously owned by two or more persons, each holding the right to concurrent possession. Such an estate is called a *concurrent estate*.

§ 10.02 Types of Concurrent Estates [116-125]

[A] Tenancy in Common

There are three basic types of concurrent estates: *tenancy in common*, *joint tenancy*, and *tenancy by the entirety*. In a tenancy in common, each co-owner holds an undivided fractional share in the entire parcel of land, and each is entitled to simultaneous possession and enjoyment of the whole parcel. Today any devise to two or more unmarried persons is presumed to create a tenancy in common (e.g., “to A and B”). A tenancy in common interest is freely transferable during the holder’s lifetime and at death.

[B] Joint Tenancy

The joint tenancy differs from the tenancy in common in that a joint tenant has a right of survivorship. If O conveys land “to A and B as joint tenants, with right of survivorship,” and A dies first, then B holds fee simple absolute. English common law required four *unities* to create and continue a joint tenancy. The joint tenants had to acquire title at the same *time*; they had to acquire *title* by the same deed or will; each *interest* had to be identical in size; and each tenant had to have an equal right to *possession*. Today some states have eroded these requirements. A joint tenancy interest is inalienable.

[C] Tenancy by the Entirety

The tenancy by the entirety—now abolished in many states—can only be created in a husband and wife (e.g., “to A and B, as tenants by the entirety”). It requires the same four unities as the joint tenancy, plus the fifth unity of marriage. It can be terminated only by divorce, the death of one spouse, or mutual agreement of the spouses. This estate is controversial because in some states creditors of one spouse cannot levy on property held in tenancy by the entirety. *See, e.g., Sawado v. Endo*, [561 P.2d 1291](#) (Haw. 1977).

§ 10.03 Rights and Duties of Cotenants [125-129]

In theory, each cotenant has an equal right to possession and enjoyment of the whole property, regardless of the share of his fractional interest. Thus, under the majority view,

even a cotenant in exclusive possession of the property is not liable to the other cotenants for rent, absent an ouster. However, each cotenant is entitled to a pro rata share of (1) rents paid by third persons and (2) profits from the land. While all cotenants are obligated to pay their share of mortgage payments, taxes, and related assessments, they are not individually liable in most states for the cost of repairs or improvements, absent special circumstances.

§ 10.04 Termination of Concurrent Estates [129-132]

Any tenant in common or joint tenant may end the cotenancy by suing for *partition*; the court will grant partition automatically, with no need to show cause. The court will either grant *partition in kind* (physical division of the land) or *partition by sale* (division of proceeds from the judicial sale of the land). In addition, a cotenant can always end or *sever* the joint tenancy merely by conveying her interest to another person. For example, if A and B are joint tenants, and B conveys her interest to C, then A and C now have a tenancy in common, because the unities of time and title are missing.

Chapter 11 **MARITAL PROPERTY**

§ 11.01 Gender and Marital Property [134]

Traditionally, the common law allowed men to exercise almost total control over marital property during the marriage, upon divorce, and at death. Most states initially followed this approach, but reforms over time have produced greater gender equality. The principal alternative, adopted by eight states, is the community property system.

§ 11.02 Traditional Common Law System [134-136]

Under the traditional approach, the husband obtained a life estate in all freehold lands owned by his wife during the marriage. When divorce occurred, property was divided between the spouses according to who had title. At death, a widow received *dower*—a life estate in one-third of her husband’s qualifying real property; a surviving widower received *curtesy*—a life estate in real property owned by his wife in fee simple or fee tail.

§ 11.03 Modern Common Law System [136-143]

[A] Rights During Marriage

The nineteenth century Married Women’s Property Acts adopted by most states eroded the prior system. Under these reforms, women are allowed to retain control of their property after marriage, and to acquire additional property thereafter. Thus, rights in property during the marriage are based on which spouse acquires it.

[B] Rights Upon Divorce

Today all common law states require *equitable distribution* of marital property at divorce. Which spouse holds title to the property during the marriage is not determinative. Rather, the court will distribute the property based on a number of factors, such as the income of each spouse, the duration of the marriage, the occupational skills of each spouse, and so forth.

[C] Rights Upon Death

The *elective share* has replaced dower and curtesy in almost all common law jurisdictions. Under this approach, the surviving spouse may elect to either abide by the terms of the decedent spouse’s will or take a share (normally one-half or one-third) of all property the decedent owned at death.

§ 11.04 Community Property System [143-146]

The community property system views marriage as an economic partnership between husband and wife in which the contributions of each are valued equally. In general, the earnings of either spouse during marriage, and all proceeds from those earnings, are deemed *community property*. During the marriage, the spouses have equal rights to use and control the community property. Upon divorce, community property is divided between the spouses, often using equitable criteria. Finally, at death the decedent spouse may transfer by will one half of the community property; the other half belongs to the surviving spouse.

§ 11.05 Conflict Between the Systems: The Problem of Migrating Couples [146-147]

If a couple moves from a common law jurisdiction to a community property jurisdiction, problems may arise. For instance, if the husband is the only wage earner in the common law state, all property acquired with his earnings belongs to him; if the couple now moves to a community property state, this may be viewed as the husband's separate property, to do with as he wishes.

§ 11.06 Attempts to Avoid the Systems: Premarital Agreements [147]

The modern trend is to recognize the validity of premarital agreements. Most states have adopted the Uniform Premarital Agreement Act, which establishes criteria for determining when such agreements will be enforced.

§ 11.07 The Future of Marital Property Law?: Uniform Marital Property Act [147-148]

The Uniform Marital Property Act may eventually bridge the gap between the common law and community property systems. Its major contribution is to provide that each spouse owns a half-interest in all marital property during the marriage, much like the community property system.

§ 11.08 Property Rights of Unmarried Couples [148-150]

In most states, property rights may exist between unmarried cohabitants, though the legal basis for this approach varies. Many states will enforce express contracts between cohabitants concerning property rights; some states provide relief based on implied contract, unjust enrichment, or other theories.

Chapter 12 INTRODUCTION TO FUTURE INTERESTS

§ 12.01 Future Interests in Context [151]

Complex rules govern the classification and enforcement of future interests. These rules arose out of the social and economic conditions prevailing in England after the decline of feudalism.

§ 12.02 What Is a Future Interest? [152]

A *future interest* is a nonpossessory interest that will—or may—become a possessory estate in the future. For example, if O conveys land “to A for life,” O retains a future interest to retake possession when O dies.

§ 12.03 Why Create a Future Interest? [152-153]

Future interests are most commonly encountered in family gifts. However, particularly in the nineteenth century, future interests were sometimes created for charitable or economic reasons.

§ 12.04 Types of Future Interests [153-155]

There are five basic types of future interests. Three of them—the *reversion*, the *possibility of reverter*, and the *right of entry*—can only be created in a transferor. The remaining two—the *remainder* and the *executory interest*—may be created only in a transferee.

§ 12.05 Classifying Future Interests: An Overview [155-156]

Classification is relatively easy when a deed or will creates a freehold estate that is followed by only one future interest, as the chart in the text indicates. However, the process is more difficult when an estate is followed by multiple future interests.

§ 12.06 Common Law Approach to Future Interests [156-157]

Future interests present a clear example of the historic tension in English law between individual autonomy and social welfare. The common law can be seen as a grudging compromise between these goals. Future interests could be created, but were restricted by various devices.

§ 12.07 Modern Future Interest Legislation [157]

Many jurisdictions have simplified the common law approach to future interests through legislation, e.g., by merging the executory interest into the remainder or by weakening the Rule Against Perpetuities.

§ 12.08 Contemporary Relevance of Future Interests [157-158]

The importance of legal future interests in real property is declining. However, equitable future interests are still used for estate planning involving personal property such as stocks and bonds.

Chapter 13 FUTURE INTERESTS HELD BY THE TRANSFEROR

§ 13.01 Three Future Interests [159-160]

Future interests are classified according to the identify of the holder—the transferor or the transferee. Three types of future interests may be held by the transferor: the reversion, the possibility of reverter, and the right of entry.

§ 13.02 Types of Future Interests [160-161]

[A] Reversion

When an owner conveys a vested estate smaller than the estate he owns, he retains a future interest called a *reversion*. For instance, if O holds fee simple absolute, but conveys merely a life estate to A, O retains a reversion.

[B] Possibility of Reverter

When a transferor creates a fee simple determinable, the future interest retained is a *possibility of reverter*. For example, if O conveys land “to L for so long as used as an orphanage,” O retains a possibility of reverter.

[C] Right of Entry

The *right of entry* arises when a transferor creates a fee simple subject to a condition subsequent (e.g., O conveys “to L, but if L fails to use the property as an orphanage, then O may enter and retake possession”).

§ 13.03 Transfer of Interest [161-162]

The reversion is freely transferable. At one time, limits were placed on the transferability of the possibility of reverter and right of entry during the holder’s lifetime; today, however, both of these interests are freely transferable.

§ 13.04 Other Rights of Interest Holder [162-163]

Before the transferor’s future interest becomes possessory, his rights are quite limited. He can bring suit if the possessor commits waste and, in some states, can also share in eminent domain proceeds if the property is condemned.

§ 13.05 Modern Reforms [163-164]

Many states now restrict the possibility of reverter and right of entry by statute. For example, in some jurisdictions such an interest will lapse within 20 or 30 years of creation unless the holder files a notice of intent to preserve it.

Chapter 14 FUTURE INTERESTS HELD BY THE TRANSFEREE

§ 14.01 An Intricate Common Law Maze [166-167]

The common law principles governing future interests held by transferees are extraordinarily complex, reflecting the internal tensions of post-feudal English society. The maze of rules that resulted from centuries of legal struggle can be described as a compromise: future interests in transferees were permitted, but restricted.

§ 14.02 Classifying Future Interests Held by the Transferee [167-168]

The common law recognized only two broad categories of future interests that could be held by a transferee: the *remainder* and the *executory interest*. There are four types of remainders and two types of executory interests.

§ 14.03 Remainders [168-175]

[A] Definition

A remainder is a future interest created in a transferee that is capable of becoming possessory upon the natural termination of a prior estate created by the same instrument. For example, if A conveys “to B for life, and then to C,” C’s interest is capable of becoming possessory when the prior estate (B’s life estate) naturally terminates; C holds a remainder.

[B] Types of Remainders

[1] Vested Remainders

The three types of vested remainders are: the *indefeasibly vested remainder*; the *vested remainder subject to divestment*; and the *vested remainder subject to open*. All three vested remainders are (a) created in a living, ascertainable person and (b) not subject to any condition precedent except the natural termination of the prior estate. The indefeasibly vested remainder is certain to become a possessory estate; for example, if A conveys “to B for life, and then to C,” C (or C’s successor) will clearly be entitled to possession upon B’s death. In contrast, the vested remainder subject to divestment is certain to become possessory *unless* some specified event occurs (e.g., “to B for life, then to C, but if C ever smokes a cigar, then to D). Finally, the vested remainder subject to open is held by one or more ascertainable members of a class that may be enlarged by the future addition of presently unascertainable persons.

[2] Contingent Remainders

The contingent remainder, in contrast, is either (a) created in an unascertainable person or (b) subject to a condition precedent. For example, suppose A conveys “to B for life, and then to C if C graduates from law school.” C’s remainder is contingent because she must first satisfy a condition precedent (graduating from law school) before she is eligible to take possession following B’s death.

§ 14.04 Executory Interests [176-178]

[A] Definition

An executory interest is a future interest created in a transferee that must “cut short” or “divest” another estate or interest in order to become a possessory estate. For example, if A conveys property “to A, but if B returns from France, then to B,” A has a form of fee simple that may potentially endure forever; in order to become a possessory estate, B’s interest must cut short A’s fee simple, so B has an executory interest.

[B] Types of Executory Interests

It is traditional to distinguish between the *shifting executory interest* (one that divests the transferee) and the *springing executory interest* (one that divests the transferor). However, this distinction has no legal significance.

§ 14.05 Consequences of the Distinction Between Remainders and Executory Interests [178-179]

At common law, the distinction was important. For example, the Rule in Shelley’s Case applied to remainders, but not to executory interests. Today, however, there is little legal difference between the two interests in most jurisdictions.

§ 14.06 Creation of Interests [179]

The remainder or executory interest in real property can arise only through express language in a valid deed or will, not through implication.

§ 14.07 Transfer of Interests [179-180]

Remainders and executory interests may be freely transferred in most states. However, some states still insist that contingent remainders and executory interests cannot be transferred by an inter vivos conveyance.

§ 14.08 Other Rights of Interest Holders [181-182]

The holder of a vested remainder still has somewhat greater rights than the owner of a contingent remainder or executory interest in two areas: remedies for waste and shares in eminent domain proceeds.

§ 14.09 Four Special Restrictions on Contingent Future Interests Held by Transferees [182-183]

The common law recognized four doctrines designed to restrict contingent future interests held by transferees: the Rule Against Perpetuities; the Doctrine of Worthier Title; the Rule in Shelley's Case; and the destructibility of contingent remainders.

§ 14.10 The Rule Against Perpetuities: At Common Law [183-194]

[A] The Rule in Context

The common law version of the Rule is: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." To comply with the Rule, it must be logically provable that within the specified period a covered contingent interest will either *vest* (that is, change into a vested interest or present estate) or *forever fail to vest* (that is, never vest after the period ends), based *only* on facts existing when the future interest becomes effective.

[B] Application of the Rule

For example, assume O conveys "to A for life, then to the first child of A to reach age 30." Assume that A is alive when the conveyance takes effect, but that A has never had children. A potential unborn child (A's first child to reach age 30) receives a contingent remainder under this language, which is a type of interest subject to the Rule. It cannot be logically proven that this interest is valid. For instance, A might have a child, B, one year after the conveyance; suppose O and A then die. Twenty-nine years later, if B survives, her contingent remainder will "vest" by becoming a present estate. B's interest is deemed invalid under the Rule—at the time of O's conveyance—because such vesting would come too late (more than 21 years after O and A, the lives in being, died).

§ 14.11 The Rule Against Perpetuities: Modern Reforms [194-197]

Most states have modified the common law Rule by: (1) adopting a "wait and see" approach (that is, waiting until the end of the relevant period to see if the interest in fact vested or forever failed to vest); and/or (2) permitting reformation to validate the interest if consistent with the transferor's intent.

§ 14.12 The Doctrine of Worthier Title [197-198]

Traditionally, if an owner transferred real property to one party, and by the same instrument transferred the following remainder or executory interest to the owner's heirs, then, under this doctrine, the owner received a reversion and the "heirs" received nothing. Today the doctrine is virtually obsolete in the United States.

§ 14.13 The Rule in Shelley's Case [198-199]

Under this rule, if a deed or will (1) created a life estate or fee tail in real property in one person and (2) also created a remainder in fee simple in that person's heirs, and (3) the estate and remainder were both legal or both equitable, then the future interest belonged to that person, not the person's "heirs." This rule has been abolished in all but two states.

§ 14.14 The Destructibility of Contingent Remainders [199-200]

At common law, a legal contingent remainder in real property was extinguished if it failed to vest when the preceding freehold estate ended. Today almost all states have abandoned this doctrine.

PART IV: LANDLORD AND TENANT

Chapter 15 INTRODUCTION TO LANDLORD-TENANT LAW

§ 15.01 Landlord-Tenant Law in Context [202]

In recent decades, American landlord-tenant law has undergone a major transformation. While traditional law was mainly oriented toward protecting landlords, modern law increasingly seeks to protect residential tenants.

§ 15.02 What Is a Leasehold Estate? [202-203]

A leasehold estate (also called a nonfreehold estate) is a legal interest that entitles the tenant to immediate possession of designated land, for either a fixed period of time (e.g., five years) or for so long as the tenant (or *lessee*) and the landlord (or *lessor*) desire.

§ 15.03 Leasehold Estate Distinguished from Nonpossessory Interests [203]

The key distinction between a leasehold estate, on the one hand, and interests such as a license or easement, on the other, is that the holder of a leasehold estate has the right of exclusive possession. One holding a license or easement merely has a right to use the land.

§ 15.04 Historical Evolution of Landlord-Tenant Law [204-205]

Early English landlord-tenant law developed when the lease was a commercial transaction—the lease of agricultural land. The lease was viewed as the conveyance of an estate to the tenant. Accordingly, the landlord had virtually no duty to the tenant during the lease period, except to refrain from interfering with the tenant's use and enjoyment of the land.

§ 15.05 Categories of Leasehold Estates [206-213]

[A] Term of Years Tenancy

The *term of years tenancy* endures for a designated period that is either fixed in advance (e.g., five years) or computed using a formula that is agreed upon in advance. This tenancy automatically expires when the agreed period ends, without any notice of termination.

[B] Periodic Tenancy

The *periodic tenancy* lasts for an initial fixed period (e.g., one month) and then automatically continues for additional equal periods until either the landlord or the tenant terminates the tenancy by giving advance notice. The classic example is the “month-to-month” residential lease.

[C] Tenancy at Will

The *tenancy at will* has no fixed duration and endures only so long as both the landlord and the tenant desire. Today most tenancies at will arise from implication, not from an express agreement.

[D] Tenancy at Sufferance

The *tenancy at sufferance* arises when a person in rightful possession of land wrongfully continues in possession after the right to possession ends. Most authorities agree that this is not technically an estate in land, but rather a convenient label. The landlord is free to evict the “tenant” at any time.

§ 15.06 Modern Revolution in Landlord-Tenant Law [213-216]

Sparked by concerns about appalling housing conditions, a wave of change began sweeping over American landlord-tenant law in the 1960s. Over the next two decades, courts and legislatures abandoned or revised long-settled rules in order to accommodate the needs of modern urban tenants, particularly poor tenants living in slum conditions. As part of this trend, many courts began to view the lease as a contract, not a conveyance.

Chapter 16 CREATION OF THE TENANCY

§ 16.01 The Lease [218-219]

The lease is the heart of the landlord-tenant relationship. Almost all states have a Statute of Frauds that requires a lease for a term of more than one year to be in writing, to set forth the key lease terms, and to be appropriately signed.

§ 16.02 Selection of Tenants [220-223]

The common law did not restrict a landlord's freedom in selecting or evicting tenants. Today federal and state statutes prohibit certain types of discrimination in the rental or sale of real property. For instance, the Fair Housing Act of 1968, [42 U.S.C. §§ 3601-3619](#), bars discrimination based on race, color, religion, sex, familial status, national origin, or handicap in connection with the sale or rental of most dwellings.

§ 16.03 Tenant's Duty to Pay Rent [224-230]

In general, the rental amount and other lease terms result from private negotiation between the parties. Some jurisdictions, however, have enacted *rent control ordinances* that limit the amount of rent a landlord may charge and otherwise regulate the landlord-tenant relationship.

§ 16.04 Landlord's Duty to Deliver Possession [230-232]

There are two views on the landlord's duty to deliver possession. The majority or "English" view requires the landlord to deliver actual possession of the leased premises to the tenant when the lease term begins, in addition to the legal right to possession. The minority or "American" view is that the landlord need only deliver the legal right to possession, and thus has no duty to oust a holdover tenant.

§ 16.05 Tenant's Duty to Occupy [232-233]

The prevailing view is that the tenant has no duty to take possession unless an express lease covenant so requires. However, an implied covenant to occupy and operate a business will be found in a commercial lease where all or most of the rent is computed as a percentage of the tenant's sales.

Chapter 17 CONDITION OF LEASED PREMISES

§ 17.01 “Let the Tenant Beware”? [236-237]

The law governing the duty to maintain the condition of leased residential premises has changed dramatically over the last 30 years in response to the problem of substandard housing. Commercial leases, however, are still largely governed by traditional law.

§ 17.02 The Common Law Foundation [237-240]

The common law tended to impose the duty to repair on the tenant. If the lease was silent on the issue, the tenant had the duty to repair, except under narrow circumstances, because of his duty to avoid permissive waste. Even where the lease expressly assigned the repair duty to the landlord, the early English tenant often had little effective recourse for breach because the law viewed lease covenants as independent of each other. Thus, the landlord's breach did not excuse the tenant from his duty to pay rent.

§ 17.03 The Problem of Substandard Housing [240-241]

By the 1960s, substandard rental housing was a major problem in the United States. Residential tenants, obligated to repair defects in their dwellings in theory, were unable to do so in practice. Housing codes enacted by cities were weakly enforced and thus ineffective. Public interest attorneys sought to remedy these conditions by reforming the common law rules.

§ 17.04 Constructive Eviction [241-246]

Constructive eviction occurs when wrongful conduct of the landlord substantially interferes with the tenant's use and enjoyment of the leased premises. For example, if a Minnesota law requires the landlord to supply heat to a rented dwelling during the winter, then his failure to do is wrongful conduct which renders the dwelling unusable. If the landlord fails to fix the problem within a reasonable time after receiving notice, then the tenant may vacate the premises without further rent liability under the lease. Alternatively, most states allow the tenant to remain in possession and sue for damages, while continuing to pay rent.

§ 17.05 Illegal Lease Doctrine [247]

Under the *illegal lease doctrine*, a lease of unsafe and unsanitary premises that violate the local housing code is deemed an illegal—and thus unenforceable—contract, allowing the tenant to withhold rent but remain in possession. This doctrine was initially adopted by some jurisdictions in the 1960s and 1970s, before the development of the implied warranty of habitability.

§ 17.06 The Implied Warranty of Habitability: New Common Law [247-254]

[A] Nature of Implied Warranty

In the 1970s, courts began to recognize a new tool in the fight against substandard rental housing: *the implied warranty of habitability*. Under this doctrine, each residential lease is deemed to contain an implied warranty that the landlord will deliver the premises in habitable condition and maintain them in that condition during the lease term. *See, e.g., Hilder v. St. Peter*, [478 A.2d 202](#) (Vt. 1984). For example, broken windows, leaky roofs, or rodent infestation normally render a rented dwelling uninhabitable.

[B] Remedies

In general, the tenant must notify the landlord of the defect and allow a reasonable time for repairs to be completed. If the landlord fails to act, the tenant may remain in possession and also: (1) withhold rent; (2) sue for damages; or, in some jurisdictions, (3) repair the defects and deduct the cost from rent due the landlord. Alternatively, the tenant may terminate the lease and sue for damages.

§ 17.07 The Statutory Warranty of Habitability [254-255]

Statutes in more than 30 states now impose a warranty of habitability in residential leases. This statutory warranty largely parallels the common law warranty, although there are key differences. For example, often the statutory warranty can be waived by the tenant, while the common law warranty cannot.

§ 17.08 Landlord Liability for Personal Injury [255-258]

At common law, the landlord was generally not liable for personal injury to tenants or others caused by dangerous conditions on leased premises, even if the landlord was negligent. The modern trend, however, is to require a residential landlord to exercise reasonable care to prevent such injuries.

§ 17.09 Fixtures [258-259]

Traditionally, any chattel permanently affixed to the premises by the tenant was a *fixture*, and thus became the property of the landlord. In order for a chattel to become a fixture today, the tenant must intend for it to become a permanent part of the premises.

Chapter 18 TRANSFER OF LEASEHOLD INTEREST

§ 18.01 Transfers in General [261-262]

Most modern leases restrict the tenant's right to transfer all or part of the leasehold interest. However, the landlord is typically able to transfer his interest freely.

§ 18.02 Distinguishing Between Assignment and Sublease [262-264]

Most states use an objective test in distinguishing between an *assignment* and a *sublease*. If a tenant transfers the right of possession for the *entire* remaining term of the lease, the transfer is an assignment. However, if only *part* of the remaining term is transferred, a sublease arises.

§ 18.03 Assignment [264-267]

[A] Assignment Basics

An assignment creates a triangle of relationships among the original *lessor*, the original lessee who transfers her right (the *assignor*), and the person who receives the right (the *assignee*). Privity of contract continues between the lessor and the assignor; privity of contract is created between the assignor and the assignee; and privity of estate arises as a matter of law between the lessor and the assignee.

[B] Rights and Duties of Parties

The assignor remains liable to the original lessor for all covenants in the original lease, because they remain in privity of contract, absent a novation. The privity of estate between the lessor and assignee requires both of them to perform those covenants in the original lease that "run with the land," and, as a practical matter, most lease covenants do so run. For example, suppose that A leases to B who assigns to C. If no one pays rent to A, both B and C are liable.

§ 18.04 Sublease [267-268]

[A] Sublease Basics

A sublease creates a new landlord-tenant relationship. Suppose A leases to B, and B (as *sublessor*) leases to C (as *sublessee*). Privity of contract and privity of estate remain between A and B; privity of contract and privity of estate arise between B and C.

[B] Rights and Duties of Parties

The sublessor remains liable to the original lessor for all covenants in the original lease. Similarly, the sublessee is liable to the sublessor for the covenants in the sublease. However, the sublessee has no obligations to the original lessor.

§ 18.05 Should the Assignment-Sublease Distinction Be Abolished? [268-269]

Some scholars argue that all transfers by lessees should be treated as assignments, noting that the feudal rationale for the distinction ended long ago. The main argument for retaining the distinction is that a sophisticated transferee should be able to choose the level of liability he wishes to incur.

§ 18.06 Tenant's Right to Assign or Sublease [269-275]

[A] Role of the Lease

Tenants are free to assign or sublease their interests in theory, absent a contrary agreement. However, the vast majority of leases expressly restrict this freedom. Some lease clauses flatly prohibit transfer; others give the lessor the sole discretion to approve or deny a transfer; still others require the lessor to act reasonably in deciding whether to consent.

[B] Silent Consent Clause

Complexity arises when the lease requires landlord consent but is silent on the standard for granting consent. The traditional approach applies the sole discretion standard in this situation. However, the modern trend is to require that the landlord act reasonably in deciding whether to grant or deny consent. *See, e.g., Kendall v. Ernest Pestana, Inc.*, [709 P.2d 837](#) (Cal. 1985).

§ 18.07 Transfers by Landlord [275-276]

The landlord's future interest in the premises (a reversion) is freely transferable to third parties in almost all cases. Lease clauses restricting this right are rare.

Chapter 19 TERMINATION OF THE TENANCY

§ 19.01 The Struggle for Possession [278]

Disputes between the landlord and the tenant most frequently arise in connection with ending the tenancy. While the common law provided the residential landlord with broad discretion in this area, the modern trend is to curtail these rights.

§ 19.02 Surrender [278-279]

An express *surrender* arises when the landlord and the tenant mutually agree to terminate the lease, ending their respective rights and duties.

§ 19.03 Abandonment [279-287]

[A] Abandonment Defined

An abandonment occurs when the tenant (1) vacates the premises without justification, (2) lacks the present intent to return, and (3) defaults in the payment of rent.

[B] Rights of Landlord When Tenant Abandons

At common law, the landlord could choose among three options when the tenant abandoned: (1) leave the premises vacant and sue later for accrued rent; (2) mitigate damages by reletting the premises to a new tenant and then sue the original tenant for the unpaid balance; or (3) terminate the lease. Today, however, most jurisdictions require that the landlord either mitigate damages or terminate the lease.

§ 19.04 Landlord's Right to Terminate Lease [287-292]

At common law, both the landlord and the tenant were free to terminate a periodic tenancy for any reason or for no reason. Today there are two main restrictions. A landlord may not terminate a tenancy for a discriminatory reason (e.g., because of the tenant's race). Similarly, in most jurisdictions a landlord cannot engage in *retaliatory eviction*—usually defined as evicting a tenant in retaliation for complaining about housing conditions or taking other action to correct such conditions.

§ 19.05 Self-Help Eviction [292-295]

When the tenant defaults under the lease, most jurisdictions still allow the landlord to exercise *self-help* to retake possession of the premises. Some allow the landlord to use reasonable force for this purpose, while others insist that any self-help eviction must be peaceable. There is clear movement, however, toward abolishing the self-help remedy,

and requiring the landlord to evict through judicial process. *See, e.g., Berg v. Wiley*, [264 N.W.2d 145](#) (Minn. 1978).

§ 19.06 Ejectment [295]

The common law landlord who sought to evict a defaulting tenant could only sue for ejectment, a frustratingly slow remedy. Today ejectment has been largely supplanted by summary eviction procedures.

§ 19.07 Summary Eviction Proceedings [296-297]

Statutes in all states now offer the landlord a special, expedited proceeding to recover possession from the breaching tenant, usually called summary eviction or unlawful detainer. These actions are characterized by short deadlines and simplified procedures.

PART V: THE SALE OF LAND

Chapter 20 THE SALES CONTRACT

§ 20.01 Anatomy of a Sales Transaction [300-302]

Every real property transaction has four basic stages: (1) locating the buyer; (2) negotiating the contract; (3) preparing for the closing; and (4) closing the transaction.

§ 20.02 Role of the Attorney [303]

At one time, the attorney was the key professional in almost every land sales transaction. However, the attorney's role is rapidly diminishing, as his tasks are taken over by the real estate broker, the title insurance company, and the escrow agent.

§ 20.03 Role of the Real Estate Broker [303-305]

In most states, the real estate broker is the main professional in home sales transactions. The broker negotiates the deal, prepares the contract, handles the transaction until the closing, and sometimes supervises the closing. As a specialized type of agent, the broker owes a fiduciary duty to the principal, including obligations of care, skill, diligence, loyalty, and good faith.

§ 20.04 Requirements for Valid Contract [306-311]

[A] Basic Elements

All types of contracts must meet the same minimum requirements of offer, acceptance, consideration, and so forth. However, a contract for the sale of an estate or interest in real property is enforceable only if it also satisfies the Statute of Frauds.

[B] Statute of Frauds Generally

The typical Statute of Frauds imposes three requirements: (1) the *essential terms* of the sales contract (2) must be contained in a *memorandum or other writing* that (3) is *signed* by the party against whom enforcement is sought. To contain the essential terms, the writing must normally identify the parties, contain words showing an intent to buy or sell, state the purchase price, and adequately describe the property.

[C] Exceptions to Statute of Frauds

There are two main exceptions to the Statute of Frauds: *part performance* and *equitable estoppel*. Courts differ somewhat on the actions that constitute part performance, but one

common formula requires that the buyer *both* (1) take possession of the property *and* (2) *either* pay part or all of the purchase price *or* make improvements to the property. Estoppel arises where (1) one party has been induced by the other to substantially change position in justifiable reliance on an oral contract and (2) serious or irreparable injury would result from refusing enforcement of the contract.

§ 20.05 A Typical Sales Contract [312]

In most home sales transactions, the contract is a preprinted standard form. Because sales transactions are mainly governed by state law, these form contracts differ from state to state.

§ 20.06 Contract Provisions on Title [312-318]

[A] Purchase of Title

Technically, a buyer is purchasing title to the land, not the land itself. Accordingly, the prudent buyer will negotiate an express contract condition that specifies the quality of title the seller must deliver. If the contract is silent on the issue, the law fills the gap with an implied covenant that the seller must deliver *marketable title*.

[B] Implied Covenant of Marketable Title

In general, marketable title is title “free from reasonable doubt, but not from every doubt.” *Norwegian Evangelical Free Church v. Milhauser*, [169 N.E. 134, 135](#) (N.Y. 1929). For example, title is unmarketable if the seller does not own the estate he purports to be selling or if his title is subject to any lien, easement, or other encumbrance.

§ 20.07 Contract Provisions on Financing [318-319]

Because the buyer is rarely able to pay the purchase price in cash, he will ensure that the contract contains a financing condition. It will provide that he is not obligated to buy if he cannot obtain a suitable loan.

§ 20.08 Closing the Transaction [320]

In general, the seller’s obligation to deliver the deed and the buyer’s obligation to pay the purchase price are deemed *concurrent conditions*. This means that until one party performs—or tenders performance—the other party is not yet obligated to perform and thus has not breached the contract.

§ 20.09 Remedies for Breach of Contract [321-325]

[A] Specific Performance

A specific performance decree mandates that the breaching party perform the sales contract. Because specific performance is an equitable remedy, it is not always available even if a breach has occurred. It will be awarded only if the usual remedy of money damages is inadequate. In addition, the court has broad discretion in deciding whether to grant this remedy and may refuse it, for example, if this would cause unusual hardship to the breaching party.

[B] Damages

The basic measure of damages for breach of a real property sales contract is the difference between the contract price and the fair market value of the property at the time of the breach. However, in many states the seller is not liable for such damages if the breach was caused by good faith inability to convey marketable title. Finally, especially when full loss of bargain damages are not available, the non-breaching party may receive incidental damages—reimbursement of out-of-pocket expenses incurred in reliance on the contract.

Chapter 21 CONDITION OF THE PROPERTY

§ 21.01 “Let the Buyer Beware”? [327-328]

The common law afforded the buyer of real property almost no remedy for defective conditions, whether discovered before or after the close of escrow. Over the last 50 years, the law has moved steadily away from this view. There is a clear trend toward holding sellers, brokers, and sometimes builders responsible to buyers for significant defects in dwellings.

§ 21.02 Seller’s Duty to Disclose Defects [328-334]

[A] Common Law Approach

Traditionally, the seller of real property had no duty to disclose hidden or *latent* defects to the buyer, absent a fiduciary duty or other special circumstances. A buyer could recover only when the seller intentionally misrepresented facts about the property or physically concealed known defects.

[B] Modern Trend Toward Requiring Disclosure

Today in most states a seller of residential property who knows of a latent defect that substantially affects the value or desirability of the property must disclose it to the buyer. *See, e.g., Johnson v. Davis*, [480 So. 2d 625](#) (Fla. 1985). Under this standard, most significant physical or legal defects in the house or lot must be disclosed. The law is less clear concerning the seller’s duty to disclose “intangible” defects, such as whether a house has a reputation for being haunted. *See, e.g., Stambovsky v. Ackley*, [572 N.Y.S.2d 672](#) (App. Div. 1991) (disclosure required).

§ 21.03 Broker’s Duty to Disclose Defects [334]

The real estate broker representing the buyer has long been required to disclose known defects in the property as part of his fiduciary duty. Some jurisdictions also require the seller’s agent to disclose such defects to the buyer.

§ 21.04 Builder’s Implied Warranty of Quality [335-337]

At common law, the builder who constructed a new home and then sold it to a buyer had no liability for defects, even if the home was negligently built. Today, however, most jurisdictions hold that—as a matter of law—an implied warranty accompanies the sale of a new home by a builder, developer, or other “merchant” of housing. The warranty

provides that the house has been constructed in a workmanlike manner and is fit for human habitation.

§ 21.05 Risk of Loss Before Conveyance [337-339]

Under the traditional doctrine of *equitable conversion*, the buyer is deemed to be the equitable owner of the land during the period between formation of the contract and close of escrow. For example, if A contracts to sell her home to B, and the home burns down before escrow closes, B is still obligated to purchase. A minority of states follows the emerging view that the risk of loss remains with the seller until either possession or title are transferred to the buyer.

Chapter 22 THE MORTGAGE

§ 22.01 The Role of Security for Debt [341-342]

Virtually all land purchases are financed with borrowed money. The lender will require that the borrower post security for the loan, so that—if the loan is not repaid as promised—the lender may cause the security to be sold and repay the loan from the sales proceeds.

§ 22.02 What Is a Mortgage? [342-343]

A *mortgage* is the conveyance of an interest in real property as security for performance of an obligation. The obligation is almost always a loan of money evidenced by a *promissory note*. If the borrower (the *mortgagor*) fails to make the payments required by the note or otherwise defaults on the obligation, the lender (the *mortgagee*) may cause the secured property to be sold and apply the sales proceeds to satisfy the unpaid debt. This process is called *foreclosure*.

§ 22.03 Evolution of the Mortgage [343-344]

By the seventeenth century, English courts routinely allowed the mortgagor to recover the property if the entire loan was repaid within a reasonable period after its due date; this right became known as the mortgagor's *equity of redemption*. A mortgagee could petition the court to end or foreclose this equity of redemption, and set a final date for payment, a process called *strict foreclosure*. Because strict foreclosure was often unfair to the mortgagor, most states adopted legislation that mandated *judicial foreclosure*—a public sale of the property under court supervision and distribution of excess sales proceeds to the mortgagor. Finally, with the development of the *power of sale mortgage*, foreclosure could occur through a public auction sale without any judicial involvement; this is called *power of sale foreclosure*.

§ 22.04 Creation of a Mortgage [344-346]

Because the mortgage is viewed as the transfer of an interest in real property, the formalities required for an effective deed also apply to the mortgage. At a minimum, (1) the material terms of the mortgage (names of parties, description of property, words manifesting intent, etc.) must be set forth in a writing signed by the mortgagor and (2) the mortgage must be delivered to the mortgagee.

§ 22.05 The Secured Obligation [346-349]

The mortgage is a nullity unless it secures an obligation. Typically, the mortgage secures repayment of a loan evidenced by a promissory note. The promissory note is simply a

specialized form of contract between the lender and the borrower; it includes the loan amount, interest rate, term, and repayment schedule. Such notes often contain a *prepayment clause* (allowing the mortgagor to repay the loan in advance of the due date in return for payment of a monetary penalty) and a *due-on-sale clause* (allowing the mortgagee to demand repayment of the entire loan if the mortgaged property is sold or otherwise transferred).

§ 22.06 Foreclosure of Mortgage [349-352]

[A] Judicial Foreclosure

Judicial foreclosure is a specialized type of litigation. The successful mortgagee receives a judgment that states the amount due on the mortgage, directs the property to be sold at public auction, and specifies the terms of the sale. Once the sale occurs, it must be confirmed by the court; the court has the power to deny confirmation if needed to protect the mortgagor's legitimate interests (e.g., if the sale was conducted in an illegal manner).

[B] Power of Sale Foreclosure

The power of sale foreclosure is a purely private procedure, without judicial involvement. It is permitted only when authorized by the express terms of the mortgage. While most states allow this form of foreclosure, statutory safeguards are generally provided for the mortgagor. For example, specified advance notice must be provided to the mortgagor and to the public, the auction must occur in a public location, and so forth. Most states allow the mortgagor to bring suit to cancel the sale only where the bid price is so grossly inadequate as to "shock the conscience" or if fraudulent or unconscionable conduct has occurred.

§ 22.07 Special Mortgagor Protection Laws [352-354]

[A] Anti-Deficiency Legislation

If the price received at foreclosure does not fully pay the secured debt, the mortgagee may then be able to sue the mortgagor to receive a *deficiency judgment*—a judgment requiring the mortgagor to pay the unpaid balance. However, legislation in some states restricts such actions. Many states limit the amount of any deficiency judgment to the difference between (1) the unpaid balance and (2) the fair market value of the property. Some states bar deficiency judgments altogether.

[B] Statutory Redemption

About half the states allow the mortgagor to redeem the property after foreclosure in a process called *statutory redemption*. In such states, the mortgagor may recover title by

paying a set amount (usually the foreclosure sale price plus other expenses) to the successful bidder within a specific period.

§ 22.08 An Alternative Financing Device: The Installment Land Contract [354-356]

The installment land contract is frequently used as an alternative to the mortgage. Under such a contract, the buyer (or *vendee*) agrees to pay the purchase price in installments to the seller (or *vendor*) over a period of years. The contract provides that the vendor retains title until all payments are made, and then transfers title to the vendee. The vendee usually holds possession during the contract period.

§ 22.09 Other Financing Devices [357-358]

The *deed of trust* is another financing device.. The borrower (or *trustor*) executes a written instrument conveying an interest in the property to a neutral third party (the *trustee*), as security for an obligation owed to the lender (or *beneficiary*). If the trustor defaults, the trustee is empowered to conduct an auction sale and repay the beneficiary with the sales proceeds. More basically, in any situation where the parties actually intend a deed, lease, or other instrument to be security for debt, the courts will treat it as a *equitable mortgage*, regardless of the form of the transaction.

Chapter 23 THE DEED

§ 23.01 The Deed in Context [359-360]

The deed is the basic document used to transfer an estate or other interest in land during the owner's lifetime. One who transfers title by deed is a *grantor*; one who receives title is a *grantee*.

§ 23.02 Evolution of the Deed [360-361]

In feudal England, a fee simple in land was transferred through an elaborate ritual called *feoffment with livery of seisin*. The 1536 Statute of Uses permitted the conveyance of a fee simple by means of a written instrument, and finally the 1677 Statute of Frauds mandated that every conveyance of an interest in land be in writing.

§ 23.03 Types of Deeds [361-362]

[A] General Warranty Deed

The general warranty deed contains six specific covenants of title that warrant against any defect in the grantor's title, as described in Chapter 26. For example, the covenant against encumbrances warrants that there are no mortgages, easements, liens or other encumbrances on the property at the time the deed is delivered.

[B] Special Warranty Deed

The special warranty deed usually contains the six title covenants found in the general warranty deed, but applies them only to defects caused by the acts or omissions of the grantor. For example, suppose A, having no title whatever to a parcel of land, purports to convey title to B, and B in turn conveys to C using a special warranty deed; because the title defect was caused by A, not B, B is not liable to C.

[C] Quitclaim Deed

The quitclaim deed contains no title covenants. By its use, the grantor does not warrant that she owns the property or—if she has any title—that her title is good. This type of deed merely conveys whatever right, title, or interest the grantor *may have* in the land.

§ 23.04 Requirements for Valid Deed [363-373]

[A] Essential Deed Components

In general, a deed must be in writing, be signed by the grantor, identify the grantor and

grantee, contain words of conveyance, and adequately describe the land. In addition, the grantor must deliver the deed to the grantee, and the grantee must accept.

[B] Delivery

A deed is not effective until it is delivered. In order to deliver a deed, the grantor must manifest by words or actions an intent that the deed be immediately effective to transfer an interest in land to the grantee. The typical grantor delivers a deed through the act of physically handing it to the grantee, with words indicating the required intent. Yet, as an early English judge observed, “As a deed may be delivered to a party without words, so may a deed be delivered by words without any act of delivery.”

[C] Acceptance

In theory, the grantee must accept the deed in order to for the conveyance to be effective. However, the law presumes that a grantee will accept a beneficial conveyance, so the issue rarely arises.

§ 23.05 Interpretation of Deeds [373-374]

The central rule in deed interpretation is to follow the intent of the grantor and the grantee. If ambiguity remains, extrinsic evidence (e.g., statements and conduct of the parties) will be considered.

§ 23.06 Recordation of Deeds [374]

Virtually all deeds are *recorded*, meaning that the information contained in the deed is entered into the public land records maintained by the appropriate local government agency, usually a *recorder's office*. Recordation is not required in order for a deed to be valid. Yet the prudent grantee will immediately record in order to protect his title against later claimants.

§ 23.07 Effect of Forgery [374-375]

A forged deed is completely void. It conveys nothing to the grantee or any subsequent grantee in the chain of title, including any bona fide purchaser.

§ 23.08 Effect of Fraud [375-376]

A deed induced by the grantee's fraud (*fraud in the inducement*) is voidable in an action brought by the true owner against the grantee, but not against a bona fide purchaser from that grantee. However, when fraud prevents the grantor from knowing that he is executing a deed at all (*fraud in the inception*), the deed is void for all purposes, just like a forged deed.

§ 23.09 Estoppel by Deed [376]

Under this doctrine, if a grantor uses a warranty deed to convey title to land he does not own, but then later does acquire title to the same land, it automatically passes to the innocent grantee.

Chapter 24 FUNDAMENTALS OF LAND TITLE

§ 24.01 The Problem of Conflicting Title Claims [378]

The legal principles used to resolve conflicting title claims are a compromise between two goals: respecting the property rights of current owners and facilitating the transfer of property rights to new owners.

§ 24.02 General Rule: First in Time Prevails [379]

The traditional rule is that the person whose interest is first delivered prevails over anyone who acquires an interest later. However, the recording acts adopted in most states carve out two exceptions to this basic first-in-time rule.

§ 24.03 First Exception to General Rule: Subsequent Bona Fide Purchaser Prevails [379-380]

Almost all states recognize a major exception to the first-in-time rule: the *bona fide purchaser* doctrine. In a title dispute between a first-in-time owner and a later bona fide purchaser, the bona fide purchaser prevails. The recording act in each state defines the precise requirements for bona fide purchaser status. Roughly half of the states are *notice* jurisdictions, about half are *race-notice* jurisdictions, and two states do not recognize the exception at all.

§ 24.04 Who Is a Bona Fide Purchaser?: Notice Jurisdictions [380-384]

In a notice jurisdiction, a bona fide purchaser is a subsequent purchaser who pays valuable consideration for an interest in real property, without any notice of an interest that a third party already holds in the land. Suppose O conveys to A, and then O conveys to B, who pays value to O and has no notice of A's interest. As a bona fide purchaser, B prevails over A.

§ 24.05 Who Is a Bona Fide Purchaser?: Race-Notice Jurisdictions [384-385]

In a race-notice jurisdiction, a bona fide purchaser is a subsequent purchaser for value without notice of any prior interest who *also* records his deed first. Suppose O conveys to A; then O conveys to B, who pays value to O, has no notice of A's interest, and who records before A does. B prevails over A.

§ 24.06 What Constitutes Notice? [385-389]

[A] Basics

The law recognizes four types of notice: actual notice; record notice; inquiry notice; and imputed notice. *Actual notice* simply means knowledge of the prior interest. *Imputed notice* arises from a special relationship between two or more people; if one has knowledge of a fact (e.g., an agent for a principal) the other (e.g., the principal) is also deemed to know the fact.

[B] Record Notice (aka Constructive Notice)

Record notice (or *constructive notice*) means notice of any prior interest that would be revealed by an appropriate search of the public records affecting land title. A subsequent purchaser is charged with notice of such a prior interest even if he never actually conducts a title search.

[C] Inquiry Notice

If a purchaser of real property has actual notice of facts that would cause a reasonable person to investigate further, he is deemed to know the additional facts that inquiry would uncover whether he inquires or not; this is called *inquiry notice*.

§ 24.07 Second Exception to General Rule: The “Shelter Rule” [389]

Under the *shelter rule*, a grantee from a bona fide purchaser is protected as a bona fide purchaser, even though the grantee would not otherwise qualify for this status. Suppose O conveys to A, and then to B (a bona fide purchaser). Before B can convey to C, A notifies C about the O-A deed; because C has notice, C cannot be a bona fide purchaser. However, under the shelter rule, C prevails over A.

§ 24.08 Special Rule for Race Jurisdictions: First Purchaser for Value to Record Prevails [389-390]

Under a race recording statute, the first purchaser for value to record prevails. If O conveys to A for value, and then O conveys to B for value, B prevails if she records her deed before A does, even if B knows about the O-A deed.

§ 24.09 Why Protect the Bona Fide Purchaser? [390-391]

One reason is that the doctrine prevents fraud and quasi-criminal conduct, while a race statute allows the sophisticated to plunder the naive. Another is grounded in comparative fault; as between the prior buyer (who can avoid the conflict by recording promptly) and

the later buyer (who cannot), it makes sense to allocate the loss to the person who is best situated to avoid it.

Chapter 25 THE RECORDING SYSTEM

§ 25.01 The Recording System in Context [393-394]

The recording acts in almost all states provide that a subsequent purchaser is charged with constructive notice of a prior recorded interest—even if he fails to search the records—and accordingly cannot qualify for protection as a bona fide purchaser. However, not all recorded documents provide constructive notice.

§ 25.02 Purposes of the Recording System [394-395]

The recording system serves two basic purposes: (1) it protects existing owners from losing their property to later purchasers by providing constructive notice; and (2) it protects new buyers by allowing them to qualify for bona fide purchaser protection after careful title searching reveals no prior interests.

§ 25.03 Anatomy of the Recording System [395-396]

The recording system functions much like a specialized library. Deeds and other instruments are placed in the public land records; a written catalogue (usually consisting of two indices) lists all recorded documents. A title searcher must examine the indices that affect the parcel at issue, read the relevant documents, and independently evaluate their legal significance to determine the state of title.

§ 25.04 Procedure for Recording Documents [396-397]

Virtually all states require that the document be acknowledged before a notary public or similar official in order to qualify for recordation. Most states also restrict the types of documents that are recordable. The actual recording process is quite simple. One merely presents the original document to the appropriate local official and pays a small fee. The official stamps the date and time of recordation on the original, a copy of the document is filed in the land records, and later the relevant indices (usually the *grantor-grantee index* and the *grantee-grantor index*) are updated to include the document.

§ 25.05 Procedure for Searching Title [397-401]

The title searcher first searches in the grantee-grantor index back in time to determine when the current owner received title; she then repeats the process from owner to owner back in time. Shifting to the grantor-grantee index, she now searches forward in time, under the name of each owner, to determine if any of them made conveyances during their respective period of ownership other than the known conveyances to each other. Finally, she reads the relevant documents and evaluates their legal significance.

§ 25.06 Recorded Documents that Provide Constructive Notice [401]

A recorded document provides constructive notice if it meets the formal requirements for recording, contains no technical defects, is recorded in the *chain of title*, and is properly indexed.

§ 25.07 Recorded Documents that Do Not Provide Constructive Notice [402-409]

[A] Defective Document

A recorded document that fails to meet the requirements for recording does not provide constructive notice. For example, if the acknowledgment is defective on its face (e.g., because it shows the notary's commission had previously expired), the document is deemed to be unrecorded.

[B] Document Outside the Chain of Title

Recorded documents that cannot be located using the standard title search described above are deemed to be "outside" the chain of title, and do not provide constructive notice. For example, suppose O conveys to A (who fails to record), A then conveys to B (who records), and finally O conveys title to C (who records). Because the recorded A-B deed cannot be found in a standard title search, it is outside the chain of title and provides no notice to C.

[C] Improperly Indexed Document

In most states, a document that is improperly indexed or non-indexed does provide constructive notice. However, a minority of states (including California and New York) treat such a document as unrecorded.

§ 25.08 Effect of Marketable Title Acts [409-410]

Many states have enacted marketable title acts. If an owner has a clear record chain of title back to a root of title (e.g., a deed) for a specified period (usually 20 to 40 years), then a typical marketable title act will provide that title is free from all interests that were recorded before the root of title.

§ 25.09 Technology and the Future of the Recording System [410-411]

There is a clear—but slow—trend toward computerization of public land records. However, most recorder's offices still use the traditional system of paper records because the costs of computerization are so high.

Chapter 26 METHODS OF TITLE ASSURANCE

§ 26.01 Title Assurance in Context [414]

How can an owner protect against a title defect that is discovered after close of escrow? There are three basic methods of title assurance: (1) covenants of title; (2) title opinions and abstracts; and (3) title insurance.

§ 26.02 Covenants of Title [415-423]

[A] What Are Title Covenants?

A deed usually contains express promises by the grantor about the state of title being conveyed. These promises are known as *title covenants* or *covenants of title*. If one of these covenants is breached, the grantee (and sometimes his successors) may recover damages from the grantor.

[B] Scope of Title Covenants

The law has traditionally recognized six title covenants. The *covenant of seisin* warrants that the grantor is the owner of the estate described in the deed; the *covenant of right to convey* warrants that the grantor has the legal right to convey title; and the *covenant against encumbrances* warrants that there are no encumbrances on the land. These three are called the *present covenants*. The *covenant of warranty* is the grantor's promise to defend the title against other claimants, while the *covenant of quiet enjoyment* warrants that the grantee's possession will not be disturbed by anyone with superior title. Finally, the *covenant of further assurances* is a promise that the grantor will take other actions that are reasonably necessary to perfect the grantee's title. These final three are known as the *future covenants*.

[C] Remedies for Breach of Covenant

A present covenant is breached—if at all—only when escrow closes and, accordingly, the relevant statute of limitations then begins running. Either the original grantee or her successors may sue for breach of a present covenant. In contrast, a future covenant is breached only when the grantee is actually or constructively evicted by one holding superior title; in most states, only the grantee has standing to sue. The measure of damages for breach of most covenants is measured by the grantee's purchase price plus interest.

§ 26.03 Title Opinions and Abstracts [423-424]

Another method of title assurance is an attorney's opinion of title based on the examination of public records. Alternatively, an attorney might provide a title opinion based on an *abstract* of title (a summary of title records prepared by a nonlawyer). The title opinion was once the dominant method of title assurance in the United States; however, the importance of this method is diminishing due to the widespread use of title insurance.

§ 26.04 Title Insurance Policies [424-432]

[A] What Is Title Insurance?

A title insurance policy is a contract of indemnity between the issuing company (the *insurer*) and the property owner or mortgagee (the *insured*). In the policy, the insurer promises to compensate or indemnify the insured against losses caused by covered title defects.

[B] Scope of Title Insurance Policies

Most title insurers use standard policy forms developed by the American Land Title Association. The standard ATLA owner's policy covers four types of risks: (1) if title to the estate is actually held by someone other than the insured; (2) if there is an encumbrance on the insured's title; (3) if title is unmarketable; and (4) if the insured has no right of access. However, the broad coverage afforded by the standard policy is limited by various exceptions and exclusions. For example, matters that could be discovered through an inspection or survey (e.g., adverse possession) are typically excluded from coverage.

[C] Negligence Liability

In some states, a title insurer can be held liable in negligence for failing to conduct a reasonably diligent title search for the benefit of the insured before issuing the title policy.

§ 26.05 Registration of Title [432-433]

In a few states, a government agency is empowered to determine who holds title. Under such a title registration system, the agency issues a certificate that conclusively establishes land title. The certificate identifies the current title holder and lists all easements, covenants, liens, and other encumbrances.

PART VI: OTHER TRANSFERS OF LAND TITLE

Chapter 27 ADVERSE POSSESSION

§ 27.01 “Title by Theft”? [436]

The doctrine of adverse possession often strikes law students as a form of theft. However, the reasons that adverse possession exists help illuminate the policies that underpin American property law.

§ 27.02 Evolution of Adverse Possession [436-437]

English law first recognized adverse possession in 1275. Later transplanted to the newly-independent United States, it served as a method to resolve widespread land title conflicts, especially in frontier areas where land was rarely surveyed and boundary lines were often unmarked.

§ 27.03 Requirements for Adverse Possession [437-446]

[A] Overview

Adverse possession is a blend of statutory and case law. All states recognize a statute of limitations for recovering possession of land from a wrongful occupant. In a majority of states, however, the other requirements stem from case law. In some states, statutes specify all of the acts necessary for adverse possession. A few states also require the adverse possessor to pay property taxes.

[B] Actual Possession

The adverse possessor must take *actual possession* of the land. Under the majority view, this means that the claimant must physically use the particular parcel of land in the same manner that a reasonable owner would, given its nature, character, and location.

[C] Exclusive Possession

The claimant must hold *exclusive possession*. His possession must not be shared with either the true owner or the general public, but must be as exclusive as would characterize an owner’s normal use for such land.

[D] Open and Notorious Possession

The claimant’s acts of possession must be *open and notorious*, so visible and obvious that a reasonable owner who inspects the land will receive notice of an adverse title claim.

[E] Adverse or Hostile Possession Under Claim of Right

In most states, the requirement of *adverse or hostile possession under a claim of right* is met if the claimant merely uses the land as a reasonable owner would—without permission from the true owner. In a minority of states, however, the claimant must believe in good faith that he owns title to the land.

[F] Continuous Possession

The requirement of *continuous possession* means that the claimant's acts of possession must be as continuous as those of a reasonable owner, given the nature, location, and character of the land. However, successive periods of adverse possession by persons in privity can be combined to satisfy the statutory duration requirement; this process is known as *tacking*.

[G] For the Statutory Period

The period for adverse possession varies from state to state. Most states use periods of 10, 15 or 20 years.

§ 27.04 Procedural Aspects of Adverse Possession [446-447]

Successful adverse possession automatically extinguishes the former owner's title and creates a new title in the adverse possessor by operation of law. As a practical matter, though, the successful adverse possessor needs to record a judgment or deed that confirms her ownership in order to convey her title easily.

§ 27.05 Special Restrictions on Adverse Possession [447-449]

The limitations period for adverse possession is extended or *tolled* when the owner is unable to protect his rights due to a *disability* such as infancy, mental illness, or sometimes imprisonment. Adverse possession is not available against land owned by the federal government or many state governments.

§ 27.06 Policy Rationales for Adverse Possession [449-451]

Scholars have identified several alternative theories that help explain adverse possession. The most common view is that adverse possession is a specialized statute of limitations to recover possession of land.

Chapter 28
TRANSFER OF PROPERTY AT DEATH

§ 28.01 Death and Property [454]

At death, the property of the decedent is transferred according to the terms of his will, which may create a trust effective at death. If there is no will, the property will either (1) be distributed to his family members as determined by state law or, if none exist, (2) escheat to the state.

§ 28.02 The Will [454-457]

[A] Nature of the Will

The *will* is a written instrument, effective only upon death, by which an owner disposes of property. The person making the will is called a *testator* (if male) or a *testatrix* (if female).

The transfer of real property by will is known as a *devise*, and the recipient is a *devisee*. In contrast, the transfer of personal property by will is known as a *legacy*, and the recipient is a *legatee*.

[B] Will Formalities

In general, a will is effective if it is (1) in writing and (2) signed by the testator at the end, (3) in the presence of two witnesses who themselves sign the will to attest to its execution. An exception to these requirements is the *holographic will*—one entirely in the handwriting of the testator—which is valid in most states without witnesses.

§ 28.03 The Trust [457-463]

[A] Nature of the Trust

The *trust* involves a special fiduciary relationship in which one or more persons (the *trustees*) manage property on behalf of others (the *beneficiaries*); the person creating the trust is called the *settlor* or *trustor*. The trustee holds *legal title* to the trust property, while the beneficiaries hold *equitable title*.

[B] Trust Formalities

The *testamentary trust* is created as part of a will and takes effect at the death of the settlor. In order to create this type of trust, the settlor must execute a writing that (1) shows the intention to form a trust, (2) identifies the trust property, and (3) complies with the formalities required for a valid will. In contrast, the *inter vivos trust* (or *living trust*) takes effect during the life of the settlor. To create such a trust, the settlor must either (1)

declare himself to be the trustee of property for a particular beneficiary or (2) transfer property in trust to a third person as trustee for the beneficiary. A written instrument is required to create an effective living trust as to land, but an oral trust is valid as to personal property.

§ 28.04 Intestate Succession [463-466]

Many Americans die *intestate*—without a valid will—and their property is distributed according to the state law of *intestate succession*. In general, the decedent's property is transferred to the closest living relatives, with a strong preference for the surviving spouse and *issue* (lineal descendants of the decedent, such as children, grandchildren, etc.). If the decedent leaves no spouse or issue, the estate goes to the surviving parents or other ancestors. Where no spouse, issue, or ancestors survive, the estate goes to *collaterals* (other blood relatives of the decedent, e.g., siblings).

§ 28.05 Escheat [466]

If one dies intestate without heirs, his estate passes to the state in which the property is located; this process is called *escheat*.

PART VII: OWNERS AND NEIGHBORS

Chapter 29 NUISANCE

§ 29.01 “An Impenetrable Jungle”? [468-469]

The common law divided nuisances into two categories: *private nuisance* and *public nuisance*. Most of the law in the field deals primarily with the private nuisance. The modern law governing private nuisances is both complex and confusing. The two key issues are: (1) what constitutes a nuisance? and (2) what is the appropriate remedy?

§ 29.02 What Is a Private Nuisance? [469-471]

The Restatement (Second) of Torts defines a private nuisance as “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.” This definition is overbroad, however, because not all such invasions are private nuisances. The traditional distinction between nuisance and trespass hinges on the nature of the intrusion. If there is a physical entry onto the land of another, the case is evaluated as a potential trespass. However, cases involving fumes, smoke, light or other nontrespassory conduct are governed by nuisance principles.

§ 29.03 Evolution of Nuisance Law [471-472]

As it evolved in early England, only one key factor was considered to determine if private nuisance liability existed: *the gravity of harm* to the landowner or occupant. A nuisance occurred when one person used his land in a nontrespassory manner that caused substantial harm to another’s use and enjoyment of his land. American courts began moving away from this standard in the nineteenth century, finding that only an unreasonable land use was a nuisance.

§ 29.04 Elements of Private Nuisance [472-477]

[A] Intentional Interference

As the Restatement (Second) of Torts provides, a person’s harmful conduct is deemed intentional if either (1) he acts for the purpose of causing the harm or (2) he knows that the harm is resulting or substantially certain to result from his conduct.

[B] Nontrespassory Interference

As noted above, the harmful conduct must be nontrespassory.

[C] Unreasonable Interference

States vary widely on what constitutes unreasonable interference. Some equate unreasonableness with serious injury to the plaintiff; others use a multi-factor test including such items as the character of the neighborhood, the nature of the conduct, its proximity to the plaintiff's land, its frequency and duration, etc. Under the Restatement (Second) of Torts approach, adopted in about one-third of the states, interference is unreasonable if the *gravity of the harm* outweighs the *utility of the defendant's conduct*.

[D] Substantial Interference

Slight inconveniences or petty annoyances do not give rise to nuisance liability. But if a normal person living in the community would regard the interference as strongly offensive or seriously annoying, then the level of interference is substantial.

[E] Interference with Use and Enjoyment of Land

Nuisance liability arises only from interference with the interests of an owner, tenant, or other land occupant in the use and enjoyment of land (e.g., if fumes from defendant's factory destroy plaintiff's apple orchard).

§ 29.05 Defenses to Liability for Private Nuisance [477-478]

At one time, many courts recognized a defense called *coming to the nuisance*; plaintiff who moved into the area after the offending conduct began was not entitled to recover. Today almost all courts reject this defense. However, a number of other defenses (e.g., laches, statute of limitations) may apply.

§ 29.06 Remedies for Private Nuisance [478-482]

[A] Injunction

The traditional remedy in private nuisance cases was an injunction against the offending conduct. However, in almost all jurisdictions today, the plaintiff no longer has an automatic right to this remedy. Instead, the court will use a balancing test (called *balancing the equities*) to determine if an injunction is appropriate on the facts of the particular case. In general, a court will issue an injunction only if the resulting benefit to the plaintiff is greater than the resulting damage to the defendant. *See, e.g., Boomer v. Atlantic Cement Co.*, [309 N.Y.S.2d 312](#) (N.Y. 1970).

[B] Damages

If the nuisance is deemed *permanent*, the plaintiff receives damages for past and future harm in one lawsuit. Damages are measured by the extent to which the nuisance

diminishes the fair market value of the affected property. However, if the nuisance is temporary or *continuing*, the plaintiff only receives damages to compensate for past harm (usually measured by diminished rental value or use value), and must sue again in the future as additional damages are suffered.

§ 29.07 Public Nuisance [482-483]

A public nuisance is “an unreasonable interference with a right common to the general public.” Restatement (Second) of Torts, § 821B(1). Almost any intentional conduct that unreasonably interferes with the public health, safety, welfare, or morals may constitute a public nuisance. Examples include keeping diseased cattle, detonating explosives on a residential street, and operating an unlicensed casino. Usually a public nuisance action is brought by a city or other governmental entity. A private party may sue only if he has suffered special injury.

§ 29.08 Special Problem: Landowner Liability for Hazardous Substance Contamination [483-484]

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, [42 U.S.C. §§ 9601-9675](#), four categories of persons are strictly liable for the cleanup of hazardous substances on land: (1) the current owner or “operator” of the land; (2) the persons who were owners or operators at time of disposal; (3) persons who arranged for disposal or treatment; and (4) persons who transported the substances to the land. However, under narrow circumstances an owner may qualify for the *innocent buyer* or *innocent landowner* defense.

Chapter 30 TRESPASS

§ 30.01 The Right to Exclude [485-486]

As the Supreme Court has explained, the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, [444 U.S. 164, 176](#) (1979).

§ 30.02 What Is a Trespass? [486-488]

At common law, any intentional and unprivileged entry onto land owned or occupied by another constituted a *trespass*. The element of intent has a special meaning in trespass law. A trespasser is strictly liable; good faith and fault are irrelevant. The doctrine only requires that the defendant intend to enter the land as a matter of her free choice, not that she had an intent to trespass. The modern law of trespass largely follows the common law approach.

§ 30.03 Trespass and Rights of Migrant Farmworkers [488-489]

In *State v. Shack*, [277 A.2d 369](#) (N.J. 1971), the New Jersey Supreme Court held that the ownership of a farm did not include the right to exclude government employees who were providing health and legal services to migrant workers living on the farm.

§ 30.04 Trespass and Freedom of Speech [489-491]

The First Amendment protects the right of freedom of speech from government action, not private action. Accordingly, the Constitution does not require a private landowner to open his land to demonstrators or others who wish to exercise the right of free speech, even if the land is a shopping center or is otherwise generally open to the public. However, some states have interpreted their state constitutions to provide that shopping center owners cannot bar such free speech activities.

§ 30.05 Trespass and Beach Access [491-492]

Under the *public trust doctrine*, state governments typically control wet-sand beaches below the mean high tide line; accordingly, the public is free to use these beaches. Some jurisdictions allow the public to use the dry sand beach as well—even if it is privately owned—based on customary rights, the public trust doctrine, or other theories.

§ 30.06 Encroachments [492-493]

An *encroachment* is a permanent or continuing trespass caused by the construction of a building or other improvement that partially extends onto another’s land. The common

law treated the encroachment like any other trespass; the successful plaintiff was allowed to choose either damages or an injunction forcing removal of the encroachment. But where the encroachment results from a good faith mistake and the injury to the plaintiff is relatively minor, most modern courts will refuse an injunction and only award damages.

§ 30.07 Good Faith Improvers [493]

Most states provide relief to the *good faith improver*—one who improves land owned by another under the mistaken but good faith belief that he owns it. For example, many states allow the good faith improver to either (1) remove the improvements or (2) receive compensation equal to the amount by which the improvements increase the market value of the land.

Chapter 31 SURFACE, SUBSURFACE, AND AIRSPACE RIGHTS

§ 31.01 Attributes of Ownership [495-496]

The common law doctrines governing surface, subsurface, and airspace rights all tended to favor “natural” uses of land, and were thus hostile to new development. Over the last two centuries, these doctrines have been slowly replaced by more flexible standards that consider the needs of third parties and society at large.

§ 31.02 Water Rights [496-500]

[A] Watercourses

Water rights in rivers, lakes, streams, and other watercourses are allocated through two basic systems. The *riparian system* dominates in eastern states. Under this system, an owner whose land adjoins a watercourse may take water for all reasonable uses that do not unreasonably interfere with the uses of other riparian owners. Under the *prior appropriation system*, which prevails in western states, water rights are allocated to the first person to take water from a watercourse for a beneficial use—even if his land does not adjoin the watercourse.

[B] Diffused Surface Water

All surface water that is not confined in rivers or other watercourses is known as *diffused surface water*. The law in this area focuses on the problem of too much water. In most jurisdictions, an owner may make reasonable use of his land (e.g., by building a home) even though this alters the flow of diffused surface water in a manner that harms others.

§ 31.03 Public Trust Doctrine [500-501]

Under the traditional public trust doctrine, navigable waters and closely-related lands are held by the sovereign in trust for use by the public in such activities as commerce, fishing, and navigation. Most states have extended the doctrine to swimming, boating, and other recreational uses.

§ 31.04 Right to Support [501-502]

Each landowner has a common law right to *lateral support*: the right to have the land in its natural condition supported by adjoining parcels of land. An adjacent landowner who removes support (e.g., by excavation on his land) and thereby causes damage is strictly liable. Similarly, each owner is entitled to *subjacent support*: the right to have his land in its natural condition supported by the earth below.

§ 31.05 Boundary Line Doctrines [502-504]

[A] Land Boundaries

The common law developed four doctrines that may establish a land boundary line in a different location from that specified in the deed: agreed boundary line; acquiescence; estoppel; and adverse possession. For example, estoppel applies when one owner misleads a neighbor about the true location of the common boundary line, and the neighbor relies on the misrepresentation to his detriment (e.g., by building a new barn over the boundary line).

[B] Water Boundaries

Two common law rules address the issue of water boundaries that may move over time (e.g., creeks and rivers). *Accretion* occurs when the location of a water boundary moves slowly due to gradual buildup of soil; a property line shifts with accretion. However, if there is a sudden change in the location of such a water boundary—which is termed *avulsion*—the property line does not move.

§ 31.06 Subsurface Rights [504-506]

The traditional rule was that the ownership of land included ownership of everything underneath the land surface down to the “center of the earth.” Modern courts still protect the surface owner’s absolute right to possession when third parties intrude into the subsurface, whether by mining, installing a pipeline, or otherwise. However, the surface owner does not necessarily own the subsurface oil and gas; in some states, for example, oil generally belongs to the first person to “capture” it through extraction.

§ 31.07 Rights in Airspace: How High? [506]

Common law courts proclaimed that each landowner owned “to the heavens.” This position collapsed with the invention of the airplane. Today it is increasingly accepted that a landowner owns only the airspace that is reasonably necessary for the use or enjoyment of the land.

PART VIII: LAND USE CONTROLS—PRIVATE

Chapter 32 EASEMENTS

§ 32.01 The Easement in Context [508-509]

The law recognizes five basic categories of affirmative easements: (1) express easements; (2) easements implied from prior existing use; (3) easements by necessity; (4) prescriptive easements; and (5) irrevocable licenses or “easements by estoppel.” Certain negative easements are also recognized.

§ 32.02 What Is an Easement? [509-511]

[A] Easement Defined

In general, an *affirmative easement* is a nonpossessory right to use land in the possession of another. For example, if A owns an easement that allows her to travel over land owned by B, A holds an affirmative easement. In contrast, a *negative easement* entitles an owner to prevent another owner from doing a particular act on the second owner’s land.

[B] Easement Terminology

In the example above, A’s land that is benefitted by the easement is called the *dominant tenement*, while B’s land that is burdened by the easement is called the *servient tenement*. Every easement is classified as either appurtenant or in gross. An *easement appurtenant* benefits the easement holder in his capacity as owner of the dominant tenement. Conversely, an *easement in gross* benefits the holder in a personal sense, whether or not he owns particular land.

§ 32.03 Express Easements [512-513]

An express easement is voluntarily created in a deed, will, or other written instrument. It may arise either by *grant* or by *reservation*. In order to create an express easement, the writing must identify the parties, manifest an intent to create an easement, describe the affected land, and be signed by the grantor.

§ 32.04 Easements Implied from Prior Existing Use [513-517]

Three elements are required for an easement implied from prior existing use: (1) severance of title to land held in common ownership; (2) an existing, apparent, and continuous use when severance occurs, and (3) reasonable necessity for the use at time of severance.

§ 32.05 Easements by Necessity [517-520]

Two elements are generally required for an easement by necessity: (1) severance of title to land held in common ownership; and (2) strict necessity at the time of severance. Under the majority view, strict necessity exists when the parcel in question has no legal right of access to a public road. Some courts only require reasonable necessity.

§ 32.06 Prescriptive Easements [521-524]

In order for a prescriptive easement to arise, the claimant's use must generally be (1) open and notorious, (2) adverse and under a claim of right, and (3) continuous and uninterrupted for the statutory period. Adverse possession principles are frequently used in interpreting these elements.

§ 32.07 Irrevocable Licenses or "Easements by Estoppel" [525-526]

Ordinarily, a license is revocable. A license that becomes irrevocable, however, becomes the functional equivalent of an easement. Three elements are necessary to create an irrevocable license: (1) a license; (2) the licensee's expenditure of substantial money or labor in good faith reliance; and (3) the licensor's knowledge or reasonable expectation that reliance will occur.

§ 32.08 Other Types of Easements [527]

In addition, an easement may be implied from a subdivision map or plat, may be created through eminent domain, and may arise by implied dedication.

§ 32.09 Scope of Easements [527-530]

The scope of an easement may evolve over time as the manner, frequency, and intensity of use change. In general, the scope of an easement turns on the intent of the parties. The law usually presumes that the parties to an express or implied easement intended that the easement holder would be entitled to do anything reasonably necessary for the full enjoyment of the easement, absent evidence to the contrary.

§ 32.10 Transfer of Easements [530-531]

Any transfer of title of the dominant tenement also automatically transfers the benefit of an appurtenant easement, absent an agreement to the contrary. The law governing the transfer of easements in gross, in contrast, is more complex. In some states, an easement in gross is transferable only if it is for a commercial purpose (e.g., a railroad easement). In other states, any easement in gross is freely transferable, unless the original parties had a contrary intent.

§ 32.11 Termination of Easements [531-533]

Easements may be terminated in many ways. For example, an easement is deemed abandoned where the holder both (1) stops using it for a long period and (2) takes other actions that clearly manifest intent to relinquish the easement. Similarly, just as one may acquire an easement by prescription, the servient owner may terminate an easement by prescription.

§ 32.12 Negative Easements [533-534]

English law recognized only four negative easements: those that prevented blocking windows, blocking air that flowed in a defined channel, blocking water that flowed in a defined channel, and removing support from a building. More recently, solar easements and conservation easements have been authorized by statute in many states.

§ 32.13 Licenses [535]

A *license* is an informal permission that allows the licensee to use the land of another for a narrow purpose (e.g., as a spectator at a football game). A license may be created orally, but may generally be revoked at any time.

§ 32.14 Profits a Prendre [535]

The *profit a prendre* is the right to enter the land of another and remove timber, minerals, gravel, game, or other physical substances.

Chapter 33 REAL COVENANTS

§ 33.01 The Birth of Private Land Use Planning [538-539]

Under early English law, a promise concerning land use could not burden or benefit the successors of the original contracting parties. Two methods were developed to address this problem: the *real covenant* and the *equitable servitude*. The rules governing the real covenant are confusing and intricate, while those governing the equitable servitude are relatively straightforward.

§ 33.02 What Is a Real Covenant? [539-540]

A *real covenant* is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise and *also their successors* and (2) is enforceable in an action for damages. A real covenant may be either *affirmative* (a promise to perform an act) or *negative* (a promise not to perform an act).

§ 33.03 Policy Implications of Private Land Use Restrictions [540-541]

English courts restricted the real covenant due to fear that it would limit the marketability of land, and thus impair productivity. Modern American courts acknowledge that the real covenant can help to ensure that land is used efficiently. In other words, such restrictions may enhance productive use.

§ 33.04 Creation of a Real Covenant [541-552]

[A] Perspectives on the Real Covenant

Two points are vital to understanding. First, the law distinguishes between the *original parties* to the covenant and their *successors*. Second, each real covenant has two “sides”—the *burden* (the promisor’s duty to perform the promise) and the *benefit* (the promisee’s right to enforce the promise).

[B] Requirements for the Burden to Run

[1] Generally

In order for the successor to the original promisor to be obligated to perform the promise (that is, for the “burden to run”), the law traditionally requires that six elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to bind their successors; (3) the burden of the covenant must “touch and concern” land; (4) horizontal privity must exist; (5) vertical privity must exist; and (6) the successor must have notice of the covenant.

[2] “Touch and Concern”

In order to *touch and concern* land, the covenant must relate to the direct use or enjoyment of the land. For example, a covenant that restricts the height of future buildings on a parcel meets this requirement. In contrast, a covenant that requires an act having no connection whatsoever to the particular parcel of land (e.g., dancing a jig in the village square) does not “touch and concern.”

[3] Horizontal Privity

The law traditionally requires that the original parties have a special relationship in order for the burden to run, called *horizontal privity*. In some states, horizontal privity exists between the promisor and the promisee who have mutual, simultaneous interests in the same land (e.g., landlord and tenant). Other states extend horizontal privity to the grantor-grantee relationship as well.

[4] Vertical Privity

Vertical privity concerns the relationship between an original party and his successors. Vertical privity exists only if the successor succeeds to the entire estate in land held by the original party.

[C] Requirements for the Benefit to Run

The law requires only four elements for the benefit of a real covenant to run to successors: (1) the covenant must be in a writing that satisfies the Statute of Frauds; (2) the original parties must intend to benefit their successors; (3) the benefit of the covenant must touch and concern land; and (4) vertical privity must exist.

§ 33.05 Termination of Real Covenants [552-553]

Two of the major defenses to enforcement of a real covenant are abandonment and changed conditions. *Abandonment* occurs when the conduct of the person entitled to the benefit of the covenant demonstrates the intent to relinquish her rights. Under the *changed conditions* doctrine, a covenant becomes unenforceable when conditions in the area of the burdened land have so substantially changed that the intended benefits of the covenant cannot be realized.

§ 33.06 Remedies for Breach of Real Covenants [553]

This historic remedy for breach of a real covenant is damages, measured by the difference between the fair market value of the benefitted property before and after the defendant’s breach.

§ 33.07 Scholarly Perspectives on Real Covenants [553-554]

The real covenant has attracted much scholarly attention in recent years. Most scholars agree that the requirements of touch and concern, horizontal privity, and vertical privity should be either abolished or greatly relaxed.

§ 33.08 The Restatement (Third) of Property: Servitudes [554-555]

The new Restatement (Third) of Property: Servitudes would greatly simplify this area by combining the real covenant and the equitable servitude into one doctrine: the *servitude*. Under this approach, a contract or conveyance creates a servitude if: (1) the parties so intend; (2) it complies with the Statute of Frauds; and (3) it is not illegal, unconstitutional, or violative of public policy.

Chapter 34 EQUITABLE SERVITUDES

§ 34.01 The Equitable Servitude in Context [558-559]

The equitable servitude is the primary modern tool for enforcing private land use restrictions. The usual remedy for violation of an equitable servitude is an injunction, which often provides more effective relief than compensatory damages.

§ 34.02 What Is an Equitable Servitude? [559-560]

An *equitable servitude* is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise *and their successors* and (2) is enforceable by injunction.

§ 34.03 Evolution of the Equitable Servitude [560]

The equitable servitude was born in the famous decision of *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848), where England's chancery court held that a promise to maintain a privately-owned park in an open state, uncovered by buildings, was enforceable in equity against a successor—even though the promise could not have been enforced as a real covenant.

§ 34.04 Creation of an Equitable Servitude [561-565]

[A] Requirements for the Burden to Run

In order for the burden of an equitable servitude to bind the original promisor's successors, four elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds or implied from a common plan; (2) the original parties must intend to burden successors; (3) the promise must "touch and concern" land; and (4) the successor must have notice of the promise.

[B] Requirements for the Benefit to Run

Only three elements are required for the benefit to run to successors: (1) the promise must be in writing or implied from a common plan; (2) the original parties must intend to benefit successors; and (3) the promise must "touch and concern" land.

§ 34.05 Special Problem: Equitable Servitudes and the Subdivision [565-568]

If a developer manifests a *common plan* or *common scheme* to impose uniform restrictions on a subdivision, most courts conclude that an equitable servitude will be implied in equity, even though the Statute of Frauds is not satisfied. The common plan is

seen as an implied promise by the developer to impose the same restrictions on all of his retained lots.

§ 34.06 Termination of Equitable Servitudes [568-573]

There are many defenses to enforcement of an equitable servitude. For example, the landmark decision of *Shelley v. Kraemer*, [334 U.S. 1](#) (1948), established that racially-restrictive covenants were unconstitutional and hence unenforceable. Similarly, when there has been such a major change in neighborhood conditions that enforcement of the restriction would not provide substantial benefit to the dominant land, it is unenforceable under the doctrine of *changed conditions*.

§ 34.07 Remedies for Breach of Equitable Servitudes [573]

The standard remedy for breach of an equitable servitude is an injunction. When the breach at issue is the failure to pay money, courts will usually impose a lien on the affected property, which the plaintiff may collect by foreclosing.

§ 34.08 The Restatement (Third) of Property: Servitudes [573-576]

As noted in Chapter 33, the Restatement (Third) of Property: Servitudes brings the prospect of revolutionary change to this area by greatly simplifying the law governing the real covenant and the equitable servitude.

Chapter 35
CONDOMINIUMS AND OTHER COMMON INTEREST COMMUNITIES

§ 35.01 A New Model of Home Ownership [577-578]

An increasing number of Americans live in a *common interest community* or CIC, where their properties are subject to comprehensive land use restrictions administered by private associations. Yet the benefits of such communal living are possible only by the surrender of individual freedom.

§ 35.02 Types of Common Interest Communities [579-580]

In a *condominium*, each owner (1) holds fee simple title to an individual unit (usually a cube of airspace); and (2) also owns an undivided interest in the common areas of the development (e.g., the building, recreational facilities, parking lot) as a tenant in common. The *planned unit development* is a broad category that includes a variety of residential developments, ranging from a small cluster of tract houses to a “gated community.”

§ 35.03 Restrictive Covenants and the Common Interest Community [580-586]

[A] Role of the Declaration

A common interest community is usually created through a document called a declaration. It imposes binding restrictions—usually enforceable as real covenants or equitable servitudes—on all units in the project. These restrictions are known in many regions as *covenants, conditions, and restrictions* or *CC&Rs*; in other areas they are just called *covenants*.

[B] Validity of Covenants

CIC covenants are presumed to be valid. Yet a growing minority of courts will invalidate such a covenant if it is arbitrary, violates a fundamental constitutional right, or violates public policy. *See, e.g., Nahrstedt v. Lakeside Village Condominium Association*, [878 P.2d 1275](#) (Cal. 1994).

§ 35.04 The Owners Association [586-588]

Every CIC is governed by an owners association; the powers of the association are usually exercised by a board of directors or similar group. The board is typically responsible for functions such as maintaining the common area, hiring staff, enforcing the covenants, collecting monetary assessments from the owners, and so forth. There is a split of authority on the appropriate standard for review of association decisions when a

unit owner sues. The majority approach holds the association to the standard of a reasonably prudent person under the same circumstances.

PART IX: LAND USE CONTROLS—PUBLIC

Chapter 36 FUNDAMENTALS OF ZONING

§ 36.01 The Land Use Revolution [589-590]

At the dawn of the twentieth century, there were essentially no governmental restraints on how a private owner could use her land, except for the nuisance doctrine. Today, however, almost every parcel of land is subject to a maze of ordinances, regulations, and statutes that restrict use.

§ 36.02 What is “Zoning”? [590]

Initially, *zoning* referred to the form of land use regulation that emerged in the 1920s, by which a community was divided into geographical districts or *zones* where particular land uses were allowed. Today *zoning* is often used loosely to mean all forms of land use regulation.

§ 36.03 The Birth of Zoning [590-592]

Zoning is best understood as a response to problems created by rapid urbanization—overcrowding, disease, traffic, smoke, odors, and the like. Comprehensive, standardized zoning spread quickly throughout the United States in the 1920s. The catalyst that produced this growth was the 1922 “Standard State Zoning Enabling Act,” issued as a model act for state legislatures to adopt. Today, most zoning ordinances are still based on this Act and, accordingly, are remarkably similar.

§ 36.04 A Sample Zoning Ordinance [592-594]

The typical state zoning enabling act empowers a city council or other local legislative body to: (1) adopt a comprehensive plan; (2) enact a zoning ordinance; and (3) delegate administrative authority to an appointed board. The zoning ordinance usually divides the community into separate zones, specifies the uses permitted in each zone, and also imposes height and bulk regulations on the buildings that house each particular use.

§ 36.05 The Constitutionality of Zoning [594-597]

The Supreme Court upheld the constitutionality of zoning in the famous decision of *Village of Euclid v. Ambler Realty Co.*, [272 U.S. 365](#) (1926). The Court held that a zoning ordinance would be upheld against substantive due process and equal protection attack unless it was arbitrary and unreasonable, having no substantial relation to the public health, safety, welfare, or morals. *Euclid* is still the most important decision in American zoning law.

§ 36.06 Zoning and the Nonconforming Use [597-600]

In general, zoning regulates only future development. Thus, virtually all zoning ordinances allow the prior nonconforming use to continue. A *nonconforming use* is a use of land that lawfully existed before the zoning ordinance was enacted, but that does not comply with the ordinance.

§ 36.07 Zoning and Vested Rights [600-601]

In most states, an owner who obtains a building permit and makes substantial expenditures in good faith reliance on the permit obtains a *vested right* to the use, regardless of any later change in the zoning law.

Chapter 37
TOOLS FOR ZONING FLEXIBILITY

§ 37.01 A Modern Approach to Zoning [603-604]

The Standard State Zoning Enabling Act recognized three devices that would add flexibility to zoning: the zoning amendment, the variance, and the special exception. Today these devices are used quite frequently. In addition, two newer layers have been added to this historic foundation: novel forms of zoning and the subdivision regulation process.

§ 37.02 Zoning Amendments [605-609]

[A] Basics

A zoning ordinance may be modified by a *zoning amendment* adopted by a city council or other local governmental entity. Traditionally, such an amendment is viewed as legislative action, just like the adoption of the initial zoning ordinance. Accordingly, it will withstand due process and equal protection attack unless it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

[B] Spot Zoning and Other Restrictions

Because of the danger that the zoning amendment process might be abused to favor particular owners, however, almost all states impose additional restrictions on rezoning. Most jurisdictions will invalidate such an amendment if it constitutes *spot zoning*: rezoning that confers a special benefit on a small parcel of land regardless of the public interest or the comprehensive plan. A few states allow rezoning only to correct an original zoning mistake or if neighborhood conditions have fundamentally changed. Others treat rezoning as quasi-judicial action, subject to a more rigorous standard of judicial review.

§ 37.03 Variances [610-613]

A *variance* is an authorized deviation from strict enforcement of the zoning ordinance in a particular case due to special hardship. The Standard State Zoning Enabling Act empowered the local zoning board to grant “in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and the spirit of the ordinance will be observed and substantial justice done.” Most states still use this standard or one similar to it. Courts generally define “hardship” to mean that the owner cannot receive a reasonable return under the

existing zoning due to some special characteristic of the property (e.g., irregular lot size) that is not shared by other parcels in the district.

§ 37.04 Special Exceptions (aka Conditional or Special Uses) [613-615]

The *special exception* is a use that is authorized by the zoning ordinance if specified conditions are met. The zoning board reviews applications for special exceptions on a case-by-case basis to ensure that the conditions are satisfied.

§ 37.05 New Zoning Tools [615-617]

A number of new zoning tools have emerged in recent years. For example, under *conditional zoning* the city or other zoning entity states the conditions that must be met before a particular parcel will be rezoned, but does not legally bind itself to rezone the land; the developer unilaterally satisfies the conditions and presumably receives approval. Another technique is the *floating zone*, where the zoning entity approves the creation of a new zoning district with particular characteristics, but does not specify its location; a developer can then apply for rezoning to attach the floating zone to her property.

§ 37.06 The Subdivision Process [617-618]

A subdivision is the legally-recognized division of one parcel of land into multiple parcels. Subdivision approval is required for almost all residential housing tracts and for some commercial developments as well. In many jurisdictions, the city or other zoning entity is required to approve any subdivision application that meets the minimum standards imposed by local ordinances; in others, the zoning entity has discretion to deny the application if required by the public, health, safety, or welfare.

Chapter 38 MODERN ZONING CONTROVERSIES

§ 38.01 The Transformation of “Zoning” [619-621]

The nature of zoning has evolved over time to serve new goals, including protecting property values, preserving neighborhood character, preventing environmental degradation, enhancing the property tax base, and encouraging economic development. This process, in turn, has generated extensive litigation.

§ 38.02 Zoning and the Constitutional Framework [621-623]

The federal Constitution is the ultimate constraint on the zoning power. Zoning challenges most frequently involve the Equal Protection, Due Process, and Takings Clauses, plus the First Amendment protection for freedom of speech. Because state constitutions usually include provisions that parallel the Constitution—and the supreme court of each state has the ultimate authority to interpret its state constitution—zoning challenges are sometimes premised on a state constitutional ground.

§ 38.03 “Family” Zoning [623-628]

[A] *Village of Belle Terre v. Boraas*

The Supreme Court upheld “family” zoning against due process and equal protection challenges in *Village of Belle Terre v. Boraas*, [416 U.S. 1](#) (1974). The ordinance permitted only one-family dwellings, and defined “family” such that no more than two unrelated persons could inhabit the same home. The Court found that the ordinance was merely social and economic regulation that should be reviewed under the traditional deferential standard accorded to zoning. The ordinance easily met this test because it reduced the traffic, parking, noise, and other urban problems caused by group living arrangements, and thus was rationally related to public health, safety, and welfare.

[B] *Moore v. City of East Cleveland*

Three years later, the Supreme Court addressed a related issue in *Moore v. City of East Cleveland*, [431 U.S. 494](#) (1977). The ordinance at issue defined the term “family” so narrowly that certain blood relatives were excluded. A divided Court struck down the ordinance because it directly interfered with the sanctity of the family, while *Belle Terre* involved unrelated persons.

§ 38.04 Exclusionary Zoning [628-633]

Exclusionary zoning refers to land-use controls that tend to exclude low-income and minority groups. An example is a city’s refusal to allow high-density, low-income

housing within its borders. The most prominent decision attacking this practice is *Southern Burlington County NAACP v. Township of Mt. Laurel*, [336 A.2d 713](#) (N.J. 1975). There, based on the state constitution, the New Jersey Supreme Court held that each developing city was obligated to meet its “fair share” of the regional need for low and moderate-income housing.

§ 38.05 Aesthetic Zoning [634-636]

Today most courts recognize that land use controls based on aesthetics are valid. One widespread form of aesthetic zoning is the architectural design review ordinance. The usual ordinance establishes an administrative board that evaluates the design of proposed single-family homes and other structures in light of specified criteria.

§ 38.06 Growth Control and Zoning [636-637]

Local ordinances that restrict the rate of growth are generally upheld against due process and equal protection attacks. Because such ordinances mitigate the impacts of uncontrolled growth on traffic, noise, parking, public services, and other potential problems, they are rationally related to the traditional police power goals of public health, safety, and welfare.

Chapter 39 EMINENT DOMAIN

§ 39.01 Eminent Domain in Context [639-640]

Federal, state, and local governments have the inherent power to take private property for public use over the owner's objection, through a process known as *eminent domain*. Attempts in recent decades to expand the eminent domain power to new arenas such as urban renewal and commercial development have sparked controversy.

§ 39.02 The Takings Clause of the Fifth Amendment: “Nor Shall Private Property Be Taken For Public Use, Without Just Compensation” [640-642]

The final sentence of the Fifth Amendment—commonly called the Takings Clause—provides: [N]or shall private property be taken for public use, without just compensation.” Although history reflects that James Madison proposed the clause, his motivation is unclear. Some believe that he was concerned about the American army's practice of seizing privately-owned supplies during the Revolutionary War. Others suggest that Madison sought to protect large landowners against government-mandated redistribution of wealth. In recent decades, the Supreme Court has stressed that one of the main purposes of the clause is to bar government from forcing some people to bear public burdens alone which, in all fairness and justice, should be borne by the public as a whole.

§ 39.03 “Nor Shall Private Property . . .” [642]

Any type of private property may be acquired through eminent domain. The vast majority of cases involve the condemnation of a fee simple absolute estate in land.

§ 39.04 “. . . Be Taken . . .” [642]

In the usual eminent domain case, a government entity takes permanent physical possession of a particular parcel of land. Under some circumstances, a temporary physical invasion of land authorized by government or an overly-restrictive land use regulation might be takings as well.

§ 39.05 “. . . For Public Use . . .” [642-646]

[A] Generally

Under the modern view, whether a public purpose exists is defined by the purpose underlying the government action. As long as the property is taken for a legitimate public purpose—one within the scope of the police power—the public use requirement is satisfied.

[B] *Hawaii Housing Authority v. Midkiff*

In *Hawaii Housing Authority v. Midkiff*, [467 U.S. 229](#) (1984), the Supreme Court interpreted the public use test to allow Hawaii to condemn property from a landlord and then convey it to the tenant. The Court explained that its review was limited to determining if the legislature rationally could have believed that the condemnation would serve a permissible public purpose. Fee simple ownership of land in Hawaii was highly concentrated in a few owners. Thus, the statute merely regulated an oligopoly to reduce its social and economic evils, which the Court viewed as a classic exercise of the police power.

§ 39.06 “. . . Without Just Compensation” [646-649]

The Supreme Court defines *just compensation* as the fair market value of the property when the taking occurs. This means the amount that a willing buyer would pay in cash to a willing seller, but does not consider any sentimental or subjective value that the property may have.

§ 39.07 Eminent Domain Procedure [649-650]

The eminent domain process usually begins with the government’s attempt to negotiate a voluntary purchase from the owner. If negotiations fail, the condemning agency will bring suit. An eminent domain lawsuit is simply a specialized form of litigation, but with limited issues. In most cases, the only real issue is the fair market value of the property taken.

Chapter 40 LAND USE REGULATION AND THE TAKINGS CLAUSE

§ 40.01 The Takings Problem [652-653]

At some point, land use regulation may so restrict an owner's rights as to become a taking—thus requiring the payment of compensation—even though government does not physically occupy the land. Defining when such a *regulatory taking* occurs is one of the most controversial issues in property law today.

§ 40.02 The Foundation Era of Regulatory Takings: 1776-1922 [654-656]

Legal scholars agree that the Takings Clause was originally intended to apply only if government physically seized or occupied property. Thus, during the foundation era (1776-1922) American courts followed a clear rule: regulation of land was not a taking. Rather, it was simply an exercise of the government's police power to protect the public health, safety, welfare, and morals.

§ 40.03 The *Pennsylvania Coal Co. v. Mahon* Revolution and Its Aftermath: 1922-1978 [656-660]

The Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, [260 U.S. 393](#) (1922) is recognized as the birthplace of the regulatory takings doctrine. There, Pennsylvania adopted a statute that prohibited the mining of coal under residential areas in a manner that caused the subsidence of any dwelling. In effect, this required that pillars of coal be left in place underground to support the land surface; prior Pennsylvania law had recognized that such pillars were an estate in land (a "support estate") separate from the rights in removable coal. The Court found that the statute took the coal company's entire support estate—so the extent of the taking was "great"—and that this was not justified by the public interest. Because the statute made it illegal to mine the pillars, this had "very nearly the same effect for constitutional purposes as appropriating" the coal. The Court struck down the statute as an unconstitutional taking.

§ 40.04 Overview of the Modern Era in Regulatory Takings: 1978-Present [660-661]

Since 1978, a number of Supreme Court decisions have created new standards for determining when a regulatory taking occurs. Although generalizations in this area are risky, there appear to be four independent tests. *Penn Central Transportation Co. v. New York City*, [438 U.S. 104](#) (1978), established a multi-factor balancing test to be applied generally to any takings claim. In later decisions, the Court crafted three "bright-line" rules that apply to special situations.

§ 40.05 Basic Modern Standard for Regulatory Takings: *Penn Central Transportation Co. v. New York City* [662-666]

The basic standard used to resolve most regulatory takings cases today is found in *Penn Central Transportation Co. v. New York City*, [438 U.S. 104](#) (1978). There, the Supreme Court characterized its past takings decisions as “essentially ad hoc, factual inquiries.” It then proceeded to create a balancing test for determining when a regulation constituted a taking. The factors were: (1) “[t]he economic impact of the regulation on the claimant,” (2) “particularly, the extent to which the regulation has interfered with distinct, investment-back expectations,” and (3) “the character of the governmental action.”

§ 40.06 Special Rule for Permanent Physical Occupations: *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) [667-669]

In *Loretto v. Teleprompter Manhattan CATV Corp.*, [458 U.S. 419](#) (1982), the Supreme Court held that any permanent physical occupation authorized by government was a taking regardless of the public interests that it may serve or the economic impact on the owner. The extent of the occupation at issue was relative minor—a wire cable and four small metal boxes on the roof and side of an apartment building. However, because any permanent physical occupation effectively destroys all of the owner’s basic property rights, the Court reasoned that a bright-line rule was appropriate.

§ 40.07 Special Rule for Loss of All Economically Beneficial or Productive Use: *Lucas v. South Carolina Coastal Council* (1992) [669-673]

The Supreme Court carved out another special rule in *Lucas v. South Carolina Coastal Council*, [505 U.S. 1003](#) (1992). There, a South Carolina statute prohibited construction on plaintiff’s oceanfront lots, as part of the state’s program (among other things) to protect life and property from hurricane risks. Under the Court’s test, a regulation that denies the landowner all economically beneficial or productive use of his land is a taking *unless* the regulation is justified by background principles of the state’s law of property and nuisance. Finding that the statute had taken all value from plaintiff’s land, the Court remanded the case so that a state court could determine whether the statute was justified under prior property or nuisance law.

§ 40.08 Special Rule for Exactions: *The Nollan-Dolan Duo* (1987/1994) [674-677]

An *exaction* is a government requirement that a land developer provide specified land, improvements, payments, or other benefits to the public to help offset the impacts of the project. But when does an exaction become so great as to become a regulatory taking? The Supreme Court considered two cases where an owner was forced to convey an interest in land to the public in exchange for a discretionary land use approval, *Nollan v. California Coastal Commission*, [483 U.S. 825](#) (1987) and *Dolan v. City of Tigard*, [512 U.S. 374](#) (1994). Taken together, these cases hold that an exaction must meet two tests:

(1) there must be an “essential nexus” between the exaction and a legitimate state interest that it serves; and (2) the exaction must be “roughly proportional” to the nature and extent of the project’s impact.

§ 40.09 Remedies for Regulatory Takings [687-679]

After decades of uncertainty, the law is now clear on the remedy for a regulatory taking: the successful plaintiff receives compensatory damages. *First English Evangelical Lutheran Church v. County of Los Angeles*, [482 U.S. 304](#) (1987). If the taking is permanent, the owner receives the fair market value of the property on the date of the taking. Conversely if the taking is merely temporary, the measure of damages is the fair market value of the use of the property during the takings period.