

PROPERTY

Summary of Freehold Estates

| Estate | Language to create | Duration | Transferability | Future interest |
|---|---|---|---|--|
| 1. Fee simple absolute | To A and his heirs. To A. | Absolute ownership, of potentially infinite duration | Devisable, descendible, alienable. | None |
| 2. Fee tail | To A and the heirs of his body. | Lasts only as long as there are lineal blood descendents of the grantee. | Passes automatically to grantee's lineal descendents. | Reversion (if held by grantor); Remainder (if held by 3 rd party). |
| 3. Defeasible fees: A. Fee simple determinable | To A so long as... To A until... To A while... (Language providing that upon the happening of a stated event, the land is to revert to the grantor.) | Potentially infinite, so long as the event does not occur. | Alienable, devisable, descendible, subject to condition. | Possibility of reverter (held by grantor) |
| B. Fee simple subject to condition subsequent | To A, but if X event happens, grantor reserves the right to reenter and retake. Grantor must carve out right or reentry. | Potentially infinite, so long as the condition is not breached and, thereafter, until the holder of the right of entry timely exercises the power of termination. | Same | Right of entry/ Power of termination (held by grantor). |
| C. Fee simple subject to an executory limitation | To A, but if X event occurs, then to B. | Potentially infinite, so long as stated contingency does not occur. | Same | Executory interest (held by 3 rd party). |
| 4. Life estate | To A for life. To A for the life of B. | Measured by life of transferee or by some other life (pur autre vie). | Alienable, devisable, descendible if pur autre vie and measuring life is still alive. | Reversion (if held by grantor); Remainder (if held by 3 rd party). |

The Present Estates

Categories:

- Fee simple absolute
- Fee tail
- Defeasible fees (there are 3)
- Life estate

Things to know about each category:

- What language creates the estate?
- What are the estate's distinguishing characteristics?
 - o Is estate devisable (can it pass by will)?
 - o Is it descendible (can it pass by statutes of intestacy if no will)?
 - o Is it alienable (can it be transferred inter vivos, during holder's lifetime)?
- Which future interests, if any, is the estate capable of?

1) Fee simple absolute

a) Create:

- i) "To A" or "To A and his heirs"
- ii) The words "and his heirs" are not necessary.

b) Characteristics:

- i) This is absolute ownership of potentially infinite duration.
- ii) It is:
 - (1) Devisable,
 - (2) Descendible, and
 - (3) Alienable.

c) Future interest?

- i) None.

d) Example: O conveys "to A." A is alive and well. What do A's heirs have?

- i) Nothing. Only A has absolute ownership.
- ii) A living person has no heirs.
- iii) While A is alive, he only has prospective heirs. They are powerless.

2) Fee tail

a) Create:

- i) "To A and the heirs of his body."

b) Characteristics:

- i) Virtually abolished in US, including NY. Hardly ever tested.
- ii) Historically, fee tail would pass directly to grantee's lineal blood descendants no matter what.

- iii) If you attempt to create a fee tail today, it creates instead fee simple absolute.
- c) Future interest?
 - i) Yes.
 - (1) In grantor, it is a reversion.
 - (2) In 3rd arty, it is a remainder.
- 3) **Defeasible fees** – 3 types:
 - a) **Fee simple determinable**
 - i) In NY this is called a **fee on limitation**.
 - ii) Create:
 - (1) Examples:
 - (a) “To A for so long as...”
 - (b) “To A during...”
 - (c) “To A until...”
 - (2) Grantor must use clear durational language.
 - (3) If stated condition is violated, forfeiture is *automatic*.
 - iii) Characteristics:
 - (1) Devisable,
 - (2) Descendible, and
 - (3) Alienable, but
 - (4) Always subject to the condition.
 - (5) Example: P conveys Blackacre “to R so long as [clear durational language] the premises are used as a studio.”
 - (a) R has a fee simple determinable.
 - (6) Example: suppose R in turn conveys to M, who seeks to convert the studio into a bowling alley. May M do so?
 - (a) No, not without forfeiting the estate.
 - (b) You can convey less than what you started with, but you cannot convey more.
 - iv) Future interest?
 - (1) Yes.
 - (a) Possibility of reverter in the grantor.
 - v) Example:
 - (1) F conveys palace “to OR, so long as [clear durational language] popcorn is never made on the premises.” Classify the interests.
 - (a) OR has a fee simple determination.
 - (b) F has the possibility of reverter.

b) Fee simple subject to condition subsequent

i) In NY this is called a **fee on condition**.

ii) Create:

(1) “To A, but if X event occurs, grantor reserves the right to reenter and retake.”

(2) Grantor must use:

(a) Clear durational language, and

(b) Carve out the right to reenter.

(c) Example: Ross conveys “to Rachel, but if coffee is ever consumed on the premises grantor reserves the right to re-enter and re-take.”
Classify the interests.

(i) Rachel has fee simple subject to condition subsequent.

(ii) Ross has the right of reentry – the power of termination.

iii) Characteristics:

(1) Estate is not automatically terminated.

(2) But can be cut short at grantor’s option if the stated condition occurs.

iv) Future interest?

(1) Yes.

(a) Right of reentry – also called power of termination.

(b) In NY, called right of reacquisition.

c) Fee simple subject to executory limitation

i) Create:

(1) “To A, but if X event occurs, then to B.”

(2) Example: “To Barry Manilow, but if Manilow ever performs music on the premises, then to Mandy.” Classify the interests.

(a) Barry has a fee simple subject to Mandy’s shifting executory interest.

(b) Mandy has a shifting executory interest.

ii) Characteristics:

(1) Estate is automatically forfeited if condition is broken in favor of someone other than the grantor.

iii) Future interest?

(1) Yes.

(a) Shifting executory interest.

d) Rules of construction for defeasible fees

i) Words of desire, hope, or intention are not enough to create a defeasible fee.

(1) This is because the court disfavors restrictions on the free use of land.

(2) Court will not find a defeasible fee unless clear durational language is used.

- (3) Example: in each of these instances, A is vested with a fee simple absolute and *not* a defeasible fee:
 - (a) "To A for the purpose of constructing a day care center."
 - (i) Words of mere purpose are not enough.
 - (b) "To A with the hope that he becomes a lawyer."
 - (i) Words of hope are not enough.
 - (c) "To A with the expectation that the premises will be used as a video store."
 - (i) Words of expectation are not enough.

ii) Absolute restraints on alienation are void.

- (1) This is an absolute ban on the power to sell or transfer that is not linked to any reasonable time-limited purpose.
- (2) Example: O conveys "to A so long as she never attempts to sell." Classify the interests.
 - (a) This absolute restraint on alienation is void.
 - (b) A has a fee simple absolute.
 - (c) O has nothing.
- (3) Example: O conveys "To A so long as she does not attempt to sell until the year 2011 when clouds on the title will be resolve."
 - (a) This is valid, as the restraint is linked to a reasonable, time-limited purpose.
 - (b) A has a fee simple determinable.
 - (c) O has the possibility of reverter.

4) **Life estate**

a) Create:

- i) Must be measured in explicit lifetime terms and never in terms of years.
 - (1) "To A for 50 years, if she lives that long" or "to A for life, but in no event more than 10 years."
 - (a) Both are in terms of years and so are a leasehold interest and *not* a life estate.
- ii) "To A for life."
 - (1) A has a life estate and is known as the life tenant.
 - (2) O has reversion.
 - (a) This means at the end of A's life, the estate reverts back to O or O's heirs.
- iii) Pur autre vie
 - (1) A life estate measured by a life other than the grantee's.
 - (2) "To A for the life of B."
 - (3) Example: O conveys "to Madonna for the life of David."
 - (a) Madonna has a life estate pur autre vie.
 - (b) O has a reversion.
 - (i) At the end of David's life, the estate reverts back to O or O's heirs.

- (4) Example: O conveys “to Madonna for life.” Madonna then sells her entire interest to David.
 - (a) It is permissible for a life tenant to sell her interest. But you cannot convey more than you have. She can only sell the life estate.
 - (b) David has a life estate pur autre vie.
 - (c) O has a reversion. At the end of Madonna’s life, the estate reverts back to O or O’s heirs.

b) Characteristics:

i) General rules:

- (1) Life tenant is entitled to all ordinary uses and profits from the land.
- (2) Life tenant must not commit waste.
 - (a) Must not hurt future interest holders.

ii) The life tenant’s entitlements are rooted in the doctrine of **waste**.

(1) Types of waste

(a) Voluntary or affirmative waste

- (i) Actual, overt conduct that causes a drop in value. Acts of destruction.

(ii) **Natural resources:** life tenant must not consume or exploit natural resources on the property *unless*: [PURGE]

1. PU: Prior use

- a. Prior to the grant, the land was used for exploitation.
 - i. Therefore the life tenant can continue to exploit.
 - ii. Open mines doctrine: if mining is done on land before life estate begins, the life tenant may continue to mine but is limited to mines that are already open.

2. R: Reasonable repairs

- a. Life tenant may consume natural resources for repairs and maintenance.

3. G: Grant

- a. Life tenant may exploit if granted that right.

4. E: Exploitation

- a. This means that the land is suitable *only* to exploit.
- b. I.e., life tenant on a quarry.

(b) Permissive waste or neglect

- (i) Occurs when land is allowed to fall into disrepair.

(ii) Obligation to repair:

- 1. Life tenant must simply maintain the premises in reasonably good repair.

(iii) Obligation to pay all ordinary taxes

1. Life tenant is obligated to pay all ordinary taxes, to the extent of income or profits from the land.
2. If no income or profits, pay all ordinary taxes to the extent of the premise's fair rental value.

(c) Ameliorative waste

- (i) Life tenant must not engage in acts that will enhance the property's value unless all future interest holders are known and consent.

(ii) **NY Distinction**

1. By statute, a life tenant may make reasonable improvements unless the remaindermen object.
2. Look for kind of change a prudent fee simple would do.
3. So you can't convert a home into a movie cinema, even if the value of the premises is increased.

c) Future interest?

i) Yes.

(1) If held by the grantor, it is a reversion.

(2) If held by a 3rd party, it is a remainder.

Future interests

1) Future interests capable of creation in the grantor

a) **Possibility of reverter**

- i) It accompanies only the fee simple determinable.

b) **Right of entry – Power of termination**

- i) It accompanies only the fee simple subject to condition subsequent.

c) **Reversion**

- i) It arises in a grantor who transfers an estate of lesser quantum than grantor started with, other than a fee simple determinable or a fee simple subject to condition subsequent.
- ii) Example: O, holder of a fee simple absolute, conveys:
- (1) "To A for life."
(a) O has conveyed less than what she started with. She has a reversion.
 - (2) "To A for 99 years."
(a) O has conveyed less than what she started with. She has a reversion.
 - (3) "To A for life, then to B for 99 years."
(a) O has conveyed less than what she started with, because a fee simple absolute can endure forever. She has a reversion.

- 2) Future interests in transferees
 - a) If future interest is held by someone other than the grantor, it has to be either:
 - i) A **vested remainder** – types:
 - (1) Indefeasibly vested remainder
 - (2) Vested remainder subject to complete defeasance (also known as vested remainder subject to total divestment)
 - (3) Vested remainder subject to open
 - ii) A **contingent remainder**, or
 - iii) An **executory interest** – types:
 - (1) Shifting executory interest
 - (2) Springing executory interest
 - b) Assessing future interests in transferees:
 - i) Distinguish vested remainders from contingent remainders;
 - ii) Distinguish 3 kinds of vested remainders from each other; and
 - iii) Distinguish all remainders from executory interests.
 - c) **Distinguish vested remainders from contingent remainders**
 - i) **Remainder** = future interest created in a grantee that is capable of becoming possessory upon the expiration of a prior possessory estate created in the same conveyance in which the remainder is created.
 - (1) Remainders are the caboose, tag-along, once the preceding estate naturally expires.
 - ii) Remaindermen are:
 - (1) Sociable. He never travels alone.
 - (a) Remainderman always accompanies a preceding estate of known, fixed duration.
 - (b) That preceding estate is usually a life estate or a term of years.
 - (c) Example: “To A for life, then to B” or “To A for 10 years, then to B.”
 - (i) B is a remainderman in both.
 - (2) Patient and polite.
 - (a) Remaindermen never follow a defeasible fee.
 - (i) If your present estate is a defeasible fee, your future interest is *not* a remainder. It will be an executory interest (if held by someone other than the grantor).
 - (b) Remaindermen wait patiently for the preceding estate to run its natural course.
 - (c) Remainderman cannot cut short or divest a prior transferee.
 - iii) Remainders are either vested or contingent
 - (1) **Vested** – if it is both:
 - (a) Created in an ascertained person, and
 - (b) Is not subject to any condition precedent.

(2) **Contingent** - if it is:

(a) Created in an unascertained person, or

(i) Called contingent because it is created in as yet unborn or unascertained persons.

(ii) Example: "To A for life, then to B's first child." A is alive, B, as yet, has no children. This is a contingent remainder.

(iii) Example: "To A for life, then to B's heirs." A and B are alive. Because a living person has no heirs, while B is alive his heirs are unknown. This is a contingent remainder.

(iv) Example: "To A for life, then to those children of B who survive A." A is alive. We don't know which, if any, of B's children will survive A. This is a contingent remainder.

(b) Is subject to a condition precedent, or

(i) Called contingent because it is subject to a condition precedent (that has not yet occurred).

(ii) Condition precedent = when it appears before the language creating the remainder or is woven into the grant to the remainderman. Prerequisite.

(iii) Example: "To A for life, then, if B graduates from college [condition precedent], to B." A is alive. B is now in high school. Before B can take, he must graduate from college and he has not yet satisfied this condition precedent.

1. B has a contingent remainder.
2. O has a reversion. If B never graduates, O or O's heirs take.
3. If B graduates from college during A's lifetime – B's contingent remainder is transformed automatically into a indefeasibly vested remainder.

(iv) Example: "To A for life, and if B reached the age of 21 [condition precedent], to B." A is alive. B is 19 years old. B must satisfy a condition precedent before B can take.

1. B has a contingent remainder.
2. O has a reversion.
3. If B attains the age of 21 during A's lifetime – B's contingent remainder is transformed automatically into an indefeasibly vested remainder.

(c) Both.

(d) In NY, any future interest that is subject to a condition precedent is called a remainder subject to a condition precedent (instead of a contingent remainder).

iv) Contingent remainders and:

(1) **The rule of destructibility of contingent remainders**

(a) Common law

(i) Contingent remainder was destroyed if it was still contingent at the time the preceding estate ended.

(ii) Example: "To A for life, and if B has reached the age of 21, to B." Now, A has died, leaving behind B, who is still only 19 years old.

1. At common law, B's contingent remainder was destroyed. SO O or O's heirs would take in fee simple absolute.

(b) Today

(i) The destructibility rule has been abolished.

(ii) Example: so if B is still under 21 when A dies, O or O's heirs hold the estate subject to B's springing executory interest. Once B reaches 21, B takes.

(c) So on exam, be a historian and say what used to be and what the result is today.

(2) **The rule in Shelley's case**

(a) Common law

(i) Rule would apply in only one case:

(ii) Example: O conveys "to A for life, then, on A's death, to A's heirs." A is alive.

1. Historically, the present and future interests would merge, giving A a fee simple absolute.

(iii) This was a rule of law, not a rule of construction. It would apply even in the face of contrary grantor intent.

(b) Today

(i) Rule is virtually abolished. In NY, rule is abolished.

(ii) Example: so when O conveys "to A for life, then to A's heirs"

1. A has a life estate.

2. A's as yet unknown heirs have contingent remainders.

3. O has a reversion, since A could die without heirs.

(3) **Doctrine of worthier title** (also known as the rule against a remainder in grantor's heirs)

(a) This doctrine is still viable in most states today.

(i) **In NY, this doctrine has been abolished with respect to transfers taking effect after Sept. 1, 1967.**

(b) It applies when O, who is alive, tries to create a future interest in his heirs.

- (i) Example: O, who is alive, conveys “to A for life, then to O’s heirs.”
 - 1. If the doctrine did not apply, A would have a life estate and O’s heirs have a contingent remainder, because O is still alive and a living person has no heirs.
 - 2. Instead, the doctrine of worthier title says that the contingent remainder in O’s heirs is void.
 - a. Thus, A has a life estate and O has a reversion.

(c) This doctrine is a rule of construction and *not* a rule of law.

- (i) So the grantor’s intent controls. If the grantor clearly intends to create a contingent remainder in his heirs, that intent is binding.

d) **Distinguish 3 kinds of vested remainders**

i) Note: only remainders can be vested.

ii) **Indefeasibly vested remainder**

- (1) The holder of this remainder is certain to acquire an estate in the future, with no conditions attached.
- (2) Example: “To A for life, remainder to B.” Both A and B are alive.
 - (a) A has a life estate.
 - (b) B has an indefeasibly vested remainder, since B is known and there are no conditions.
- (3) Example: so what if B predeceases A?
 - (a) At common law, B’s future interest passes by will or intestacy.

iii) **Vested remainder subject to complete defeasance** or vested remainder subject to total divestment.

- (1) **In NY, called a remainder vested subject to complete defeasance.**
- (2) Here, the remainder men exist and his taking is not subject to any condition precedent. However, right to possession could be cut short because of condition subsequent.
- (3) So note the difference:
 - (a) Condition precedent = contingent remainder
 - (b) Condition subsequent = vested remainder subject to complete defeasance.
- (i) To tell the difference, apply the Comma Rule:
 - 1. When condition language in a transfer follows language that, taken alone and set off by commas, would create a vested remainder, the condition is a condition subsequent, and you have a vested remainder subject to complete defeasance.

- a. Example: O conveys “to A for life, remainder to B, provided, however, that if B dies under the age of 25, to C.” A is alive. B is 20 years old.
 - i. A has a life estate.
 - ii. B has a vested remainder subject to complete defeasance.
 - iii. C has a shifting executory interest.
 - iv. O has a reversion – it is possible that C or C’s heirs will not exist if and when the condition is breached.
 - b. Example: assume now that B is under 25 at the time of A’s death.
 - i. B still takes – age of 25 is not a condition precedent to B taking possession.
 - ii. However, B must live to 25 for his estate to retain his interest. Otherwise, B’s heirs lose it all and C/C’s heirs take.
2. By contrast, if the conditional language appears *before* the language creating the remainder, the condition is a condition precedent and you have a contingent remainder.
- a. Example: O conveys “to A for life and if B has reached the age of 25, to B.” A is alive. B is 20 years old.
 - i. A has a life estate.
 - ii. B has a contingent remainder. His taking is subject to a condition precedent. B must be 25 years old before he can take possession.
 - iii. O has a reversion.
 - b. Example: so if B is still alive but under 25 at the time of A’s death, B cannot take. Instead, the estate reverts back to O or O’s heirs, who holds it subject to B’s springing executory interest.
 - i. If and when B reaches 25, B divests O.

iv) **Vested remainder subject to open**

- (1) Remainder vested in a group of takers, at least 1 of who is qualified to take possession.
 - (a) Each class member’s share is subject to partial diminution because additional takers can still join in.
 - (b) Example: “To A for life, then to B’s children.” A is alive. B has 2 children, C and D.
 - (i) C and D have a vested remainder subject to open.
- (2) A class is open if it is possible for others to enter.
- (3) A class is closed when its maximum members have been set.
 - (a) So persons born after are shut out.

- (4) Determining whether the class is closed:
- (a) Common law rule of convenience:
 - (i) The class closes whenever any member can demand possession.
 - (b) Example: so in above example, the class closes at B's death (no more kids can be had). According to the rule of convenience, it also closes at A's death, even if B is still alive, because that is when C and D can demand possession.
 - (i) So once A dies, any child of B's born afterward will not share in the gift.
 - (ii) Exception: the womb rule. Any child in B's womb at the time of A's death will share with C and D.
 - (c) Example: what if C or D predeceases A?
 - (i) At common law, their share goes to their devisees or heirs.
 - (ii) NY statutory rule, look in Wills for answer.
- e) **Distinguish remainders from executory interests**
- i) **Executory interest** = future interest created in a transferee (3rd party), which is not a remainder and which takes effect by either cutting short some interest in another person ("shifting") or in the grantor or his heirs ("springing").
 - ii) **Shifting executory interest**
 - (1) Always follows defeasible fees and cuts short someone other than the grantor.
 - (2) Example: "To A and her heirs [present possessory estate of infinite duration], but if B returns from Canada sometime next year, to B and his heirs."
 - (a) B has a shifting executory interest.
 - (b) A has a fee simple subject to B's shifting executory interest.
 - (c) Does the conveyance violate the rule against perpetuities? No, because there is a 1 year limit on B's power.
 - (3) Example: "To A, but if A uses the land for nonresidential purposes at any time during the next 20 years, then to B."
 - (a) B has a shifting executory interest.
 - (b) A has a fee simple subject to B's shifting executory interest.
 - (c) Does the conveyance violate the rule against perpetuities? No, because there is a 20 year limit on B's potential power.

- iii) **Springing executory interest** (cuts short O)
 - (1) Example: O conveys “to A, if and when he marries.” A is unmarried.
 - (a) A has a springing executory interest.
 - (b) O has fee simple subject to A’s springing executory interest.
 - (c) Does the conveyance violate the rule against perpetuities? No, because we will know by the end of A’s life if the condition is met or not.
 - (2) Example: O conveys “to A, if and when he becomes a lawyer.” A is in high school.
 - (a) A has a springing executory interest.
 - (b) O has fee simple subject to A’s springing executory interest.
 - (c) Does the conveyance violate the rule against perpetuities? No, because we will know by the end of A’s life if the condition is met or not.
- f) **Note: NY has abolished the distinction between executory interest and contingent remainders. Instead, contingent remainder and executory interests are called:**
 - i) **Remainders Subject to a Condition Precedent.**

RAP: rule against perpetuities

- 1) Rule: certain kinds of future interests are void if there is any possibility, however remote, that the given interest may vest more than 21 years after the death of a measuring life.
- 2) Assessing RAP problems:
 - a) **Determine which future interests have been created by the conveyance.**
 - i) RAP only applies to:
 - (1) Contingent remainders,
 - (2) Executory interests, and
 - (3) Certain vested remainders subject to open.
 - ii) RAP does not apply to:
 - (1) Any future interest in O (the grantor),
 - (2) Indefeasibly vested remainders, and
 - (3) Vested remainders subject to complete defeasance.
 - iii) Example: “To A for life, then to A’s children.” A is alive and has no children.
 - (1) The unborn children have a contingent remainder.
- b) **Identify the conditions precedent to the vesting of the suspect future interest.**
 - i) In the above example, what has to happen before a future interest holder can take?
 - (1) A must die leaving a child.

- c) **Find a measuring life.**
 - i) Look for a person alive at the date of the conveyance, and
 - ii) Ask whether that person's life or death is relevant to the conditions occurrence.
 - iii) In the above example, who qualifies as a measuring life?
 - (1) A – it is her lifetime and death that are relevant to the condition.
- d) **Ask:**
 - i) **Will we know, with certainty, within 21 years of the death of our measuring life, if our future interest holders can or cannot take?**
 - (1) If so, the conveyance is good.
 - (2) If not, the future interest is void.
 - ii) In the above example, the conveyance is good because we will know at the instant of A's death whether A has left behind a child.
- e) Example: "To A for life, then to the first of her children to reach the age of 30." A is 70. Her only child, B, is 29 years old.
 - i) Classify the future interest.
 - (1) It is a contingent remainder.
 - ii) What are the conditions precedent to the vesting of the future interest?
 - (1) A must die and have a child reach 30.
 - iii) Find a measuring life.
 - (1) A.
 - (2) Why not B? Because the conveyance is not "B specific." The conveyance is to the first of her children to reach 30, so it could be any of A's children.
 - iv) Will we know, with certainty, within 21 years of the death of our measuring life, if a future interest holder can take? Is there any possibility, however remote, that A would not have a child to reach 30 until more than 21 years after A's death?
 - (1) No.
 - (2) The possibility is this: B could die tomorrow. A could then have another child and die in labor, which would mean that a child of A's would turn 30 years old more than 21 years after A's death.
 - (3) So we have: A with a life estate, O with a reversion. The future interest is void.
 - (4) Fertile Octogenarian Rule – presumes that a person is fertile no matter what their age.
- 3) Bright line rules of RAP:
 - a) **A gift to an open class that is conditioned on the members surviving to an age beyond 21 violates the common law RAP.**
 - i) If a gift is bad to one, it is bad to all and the entire class gift is void.

- ii) Example: “To A for life, then to such of A’s children as live to attain the age of 30.” A has 2 children, B and C. B is 35 and C is 40. A is alive.
 - (1) This class is still open.
 - (2) B and C’s interest – vested remainders subject to open.
 - (3) This violates RAP.
 - (a) A could have another baby tomorrow, die in labor, and it takes more than 21 years for baby to reach age of 30.
 - (4) So since bad to one, it is bad for all.
 - (5) We are left with A = life estate, O = reversion.
- b) **Many shifting executory interests violate RAP. An executory interest with no limit on the time within which it must vest violates RAP.**
 - i) Example: “To A and his heirs so long as the land is used for farm purposes, and if the land ceases to be so used, to B and his heirs.”
 - (1) Classify the future interests.
 - (a) B has a shifting executory interest.
 - (2) What are the conditions that will trigger B’s entitlement?
 - (a) Ceasing to use land for farm purposes.
 - (3) Find a measuring life.
 - (a) A – has the power during her lifetime to abide by the condition.
 - (4) Will we know, with certainty, within 21 years of the death of the measuring life if a future interest holder can take?
 - (a) No. A might follow the condition for his life. The condition may not be breached, if ever, until hundreds of years have passed. Therefore, the future interest is void.
 - (5) We are left with “To A and his heirs so long as the land is used for farm purposes.”
 - (a) A has a fee simple determinable.
 - (b) O has the possibility of reverter.
 - (c) Is there still a RAP problem?
 - (i) No, because RAP does not apply to future interests in O.
 - ii) Compare above to: “To A and his heirs, *but if* the land ceases to be used for farm purposes, to B and his heirs.”
 - (1) It is the same result as in the preceding example, except that now, when the offensive future interest [“to B and his heirs”] is stricken, the conveyance is no longer grammatically sound.
 - (2) Therefore, the entire conditional clause is stricken.
 - (a) A has a fee simple absolute. O has nothing.

iii) Charity-to-charity exception

- (1) A gift from one charity to another will not violate the RAP.
- (2) Example: “To the Red Cross, so long as the premises are used for the red Cross purposes, and if they cease to be so used, then to the YMCA.”
 - (a) Ordinarily, YMCA would have an invalid shifting executory interest.
 - (b) But using the charity-to-charity exception, the gift is good.
 - (c) Red Cross = fee simple subject to YMCA’s shifting executory interest.

4) **Reform of RAP**

- a) “Wait and see” or “second look” doctrine
 - i) The validity of any suspect future interest is determined on the basis of the facts, as they now exist, at the end of the measuring life.
 - ii) Eliminates the “what if” or “anything is possible” line of inquiry.
 - b) Uniform Statutory Rule Against Perpetuities – USRAP
 - i) Codifies the common law RAP and also provides for an alternative 90 year vesting period.
 - c) Both USRAP and “wait and see” doctrine reforms embrace:
 - i) The **cy pres doctrine** – “as near as possible.”
 - (1) If a given disposition violates the rule, a court may reform it in a way that most closely matches the grantor’s intent while still complying with RAP.
 - ii) The reduction of any offensive age contingency to 21 years.
 - d) NY Perpetuities Reform Statute:
 - i) Uses common law.
 - ii) Rejects “wait and see” doctrine and cy pres doctrine except for:
 - (1) Charitable trusts, and
 - (2) Powers of appointment.
- iii) Points to know for the NY test day:
- (1) Under the NY perpetuities reform statute, where an interest would be invalid because it is made to depend on any person’s having to attain an age in excess of 21 years:
 - (a) The age contingency is reduced to 21 years.
 - (2) The fertile octogenarian principle is reformed. The NY statute presumes that a woman over the age of 55 cannot have a child.
 - (a) Possibility of person adopting a child is disregarded.
 - (3) NY “suspension” rule (from trusts and wills):
 - (a) The rule against suspension of the absolute power of alienation applies the common law RAP on restrictions on power to sell or transfer.
 - (b) Therefore, in NY, an interest is void if it suspends the power to sell or transfer for a period longer than lives in being + 21 years.

Concurrent estates

- 1) Summary
 - a) Joint tenancy – 2 or more own, with the right of survivorship.
 - b) Tenancy by the entirety – marital interest between marital partners with the right of survivorship.
 - c) Tenancy in common – 2 or more own, with no right of survivorship.
- 2) **Joint tenancy**
 - a) Characteristics
 - i) Right of survivorship
 - (1) When one joint tenant dies, his shares go automatically to the surviving joint tenant.
 - ii) Joint tenant's interest is alienable. It is not devisable or descendible.
 - b) Creation
 - i) 4 unities - "T-TIP" – Joint tenants must make their interests:
 - (1) **T**: Time – take at the same time.
 - (2) **T**: Title – by the same title (same instrument)
 - (3) **I**: Identical interests – equal shares
 - (4) **P**: Possession – right to possess the whole
 - ii) Grantor must clearly express the right of survivorship.
 - (1) Joint tenancies are disfavored, so in addition to the 4 unities, the grantor must clearly state the right of survivorship.
 - iii) Use of a straw.
 - (1) Example: D holds Blackacre in fee simple absolute. He wishes to hold it as a joint tenant with his best friend, P. What must D do?
 - (a) To satisfy the 4 unities, D must use a strawman – a middle man.
 - (b) Dave conveys to the straw.
 - (c) Then the straw conveys back to D and P as joint tenants with the right of survivorship.
 - (i) This guarantees the presence of all 4 unities, including time and title.
 - (2) **NY has dispensed with the need for a straw.**
 - (a) It is ok in NY for D to convey directly to himself and P as joint tenants.
 - c) Severance of a joint tenancy – "SPAM"
 - i) **S**: sale
 - (1) A joint tenant can sell or transfer her interest in her lifetime.
 - (a) This can happen without the consent of the other or without their knowledge.

- (2) The sale by one will sever the joint tenancy *as to the seller's interest* because it disrupts the 4 unities. So the buyer is a tenant in common.
 - (a) But if there were more than 2 joint tenants in the first place, the joint tenancy remains in tact as between the other, non-transferring joint tenants.
 - (3) Example: O conveys Blackacre "to P, R, and M as joint tenants with the right of survivorship."
 - (a) Each owns 1/3, plus right to use the whole.
 - (4) Example: now P sells her interest to C. What is the state of the title?
 - (a) P's act of selling severs the joint tenancy as to her interest. So C holds 1/3 as tenant in common.
 - (b) R and M still each hold 1/3 as joint tenants.
 - (5) Example: now R dies, leaving behind his heir, R1. What is the state of title?
 - (a) M takes R's share. So she has 2/3.
 - (b) C still has 1/3. M and C are tenants in common.
 - (c) R1 takes nothing.
 - (6) In equity, a joint tenant's mere act of entering into a contract for the sale of her share will sever the joint tenancy as to the contracting party's interest.
 - (a) This is due to the doctrine of equitable conversion.
 - (b) Example: O conveys Blackacre to "R, P, and J as joint tenants with the right of survivorship." On 1/1, R enters into a contract for sale of his interest in the joint tenancy to G, with the closing to take place on 4/1. When does severance occur as to R's interest?
 - (i) 1/1 under the doctrine of equitable conversion. Joint tenancy interest is severed as soon as the contract is signed.
- ii) **P: partition**
- (1) By voluntary agreement
 - (a) Where the parties agree to a dissolution of the joint tenancy.
 - (2) Partition in kind
 - (a) Court action for the physical division of property, if it is in the best interests of all.
 - (b) This is best suited for land that is agricultural.
 - (3) Forced sale
 - (a) Court action if in the best interests of all, where property is sold and proceeds are divided proportionately.
 - (b) This is best suited for physical buildings.

- iii) **M: mortgage**
 - (1) Title theory of mortgages
 - (a) 1 joint tenant's execution of a mortgage or lien on his share will sever the joint tenancy as to that now encumbered share.
 - (b) Minority rule
 - (2) Lien theory of mortgages
 - (a) 1 joint tenant's execution of a mortgage on his interest will not sever the joint tenancy.
 - (b) Majority rule + NY
 - (3) Example: P, J, and G are joint tenants. P mortgages his interest in the joint tenancy. Will this sever the joint tenancy as to P's interest?
 - (a) Title theory minority states = yes
 - (b) Lien theory majority states = no
- 3) **Tenancy by the entirety**
 - a) Recognized by 21 states + NY
 - b) Create
 - i) Only between married partners who share a right of survivorship.
 - ii) In states that recognize it, it arises presumptively in any conveyance to married partners unless stated otherwise.
 - c) Very protected form of co-ownership
 - i) Creditors
 - (1) Creditors of only 1 spouse cannot touch this tenancy.
 - (2) In NY, 1 spouse may mortgage his interest and his creditors may enforce against that interest, but only as to the debtor's spouse's share.
 - (a) Non-debtor spouse's rights, including right of survivorship, must not be compromised.
 - ii) Unilateral conveyance
 - (1) Neither tenant, acting alone, can defeat the right of survivorship by unilateral transfer to a 3rd party.
 - (2) Example: T and C, married to each other, own Blackacres as tenants by the entirety. T secretly transfers his interest to J. What does J have?
 - (a) Nothing. Unilateral conveyance is a nullity.

4) **Tenancy in common**

- a) Each tenant:
 - i) Owns an individual part, and
 - ii) Each has a right to possess the whole.
- b) Each interest is:
 - i) Devisable,
 - ii) Descendible, and
 - iii) Alienable.
- c) There is no right of survivorship.
- d) Presumption favors tenancy in common.

5) **Rights and duties of co-tenants**

- a) Example: G and M own Blackacre as tenants in common [just for example – these rules apply to all common ownership]. G contributed 90% of the purchase price and M 10%.
 - i) Possession - each co-tenant is entitled to possess the whole. If one co-tenant wrongfully excludes another co-tenant from possession of the whole or any part, he has committed wrongful ouster.
 - (1) Example: G takes a can of paint and divides up the premises and tells M that she can use her 10% on the other side of the line only. Is this permissible?
 - (a) No.
 - ii) Rent from co-tenant in exclusive possession – absent ouster, a co-tenant in exclusive possession is not liable to the others for rent.
 - (1) Example: M leaves Blackacre voluntarily for 3-month trip. On her return, she demands rent from G for the 3 months in which he enjoyed exclusive possession. Will she prevail?
 - (a) No.
 - iii) Rent from 3rd parties – co-tenant who leases all or part of his premises to a 3rd party must account to his co-tenants providing them their fair share of the rental income.
 - (1) Example: G leases Blackacre's basement to A, a tenant. Is M entitled to a portion of the rental income?
 - (a) Yes. M would get 10%.
 - iv) Adverse possession – absent ouster, a co-tenant in exclusive possession for the statutory adverse possession period cannot acquire title to the exclusion of others.
 - (1) The hostility element is absent, since there was no ouster.
 - (2) Recent court decision holds that co-tenant may acquire full title by adverse possession if he is in exclusive possession for 20 consecutive years.

- (3) Example: M decides to move to AZ for 20 years. In her absence, can G acquire title to the whole through adverse possession?
(a) No.
- v) Carrying costs – each co-tenant is responsible for his fair share of carrying costs (taxes and mortgage interest payments) based on the undivided share he holds.
(1) Example: What are M and G's responsibilities to Blackacre's carry costs?
(a) M = 10%, G = 90%
- vi) Repairs – the repairing co-tenant enjoys a right to contribution for reasonably necessary repairs provided that he told others of the need.
(1) Example: a football, thrown in M's direction, goes through a window. M has repaired the window and now seeks contribution from G. Will she prevail?
(a) Yes. G must contribute 90%. M pays 10%.
- vii) Improvements – during the life of the co-tenancy, there is no right to contribution for improvements.
(1) However, at partition, the improving co-tenant is entitled to a credit equal to any increase in value caused by her efforts. The improving co-tenant also bears full liability for any drop in value caused by her efforts.
(2) Example: M wallpapered Blackacre's den with posters of Davy Jones. She now seeks contribution from Greg for his fair share of the improvements. Will she succeed?
(a) No.
- viii) Waste – a co-tenant must not commit waste.
(1) Voluntary, permissive, and ameliorative
(2) A co-tenant can bring an action for waste during the life of the co-tenancy.
(a) Don't have to wait until partition to bring an action.
- ix) Partition – a co-tenant has a right to bring an action for partition.

Landlord/Tenant Law

4 or 5 questions on the NY day part of the Bar.

1) 4 leasehold or nonfreehold estates

- a) Tenancy for years – also known as the estate for years or the term of years
 - i) Lease for a fixed period of time.
 - (1) So when you know the termination date from the start, you have a tenancy for years.
 - ii) No notice is needed to terminate.
 - (1) Since it is known from the outset when it will terminate.
 - iii) Example: L leases Blackacre to T “from 1/1/07 to 7/1/07.” Which form of tenancy?
 - (1) Tenancy for years b/c the lease is for a fixed period of time.
 - (2) No notice is needed to terminate the tenancy.
 - iv) If term is greater than 1 year, it must be in writing to be enforceable (SOF).
- b) Periodic tenancy – lease continues for successive intervals until L or T gives proper notice of termination.
 - i) Created
 - (1) Expressly
 - (a) Example: L conveys to T from month to month, or year to year, or week to week.
 - (2) Implication – by:
 - (a) Land is leased with no mention of duration, but provision is made for payment of rent at set intervals.
 - (i) Example: T rents apartment from L, beginning 6/1. Nothing is said about duration. T pays rent each month. What tenancy exists?
 - 1. T is an implied, month-to-month, periodic tenant.
 - (b) An oral term of years in violation of the statute of frauds creates an implied periodic tenancy measured by the way rent is tendered.
 - (i) Example: L and T negotiate for a commercial lease, orally agreeing on a 5 year lease with rent at \$1k/month.
 - 1. Is this a tenancy for years?
 - a. No, it violates the statute of frauds.
 - 2. What if T sends L a check for \$1k and L accepts it?
 - a. T’s first rental payment renders his interest an implied periodic tenancy with intervals based on the way rent is tendered.

- (c) The holdover – in a residential lease, if L elects to holdover a T who has wrongfully stayed on past the conclusion of the original lease, an implied periodic tenancy arises. It is measured by the way rent is now tendered.
 - (i) Example: T holds over after the expiration of her 1-year lease, but sends another month's rent check to L, who cashes it. What tenancy now exists?
 - 1. An implied month-to-month periodic tenancy.
 - (ii) In NY, L who elects to holdover a T creates an implied month-to-month periodic tenancy, unless otherwise agreed.
- ii) Termination
 - (1) Notice – usually written – must be given.
 - (a) At common law, notice at least equal to the period itself must be given, unless otherwise agreed.
 - (i) Example: month-to-month periodic tenancy must give one month notice. Week-to-week periodic tenancy, one week notice must be given.
 - (b) Exception: if tenancy is from year-to-year or greater, only 6 month notice is required.
 - (c) Parties may length or shorten these notice provisions by agreement.
 - (d) Periodic tenancy must end at the conclusion of a natural lease period.
 - (i) Example: L leased Blackacre to T on 1/1/03 for a periodic tenancy of month-to-month. On 5/15/03, T sends written notice of termination.
 - 1. T is bound until 6/30/03.
- c) Tenancy at will – tenancy for no fixed period of duration.
 - i) I.e., “to T for as long as L or T desires.”
 - ii) Unless parties *expressly agree* to a tenancy at will, the payment of regular rent will cause the court to treat it as an implied periodic tenancy.
 - iii) Termination
 - (1) By either party at *any* time.
 - (2) However, a reasonable demand to vacate is usually needed.
 - (3) **In NY**, L terminating a tenancy at will **must give a minimum of 30 days written notice of termination**.

d) Tenancy at sufferance

i) Created

- (1) When T wrongfully holds over past the expiration of the lease.
- (2) It allows L to recover rent.

ii) Lasts only until L either:

- (1) Evicts T, or
- (2) Elects to hold T to a new tenancy.

iii) **In NY**, L's acceptance of rent subsequent to expiration of the term will create an implied month-to-month periodic tenancy, unless otherwise agreed.

2) **Tenant's duties**

a) T's liability to 3rd parties – a matter of tort law

- i) Must keep premises in reasonably good repair.
- ii) Liable for injuries sustained by 3rd parties that T invited, even where L explicitly promised to make all repairs.
 - (1) Example: L leases building to T, expressly promising to maintain the premises in a state of good repair. T's invitee trips over a loose floorboard and sues T. If invitee sues T, what result?
 - (a) T loses. It doesn't matter that T may seek indemnification from L. With regard to the plaintiff, who is a guest, T loses.

b) T's duty to repair

- i) When lease is silent:
 - (1) Standard is maintenance – T must maintain premises and make ordinary repairs.
 - (2) T must not commit waste.
 - (a) Voluntary waste – overt, harmful acts
 - (b) Permissive waste – neglect
 - (c) Ameliorative waste – alterations that enhance premises' value
 - (3) Fixtures
 - (a) Def: by virtue of its annexation to realty, objectively there is the intent to permanently improve the realty.
 - (i) I.e., heating systems, custom storm windows, furnace, certain lighting installations.
 - (b) When T removes a fixture, he commits voluntary waste. T must not remove a fixture, no matter that T installed it.
 - (i) **Fixtures pass with ownership of the land.**

- (ii) Example: T installs a beautiful heirloom chandelier in the dining room. At end of leasehold, as T is about to remove it, L demands that it stay.
 - 1. If chandelier qualifies as a fixture, it must stay, even though T thought subjectively that she should be able to take it with her.
 - (c) When is something T puts in a fixture?
 - (i) Express agreement controls – agreement between L and T on this is binding.
 - (ii) If no agreement, T may remove what she installed so long as removal does not cause substantial harm to the premises.
 - 1. If removal will cause substantial damage, then in objective judgment, T has shown an intent to install a fixture.
 - a. We don't care what the subjective intent was here.
- ii) When expressly promised in the lease
 - (1) If T promises to maintain the property in good condition for the duration of the lease:
 - (a) At common law:
 - (i) Historically [write this on exam], T was liable for any loss to the property, even losses due to the force of nature.
 - (b) Majority view:
 - (i) T may terminate the lease if the premises are destroyed without T's fault.
 - (c) **NY:**
 - (i) Absent T's express undertaking to restore the premises in the event of their destruction, if the premises are destroyed through no fault of T, T may quit the premises and surrender possession without any further duty to pay rent.
- c) T's duty to pay rent
 - i) T breaches and is **in** possession of the premises:
 - (1) L's only options are to:
 - (a) Evict through the courts, or
 - (i) L can still get rent from T until T vacates.
 - (b) Continue the relationship and sue for rent.
 - (2) L must not:
 - (a) Engage in self-help, such as changing the locks, forcibly removing the tenant, or removing tenant's possessions.
 - (i) This is banned and can be punished civilly and criminally.
 - (ii) **In NY**, self-help entitles T to *treble damages*.

- ii) T breaches but is **out** of possession of the premises:
 - (1) I.e., T wrongfully vacates with time left on a term of years lease.
 - (2) Surrender – T shows by words or actions that she wants to give up the lease.
 - (a) L could choose to treat T's abandonment as an implicit offer of surrender, which L accepts.
 - (b) If the unexpired term is more than 1 year, surrender must be in writing for SOF.
 - (i) So L must sign a letter to breaching T indicating that breach is a tacit offer of surrender, which L accepts.
 - 1. Sending this letter to the last known address of T, which is where T just abandoned, is ok.
 - (3) Ignore abandonment
 - (a) Hold T responsible for unpaid rent, just as if T were still there.
 - (b) Available in only a minority of states. (because most require L to mitigate)
 - (c) **In NY, though**, L is **not** required to mitigate damages when T abandons the premises.
 - (4) Re-let the premises
 - (a) Done on behalf of the abandoning tenant, and then hold T liable for any deficiency.
 - (b) Majority rule – must try to re-let it.
 - (i) This is mitigation of damages.
- 3) **Landlord's duties**
- a) Duty to deliver possession
 - i) English rule – majority rule:
 - (1) L must put T in physical possession of the premises.
 - (2) So if at start of T's lease, a prior holdover T is still in possession, L has breached and the new T gets damages.
 - ii) American rule – minority rule:
 - (1) L does not have to provide physical possession to T.
 - (2) L need only provide T with legal possession (the legal right to be there).
 - b) Implied covenant of quiet enjoyment
 - i) T has a right to quiet use and enjoyment of the premises without interference from L.
 - (1) Applies to both residential and commercial leases.
 - ii) Breach by actual eviction
 - (1) Occurs when L wrongfully evicts T or excludes T from the premises.

- iii) Breach by **constructive eviction**
 - (1) Elements [SING]
 - (a) **SI: Substantial Interference** due to L's actions or failure to act.
 - (i) Looking here for regularly recurring or chronic – doesn't need to be permanent.
 - (b) **N: Notice**
 - (i) T must notify L of the problem and L must fail to meaningfully respond.
 - (c) **G: Goodbye**
 - (i) T must vacate within a reasonable time after L fails to fix the problem.
 - iv) L is generally not liable for the acts of other T.
 - (1) Exceptions:
 - (a) L must not permit a nuisance on site.
 - (b) L must control common areas.
- c) Implied warranty of habitability
- i) Applies **only to residential leases**.
 - ii) This is **non-waivable**.
 - (1) Any attempt by L to coerce a waiver from T is unconscionable.
 - iii) Standard: premises must be fit for basic human habitation.
 - (1) Bare living conditions must be met, not luxury.
 - (2) Appropriate standard can be supplied by the local housing code or case law.
 - (3) I.e., no heat in winter, no plumbing or running water.
 - iv) T's entitlements when this is breached [MR3]:
 - (1) **M: Move out and terminate lease.**
 - (2) **R: Repair and deduct**
 - (a) Allowable by statute in a number of jx, T may make reasonable repairs and deduct cost from future rent.
 - (3) **R: Reduce rent**
 - (a) Or withhold all rent until court determines fair rental value.
 - (b) T must place withheld rent into an escrow account to show good faith.
 - (4) **R: Remain in possession**
 - (a) And pay rent but seek money damages.
 - v) Compare this with implied covenant of quiet enjoyment/constructive eviction:
 - (1) Those require T to vacate. This one doesn't.

d) Retaliatory eviction

- i) If T lawfully reports L for housing code violations, L is barred from penalizing T.
 - (1) I.e., can't raise rents, end lease, harass T

4) **Assignment vs. the sublease**

- a) Unless the lease says otherwise, T may freely transfer her interest in whole (called an assignment) or in part (called a sublease).

- b) L can prohibit assignments or subleases without L's prior written approval.

- i) However, once L consents to 1 transfer by T, L waives the right to object to future transfers by that T unless L expressly reserves the right.

c) **In NY:**

- i) Assignment

- (1) Unless the lease provides otherwise, a residential T may not assign without L's written consent.

- (a) L can unreasonably withhold consent to assign and T's sole remedy is to seek release from the lease.

- ii) Sublease

- (1) T in a residential building having 4 or more units has the right to sublease subject to L's written consent.

- (a) L cannot unreasonably withhold consent. Unreasonably withheld consent is deemed consent.

d) **Assignment**

- i) Example: T1 has 10 months remaining on a 2-year term of years. T1 transfers all 10 months to T2.

- (1) This is an assignment.

- (2) L and T2:

- (a) Are in privity of estate.

- (i) L and T2 are liable to each other for all the covenants in the original lease that run with the land.

- 1. I.e., promise to pay rent, paint the premises, make repairs, pay taxes.

- (b) Are *not* in privity of contract unless:

- (i) T2 assumed all promises in the original lease.

- (3) L and T1:

- (a) Are *not* in privity of estate.

- (b) Are in privity of contract.

- (i) So they are secondarily liable to each other.

- ii) Example: L leases Blackacre to T1. T1 assigns to T2. T2 assigns to T3. T3 then engages in flagrant abuse to the premises.
 - (1) Can L proceed against T3, the direct wrongdoer?
 - (a) Yes. L wins because L and T3 are in privity of estate.
 - (2) Can L proceed against T1, the original tenant?
 - (a) Yes because they have privity of contract. T1 is secondarily liable to L. If T3 flees or is insolvent, T1 is the back-up.
 - (3) Can L proceed against T2?
 - (a) No. L loses. Privity of estate ended when T2 assigned to T3. No privity of contract unless T2 had assumed all promises in the original lease.
 - e) **Sublease**
 - i) L and sublessee are neither in privity of estate or contract. They share no nexus.
 - (1) L and T1's relationship remains fully intact.
 - ii) T2 is responsible to T1 and vice versa.
- 5) **Landlord's tort liability**
- a) Common law
 - i) Let T beware.
 - ii) In tort, L was under no duty to make the premises safe.
 - b) Exceptions [CLAPS]
 - i) **C: Common areas**
 - (1) L must maintain all common areas.
 - ii) **L: Latent defects rule**
 - (1) L must warn T of hidden defects that L knows about or should know about.
 - (2) This is a duty to warn, not to repair.
 - iii) **A: Assumption of repairs**
 - (1) L, who volunteers to make repairs, must complete them with reasonable care.
 - iv) **P: Public use rule**
 - (1) L, who leases public space (convention hall, museum, etc.), and who should know because of the nature of the defect and the length of the lease, that T will not repair, is liable for any defects on the premises.
 - v) **S: Short term lease of furnished dwelling**
 - (1) L is liable for any defect on site.
 - (2) No bright line for short term. From a few days up to 6 weeks.

Servitudes – memorize this – *need to figure out how to finish*

| Form of Servitude | Method of Creation | Parties Bound | Remedy |
|---|--|--|-----------------------|
| Affirmative Easements | <p>P-I-N-G</p> <p>P – Prescription (use that is continuous, open, and notorious under a claim of right that is hostile for the stat. period)</p> <p>I – Implication (implied from prior use; at time land is severed, a use of one part existed from which it can be inferred that an easement permitting its continuation was intended)</p> <p>N – Necessity (division of a tract deprives one lot of means of access out)</p> <p>G – Grant (writing signed by grantor)</p> | <p>Easement appurtenant is transferred automatically with dominant tenement.</p> <p>Easement in gross for commercial purposes is assignable.</p> | Injunction or damages |
| Negative Easements (LASS: Light, Air, Support, and Streamwater) | Can be created only by writing signed by grantor. | | Injunction or damages |

Need to figure out what this beginning part of the outline I am missing for easements.

Rights in the land of another

In general: easements, profits, covenants, and servitudes are non-possessory interests in land, creating a right to use land possessed by someone else.

1) Easements

- a) An easement holder has the right to use another's land for a special purpose but has no right to possess or enjoy that land.
 - i) It is presumed to be of perpetual duration unless the grant specifically limits the interest.

- b) Types of easements
 - i) Affirmative
 - (1) Holder is entitled to make affirmative use of the servient tenement.
 - ii) Negative
 - (1) Holder is entitled to compel the possessor of the servient tenement to refrain from engaging in an activity on the servient estate.
 - (a) Generally confined to light, air, lateral and subjacent support, and flow of an artificial stream.
 - (2) These are really restrictive covenants.

- c) Either **appurtenant** to land or held **in gross**
 - i) **Appurtenant** – when it benefits its holder in his physical use or enjoyment of his property.
 - (1) **Must involve 2 parcels of land**
 - (a) Dominant tenement derives the benefit.
 - (b) Servient tenement bears the burden.
 - (2) Example: A grants B a right of way across A's land, so that B can more easily reach his land. B's land is benefited by the easement.
 - (a) B's land = dominant tenement.
 - (b) A's land = servient tenement.
 - (c) So B has an easement appurtenant to B's dominant tenement.
 - (i) An easement is never appurtenant to servient tenement.
 - ii) **In gross** – if it confers upon its holder only some personal or pecuniary advantage that is not related to his use or enjoyment of the land.
 - (1) **Only 1 parcel of land is involved**
 - (a) The servient land is burdened.
 - (b) There is no dominant tenement.
 - (2) I.e., right to place billboard on another's land, right to swim in another's pond, utility company's right to lay power lines on another's land.

- d) **Transferability** of easement
 - i) Appurtenant easement
 - (1) Passes automatically with the dominant tenement.
 - (a) Even if not mentioned in the conveyance.
 - (2) The burden of the easement appurtenant also passes automatically with the servient tenement, unless:
 - (a) The new owner is a bona fide purchaser without notice.
 - (3) Example: A has an easement entitling her to cut across B's lawn to get more easily to her land.
 - (a) This is an easement appurtenant.
 - (b) A's land = dominant tenement.
 - (c) B's land = servient tenement.
 - (4) Example: if A sells her land to X, with no mention of easement, does X get easement?
 - (a) Yes, it passes automatically with the dominant land.
 - ii) Easement in gross
 - (1) Is not transferable unless it is for commercial purposes.
 - (a) It is personal to its holder.
 - (b) Example: A has an easement entitling her to swim in B's lake. [only 1 parcel is involved and it is the servient tenement]
 - (i) This is an easement in gross.
 - (ii) It is not transferable – it is personal to its holder.
 - (c) Example: Starkist has an easement to use B's lake to fish for bait for Starkist's tuna company.
 - (i) This is an easement in gross.
 - (ii) It is transferable because it is for commercial purposes.
- e) **Creation** of an affirmative easement [PING]
 - i) **P: Prescription** – analogize to adverse possession
 - (1) Easement may be acquired by satisfying the elements of adverse possession.
 - (a) Continuous use for the statutory period
 - (i) In **NY**, period is 10 years.
 - (b) Open and notorious use
 - (c) Actual use (cannot be symbolic use)
 - (d) Hostile (without consent)
 - (i) Permission defeats acquisition by prescription.

- ii) **I: Implication** – implied from prior use
 - (1) Example: A owns 2 lots. Lot 1 is hooked up to a sewer drain located on lot 2. A sells lot 1 to B, with no mention of B's right to use the drain on A's lot 2.
 - (a) The court may nonetheless imply an easement on B's behalf if:
 - (i) Previous use had been apparent, and
 - (ii) Parties expected that use would survive division because it is reasonably necessary to the dominant land's use and enjoyment.
- iii) **N: Necessity** – land-locked setting
 - (1) An easement of right of way will be implied by necessity if grantor conveys a portion of his land with no way out, except over some part of grantor's remaining land.
- iv) **G: Grant** – express writing
 - (1) An easement to endure for more than 1 year must be in a writing that complies with the formal elements of a deed. (SOF)
 - (2) Called a deed of easement.
- f) **Scope** of an easement
 - i) Set by the terms of the grant or the conditions that created it.
 - (1) Over-use or misuse of an easement does not terminate it. Remedy would be for servient owner to get an injunction against the misuse.
 - ii) Example: A grants B an easement to use A's private road to get to and from B's parcel, Blackacre.
 - (1) B has an easement appurtenant to B's dominant land.
 - (2) A's land is servient.
 - iii) Example: subsequently, B purchases the adjacent Greenacre, with its small marina. May B unilaterally expand the use of the easement to benefit Greenacre?
 - (1) No. Unilateral expansion is not allowed.
- g) **Termination** of an easement [END CRAMP]
 - i) **E: Estoppel**
 - (1) Servient owner materially changes his position in reasonable reliance on the easement holder's assurances that the easement will not be enforced.
 - (2) Example: A tells B that A will no longer be using her right of way across B's parcel. In reasonable reliance, B builds a swimming pool on B's parcel, thereby depriving A of the easement.
 - (a) In equity, A is estopped from enforcing the easement.

- ii) **N: Necessity**
 - (1) Easements created by necessity expire as soon as the need ends.
 - (a) But if the easement was created by express grant, even if attributable to necessity, it will not end when the need ends.
 - (2) Example: O conveys a portion of his 10-acre tract to A, with no means of access out except over a portion of O's remaining land. Parties reduce their understanding to writing. After, the city builds a road that gives A access out.
 - (a) The easement continues since it was by an express writing.
- iii) **D: Destruction of the servient land**
 - (1) Other than through the willful conduct of the servient owner.
- iv) **C: Condemnation of the servient estate**
 - (1) Eminent domain terminates the easement
- v) **R: Release**
 - (1) A written release, given by the easement holder to the servient owner.
- vi) **A: Abandonment**
 - (1) Easement holder must demonstrate by physical action the intent to never use the easement again.
 - (a) Physical action is a requirement.
 - (b) Mere non-use or words are insufficient to terminate by abandonment.
 - (2) Example: A has a right of way across B's parcel. A erects a structure on A's parcel that precludes A from ever reaching B's property.
 - (a) This is an action to signify abandonment.
- vii) **M: Merger doctrine (or unity of ownership)**
 - (1) Easement is extinguished when title to the easement and title to the servient land become vested in the same person.
 - (a) Even though there may be later separation of title, the easement is not revived.
 - (2) Example: A has a right of way across B's parcel, to enable A to better reach her parcel.
 - (a) A is the dominant tenement and is the holder of an easement appurtenant.
 - (b) B's land is servient.
 - (3) Example: Later, A buys B's land.
 - (a) The easement is now extinguished.

(4) Example: Later, A sells the parcel over which she once enjoyed the right of way.

(a) The easement is not reinstated. TO create it, it must be done from scratch.

viii) **P: Prescription**

(1) Extinguish the easement by interfering with it in accordance with the elements of adverse possession.

(2) Example: A has an easement of right of way across B's parcel. B erects a chain link fence on B's parcel, precluding A from reaching it. Over time, B may succeed in extinguishing the easement through prescription.

2) **License**

a) Def = a mere privilege to enter another's land for some delineated purpose.

b) Not subject to SOF, so need not be in writing.

c) Freely revocable at the will of the licensor, unless estoppel applies.

i) Estoppel will bar revocation only when the licensee has invested substantial money, labor, or both, in reasonable reliance on the license's continuation.

d) Classic cases:

i) Tickets – create freely revocable licenses.

ii) Neighbors talking by the fence

(1) Example: Neighbor A, talking by the fence with neighbor B, says "B, you can have that right of way across my land."

(a) This oral easement is unenforceable because it violates SOF.

(b) An oral easement creates a freely revocable license.

3) **The Profit**

a) The profit entitles its holder to enter the servient land and take from it the soil or some substance of the soil.

i) Minerals, timber, oil, fish

b) The profit shares all the rules of easements.

4) **Covenants**

a) Def = promise to do or not to do something related to land.

i) It is not an easement because it is not the grant of a property interest but rather a contractual limitation or promise regarding land.

ii) It starts out as a contract, it happens to pertain to land.

iii) One tract is burdened by the promise and another is benefited.

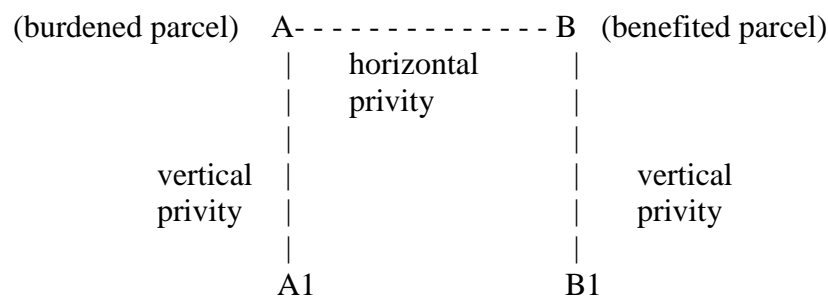
b) Restrictive covenants – negative

i) Promise to refrain from doing something related to land.

ii) I.e., "I promise not to build for commercial purposes on my land." "I promise not to maintain a petting zoo"

- c) Affirmative covenants – promise to do something related to land.
 - i) I.e., “I promise to maintain our common fence.”
- d) Covenants **run with the land** when they are capable of binding successors.
 - i) Example: Neighbor A promises neighbor B that A will not build for commercial purposes of A’s property.
 - (1) A’s property is burdened by the promise and B’s property is benefited.
 - ii) Example: Later, A sells her burdened parcel to A1. B sells his benefited parcel to B1. A1 begins to build a factory on the premises. B1 wishes to proceed against A1 for money damages. Will B1 succeed?

(1) Diagram these answers to keep track of it.



- (2) To answer question, must resolve 2 things:
 - (a) Does the burden of A’s promise to B run from A to A1?
 - (i) Do burden first.
 - (b) Does the benefit of A’s promise to B run from B to B1?
 - (i) Basically, does B1 have standing to make this claim?

iii) Requirements for **burden** to run with the land: [WITHIN]

- (1) **W: Writing**
 - (a) Original promise between A and B must have been in writing.
- (2) **I: Intent**
 - (a) Original parties must have intended that the burden would run.
 - (b) Courts are generous with finding the requisite intent.
- (3) **T: Touch and concern the land**
 - (a) Promise must affect the parties’ legal relations as landowners and not simply as members of the community at large.
 - (b) Examples that do touch and concern the land:
 - (i) Covenants to pay money to be used in connection with the land, like HOA fees
 - (ii) Covenants not to compete

(4) **H: Horizontal and vertical privity**

(a) Both privities are needed.

(b) Horizontal privity: (A-B)

(i) Requires that the originally covenanting parties share succession of estate at the time the covenant is made.

1. I.e., at the time A made the promise, she was purchasing her now-burdened lot from B.

(ii) So requires:

1. Must be between the originally promising parties, **and**

2. That they be in succession of estate, meaning that they were in a grantor-grantee or landlord-tenant or mortgagor-mortgagee relationship.

(iii) This privity is harder to establish.

1. Its absence is the reason why many burdens will not run.

(c) Vertical privity: (A-A1)

(i) Requires some non-hostile nexus, such as a contract, devise, descent.

(ii) Only time vertical privity will be absent is if A1 acquires property through adverse possession.

(5) **N: Notice**

(a) A1 must have had some notice of the covenant when she took the land.

iv) Requirements for **benefits** to run with the land: [WITV]

(1) **W: Writing**

(a) Original promise between A and B was in writing.

(2) **I: Intent**

(a) Original parties intended that the benefit would run with the land.

(3) **T: Touch and concern**

(a) Promise affects parties as landowners.

(4) **V: Vertical privity**

(a) Some non-hostile nexus between B and B1.

(b) No horizontal privity is needed for the benefit to run.

- e) Is the promise a covenant or an equitable servitude?
 - i) Depends on the remedy that is sought.
 - ii) P seeks money damages = covenant.
 - iii) P seeks injunction = equitable servitude.

Covenants vs. Equitable Servitudes

| | Covenants | Equitable Servitudes |
|---------------------------|--|--|
| Creation | Writing is <i>always</i> required. | Writing is usually required but may arise by implication from common scheme of development of a residential subdivision. |
| Running of Burden | Horizontal <i>and</i> vertical privity are required. | No privity is required. |
| Running of Benefit | Vertical privity is required. | No privity is required. |
| Remedy | Damages | Injunction |

5) **Equitable servitudes**

- a) Def = promise that equity will enforce against successors. Relief sought is injunctive relief.
- b) Create: [WITNES]
 - i) **W: Writing**
 - (1) Generally required but may arise by implication from a common scheme of development of a residential subdivision.
 - ii) **I: Intent** – original parties intended that promise would be enforceable by and against assignees.
 - iii) **T: Touch and concern** – promise affects parties as landowners.
 - iv) **N: Notice** – assignees of burdened land had notice of the promise.
 - v) Create an **Equitable Servitude**
- c) Implied equitable servitude – general or common scheme doctrine.
 - i) Example: A subdivides her land into 50 lots. She sells lots 1-45 through deeds that contain covenants restricting use to residential purposes. A then sells one of the last lots to a commercial entity, B, by deed containing no such covenant. B now wants to build a store. Can he be enjoined from doing so?
 - (1) Seeking injunction so is an equitable servitude.

- ii) Court will imply a reciprocal negative servitude to hold the unrestricted lot holder to the restrictive covenant.
- (1) Elements required:
 - (a) When sales began, the subdivider:
 - (i) Had a general or **common scheme of residential development** that included defendant's lot.
 - (ii) Defendant lot holder had **notice** of the promise contained in the prior deeds.
 - 1. Actual notice – defendant had literal knowledge of the promises in the prior deeds.
 - 2. Inquiry notice – neighborhood conforms to common restriction.
 - a. Lay of the land would reveal to the reasonable buyer of possible restriction.
 - 3. Record notice – imputed on buyer on the basis of publicly recorded documents.
 - a. Courts are split here.
 - i. Some say subsequent buyer is on record notice of the contents of prior deeds transferred to others by a common grantor.
 - ii. Better view, in **NY**, subsequent buyer does not have record notice of the contents of prior deeds transferred to others by a common grantor.
- d) Equitable defenses to enforcement of equitable servitude
 - i) Changed conditions
 - (1) Changed conditions alleged by party seeking release from the terms of the equitable servitude **must be so pervasive that entire area or subdivision has changed.**
 - (a) Piecemeal or limited change is never good enough.
 - ii) Unclean hands – person seeking enforcement is violating a similar restriction on his own land.
 - iii) Acquiescence – benefited party acquiesced in a violation of the servitude by one burdened party.
 - iv) Estoppel
 - v) Laches – benefited party fails to bring suit in a reasonable time.

Requirements for running of benefits and burdens

| | Covenants | | Equitable Servitudes | |
|---------------------------|-----------|--------|----------------------|--------|
| | Benefit | Burden | Benefit | Burden |
| Intent | X | X | X | X |
| Notice | | X | | X |
| Touch and Concern | X | X | X | X |
| Horizontal Privity | | X | | |
| Vertical privity | X | X | | |

Adverse Possession

- 1) Basic concept: possession, for a statutorily prescribed period of time and if certain elements are met, ripen into title.
- 2) Elements: [COAH]
 - a) **C: Continuous**
 - i) Uninterrupted possession for the statutory period
 - ii) **In NY**, statutory period is 10 years.
 - b) **O: Open and notorious**
 - i) This is the sort of possession that the usual owner would make under the circumstances.
 - c) **A: Actual**
 - i) Entry cannot be symbolic r hypothetical.
 - ii) Must be actual, literal entry.
 - d) **H: Hostile**
 - i) Possessor does not have the true owner's consent to be there.
 - e) Issue of **intent**
 - i) On **multistate** = possessor's subjective state of mind is irrelevant.
 - ii) For **NY** = possessor must have a good faith belief (albeit a mistaken one) that the land that he is occupying is indeed his.
 - (1) In NY, it is bad faith, and an impediment to a successful adverse possession claim, for the claimant to know that he is occupying another's land.

3) Tacking

- a) One adverse possessor may tack on to his time with the land his predecessor's time, as long as:
 - i) There is privity – satisfied by any non-hostile nexus such as contract, deed, or will.
 - ii) Tacking is not allowed if there has been an ouster.
- b) Example: O owned Blackacre in 1980 when A entered adversely. A was on her way to satisfying the elements of adverse possession when, in 1986, X ousted her. X stays on the land through 2000. This jx has a 20-year SOL. In 2000, who owns Blackacre?
 - i) O. Ouster defeats privity and X cannot tack A's time onto his.

4) Disabilities

- a) Disabilities = insanity, infancy, imprisonment.
- b) SOL will not run against a true owner who is afflicted by a disability at the start of the adverse possession.
- c) Example: O owned Blackacre in 1980 when A entered adversely. In 1990, O went insane. In 2000, O recovered. This jx has a 20-year SOL. In 2000 who owns Blackacre?
 - i) A, assuming that she met all the adverse possession elements. O cannot claim the benefit of his disability because he was not suffering from it at the start of the adverse possession.

Land Conveyancing: The purchase and sale of real estate

Every conveyance of real estate consists of a two-step process:

Step 1: the land contract, which endures until step 2.

Step 2: the closing, where the deed becomes our operative document.

1) The land contract

- a) SOF
 - i) Standard: land contract must be in writing, signed by the party to be bound (defendant), must describe the land, and must state some consideration.
 - ii) When the amount of land in the contract is more than the actual size of the parcel:
 - (1) Example: B enters into a contract to purchase a farm. The contract recites that the farm is 100 acres. When B had a survey done, B learns that the farm is actually 98 acres. What is B's remedy?
 - (a) Specific performance, with a pro-rata reduction in purchase price.

- iii) Exception to SOF
 - (1) Doctrine of part performance
 - (a) If, on your facts, you have 2 of the 3:
 - (i) B takes possession;
 - (ii) B pays all or part of the price; and/or
 - (iii) B makes substantial performance.
 - (b) Doctrine is satisfied and equity will decree specific performance of an oral contract for the sale land.
- b) Problem of risk of loss
 - i) For multistate:
 - (1) Apply doctrine of equitable conversion – equity regards to be done that which ought to be done.
 - (a) So once a contract is signed, B owns the land, subject to the condition that he pay the purchase price at closing.
 - (2) Destruction
 - (a) If, in the interim between contract and closing, Blackacre is destroyed through no fault of either party, B bears the risk of loss unless contract says otherwise.
 - ii) **In NY** – so long as the buyer is without fault, the risk of loss remains with the seller until buyer has title or takes possession.
- c) Implied promises in every land contract
 - i) **Seller promises to provide marketable title** at closing
 - (1) Title that is free from reasonable doubt – free from lawsuits and threat of litigation.
 - (2) Circumstances that render title unmarketable:
 - (a) Adverse possession
 - (i) Even part of the title on adverse possession is unmarketable.
 - (ii) Seller must be able to provide good record title.
 - (b) Encumbrances
 - (i) Marketable title means unencumbered fee simple.
 - (ii) Servitudes and mortgages render title unmarketable unless the buyer has waived them.
 - (iii) Note: seller has the right to satisfy a mortgage at closing with the proceeds of the sale. So buyer cannot claim unmarketable title because it is subject to a mortgage prior to closing, so long as they understand that closing will discharge it.

- (c) Zoning violations
 - (i) Title is unmarketable when Blackacre violates a zoning ordinance.
 - (ii) The mere presence of a zoning scheme is irrelevant. It is only the violation that causes a problem.
 - ii) **Seller promises not to make any false statements of material fact**
 - (1) Majority of states also find sellers liable for failing to disclose latent material defects.
 - (a) So seller is liable for material lies and material omissions.
 - (2) If contract has general disclaimer of liability (“sold as is” or “with all faults”)
 - (a) Disclaimer does not excuse seller from liability for fraud or failure to disclose.
 - d) Land contract contains no implied warranties of habitability or fitness.
 - i) Common law norm is buyer beware.
 - ii) Exception:
 - (1) Implied warranty of fitness and workman-like construction applies to the sale of a new home by a builder-vendor.
- 2) **The Closing**
 - a) Controlling document: deed. This passes legal title from seller to buyer.
 - b) How does deed pass title? [LEAD]
 - i) **Lawfully executed**
 - (1) Standard – must be in writing, signed by grantor.
 - (2) Consideration
 - (a) Deed need not state consideration.
 - (b) Consideration not needed to make deed valid.
 - (3) Land description
 - (a) Need not be perfect. Only requires an unambiguous description and a good lead.
 - (4) Example: Deed recites that O conveys “all of O’s lands” or “all of O’s lands in Essex County.” Would this description suffice?
 - (a) Yes – it provides a good lead. We can research to learn what “all my land” means.
 - (5) Example: O conveys “some of my land in Sussex County.” Does this description suffice?
 - (a) No – even with research, we would not know what “some” means.
 - ii) **Delivered**
 - (1) Test: present intent of the grantor.
 - (a) Did the grantor have the present intent to be immediately bound, irrespective of whether or not the deed itself was literally handed over?
 - (b) Does not require actual physical transfer of the deed instrument itself.

- (2) Satisfied when grantor physically or manually transfers deed to grantee.
 - (a) Can use the mail, an agent, or a messenger.
- (3) Express rejection of the deed defeats delivery.
 - (a) Example: As a surprise gift, A's aunt executes a deed conveying Blackacre to A. A responds "I can't accept such a gift." Blackacre belong to?
 - (i) Aunt.
- (4) Oral condition
 - (a) If a deed, absolute on its face, is transferred to grantee with an oral condition, the condition drops out.
 - (b) Example: O conveys deed to Blackacre that is absolute on its face but says to grantee "Blackacre is yours only if you survive me." This oral condition is void and delivery is done.
- (5) Delivery by escrow
 - (a) Is acceptable.
 - (b) Grantor may deliver executed deed to 3rd party, escrow agent, to deliver to grantee once conditions are met and once they are, title passes automatically to grantee.
 - (i) If grantor dies or becomes incompetent before conditions are met, title can still pass once conditions are met.

c) **Covenants and types of deeds**

i) **Quitclaim**

- (1) Contains no covenants.
 - (a) Grantor does not even promise to have title to convey.
 - (b) Grantor did implicitly promise in the land contract to provide marketable title at closing. Any promises that arise post-closing and seller is off the hook. [??]

ii) **General warranty deed**

- (1) Warrants against all defects in title, including those due to grantor's predecessors.
 - (a) The best deed for buyer.
- (2) Contains all 6 covenants:
 - (a) Present covenants
 - (i) A present covenant is breached, if ever, at the time the deed is delivered.
 - (ii) SOL for breach begins from the instant of delivery.

(iii)Types:

1. **Covenant of seisin**
 - a. Grantor owns the estate he now claims to convey.
2. **Covenant of right to convey**
 - a. Grantor has the power to make this transfer.
 - b. Grantor is not under any temporary restraints as to alienation, no disability.
3. **Covenant against encumbrances**
 - a. There are no servitudes or liens on Blackacre.

(b) Future covenants

- (i) A future covenant is not breached, if ever, until the grantee is disturbed in possession.
- (ii) SOL for breach will not begin until that future date.

(iii)Types:

1. **Covenant for quiet enjoyment**
 - a. Grantee won't be disturbed in possession by a 3rd party's lawful claim of title.
2. **Covenant of warranty**
 - a. Grantor promises to defend grantee, should there be lawful claims of title brought by others.
3. **Covenant for further assurances**
 - a. Grantor promises to do whatever is reasonably necessary in the future to perfect the title.

iii) **Statutory special warranty deed**

- (1) Deed contains 2 promises that grantor makes only on behalf of himself.
No promises made on behalf of predecessors.
 - (a) Grantor promises that he has not conveyed Blackacre to anyone other than grantee, and
 - (b) Blackacre is free from encumbrances made by grantor.
- (2) **In NY**, this is called a bargain and sale deed.

The Recording System

Model: Case of the double-dealer. O conveys Blackacre to A. Later, O conveys Blackacre to B. O, the double-dealer, has skipped town. In A vs. B, who wins?

- 1) Brightline rules
 - a) **If B is a bona fide purchaser (BFP), and we are in a notice jx, B wins** regardless of whether she records before A does.
 - b) **If B is a BFP and we are in a race-notice jx, B wins if she records properly before A does.**
 - i) NY is a race-notice jx.
- 2) **BFP** is one who:
 - a) Purchases for value, and
 - i) Bargain basement sale
 - (1) Example: B paid \$50k cash for Blackacre when FMV is \$100k. Is B a purchaser for value?
 - (a) Yes. B remitted substantial pecuniary consideration.
 - ii) Doomed donee
 - (1) Recording statutes do not protect donees, heirs, or devisees unless the Shelter Rule applies.
 - b) Without **notice** that someone else got there first. [AIR]
 - i) Types of notice:
 - (1) **A: Actual**
 - (a) Prior to B's closing, B learns of A.
 - (2) **I: Inquiry**
 - (a) Constructive notice, imputed to B no matter that B had no actual notice.
 - (b) So whether B looks, B is on inquiry notice of whatever an examination of Blackacre would have shown.
 - (c) Buyer has a duty to inspect before transfer of title to see if anyone else is in possession.
 - (i) So if someone else is in possession, B has inquiry notice regardless of whether buyer actually inspected.
 - (ii) So in model question, if A had taken possession, B would be on inquiry notice and this would defeat B's status as BFP.
 - (d) If recorded instrument references an unrecorded transaction, grantee is on inquiry notice of whatever a reasonable follow-up would have shown.

(3) **R: Record**

- (a) Constructive notice, imputed to B no matter that B had no actual notice.
- (b) B is on record notice of A's deed if at the time B takes, A's deed was properly recorded within the chain of title.
 - (i) So in model question, what if A had not recorded at time B takes? If B is BFP, does B win?
 - 1. It depends on which recording statute is enacted in jx.
 - a. In notice jx, B wins.
 - b. In race-notice jx, to win B must be a BFP and record first.

3) **Recording statutes**

a) Notice jx

- i) Conveyance of an interest in land shall not be valid against any subsequent purchaser for value, without notice thereof, unless the conveyance is recorded.
- ii) So, if at the time B takes, he is a BFP, he wins.
 - (1) It doesn't matter that A records first or if B never records (for an A vs. B suit).
- iii) Last BFP wins.

b) Race-notice jx

- i) Any conveyance of an interest in land shall not be valid against any subsequent purchaser for value, without notice thereof, whose conveyance is first recorded.
- ii) So to win, B must:
 - (1) Be a BFP, and
 - (2) Record first.
- iii) Example: On 3/1, O conveys to A, a BFP who does not record. On 4/1, O conveys same land to B, a BFP who does not record. On 5/1, A records.
 - (1) In notice jx = B (last BFP wins).
 - (2) In race-notice jx = A (BFP who recorded first).

c) In model question:

- i) In either a notice or race-notice jx, if A properly records before B takes, this will defeat B's status as a BFP.
 - (1) A's proper recordation puts later buyers on record notice, which will defeat their status as BFP.

d) **Chain of title**

- i) To give record notice to subsequent takers, deed must be recorded properly within the chain of title – the sequence of recorded documents capable of giving record notice to later takers.
- ii) Established through a title search of the grantor-grantee index.

iii) Chain of title problems

(1) **Shelter Rule**

- (a) One who takes from a BFP will prevail against any entity that the transferor or BFP would have prevailed against.
- (b) Transferee “takes shelter” in the status of transferor and steps into the shoes of the BFO, even if she otherwise fails to meet requirements.
- (c) Example: O conveys to A, who does not record. Later, O conveys to B, a BFP, who records. B then conveys to C, who is a donee who has no actual knowledge of the O-to-A transfer. A vs. C, who prevails?
 - (i) C wins in both notice and race-notice jx because of the shelter rule.
 - (ii) C steps into the shoes of B, who was a BFP who recorded first.
 - 1. Shelter rule aims to protect B, the BFP, by making it easier for B to transfer successfully.

(2) **Wild Deed**

- (a) Rule: if a deed, entered on the records (A to B), has a grantor unconnected to the chain of title (O to A), the deed is a wild deed. It is incapable of giving record notice of its existence.
- (b) Example: O sells Blackacre to A, who does not record. Then A sells to B. B records the A-to-B deed.
 - (i) The A-to-B deed is recorded but it is not connected to the chain of title because it contains a missing grantor. The O-to-A link is missing.
 - (ii) So the A-to-B deed is a wild deed.
- (c) Continued: O then sells Blackacre to C. Assume C has no actual or inquiry knowledge of the O-to-A or A-to-B transfer. C records. In B vs. C, who wins?
 - (i) C wins in both notice and race-notice jx.
 - 1. In notice because C is last BFP.
 - 2. In race-notice because C is a BFP who wins the race to record. B recorded but it is a nullity – wild deed.

(3) Estoppel by deed

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

(b) Example: In 1950, O owns Blackacre. He is thinking about selling it to X but for now decides against it. In 1950, X, who does not own Blackacre, sells it anyway to A. A records.

(i) In 1960, O finally sells Blackacre to X. X records in 1960.

(ii) In 1970, X sells Blackacre to B. B records.

1. As between X and A, who owned Blackacre from 1960-1969?

a. A – estoppel by deed

2. Who owns Blackacre in 1970?

a. B, as long as he is a BFP.

b. In notice jx, he wins b/c BFP.

c. In race-notice jx, he wins because he is a BFP and he records first. A recorded earlier but his recorded is a wild deed.

i. A recorded too early so B's title searcher would not be able to find A's deed. One is entitled to assume that no one sells the land until they first own it so the title search would not have found X's 1950 pre-ownership transfer to A.

Mortgages

Model: C, a creditor, is thinking of lending O \$50k. O offers Blackacre as collateral.

1) Create

a) Mortgage is the conveyance of a security interest in land, intended by the parties to be collateral for the repayment of a monetary obligation.

b) Elements:

i) Debt, and

ii) Voluntary transfer of security interest in debtor's land to secure the debt.

c) Def:

i) Debtor = mortgagor

ii) Creditor = mortgagee [gee, I hope he pays me back!]

d) Must be in writing for SOF.

i) Legal mortgage – also called a note, deed of trust, sale lease-back, security interest in land.

2) **Equitable mortgage**

- a) Example: O owns Blackacre. Creditor lends O money. Parties understand that Blackacre is the collateral for the debt but instead of executing a note or mortgage deed, O hands Creditor a deed to Blackacre that is absolute on its face.
 - i) This is an equitable mortgage.
 - ii) Between O and Creditor, parol evidence is admissible to show parties' true intent.
- b) If Creditor proceeds to sell Blackacre to BFP X?
 - i) X is the owner.
 - ii) O's only recourse is against Creditor for fraud and the sale proceeds.

3) **Parties' rights** once mortgage is created

- a) Debtor-mortgagor (unless and until foreclosure):
 - i) Title, and
 - ii) Right to possession
- b) Creditor-mortgagee:
 - i) Lien

4) **Transfer of interests**

- a) All parties can transfer their interest. Mortgage automatically follows a properly transferred note.
 - b) Creditor-mortgagee can transfer by:
 - i) **Executing separate document of assignment, or**
 - ii) **Endorsing the note and delivering to transferee.**
 - (1) Here, transferee is eligible to become a holder in due course:
 - (a) He takes the note free of any personal defenses that could have been raised against the original creditor-mortgagee.
 - (i) Personal defenses:
 - 1. Lack of consideration
 - 2. Fraud in the inducement
 - 3. Unconscionability
 - 4. Waiver
 - 5. Estoppel
 - (b) So that means that the holder in due course may foreclose the mortgage despite any such personal defense.
- (c) Holder in due course still subject to real defenses:
 - (i) Material
 - (ii) Alteration
 - (iii) Duress
 - (iv) Fraud in the factum (a lie about the instrument, such as debtor told he was signing a credit application)
 - (v) Incapacity
 - (vi) Illegality
 - (vii) Infancy
 - (viii) Insolvency

- (d) Criteria to be a holder in due course:
 - (i) Note must be negotiable, made payable to the named mortgagee;
 - (ii) Original note must be indorsed, signed by the named mortgagee;
 - (iii) Original note must be delivered to the transferee;
 - 1. Photocopy is unacceptable.
 - (iv) Transferee must take the note in good faith without notice of any illegality; and
 - (v) Transferee must pay value for the note.
 - 1. Meaning some amount that is more than nominal.
- c) Debtor-mortgagor sale of mortgage property:
 - i) Lien remains on the land so long as the mortgage instrument was recorded properly.
 - (1) Recording statutes protect mortgages.
 - ii) Example: On 1/10, M took out a \$50k mortgage on Blackacre with Bank. Bank promptly and properly recorded its interest on 1/10. On 1/15, M sold Blackacre to Buyer. Buyer had no actual knowledge of the lien. Buyer promptly and properly recorded its deed.
 - (1) Does Buyer hold subject to Bank's mortgage?
 - (a) Yes. All recording statutes apply to mortgages as well as deeds.
 - (2) Does it matter what jx this is?
 - (a) No.
 - (i) In notice jx, Buyer takes subject to lien because Buyer is on record notice.
 - (ii) In race-notice jx, Buyer takes subject to lien because Buyer is on record notice and Bank won the race to record.
 - iii) Example: Assume now that on 1/10, M took out a \$50k mortgage with Bank. On 1/15, M sold Blackacre to Buyer. Buyer has no knowledge of the lien. On 1/20, Bank records its mortgage. On 1/30, Buyer recorded his deed to Blackacre.
 - (1) Does Buyer hold subject to Bank's mortgage? Depends on jx.
 - (a) In race-notice jx, Buyer loses because Bank won the race to record.
 - (b) In notice jx, Buyer wins so long as he was a BFP when he took.
- d) Who is liable on the debt if O, debtor-mortgagor, sells Blackacre to B?
 - i) If B has assumed the mortgage:
 - (1) Both O and B are personally liable.
 - (a) B is primary
 - (b) O is secondarily liable.
 - ii) If B takes subject to the mortgage:
 - (1) B has no personal liability
 - (2) Only O is liable.
 - (3) But if it is recorded, the mortgage remains on the land, so if O doesn't pay, the mortgage may be foreclosed.

5) Foreclosure

- a) Must be done by proper judicial action.
 - i) At foreclosure, land is sold.
 - ii) The proceeds go to satisfying the debt.
 - (1) If proceeds are less than the debt, the mortgagee can bring a deficiency action against debtor.
 - (2) If proceeds are more than the debt, junior liens are paid off in the order of their priority. Any remaining surplus goes back to debtor.
- b) Example: Assume Blackacre has a FMV of \$50k and is subject to 3 mortgages executed by owner, M. First Bank has first priority and is owed \$30k. Second Bank is second and is owed \$15k. Third Bank is third and is owed \$10k. First Bank's mortgage is foreclosed and Blackacre sold for \$50k. How are funds distributed?
 - i) Off the top:
 - (1) Attorney's fees
 - (2) Expenses of the foreclosure
 - (3) Any accrued interest on First Bank's mortgage
 - ii) Then pay off the mortgages in the order of their priority:
 - (1) Each claimant is entitled to satisfaction in full before a subordinate lienholder may take.
 - (a) First Bank = \$30k
 - (b) Second Bank = \$15k
 - (c) Third Bank = remaining balance \$5k.
 - (i) Third Bank can now proceed with a deficiency judgment.
- c) Example: Assume now Blackacre is sold at First Bank's foreclosure sale for \$60k.
 - i) Surplus goes back to M.
- d) Effect of foreclosure on interests
 - i) Foreclosure will terminate interests junior to the mortgage being foreclosed but will not affect senior interests.
 - (1) Senior lienholders:
 - (a) Foreclosure does not affect any interest senior to the mortgage being foreclosed.
 - (b) Buyer at the sale takes subject to such interest – so buyer is not personally liable.
 - (i) But as a practical matter, if the senior mortgage is not paid, the senior creditor will foreclose on the land.

- (2) Junior lienholders:
 - (a) So they will be paid in descending order with the proceeds from the sale, assuming proceeds are left after satisfaction of superior claims.
 - (b) They should be able to proceed with a deficiency judgment.
 - (c) Once foreclosure of a superior claim has occurred and proceeds distributed appropriately, they can no longer look to Blackacre for satisfaction.
- ii) Necessary parties to a foreclosure action:
 - (1) Those with interests subordinate to those of the foreclosing party.
 - (2) Debtor-mortgagor, especially if creditor wants to proceed with a deficiency judgment.
 - (3) Failure to include a necessary party results in a preservation of that party's claim, despite the foreclosure.
 - (a) So if a necessary party is not joined, its mortgage remains on the land.
- iii) Example: Assume Blackacre has a FMV of \$50k and is subject to 3 mortgages executed by owner, M. First Bank has first priority and is owed \$30k. Second Bank is second and is owed \$15k. Third Bank is third and is owed \$10k. Suppose it is Second Bank's mortgage that is being foreclosed.
 - (1) First Bank:
 - (a) Foreclosure of Second Bank will not affect First Bank's mortgage.
 - (b) First Bank mortgage will continue to exist on Blackacre in the hands of the foreclosure sale buyer.
 - (c) So buyer is not personally liable to First Bank but if debt is not paid, First Bank can foreclose. So the foreclosure sale buyer has a strong incentive to pay off First Bank's lien.
 - (2) Bidding at the foreclosure sale brought by Second Bank?
 - (a) Buyer should bid up to \$20k, which represents FMV of \$50k less \$30k that buyer will have to pay to discharge First Bank's mortgage.
 - (3) Proceeds distributed:
 - (a) \$15k to Second Bank
 - (b) \$5k to Third Bank – then go for a deficiency judgment vs. debtor for balance.
 - (c) Buyer then pays \$30k to First Bank.
- e) **Priorities**
 - i) Creditor must record – no priority until you properly record.
 - ii) Once recorded, priority is determined by first in time, first in right.
 - iii) Purchase money mortgage
 - (1) Mortgage given to secure a loan that enables debtor to acquire the encumbered land.
 - (2) If properly recorded, purchase money mortgagee has first priority as to the parcel he finances.

- (3) Example: C lends O \$100k so O can purchase Blackacre. C takes a security interest in Blackacre, the very land that C's credit helped O acquire.
 - (a) C is a purchase money mortgagee.
 - (b) If C properly records, he has first priority.
- (4) *Superpriority* of purchase money mortgagee
 - (a) Example: C1 lends \$200k to O, taking a security interest in all of O's real estate holdings "whether now owned or hereinafter acquired"
 - (i) This clause is called an after-acquired collateral clause – floating lien. It is permissible.
 - (b) C1 records the mortgage. 6 months later, C2 lends O \$50k to enable O to acquire Blueacre, taking a security interest in Blueacre and recording that interest. O then defaults and all he has left is Blueacre. Who has priority to it?
 - (i) C2. The purchase money mortgagee has first priority.
- iv) Subordination agreements are allowed.
 - (1) By private agreement, a senior creditor may agree to subordinate its priority to a junior creditor.

f) **Redemption**

i) Redemption in equity

- (1) At any time prior to the foreclosure sale, debtor has right to redeem the land and free it of the mortgage.
 - (a) Done by paying missing payments + interest + costs
 - (b) If has an acceleration clause, done by paying full balance + accrued interest + costs.
 - (i) Acceleration clause permits mortgagee to declare the full balance due in case of default.
- (2) Recognized up to the date of sale.
 - (a) Once valid foreclosure has taken place, right to equitable redemption is cut off.
- (3) Debtor-mortgagor cannot waive the right to redeem in the mortgage itself.
 - (a) Repugnant to public policy.

ii) Statutory redemption

- (1) Recognized in half of the states. **Not in NY.**
- (2) Gives the debtor-mortgagor a right to redeem for some fixed period after the foreclosure sale has occurred.
- (3) The amount to be paid off is foreclosure sale price.
- (4) Mortgagor will have the right to possess during the statutory period.
- (5) When mortgagor redeems, the effect is to nullify the foreclosure sale and redeeming owner is restored to title.

Lateral Support

If land is improved by buildings and an adjacent landowner's excavation causes that improved land to cave in, the excavator will be liable only if negligent.

For strict liability to attach, plaintiff must show that the improvements on his land (shrubs, fountain, structure) did not contribute to his land's collapse.

Water Rights

- 1) Systems for determining allocation of water in **watercourses** (streams, rivers, lakes)
 - a) **Riparian doctrine**
 - i) Water belongs to those who own the land bordering the water course.
 - (1) These people are known as **riparians**.
 - ii) Riparians must share the right of reasonable use of the water.
 - (1) So there will be liability if his use unreasonably interferes with other's use.
 - b) **Prior appropriation doctrine**
 - i) The right to divert and use water can be acquired by an individual regardless of whether that person is a riparian owner.
 - ii) Rights determined by priority of beneficial use.
 - (1) **First in time, first in right.** First to divert and use the water has the right to it.
 - (2) Any productive use of water, including for agriculture, is sufficient to create the right.
- 2) **Groundwater** = percolating water
 - a) Water beneath the surface of the earth that is not confined to a known channel.
 - b) Surface owner is entitled to make reasonable use of groundwater.
 - i) Use must not be wasteful.

- 3) **Surface water** = water from rain, springs, melting snow and have not reached a natural water course or basin
 - a) **Common enemy rule** – surface water is an enemy to be eradicated.
 - i) Landowner may change drainage or make any other changes/improvements on land to combat the flow of surface water.
 - b) Many courts have modified this rule to prohibit unnecessary harm to other's land.

Possessor's Rights

- 1) Possessor of land has the right to be free from trespass and nuisance
 - a) Trespass:
 - i) Invasion of land by tangible physical object.
 - ii) To remove a trespasser, bring an ejectment action.
 - b) Private nuisance:
 - i) Substantial and unreasonable interference with another's use and enjoyment of land.
 - ii) Does not require tangible physical invasion.
 - (1) Odors and noise qualify (but they would not be trespass).
 - iii) Hypersensitive plaintiff?
 - (1) No nuisance if it arises from plaintiff's hypersensitivity or from plaintiff's unique use of property.
 - (2) Example: A operates a dog kennel located near a power plant. A notices that her dogs are always agitated, causing her to lose business. Power plant emits a high frequency that the dogs can hear but not humans. A sues for nuisance.
 - (a) A loses – she is hypersensitive.

Eminent Domain

- 1) 5th Amendment power to take private property for public use in exchange for just compensation.
 - a) Explicit taking – condemnation
 - i) Govt condemns your land for a public highway.
 - b) Implicit or regulatory taking
 - i) Regulation that has the same effect, though may not intend to be a taking
 - (1) Example: You buy land in NC to develop. Later, govt imposes a ban on all development. You are not the target of condemnation but the regulation is an implicit taking, as it is an economic wipeout of your investment.

- ii) Remedy for a regulatory taking
 - (1) Govt must either:
 - (a) Compensate owner for the taking, or
 - (b) Terminate the regulation and pay owner for damages that occurred while it was in effect.

Zoning

- 1) Pursuant to its police powers, govt may enact statutes to reasonably control land use.
- 2) **Variance** – principal means of achieving flexibility in zoning.
 - a) Granted or denied by administrative action – typically a zoning board.
 - b) Proponent must show:
 - i) Undue hardship, and
 - ii) Variance will not work to detriment surrounding property values.
- 3) Nonconforming use
 - a) A once lawful, existing use now deemed nonconforming by a new zoning ordinance.
 - b) It cannot be eliminated all at once unless just compensation is paid.
 - i) Otherwise it is an unconstitutional taking.
- 4) Unconstitutional exactions
 - a) Exactions = amenities govt seeks in exchange for granting permission to build.
 - b) Example: You are a developer seeking permission to build a 200-unit development. Town tells you that it will grant you the permit if you agree to provide several new streetlights, a small park, and wider roads. To pass constitutional scrutiny, these exactions must be reasonably related in nature and scope to the impact of the proposed development.
 - i) If not, the exactions are unconstitutional.