**Adverse Possession**

Is born from the statute of limitations applicable to ejectment which limits the time period in which the true owner may sue to recover the possession of the real property.

A. Statute of limitations: a particular cause of action must occur within a certain amount of time since the reason for the cause of action has occurred.

B. SOL does not run until possession by adverse possessor has fulfilled all five requirements.

1. *Jarvis v Gillespie*: the plaintiff purchased the land from the true owner and yet he lost the case because the statutory period had run and now the adverse possessor owns the land.

 a. The true owner’s rights had been extinguished entirely.

Transfers of property

A. Peaceable possession is said to occur when the land passes peaceably from one owner to the next

B. An heir is someone who receives the land through peaceable possession when there is no will.

1. Presume that as an heir to a prior possessor, upon the ownership passing to you, you possess the land (whether actual or not)

a. *Tapscott v Cobbs*: as Cobbs is an heir to the prior possessor, she is assumed to be in possession of the land; she creates a protectable interest in the land simply by possession – she has ownership rights over everyone in the world except the true owner

i. Rights are usable, transferrable, inheritable, excludable to others

Through adverse possession we convert possession into ownership.

A. *Pierson v Post*; possession is sufficient to give the possessor protective property rights

B. EFFECT: true ownership of real property can be involuntarily transferred to another.

 1. Ex. *Jarvis and Gillespie*

Elements necessary of an adverse possessor to gain rights to the real property

 1. open and notorious

 2. actual

 3. exclusive

 4. continuous

 5. hostile

1. Open and Notorious

 a. The person must have possessed the land openly, not in secret

b. The possession of the land must be open and notorious to the extent that a true would possess it.

c. The prior owner does not need to have actual knowledge of the adverse possession; but actual knowledge is sufficient.

2. Actual

a. The person must have been in actual possession of the land for the statutory period.

 b. Mere trespass is not enough

c. Generally the activities required to demonstrate actual possession are those which are consistent with the land in question.

3. Exclusive

a. The person must have possessed the land exclusively for the statutory period.

b. He must treat the land as if he has the exclusive rights to it

c. Still able to give permission for others to use the land; just as long as he is acting as a real owner would toward possessing the land.

4. Continuous

a. The person must have possessed the land continuously for the statutory period.

b. This does not mean he can *never* leave the land, but that he must possess the land in a manner that is consistent with the nature of the land and as a true would.

5. Hostile

 a. Connecticut Rule

 i. Majority rule

 ii. Also known as the Objective Rule

iii. This requirement is met is the possession of the land is objectively adverse to the true owner’s legal rights to the land.

 b. Maine Rule

 i. Subjective rule; one of the minority rules

ii. The adverse possessor must know he is violating the rights of the true owner

A. *Mannillo v Gorski*: Under the Maine Rule, Gorski loses because she mistook the land as her own; upon application of the Connecticut Rule, Gorski’s actions were objectively inconsistent with Mannillo’s and so the hostility requirement is met

 c. Iowa Rule

 i. Subjective rule; one of the minority rules

ii. The active possessor must be making an honest mistake; his possession must be in good-faith; he believes he is the true owner of the land

A. *Carpenter v Ruperto*: Under both the Connecticut and Maine Rules, the adverse possessor would win, but this case is in Iowa and the plaintiff’s knowledge that she did not own the land does not fulfill the hostility requirement here.

 d. Boundary disputes

i. The hostility requirement becomes an important one in dealing with adverse possession of land by a small encroachment across a boundary.

A. Without a proper survey of the land, it can be difficult to know if your land is truly being encroached or not

Innocent Improver Doctrine

A. Whenever the claimer has made a substantial improvement to the land courts may look at the rules in equity to give a fair holding

B. If a party makes improvements upon the land which is not his, the true owner may be required to sell the land to the improver at a fair price less the improvements or the true owner may need to pay the improver for his improvements to the land

C. The improver must have “clean hands” when they make their improvements; they must make a good-faith claim that they believed the land was theirs

i. *Carpenter v Ruperto*: as plaintiff did not believe the land was hers, she could not win under the Innocent Improver Doctrine due to her lack of “clean hands”

Color of Title

 A. This exists when there is a title transfer, but it is defective in some way

 B. In most states, it establishes hostility dispositively

 C. Will shorten the SOL in some states

 i. Will use adverse possession to cure the defects in title

D. If the defective title covers an area larger than the actual area possessed, then upon completion of the SOL, you have title to the entire land without actual use of the land

E. Mere prior possession will not give rise to a cause of action for ejectment to a person with color of title

 i. It falls somewhere in between title and possession.

Tacking

A. The time which the land has been in possession by two separate parties can be tacked together if those two parties are in privity with each other

 i. Privity: by reason of voluntary transfer.

B. If adverse possession occurs after the transfer has been established, then there is no privity between the life estate and the remainder

C. If adverse possession occurs before the timeshares are divided, then there is privity among all parties

i. The difference in B and C is due to the fact that in B, there was no time when there was one person with the power and responsibility to defend the entire owner’s line. In C, it was the original owner’s responsibility to eject the adverse possessor as he had an interest in the land which was a fee simple absolute.

Tolling

**Concurrent Estates**

I. Two or more people have the right to current possession at the same time.

A. These rules most obviously apply when two or more people buy a piece of property together.

i. The intention is for both to have right to current possession simultaneously.

ii. i.e. Married couples, friends, business partners

iii. Or when the property passes by other means than a sale

 a. i.e. To the children

B. Could solve the problem by dividing the property if possible; force a sale and divide the proceeds.

i. If don’t want to do this or it’s not possible, can divide the right, giving concurrent possession of the whole and calling each a cotenant.

II. Tenancy in Common

A. Each tenant has the undivided right to possess the whole property concurrently

B. Alienable, devisable, descendible

i. Interest passes under the laws of intestacy, not to the other tenant in common.

C. Presumption that this is the concurrent estate intended unless there is evidence to the contrary.

III. Joint Tenancy with Right of Survivorship

A. Upon the death of one of the cotenants, the remaining owners take the deceased owner’s share.

 i. An automatic transfer of interest.

B. Generally alienable

i. Not devisable or descendible because it automatically passes to the other cotenants upon death.

 C. Must fulfill the four unities test

i. Time: the joint tenants must have acquired their joint interest at the same time

ii. Title: they must have acquired their interests by the same instrument

iii. Interest: (quantity) each joint tenant must have an identical percentage interest in the property

iv. Possession: (quality) each share must be identical with respect to rights

a. Fulfilling these does not override the presumption of a tenancy in common

b. At common law, fulfillment of the four unities presumed that this type of interest were intended.

D. Even if the four unities are met, unless there is a an express intention for the joint tenancy with right of survivorship, we presume that a tenancy has been formed.

E. This interest can be severed when one of the cotenants transfers his interest

 i. No longer meets the four unities test

ii. The cotenants become tenants in common

iii. Leases: courts are split as to whether a lease by one co-tenant severs the JRTS

 a. Some say it severs the unity of possession

b. Others say that there is a temporary severance until the expiration of the lease; if the lessor dies while the lease is still in existence, it is severed

c. *Tenhet v. Boswell* – CA Supreme Court finds that Boswell has no right and the JTRS has remained and therefore goes to Tenhet

IV. Tenancy by the Entirety

A. Like joint tenancy in that it goes to the surviving spouse at the death of the first.

B. Can only be created between two married people

 i. This is considered a fifth unity – person (marriage)

 ii. When not legally married, there is a split among the courts as to what it is

a. Default to JTRS because it is closest – attempts to approximate the intention

b. Default to tenants in common because of the presumption in favor of tenancy in common

C. Cannot be severed by one spouse alone

i. Divorce terminates a tenancy by the entirety because it severs the unity of marriage (separation does not)

D. Exists in only twenty states, but extremely common within those states

i. In these states, when property is transferred to a married couple, tenancy by the entirety is presumed

V. Rights of Cotenants Among Themselves

 A. Each cotenant has the rights to the property as a whole

i. A 1/3 interest does not mean the cotenant only has a right to 1/3 of the property.

a. This division only applies to the fiduciary relationship between the two cotenants

 B. Accounting

 i. When the “Other” sues the “User” to recover revenue or sale proceeds

ii. An equitable action demanding the fiduciary to account for their actions as a fiduciary

a. The law treats cotenants for some purposes as fiduciaries of each other; they are never viewed as independent, rationale, selfish actors

iii. Ex 1. The user obtains cash from the land directly (from renting it out).

a. The User is compelled to give the Other his percentage share (equal to his percentage interest) of the net profits.

b. Both are entitled to use the land

iv. Ex 2. The User lives on the land and the Other does not; purely a benefit of living on the land, no monetary benefit.

a. Majority Rule: the User does not need to pay the Other anything, he is simply invoking his right to the use of the land while the Other is not

1. EXCEPTION: If the User has ousted the Other from the land, then the Other is entitled to her share of the fair rental value of the property from the User.

α. Ouster: something that would presumably cause a reasonable person to leave

ß. Known as an action for mesne profits.

b. Minority Rule: a cotenant not in possession is entitled to her share of the fair rental value even if there has been no ouster.

 v. Laches: the equitable equivalent to SOL

a. When you do not come into the court of equity with clean hands.

b. As it wouldn’t be fair to allow someone to sit on her rights and then later come in and invoke these rights.

 vi. Costs

 a. Both mandatory and optional costs are taken into account

b. The person who has the obligation to account must only account for the net profits.

1. If User rents out the property after making an improvement that increase the fair rental value, he keeps the net increase to himself and then divides the fair rental value according to the percentage interest each party owns.

c. Capital Expenses: improvements that have a long-term benefit as opposed to routine maintenance

 C. Contribution

i. When the “User” sues the “Other” to force the co-tenant to kink in for an expense that the plaintiff has already paid

 ii. An action for contribution is a legal action

 a. Requirements for a cause of action

 1. Both cotenants must be using the land

α. Generally, if the payor is in possession and the other party is not, there is no cause of action for contribution as he is benefitting from the property use.

ß. EXCEPTION: when the mandatory costs exceed the fair rental value for the property, the payor is entitled to contribution with respect to the excess.

 2. The cost must be a mandatory cost

α. If the cost is optional (i.e. maintenance) then there is no cause of action for contribution, regardless of whether the cotenant is living on the premises.

 iii. Ex1. The User pays all of the income tax on the property.

 D. Partition

i. A tenancy in common or a joint tenancy with right of survivorship can be terminated by either voluntary or involuntary partition.

a. Voluntary: when the cotenants split up the property themselves in a way that is perceived fair by the parties.

b. Involuntary: the court gets involved and we have rules

 ii. Action for partition is an action in equity

 a. Almost always accompanied by an action in accounting

 1. Adjustments for capital items on partition

α. Look at the fair market value of the property and what the fair market value would have been without the improvement.

ß. The difference goes to the one who paid and the remaining is split between the cotenants.

 b. We do what is fair

 1. May split the property into parts

2. Order the property to be sold and split the proceeds between the cotenants

**Property and Cohabitants (Spouses/Marital Property)**

I. Common Law

 A. Assumed male dominated everything

 B. Land passed by laws of primogeniture

 C. Recognized dower and curtesy

i. This was to solve the problem that arose due to the fact that the spouse would receive nothing upon the death of the other and marriage was supposed to be an economic arrangement

ii. These only apply to real property, not personal property

a. A large reason why dower and curtesy have become less important – personal property has become a larger way of storing your wealth and dower and curtesy ceased to perform the economic function that they used to perform

II. Law of Coverture

 A. Gave the husband absolute control over the wife’s property during his lifetime

 B. The husband and wife were one person and that one person was the husband

 C. Bequeathing rights to a daughter would give her no rights if she were married

 D. Today – most states give equal rights to both spouses

III. Dower

 A. Surviving widow has the right to dower

 i. A property interest in advance is not required

ii. She is not treated as inheriting this from her husband, but rather, this property is considered hers form the moment they are married

iii. Traditionally, was an optional grant by the husband to the wife during the marriage ceremony

 a. Today, it is mandatory and generally applies equally to men and women

 B. It is a right to a life estate in 1/3 of:

 i. All lands (not a 1/3 interest, but rather a physical 1/3 partition)

 ii. Of which her husband was seized

 iii. Of legal estate

 iv. Of any time during the marriage

a. Even if it is sold to a third party, at the husband’s death, the wife still has a right to 1/3 of the property

1. Therefore, for a husband to sell property, he must have his wife’s consent to release her dower interest so the buyer can take in fee simple absolute not subject to the dower

 v. In which he had an estate capable of inheritance by issue of their marriage

 C. Called a dower inchoate because only once the husband has died can she assert this right

 D. Called a dower in consummate once he has died and she becomes known as a dowager

IV. Curtesy

 A. Has been largely abandoned

B. Once the first child is born alive, the life estate given to the husband (by way of coverture) is by the husband’s life

 i. Under coverture, there existed a life estate by marital right

ii. The husband gets a life estate by martial right in all the land owned by the wife and inheritable by issue of the marriage

C. While wife is alive it is known as a curtesy initiate and once she dies, it becomes a curtesy consummate

**Community Property**

I. Community Property

 A. Can own property and owe debt by a couple, as a couple (one entity)

 B. Property acquired during the marriage

i. It can be difficult to establish what was acquired during the marriage and what was acquired before

ii. All property acquired through labor is automatically considered community property and half of it belongs to the spouse immediately

a. Even non-vested rights, like a contingent remainder, will be treated as community property

 C. Each spouse has the right to do what he/she wants with his/her share

 D. If a spouse dies intestate, most will pass to the other spouse

II. Separate Property

 A. Owned by each individual within the couple separately

B. Property acquired before the marriage or without effort by one of the parties during the marriage

i. Like common law separate property except that the other spouse has no right to dower

III. Choosing Common Law or Community Property Rules

 A. Generally the choice is dependent upon where the property is located

B. If a couple lives in a state other than where the property is located, then the status is determined by the domicile of the couple at the time of the acquisition of the property.

**Estates in Land and Future Interests**

**Present Interests**

I. Gives you the right to possession of the land against a future interest

II. Words of purchase: the words of to whom we are granting the land

 A. i.e. “To A for life.” – “To A” are the words of purchase.

III. Words of limitation: the words designating the type of estate

 A. i.e. “To A for life.” – “for life” are the words of limitation.

IV. Fee simple, fee tail, and life estate can all be followed by absolute, determinable, or on condition subsequent

V. Fee simple absolute

 A. Ownership; right to land from now until the end of time

 B. Alienable, devisable and descendible

 C. Magic language: “and his heirs”

i. This is not giving heirs any rights whatsoever, it merely indicates the kind of estate A is getting

ii. Today, we assume a fee simple absolute if no other designation or words of limitation, even without “and his heirs”

 D. Common law presumes fee simple absolute over life estate

i. Presumptions are there to resolve problems of ambiguity; not to act as a rule or law.

VI. Fee tail

 A. Successor to the fee simple conditional

i. The holder’s interest passed to his lineal descendants under the rules of primogeniture (1st born)

ii. Goes to the eldest son; if no sons, divided equally among daughters

iii. If no lineal descendants, land goes back to original grantor or his descendants

iv. Keeps the land in the family as one parcel; maintain aristocratic wealth

v. If the holder who has seisin had a child, had the ability to convey in fee simple absolute

 a. Through a strawman, able to destroy primogeniture

vi. Abolished by De Donis Conditionalibus in 1285

 a. Creates instead the fee tail

 b. Holder in fee tail can only convey a life estate

 B. Alienable and descendible

 i. Not devisable; automatically goes to the oldest son

 C. Magic language: “and the heirs of his body”

 D. Followed by a reversion

i. When the line dies out, the interest reverts back to the original grantor

E. Four types: general, male, female, special (“to A and the heirs of his body by B”)

F. Common recovery

 i. The courts find a way around the fee tail

 ii. Taltarum’s Case (1472)

iii. A type of charade that allows the tenant in tail to obtain the interest in fee simple absolute

iv. Purpose is so the king was able to obtain a fee simple absolute upon forfeiture instead of simply a life estate 🡪 led to control over the barons

VII. Life Estate

 A. Followed by a reversion in the grantor

 B. Alienable

 i. Not descendible or devisable (no interest beyond the life)

 C. Life estate per autre vie

i. Any time there is another life involved besides the person to whom it is conveyed

ii. Because it is dependant upon another’s life, it is alienable, devisable, and descendible

iii. When the interest holder dies, it passes to his successors in interest until the person upon whose life the duration of the life estate is determined dies

 D. Magic language: “for life”

VIII. Fee simple determinable

 A. A fee simple estate that endures for a specified “but not” period

 B. Is followed by a possibility of reverter in the grantor

i. Once the “so long as” condition no longer remains, the interest automatically reverts back to the grantor.

ii. *Mahrenholtz*: made a difference as to whether Harry’s transfer to the Mahrenhotlz’ was valid

iii. Has an effect on adverse possession because the SOL begins to run automatically

iv. The possessor must make clear that he is no longer using the property for the established purpose; the future interest holder must somehow be put on notice

 C. Alienable, devisable, descendible

 D. Magic language: “so long as”

 i. Language of duration

IX. Fee simple on condition subsequent

A. A fee simple estate that ends because of a particular event, but not automatically.

B. Is followed by a right of reentry in the grantor

i. The holder of the future interest may invoke to get the property back, but until that time, the present interest holder maintains her right of possession.

ii. *Mahrenholtz*: made a difference as to whether Harry’s transfer to the Mahrenhotlz’ was valid

iii. Cannot be effected by adverse possession because would not be a present interest holder until invoked his rights in fee simple absolute and only then would the SOL begin to run.

iv. The possessor must make clear that he is no longer using the property for the established purpose; the future interest holder must somehow be put on notice

v. Must invoke the right of reentry within a “reasonable time.”

C. Presumption of this interest over fee simple determinable when ambiguous

 i. Because we don’t like automatic forfeitures of rights.

 D. Alienable, devisable, descendible

 E. Magic language: “provided that,” “but if”

 i. Language of condition

X. Definite vs. Indefinite Failure of Issue Construction

 A “To A, but if A dies without issue, to B.”

 B. Definite Failure of Issue Construction

i. Only ask the question once: when A dies, if A is without issue, then it converts to fee simple absolute

ii. Standard in modern courts

a. EXCEPTION: When language follows immediately after an interest in fee tail, we interpret it as “and we really mean fee tail” and use the indefinite failure of issue construction.

1. It is then not divesting language and is understood as a natural termination of the fee tail.

iii. “To A for life and upon A’s death to B and his heirs, but if B dies without issue, then to C and his heirs.”

a. Substitutional Construction

1. If B dies without issue during A’s lifetime, substitutional because it will either go from A to B or A to C.

 b. Successive Construction

1. If B dies without issue ever, successive because could go from A to B to C

 c. Naming does not change, but practical use does.

 C. Indefinite Failure of Issue Construction

 i. We look to see if there was issue every time someone in the line dies

 ii. We say that A died without issue in the year that his line dies out

XI. The Law of Waste

A. When the present possessor does something that may reduce the value of the future interest

B. The future interest holder can get damages or an injunction against the present interest holder

i. Damages are only available if the future interest holder joins as parties to the lawsuit all possible future interest holders (could still seek an injunction without)

C. At common law, can sue for waste when there is any major change – even if it increases the property value.

D. Modern courts tend to look at the economic value of the change

E. Permissive waste – waste by inaction

 i. Generally not the obligation of the present interest holder

XII. Trust – From Equity

A. Enables a conveyance in fee simple absolute to T (legal right), with beneficiaries having the (equitable) right to use, but not convey

B. When the property is to be sold, it can be done in fee simple absolute by T and divided into the corpus and income, with money held in trust for the beneficiaries.

C. Enables the property to be leased, sold, given a lien, grant a mortgage

D. If cash is added to the trust, it can be the trustee’s responsibility to make necessary repairs

**Future Interests**

I. Naming future interests depends on what happens to the remainder after the present interest

*Red: reversionary interests; Blue: remainders; Green: executory interests*

II. Reversionary Interests

 A. Reversion

 i. Alienable, devisable, descendible

 a. Retains its name when it is alienated

 B. Possibility of Reverter

 C. Right of Reentry

III. Remainders

A. “Any future interest limited in favor of a transferee in such a manner that it can become a present interest upon the expiration of all prior interests simultaneously created, and cannot divest any interest.”

 B. Must follow a freehold estate; can only follow a life estate or a fee tail

i. The future interest need not ever become possessory, just so long as it *can*

C. Contingent Remainder

 i. The remainderman is either unborn or unascertained

ii. There is a condition precedent that must be met before the remainderman takes

a. The natural termination of the preceding estate is never considered a condition precedent

iii. Can never end a grant with a contingent remainder, must be followed by a reversion

 D. Vested Remainders

 i. Vested remainder subject to complete divestment

 a. Vested remainder subject to a condition subsequent

b. Ex. “To B for life, and then to C and his heirs, but if liquor is ever sold on the land, the grantor may reenter and repossess.

1. C is born and ascertained, but after he has taken, there is a condition which can lead him to lose the land

2. Grantor retains the right of reentry

 ii. Vested remainder subject to open

 a. Vested remainder subject to partial divestment

b. May be subject to open if it is given to a class of people rather than specific people – defined by a class gift

1. A class gift becomes vested when there is at least one ascertainable, living member of the class, and there are no unmet conditions precedent (otherwise a contingent remainder).

2. Subject to open if new members can join the class.

3. Closed if no new members can join the class.

 iii. Vested remainder

a. Refers only to a vested remainder that is not subject to complete divestment nor subject to open

b. We must know who all the holders are

c. They or their heirs must be certain to acquire a present interest at some time in the future

d. They or their heirs must be certain to retain permanently the retained interest thus acquired.

IV. Executory Interests

 A. Pre-1536

 i. Rule Against Springing Interests

a. Any future interest in a third party must be capable of taking effect immediately upon the expiration of the preceding estate.

b. There must be someone with seisin at all times.

 1. “To A for life, and one year after A’s death, to B.”

α. Violates the rule, therefore it becomes a life estate in A, followed by a reversion in O.

c. *Purefoy*: where a condition can be read to avoid the rule against springing interests, it should be read that way and be kept as a valid future interest.

1. 🡪 Contingent remainder instead of a springing executory interest

2. This never applies to contingent remainder vs. shifting executory interests ONLY SPRINGING.

 ii. Rule Against Shifting Interests

a. Only naturally expiring estates can be followed by a future interest in a grantee

b. Attempts to create interests in a third party following a divesting event was void from the outset

c. No condition in estranger.

1. “To A and his heirs, but if liquor is ever sold on the land, to B and his heirs.”

α. Only a reversion could be transferred to a third party; possibility of reverter or right of reentry were descendible, but not alienable or devisable

ß. The grant to B is void 🡪 A holds in fee simple absolute.

 d. “But if” is magic language of defeasement

1. Intending to defease the prior estate and would be automatically void under the rule of shifting interests.

e. When we void the language by reason of this rule, we also void language of condition, but not language of duration.

 B. Statute of Uses (1536)

i. Springing and shifting interests were allowed in equity by way of use (the predecessor of the trust)

ii. Anti-tax avoidance statute

iii. Converts all equitable uses into legal interests

a. Only those that were allowed previously in equity to now be allowed in law.

1. Only springing interests were allowed to come into existence from a result of an event certain to occur (i.e. a particular date).

iv. This does not repeal either rule, just finds a way around them.

a. Why possibility of reverter and right of reentry are still not devisable or alienable today

v. The names that were assigned each interest prior to 1536 do not change.

 C. Shifting Executory Interest

 i. Interest divests a third party

 ii. If there is a possibility of either shifting or springing 🡪 shifting.

 D. Springing Executory Interest

 i. Interest divests the grantor

V. Class Closing Rules

 A. Physiologically

i. The class closes when the person who is capable of giving birth to or adopting class members dies

ii. Death is the only factor considered, not the inability to have children.

iii. A child in the womb when the father dies (if he is the person of interest) is considered to be alive for class purposes.

 B. Rule of Convenience

i. The class closes whenever any member of the class is entitled to demand possession of his or her share.

ii. Closure occurs automatically; the member does not need to invoke his/her right; nor can he/she reject it and wait for it to close by other means if the rule is to apply

ii. Rule of construction, not law, and can therefore be overridden by testator’s intentions that are clearly and expressly contrary.

VI. Rule of Destructibility of Contingent Remainders

A. If a contingent remainder does not vest by the time the preceding freehold estate terminates, the contingent remainder is destroyed.

 B. This is not an interpretive question, it is a rule of law.

 C. Upon the natural expiration of the prior freehold estate.

i. “To A for life and upon A’s death, to A’s eldest child if he shall attain the age of 21.”

a. Life estate in A, contingent remainder in A’s oldest child, reversion in O.

1. Because of *Purefoy* we interpret that he must attain the age of 21 before A dies.

b. If A dies before A’s oldest son has reached 21, his interest disappears – it is destroyed.

 D. Upon termination by merger

i. Merger applies whenever one person owns two interests which, when taken together, comprise one named interest.

ii. If an intervening contingent remainder have not yet vested when the present and future interests merge, the contingent remainder is destroyed.

iii. “To A for life, then to B and his heirs if B marries C.”

 a. Life estate in A, contingent remainder in B, reversion in O.

 b. O conveys his reversion to A 🡪 Fee simple absolute in A.

1. B’s intervening contingent remainder has not yet vested and is therefore destroyed.

iv. Very useful tool if you want to convey the property to someone who wants to purchase it with a clean title.

v. Exception

a. When a life estate and the next vested estate are created simultaneously in the same person with an intervening contingent remainder in another, destructibility does not apply because we assume it was the grantor’s intention to keep these separate.

E. Upon the unnatural termination of the freehold estate – does not refer to difeasement or divestment

 i. “To A for life and then to B’s children.”

a. Ex1. Forfeiture – if A commits a felony, under forfeiture the land goes to the lord and if the future interest has not yet vested, it is destroyed.

b. Ex2. No longer have forfeiture, but if A renounces his interest, his interest terminates and B’s children’s interest, if not yet vested, is destroyed.

F. Executory interests are not subject to this rule, but if under *Purefoy*, if an executory interest can take possession as a contingent remainder, it will be treated as a contingent remainder for the purposes of this rule.

 i. Ex. “To A for life, then if B marries C before or after A dies, to B.”

a. Life estate in A, reversion in O, springing executory interest in B.

b. Treat as a contingent remainder for this rule because it *could* take as a contingent remainder.

c. If B has not yet married C at the time of A’s death, B’s interest is destroyed.

VII. Rule in Shelley’s Case

A. If a grantor conveys a life estate in A and in the same instrument (within the same line of text) purports a remainder to A’s heirs, the remainder disappears and goes to A.

B. A gets whatever type of remainder that was originally conveyed to A’s heirs.

C. Rule only applies if the life estate in A and the remainder are both legal or both equitable.

i. Ex. “To A for life, then to B and the heirs of his body, remainder to A’s heirs.”

a. Life estate in A, vested remainder in fee tail in B, contingent remainder in A’s heirs (we don’t know who A’s heirs are), reversion in O.

b. 🡪 Life estate in A, vested remainder in fee tail in B, vested remainder in A.

D. The rule was developed as an anti-tax avoidance rule. At the time, inheritances by intestacy were taxable and grants were not.

i. Apply the Rule in Shelley’s Case and it creates a fee simple absolute, making the passing to the kids’ heirs taxable.

 E. Only applies to “heirs”

i. This is case law and was not expanded to cover beyond the holding in that case which used the term “heirs”

ii. A very limited rule

 F. Circumventing the rule

i. If future interest is left to A’s children, instead of A’s heirs, then the rule does not apply

ii. Create an executory interest in A’s heirs.

a. A life estate and an executory interest do not sum to fee simple absolute.

b. Ex. “To A for life, and one day after A dies, to A’s heirs.”

1. Life estate in A, reversion in O, springing executory interest in A’s heirs.

2. The rule does not change the title.

VIII. Doctrine of Worthier Title

 A. Testamentary Branch

 i. By will (the worthier way of obtaining property was by intestacy)

 ii. No longer the law in any state

 iii. “To my heir” – void as if the language never appeared in the will

a. Old Common Law: something passed by will was not subject to inheritance tax

b. Voiding this language made the property pass by intestacy and it became taxable

iv. A devise to the heir was void if it purported to give the devisee an interest of the same quality and quantity that the devisee would have taken if the testator had died intestate.

 B. Inter Vivos Branch

 i. Between the living

ii. A conveyance of a remainder or executory interest to the heirs of the grantor was void and the grantor retained the reversion.

iii. Remains the rule in five states, abolished in nine, a rule of construction in the remaining

IX. Rule Against Perpetuities

A. No future interest is good unless it must vests, if at all, not later than 21 years after some life in being at the creation of the interest.

i. If it is possible, regardless however unlikely, that the interest will vest more than 21 years after some life in being then the interest is void from the outset.

B. Apply at the time of conveyance and if violates the rule, it is voided from the outset

C. Is it possible for X to occur more than 21 years after Y?

 i. X = the event that causes the vesting

 ii. Y = death of the last life in being

D. Life in Being

 i. Is identifiable at the time of the conveyance

 ii. Is relevant in some way to the grant

 iii. Is not a member of an open class

 iv. O is always a life in being

 E. Doctrine of Infectious Invalidity

i. If the only purpose for including the interest preceding the voided interest was to hold it for the invalid interest, it too is void.

 F. The Unborn Widow Problem

i. “To son for life, then to son’s widow for life, and then to such of their issue as shall be living.”

a. Life estate in the son, contingent remainder for life in son’s widow, contingent remainder in their issue, reversion in O.

b. RAP: (grant to widow): Is it possible that the son die more than 21 years after the son dies?

 1. No, therefore valid.

c.: RAP: (their issue): Is it possible that the son’s widow die more than 21 years after the son dies?

 1. Yes, therefore void.

2. Must then ask if the widow’s was only for the purpose of retaining it for the children (Doctrine of Infectious Invalidity)

 α. If yes, then 🡪 Life estate in son, reversion in O.

ß. No 🡪 Life estate in son, contingent remainder for life in son’s widow, reversion in O.

 G. The Slothful Attorney Case

i. “To my grandchildren who are living at the time T’s will is admitted to probate.”

a. Contingent remainder in T’s grandchildren living at the time the will is admitted to probate, reversion in T.

b. RAP: Is it possible for the will to be admitted to probate more than 21 years after T dies?

 1. Yes, therefore void 🡪 Fee simple absolute in T.

2. If T’s children all predeceased T, then the class of grandchildren would be closed and they would be lives in being making this conveyance valid.

H. Wait-and-See Approach

i. Wait and see if it vests within 21 years after the deaths of the lives in being

ii. Do not void at the outset, but rather after the 21 years have lapsed.

iii. Problems: there is a cloud on the title while we wait and see (uncertainty)

 I. Uniform Statute Rule Against Perpetuities

i. Grant is okay if it is valid under the common law rule OR if it actually vests or terminates within 90 years.

 a. Still need to do the common law analysis

b. However, even if grant fails under common law, can still be okay if within 90 years.

1. This second step does not take into account lives in being.

 ii. Adopted by 28 states, including California

iii. Problem: property can be tied up for 90 years

 J. Cy pres

i. The court has the power to rewrite the language so that it is consistent with the rule.

**Leasehold (Non-Freehold) Estates**

I. Non-freehold estates are unlike freehold interests in that the owners do not hold seisin

 A. Now referred to as landlord-tenant law

B. We determine which type of non-freehold estate is created by looking at the intentions of the parties

 i. Typically written agreements will be found to be term of years

 ii. Typically oral agreements will be found to be periodic tenancy

 iii. Main difference between the three is the notice to terminate

iv. Interest in land has to be in writing to be enforceable, signed by the person against whom enforcement is sought, unless it is for < 3 years (CA is < 1 year)

a. If a lease is invalid under the SOF, but the T takes possession with permission of the L, he becomes a T at will

1. If then begins paying and L accepts the rent, the lease becomes one of periodic tenancy with the facts and circumstances used to figure out the period

2. If a lease exists that is not signed with other terms, then all aspects of the lease except for the lease term are enforceable and binding (the lease term is simply invalid if the lease does not fulfill the SOF)

 α. Doctrine of Partial Performance

 I. **Equitable** exception to SOF

II. If a tenant acts in an unusual way, such as builds a building on the property, the court will hold that there was no fraud and that party therefore gets the benefit of the full term of the lease

III. This works both ways, if the L promises to build a building and does so then he can enforce the full term due to his investment

 ß. Uniform Residential L and T Act (URLTA)

 I. Another exception to SOF

II. If one party fails to sign the agreement, but the other has and the party who didn’t sign acts as though the contract is in place, he will be bound for up to one year

III. Applicable only to leases of residential real estate

3. The lease is not void simply because it is invalid under the SOF

α. If the tenant has not yet taken possession then the lease is void

C. If an agreement is a contract to make a lease then the damages would be determined by measures of the contract.

i. If the facts indicate that it is in fact a lease, the L would be entitled to damages measured by the rent

ii. Both a lease and a contract to lease are enforceable, the only difference is the measure of damages

II. Tenancy for Term of Years

A. Fixed for a computable period of time – can be for any stated amount of time; not just long term

i. Unless otherwise stated, begins at midnight on the first day and ends at 11:59PM on the last day

 a. Typically inclusive of the start and end dates

 B. Almost always created by written contracts

C. Some states limit the period for which it may last – typically very long limits

D. No notice of termination required

 a. Can modify this within the lease

b. Neither party may terminate this lease until the date set to terminate unless early termination is provided in the lease itself

1. At common law, there was no early termination for any reason; it was considered a complete conveyance

2. Today, L may terminate is T fails to pay rent; either by way of a provision in the lease or some states have even overruled the common law to allow this regardless

III. Periodic Tenancy

A. Lasts for a definite period and then automatically renewed at the end of that period unless one of the parties gives notice of termination

B. Notice of termination

i. Under the common law, a year-to-year lease required six months notice of termination; shorter than a year required one period’s worth of time

IV. Tenancy at Will

 A. May be terminated at any time by either party – uncommon today

 B. Unless clearly intended, courts will presume against this type

 C. No notice is required to terminate

 i. Automatically terminates upon the death of a party

 ii. Many states have changed the common law rule and require notice

V. Tenancy at Sufferance

 A. Applies to holdover tenants

B. NOT an estate because the holdover tenant does not have a right to be there

C. The L can elect to treat the holdover tenant as a trespasser or as a periodic tenant and hold him to the rent

VI. Market Theory as Applied to Leases

A. Rent and terms within a lease are subject to market theory in that they will reach an equilibrium point through an efficiently operating market

i. There will be similar rent and terms throughout the market as the average T will be willing to pay a certain amount for each

ii. If the contract does not speak to an issue, the law should be structured to assign the cost to the least cost provider for two reasons

 a. The parties would have anyway

b. Maximizes overall societal wealth, as it reduces the overall costs

c. If parties do deal with an issue and markets are efficient, the law should never override their agreement

1. Also, government intervention in markets reduces social welfare – caps lead to shortages

α. Should never regulate, people are better off when able to make their own decisions

iii. Microeconomic theory says that eventually the boilerplate language will correctly assign the costs because they will have a competitive advantage when the costs are correctly assigned

iv. All of this assumes that T have read and understood their leases

 B. Least Cost Provider/Avoider

 i. Provider – costs

 ii. Avoider – risks

iii. If parties are well informed, their contracts will assign costs and risks to the party who can deal with them most cheaply

a. In the long run, it shouldn’t matter who is assigned costs, the same party will bear the costs – the assignment simply provides if it will be cheaper or not

b. Caveat: assumes there are no transaction costs

c. A lease term that may appear to be anti-tenant on its face may in reality make sense under economic theory because he is the least-cost avoider

1. Who ultimately bears the costs depends on the shape of the D and S curves, not upon whomever we initially assign the costs

 C. Eviction of a Holdover Tenant

i. The L can account for the costs by including in the old tenant’s lease a clause imposing the cost of the eviction on him if he stays over

a. In the long run, the L has a way of avoiding this cost with the inclusion of this provision

ii. The ultimate lowest cost provider is the holdover tenant; he could simply leave and incur no costs

iii. *Hanan v. Dusch* – the court imposes the responsibility on the T, as this is consistent with the theory of estates and land; the L does not have a right to current possession as he has conveyed that right to possession to the tenant and therefore has no right to bring suit against the holdover T

a. American Rule: L is not bound to put T into actual possession, only legal possession, so that no obstacle in the form of a superior right of possession will be interposed to prevent the tenant from obtaining actual possession; the T assumes the burden of enforcing such a right of possession as against all persons wrongfully in possession, whether they be trespassers or former tenants wrongfully holding over

 1. Probably actually the minority rule in the states

b. English Rule: there is an implied covenant on the part of the L that the premises shall be open to entry by the T at the time fixed by the lease by the beginning of his term

 1. Adopted by the URLTA and the Restatement

2. It is the L’s responsibility to get rid of the holdover tenant regardless of knowledge of his presence; if he breaches this obligation, T can terminate

α. Under R.2d the L is to take reasonable measures to evict once he knows or should know; therefore T cannot terminate immediately in a jurisdiction that has adopted this

 D. Trespasser

i. If the current T fails to possess the land immediately and when he does there is an interloper, he then has the responsibility to evict the interloper regardless of English or American Rule

a. R.2d Property goes further than the English Rule in this regard; if L has reasonable notice of the trespass, then he has the responsibility to evict even if the interloper arrived after the beginning of the lease term

b. T generally has no duty to occupy promptly

VII. Use of Lease Premises

 A. Restriction clauses

i. Must look at the scope of the restrictions; ask interpretive questions; look at the rationale behind including such a clause and argue whether your client’s use violates this rationale or only a particular interpretation of the actual language

ii. Procedural rule: we resolve ambiguities against the person who drafted the language – this is the least cost avoider (if they had drafted the language appropriately, we wouldn’t have this problem in the first place)

iii. Waiver by a L for other T’s in the building leads to a waiver for the specific T; knowledge of violation before rents out apartment can act as waiver as well

iv. “Unless it is expressly permitted by L” indicates that L will give permission in good faith; he does not simply have unlimited discretion

v. If certain restrictions are left out in the lease, there may be added a provision that allows the L to make unilateral modifications throughout the rental period

a. The URLTA does have a section that authorizes such a unilateral modification, but it is limited

B. If the use is restricted by the government, who bears the risk between the T and the L?

 i. If the lease deals with it explicitly, then the lease should govern

 ii. Economics would say the least cost avoider should bear the risk

a. As it is less likely that the T would be able to shift to another line of business, it is the L

b. Placing the risk on the tenant would likely lead to the property remaining empty.

 iii. If the use is illegal from the outset

a. The burden is on the T as he knows what he wants to do with the land and is aware that it is illegal; he is the least cost provider

 iv. If both the T and the L know the use would be illegal

a. The law places the burden on the L and allows the T to terminate

b. The L is in the best position to be sure that the land is not used in this illegal manner and could rent it out to someone else

 v. If the activity becomes illegal after the lease is signed

a. The burden is on the L; he is the least cost avoider as he can simply rent it out to someone else

b. R.2d of Property § 9.2

 vi. Doctrine of Commercial Frustration

a. By reason that the government has frustrated the use even if it doesn’t make it illegal

b. R.2d § 9.3

c. Ex. decides to build a subway and digs up the street where the entrance is; no one can come in and buy goods from the store

d. Law of Economics does not help here because the property is not usable by either party.

VIII. Doctrines that Apply to Rentals

 A. Implied Warranty of Habitability

i. Default rule when the lease does not say anything as to what the L should provide

 ii. Generally states will apply the local housing code

iii. If there is no housing code or it does not address an issue, it is whatever would be reasonably suited for human residents

iv. Tenant’s Remedies in Case of Breach

a. Terminate – tenant must vacate the premises within a reasonable amount of time and terminate the lease

b. Repair and Deduct – after notice to L and the L’s failure to repair, T may repair the problem himself and deduct the costs from future rental obligations.

 1. Some jurisdictions limit this remedy

c. Reduced Rent – T may reduce the rent to reflect the fact that the premises does not comply with the warranty and is worth less than one that does

d. Damages – T remains, pays full rent, but sues for damages

 v. Courts are split as to whether this can be waived by contract

vi. Applies to residential leases, but expanded to commercial leases with implied warranty of suitability

a. *Davidow v. Inwood North Professional Group*: Davidow was a doctor renting out the space; there were a ton of problems including rats; L’s theory was that inhabitability is an independent covenant; court finds that the implied covenant of habitability should apply equally to commercial leases, but calls it implied warranty of suitability

1. Unnecessary to have extended this rule; this was dealing with an issue of independent covenants, and simply could have used constructive eviction

2. Texas remains an outlier; may states have chosen not to adopt this rule; some states have simply abolished the rule of independent covenants

 B. Warranty of Fitness for a Particular Purpose

i. From  *Ingalls v. Hobbs* – infestation in a vacation rental; the whole idea was to have a vacation and the entire idea has been frustrated

 ii. Applies to short-term furnished residential leases

 iii. Led to implied warranty of inhabitability

 a. Now the two doctrines live side by side

iv. Courts are split today as to whether this applies to commercial leases

a. Would argue that it is being used for a particular purpose and should apply

b. *Woolford* – extended warranty for a particular purpose

 C. Implied Covenant of Quiet Enjoyment

 i. Applies to all freehold and non-freehold subinfeudations

 a. Applies to all leases without exception

 1. Applies equally to commercial leases

 b. Only one CA case demonstrates that it can be waived

ii. The L promises that neither he nor anyone claiming through him nor any third person having superior title will disturb the tenant in the tenant’s use and enjoyment of the premises.

a. *Louisiana Leasing Company v. Sokolow* – demonstrates the use of this covenant against “anyone claiming through him”

iii. So important because it gets around the common law rule of independent covenants

a. When a L conveys to the T and interferes with the use it is a violation of the T’s property rights

 iv. Rule of Independent Covenants

a. All promises were merely contractual; they are not part of property law

b. If rent isn’t paid or L does not make repairs would have to sue under contract law

c. Termination of conveyance is not allowed

 D. Constructive eviction

i. The courts found the L’s failure to perform a duty as a constructive eviction

ii. To get around the rule of independent covenants

a. Rather than the only obligation of the L being implied covenant of quiet enjoyment, the T is able to terminate for any breach of any obligation

iii. Now the L is under a duty to keep the premises in a state of repair

iv. Four elements

 a. Duty

1. L must wrongfully perform or fail to perform some duty under a contractual obligation, an implied warranty, or other expressed duty

 b. Substantial Interference

 1. It must cause substantial interference with the T’s use

 c. Notice and Opportunity to cure

 1. Must give L notice and an opportunity to cure

 d. Failure to remedy and vacation within a reasonable time

1. If L fails to remedy, the T must vacate within a reasonable time (depends on the nature of the problem)

IX. Retaliatory Eviction

A. T may assert L’s retaliatory motive as a defense to an action for eviction as an affirmative defense

i. *Robinson v. Diamond Housing Corporation* – T begins to withhold rent to make L satisfy habitability; L sues to evict; court rule in favor of Mrs. Robinson due to defense of retaliatory eviction

B. L can take the land off of the market only if he can demonstrate that repairs are not feasible

C. Courts have generally declined to make this defense available to commercial tenants

 i. It is difficult to apply the same sort of public policy rationale

D. If T vacates due to a retaliatory eviction, he can then later sue for damages

E. URLTA § 5.101 is a typical example of statutes incorporating the retaliatory eviction defense

 i. Specifically protects T organizing whereas the common law does not

X. Transfer of Leases

 A. Assignment

 i. If T transfers entire interest

 ii. T-2 owes directly to L

 a. L can only sue T-2 for the rent, not T-1

b. T-2 would only need to pay L the original lease rent and does not owe T-1 anything

 B. Sublease

 i. If T transfers less than all remaining interest

 ii. T-2 owes duties to T-1, not L

a. If T-1 charges T-2 a higher rent than the original lease, then T-2 owes T-1 that increased rent and T-1 is still obligated to pay L the lesser amount as designated in the lease

 C. Deciding whether a transfer is an assignment or a sublease

 i. Common Law: formalistic and depends on quia emptores tararum

a. If T-1 retains a reversion of any time, it is a sublease; if he transfers the entire remaining interest, it is an assignment

b. Regardless of the intention of the parties

 ii. Minority Rule: look to the intention of the parties

a. Ex. *Jaber v. Miller* – Jaber (T-1) rents out to Miller (T-2) and continues to collect payments from him and pay the L himself; property burns down; supreme court rejects the common law rule and finds that the intention of the parties was to create an assignment and therefore Miller still owed the payments on the notes

iii. If what is retained is something equivalent to a right of reentry or possibility of reverter, courts are split as to which this creates

a. If follow the theory of quia emptores tararum then it is a sublease

1. Ex. *Spears* – T-1’s retention of right to terminate lease if T-2 failed to pay was essentially a right of reentry and made this agreement a sublease

 b. *Danaj* – court found it to be an assignment

 D. Restrictions on lease assignments and subleases

i. Allow provisions in the lease for such a restriction, but construe them strictly against the L

ii. R.2d of Property allows for this prohibition to be implied, but it is a very limited category

iii. Discretion in allowing the transfer

a. Majority rule: the lessor may be arbitrary in its exercise of power, however, this is often tempered by findings of waiver and estoppel

b. Minority rule: (*Kendall v. Ernest Pestana*) the L cannot withhold permission without reason

iv. *Dumpor*’s case: if L consents to an assignment, he has waived all future assignments

a. Does not apply to subleases because there is no relationship between L and the subleasor

b. Two minority positions

1. Rejects it: one consent does not preclude power to reject future assignments

2. Expands it: also applies to subleases

XI. Tort Law

A. Common law: the L was not liable for a hazard on the land inexistence at the beginning of the lease term; it was the lessee’s own risk as he had looked at the land beforehand

i. T could terminate if there was fraud as to the quality of the property to induce the T to enter into the lease

B. Phase Two: rule is gradually modified to allow negligence on the part of L

 i. Contract to repair, if the L promised to repair

 ii. Latent defects known to the L and not disclosed to the T

a. *Williams v. Melby* – low windowsill and argued that it would not be known that this was dangerous; L has a duty to disclose latent defects; once disclosure has been made, then this duty has been fulfilled; disclosure uses phase one argument of fraud to justify this argument

iii. Public use: when leased for purposes of use by the public and a member of the public is injured

 a. The T’s customer is suing the L

iv. Common areas retained by the L, but used by the T are subject to the ordinary rules of negligence

v. If it is not within these four, then there is no liability in tort.

a. Obvious and patent defects are still not under the responsibility of the L under tort law

 C. Phase Three

 i. Legal duty to repair is no longer just a contractual duty

ii. Short-term furnished rentals have tort remedies available here as well

 D. Phase Four

 i. Modern trend

ii. Same rules apply as those that apply a reasonable care standard in all other industries

iii. *Becker* – strictly liable for injuries resulting from latent defects

XII. Law of Real Covenants as Applied to Leases

A. Look to whether an obligation (pay rent/make repairs – both L and T) runs with the land; does the right transfer with the transfer of the leasehold?

i. A L can sue T-2 (who has been assigned the lease) due to privity of estate and can sue T-1 due to privity of contract

a. Assignment of the lease does not make the contract between T-1 and L void

b. In order to avoid liability, T-1 would have to obtain L’s consent to release him from obligations under the contract upon assignment

ii. Two ways T-1 may be able to avoid liability for T-2’s failure to pay rent (in contract law, not property law)

 a. Assumption: T-2 assumes T-1’s obligations

1. T-2 will be bound under whatever the original contract said

2. Assumption does not necessarily mean release

3. Can be done unilaterally by T-2.

 b. Novation: a new lease is created.

1. The original lease is cancelled and L and T-2 enter into a new lease

2. It may be identical or different from the original lease

3. Technically you could have a new lease without cancelling the old lease, but people will typically cancel the first and novation clears things up

iii. To see if one party can sue another, look for privity of contract or privity of estate

 B. Subleases

i. L and T-1 are in privity of contract due to lease and privity of estate because T still holds of L through reversion

ii. T-1 and T-2 are also in privity of contract and privity of estate

iii. No privity of contract nor privity of estate between L and T-2

a, Third Party Beneficiary Doctrine: modern development in contract law that may allow L to sue T-2 if T-2’s promise to T-1 was intended to benefit L

b. If T-2 pays T-1, but T-1 fails to pay L then L can sue T-2 for possession

1. As T-1 no longer has rights to possession, nor does T-2 and L is entitled to present possession of the land

α. Ex. *USA Petroleum Corp*: the lease contained a bankruptcy clause; even though rent was continued to be paid, because D filed for bankruptcy, the L had the right to possession and could pursue this against T-2

2. T-2 can sue T-1 for this breach of quiet enjoyment

XIII. Improper Termination

 A. When the L tries to improperly terminate, T can sue for possession

 B. Two possible contexts for wrongful termination by T

 i. T stops paying rent, but stays on the land

 a. Common law: no termination, L can only sue for the rent

b. Today L may terminate and evicts when T defaults on the rent

 ii. T leaves the land and is no longer paying rent

a. Common law: gives the L two courses of action (as seen in *Sagamore Corp. v. Willcutt*)

1. Accept surrender: L can sue for damages under contract law

α. Can obtain the cost of reletting and the difference between the rent he can obtain as compared to the original lease

ß. Effectively requires mitigation; it doesn’t force L to relet, but if he doesn’t and could have, that affects the damages regardless, so would expect him to do so

∂. If L begins to use the premises himself, this is acceptance by act

I. Reletting runs the risk of breaching quiet enjoyment, thereby making T’s termination proper

 2. Refuse surrender and

α. Collect rent: L leaves the premises empty and goes after T for old rent

I. Cannot sue for anticipatory breach and would have to wait until each time rent is due before could sue for that period

 A. Must be aware of SOL

II. No mitigation

A. Doesn’t have a duty to do so derives from property law viewing the lease as a conveyance and mitigation would be a violation of quiet enjoyment

ß. Relet the premises: L can sue for the difference and the old T is still on the lease, therefore if new T defaults, can still collect from old T

I. Can invoke remedies against the old T every period L is unable to obtain the same amount of rent after each term

II. Mitigation

A. If L uses the legal fiction that he is acting as T-1’s agent and renting it out to T-2 on his behalf then there is no breach of the covenant of quiet enjoyment and T-1 is still held accountable for the rent.

i. Often hard to support this characterization on the facts; still face a risk that L has accepted the surrender or violated the covenant of quiet enjoyment

a. *Leo v. Santagada*: L rented out premises after 5 days old lease began was found to be acceptance of surrender

ii. Can solve this problem with explicit language in the lease and it becomes a rebuttable presumption (*Hurwitz*)

iii. Solve it by notifying T-1 that acting as agent (*Casper National Bank*)

III. Pressure for L to choose “α” so as not to be treated as acting under (1) above.

 3. Still followed by the Restatements

b. No longer the rule necessarily; majority rule for purposes of the bar

c. Modern rule

 1. L is required to mitigate and “2(α)” is not an option

α. Mitigation is demonstrated by showing the apartment to all prospective tenants; listing ads in the newspaper; contacting a realtor; asking for a higher rent does not necessarily breach the duty to mitigate; accepting less favorable terms does not breach

I. All of this must be reasonable given the circumstances

 ß. Failure to mitigate

I. Majority: only consequence is the amount he can collect is reduced by the amount he could have collected based on the FRV of the property; T is still required to pay any premium over the FRV that he was originally required to pay

II. Minority (including URLTA): lease is terminated and L can collect nothing from T

 2. Derived from contract law

3. *Sommer v. Kridel*: T pays rent and security deposit; never moves in and writes a letter wanting to terminate; L never responds; a prospective T wants to rent, but L refuses; year and half later, L rents it out and sues for the rent he had lost in the time

α. Court rejects the traditional rule that L has no duty to mitigate and creates this modern rule

ß. Duty to mitigate cannot be waived

 4. Has been adopted by the uniform codes

5. Duty to mitigate applies to residential and commercial leases

XIV. Holdover Tenants (Tenants at Sufferance)

 A. L has the choice to treat T as a trespasser or as a periodic T

i. This rule is not applied mechanically, but courts look at the entire facts and circumstances (the nuances of the situation)

ii. Courts will look at intention of T (*Commonwealth Building Corp. v. Hirschfield* – last few items were moved out a day late), or whether it is fully voluntary (15 days because mother was sick and could not move)

iii. L must make the election within a reasonable time

iv. Can make the election explicitly or implicitly

 a. Explicitly: send notice to T; file a suit to evict

 b. Implicitly: through actions

1. *Brown v. Music*: renting out to someone else constituted an election to treat the holdover as a trespasser

2. *Grisham*: accepting rent checks constituted acceptance as a new periodic tenancy

 v. Once election is made, L cannot change his mind

 vi. Rent can be increased

 vii. Period is split

 a. Majority: periodic tenancy is created

 1. Split as to whether year-to-year or month-to-month

 α. Probably based on facts of the case

 b. Minority: L’s election creates a tenancy as a number of years

**Servitudes**

I. Servitude

 A. A type of interest in land

i. The right to use the land of another or to limit its use by the owner in specified ways

 B. Three types

 i. Easements

 a. A legal interest in land

 b. Property law interests

c. Evolved at the same time as the system of estates and shares a lot of that system’s formalities

 ii. Real covenants

a. Contractual interests in land even though part of property law

b. Evolved at a time when contract law was very formalistic and technical

c. Cannot create easements to require that the landowner affirmatively do something, therefore needed a new set of rules

 iii. Equitable servitudes

 a. Equitable

b. When legal rules fail (of real covenants), the courts will use equitable rules

c. Control exactly the same contractual covenants as under real covenants

d. Cannot create easements to require that the landowner affirmatively do something, therefore needed a new set of rules

II. Easements

 A. A right to use someone else’s property in a specified way

 i. Not a possessory interest and never will become possessory

 a. But still a property interest in land

 B. Easement appurtenant

 i. An easement that benefits the land

ii. The parcel of land that the easement is appurtenant to is the dominant estate

iii. The parcel that is subject to the easement is the servient estate

iv. If the parcel is sold, an easement appurtenant will pass with the land

 C. Easement in gross

 i. Does not benefit a parcel of land

ii. The benefit is personal rather than attached to a particular parcel of land

a. Must sell the easement separately as there is no piece of land that will lead to the easement in gross being automatically transferred.

iii. The servient estate still is subject to the easement

 D. By grant

 i. Easiest way of creating an easement

 E. By reservation

 i. If O owns both parcels A and B

a. Sells parcel A to me, but reserves an easement to get to the road

 1. This is reserving an easement to benefit parcel B

2. The holder of the dominant estate is reserving an easement

 ii. There is a problem with no grant to the dominant estate

a. Courts solved this by requiring the full parcel is sold and then granting back the easement to the dominant estate

iii. In form, it is a grant of a fee simple absolute in the servient estate subject to an easement in the dominant estate

 F. Reservation in a stranger

 i. Under common law this was void

a. Cannot pretend there is a regrant because the owner of B is not involved in the transaction

 1. Becomes a problem when performing a title search

b. Still true in a majority of states

1. Can accomplish the same thing by executing two rather than one document

α. First grant the easement and then sell the parcel to the new buyer

I. By necessity, the conveyance is subject to the easement

ii. Owner of the servient estate conveys it to a buyer subject to an easement in the dominant estate (owned by someone else)

 a. The owner of the dominant estate is a stranger to the deed.

 G. By implication

i. Applies where a transferor sells one property and keeps another, but there is no document that creates the easement at all

 a. The use must exist at the time of severance

ii. Requirements at time of severance

 a. Separation of title

1. Title theory: legal title of the land passes to the mortgagee at the time the mortgage is given and the beneficial interest remains with the mortgagor

2. Lien theory: only a security interest and the legal title remains with the owner of the property until foreclosure, which is therefore when the separation of title occurs

 b. Apparent

1. Someone who is “ordinarily conversant with the subject” would have found it plainly visible

2. Designed to protect the future buyer of the servient estate

α. Nothing about the easement would be in the documents since the court has created it

ß. Would only know you are purchasing a servient estate if it is apparent, therefore okay to create an easement

 c. Necessary

1. Does not need to be indispensible, just reasonably necessary and convenient

iii. When parties fail to create an easement by grant, the court can essentially create an easement judicially

a. Assuming a perfectly functioning market, only efficient easements would be created

b. Law in economics suggests that the courts should intervene when there is an inefficient allotment of resources

1. All the courts are doing is effectuating the parties’ intent

 H. By necessity

 i. Arguably a subset of easements by implication

 ii. Always an access easement

 a. The right to cross the servient property to get to a road

 iii. Three conditions at the time of the separation of title

a. Both properties must have been owned by the same person at some point

 1. Unity of ownership or common source of title

2. A remote source of title is okay so long as the necessity was created at the time of separation of the title

b. Creation of necessity

1. The common source of title must have made the future dominant estate become landlocked

2. If landlocking is not created by the source of title it does not qualify

c. Servient estate must have access to a public road (or right of way)

 I. By Prescription

 i. Some courts divide this into four

 a. Prescription

 b. Implied dedication

 c. Custom

 d. Public trust

ii. All four deal with the same issue of wanting to provide some protection for the user if an “easement” has been used over a substantial amount of time

a. An easement should never be able to vest by the running of the SOL on ejectment (through adverse possession)

1. Each time a person uses the easement, it is a new act of trespass, never possession

 iii. Prescription

a. Cannot be based on the SOL and therefore it is unclear what justifies it

1. Each theory leads to different conclusions due to the permission requirement

b. Lost grant theory

1. Some time ago, the owner granted an easement and no one remembers when

 2. Here, we assume there was permission

c. Adverse possession theory

1. A doctrine that parallels adverse possession, but for easements

α. Problems arise as it was not a theory designed to deal with this area of law

2. The statutory period of use used is that of the jurisdiction’s adverse possession SOL

3. Exclusivity requirement suggests that we cannot have an easement by prescription in the public

α. Several cases have recognized easements by prescription when the use was by a particular group

I. *Zuni Tribe*: since the tribe was a specific legal entity, the court recognized an easement by prescription in the tribe for the right to make a religious pilgrimage every four years along the specified route

II. *MacDonald Properties*: court found the golfers were acting as agents of the club each time they entered the land to retrieve balls and so the club had acquired an easement by prescription

III. *Town of Sparta*: postal workers use a route and grant it in the town, not the public

ß. Want to designate it to a specific group rather than the public so that it is transferrable

∂. Majority of states do recognize easements by prescription in favor of the public

I. Right of way or right of access used by the public for the statutory period openly, actually, and continuously, lack of permission is presumed, unless this is rebutted, leads to an easement in favor of the public

 A. Exclusive use is not required

B. If claimed easement is for any other type of use, permission is presumed

i. In order to prevail in establishing the easement, the claimant must prove that no permission was granted

γ. Minority of states do not recognize easements in the public by prescription, only for groups or entities

 4. Hostility requirement

α. Courts created a presumption that no permission was given unless the other can prove it was

I. As soon as can demonstrate that there was permission, adverse possession fails

d. The exact path needs to be used for an easement by prescription to exist

 1. The servient estate cannot insist on a different path

 iv. Doctrine of implied dedication

 a. The courts imply the grant of an easement by the public

 1. Looks a lot like grants by implication

2. The court must be confronted with “convincing evidence” of an intention to appropriate the land for public use

b. Public will never acquire the land if post § 1008 sign every 200 feet

 1. Post both a “No Trespassing” sign and a § 1008 sign

 α. Don’t come on the land

ß. Even if don’t object, an easement by prescription still has not been created

v. Law of custom

a. The public could acquire a right of use if three conditions were met

1. The use had continued from time immemorial (no one remembers when it wasn’t so) without interruption and as a right

α. Now beginning to use this doctrine as time immemorial has begun to be applicable

2. It was certain as to place and persons

3. Reasonable as to subject matter

 vi. Public trust

 a. Until recently, only applied to government owned beaches

1. The government owns all waterways for the use of the public

α. Therefore, the government had to give the public access to such waterways under the public trust doctrine

 I. Even if the land says “keep off”

2. *Matthews v. Bay Head Improvement Ass’n*: extends doctrine to land owned by private community

α. Don’t know how much this extension will continue now

 J. Easements can be divided into two types

 i. Affirmative easements

 a. Right to use another’s land

 ii. Negative easements

 a. Insist that others not use the land in a specified way

 1. Common law had four types

 α. For light

 ß. For air

 ∂. For subjacent or lateral support

I. Lateral: prevents servient estate from removing whatever is preventing the dominant estate from falling down the hill

II. Subjacent: if the mining company has dug a hole under your property, the mineral rights owner would agree not to behave in such a way as to cause the house to collapse

γ. For flow of an artificial stream

 iii. Only affirmative easements may be created by Prescription

 a. Negative easements cannot

 1. Exception: Doctrine of Ancient Lights

α. One who receives undisturbed sunlight through his windows for 20 years acquires a negative easement

 K. Scope

 i. Problem of secondary easements

a. A collateral right that is necessary to exercise the primary easement

b. If acquire a primary easement by prescription than the secondary easement flows from it

1. The secondary easement is not independently acquired

2. The secondary easement is what is reasonably necessary for the enjoyment of the purpose of the primary easement

α. Indicates that property rights are somewhat inherent and natural

 ii. Use of the easement to benefit land other than the dominant estate

 a. Common law: doing so destroyed the easement

 b. Modern trend is to tend away from automatic destruction

 1. Instead may be enjoined or damages

2. Only the remedy that has changed though, not the theory

c. *Penn Bowling Rec Center v. Hot Shoppes, Inc*: uses the access easement to service the dominant estate and a 3rd parcel; court does not order the easement be forfeited, but rather an injunction until the dominant estate can fix it

1. Practically, this will lead to a payment so that the right of way can be used again just as it would have under the common law

 iii. If the nature of the owner’s use changes

a. *Fristoe*: right of way easement created by implication; at of severance, dominant estate was agricultural purposes and then decides to build a house

1. Court allows the change of use on the grounds that it may have been reasonably contemplated by the parties

 α. Uses expectation analysis

b. *Glenn*: driveway easement by prescription; then goes into the snowplowing business and uses heavier vehicles; resurfaces the road

1. No alleged injury to the servient estate and it is therefore allowed

c. *O’Brien v. Hamilton*: six-wheel gravel trucks 🡪 ten-wheel gravel trucks

 1. Found to be beyond the scope of the easement

2. Distinguishable from *Glenn* because the owner in *O’Brien* alleges actual injury due to the larger, louder trucks now on the property

d. *Onarga, Douglas*: drain that runs from one land to another; easement by prescription; dominant estate wants to replace the drain with one of larger diameter

1. Court says no, the replacement is beyond the scope of the original easement

α. Note: it is underground and no one would notice

ß. This is on the grounds of what was the original right and that cannot be expanded

iv. Owner of the servient estate can grant multiple easements so long as the use of the new easements do not interfere with the old ones

 L. Transfer of easements

 i. Transfer of an appurtenant easement usually not a problem

a. They are attached to the dominant estate and whoever owns the dominant estate gets the enjoyment of the easement

1. It does not have to be mentioned in the conveyance, it is part of the estate

2. The parties can agree to detach the benefit end of the easement, making it an easement in gross or can agree to transfer it to another land

 ii. Subdivided dominant estate

a. The easement attaches to each of the new parcels unless it would for some reason be inconsistent with the intended use of the original easement

1. *Martin v. Music*: after the sewer is built, Martin subdivides and many homes are built on the land; court finds that the easement is appurtenant and therefore each of these new pieces become the dominant estate with the right to attach

b. Easements in gross do not automatically follow a transfer in land and therefore would not flow to each of the subdivided parcels without an individual transfer

iii. Common law: easements in gross were nontransferable and irrevocable

 a. Today, has changed in every state

 1. Easements in gross for commercial use are assignable

2. Easements in gross for non-commercial purposes less clear

α. General rule is that they may be assignable if the parties intended that they are assignable, otherwise, they are not

iv. When an easement in gross is held by more than one person, always must determine if it is divisible

 a. One stock rule

1. A profit may be assigned to more than one person, but it will remain a unitary thing exercised as “one stock”

2. All assignees must agree upon its use or else it cannot be used at all

 α. It is not divisible

III. Real Covenants

 A. Covenants are merely promises to do or refrain from doing something

i. Deals with promises with respect to land and one or the other transfers his land to a third party

a. No privity of contract and therefore property law had to develop its own solutions of whether the promisor or promisee’s successor in interest was liable to the other

i. The benefit end of a personal real covenant can generally be assigned

 B. First developed in the context of landlord-tenant law

 C. Enforceable both at law and equity

i. If seeking damages, the plaintiff must comply with the law of real covenants

a. If only wants injunctive relief then only needs to comply with equitable rules

 D. A contractual promise

 i. Must have consideration

 ii. Must satisfy the SOF

 iii. They cannot arise by slip of the tongue

 E. Divide it into two parts

 i. Whether the burden runs with the land

a. Tells us whether the promisor’s successors in interest are obligated to the promisee (or the promisee’s successor in interest if the benefit runs)

 ii. Whether the benefit runs with the land

a. Tells us whether the promisee’s successors in interest are able to enforce the promise against the promisor (or the promisor’s successors in interest if the burden runs)

 F. The burden runs if

 i. Intention

a. The parties must have intended that the successors in interest are to be bound

b. Can be demonstrated with express language

1. Magic language: “heirs and assigns” or

2. These covenants will run with the land

c. If the instrument is unclear, the intention of the parties considering all the facts and circumstances governs

 1. Common law exception: Rule in Spencer’s Case

α. If the promise concerns something that is not in being at the time the promise is made, the burden will not run unless the promisor’s assigns are expressly mentioned

ß. This rule has been abolished in a majority of jurisdictions

 ii. Privity

 a. Horizontal privity

1. Refers to the relationship between the two original parties

2. A certain relationship must exist between the parties at the moment the promise was made

α. English Rule: exists only in the landlord-tenant context

I. The burden will not run unless the original relationship was L-T

ß. Massachusetts Rule (Mutual Relationship Rule): exists if at the time the promise was made both parties simultaneously held legal interests in a single parcel of land

I. Real covenant coupled with an easement

A. If one party holds an easement and the other holds the land in fee simple absolute, the covenant that is imposed on top of those two holders

∂. Majority Rule (Successive Relationship Rule): exists if either the mutual relationship is met or the real covenant is given in connection with a deed from one party to another (promisor and promisee are parties to a deed)

γ. Minority: no horizontal privity is required

 b. Vertical privity

1. A certain type of relationship between the promisor and his successor in interest must exist

2. Satisfied if the successor succeeds to the estate of the promisor

α. Adverse possession or a foreclosure sale would not qualify because this is not a voluntary transfer and privity is broken

I. Adverse possession will meet the vertical privity requirement if it is under color of title

3. Promisor’s successor in interest must succeed to an identical estate

α. Ex. If the promisor holds in fee simple absolute and the successor in interest holds a life estate, vertical privity does not exist and therefore the burden does not run

 iii. Touch and concern

 a. The covenant must touch and concern the land

1. Majority: must touch and concern both the burdened and the benefitted land

2. Minority: need only touch and concern the burdened land

b. A promises touches and concerns the burdened land if it relates to ownership or possession of the burdened land

c. It touches and concerns the benefitted land if it is likely to be a particular benefit to the owner of the benefitted land

 iv. Notice

a. Successor to the promisor is not bound by the burden unless he or she had notice (constructive or actual) of the covenant before buying it

1. If it is in a recorded document, it is assumed that notice has been met as assumed have read all the documents

 G. The benefit runs if

 i. Intention

 a. The parties must intend the benefit to run

1. Conceptually a separate question from whether the burden runs with the land

α. Could conceivably intend for one to run and not the other

 ii. Privity

 a. Vertical privity

1. Privity between the promisee and his successor in interest

2. No requirement that the succession be to an identical estate

α. But adverse possession still does not work because there is no privity

 I. Color of title usually does satisfy

 b. Horizontal privity is not required

 iii. Touch and concern

 a. Benefit must touch and concern the benefitted land

 iv. No notice requirement

a. It is okay for the successor in interest to be pleasantly surprised

H. *Moseley v. Bishop*: two original owners of the parcels enter into a contract allowing the straightening and retiling of the drain; will retile and “permanently maintain the tile”; the owner of portion of the later subdivided land where the drain T&C is liable to maintain the ditch

 I. After the burden has run, is the promisor still liable?

i. If the promise is to perform an act, promisor is not normally liable after the burden has run

ii. If the promise is to pay money, the promisor may be still be liable if the original contracting parties so intended

a. The person who is suing for money would therefore have a choice

IV. Equitable Servitudes

A. Same promises as those dealt with in real covenants, but only enforceable in equity

i. If only want injunctive relief, only need to deal with the equitable rules

 a. Damages requires law of real covenants

ii. *Tulk v. Moxhay*: M knew of covenant but decided to ignore it and English law applied so there existed no horizontal privity and M was not bound by the burden of the covenant

a. Court enforces the covenant in plaintiff’s request for an injunction and this led to the doctrine of equitable servitudes

 1. Rationale

α. The price probably reflected that this covenant was within the transfer; allowing sale free of the covenant would allow the owner to sell the land for a much higher price than what he had paid for it and would lead to unjust enrichment

ß. If M could take this free of the covenant then he would be interfering with an advantageous contractual relationship between T and E (T will be able to obtain a higher rent from his tenants with this park)

 B. Can be created by a promise in writing or implied

 C. No privity is required

 D. Notice

 i. No notice required for the benefit to run

 ii. Notice is required for the burden to run

 E. Servitudes in gross are assignable

 F. Touch and concern

 i. For the benefit to run, must T&C the benefitted land

 ii. For the burden to run

 a. Majority: must T&C the benefitted and the burdened land

 b. Minority: must T&C the burdened land

iii. This is the key requirement that generally makes it so that all contracts are not equitable servitudes

a. Distinguishes between contracts that are intended to be temporary and those that go on forever

b. In construing this T&C requirement, the courts really are asking if this is a type of promise that should last forever

1. While it may relate to the land, it may still not satisfy T&C because that is not the significant question for equitable servitudes

 G. Implied equitable servitudes

i. Rule: a buyer is bound even if the deed for her lot does not contain the covenant in question if

a. A developer has a uniform scheme for the development of an area on which purchasers may be expected to rely (e.g., will be exclusively residential), and

b. The buyer is given a plot has notice (constructive or actual) of the scheme.

 ii. We imply the covenant even with no explicit writing

 a. May merely have statements on a sales brochure

 b. Might have covenants in some deeds, but not all

c. Might be that you can look around the neighborhood and see the covenant in action

V. Touch and Concern Rules (as applied to both real covenants and equitable servitudes)

A. A covenant not to do some physical act on the burdened property clearly T&C that property

 i. This fills in the hole left by the law of easements

B. A covenant not to compete in a particular line of business on the property is not generally held to T&C that piece of property

i. Due to if it is unreasonable in duration or in scope, find that it does not T&C the land

C. A covenant not to compete in a particular line of business on the burdened property is now generally held to T&C the benefitted property where the protected business is being operated.

D. Affirmative covenants

 i. In England, affirmative covenants do not T&C the land

a. Doesn’t actually resolve the problem because can simply rephrase an affirmative covenant in a negative way

 ii. Early American cases tended to adopt the English Rule

a. Exception: a covenant to maintain a specified physical feature

 iii. Majority rule: no problem with affirmative covenants

iv. Minority rule 1 (English rule): only negative covenants T&C the land with various exceptions that vary from state to state

v. Minority rule 2: doesn’t care about T&C

 a. R.3d of Servitudes takes this position

b. Servitudes are only invalid if they impose unreasonable restraints on alienation, undue restraints on trade, or if they are unconscionable or lack rational justification

c. Pretty radical position

E. Performance of an act off of the burdened land that does not benefit the burdened land generally does not T&C the burdened land

i. Ex. Sell land to B and in return, B promises to build a barn on A’s land. Therefore, in general, this would not T&C the burdened land (B’s parcel)

F. A promise to pay money will T&C the burdened land if it benefits the promisor by enhancing the value of his property. Therefore the burden of the promise can run with the land

i. *Candlewood Lake Association, Inc. v. Scott*: there are a lot of communities today that are subject to these types of restrictions and therefore they are very important in modern times

G. *Davidson Bros. Inc. v. D. Katz & Sons, Inc.*: court finds that the covenant not to compete should be enforced; also urges that the T&C element be eliminated for a simpler “reasonable” standard that other jurisdictions have adopted

i. Instead suggests that the T&C requirement should be used as one factor as whether the covenant is reasonable

ii. If the covenant was reasonable when it was created, it should be enforced

a. If it is still reasonable, it should be enforced by both an injunction and damages

b. If it is no longer reasonable, it should be enforced by damages, but not by injunctive relief

iii. Demonstrates the modern shift of integrating real covenants and equitable servitudes and getting rid of all privity and T&C and adopting reasonableness

 a. A number of academics have urged this merger

1. Argue whether it is enforceable and only then decide what type of relief to award

b. Some academics have tried to merge the two with easements as well

1. This becomes even more difficult because easements can be created by prescription, no notice requirement, etc.

2. This is now the position taken by the R.3d of Servitudes

 H. Two views that academics have on the direction T&C should be moving

 i. Law of servitudes should be a subset of the freedom of contracts

a. Under contract law people should be able to bind third parties

b. This should maximize efficiency and courts should not second guess people’s judgments (law of economics)

c. Person who made the promise took this into account when purchased and those who entered into the covenant determined that this would maximize social welfare

 ii. Not persuaded by the law of economics view

 a. Whole range of views on this side

b. T&C is a way of saying that certain restrictions should affect land permanently

c. The covenantor may not care what happens to the property 40 years from now, but society does

VI. Termination of servitudes

 A. Merger

i. The dominant and servient estate are now owned by the same person and therefore the easement no longer exists

ii. Both kinds of estates must be the same and both must be possessory

 B. Abandonment

 i. Must be clear and convincing evidence of the intention to abandon

 a. Nonuse is not the same thing as abandonment

 C. Adverse Possession

 i. Has been fenced for more than the statutory period

ii. Hostility can only be met when there is use inconsistent with the use of the easement

a. Until there exists use of the easement, there can be no use that is inconsistent with that use

 D. Equitable defenses (to enforcing equitable servitudes)

 i. Estoppel

a. If the benefitted party acts so as to lead a reasonable person to believe that the servitude has been abandoned and the person subject to the servitude acts in reliance on that action, then the benefitted party may be estopped from enforcing the servitude

 ii. Relative hardship

a. If enforcing the servitude will cause great hardship to the burdened party but will afford only a small benefit to the benefitted party, courts will not enforce the servitude in equity

1. The benefitted party’s remedy would then be damages

 iii. Changed conditions

a. The character of the neighborhood has changed so much that the enforcement of the covenant won’t really benefit the benefitted party

1. *El Di Inc. v. Town of Bethany Beach*: town has developed so much that the covenant to not sell alcohol on the premises is no longer acting as originally intended

2. Note that this theory should only be available in a suit for injunctive relief, but many courts have applied this rule to both equitable servitudes and real covenants

α. May be viewed as one more instance of merger of the two doctrines, or courts just not paying attention to what they are doing

iv. These defenses are not applicable to suits for damages on easements or real covenants

a. But there remains a possibility with the modern trend of merging the doctrines

VII. The Recording Acts

 A. Common law: first in time is first in right

i. If the buyer purchases something that has already been transferred, he now owns nothing

 a. One solution is the recording acts

B. A deed can only be enforced against a subsequent purchaser if it is recorded

 i. Must be indexed to perform a search

a. Majority of property in US is described using metes and bounds

 1. Not a very convenient way of indexing

b. Grantor-grantee indexes

 C. Title search

i. First look in the grantee index and search your chain of title from whomever you’re buying the property from to the source of title

ii. Then do a grantor search to see if each grantor conveyed anything out to someone else prior to conveyance to the next grantee up the chain

 a. If no, then the property is unencumbered

 b. If yes, the title has been clouded

iii. When performing a search, it is expected that you have read every deed and are on notice regarding whatever is in each

VIII. Licenses

 A. Normally revocable at the will of the grantor

 i. A license coupled with an interest is irrevocable

a. When the licensee has made substantial expenditures and the licensor has benefitted from such expenditures

 B. Not an easement, but permission

 C. Licenses are personal and therefore non-transferrable

**Assuring Good Title**

I. A buyer’s protection under the common law rule

 A. Common law: first in time is first in right

i. When two owners assert competing claims, the earlier deed wins, regardless of the type of conveyance

ii. One major exception: first is an equitable interest and the second is legal

a. Ex. A is granted an easement and B is then conveyed fee simple absolute

1. If B is a bona fide purchaser then his interest prevails over A

iii. If the owner has conveyed the house to someone else and then to you, your deed is subject to whatever had been conveyed to the first person

 B. Title warranty from the seller

 i. Covenant from the seller

 ii. Right to sue the seller out not to be true

a. Only beneficial if the original seller is still around and has deep pockets to satisfy

 C. Title search

 i. Can research title yourself or hire someone

 ii. Expensive

 D. Title insurance

 i. Insurance of good title

ii. If the first two fail, it is unlikely that insurance will help because unlikely to insure against titles that are unclear

II. Warranties from the seller

 A. General warranty deed

 i. The seller warrants whatever she warrants

ii. Not merely that she didn’t do anything to impair the title, but that no one in the last however many years has either

iii. Common in CA

iv. Historically contained six covenants

a. Seisin: covenant that the seller is seized of the interest he claims to be conveying

1. It is breached if and only if at the moment of conveyance the grantor does not hold the property in fee simple

α. A bit ambiguous because who knows what type of fee simple

b. Power to convey: is breached if and only if at the moment of conveyance the seller does not have lawful power to convey the property to the buyer

1. Ex. If the seller owns the property, but it is subject to some lawful restriction on alienation

c. Against encumbrances: is breached if and only if at the moment of conveyance the property is subject to an encumbrance not disclosed in the deed

1. An encumbrance is any interest in a third party, including, but not limited to, easements, profits, real covenants, equitable servitudes, mortgages, liens, leases, and irrevocable licenses

2. If there is an obvious encumbrance

α. Majority: does not matter how obvious it is, if the seller the covenant against encumbrances without exception, the seller is in breach

ß. Minority: makes an exception for open, visible and notorious encumbrances

I. *Leach v. Gunnarson*: recognizes the minority rule, but the scope of the exception only applies to known easements to really big items such as public highways, power lines, and railroads

A. Only palpable (visible, noticeable) and physically permanent

B. Does not apply to licenses

3. Common law rule: breach does not occur unless there is an actual claimant who actually wins in court against the buyer

α. The buyer has to defend the claimant’s lawsuit at his or her own expense

ß. But the encumbrance must have existed at the time the conveyance is made

∂. The SOL does not begin to run until the buyer has lost the lawsuit

d. Quiet enjoyment: warrants that the grantee will not be ousted by superior title at any time in the future

 1. Violated, if at all, at the time of the future ouster

2. Common law rule: breach does not occur unless there is an actual claimant who actually wins in court against the buyer

α. The buyer has to defend the claimant’s lawsuit at his or her own expense

ß. It is irrelevant if it existed at the time of conveyance

∂. The SOL does not begin to run until the buyer has lost the lawsuit

e. Warranty: now treated as identical to covenant of quiet enjoyment

f. Further assurances: a promise to execute any documents necessary to perfect the grantee’s title

1. Injunctive relief so that the seller will sign the document

g. Covenants a-c are present covenants

1. They are breached if the representation was not true at the moment of conveyance.

2. The benefits of present covenants do NOT run with the land

h. Covenants d-f are future covenants and their breach occurs later

 1. The benefits of future covenants do run with the land

α. Can avoid this by taking out the words “heirs and assigns” to indicate the intention does not run with the land

 B. Special warranty deed

 i. The seller merely warrants that she hasn’t done anything

 ii. No warranty with respect to those before her

 C. Quitclaim deed

 i. No warranties whatsoever

 ii. It is an “as is” transfer

 iii. No financial responsibility is taken by the seller

 iv. There are states where that is all that is available

 a. Common in Massachusetts

1. Been around a long time; who knows who originally owned it

 v. Often used to clear title

a. Ex. If Y buys the easement back from X, X would issue a quitclaim deed that basically states that X has no idea if he has any rights to the easement or the extent of those rights, but whatever they are, Y can now have

 D. Use whatever type is customary in your jurisdiction

 E. Remedies

i. Ordinary remedy other than covenant for further assurances is damages

III. Doctrine of After Acquired Title (Estoppel by Deed)

A. Common law: when a grantor purports to transfer an estate in land that he does not own and later acquires title to that estate, the title passes automatically under the original grant

i. Common law: a quitclaim deed only transfers what the seller has at the moment of conveyance and therefore this doctrine would not apply to a quitclaim deed

a. Modern trend is to look at intention and doctrine of after acquired title might apply

 B. Only applies to the common law result, not the recording acts result

IV. Recording Acts

 A. Approach

 i. Look at common law first

 ii. See if the result would change under any of the three approaches

 a. Race

 b. Notice

 c. Race Notice

 d. If no one recorded, apply the common law

 B. Race

 i. The first transferee to record wins

ii. True even if B knows when he purchases from O that has already been a conveyance to A

a. O’s grant to A is still valid, but it does not stand if B records before A

b. Does not require B be a bona fide purchaser

iii. Courts and legislatures quickly became uncomfortable that a purchaser with notice could nevertheless prevail and so led to the notice statutes

 C. Notice

i. A subsequent purchaser for value prevails notwithstanding the common law if he records and is without notice at the time of conveyance of the earlier purchase

 a. B must be a bona fide purchaser

ii. If he did not have notice, B would prevail regardless of when A recorded so long as he records at some point

 D. Race notice

i. A subsequent purchaser wins under the recording act only if he recorded first and had no notice of the prior sale at the moment of his purchase

 a. B must be a bona fide purchaser

ii. Law in CA

 E. Bona fide purchaser

 i. Must have no notice of the prior purchase

 ii. Must have good record title

 a. Must be able to show that their record title is clean

iii. If not able to show good record title due to defects in the recordation, some states have enacted laws that will allow you to be recognized as a bona fide purchase

a. CA: defects in recorded documents are deemed cured one year after the recordation

b. ND: defects in recordation do not defeat your status as a bona fide purchaser if you would otherwise be

c. Also is a modern trend that facially good deeds will be acknowledged as having been properly recorded

 F. Doctrine of Muniments of Title

i. When a recorded document refers to another document, the buyer is deemed to know of the referenced document

a. Minority 1: each document must be separately recorded and the document which refers to the other would need to indicate where it was recorded

b. Minority 2: eliminated the doctrine all together

ii. *Guerin v. Sunburst Oil*: court finds that Guerin was on constructive notice of the lease in the recorded option to purchase and should have read the option; therefore he is not a bona fide purchaser and the common law must be applied

 G. If it is misindexed

 i. Majority: it is validly recorded for recording act purposes

ii. Minority: no constructive notice and it is not valid for recording act purposes

 a. Supported by the logic of the least cost avoider

V. Marketable title acts

 A. Modification to the recording acts

i. Tries to establish a way of finding a more recent root of title and save the title searcher time

B. Defines the root of title as the most recent conveyance on the property that older than a specified number of years

i. Because do not need to search all the way back under these acts, they can make forged deeds valid so long as enough time has passed

ii. It has effectively rid us of the purpose of the recording acts

iii. In order to be sure that the grantor ever had good title would need to perform an entire search

 a. The exact act this was trying to avoid

 C. One solution has been to exclude wild deeds

i. Problem: the only way to tell if a wild deed exists is to search all the way back once again undermining the very purpose of the act

 D. Torrens System (Land Registration System)

 i. Further modifies and trumps the marketable title acts

ii. Prepare a certificate of ownership and that is conclusive of ownership of the land

iii. Problems

a. This is expensive

 1. Have to bring a lawsuit to get your certificate

b. Does not protect against all claims so have to perform a full title search anyway to protect against these excepted claims

iv. Not really in use anymore, but states have not gotten rid of them because it would be unfair to those people who had spent the money to get these certificates

 E. Necessary Approach

i. Do your title search all the way back as you would under the recording acts

ii. Then see if the marketable title acts changes it

iii. Then see if it changes under the Torrens act