

PROPERTY
8, 9, & 12 January 1998

PART ONE: FREEHOLD ESTATES

<u>Estate</u>	<u>Language to Create</u>	<u>Duration</u>	<u>Transferability</u>	<u>Future Interest</u>
1. Fee Simple Absolute	“To A & his heirs” or “To A”	Absolute ownership of potentially Infinite Duration	Devisable, Descendible, Alienable	NONE
2. Fee Tail	“To A and the heirs of his body”	Lasts ONLY as long as there are Lineal Blood Descendants of Grantee.	AUTOMATIC pass to Grantee’s Lineal Descendants	REVERSION (if held by Grantor), or REMAINDER (if held by 3 rd Party)
3. Defeasible Fees: A: Fee Simple Determinable	“To A So Long As.” “To A Until.” “To A While” Language providing that upon the happening of a stated event, the land is to revert to grantor	Potentially Infinite, so long as the event does not occur	Devisable, Descendible, Alienable (ALL SUBJECT to CONDITION)	POSSIBILITY OF REVERTER (held by Grantor)
3. Defeasible Fees: B: Fee Simple Subject to Condition Subsequent	“To A, but if X event happens, grantor reserves the right to reenter and retake.” Grantor MUST carve out the Right of Reentry	Potentially Infinite, so long as the condition is NOT BREACHED and, thereafter, until the holder of the right of entry Timely exercises the power of termination	Devisable, Descendible, Alienable (ALL SUBJECT to CONDITION)	RIGHT OF ENTRY or POWER of TERMINATION (held by grantor)
3. Defeasible Fees: C: Fee Simple Subject to an Executory Limitation	“To A, but if X event occurs, then to B”	Potentially Infinite, so long as stated contingency Does NOT occur.	Devisable, Descendible, Alienable (ALL SUBJECT to CONDITION)	EXECUTORY INTEREST (held by 3 rd Party)
4. Life Estate	“To A for Life” “To A for the Life of B”	Measured by life of transferee OR by some other life (<i>pur autre vie</i>)	Alienable, Devisable, Descendible, if <i>pur autre vie</i> and measuring life is still alive	REVERSION (if held by Grantor), or REMAINDER (if held by 3 rd party)

§ 1: THE PRESENT ESTATES

- There are 4 categories of Freehold Estates, so named since they grew out of English system of feudalism
 1. *Fee Simple Absolute*
 2. *Fee Tail*
 3. *Life Estate*
 4. *Defeasible Fees*

- There are 3 things that the bar examiners will expect re: each estate:
 1. What language will create the estate?
 2. What are the Distinguishing Characteristics of the Estate? (i.e., *devisable* –can it pass by will; *descendible* –can it pass by statutes of intestacy; *alienable* –can it transfer *inter vivos*?)
 3. What Future Interests, if any, is the estate capable of?

I: The Fee Simple Absolute

Creation

- Magic words of “To A” or “To A and his heirs”
- At common law, required the magic words “To A and his heirs”, but today, no longer need those magic words (but most still do it the old fashioned way)

Distinguishing Characteristics

- ABSOLUTE: Ownership of potentially Unlimited Duration. Freely *Devisable*, *Descendible*, and *Alienable*.
- Best possible present possessory estate.

Accompanying Future Interests

- NONE: No accompanying future interests
- At time of Conveyance, A’s prospective heirs have nothing (beyond an expectation). Really, at time of conveyance, there are no heirs, only heirs apparent.
- *For example*: O conveys to A (or to A and his heirs). A is alive and well. What do A’s heirs have?
 - Nothing. A’s heirs don’t even exist. Living people have no heirs (just heirs apparent).

II: The Fee Tail

Creation

- Magic Words (Required): “To A and the Heirs of his Body”

Distinguishing Characteristics

- Virtually abolished in the US today, rarely tested on the exam, From feudal England
- Purpose is to keep the land “All in the Family”, the Archie Bunker Estate
- Fee Tails pass directly to holder’s lineal blood descendants (regardless of holder’s will devising to a stranger or non-blood relation; will becomes a nullity)

Accompanying Future Interest

- Yes: Grantor retains a *REVERSION*. When Blood line runs dry, Estate reverts to Grantor, O, or his heirs.
- Also: a possible *REMAINDER* (created in non-grantor). 3rd Party takes when Grantee’s blood line runs dry.
- MASSACHUSETTS: Still recognizes Fee Tail: But very hollow interpretation. Virtually meaningless. By statute, holder of Fee Tail has power to disregard the estate’s limitation. (so have a power to convey in FSA). *Alienable*, *Devisable*, *Descendible*.

III: Defeasible Fees: The Fee Simple Determinable

Often tested. All have potentially infinite duration. Automatically terminates upon the happening of some stated event.

Creation

- Must use *Durational Language*. Such as: **for so long as, during, until**
- Potentially unlimited, infinite duration, unless or until some event.

Distinguishing Characteristic

- Devisable, Descendible, Alienable (*so long as stated condition has not yet been violated*)
- Remains subject to limitation, regardless of who holds
 - *For Example*: Paul conveys Blackacre “to Ringo so long as the premises are used as a recording studio.” Ringo then conveys to Mick, who seeks to convert the recording studio into a bowl-a-rama. May Mick do so?
 - *NO*; Can not do so without forfeiting estate. Mick takes subject to the limitation.
MAXIM: may convey less than you’ve got, but can’t convey more than you’ve got.

Accompanying Future Interest

- Just one: *POSSIBILITY OF REVERTER* (in O, the grantor).
- Arises automatically when there is a Fee Simple Determinable. This is not reversion, right of re-entry, or the possibility of Reversion.
 - *For Example*: Frank Sinatra conveys Sinatra Palace “to Orville Redenbacher, so long as popcorn is never made on the premises.” Classify the interests.
 - *Orville*: has a Fee Simple Determinable
 - *Frank*: has a Possibility of Reverter
- Remember **FSDPOR**. Fee Simple Determinable – Possibility of Reverter
- Frank Sinatra Doesn’t Prefer Orville Redenbacher

III: Defeasible Fees: The Fee Simple Subject to Condition Subsequent

Creation

- Magic Words “To A, but if X event occurs, grantor RESERVES the right to Reenter and Retake.”
- Grantor attaches a condition, but grantor must expressly carve out the Right to Reenter.
- This is not an automatic termination of the estate upon the happening of the specified event, instead, if the condition is violated, the estate may be terminated at the grantor’s option.
 - *For Example*: Ross conveys “To Rachel, but if coffee is ever consumed on the premises grantor reserves the right to re-enter and re-take.”
 - *Rachel* has a Fee Simple Subject to Condition Subsequent
 - *Ross* has a Future Interest, specifically, the Right of Entry (a.k.a. The Power of Termination).
 - There is no automatic forfeiture upon the happening of the condition, but there is an option to terminate the estate by the grantor.

Distinguishing Characteristics

- Devisable, Descendible, Alienable, but always subject to the condition

Accompanying Future Interest

- Right of Entry (Power of Termination)

NOTE: *MA* recognizes defeasible fees, but the Fee Simple Determinable or the Fee Simple Subject to Condition Subsequent will AUTOMATICALLY become a Fee Simple Absolute if the stated contingency fails to occur within 30 years from the date the estate becomes possessory.

III: Defeasible Fees: The Fee Simple Subject to EXECUTORY LIMITATION

Creation

- Magic Words: “To A, but if X event occurs, then to B.”
- Similar to a fee simple determinable, but if the condition is breached, the forfeiture is in favor of the non-grantor (non-O, where as in fee simple determinable, the forfeiture is in favor of the grantor)
 - *For Example*: “To Barry Manilow, but if music is ever performed on the premises, then to Mandy.”
 - Barry has a Fee Simple Subject to Mandy’s Executory Limitation
 - Mandy has a Future Interest, which is called a SHIFTING EXECUTORY INTEREST

Distinguishing Characteristics

- Alienable, Devisable, Descendible, but always subject to condition

Accompanying Future Interest

- Shifting Executory Interest

As Concerns the Defeasible Fees, NOTE 2 Important Rules of Construction

1. Words of Mere Desire, Hope, or Intention are Insufficient to Create a Defeasible Fee.

- Courts generally despise restrictions on free use of property. Ergo, as a matter of judicial interpretation, courts will not find a Defeasible fee unless the magical words of duration (so long as, during until) are contained in the transfer. No defeasible fees occur when use mere words of desire
 - *For Example*: In each of the following instances, A is vested with fee simple absolute, and NOT a defeasible fee.
 - “To A for the purpose of construction a day care center”
 - “To A with the hope that he becomes a lawyer”
 - “To A with the expectation that the premises will be used as a health clinic”

2. Absolute Restraints on Alienation are Void.

- An absolute restraint on alienation that is NOT linked to any reasonable time limited purpose is void (i.e., it is a nullity)
- *For Example*: O Conveys “to A so long as she never attempts to sell”
 - This is an absolute restraint on alienation
 - Thus, A has a Fee Simple Absolute
 - O has nothing (there are no accompanying future interests to a fee simple absolute)
- *For Example*: O conveys “to A so long as she does not attempt to sell until the year 2001, when clouds on the title will be resolved.”
 - This is a reasonable, time limited restraint on alienation
 - A has a Fee Simple Determinable
 - O has the Possibility of Reverter.

IV: The Life Estate

Creation

- Estate must be measured by *LIFE* and never Time
- Like the Romantic Estate: Love of Life (not term of years)
- Magic Words: O Conveys “To A for Life.”
 - A has a Life Estate
 - A is known as the Life Tenant (holder of the Life Estate)
 - O has Reversion (when A dies, estate reverts to O or to O’s heirs)
 - CONTRAST: “To A for 50 years, if she lives that long”, or “To A for life, but in no event more than 10 years”, both of which create the Term of Years, and NOT the Life Estate
 - This is not Romantic: Term of Years is not a life estate. This is a Non-freehold estate (the term of years).
- May also Convey the Life Estate **pur autre vie**; This life estate is measured by a life other than the grantee. Magic Words: “To A for the life of B.”
 - *For Example*: O conveys to Madonna, for the life of David Letterman”
 - *Madonna*; has a Life Estate pur Autre Vie
 - *O*; has Reversion (At Letterman’s death, revert to O or to O’s heirs)
 - *For Example*: O conveys “to Madonna for life. Madonna then sells her entire interest to David Letterman.
 - *David Letterman* has a Life Estate pur Autre Vie (measured by Madonna’s Life)
 - *O* has Reversion (at conclusion of Madonna’s life, revert to O or O’s heirs.)
- Life Estates are alienable, but can’t convey more than you’ve got
- Also, *the Legal Life Estates (of Historical Interest Only)*
 - Curtesy: At common law, the husband who survived his wife got curtesy, which was an automatic entitlement to a life estate in all of the wife’s real property. This has been replaced by statute in most states.
 - Dower: At common law, the wife who survived her husband got dower, which was a life estate in 1/3 of each parcel of her husband’s realty. This, too, has been replaced by statute in most states.
 - Remember that the common law dower was *inchoate*, meaning that it would attach to the husband’s land at the moment of marriage.
 - *Inchoate*: sticks to the property at the instant of marriage.
 1. After marriage, husband could not sell Blackacre in such a way as to defeat wife’s 1/3 legal life estate.
 2. Husband’s creditors could not reach property in such a way that would defeat the wife’s claim.

Distinguishing Characteristics

- The Life tenant’s entitlements are rooted in the Doctrine of **Waste**
 - Waste pertains wherever more than 1 entity has an interest in the property (includes present, future interests, concurrent ownership, landlord-tenant, etc.)
 - Rules:
 1. Life Tenant entitled to all ordinary uses & profits from the land
 2. Life Tenant must not commit Waste.
(can’t injure future interest holders)

- There are **3 Species of Waste**
 1. ***Voluntary or Affirmative Waste***
 - Voluntary or Affirmative Waste is the Actual Overt Conduct that causes a Diminution in Value to the Property
 - As to Voluntary Waste and Natural Resources: in general: The Life Tenant may **NOT** consume or exploit natural resources on the property (such as oil, timber, minerals) unless it falls within 1 of 4 Exceptions. For the Exceptions, Remember **PURGE**
 - **PU; Prior Use**: If prior to the grant, if the land was used in exploitation, then the life tenant may continue to exploit unless otherwise agreed
 - Note: *Open Mines Doctrine*: If mining was done before the life estate began, the life tenant may continue to mine, but his exploitation is limited to mines already opened (he may not open any new mines)
 - **R: Reasonable Repairs**: May consume natural resources to make reasonable repairs and maintain the property
 - **G: Grant**: May exploit natural resources if expressly granted the right to do so
 - **E: Exploitation**: may exploit natural resources if the land has no other economic value beside exploitation
 2. ***Permissive Waste, or Neglect***
 - Permissive Waste, or Neglect, occurs when Land is allowed to fall into Disrepair and the life tenant fails to take reasonable measures to protect the land
 - *Obligation to Repair*: The life tenant must maintain premises in reasonably good repair. (Though need not always fix and replace). If fails to maintain repeatedly, the life tenant may be liable for permissive waste.
 - *Obligation to Pay All Ordinary Taxes*: The life tenant is obligated to pay all ordinary taxes on the land, to the extent of income or profits from the land. If there is no income or profits, the life tenant is required to pay all ordinary taxes to the extent of the premises **FAIR RENTAL VALUE**
 3. ***Ameliorative Waste***
 - The life tenant must not engage in Acts that will actually *Enhance* the value of Blackacre unless all future interest holders are **known** and **consent**. This is to honor the sentimental expectations of the future interest holders.

Accompanying Future Interest

- If held by **O** -> **Reversion**
- If held by **3rd Party** -> **Remainder**

§ 2: FUTURE INTERESTS

- There are **6** categories of future interests, and they are classified based on whether they are retained by the grantor, or instead by a transferee (non-grantor).

Future Interests Capable of Creation in the Grantor

- There are only **3** Future Interests capable of creation in the grantor.

1) Possibility of Reverter

- ONLY accompanies the Fee Simple Determinable (Remember FSDPOR)

2) Right of Entry (a.k.a.: Power of Termination)

- Must expressly be carved out in the present estate
- Accompanies the Fee Simple Subject to Condition Subsequent

3) Reversion

- If present estate is neither Fee Simple Determinable nor Fee Simple Subject to Condition Subsequent, O, the grantor, will have a reversion.
- A Reversion is the future interest that arises in a grantor who transfers an estate of lesser quantum than she started with (other than a Fee Simple Determinable or a Fee Simple Subject to Condition Subsequent).
- Can never convey more than the grantor starts with, but can always convey less.
- The Fee Simple Absolute is the Big Turkey and O, the grantor, can dispense pieces of it
 - *For Example:* O, the holder of a Fee Simple Absolute Conveys:
 - “*To A for Life*”: O has conveyed less than she started with. She, O, has a Reversion (whilst A has a Life Estate)
 - “*To A for 99 Years*”: O has conveyed less than she started with. O, the grantor, has a Reversion.
 - “*To A for life, then to B for 99 years.*” O still has conveyed less than that with which she started. (Remember that the Fee Simple Absolute can endure forever). O has reversion. (A has a life estate, B has something else, a term of years?)

Future Interests in Transferees

- If the future interest is held by someone other than the grantor, it has to be either:
 - 1) **A Vested Remainder** (of which there are three species: (1) the indefeasibly vested remainder, (2) the vested remainder subject to complete defeasance, a.k.a. the vested remainder subject to total divestment, and (3) the vested remainder subject to open)
 - 2) **A Contingent Remainder; OR**
 - 3) **An Executory Interest** (of which there are 2 species; (1) the shifting executory interest and (2) the springing executory interest)
- For the Bar, must be able to distinguish:
 - I. Vested Remainders from Contingent Remainders
 - II. Vested Remainders amongst themselves
 - III. All remainders from Executory Interests

I: The Difference Between Vested Remainders & Contingent Remainders

- Definition of Remainder: A remainder is a future interest created in a *Grantee* (never created in a grantor) that is capable of becoming possessory upon the expiration of a prior possessory estate created in the same conveyance in which the remainder is created.
- Remember that the Remainder is *Forrest Gump*; that is, he is *Sociable, Patient, & Polite*
 - Sociable: The remainderman never travels alone. The remainderman always follows a preceding estate of known, fixed duration. He is the caboose, the tag along (usually after a life estate or term of years)
 - Patient & Polite. Means that the Remainderman NEVER follows a defeasible fee. The remainderman cannot cut short, or divest anyone else's interest. The remainderman will never follow a preceding estate of potentially limitless duration (like a Fee Simple Absolute). TIP: if see "A & his heirs", that is a potentially limitless duration; but if see words like "but if", "unless", "during", then there may be a remainder.
 - The preceding estate MUST be KNOWN, FIXED, FINITE for there to be a remainderman.
- Remainders are Either *Vested* or *Contingent*
 - A remainder is **vested** if it is **both** created in an ascertained (known) person AND is NOT subject to any Condition Precedent
 - A remainder is **contingent** if it is created in an unascertained (unknown) person OR is subject to any Condition Precedent, OR Both
 - Contingent Remainder due to **unborn/unascertained persons**.
 - *For Example*: "To A for life, then to B's First Child". A is alive. B, as yet, has no children
 - Since the first child is not yet born, he is unknown, unascertained. Ergo, it is a contingent remainder
 - *For Example*: "To A for life, then to B's heirs". A is alive. B is alive.
 - Because a living person has no heirs, while B is alive his heirs are unknown (he has only heirs apparent). Thus, unknown person, contingent remainder
 - *For Example*: "To A for life, then to those children of B who survive A." A is alive.
 - Since A still alive, we don't yet know which, if any, of B's children will survive A. Thus, unascertainable, and contingent remainder
 - Contingent Remainder due to **Condition Precedent**
 - A condition is a condition precedent when it appears before the language creating the remainder (or when woven into the fabric of the grant to the remainderman).
 - *For Example*: "To A for life, then, if B graduates from college, to B." A is alive, B is now in High School.
 - Before B can take, he must graduate from college. He has not yet satisfied the condition precedent. **B**, therefore, has a Contingent Remainder. **O** has reversion.
 - If B graduates from college during A's lifetime, the contingent remainder is automatically transformed into a Vested Remainder.
 - *For Example*: "To A for life, and, if B has reached the Age of 21, to B." A is alive, B is 19 years old

- Again, B must satisfy the condition precedent before B can take. **B**, therefore, has a Contingent Remainder. **O** has reversion
 - If B attains the age of 21 during A's lifetime, B's contingent remainder is automatically transformed into a Vested Remainder.
- Remember, the Contingent Remainder is the **Outlaw** of the Common Law Estate System. It is so despised that the court had to go out and create lots of **rules** to weaken it.
- **The Rule of Destructibility & Contingent Remainders**
 - At common law, A contingent remainder was **destroyed** if it was still contingent at the time the preceding estate was terminated.
 - *For Example*: "To A for life, and if B has reached the age of 21, to B". Now, A has died, leaving behind B, who is still only 19 years old. Assess the state of title.
 - Historically, at Common Law, the Rule of Destructibility Applied. B's contingent remainder would be destroyed (since still contingent at the time the preceding estate ended). O or O's heirs would then take in Fee Simple Absolute.
 - Today: Destructibility rule has been virtually abolished. B's contingent remainder would not be destroyed. Rather, the Estate would revert back to O who holds it subject to B's Springing Executory interest. If B reaches the age of 21, B will divest O.
- **The Rule in Shelley's Case**
 - At common law, the rule would apply in one setting only: O conveys "To A for life, then, on A's death, to A's heirs." A is alive.
 - Historically: At common law, Rule in Shelley's Case; if 1 instrument creates a life estate in A and a future interest in A's heirs, the present and future interests would be merged. Thus, A would have a Fee Simple Absolute at Common Law.
 - Note: The Rule in Shelley's case is a Rule of LAW (not a Rule of Construction). It applies even in the face of contrary grantor intent (it ignores grantor intent).
 - Today: The Rule in Shelley's case has virtually been abolished. A now has a life estate. A's unknown heirs have a contingent remainder. O would have a reversion.
- **Doctrine of Worthier Title (a.k.a. the Rule against a remainder in Grantor's Heirs)**
 - Still applies in most states. However **it does NOT apply in MASSACHUSETTS**.
 - This applies to inter vivos conveyances which attempt to create a future interest in O's heirs.
 - *For Example*: O conveys "To A for life, then to O's heirs"
 - If the doctrine of worthier title DID NOT APPLY (as in MA), O's heirs have a contingent remainder (while O is still alive, O's heirs are unknown).
 - When the Doctrine of Worthier Title DOES apply (for MBE majority), the attempted creation of a contingent remainder in O's heirs is VOID. All

that remains is the LIFE ESTATE in A, and O has reversion. The point of the Doctrine of Worthier Title is to Promote Alienability.

- Note: the Doctrine of Worthier Title is a Rule of Construction and Not a Rule of Law (thus, grantor intent is relevant).

II: Distinguish the 3 Types of Vested Remainders: (note: only remainders can be vested)

1) The Indefeasibly Vested Remainder

- The holder of this remainder is *CERTAIN* to acquire a possessory estate in the future without any conditions attached. This is the best possible future interest one can hope for.
- The Holder is Known and the Entitlement to Take is not subject to any conditions.
 - *For Example*: “To A for Life, remainder to B.” A is alive. B is alive
 - A has a life estate
 - B has an indefeasibly vested remainder
 - *What if B predeceases A?* All vested remainders are **transferable (alienable), descendible, and devisable**. Thus, B’s future interest will pass to B’s devisees or heirs.

2) The Vested Remainder Subject to Complete Defeasance (a.k.a. the Vested Remainder Subject to Total Divestment)

- The remainderman is known. The interest is not subject to a condition precedent. It is a vested remainderman. BUT, subject to condition subsequent.
- Here, note the difference between a condition precedent, which creates a contingent remainder, and a condition subsequent, which creates a vested remainder subject to complete defeasances:
 - **Conditions precedent -> Contingent Remainder**
 - **Conditions subsequent -> Vested Remainder Subject to Complete Defeasance**
- To tell the difference, apply the **Comma Rule**: When conditional language in a transfer follows language that, taken alone and set off by commas, would create a vested remainder, the condition is a condition subsequent, and you have a vested remainder subject to complete defeasance.
 - *For Example*: O conveys “To A for life, remainder to B [*this creates the vested remainder*], provided, [*the condition appears after, it is a condition subsequent*] however, that if B dies under the age of 25, to C”. A is alive. B is 20 years old.
 - A has a life estate
 - B has a Vested Remainder Subject to Complete Defeasance
 - C has a Shifting Executory Interest
 - *If B is under 25 at the time of A’s death*; B can still take, but B must still live to the age of 25 to avoid subsequent forfeiture. O has reversion (if B breaches and C has no heirs)

- *By Contrast*, if the Conditional language appears **before** the language creating the remainder, the condition is a condition precedent, and you have a contingent remainder.
- *For Example*: O conveys “to A for life, and if B has reached the age of 25 [*the conditional language before, it is contingent remainder*], to B [*the remainder*].” A is alive and B is 20 years old.
 - A has a Life Estate
 - B has a Contingent Remainder
 - O has Reversion
 - *If B is still alive, but under 25 at the time of A’s death*, B cannot take (he fails the condition precedent). Estate reverts back to O who holds it subject to B’s Springing Executory Interest. If B reaches the requisite age, B will divest O.

3) The Vested Remainder Subject to OPEN

- This vested remainder is created in a class that has not yet closed
- This vested remainder subject to open is created in a group
- At least 1 member of the group is KNOWN and QUALIFIED TO TAKE (transform from a contingent to a vested)
- Class takers entitlement is **subject to partial diminution** because additional class members may be added (qualify for admission)
 - *For Example*: “To A for life, then to B’s children.” A is alive. B has 2 children (C & D).
 - *What do C & D have?* They have Vested Remainders Subject to Open.
- A Class is either **Open** or **Closed**
 - A class is **open** if it is possible for others to enter
 - A class is **closed** when its maximum membership has been determined. People born thereafter are shut out.
 - How to know when a class is closed? Based on a Rule of Construction (won’t apply if grantor intends for it not to (clearly shows intent not to follow).
 - Common Law: **Rule of Convenience**: A Class closes whenever any member can demand possession.
 - *In the above example, when does the class close?* The class closes at B’s death. At A’s death, (even if B still living). Class closes whenever a member may demand possession.
 - *Rule of Convenience used* because it is easy to administer.
 - *Once A dies*, child of B, born or conceived, will be shut out.
 - **“Womb Rule”**: Child of B in womb at A’s death does get to share in gift
 - *What if C or D predeceases A?* At common law, Vested Remainders are alienable, devisable, & descendible. Thus, the heirs or devisees of C or D get that vested remainder.

III: Distinguish Remainders from Executory Interests

- **Definition: Executory Interest:** It is a future interest created in a *transferee* (a 3rd party) which is NOT a Remainder and which takes Effect by EITHER cutting short some interest in another person (SHIFTING) or in the Grantor or his heirs (SPRINGING).
- **Shifting Executory Interest**
 - Always follows a DEFEASIBLE Fee. It cuts short the Fee of A
 - *For Example:* “To A and her heirs [*potentially unlimited estate*], BUT if B returns from Canada sometime next year [*this subjects the estate to being cut short*], to B and his heirs.”
 - B, thus, has a Shifting Executory Interest
 - *Why doesn't B have a Remainder?* Remainders NEVER follow Defeasible Fees.
 - A has a Fee Subject to B's Shifting Executory Interest
 - An Executory Interest Holder is an Executioner. He can cut short the power & estate of another.
 - *Does the Conveyance Violate the Rule Against Perpetuities?* Note, for now, the answer is NO. (there is a 1 year limitation on B's power).
 - *For Example:* “To A [*potentially limitless estate*], but if A uses the land for non-residential purposes at any time during the next 20 years [*subject to being cut short: another's shifting executory interest*], then to B.”
 - B has a Shifting Executory Interest
 - A has a Fee Simple Subject to B's Shifting Executory Interest
 - *Does the Conveyance violate the Rule Against Perpetuities?* No, the perpetuity problem arises only if exceed the 20 year limit on B's potential power.
- **Springing Executory Interest**
 - Executioner who will divest, potentially, O (the grantor, not the grantee A).
 - *For Example:* O conveys “to A, if and when he marries”. A is unmarried.
 - A has a Springing Executory Interest (A will divest O if and when A marries)
 - O has Fee Simple Subject to A's Springing Executory Interest
 - *Does the conveyance violate the Rule Against Perpetuities?* NO, will know whether satisfy the condition by the end of A's life.
 - *For Example:* O conveys “To A, if and when he (A) becomes a lawyer.” A is in high school. [*A has power to cut short O's potentially limitless time with the land*]
 - A has a Springing Executory Interest
 - O has Fee Simple Subject to A's Springing Executory Interest
 - *Does the conveyance violate the Rule Against Perpetuities?* NO, will know whether satisfy the condition by the end of A's life.

- **Note on the Rule Against Perpetuities**

I. The Rule Against Perpetuities. Certain kinds of FUTURE INTERESTS are VOID if there is ANY possibility, however remote, that the given interest MAY vest more than **21** years after the death of a MEASURING LIFE

- Purpose: prevent 1 generation of property owners from tying up the land too far into the future
- Measured by the *lives in being* at the time of the conveyance

II. Four Step Technique for Assessing Potential RAP Problems

1. Classify the Future Interest

- Determine which FUTURE INTERESTS have been created by the conveyance. The RAP potential applies ONLY to CONTINGENT REMAINDERS, EXECUTORY INTERESTS, and CERTAIN VESTED REMAINDERS SUBJECT TO OPEN. The RAP does not apply to Any of the 3 Future Interests Created in O, the Grantor (possibility of Reverter, Right of Entry, Reversion). Also, does not apply to Indefeasibly Vested Remainders or Vested Remainders Subject to Complete Defeasance.

RAP	NON-RAP
Contingent Remainders	Possibility of Reverter
Executory Interests	Right of Entry
Vested Remainder Subj. to Open	Reversion
	Indefeasibly Vested Remainders
	VR subject to complete defeasance

- *For Example:* “To A for life, then to A’s children.” A is alive. She has no children.
 - The as yet unborn children have a Contingent Remainder (puts you on RAP Alert).

2. Determine what are the conditions precedent to the Vesting of the Future Interest.

- Must identify the conditions precedent to the vesting of the suspect future interest.
 - *For Example:* from above, what has to happen before the future interest holder can take?
 - A must die, leaving a child.

3. Find a Measuring Life

- Look for person alive at date of conveyance, and ask whether that person’s life or death is related to condition’s occurring. If so, he is qualified as a measuring life.
- May have more than 1 measuring life.
 - *For Example:* in the above example, who qualifies as a measuring life?
 - A

4. Ask, will we know with certainty, within 21 years of the death of the measuring life if a future interest holder can take?

- If **Yes**, the conveyance is good.
- If **No**, (i.e., if there is any possibility, however remote, that the condition precedent could or could not occur more than 21 years after the death of a measuring life), the future interest is VOID.

- *Above*, we will know within 21 years of A's death (actually during A's life, at death), if there is a future interest holder who can or cannot take
- *The preceding conveyance*, therefore, at the time of A's death, we will know with certainty whether there is a future interest holder who can or cannot take, and therefore, the conveyance is good and survives RAP
- *IF* there were any possibility of not knowing, then the future interest is void.
 - *For Example*: "To A for life, then to the first of her children to reach the age of 30." A is 70. Her only child, B, is 29.
 - *Applying the 4 steps*:
 - *Classify the future interest*. B has a contingent remainder
 - *What are the conditions precedent to the vesting of the future interest?* A must die and a child must reach the age of 30.
 - *Find a Measuring life*. A is the measuring life
 - *Will we know, with certainty, within 21 years of the death of the measuring life if a future interest holder can take?* NO: at common law, the Rule Against Perpetuities demands what MAY happen. Presumes anything is possible. Need to have a parade of horrors.
 - Is there any possibility, however remote, that A would not have a child reach 30 more than 21 years after A's death.
 - What could happen? B dies, before reaching age 30. A has another child. A dies in labor. The condition precedent won't be satisfied within 30 years of death of the measuring life, A.
 - Since it is possible, the future interest is void under the Rule Against Perpetuities. What is left? A for life (A life estate in A), with Reversion for O, the grantor.
 - **Fertile Octogenarian Rule**: Women presumed to be fertile, regardless of Age

III. *Two Bright Line Rules of Common Law RAP*

1. **A Gift to an OPEN CLASS that is Conditioned upon the members Surviving to an Age BEYOND 21 violates the common law Rule Against Perpetuities.**

(Memorize)

- "Bad as to One, Bad as to All."
- Often, on MBE, certain Vested Remainders Subject to Open are also subject to the Rule Against Perpetuities. When the Vested Remainder Subject to Open is conditioned upon a member surviving beyond 21, the entire class will fail for Rule Against Perpetuity purposes. The entire class gift is void no matter that certain members of a class already satisfy the age contingency.
 - *For Example*: "To A for life, then to such of A's children as live to attain the age of 30." A has 2 children, B & C. B is 35 and C is 40. A is alive.
 - Since A is alive, the Class is still OPEN (A could have more kids). Therefore, B & C have a Vested Remainder Subject to Open.
 - Under the Common Law, the Rule Against Perpetuities is violated as to any After-born children.
 - A could have another child, and die. The child would not take for more than 21 years after the end of the measuring life. Fruit of poisonous tree. Bad as to 1, bad as to all. Result, A has Life Estate, O has Reversion.

2. Many Shifting Executory Interests violate the Rule Against Perpetuities. An executory interest with no limit on time within which it must VEST violates the Rule Against Perpetuities. (Memorize)

- *For Example:* “To A and his heirs so long as the land is used for farm purposes, and if the land ceases to be so used, to B and his heirs.”
 - 1. Classify the future Interest.** B has a shifting executory interest (follows a defeasible fee)
 - 2. What conditions trigger B’s entitlement.** Land must cease to be used for farm purposes
 - 3. Find a measuring life.** A
 - 4. Know with certainty within 21 years of death of measuring life if future interest holder will take?** NO, B and heirs take only if the condition is breached. The condition may not be breached in A’s lifetime or for 100 years. This Violates the RAP. Future interest is void. Under the common law, what is left: A has a Fee Simple Determinable, O has a possibility of Reverter.
- Remember: RAP does NOT apply to future interests held by Grantor.

IV. Reform of RAP. (2 methods)

1. the “Wait & See” or “Second Look” Doctrine

- MA Rule: Applied in the Majority of the Jurisdictions
- The validity of a future interest is determined on the Basis of the Facts as they ACTUALLY OCCURRED now that the measuring life has expired.
- Patiently wait until the expiration of measuring life and wait for the facts to happen
- Eliminates the ‘what if’ or anything possible line of inquiry.
- No parade of horrors
- Will be valid if the future interests vest within the perpetuities period now that the measuring life has ended.

2. The Uniform Statutory Rule Against Perpetuities (USRAP)

- Any future interest subject to the Rule Against Perpetuities must be certain to vest within traditional common law perpetuities period OR within 90 years after its creation. Really, this is an alternative vesting period.
- **Note:** MA Rule: in 1990, MA enacts the USRAP alternative vesting period of (90 years), so MA really has both reforms.
- **Note:** Both the “Wait & See” and USRAP reforms embrace:
 - **The Cy Pres Doctrine**
 - Means ‘as near as possible’. If a given disposition violates RAP, allow the court to reform the transfer in a way that most closely matches the intent of the grantor and complies with RAP
 - **Reduction of Offensive Age Contingency to 21**
 - If the future interest violates RAP because it is contingent on any person reaching an age > 21, will automatically reduce age contingency to 21 years.

Summary of Future Interests

<u>Future Interest</u>	<u>Created in</u>	<u>Accompanying Present Interest</u>	<u>Characteristics</u>	<u>RAP issues?</u>
Possibility of Reverter	Grantor (O)	Fee Simple Determinable (only): FSDPOR	Automatic cessation of estate: revert back to O	None
Right of Entry (a.k.a. Power of Termination)	Grantor (O)	Fee Simple Subject to Condition Subsequent	Optional Termination of Estate: revert back to O	None
Reversion	Grantor (O)	Whenever O conveys a lesser quantum of the estate that he owns (except for FSD or FSSCS)	Most likely future interest	None
Indefeasibly Vested Remainder	Transferee (non-O)	Non-defeasible Fee (such as a Life Estate)	Taking not subject to any conditions & the VR is freely alienable, descendible & devisable	None
Vested Remainder Subject to Complete Defeasance (Total Divestment)	Transferee (non-O)	Non-defeasible Fee (such as a Life Estate)	Taking is subject to a Condition Subsequent (though not a Condition Precedent). VR is freely alienable, descendible, devisable	None
Vested Remainder Subject to Open	Transferee (non-O)	Non-defeasible Fee (such as a Life Estate)	At least 1 member of the class is known and qualified to take, but subject to partial diminution owing to potential additional members	RAP issues
Contingent Remainder	Transferee (non-O)	Non-defeasible Fee (such as a Life Estate)	Taking is subject to a Condition Precedent. Also destructibility or reversion subject to executory interest	RAP issues
Shifting Executory Interest	Transferee (non-O)	Defeasible Fee (potentially limitless, such as Fee Simple Subject to Shifting Executory Interest), basically a non-Life Estate	The potential Divestor is non-O, i.e., the person to get the estate is somebody other than the grantor.	RAP issues
Springing Executory Interest	Transferee (non-O)	Defeasible Fee (potentially limitless duration. Non Life Estate)	The potential Divestor is O, i.e., the person to get the estate is O	RAP Issues

§ 3: CONCURRENT ESTATES

- There are **3 Types of Concurrent Ownership**
 1. The **Joint Tenancy**
 - 2 or more persons own Blackacre
 - Distinguishing feature: Right of Survivorship
 2. The **Tenancy by the Entirety**
 - A specially protected marital interest. Only exists between a Husband & Wife. Recognized in only a Minority of States.
 - Also has a Right of Survivorship
 3. The **Tenancy in Common**
 - 2 or more persons own Blackacre with NO Right of Survivorship

I. The Joint Tenancy

Distinguishing Characteristics of a Joint Tenancy

1. **Joint Tenant owns by the whole and by the part**
 - Joint Tenancy is regarded as one singular unit, ergo share the right of survivorship
 - When 1st Joint tenant dies, property passes automatically to the surviving joint tenants
2. **Joint Tenant interest is Transferable Inter Vivos**
 - Though Transferable inter vivos, a Joint Tenancy is NOT Devisable or Descendible (owing to the right of survivorship)

Creation of a Joint Tenancy

1. **The 4 Unities**
 - Remember “T-Tip”
 - **T – Time:** Joint Tenants must take interests at the same time as one another
 - **T – Title:** Joint Tenants must Take by the Same Title
 - **T – Identical Interest:** The interest they own must be identical
 - **P – Possess:** The Joint Tenants must have Identical Rights to Possess
2. **Grantor must Clearly Express the Right of Survivorship**
 - Presumption favors Tenancy in Common, ergo, to create a Joint Tenancy, the 4 unities are required, as well as for the grantor to Clearly Express the Right of Survivorship.
 - *For Example:* O conveys “To A and B, as joint tenants with right of survivorship.”

Severance of a Joint Tenancy

- Remember **SPAM:** Sale, Partition, and Mortgage
- 1. **Sale**
 - a.) **A Joint Tenant Can Sell or Transfer her interest during her lifetime**
 - The Joint Tenant may even sell her interest **covertly** (secretly)
 - One joint tenant’s sale severs the joint tenancy as to that selling Joint tenant’s interest. The new buyer becomes a Tenant-in-Common.

- To the extent that there were more than 2 Joint tenants in the 1st place, the Joint Tenancy remains in tact as between the other non-transferring joint tenants.
 - *For Example:* O conveys Blackacre “To Phoebe, Ross, and Monica as joint tenants with the right of survivorship”
 - *Each owns* a Presumptive 1/3 share plus the right to use and enjoy the whole (so long as the 4 unities exist).
 - *If Phoebe then sells her interest to Chandler, what is the state of the Title?* Phoebe’s action severs the Joint Tenancy as to Phoebe’s interest. Ross & Monica hold 2/3 as Joint Tenants, and Chandler holds 1/3 as a Tenant-in-Common
 - *Later, Ross dies, leaving behind his heir, Rachael. What is the state of the Title?* Rachael takes nothing (since Ross & Monica share a right of survivorship, at Ross’ death, his share passes automatically to Monica, irrespective of his will or intestacy statute). Now at this point, Monica holds 2/3 and Chandler holds 1/3. The Joint Tenancy no longer exists, and Monica and Chandler are Tenants-in-Common

b.) In Equity, a Joint Tenant’s mere act of entering into a contract for the sale of her share will SEVER the joint tenancy as to the contracting party’s interest, under the doctrine of EQUITABLE CONVERSION. (in equity, the joint tenancy is severed as to the contracting party's interest from the interest that the contract for the sale of her share is signed.

- *For Example:* O conveys Blackacre to “Ringo, Paul, and John as joint tenants with the right of survivorship”
- This creates a Joint Tenancy
- *On January 1, Ringo enters into a contract for sale of his interest in the joint tenancy to George, with the closing to take place on April 1. When does the severance as to Ringo’s interest occur and why?* On January 1, as to Ringo’s share, the Joint Tenancy is Severed under the Doctrine of *Equitable Conversion*. In equity, the Joint tenancy is severed as to the contracting (Ringo) party’s interest.

2. Partition

- There are **3 Variations** of Partition
 - a.) By Voluntary Agreement**
 - Parties are empowered to voluntarily dissolve their relationship. This is the most amicable solution possible.
 - b.) Partition in Kind**
 - An equitable/judicial proceeding. Court is authorized to order the physical division of Blackacre, if it is in the BEST INTEREST of all parties.
 - c.) Forced Sale**
 - Also a Judicial Action. The court is authorized to order the sale of Blackacre, with the proceeds divided appropriately if it is in the best interest of all parties.

3. Mortgage

- One Joint Tenant's Execution of a Mortgage on her share will sever the Joint Tenancy as to her share; but only in the Minority of states to follow the *Title Theory of Mortgages*. (meaning 1 Joint tenant's execution of a mortgage on her shares severs the joint tenancy as to the mortgage amount of share)
- In the Majority of states, *Lien Theory of Mortgages*: a Joint Tenant who executes a mortgage on her share will NOT sever the Joint Tenancy.
 - *For Example*: Paul, John, and George are Joint Tenants. Suppose now that Paul mortgages his interest in the joint tenancy. Will this sever the joint tenancy as to Paul's Interest?
 - *YES*; in states that follow the Title Theory of Mortgages
 - *No*: in states that follow the Lien Theory of Mortgages

II. The Tenancy by the Entirety

- This form of co-ownership is recognized in **21 States** (including MA)

Creation

- This form of co-ownership can only be created in a Husband and Wife.
- Take as fictitious Single Person with Right of Survivorship
- This Arises *Presumptively* in Any conveyance to a Husband & Wife, unless O, the grantor, has clearly expressed otherwise

Very Protected Form of Co-ownership

- Think MC Hammer, "Can't Touch This"
 1. MBE: Creditors of only 1 Spouse Can't touch the Tenancy by the Entirety (in MA, however, allow 1 tenant by the entirety to encumber his interest and will allow creditors to enforce a lien, but only as to the debtor spouse's share)
 2. Not only will the whole estate go to the surviving spouse (right of survivorship), but neither Tenant, acting alone, can defeat the right of survivorship by a UNILATERAL conveyance to a 3rd Party
 - *For Example*: Marla and Donald, married to each other, own Blackacre as Tenants by the Entirety. Donald then secretly transfers his interest to Rudy. What does Rudy have?
 - *Nothing*: "can't touch this". 1 tenant by the entirety cannot make a unilateral conveyance to a 3rd party.

III. The Tenancy in Common

- Three Key Features
 1. Each co-tenant owns an individual part and each has a right to Possess the whole.
 2. Each Tenant in Common's Interest is Descendible, Devisable, and Transferable Inter Vivos (i.e., there are no rights of survivorship)
 3. Presumption favors Tenancy in Common
 - Any conveyance to 2 or more people that fails to specify a form of concurrent ownership is presumed to create a tenancy in common (unless in a minority state where transfer to a husband and wife is presumed by be a Tenancy by the Entirety)

Rights and Duties of Co-Tenants

- *For Example:* Greg and Marcia own Blackacre as Tenants In Common. Greg Contributed 90% of the purchase price, and Marcia contributed 10% of the Purchase price.
1. **Possession**
 - *For Example:* Greg takes a can of white paint and divides up the premises. Tells Marcia that she can use only the 10% of Blackacre marked by the white boundaries. Are Greg's Actions permissible?
 - *NO:* Each Co-tenant is entitled to possess and enjoy the whole of the property
 - *IF* 1 co-tenant wrongfully excludes another, he has committed **ouster**
 2. **Rent from co-tenant in Exclusive Possession**
 - *For Example:* Marcia leaves Blackacre Voluntarily, for a 3 month tour of Europe with her cheerleading squad. On her return, she demands rent from Greg for the 3 months in which he enjoyed Exclusive possession. Will she prevail?
 - *NO:* Unless there has been an **ouster**, the co-tenant in exclusive possession is not liable to the others for rent.
 - Only the **ousted** co-tenant is entitled to an accounting to receive her fair share of rental value during the time she was forced out.
 3. **Rent from 3rd Parties**
 - *For Example:* Greg leases Blackacre's basement to Alice, a tenant. Is Marcia entitled to a portion of the rental income?
 - *YES:* A co-tenant who leases all or part of Blackacre must account to his co-tenants. He must give them their fair share of the rental income. (Here, Marcia is entitled to 10% of the rental income).
 4. **Adverse Possession**
 - *For Example:* Marcia, so enthralled by a family trip to the Grand Canyon, decides to stay there for the next 20 years. In her absence, can Greg Acquire title to the whole through Adverse Possession?
 - *NO:* unless he has **ousted** the others, a co-tenant in exclusive possession CANNOT acquire title to the whole to the exclusion of the others. (note: adverse possession won't work here because there is no hostility)
 5. **Carrying costs**
 - *For Example:* What are Marcia and Greg's respective responsibilities with respect to Blackacre's carrying costs?
 - Each co-tenant is responsible for her fair share of the carrying costs (like tax payments, mortgage interest payments, etc.) based on the undivided share that she holds.
 - Here, Marcia responsible for 10%, Greg 90% of the carrying costs
 - If 1 co-tenant pays more than her fair share, she is entitled to a Right of Contribution from the others
 6. **Repairs**
 - *For Example:* A football, thrown in Marcia's direction, goes through Blackacre's front window. Marcia, who has repaired the window, now seeks contribution from Greg. Will she prevail?
 - *YES:* A repairing co-tenant gets a right to contribution during the life of the co-tenancy so long as the repairing co-tenant NOTIFIES the others as to the need for repairs.

7. Improvements

- *For Example:* Marcia has wallpapered Blackacre's den with life-size posters of her idol, Davy Jones. She now seeks contribution from Greg, for his fair share of the costs of her 'improvements'. Will she succeed?
- *NO:* 1 Tenant's improvement may be another tenant's nightmare
- During the life of co-tenancy, there is no right to contribution for so-called improvements
- Result: at partition, the improving tenant does receive a credit = any increase in value due to the improvements. Similarly, for any decrease in value attributable to his efforts, the co-tenant will receive full liability.

8. Waste

- A co-tenant must not commit waste (Remember the 3 Species: Ameliorative, Permissive, Voluntary)

9. Partition

- A joint tenant or tenant in common has a right to bring an action for Partition (tho not a tenancy by the entirety)

PART TWO: LANDLORD/TENANT LAW

§ 1: THE FOUR LEASEHOLD OR NON-FREEHOLD ESTATES

1. *The Tenancy for Years (a.k.a. Estate for Years or Term of Years)*

- A leasehold for a **fixed, determined period of time**
 - Can be 1 day, 2 months, or 99 years
 - **KEY:** know from the start the duration of the lease
 - However, if termination date is unknown at the start, it **CANNOT** be a tenancy for years
- **NO notice** is necessary to bring this tenancy to an end (Why not? From start, by definition, know when it will end)
- If a Term of Years is > 1 year, it must be evidenced in **writing** to be enforceable (Statute of Frauds issue)

2. *The Periodic Tenancy*

- Lease that continues for Succeeding periods or Intervals until Either the Landlord or the Tenant Gives **proper notice of termination** (the key: successive or continuous)
- May be created either **expressly** (most often) : *For example:* L conveys to T from month to month (continuous)
- Or Can Arise by **implication** in 1 of 3 Ways:
 - a. Land leased without any mention of Duration, but Provision made for **payment of rent at designated intervals**. (This creates an implied periodic tenancy based on intervals for payment of rent.
 - *For Example:* T rents an apartment from L, commencing June 1. Nothing is said about duration. T pays rent each month. What tenancy exists here?
 - This is an Implied Month-to-Month Periodic Tenancy
 - b. An **oral term of years** in violation of the Statute of Frauds will create an implied periodic tenancy.
 - *For Example:* L and T negotiate on the telephone for a commercial lease. They verbally agree on a 5 year lease with rent at \$1,000 per month. Is this a tenancy for years?
 - **NO:** since this agreement violates the Statute of Frauds, it results in an implied Periodic Tenancy
 - *What if T sends L a check for \$1,000 and L accepts it?*
 - T's 1st Rental Payment renders this an Implied Periodic Tenancy with intervals based on the way the rent is tendered
 - c. **Holdover doctrine:** In a Residential Lease, if the Landlord elects to **HOLDOVER** a tenant who *wrongfully stayed on*, an implied periodic tenancy will arise. Periods will be determined based on the way the rent is tendered.
 - *For Example:* T holds over after the expiration of her 1 year lease, but sends another month's rent check to L, who cashes it. What tenancy now exists?
 - This is An Implied Month-to-Month Periodic Tenancy (based on the Holdover Doctrine)

- **Notice** must be given to Terminate a Periodic Tenancy
 - *How Much?* Usually, at least equal to the length of the measuring period itself (unless the parties have otherwise agreed)
 - Exception: If the periodic tenancy runs year-to-year or greater, only 6 Months notice is required
 - Note: Periodic tenancy must end at the conclusion of a **natural lease period**
 - *For Example*: L leases Blackacre to T on June 1, 1996, for a periodic tenancy of month-to-month. On October 15, 1996, T sends written notice of Termination. T is bound until: *November 30, 1996*.
 - *Why?* Tenancy must end at the conclusion of a Natural Lease Period. By agreement, though, parties may lengthen or shorten the amount of notice required.

3. *The Tenancy at Will*

- **No Fixed Period of Duration**
- **Unless parties have expressly agreed to it, the payment of rents at periodic times will cause the court to treat the tenancy as an Implied Periodic Tenancy**
- **May be terminated by either party at any time. However, requires a reasonable demand to QUIT the premises.**

4. *The Tenancy at Sufferance*

- Created when a Tenant has wrongfully held over
 - Gives the wrongdoer an estate in order to allow the landlord to recover rent
 - Short-lived: lasts only until eviction or a new lease

§ 2: TENANT'S DUTIES

1. T's Liability to 3rd Parties

- T responsible for Keeping the Premises in **Reasonably Good Repair**
- **MBE**: Tenant is liable for injuries sustained by 3rd Parties (even though the landlord may have expressly promised to make all repairs)
 - *For Example*: L leases a building to T, Expressly promising to maintain the premises in a state of good repair. T's invitee trips over a loose floorboard and sues T. If the invitee sues T, what result?
 - *Invitee wins*, T liable. In the suit if Invitee v Tenant, the tenant will lose (thought the Tenant may have a good case of indemnification against the Landlord)
- **MA**: for a **MA Residential Lease**, the Landlord will be liable if any 3rd Party is injured due to unsafe conditions (of which the landlord had **knowledge**). Does NOT apply to Commercial Leases

2. T's Duty to Repair

- When the lease is Silent, T required **ONLY** to keep the premises in **reasonably good repair**.
 - However, T must not commit WASTE (Ameliorative, Permissive, Voluntary), else liable
 - *Law of Fixtures*: When a tenant removes a fixture, T commits VOLUNTARY WASTE
 - *Fixture* = once movable chattel that, by virtue of its annexation to realty, Manifests the Intention to permanently improve that realty.
 - *For Example*: Heating systems, Custom made storm windows, furnaces
 - The tenant must not remove a fixture, no matter that she may even have been the one to have installed it. Fixtures pass, **ONLY**, with ownership of land
 - How to know when the Tenant's installation qualifies as a Fixture?
 - *For Example*: T puts in carpeting, or furnace, or chandelier at own expense. Is it a fixture?
 1. **By Express Agreement (will control)**
 2. In absence of an agreement, T may **remove the installation so long as removal does not cause SUBSTANTIAL HARM to the Property**
 - If the removal will cause substantial damage, T has installed a fixture, regardless of T's subjective intent (this is an Objective standard)
- When T has expressly covenanted in the lease to maintain the property in good condition for the duration of the lease:
 - At common law: T responsible for Any loss to the property *except* for the ordinary wear and tear.
 - At common law, T pretty much screwed if anything bad happened to the property. He would be responsible for re-construction, re-furbishment, and all else, even for things that happened by force majeure (i.e., weren't his fault)

3. T's Duty to Pay Rent

- If T fails to Pay Rent, what L can do depends on whether T is in possession or not
 - a. **T Breaches his Duty to Pay Rent and is IN POSSESSION**
 - L's options are only to *Evict through Appropriate Judicial Process or Sue for Rent Due*
 - If L Moves to **evict**, he is still entitled to rent from the Breaching Tenant (now a Tenant at Sufferance). L is entitled to rent from T until T vacates
L must NOT engage in self-help. L must not change the locks, he must not forcibly remove tenant or his possessions. Self-help is outlawed and punished by Civil and Criminal penalties.
 - MA: if tenant is evicted without court order, the Landlord is **LIABLE** for **TREBLE DAMAGES** (or 3 months rent + attorney's fees).
 - b. **T Breaches his Duty to Pay Rent, but is OUT OF POSSESSION**
 - T wrongfully vacated with time left on Term of Years lease. What may L do?
 - Remember **SIR**
 - **S: Surrender** – L could treat T's abandonment as an *Offer of Surrender*. This means that the tenant says, "I give up, please release me." If L accepts T's abandonment as an Implied Surrender, the Lease is amicably terminated. But if more than 1 year left on lease, surrender needs to be **IN WRITING**.
 - **I: Ignore the Abandonment** – L proceeds as if T never vacated at all. Holds T liable for each month's unpaid rent. Option is available only in a **MINORITY** of states. The **MAJORITY** says that the Landlord **MUST** at least try to re-let the premises on behalf of the breaching Tenant.
 - **R: Re-let** – Hold Wrong-doer liable **ONLY** for any deficiency. The **MAJORITY** requires a reasonably diligent effort by the Landlord to find a substitute tenant. Thus, the Majority imposes a **DUTY TO MITIGATE** on the wronged Landlord.

§ 3: LANDLORD'S DUTIES

1. Duty to Deliver Possession

- L must put T in *Actual, Physical Possession of the Premises*.
 - *For Example:* if told at the start of T's lease that a prior hold-over tenant is still there, L is in breach. New T is entitled to damages from L (and L can sue original T)

2. The Covenant of Quiet Enjoyment

- This covenant applies to **residential AND commercial leases**. T has the right to QUIET USE & ENJOYMENT of the premises without interference from L.
 - A.) *Breach by Wrongful Eviction*
 - L may breach the Covenant of Quiet Enjoyment by **wrongfully** evicting or excluding T from any portion of the premises.
 - B.) *Breach by Constructive Eviction*
 - L committing Constructive Eviction breaches the Covenant for Quiet Enjoyment
 - Ways to Constructively Evict: Remember **SING**
 - **S I : Substantial Interference:** T's use and enjoyment must be SUBSTANTIALLY INTERFERED with because of some ACT or Failure to Act attributable to L.
 - Substantial Interference is not the same as Permanent Interference
 - Substantial Means REGULARLY recurring, Chronic Interference which is attributable to L and FUNDAMENTALLY INCOMPATIBLE with T's Quiet Use and Enjoyment.
 - *For Example:* If whenever it rains, the roof leaks and the house floods, that is chronic, recurring substantial interference with the Tenants right of Quiet Enjoyment and is thus a Constructive Eviction
 - **N : Notice:** Before claiming Constructive Eviction, T must Notify L of the problem and L must fail to remedy the problem within a reasonable time thereafter. Note; notice is a mitigation problem
 - **G : Get-out.** To claim constructive eviction, T must Vacate the premises within a reasonable time after L fails to correct the problem. (T can't stay in possession and claim a constructive eviction)
- *Is the Landlord Liable for the Acts of Other Tenants?*
 - General Rule: NO, the landlord is not responsible for 1 tenant causing annoyance to another. But, there are 2 Major Exceptions.
 - a.) L has duty not to permit **nuisances** on premises.
 - *For example:* if L leases apartment to a Bongo Drum Troupe, L will be liable for a breach of quiet enjoyment
 - b.) L has duty to **control common areas**. If the offensive conduct takes place in a common area, L is liable for a breach of quiet enjoyment.

3. The Implied Warranty of Habitability

- Applies ONLY to RESIDENTIAL Leases (NOT commercial leases)
- Majority: in every residential lease, L implicitly promises that the premises will be maintained in habitable condition for the duration of the lease. It is a non-waivable warranty. That is, it cannot be disclaimed or waived.
- Standard: Bare Living Requirements Must be Met.
 - Premises need not be perfect, just fit for human habitation.
 - Often, found in the local housing code. But, courts may establish an independent judicial standard
 - Includes things like heat, plumbing, running water, etc.
- T's Entitlements when Warranty of Habitability has been **breached**. Remember **MR**³
 - **M : Move** – T is empowered to move-out and terminate the lease. But doesn't have to
 - **R : Repair** – (Repair & Deduct). Many statutes allow T to make necessary repairs and deduct the costs from future rents
 - **R : Reduce** – allow T to reduce amount of rent paid to the fair rental value of the premises in view of the defects. Or, alternatively, to withhold all rental payments until court determines the fair rental value. (If T chooses this, required to deposit the rental payment in an Escrow account to show good faith.)
 - MA: Does not require T to put rent into an escrow to withhold (MA in the minority)
 - **R : Remain** – Remain, pay full rent, and seek money damages
- Note: **Retaliatory Eviction**: if T legally reports L (for code violation) L is Barred from taking retaliatory measures against T. L may not evict or raise rent or harass in response.
- Remember: Covenant of Quiet Enjoyment and Warranty of Habitability can co-exist, they are different remedies.

§ 4: THE ASSIGNMENT v. THE SUB-LEASE

- In the absence of some prohibition in the lease, a T may **freely transfer** his or her interest in whole or in part.
- In lease, though, L may Prohibit T from assigning or sub-letting without L's prior written approval. This clause, demanding prior written approval of L before assignment or sub-lease is lawful and authorized.
- Once L consents to **1 transfer** by T, L **waives** right to object to future transfers by that T, unless he **expressly reserves that right**.

1. The Assignment

- Arises when T₁ transfers an *entire freehold interest*
 - *For Example:* T₁ has 10 months remaining on a 2 year Term of Years. T₁ transfers all 10 months to T₂. This is:
 - *An Assignment*
 - As a result, L and T₂ (the assignee) are **in privity of estate**. This means that they are liable to each other for all the covenants in the original lease that **run with the land**. Any promise that pertains to Blackacre runs with the land.
 - *Examples of things running with the land;* Pay rent, paint, not remove fixtures, insure property
 - *NOTE:* L and T₂ are NOT in **Privity of Contract** (unless T₂ has expressly promised L to assume and perform ALL covenants (including those that do not run with the land) in the original lease.
 - *Thus,* L and T₁ (Assignor) are no longer in **privity of estate**. However, L and T₁ (assignor) remain in **privity of contract** as a result of the assignment. Thus, L and T₁ remain secondarily liable to one another.
 - *For Example:* L leases Blackacre to T₁. T₁ assigns to T₂. T₂ assigns to T₃. T₃ then engages in flagrant abuse to the premises.
 - *Can L proceed against T₃, the direct wrongdoer?* Yes, under **privity of estate** (L and T₃ are under privity of estate, not privity of contract, unless facts show T₃ expressly assumes performance of all covenants in the original lease)
 - *Can L proceed against T₁, the original occupant?* Yes, under **privity of contract** (L and T₁ are no longer under privity of estate, but still under privity of contract; thus T₁ is still secondarily liable to L)
 - *Can L proceed against T₂?* NO, L will have neither an action under Privity of Contract nor Privity of Estate against T₂.

2. The Sub-lease

- Arises when T₁ transfers **less than full interest**
- If T₁ subleases, L & T₂ (sub-lessee) have no **nexus**, neither in privity of estate nor in privity of contract. Instead, T₂ is responsible to T₁ and vice-versa. If T₂ commits a wrong, L cannot proceed against T₂, but rather must proceed against T₁.

§ 5: LANDLORD'S TORT LIABILITY

- **Common Law of Caveat Lessee**: Let the tenant beware. Very Hard Hearted. Under the Common Law, L under NO duty to make premises safe for T, in general. Exceptions: 5 Big ones listed below: **CLAPS**

C: Common Areas – L is under duty to maintain, in reasonable repair, all common areas

L: Latent Defects – L is under duty to WARN T of all latent defects of which L has knowledge or reason to know (note: just a duty to warn, not to repair)

A: Assumption of Repairs – While under NO DUTY to make repairs, once undertaken, L must complete them with Reasonable Care. If L, as a volunteer, make repairs negligently and T is injured as a proximate result, L is liable.

P: Public Use – L who leases public space (such as a tavern, concert hall) and who SHOULD know, because of the NATURE of the defect and the LENGTH of the lease that T won't repair it, L will be liable for any defect on premises.

S: furnished dwelling for the SHORT TERM – whenever there is a short term lease of a furnished dwelling, L responsible for any defective condition which proximately harms T. Why? T has neither the time nor the inclination to make repairs herself

PART THREE: SERVITUDES

A Summary of Servitudes

<u>Form of Servitude</u>	<u>Method of Creation</u>	<u>Parties Bound</u>	<u>Remedy</u>
AFFIRMATIVE EASEMENT	<p>PING</p> <p>P – Prescription (use that is continuous, open, notorious, actual under a claim of right that is hostile for the requisite statutory period)</p> <p>I – Implication (implied from prior use: at time land is severed, a use of one part existed from which it can be inferred that an easement permitting its continuation was intended)</p> <p>N – Necessity (division of a tract deprives one lot of means of access out)</p> <p>G – Grant (writing signed by grantor)</p>	<p>Easement Appurtenant is transferred automatically with the dominant tenement.</p> <p>Easement in Gross for Commercial purposes is Assignable</p>	Injunction or Damages
NEGATIVE EASEMENT (LASS: Light, Air, Support, Streamwater)	Can be created ONLY by writing signed by grantor	<p>Easement Appurtenant is transferred automatically with the dominant tenement.</p> <p>Easement in Gross for Commercial purposes is Assignable</p>	Injunction or Damages
REAL COVENANTS	Writing signed by grantor	<p>Burden of Promise will Run to successor of Burdened Lot IF WITHN requirements are satisfied:</p> <p>W – Writing I – Intent T – Touch & Concern H – Horizontal + Vertical Privity N – Notice</p> <p>Benefit of promise will run to successor of benefited lot if WITV:</p> <p>W – Writing I – Intent T – Touch & Concern V – Vertical Privity</p>	Damages
EQUITABLE SERVITUDES	Writing Signed by Grantor (unless implied by General Scheme Doctrine)	Successors bound if WITN: W – Writing I – Intent T – Touch & Concern N – Notice (note: no Privity requirements)	Injunction
RECIPROCAL NEGATIVE SERVITUDES (General Scheme Doctrine)	<p><u>Majority</u>: in a subdivision, residential restriction contained in prior deeds conveyed by common grantor will BIND subsequent grantees whose deeds contain no such restriction if: At start of subdividing, grantor had both a common scheme and unrestricted lot holders had notice</p> <p><u>Minority</u>: will not bind subsequent grantees unless their lots are expressly restricted in writing</p>	Where a common scheme exists, subsequent purchasers with NOTICE are bound.	Injunction

§ 1: EASEMENTS

1) Easement Defined

- This is the Most Formidable Non-possessor interest in land
- Easement is the *grant* of a non-possessor property interest that entitles the holder to some *limited use or enjoyment* of *another's* land.
- Servant Tenement: the other's land

2) Affirmative v Negative Easements

- Affirmative: (the majority of easements are affirmative): This entitles the holder to go out and *do something* on another's land (the servient tenement)
- Negative: Entitles the holder to *Compel servient landowner* to *Refrain* from doing something that would otherwise be allowed. Remember **LASS**

L: Light, A: Air, S: Support, S: Streamwater

- Historically & currently, Negative easements were not favored by the courts
- There is no natural or automatic right to a negative easement
- Negative Easements can be created **ONLY EXPRESSLY, BY WRITING, SIGNED BY GRANTOR**

3) Appurtenant to Land or Held in Gross Easements

- Easement Appurtenant: When the easement benefits its holder in his *physical use or enjoyment* of the property.
 - *How to tell when you've got an Easement Appurtenant?*
 - Remember, IT TAKES TWO
 - There will always be 2 Affected parcels of land to have an easement appurtenant
 - *Benefited Parcel* (the Dominant Tenement)
 - *Burdened Parcel* (the Servient Tenement)
 - *For Example*: A grants B a right of way across A's land, so that B can more easily reach his land. B's land is Benefited by the Easement. In easement parlance, B's land is the Dominant Tenement. A's land is Serving B's easement, therefore, it is the Servient Tenement. Notice that there must be 2 parcels involved.
 - B has an easement appurtenant to B's Dominant Tenement
 - Easement in Gross: confers its holder with only some *personal or pecuniary* advantage that is *not related to the use or enjoyment of the land*. Here, servient land is burdened. However, there is no benefited or dominant tenement.
 - Only 1 parcel is involved. *In Gross* when give the easement holder some personal or financial gain unrelated to the dominant tenement
 - *For Example*: A billboard, utility lines, Right to fish or swim in a pond

4) Transferability of Easement

- Easement Appurtenant: Passes *Automatically* with the dominant tenement, regardless of whether it is even mentioned in the Conveyance
 - Don't be fooled by the MBE; it NEED NOT be in deed to be transferable
 - The Easement Appurtenant transfers automatically with the dominant parcel
 - *For Example*: A has an easement entitling her to cut across B's lawn to get more easily to her land.
 - This is a *Easement Appurtenant*
 - A's Land is *Dominant Tenement*
 - B's Land is *Servient Tenement*

- Now, A sells her parcel to Mr. X, with no mention of the easement. Does Mr. X enjoy the easement?
 - YES: the easement appurtenant is transferred automatically with the dominant estate.
 - Further, beside the **benefit**, the **burden** of the easement appurtenant Also passes **automatically** with the servient land. Unless the new owner is a **Bona Fide Purchaser with no knowledge or Notice of the Easement**
- Easement in Gross; Not transferable unless it is for Commercial Purposes
 - *For Example*: A has an easement entitling her to swim in B's lake.
 - This is an *Easement in Gross for Personal Use*
 - *Is it transferable?* NO: personal easements in gross are NOT Transferable
 - *For Example*: Star-Kist has an easement to use B's lake to fish for bait for Star-Kist's tuna company.
 - This is an *Easement in Gross for Commercial Purposes*
 - *Is it transferable?* YES: easements in gross for commercial purposes are Assignable

5) Creation of Affirmative Easement

- Note: Negative Easements can only be created *Expressly*
- But, for Affirmative Easements, remember **PING** (Prescription, Implication, Necessity, Grant)
 - **G: Grant** – Remember, an easement is a property interest. The statute of Frauds applies to an easement that is not capable of being performed within a year (i.e., those that last for more than a year). Must comply with the formal requirements of a Deed. Most Easements are created by **Deed of Easement**. This is the Grant.
 - **I: Implication** – Implied from an *Existing Use*
 - *For Example*: A owns 2 lots. Lot 1 is hooked up to a sewer drain located on Lot 2. A sells Lot 1 to B, with no mention of B's right to continue to use the drain on A's remaining Lot 2. The court may nonetheless **imply an easement on B's behalf if**:
 1. Previous use had been **readily apparent** to anyone making a Routine inspection of the premises
 2. Parties **Reasonably Expected** that the use would continue after division.
 - **N: Necessity** – Usually applies to a **Land-locked** setting.
 - Rule: Easement of Right of Way will be **IMPLIED BY NECESSITY** if Grantor conveys a portion of land with no way out.
 - **P: Prescription** – Analogous to Adverse Possession. Thus, an Affirmative Easement can be acquired by satisfying the elements of adverse possession (Remember **COACH**)
 - *C: Continuous, O: Open & Notorious, A: Actual, C: under Claim of Right, H: Hostile*
 - *Will transform a Trespass into an Easement by Prescription*
 - Permission: defeats the acquisition of easement by prescription. An easement by prescription requires that the use be hostile.
- 6) **Scope of Easement** – will be **fixed by the terms of the grant (or conditions)** that created it. Point: Easement Holders unilateral expansion of scope of easement is NEVER ALLOWED
 - *For Example*: A grants B an easement to use A's private road to get to an from B's parcel, Blackacre
 - B has an Easement Appurtenant to B's Dominant Tenement

- A's parcel is the Servient tenement
- *Subsequently, B purchases the adjacent Greenacre, with its small marina. May B expand the use of the easement to benefit Greenacre?*
 - NO: B is not permitted to expand the use of the easement UNILATERALLY to benefit *a non-dominant parcel*.

7) **Termination of Easement** – 8 Ways to Kill an Easement: **END CRAMP**

- **E – Estoppel** : Servient Tenement owner *Materially* changes his position in *Reasonable Reliance* on the Easement Holder's Assurances that this easement will no longer be enforced.
 - *For Example*: A tells B that A will no longer be using her right of way across B's parcel. In reasonable reliance, B builds a swimming pool on B's parcel, thereby depriving A of the Easement.
 - *In Equity*: A, the easement holder, is ESTOPPED from enforcing the easement
- **N – Necessity**: Easements created by Necessity Expire as soon as the necessity *ends*
 - Pertains only if the original easement, born of necessity, *arose impliedly*
 - If easement by necessity had been reduced to a *writing*, it will NOT automatically terminate when the necessity ends
- **D – Destruction**: Destruction of Servient estate, other than through willful conduct of the servient owner, will terminate the easement
- **C – Condemnation of the Servient Estate**: If the government Condemns the servient easement, it will terminate
- **R – Release**: Released *given by Holder* of easement to the owner of the servient land will terminate the easement. Remember, the Statute of Frauds applies. If the easement could have endured beyond 1 year (i.e., was not capable of being performed within one year), then the release needs to be in writing to be enforceable
- **A – Abandonment**: Easement holder must demonstrate by *physical evidence* the intention to Never Again make use of the easement
 - Note: Abandonment requires *physical action* by the easement holder. *For Example*, A has a right of way across B's parcel. A erects a structure on A's parcel that prevents her from ever again reaching B's parcel. That is the sort of action that signifies Abandonment. By contrast, *mere non-use, or mere words, are insufficient* to terminate by abandonment.
- **M – Merger Doctrine (a.k.a. Unity of Ownership)**: Easement is Extinguished when title to the Easement and Title to the Servient Land *vest in the same person*
- **P – Prescription**: Easement holder sits on rights. Over time, Servient landholder can Extinguish the Easement by Interfering with it in Accordance with the **COACH** elements of Adverse Possession (Continuous, Open & Notorious, Actual, under Claim of Right, Hostile)
 - *For Example*: A has an easement of right of way across B's parcel. B erects a chain link fence on B's parcel, thereby precluding A from reaching it. Over time, B may succeed in extinguishing the easement through Prescription (via COACH).

§ 2: THE LICENSE

- Note: this is the most flimsy of all servitudes
- **License (defined)**
 - Freely revocable, it is a mere privilege to enter another's land for some narrow, delineated purpose.
 - *For Example*: Laundry service, Newsboy, Ticketholder
 - It is so informal that ***the statute of frauds does NOT apply***
 - May be revoked at any time, ***at-will of licensor***, unless estoppel applies to bar revocation.
- **Classic License Cases**
 - ***Ticket Cases***
 - *For Example*: purchase tickets to the theatre. When you get there, all other ticket holders are admitted except for you. Is that permissible?
 - *Well*, all you have is a ***freely revocable license*** (though may later have a breach of contract case). For property purposes, you are not entitled to see the show.
 - ***Neighbors Talking by Fence Cases***
 - Nothing good ever comes from neighbors talking by the fence (for MBE purposes)
 - *For Example*: A tells B across the fence that B can have the easement (non-PING). The oral easement is *Unenforceable*. ***An unenforceable oral easement instead creates a mere, freely revocable license***

§ 3: THE PROFIT

- Definition of Profit: Profit allows a Holder to enter Servient Land and to take from it the ***soil or some substance of the soil (such as Minerals, Timber, Oil)***.
- Shares all the Easement Rules

§ 4: THE COVENANT

1. ***Covenant Defined***: To do or refrain from doing something related to the land. (NOT the same as an easement, it is NOT a grant of a property interest; but it is a CONTRACTUAL limitation)
2. ***Negative v Affirmative Covenants***
 - Negative: (a.k.a. Restrictive Covenants). *For Example*: promise NOT to build for commercial properties on any of the land.
 - Affirmative: *For Example*: I promise to maintain in good repair a fence along our common border.
3. ***Promise as Covenant v. Equitable Servitude***
 - On the basis of the relief that is sought:
 - If Plaintiff wants **money** damages, must construe promise as a **covenant** (at-law)
 - If Plaintiff wants **injunctive** relief, must construe promise as **equitable servitude** (at-equity)

§ 5: EQUITABLE SERVITUDES

1. *Equitable Servitudes Defined:*

- A promise that Equity will enforce against Successors. Remedied by Injunction

2. *Creation: Ways to Create in such a way as to Bind Successors*

- Remember **WITN(ES)**
- **W: Writing** – Usually in writing
- **I: Intent** – original parties intend servitude to be enforced by and against assignees
- **T: Touch & Concern** -
- **N: Notice** – Assignees **Burdened** land **MUST** have had **NOTICE** of the Equitable Servitude for it to be enforced
- **ES = Equitable Servitude (No Privity Requirement - horizontal or vertical)**

3. *Implied Equitable Servitude: General or Common Scheme*

- **MBE** (only) – *For Example:* A subdivides her land into 50 lots. She sells lots 1 through 45 through DEEDS that contain Covenants Restricting Use to Residential Purposes. A then sells one of the remaining lots to a commercial entity, B, by deed, which contains no such covenant. B now seeks to build a convenience store on his lot. Can he be Enjoined from doing so?
 - **Yes:** if the 2 elements of the General Or Common Scheme Apply. Under the Common Scheme Doctrine, the court will imply a Reciprocal Negative Servitude to hold the unrestricted lot holder to the restrictive Covenant
 - **MA:** Does not follow or recognize the General Or Common Scheme Doctrine. MA is in the minority. MA statute of frauds bars the enforcement of any restrictions against buyers whose lots are not expressly restricted in writing
 - **General or Common Scheme Doctrine Requirements**
 1. *When the Sale began, subdivider had a General Scheme of Residential Development which included the lot now in question*
 2. *The Unrestricted Lot Holder MUST have had NOTICE of the Restriction in order for the General or Common Scheme of Implied Equitable Servitude to be in effect (non-MA). The Forms of Restriction can be AIR*
 - A: Actual** – the unrestricted lot holder literally knew of the restrictions in the general scheme
 - I: Inquiry** – the neighborhood appears to conform to some common scheme to any reasonable person who investigates his purported purchase
 - R: Record** - IMPUTED to buyers on basis of Public Records
 - MBE:** (majority): A subsequent Buyer is NOT on Record notice of the contents of prior deeds transferred to others by a Common Grantor
 - MA:** (minority): *Subsequent Buyer IS ON RECORD NOTICE of the restrictions contained in prior deeds transferred by a common grantor. (But MA doesn't recognize common scheme doctrine, anyway).*

4. *Equitable Defenses to enforcement of Equitable Servitude*

- **Changed Conditions:** Must be so **pervasive** and so **infectious** that the entire essential character has changed. A piecemeal change is not good enough.

PART FOUR: ADVERSE POSSESSION

1. *Concept of Adverse Possession*

- Possession, for a **statutorily described period** can sometimes **ripen into title**

2. *Elements of Adverse Possession*; Remember **COACH**

- **C: Continuous** – uninterrupted, for statutory period
 - MA: 20 Years (strictly enforced)
- **O: Open & Notorious** – Visible Occupation. Similar in nature to the type of possession a rightful owner would make.
- **A: Actual** – Must be actual, not fictitious, possession
- **C: Claim of Right** – In objective judgment, possessor must INDICATE by Words & Actions that he Holds this land as Against the whole world. Claim of Right Standard is never subjective, but always objective
- **H: Hostile** – Possessor does not have Rightful Owner's permission to possess.

3. *Tacking*

- One Adverse Possessor May Tack on to his time with the land *his predecessor's* time with the land So Long As there is **privity** between them.
- Privity is Liberally Defined, here: Whenever any *non-hostile* nexus exists (like blood, contract, deed or will)
- Only time that tacking is NOT permitted is when there has been an ouster
 - *For Example*: O owned Blackacre in 1976 when A entered adversely. A was on her way to satisfying the elements of adverse possession when in 1986, Mr. X ousted her. Mr. X stays on the land through 1996. Our jurisdiction has a 20 year statute of limitations (for adverse possession). In 1996, who owns Blackacre?
 - O owns Blackacre (No tacking permitted when subsequent Taker has ousted the predecessor). Ouster defeats Privity for tacking purposes.

4. *Disabilities Influence on Adverse Possession*

- Statute of Limitations **will not run** against the True Owners Afflicted with a Disability at the **inception** of the adverse possession.
- Common disabilities include: Insanity, Infancy, Imprisonment
- Disability protects the owner from adverse possession only if he was suffering from it at the Start of the Adverse Possession.
 - *For Example*: O owned Blackacre in 1975 when A entered adversely. In 1985, O went insane. In 1995, O recovered. Our jurisdiction has a 20 year statute of limitations. In 1995, who owns Blackacre?
 - A. (Assuming he satisfies the other COACH elements). O can't claim benefit of disability since he was not suffering from the disability at the inception of the adverse possession.

PART V: LAND CONVEYANCING: THE PURCHASE & SALE OF REAL ESTATE

- Every Conveyance of Real Estate consists of a Two-step Process
 1. The Land Contract, which endures up until Step 2
 2. The Closing, where the deed becomes the operative document

§ 1: The Land Contract

1. *The Land Contract & the Statute of Frauds*

- Standard: Land contracts must be in *writing*, signed by the *party against whom enforcement is sought*. The Land contract must contain a *Description* of the Land, and State some *Consideration*
- If amount of land recited in Contract is > actual size of parcel:
 - *For Example*: B enters into a contract to purchase a farm. The contract recites that the farm is 100 acres. When B has a survey done, B learns that the farm is actually 98 acres. What is B's remedy?
 - *Specific Performance with a Reduction in the Purchase Price that is commensurate with the Acreage deficiency*.
 - Give B a pro rata adjustment of purchase price
- 1 Exception to the Statute of Frauds: Doctrine of Part Performance; Only 2 Things a Buyer can do to Satisfy this doctrine (that is, take the oral contract out of the Statute of Frauds)
 1. *Buyer Takes Possession of Blackacre and pays all or a Substantial part of the Purchase Price*
 2. *Buyer Takes Physical Possession and Makes Substantial Improvements*
Thus: Possession + Payment/Improvement

2. *The Problem of Risk of Loss*

- MBE: Applies the **Doctrine of Equitable Conversion**. Once the contract is signed, the Buyer, In Equity, is considered the owner of the land (subject to the condition that he remit purchase price at closing). The end result: if between the signing of the contract and the closing Blackacre is destroyed by Act of God (force majeure) Buyer bears the risk of the loss unless contract says otherwise
- MA: Does NOT recognize doctrine of Equitable Conversion of Title. Therefore, in MA, the party in possession prior to closing bears the risk of loss.

3. *Two Implied Promises in Every Land Contract: Marketable Title + No False Statements of Material Fact*

- Seller Promises to Provide MARKETABLE TITLE. This implied warranty of marketable title is contained in EVERY land contract
 - Standard: Title is free from Reasonable Doubt. (free from lawsuits & threats of litigation)
 - 3 Circumstances which render Title Unmarketable:
 - a. **Adverse Possession**. For MBE, Title acquired by Adverse Possession is unmarketable. If even a Portion of the title rests on Adverse Possession, the whole is unmarketable. Seller must provide good record title
 - b. **Encumbrances**. Marketable title means unencumbered fee simple. So unless buyer has waived, presence of a servitude, or lien, renders the title unmarketable. MBE: seller has right to satisfy an outstanding mortgage with the proceeds of a sale from the buyer at closing in order to make title marketable.

- c. **Zoning Violations.** Title is unmarketable if property violated an applicable zoning ordinance. Mere existence of an ordinance or zoning scheme is of no consequence. Only a violation of that code or scheme renders title unmarketable.
 - Seller Promises not to make any FALSE STATEMENTS OF MATERIAL FACT
 - Majority: will hold seller liable for not only making an affirmative false statement of a material fact, but also for failing to disclose a latent defect.
 - If told that a contract has a general disclaimer or waiver, it will be a nullity on this point. Seller is always liable for fraud.
4. **Land Contract contains NO Implied Warranties of Fitness or Habitability**
- The common law norm is Caveat Emptor
 - One important exception: The Implied Warranty of Fitness and Workmanlike Construction applies to the sale of the *NEW HOME* by a Builder-vendor

§ 2: The Closing

- Deed becomes the controlling document: The land contract dies at the closing, unless otherwise agreed to. Once the Deed is accepted, discharge all the contractual obligations. (if the MBE says the closing has occurred, rules out all answers regarding contract (such as marketable title, etc.)
- *How does the deed pass legal title from the Seller to buyer? It must be **LEAD, Lawfully Executed and Delivered***

1. Lawful Execution

- Standard: Deed must be in *Writing, Signed by Grantor* (for MBE: need not recite nor pass any *Consideration*), and *Identify the Parties & the Land*
- Description of Land: Does not have to be perfect, only provide an *Adequate Description*. Adequate is defined in terms of whether it gives a good lead as to the location of the property.
 - *For Example*: The deed recites O conveys “all of O’s land” or “all of O’s land in Essex County.” Would such descriptions suffice?
 - *YES*: Adequate description because it gives a good lead. With research, will know precisely what O has conveyed.
 - *For Example*: O conveys “some of my land in Sussex County.” Does such a description satisfy the standard?
 - *NO*: Fatally flawed. *Some* is way too vague. Even with research, won’t know what land he is talking about.

2. Delivery

- Grantor **physically or manually transfers** the deed to the grantee; Use of *mails or agent* is permissible here.
- Recipient’s **express rejection** of Deed **defeats delivery** (delivery requires acceptance)
 - *For Example*: As a surprise graduation gift, A’s Aunt Gertrude executes a deed conveying Blackacre to A. A responds, “I can’t accept such a lavish gift.” Blackacre belongs to:
 - *Aunt Gertrude*: There was no effective acceptance for the delivery of the deed
- **No** requirement for actual physical transfer of instrument itself (for delivery purposes). Delivery is a legal standard of *present intention to be legally bound*.

- If deed, absolute on its face, is accompanied by an oral condition, the **oral condition is void** and delivery is deemed accomplished
 - *For Example:* O conveys a deed to Blackacre that is absolute on its face, but says to grantee, “Blackacre is yours only if you survive me.” This oral condition is:
 - *Void.* It is not a provable oral condition. However, delivery is deemed accomplished.
- Delivery **by escrow**. Grantor can deliver an executed deed to a 3rd party/escrow agent with instructions that deed is to be transferred to grantee once certain conditions are met. When the conditions are met, Title Passes *Automatically* to grantee. Before the conditions are met, though, grantee is not yet vested with title.
- **Covenants for Title & the 3 Types of Deeds:**
 1. **The Quitclaim**
 - This is the worst that a buyer could hope for
 - In MA, A quitclaim deed is known as a **release** deed.
 - This contains no covenants at all. Grantor isn’t even promising that he has title or anything else to convey.
 2. **The General Warranty Deed**
 - This is the Best a buyer could hope for
 - In MA, this is still called a General Warranty Deed
 - This warranties against ALL defects in Title, including those attributable to the Grantor’s predecessors
 - Generally, the General Warranty Deed contains **6** covenants (the first 3 of which are Present Covenants meaning that it can be breached only at the time delivered. The statute of limitations begins to run from the instant of delivery. Conversely, Future Covenants are breached, if ever, after the grantee is disturbed in possession. The statute of limitations for a future covenant won’t begin running until that future date when the grantee is disturbed in possession.
 - **Covenant of Seisin** (present) – Grantor warrants that he owns the estate that he now claims to convey
 - **Covenant of Right to Convey** (present) – Grantor promises that he has the Power to Make the Conveyance (i.e., there are no restrictions on the grantor’s power to Sell, such as infancy, insanity, disability)
 - **Covenant Against Encumbrances** (present) – Grantor promises No encumbrances (such as Servitudes, Mortgages, Liens)
 - **Covenant for Quiet Enjoyment** (future) – Grantor promises grantee that the grantee will not be disturbed in possession due to some 3rd party’s legal claim of title
 - **Covenant of Warranty** (future) – Grantor promises to defend the grantee if someone else does assert a lawful claim of title
 - **Covenant of Further Assurances** (future) – Grantor promises to do whatever future acts are reasonably necessary to perfect the grantor’s title

3. *The Statutory Special Warranty Deed*

- In MA, this is called a *Quitclaim*
- Contains 2 promises that grantor makes on behalf of self (not predecessor)
 1. *Grantor promises he hasn't already conveyed the estate to anyone other than the grantee*
 2. *Grantor promises that the estate is free from Encumbrances of the Grantor's making*

§ 3: The Recording System

- The Model: The Case of the Double Dealer
- *For Example*: O conveys Blackacre to A. Later, O conveys Blackacre, the same parcel, to B. O, the double dealer, has skipped town. In the battle of A v B, who wins?
- Remember 2 *Brightline Rules*
 1. *If B is a BONA FIDE PURCHASER and we are in a NOTICE JURISDICTION (such as MA), B wins, regardless of whether or not she records before A does.*
 2. *If B is a BONA FIDE PURCHASER and we are in a RACE-NOTICE JURISDICTION, B wins if she records properly before A does.*
- Note- Recording Acts exist ONLY to protect the Bona Fide Purchasers & Mortgagees.
- Bona Fide Purchaser: Purchase Blackacre *for value* and *without notice* (that someone else had previously bought it)
- Note: *Routine Value Questions*
 1. *The bargain basement sale: B paid \$50,000 cash for Blackacre, when its Fair Market Value is estimated at \$100,000. Is B a purchaser for Value?*
 - YES – so long as B remits *substantial pecuniary consideration*, qualifies him as a purchaser for value. It is irrelevant that the purchase price is not the same as the Fair Market Value. Requires Real, Substantial Consideration. Love & Affection never suffice.
 2. *The Case of the Doomed Donee*:
 - Recording statutes NEVER protect donees, heirs, or devisees.
 - *For Example*: B is O's heir, or devisee or donee. In a recording statute question, B: Always loses because he is NEVER a Purchaser For Value.
- Note: *3 Forms of Notice that a Buyer may Potentially be charged with (AIR)*
 1. **Actual Notice** – Literal knowledge of the earlier conveyance. If on notice, can't be a bona fide purchaser.
 2. **Inquiry Notice** –
 - MBE: Buyer of Real Estate has a **duty to inspect** the land before the closing. Ergo, whether he looks at the property or not, B is on inquiry notice of whatever an exam of the land would reveal. If another is in possession, B is on inquiry notice of that fact regardless of whether B actually checked it out. PLUS, if a recorded instrument makes reference to an unrecorded transaction, the grantee has a **duty to make a reasonable follow-up inquiry** to learn the nature of the unrecorded interest.
 - MA: Does **not** recognize inquiry notice. IN MA, buyer is held to ACTUAL and RECORD notice.
 3. **Record Notice** – Another form of Constructive Notice, imputed to Buyers on Basis of the Public Record.

- *For Example:* B is on Record Notice of A's deed if at time B takes, A's deed was properly recorded within the chain of title. B cannot be a Bona Fide Purchaser if A had properly recorded before B entered the picture.
- *In the model, what if A has not recorded, or has not recorded properly at the time B takes? Assume that B is a Bona Fide Purchaser. Does B win?*
 - Depends on whether notice or race-notice jurisdiction
 - Notice (MA): B wins
 - Race-notice: B wins if also wins the race to record
- **Recording Statutes**
 1. **The Notice Statute:** "A conveyance of an interest in land shall not be valid against any subsequent purchaser for value, without notice thereof, unless the conveyance is recorded."
 - B, as subsequent Bona Fide Purchaser, wins in a notice state
 - B's status, in notice state, is determined AS SOON AS he takes
 - In Notice state, it is irrelevant if A was a bona fide purchaser and records an instant before B
 2. **The Race Notice Statute:** "Any conveyance of an interest in land shall not be valid against any subsequent purchaser for value, without notice thereof, whose conveyance is first recorded."
 - B, to win, needs to be a bona fide purchaser PLUS win the race to record.
 - *For Example:* On March 1, O conveys to A, a bona fide purchaser who does not record. On April 1, O conveys the same parcel to B, a bona fide purchaser who does not record. On May 1, A records.
 - *Who Takes Blackacre in a Notice Jurisdiction?* B. At time B takes, she is a bona fide purchaser. It doesn't matter that at time A takes, she was a bona fide purchaser. It also doesn't matter that A ultimately records 1st before B. It also doesn't matter that B never records. (B, though, had better record to protect him from a future C)
 - *Who takes in a Race-Notice Jurisdiction?* A. A was a bona fide purchaser when took and won the race to record.
- *Back to the original model, note that in either a Notice or Race-Notice Jurisdiction, B's status as a Subsequent Bona Fide Purchaser will be defeated if A had promptly and properly recorded before B takes. In other words, A's proper recordation places subsequent buyers on Record Notice, thereby defeating their status as Bona Fide Purchasers.*
- *To give Record Notice to Subsequent takers, the Deed must be recorded PROPERLY, within the Chain of Title. This refers to the series of recorded instruments that give record notice to subsequent takers. In most states, including MA, arrive at chain of title by searching the Grantor-Grantee Index*

- 2 Chain of Title Problems

- 1. The Problem of the Wild Deed

- MBE will give a lengthy fact pattern, don't get intimidated.
 - *For Example:* O sells Blackacre to A, who does not record. A sells to B. B records the A-to-B deed.
 - *The A-to-B Deed, although recorded, is NOT connected to the Chain of Title because it Contains a MISSING GRANTOR (the O-to-A link is missing).*
 - *The A-to-B Deed, therefore, is the **Wild Deed**. (Wild Deed, I think I loathe you). The wild deed is the outlaw, not hooked up to the chain of title. This A-to-B deed will never be found by the title search. The missing link makes it impossible for the A-to-B deed to be recorded properly.*
 - *O, the initial grantor and dirty double dealer, then sells Blackacre to C. Assume that C has no actual or inquiry knowledge of the O-to-A or A-to-B conveyance. C records. O skips town, IN the contest of B v C, who wins?*
 - C will win. (In both notice & race-notice jurisdictions). B's act of recording is a nullity. Rule of Wild Deed: If a Deed entered on the records has a grantor unconnected to the chain of title, the deed is a wild deed, and it is a nullity, as if it never happened. Hence, C, the subsequent Bona Fide purchaser:
 - In notice: subsequent bona fide purchaser (for value, without notice) will win, regardless of recording
 - In Race-notice: subsequent bona fide purchaser + 1st to Record properly, will win

- 2. Estoppel by Deed

- *For Example: in 1950, O owns Blackacre. He is thinking about selling it to X, but for the time being, decides against it. In 1950, X, who does not own Blackacre, sells it anyway, to A. A records. In 1960, O finally sells Blackacre to X. X records. In 1970, X, the double dealer, sells Blackacre to B. B records.*
- *As between X and A, who owned Blackacre from 1960-69? A. by principal of **estoppel by deed**. One who conveys realty in which he has no interest is Estopped from denying validity of that conveyance if he subsequently acquires title to that land which he previously purported to transfer. So here, although A has nothing in 1950, in 1960-when X gets title to the land- A is deemed the owner. Throughout the 1960's, A owns.*
- *Who owns Blackacre in 1970? B. So long as B is a Bona Fide Purchaser, B will win in both notice & race-notice jurisdictions. A's earlier recording is a nullity. A recorded too soon (before X had acquired title and A was a constructive owner). A title search would never find A's deed. Title Searchers are entitled to Assume that nobody sells land until they own it. Thus, B would win as a Bona Fide Purchaser in both Notice and Race-Notice jurisdictions.*

§ 4: Mortgages

- The Model: C, a creditor, is thinking of lending O \$50,000. O offers Blackacre as collateral.

1. *Creation of a (legal) Mortgage*

- Mortgage = any conveyance of an interest in land, intended by the parties to be security for the repayment of a debt.
- A mortgage is the union of 2 elements: **1. A debt, and 2. Voluntary transfer** (usually in writing) of a security interest in debtor's land in order to secure the debt
- *Mortgagee = Creditor, Mortgagor = Debtor*
- The written instrument is usually called the mortgage deed or a note (or a security interest in land, or a deed of trust, or a sale lease-back

2. *The Equitable Mortgage*

- *For Example:* O owns Blackacre. Creditor lends O a sum of money. The parties understand that Blackacre is collateral for the debt. However, instead of executing a note or mortgage deed, O hands the creditor a deed to Blackacre that is absolute on its face. This is called the **equitable mortgage**. The deed does not recite that it has been transferred as collateral, although that is what the parties intent.
- *As Between O and the Creditor:* the mortgage is enforceable. Even though it seems the creditor is now owner of Blackacre, Parole Evidence is freely admissible to show that the deed was transferred only as a security.
- *What if Creditor proceeds to Sell Blackacre?* The Bona Fide Purchaser, X, prevails over O and owns the land. O's only recourse is to proceed against Creditor for Fraud in hopes of Recovering the proceeds of the sale.

3. *Rights of the Parties (once the mortgage has been created)*

- Unless and until foreclosure, the *Mortgagor (debtor)* has **title and right to possess**. The *Mortgagee (creditor)* only has a **lien**.

4. *Transferability*

- **All parties to a Mortgage can Transfer their interests**
 - Mortgagee (creditor) can transfer his interest by **endorsing the note & assigning the mortgage**. A mortgage **automatically** follows a properly transferred note.
 - Mortgagor (debtor) who sells the Mortgaged Blackacre . The lien remains on the land, so long as the Mortgage instrument has been **properly recorded**. So Recording Statutes protect *mortgagees*.
 - *But who is Personally Liable on the debt if O (the Mortgagee-debtor) sells Blackacre to B?* It depends on whether B assumed the Mortgage
 - **If B assumes the mortgage**, Both O & B are personally liable. B is Primarily liable, O is secondarily liable
 - **If B takes subject to the mortgage**, B assumes **no personal liability** on the debt. O remains **solely personally liable**
 - However, if recorded, the mortgage remains with the land. So, if O can't pay, the mortgage may be foreclosed.

5. Foreclosure

- *Assuming that the Mortgagee-creditor must look to the land for satisfaction, how must he proceed?*
 - When the Mortgagor-debtor defaults, the Mortgagee-creditor **MUST** foreclose by **appropriate judicial proceeding**. No self-help allowed
- *What if the proceeds from the sale of Blackacre are less than the amount owed?*
 - Mortgagee-creditor may bring a personal action against Mortgagor-debtor for a **deficiency judgment**
- *By contrast, what if there is a surplus?*
 - Surplus is used to 1st, pay off all junior liens, in order of priority. If after that, there is still a surplus, it goes back to the mortgagor-debtor

6. Priorities

- If more than 1 Mortgagee-creditor has a security interest in Blackacre
 1. **Must record properly**. Until the creditor properly records, he has no Priority. Recording statutes thus protect mortgagees.
 2. **Once properly recorded, Priority determined by 1st in time, 1st in right**.
 3. **The Purchase Money Mortgage**: only entity who may defy the 1st in time, 1st in right rule. The PMM is a mortgage given to secure a loan that enables a debtor to acquire the encumbered land
 - *For Example*: C lends O \$100,000 so that O can purchase Blackacre. C takes as collateral a security interest in Blackacre, the very parcel that C's extension of value enabled O to acquire.
 - C is the Purchase Money Mortgagee
 - *Assuming that C records properly, he has*; 1st priority as to the parcel he financed. He has *Superpriority*
 - The Purchase Money Mortgagee's *Superpriority*
 - *For Example*: C₁ lends \$200,000 to O, taking a security interest in all of O's real estate holdings, "whether now owned or hereafter acquired." *That is a lawful collateralization. (also known as the After Acquired Collateral Clause)*. C₁ records the mortgage note. Six months later, C₂ lends O \$50,000 to enable O to acquire a parcel known as Blueacre, taking back a security interest in Blueacre and recording that interest. (*This makes C₂ a Purchase Money Mortgagee*). Subsequently, O defaults on all outstanding obligations. All he has left is Blueacre. Who has first priority in Blueacre, C₁ or C₂?
 - C₂ - The Purchase Money Mortgagee has 1st priority as to Blueacre (this is Superpriority)

§ 5: Lateral Support

- If land is improved by buildings and an adjacent landowner's excavation causes that improved land to cave in, the excavator will be liable only if he acted **negligently**
- **Strict Liability** does not attach to the excavator's actions unless: it can be shown that because of the excavator's actions, the adjacent improved land would have collapsed even in absence of the improvement

§ 6: Water Rights

- The 2 Major systems for determining the allocation of water in **watercourses**, such as streams, rivers, and lakes are the Riparian Doctrine and the Prior Appropriation Doctrine
 1. **Riparian Doctrine**
 - The water belongs to those who own the land **bordering** the water course. These people are called **riparians**. Riparians Share the right of **reasonable use** of the water. One riparian is liable if his use **unreasonably interferes** with the use of another riparian.
 2. **Prior Appropriation Doctrine**
 - The water initially belongs to the State, but the **Right to Divert** it can be acquired by an individual. The **Right of Use** may also be Acquired. This is regardless of whether the individual is a Riparian owner. Here, Rights are determined by **priority of beneficial use**, 1st in time, 1st in right. A person can acquire the Right to Divert or Use the water from a stream simply by being the first on the scene. Any productive or beneficial use suffices, including Agricultural purposes.
- **Groundwater**
 - The water beneath the surface of the earth that is **not confined to a known channel** (also called **percolating**). Majority: Surface owner can make reasonable use of the groundwater, but use must **not be wasteful**.
- **Surface Water**
 - Those waters which come from rain or springs or melting snow and that have not yet reached a natural watercourse or basin.
 - Common Enemy Rule (½ states, common law rule): A landowner may change the drainage on land (or make other reasonable improvements on land) to fight the flow of surface water. Many courts say the landowner is prohibited from causing any unnecessary harm to neighbors.

§ 7: Possessor's Rights

- The Possessor of land has the **right to be free of trespass and nuisance**
 - Trespass: Invasion of land by a **tangible, physical object** that **interferes with the right of exclusive possession**. To remove a trespasser, bring an action for **ejectment**
 - Private Nuisance: Substantial, Intentional, and Unreasonable Interference with one's use & enjoyment of land. While trespass requires actual, physical invasion, a nuisance does not. Thus, odors or noise could be a nuisance. For the interference to be substantial, must be **offensive to the average person in the community**. Won't be substantial if the problem is due to the plaintiff's *hyper-sensitivity* or *specialized use of the land*.
 - *For Example*: A operates a dog kennel located near a power plant. A notices that her dogs are chronically agitated, causing her to lose business. She learns that the power plant emits a high frequency sound heard by animals, but not humans. A sues the plant for nuisance. What result? A loses. Her use of land deemed hyper-sensitive, specialized

§ 8: Eminent Domain

- Defined: Federal, state, local governments have the power to take title to private property against the owner's will. However, if the government takes private property for public good, it must pay **just compensation** to targeted private landowners.
- Explicit Takings: When the government engages in condemnation proceedings or easement or servitude. Requires just compensation
- Implicit or Regulatory Takings: Private landowner claims that a government regulation has wiped out the land's economic value and is therefore a taking.
- Remedy for a Regulatory Taking:
 1. **Targeted Landowner may sue for injunction to invalidate the regulation**
 2. **Targeted private landowner may sue for money damages in a suit called REVERSE CONDEMNATION**

§ 9: Zoning

- Defined: Inherent power of the state derivative of its POLICE powers. State may enact statutes to **reasonably control** land use for the protection of general health, safety & welfare. It will be **invalid** if **no reasonable relation** to public welfare. Also, invalid if **discriminatory**.
- The Variance: Permission to depart from the Literal Requirements of the Zoning Ordinance. Granted or Denied by Administrative Action. 2 Main Types:
 1. **Use Variance** – harder to get. Permission to depart from allowed uses in a given zone
 2. **Area Variance** – Permissible use that presents a problem of ill-fit. *For Example*: want to build a house in a residential zone. Problem, the house is too small, this is a problem of ill-fit. Will require an area variance.
- The Non-conforming Use: A once lawful, existing use that is NOW deemed non-conforming because of a new zoning ordinance. In most instances, the non-conforming use can't be eliminated all at once, because to do so would likely be a taking. In many states, non-conforming uses are gradually eliminated through an amortization period.
- Unconstitutional Extractions:
 - *For Example*: A developer wants approval for development. Town OKs the plan, but requires the developer to build a park. This extraction represents something that a town seeks from a developer in exchange for giving the developer permission to build. The extraction will be **unconstitutional** if it is **not reasonably related (in nature & extent) to the impact of the proposed development**.