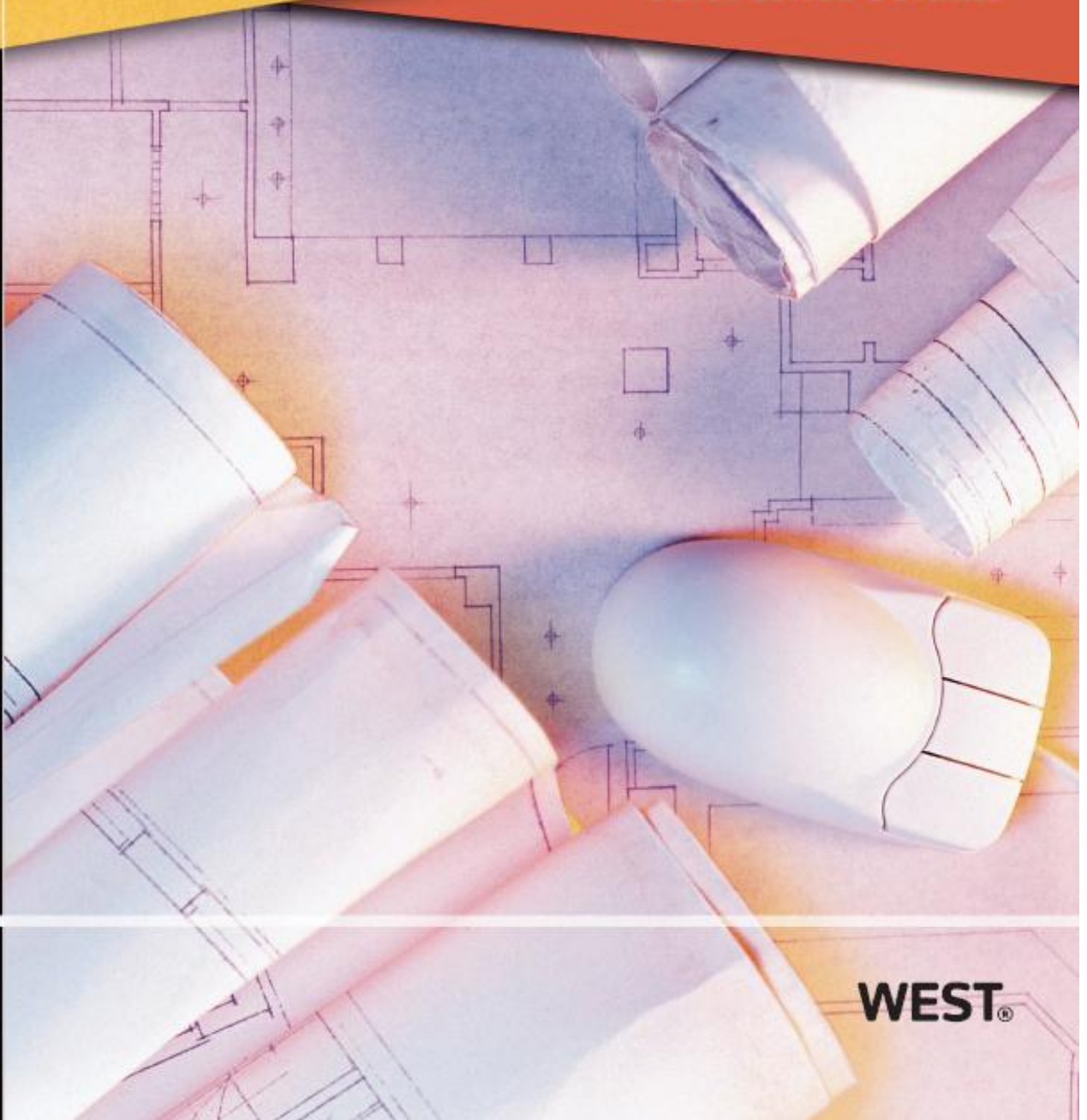


SIXTH EDITION

Property

Roger Bernhardt
Ann M. Burkhardt

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Property

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SIXTH EDITION

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610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

ISBN: 978-0-314-27550-9

Preface

This “Black Letter” is designed to help a law student recognize and understand the basic principles and issues of law covered in a law school course. It can be used both as a study aid when preparing for classes and as a review of the subject matter when studying for an examination.

Each “Black Letter” is written by experienced law school teachers who are recognized national authorities on the subject covered.

The law is succinctly stated by the authors of this “Black Letter.” In addition, the exceptions to the rules are stated in the text. The rules and exceptions have purposely been condensed to facilitate quick and easy recollection. For an in-depth study of a point of law, citations to cases in major student texts are given. In addition, a Text Correlation Chart provides a convenient means of relating material contained in the Black Letter to appropriate sections of the casebook the student is using in his or her law school course.

If the subject covered by this text is a code or code-related course, the code section or rule is set forth and discussed wherever applicable.

FORMAT

The format of this “Black Letter” is specially designed for review. (1) **Text.** First, it is recommended that the entire text be studied and, if deemed necessary, supplemented by the student texts cited. (2) **Capsule Summary.** The Capsule Summary is an abbreviated review of the subject matter which can be used both before and after studying the main body of the text. The headings in the Capsule

Summary follow the main text of the “Black Letter.” (3) **Table of Contents.** The Table of Contents is in outline form to help you organize the details of the subject and the Summary of Contents gives you a final overview of the materials. (4) **Practice Examination.** The Practice Examination in Appendix B gives you the opportunity to test yourself with the type of questions asked on an exam and compare your answer with a model answer.

In addition, a number of other features are included to help you understand the subject matter and prepare for examinations:

Perspective: In this feature, the authors discuss their approach to the topic, the approach used in preparing the materials, and any tips on studying for and writing examinations.

Analysis: This feature, at the beginning of each section, is designed to give a quick summary of a particular section to help you recall the subject matter and to help you determine which areas need the most extensive review.

Examples: This feature is designed to illustrate, through fact situations, the law just stated. This, we believe, should help you analytically approach a question on the examination.

Glossary: This feature is designed to familiarize you with the meaning of a particular legal term. We believe that the recognition of words of art used in an examination helps you to better analyze the question. In addition, when writing an examination you should know the precise definition of a word of art you intend to use.

We believe that the materials in this “Black Letter” will facilitate your study of a law school course and assure success in writing examinations not only for the course but for the bar examination. We wish you success.

THE PUBLISHER

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Capsule Summary of Real Property

■ PART ONE: INTERESTS IN LAND

I. THE IMPORTANCE OF POSSESSION

Possession, even absent ownership, is a protected property right. Possession plays a central role in property law because of the near-impossibility and great inconvenience of requiring people to prove ownership of all their goods at any time. Moreover, possession and the transmission of possession serve important practical and legal functions.

A. Possession of Unowned and Owned Goods

1. Unowned Goods

Unowned goods either never have been owned or have been abandoned by their owner. The first person who takes possession of an unowned good usually becomes its owner. To satisfy the possession requirement, the possessor must exercise physical control over the object and must intend to control it and to exclude others from it. The person who acquires ownership by taking possession of an object is entitled to all the same legal rights as any other owner.

2. Owned Goods

a) Relationship of the Owner and the Possessor

Unlike the situation with unowned goods, a person does not become the owner of an object that already has an owner simply by taking possession of it. In fact, the possessor is legally obligated to return the object to its owner. The scope of the duty depends on the type of relationship that exists between the possessor and the owner with respect to the property.

b) Lost or Mislaid Property

If an owner has lost or mislaid property, she does not lose title to it unless she abandons her ownership rights. The person who finds the property must return it to the owner. Until the owner is discovered, however, the finder or the owner of the premises where the property was found has a protected possessory right in the property. No one, except the true owner, has a right to take possession from the rightful possessor. The courts have created a number of tests to determine whether the actual finder or the owner of the premises where the property was found has the right to possess it until the true owner is discovered. The tests can be ambiguous in application and may produce conflicting results. However, most issues concerning found property are now covered by legislation or by tort and contract law concepts.

B. Gifts

Possession also plays a central role in the law of gifts. Usually, for a gift to be valid, the donor must deliver possession of the gift to the donee. By requiring the transfer of possession, the law requires that the donor demonstrate an understanding of the legal effect of the gift. Moreover, possession provides the donee with prima facie evidence that a gift was made.

1. Inter Vivos Gifts

An inter vivos gift is given by a living donor to a donee. It must be absolute and irrevocable to be valid.

a) Elements

The three necessary elements for an inter vivos gift are (1) intent, (2) delivery, and (3) acceptance.

1) Intent

The donor must intend to make a present, irrevocable gift, whether of a presently possessory interest or of a future interest. If the alleged donor only intends to make a gift in the future, the gift is an unenforceable promise because it is not supported by consideration. In determining whether the alleged donor had the requisite intent to make a present gift, a court will examine the donor's verbal and written statements and the other circumstances surrounding the gift.

2) Delivery

Normally, only a manual delivery of the gift to the donee satisfies the delivery requirement. If the donor cannot deliver the gift manually because of its size, location, or character, a court may accept some form of constructive delivery by which the donor transfers control over the gift though he has not given the donee actual possession. Similarly, the donor may satisfy the delivery requirement if she irrevocably delivers it to a third person as the donee's agent.

3) Acceptance

A donee is free to reject a gift for any reason. However, courts presume acceptance of a beneficial gift, rather than require an outward manifestation of the donee's acceptance.

2. Gifts Causa Mortis

A gift causa mortis is a gift made in anticipation of the donor's imminent death. It is an emergency measure that is designed to permit a dying person a last opportunity to dispose of his property. By its nature, it is a conditional gift—contingent on the donor's death. In effect, the donor is saying that the donee should have the property if the donor is dead. The conditional aspect of the gift has troubled some courts because it appears to be, in essence, a testamentary gift, which is governed by strict statutory requirements. This is particularly troublesome for courts because of the enhanced potential for false claims of gift causa mortis because the alleged donor is dead and obviously unable to testify.

II. ADVERSE POSSESSION

If a property owner fails to sue a person in wrongful possession of it during the statute of limitations period, the possessor may acquire title to the property.

A. Background

Adverse possession operates to confirm the possessory claims of persons that have been asserted long enough and visibly enough. In most cases, such a claimant believes that he owns the property.

B. Theory

A property possessor, even though not an owner, may protect his possession against everyone except the owner. Although the owner may bring an action against a wrongful possessor, the owner's failure to do so before the statute of limitations expires means that the possessor is then protected from action by anyone, stranger or former owner. At this stage, the possessor becomes the owner.

C. Elements

1. Continuous and Uninterrupted

An adverse possession must last as long as the statute of limitations for a cause of action to recover possession. The possession must be continuous, so that the owner could have sued at any time during the period. It must be uninterrupted, so that no other person possessed adversely to the adverse possessor during that period. The adverse possession of predecessors may be added (tacked) if privity exists between the adverse possessors.

a) Extenuating Features

The statute of limitations does not begin to run against future interests until they become possessory or against possessory interests if, at the time of the wrongful entry, the owner is under a legal disability. However, subsequent disabilities or transfers by the owner do not extend the time period once the cause of action has arisen.

2. Open and Notorious

An owner's lack of actual knowledge is not a defense, but adverse possession must be sufficiently open and notorious to give notice to any owner inspecting her property.

a) **Extent of Possession**

An adverse possessor acquires only the property he actually possessed, unless he has color of title to a larger area and actually possesses some part of it, thereby establishing constructive possession of it all.

3. **Hostile; Ouster**

An adverse possessor must act like an owner with regard to others and must allow them to be on the property only with her permission. Her possession must be hostile to the owner's title.

a) **Ouster; When the Initial Possession was Permissive**

When possession begins permissively, an ouster must occur before it becomes adverse to the owner. The possessor must notify the owner that the possessor has repudiated the owner's rights in the property.

b) **State of Mind**

In some jurisdictions, the adverse possessor will acquire title only if she possessed with a good faith belief that she owned the property. Other jurisdictions require the opposite; the adverse possessor must know that someone else owns the property.

D. **Effect**

Completion of a successful adverse possession gives the possessor an original title to the property, although it may not be marketable until established in court. The title is good only against those rights in the property that have been extinguished by the statute of limitations. Therefore, adverse possession will not extinguish future interests, nonpossessory interests, or interests owned by the government.

III. ESTATES

A. **Present Estates**

1. **Types**

a) **Freehold**

Freehold estates have no ascertainable termination date. At common law, a person in possession of a freehold estate was

said to have seisin. A fee simple estate was created by a grant to a person "and his heirs." These words of limitation indicated that the estate was inheritable and would not terminate on the grantee's death. A fee tail estate was created by a grant to a person "and the heirs of his body." This estate was inheritable only by the grantee's lineal descendants. A life estate was created when the grant did not include any words of inheritance. It ended at the grantee's death or the death of anyone else who was the measuring life.

b) Nonfreehold

Nonfreehold estates have ascertainable termination dates. They include the tenancy for a term, the periodic tenancy, the tenancy at will, and the tenancy at sufferance.

c) Defeasible Estates

Any freehold or nonfreehold estate can be made conditional (defeasible). An estate is determinable if some condition is incorporated into its duration ("so long as") and if the grantor retains the future interest following it. It ends automatically if the event occurs. Alternatively, an estate is subject to condition subsequent if the grant states that, upon the occurrence of a specified event, it may be reclaimed by the grantor ("but if . . . , then"). Termination of this estate is optional, rather than automatic. If the property passes to a third person when the condition occurs, rather than to the grantor, the estate is subject to an executory interest.

B. Future Interests

1. Possibility of Reverter and Power of Termination

If the owner conveys a determinable estate, he retains a possibility of reverter. If he conveys an estate subject to condition subsequent, he retains a power of termination (also known as a right of re-entry).

2. Reversion

A grantor retains a reversion whenever she gives away possessory estates smaller than she held. A reversion becomes possessory at the natural termination of the prior estate, rather than by cutting it short. A reversion is always vested, though it may be subject to divestment, and requires no special creating language. A grantor

may retain both a reversion and a possibility of reverter or a power of termination when she conveys an estate that is both defeasible and smaller than the estate she held.

3. Remainder

A remainder is a future interest created in a third person. It takes effect at the natural termination of a preceding estate, rather than by cutting it short. When a grantor conveys a series of estates of less than fee simple, a series of remainders may exist. A remainder is contingent if the taker is unascertained or if it is subject to a condition precedent. A remainder is vested if it is given to an ascertained person and is not subject to a condition precedent (other than natural termination of the prior interest). A vested remainder is defeasible if it is subject to a condition subsequent and is subject to partial divestment if it is given to a class of persons whose individual ownership shares are reduced as new members enter the class and claim their corresponding fractional shares.

4. Executory Interest

An executory interest divests a prior interest or cannot become possessory immediately upon termination of the prior estate. If the grantor conveys both a defeasible estate and the future interest following it to a third person, the future interest is a shifting executory interest. If the executory interest will divest the grantor's possessory estate, it is a springing executory interest.

C. Destructibility

At common law, a contingent remainder was destroyed if it had not vested before the prior estates terminated. It did not matter whether the prior estates ended naturally or prematurely. A merger of a preceding estate into a vested future interest also destroyed any intervening contingent remainders. All other future interests are indestructible.

D. Rule Against Perpetuities

This Rule invalidates contingent interests (contingent remainders and executory interests) that could vest or fail to vest more than 21 years after the end of some life in being at the creation of the interest. Thus, contingent remainders and executory interests must be certain to vest or fail within that time period, or they are invalid. Whether the interest actually vests in time is irrelevant if any possibility existed at the time of its creation that it might not, unless the jurisdiction has adopted a

wait-and-see rule. A remainder subject to open must be closed and vested as to every member within the time period, or the entire class gift is void, unless the jurisdiction follows the “rule of convenience.” An exception applies when both the present and future interests are given to charities. When an interest is invalid, it is stricken from the document, and either a new reversionary interest is created in the grantor or the preceding estate is enlarged.

E. Rule in Shelley’s Case

At common law, if a grantor conveyed a freehold estate to a grantee and a remainder to the grantee’s heirs in the same instrument, the remainder was converted to a remainder in the grantee. The remainder then might become vested and might merge with the preceding freehold estate. The Rule does not apply when one interest is legal and the other equitable, and it applies only to land.

F. Doctrine of Worthier Title

At common law, an inter vivos gift of a future interest to the grantor’s heirs was void. It remained a future interest in the grantor. A testamentary devise of an estate to a person who would take the same interest by intestate succession also was void.

G. Marital Estates

1. Dower

Dower was the surviving wife’s common law right to a life estate in one-third of all property her husband owned during the marriage if it was inheritable by her issue.

2. Curtesy

At common law, immediately upon marriage, a husband acquired a legal life estate in all property his wife owned (*jure uxoris*). As soon as the couple had a child who was born alive, the husband’s life estate was measured by his life alone and was not dependent on his wife’s continued survival (*curtesy initiate*). After her death, the husband’s life estate continued in its own right (*curtesy consummate*).

3. Statutory Forced Share

Many states statutorily provide a specified share of a decedent’s estate to the surviving spouse regardless of any conflicting will provisions.

4. Community Property

In community property states, property acquired during marriage generally is owned in equal shares by the spouses even if title is taken in only one spouse's name.

H. Restraints on Alienation

A deed provision that absolutely prohibits the grantee from conveying the property is invalid. However, a restraint may be valid when it is limited by time or by taker.

IV. CONCURRENT OWNERSHIP

A. Types

1. Joint Tenancy

A joint tenancy includes a right of survivorship, whereby the last surviving joint tenant takes the entire estate. A fee simple absolute estate need not be involved. A joint tenancy requires unity of time (the cotenants acquire title at the same time), unity of title (the cotenants acquire title by the same instrument), unity of interest (the cotenants own equal shares), and unity of possession (the cotenants have equal rights to possess the whole property). Because the modern presumption is for a tenancy in common, a conveyancing instrument specifically must state that the grantees are acquiring title as joint tenants with right of survivorship if that is the grantor's intent.

a) Severance

Each joint tenant can sever its interest from the joint tenancy, thereby converting that tenant's share into a tenancy in common. A severance occurs when one joint tenant conveys her interest by deed and may occur if she mortgages, leases, or contracts to convey her interest.

2. Tenancy in Common

The modern presumption is for a tenancy in common. The only required unity is possession.

3. Tenancy by the Entirety

This estate is a joint tenancy between a married couple. It cannot be severed or terminated except by death, divorce, or mutual agreement.

4. Condominium

A condominium owner has sole ownership of an individual unit in a project and owns the common parts of the project as a tenant in common with the other unit owners.

5. Cooperative Apartments

In a cooperative apartment building, a corporation owns the building, and the tenants own shares in the corporation, which usually entitles them to a lease to a particular apartment in the building.

B. Possession and Income

Each cotenant is entitled to possess all the property, subject to the other cotenants' equal rights to do the same. No cotenants may exclude the others, and sole possession by one cotenant resulting from the others' voluntary absence is not actionable. However, a few states charge the tenant in sole possession for a fractional share of the rental value. The Statute of Anne compels a cotenant who collects rent from third parties to account for them to the other cotenants.

C. Expenditures**1. Affecting Title**

Unequal contributions to the purchase price may cause the cotenants to acquire unequal interests if they take as tenants in common. Joint tenants are required to hold equal interests. Therefore, unequal contributions to a joint tenancy constitute either a loan or a gift.

2. Reimbursements

A cotenant is liable for a portion of the property expenses in a contribution action only if she is personally liable for them. Therefore, a cotenant who makes payments necessary to prevent a mortgage foreclosure or otherwise to protect the title may sue the other cotenants for contribution only if they were personally liable for the debt. Alternatively, the payments may constitute an offset in a partition or accounting action. A party who pays for repairs may not sue for contribution unless the other cotenant agreed to share the cost, but that expenditure may be recognized in an accounting or partition action. Similarly, a party who pays for improvements to the property without a cotenant's consent may recover the cost only in a partition or accounting action and only to the extent the improvements increased the land's value or the rents from the property.

D. Partition

Partition separates the undivided interests of cotenants into divided, separate interests. It is accomplished either by a physical division of the property (partition in kind) or by a sale of the property and division of the proceeds (partition by sale). Covenants between cotenants not to partition the property may be valid. A tenancy by the entirety may not be partitioned until after a divorce has converted it into a joint tenancy or tenancy in common.

E. Transfers**1. Inter Vivos**

Tenants in common and joint tenants may convey their fractional interests. A joint tenant's conveyance severs her interest from the joint tenancy. A tenancy by the entirety may be conveyed only by the owners' joint act.

2. Death Transfers

The right of survivorship gives the last surviving joint tenant or tenant by the entirety entire ownership of the property. Tenancy in common interests are subject to testamentary disposition or intestate succession.

V. LANDLORD AND TENANT**A. Leasehold Estates**

A leasehold is a nonfreehold estate that gives the tenant a possessory interest. The landlord retains a future interest (a reversion). The tenant's possession distinguishes a leasehold from a license or an easement.

B. Types of Tenancies**1. Tenancy for a Term**

A tenancy for a term arises when the parties have agreed on a termination date for the leasehold estate. If the term is for longer than one year, the Statute of Frauds usually requires a writing. Upon expiration of the term, the tenancy ends automatically.

2. Periodic Tenancy

A periodic tenancy arises when the landlord and tenant have agreed on a regular payment of rent but have not established a termination

date. It may arise by express agreement or by a tenant being in possession and paying rent on a regular basis. The length of the period is established according to the time for which rent is paid or calculated. A periodic tenancy is automatically renewed at the end of each period unless either party gives proper notice of termination. At common law, notice had to be given at least one period in advance or six months in the case of a tenancy from year to year.

3. Tenancy at Will

A tenancy at will exists when someone possesses another's land with her consent but without any agreement as to termination or payment of rent. It may be terminated at any time by either party, though most jurisdictions require some period of notice.

4. Tenancy at Sufferance

A tenancy at sufferance arises when a tenant holds over after the expiration of his term without the landlord's consent. The landlord can elect to treat him as a trespasser or as a tenant for another period or term.

C. Possession

1. Possession at Lease Commencement

Under the American Rule, a landlord is not responsible if the tenant cannot take possession because of interference by others, such as the prior tenant. The English Rule requires the landlord to deliver actual possession to the tenant.

2. Possession Throughout the Term

The covenant of quiet enjoyment, which is implied in every lease, imposes a duty on the landlord not to interfere with the tenant's possession during the term. A landlord is not responsible for interferences caused by strangers but is responsible if the tenant is evicted by a paramount title holder, by the landlord, or by the landlord's agents. The tenant's rent obligation is dependent on the covenant of quiet enjoyment. Therefore, a tenant is excused from further rent liability if the landlord or a paramount title holder evicts him.

3. Abandonment

At common law, if a tenant abandoned the premises during the term, the landlord was entitled to recover the rent from the tenant as

it came due and had no duty to mitigate. Alternatively, the landlord could elect to treat the abandonment as an offer to surrender the leasehold estate and could accept it by retaking possession for her own account. As a third remedy, the landlord could treat the abandonment as empowering her to act as the tenant's agent to relet the premises for the tenant's account. The landlord could hold the tenant liable for the difference between the amount received on reletting and the rent due under the lease. Some jurisdictions now permit a landlord to sue the tenant, immediately following his abandonment, for damages equal to the lost benefit of the bargain (the difference between rent reserved and the rental value for the balance of the term).

4. Holding Over

When a tenant wrongfully holds over after the expiration of his term, the landlord may elect to remove him or to compel him to remain for another term or period. If a landlord elects to treat the tenant as a trespasser, she generally cannot use self-help to recover possession but must bring an action to evict the tenant. Statutory summary dispossession or unlawful detainer procedures are available in every jurisdiction for this purpose. Alternatively, the landlord may compel the holdover tenant to remain, usually as a periodic tenant based on the original lease term or on the period for which rent was paid or calculated. Until the landlord makes an election, the holdover tenant is a tenant at sufferance.

D. Rent

If a tenant fails to pay the required rent, the landlord may sue for the rent and may terminate the tenancy and bring an action to evict the tenant. The landlord's right to retain an advance payment by the tenant depends on whether it was a security deposit to cover actual losses, payment of advance rent to cover specified future periods, or a bonus given to the landlord as consideration for executing the lease.

E. Condition of the Premises

1. Common Law

At common law, a landlord had no duty to repair either pre-existing or subsequently arising defects in the property and had to disclose only hidden (latent) defects. The tenant had an obligation to avoid waste. If the premises were destroyed or significantly damaged by

some outside cause, neither party had a duty to repair or to rebuild, and neither was entitled to terminate the lease. The parties could alter their positions by lease covenants.

2. Constructive Eviction

If a landlord fails to perform its duty to repair the premises and if the disrepair substantially interferes with the tenant's enjoyment of the premises, the tenant may claim that he has been constructively evicted and may quit the premises and terminate the lease. However, the tenant must show that the landlord was under an obligation to repair, that the disrepair substantially impaired the tenant's enjoyment of the premises, and that the tenant moved out within a reasonable time. If a court disagrees with the tenant, he wrongfully abandoned the premises and continues to owe rent.

3. Illegal Lease

Some courts hold that the rental of premises that violate the housing code constitutes an illegal agreement, which is invalid. The tenant can leave at any time.

4. Implied Warranty of Habitability

In most states, a landlord of residential property impliedly warrants that the property will be habitable for the entire lease term. If the warranty is breached, some states allow a tenant to remain in possession and to withhold rent until the repairs are made or to pay a reduced rent (rent abatement). Other states limit the tenant to a cause of action for damages. Some states authorize the tenant to make the repairs and to deduct the cost from the rent. Many states prohibit a landlord from evicting a tenant in retaliation for exercising these rights or from requiring a tenant to waive them.

5. Tort Liability

At common law, the tenant's possession of the premises eliminated the landlord's liability for personal injuries caused by defective conditions, subject to a few exceptions. (1) A landlord is liable for personal injuries caused by latent defects known to her and not disclosed to the tenant. She also may be liable under this theory for injuries to third persons. (2) A landlord is liable for injuries suffered by tenants and third persons in the common areas, because she is deemed to possess them. In some jurisdictions, courts have extended this exception to include harm resulting from criminal

activities occurring in the common areas. (3) A landlord is liable for her negligent repairs and for failing to make repairs when she has covenanted to do so. (4) Many courts now treat local housing and building codes as safety ordinances and hold a landlord liable for injuries arising from code violations. (5) A landlord can be liable for injuries to members of the public if she knew that the premises were going to be open to the public. (6) A landlord is liable for injuries caused by a condition on the leased premises that create an unreasonable risk of harm to people who are not on the premises. Some courts now hold landlords to the usual tort standard of exercising due care under the circumstances, rather than limiting the landlord's duty to the common law exceptions described above. Courts often hold that lease clauses exculpating the landlord from liability for injuries are invalid and ineffective against injured third parties.

F. Transfers

1. Right to Transfer

A tenancy is transferable unless the lease provides otherwise. A landlord may prohibit transfers or may require the tenant to obtain the landlord's prior consent. The landlord generally has no duty to act in good faith when granting or withholding consent, unless the lease provides otherwise. A no-assignment clause usually operates as a forfeiture restraint, which entitles the landlord to terminate the lease if an improper transfer has been made.

2. Kinds of Transfers

A tenancy may be assigned or sublet. An assignment occurs when the tenant transfers his entire remaining lease term. A sublease occurs when the tenant transfers less than the entire remaining term. In some jurisdictions, the distinction is made based on the parties' intent. A landlord may transfer the reversion.

3. Effect of Transfer

a) Assignment

If a tenant assigns, the assignee is in privity of estate with the landlord, and the assignee and landlord can enforce the lease's real covenants against each other. The tenant and landlord remain in privity of contract. An assignee who assigns his

interest no longer has privity of estate with the landlord and, therefore, no longer is liable for the rent, unless he assumed the lease obligations. The most recent assignee now has privity of estate with the landlord.

b) Sublease

A sublease creates neither privity of estate nor privity of contract between the subtenant and the landlord. The subtenant is not bound or benefited by the covenants in the lease. The sublessor and sublessee are in privity of estate and privity of contract. The sublease terminates if the lease terminates because the sublessee no longer can possess the property.

G. Discrimination in Leasing

A variety of federal, state, and local laws prohibit class-based discrimination in the leasing of property. The equal protection clause of the Constitution and § 1982 of the Civil Rights Act of 1866 both prohibit such discrimination. However, their effectiveness as a tool to combat discrimination is hampered by the necessity of proving discriminatory intent for the equal protection clause and, in many jurisdictions, for § 1982. Moreover, § 1982 applies only to racial discrimination, and the equal protection clause is effectively limited to protecting only members of suspect and quasi-suspect classes and applies only if state action exists. In contrast, the federal Fair Housing Act and a variety of state and local laws prohibit discrimination against a wider variety of classes of people, applies to private persons, and may require proof of only a discriminatory effect, rather than of discriminatory intent.

VI. EASEMENTS AND PROFITS

A. Definitions

An easement is a nonpossessory right to use another's land for a limited purpose. The easement holder is the dominant tenant. The owner whose land is subject to the easement is the servient tenant, and his land is the servient estate (also called the servient tenement). An easement is appurtenant when it benefits land (the dominant estate; also called the dominant tenement). The easement is in gross when it benefits a specified person. An affirmative easement entitles the dominant tenant to use the servient estate for a particular purpose. A negative easement entitles the dominant tenant to prohibit the servient tenant from engaging in otherwise privileged activity on his land.

If the use is revocable at will, it is a license, rather than an easement.

A profit authorizes its holder to enter another's land to remove a natural product, such as timber.

B. Creation

1. Express Language

A grantor may convey an easement to another person or may reserve one for herself on land that she is conveying to another. If the interest is granted orally, it usually is a license and is revocable at will unless the grantor is estopped from doing so by virtue of the grantee's detrimental reliance. In most jurisdictions, an easement cannot be reserved in favor of a third party to a deed.

2. By Implication

When one part of a parcel of land is used for the benefit of another part, a physical division of the parcel may create an easement by implication. The use must have been apparent, continuous, and beneficial (or necessary, if an implied reservation is claimed). When severance landlocks a parcel, an easement of necessity may be implied even if no prior use existed.

3. Prescription

Adverse use of another's land may create a prescriptive easement. Unlike adverse possession, the prescriptive use need not have excluded all other activities on the affected land. The servient tenant's objections do not interrupt a prescriptive use except in jurisdictions that follow the lost grant theory. The use need not be continuous, but, if it is limited in time, the easement will be similarly restricted. A few jurisdictions permit the public to acquire recreational easements through long continued use.

C. Scope and Variation

1. Express Easements

The document that transfers the easement controls the permitted use. If it is silent concerning the scope of use, the dominant tenant may engage in activities reasonably related to the easement, including those related to the normal development of the dominant estate. The use must not unreasonably burden the servient estate. The dominant estate may not be enlarged.

2. **Implied Easements**

The circumstances that created an easement by implication determine its scope.

3. **Prescriptive Easements**

The activities that created a prescriptive easement determine its scope. New and different activities can become privileged if continued for the time period for prescription.

4. **Use by the Servient Tenant**

The servient tenant may engage in any activities on the land that do not unreasonably interfere with the easement. He may permit third parties to use the easement area. He is not entitled to relocate an easement when the instrument that granted it specified its location.

D. Transfer and Subdivision

1. Burden

An easement's burden transfers with the servient estate. If the servient estate is subdivided, each parcel is subject to the burden, unless the easement has been confined to one area.

2. Benefit

A transfer of the dominant estate includes the appurtenant easement. When the dominant estate is subdivided, all the lots enjoy the easement's benefit. At common law, an easement or profit in gross could not be transferred or subdivided. Courts now generally allow transfer of an in gross easement or profit if it is for commercial use, is quantifiable, or requires payments for its use.

E. Termination

An easement ends when (1) its express time period expires, (2) it has been properly revoked, (3) the servient estate has been destroyed, (4) the necessity that created it ends, (5) the dominant and servient estates merge, (6) the dominant tenant reconveys it to the servient tenant or abandons it, (7) the servient tenant recovers it by prescription, or (8) it is forfeited by the dominant tenant's abuse of it.

VII. REAL COVENANTS AND EQUITABLE SERVITUDES

A. Nature of Covenants

A covenant running with the land (real covenant) is a promise that can be enforced by the successors to the original covenantee and against the

successors to the original covenantor. Its benefits or burdens run automatically without the need for an assignment of rights or delegation of duties.

B. Requirements

1. General Prerequisites

A covenant will not run with the land unless it is enforceable between the original parties, and they must have intended that it run. In most jurisdictions, it must be in writing. It also must “touch and concern” the land.

2. Legal Requirements

For a covenant to “touch and concern” land, it must relate to the property, rather than to its owner personally. A covenant to pay money may be treated as touching and concerning land if the payment is for an act that touches and concerns land, such as maintenance. Some jurisdictions require only that the burden of the covenant touch and concern the land when the burden is to run and only that the benefit of the covenant touch and concern the land when the benefit is to run. Other jurisdictions require that both the burden and benefit touch and concern land for the burden to run.

Some jurisdictions require the covenantor and covenantee to be in privity of estate (horizontal privity). This type of privity requires the covenant to have been created when the affected land was conveyed, but a landlord-tenant relationship or persons sharing other interests in the same property also can satisfy it. Neighbors may exchange covenants that will run with the land only if the jurisdiction does not require horizontal privity.

Some states require that the covenantor’s entire estate pass to her successor for the burden to run and that the covenantee’s entire estate pass to his successor for the benefit to run (vertical privity). Vertical privity also requires an unbroken chain of conveyances from the original covenantor to the current owner of the burdened land and from the original covenantee to the current owner of the benefited land. Vertical privity is destroyed if an adverse possessor acquires title to the land or if a bona fide purchaser without notice of the covenant acquires the land.

Some jurisdictions require both horizontal and vertical privities of estate.

C. Equitable Servitudes

For a covenant to run with the land as an equitable servitude, horizontal and vertical privity are unnecessary. However, equity requires that the party to be burdened by a covenant had notice of it when he bought the land. The covenant also still much touch and concern the land, and the original parties must have intended that it run.

D. Subdivisions

1. Standing

As the original promisee, the subdivider has standing to enforce covenants made by grantees in their deeds to individual lots for as long as the subdivider owns any benefited property. The homeowners' association generally has standing to enforce those covenants as successor to the title of the common (benefited) land. Individual lot owners may enforce covenants against other owners in the subdivision who acquired title to burdened parcels before them. Lot owners may enforce covenants against owners who purchased after them if they can show that reciprocal burdens were implied from their own covenants, that they are third party beneficiaries of later covenants, or that the subdivider promised them to restrict all retained land.

If the covenants were created properly, the fact that later deeds to the burdened lots do not mention them is irrelevant. They will run with the land if the new grantees have actual or constructive notice.

2. Common Plan

If some parcels in the subdivision are unrestricted, a court may hold that other grantees cannot be charged with notice of the restriction, that a theory of implied reciprocal servitudes or of third beneficiary status will not be allowed, or that the covenant is invalid because it burdens an owner who cannot enforce it against others.

E. Termination and Nonenforcement

1. Defenses

A covenant endures only for as long as the creating document or a statute provides. Merger of the benefited and burdened parcels, release, abandonment, waiver, and prescription also can destroy a covenant. A court will not enforce a covenant when changed

conditions make the benefit too insubstantial to justify the burden. Acquiescence, estoppel, and laches also are defenses.

2. Government Action

When the government acquires property burdened by a restrictive covenant, it takes title free of the covenant. Covenants on property sold by the government at a tax sale also may be extinguished.

■ PART TWO: CONVEYANCING

VIII. REAL ESTATE AGENTS

A. Qualifications

Brokers are licensed to negotiate sales, leases, financing, and related real property transactions. Without a license, no person may claim compensation for performing the above services, except for a finder's fee for merely introducing the parties to one another. Persons working under a broker's supervision usually are called salespersons and also must be licensed.

B. Listing Agreements

A listing agreement is the employment contract between the broker and the seller. It authorizes the broker to solicit offers to purchase the seller's property in return for a fee if she is successful. In most states, the listing agreement must be written. The most common types of listing agreements are:

1. **Open (also called Nonexclusive)**—The broker earns a commission only if she finds the buyer;
2. **Exclusive Agency**—The broker earns a commission even if some other broker finds the buyer; and
3. **Exclusive Right to Sell**—The broker earns a commission even if some other broker or the seller finds the buyer.

C. Ready, Willing, and Able Purchaser

A broker generally earns a commission when she produces a ready, willing, and able purchaser. The purchaser must make an offer that

matches the terms of the listing agreement or that is otherwise acceptable to the seller. In most states, the agent's right to a commission vests when the seller and buyer enter into a purchase agreement. If the agreement is subject to any conditions, the agent's commission right vests when the conditions are eliminated. In a minority of states, the agent's commission right does not vest unless and until the sale is consummated.

D. Duties

A broker and salesperson have obligations pursuant to:

1. **Contract**—They must perform the obligations that they have undertaken in the listing agreement;
2. **Agency**—They are subject to the fiduciary duties of loyalty, integrity, and good faith as an agent to her principal;
3. **Tort Law**—They must meet the standards of due care expected of a professional in this field; and
4. **Licensing**—They must comply with the duties imposed by the licensing authority.

E. Agency

A listing agreement makes the broker the seller's agent. It also may make other brokers cooperating under a multiple listing service subagents of the seller, especially when they receive their commissions from the seller. A broker can work under a dual agency arrangement and represent both the seller and buyer in the same transaction or can be the buyer's agent based on a buyer's broker agreement.

IX. CONTRACT FOR THE SALE OF LAND

A. Enforceable Contract

A binding contract for the sale of land must be written and must describe the property, the price, and the parties, although the purchaser may indicate that title is to be taken by a "nominee." Part performance, consisting of the purchaser taking possession and sometimes paying part of the price or making improvements, may excuse the lack of the writing. A court will imply a reasonable time for performance if the contract does not specify one.

B. Marketable Title

Absent a contrary provision, a contract for the sale of land includes an implied covenant that the purchaser will receive marketable title—title

that is free from reasonable doubt as to its validity and as to the existence of any encumbrances or defects. If the vendor owns less than he has contracted to convey, if irregularities in the chain of title exist, or if the property is subject to an encumbrance, it is unmarketable. Land use ordinances and physical defects in the property do not affect title, and monetary encumbrances may be removed by using part of the purchase price to satisfy them. If title is unmarketable at the time for closing, the purchaser may refuse to perform or may be granted specific performance with an abatement of the purchase price.

C. Equitable Conversion

Once the vendor and purchaser have executed a specifically enforceable contract, the purchaser becomes the equitable owner of the property, and the vendor holds legal title only as security for the purchase price. Courts that follow this doctrine hold that the purchaser bears the risk of innocent destruction of the premises. However, other courts imply a provision into the contract that the purchaser will receive the property in the same condition as when the contract was executed, unless the purchaser has taken possession. The parties may insure themselves against risk of loss or may contract as to the allocation of risk.

D. Performance

The vendor performs by tendering a valid deed. The purchaser performs by paying the contract price. Once the parties perform the contract, its provisions end (merge) and are replaced by any covenants in the deed. However, the purchaser may have subsequent rights against the vendor for fraud or based on the warranty of habitability.

E. Breach

Unless time is of the essence, both parties have a reasonable time after the specified closing date to perform. If either party fails to perform, the other may terminate the contract or sue for specific performance or damages.

X. DEEDS

A. Formal Requirements

1. Writing

A deed must identify the grantor and grantee and must adequately describe the property. It also must include words indicating the

grantor's intent to transfer title to the property. The grantee need not sign the deed, and the signatures usually need not be notarized for the deed to be valid. Recording and consideration also are unnecessary for the deed to be valid between its parties.

Parol evidence may resolve ambiguities in the legal description of the land. When internal inconsistencies exist, monuments prevail over courses and distances, which prevail over names and quantities. Generally, reference to a boundary with width, such as a road, extends to its center. Boundary lines may change where a waterway is involved as the course of the waterway changes. Condominium boundaries include altitude as well as surface location and exclude the exterior walls, which are part of the common areas.

When neighbors orally relocate a common boundary, their agreement is upheld if it resulted from uncertainty or disagreement but not if it resulted from mistake or conscious intent to change the line.

2. Deed Types

A deed that contains no title covenants is a quitclaim deed. A general warranty deed contains all six common law title covenants. A limited warranty deed (also known as a special warranty deed or a grant warranty deed) contains some, but not all, of the title covenants, or the covenants apply only to the grantor's period of ownership.

B. Delivery

A deed transfers title only when the grantor delivers it. To deliver a deed in the legal sense, the grantor must manifest an intent that a completed legal act has occurred. If the grantor intends instead that title pass only in the future, delivery has not occurred. In transactions involving only the grantor and grantee, the grantor's conditional delivery means either that delivery has not occurred or that title passes absolutely without the condition. A grantor may make a future or conditional transfer of title by employing an escrow agent and unconditionally delivering the deed to her with instructions to deliver it to the grantee at the later time. In that case, the escrow agent's delivery relates back to the grantor's delivery to the escrow agent.

XI. RECORDING ACTS

A. Priority Disputes

The recording act principle of protecting bona fide purchasers has replaced the common law principle of "first in time, first in right." The

prior grantee of a deed or other conveyancing instrument may lose priority to a subsequent grantee by failing to record. This rule permits potential purchasers of land to rely on the chain of title as shown in the public property records.

B. Recording Acts

1. Recordable Documents

Any instrument affecting title to land may be copied into the official records and indexed according to the names of the grantor and grantee or according to the property's description. These indexes permit a title searcher to trace the title from its current owner back to the original source and then determine what interests, such as easements and mortgages, encumber the title.

2. Types of Acts

The two most common recording acts are notice acts, which protect a subsequent purchaser who takes without notice of an unrecorded instrument, and race-notice acts, which protect a subsequent purchaser who takes without notice and records first. Race statutes, which protect the purchaser who records first, and period of grace statutes exist in a few states.

3. Value

Most recording acts protect only subsequent grantees who have given value. Grantees are protected if they gave more than a nominal consideration. Donees, unsecured creditors, judgment creditors, and persons who have merely promised to pay are not protected. Execution of a negotiable note that has been transferred to a holder in due course and cancellation of a prior debt qualify as paying value. When the grantee has paid only part of the price, she has pro tanto protection. The purchaser at an execution sale is protected as a purchaser for value, although the jurisdictions are divided when that person also is the judgment creditor.

4. Notice

Subsequent purchasers who have notice of a prior conveyance are not protected against it. "Notice" includes actual knowledge and constructive notice from the property records. Misindexed documents and "wild" documents (those not linked to any instrument in the chain of title) generally do not give notice. The jurisdictions are

divided concerning whether instruments recorded after the owner transferred title, before he acquired title, or that relate to other property owned by him, give notice. Courts impose a duty on prospective purchasers to make inquiries about any suspicious information concerning the title and to inspect the property and impute to him any knowledge that a reasonable inquiry would have produced. Thus, a purchaser must investigate defectively recorded instruments, unrecorded instruments that are mentioned in recorded instruments, and rights of persons in possession of property, unless their possession is consistent with the record title.

C. Torrens Registration

Torrens registration is based on the premise that the government should certify the title to a parcel of land, as it does for cars, rather than simply serving as a repository for documents concerning it. To register a parcel of land in the Torrens system, the owner brings a quiet title-like action in which the title is determined. Thereafter, with limited exception, no one owns an interest in that parcel unless it is shown on the certificate of title that the government issues. The government is liable for any title mistakes it makes with respect to the registered land.

XII. TITLE ASSURANCE

A. Title Covenants

1. Deed Types

A quitclaim deed contains no covenants of title. A limited warranty deed has limited title covenants. A general warranty deed includes all the common law title covenants.

2. Deed Covenants

The present title covenants are the covenants of seisin, right to convey, and against encumbrances. These warrant that the grantor has the title he is purporting to convey and that he has the power to transfer it free of all encumbrances, except those expressly or impliedly excluded. The future covenants are the covenants of quiet enjoyment, warranty, and further assurances. These warrant that the grantee will not be evicted by a paramount interest holder and that the grantor will execute any additional document necessary to perfect the transfer of title.

3. Breach of Covenant

The present covenants are breached, if ever, when the conveyance is made. The future covenants are breached only when the grantee is injured by a conflicting title interest. Future covenants run with the land and may be enforced against the covenantor by a remote grantee. The measure of damages may be the purchase price, the cost of removing the encumbrance, or the depreciation in market value caused by the encumbrance.

B. Title Insurance

Title insurance guarantees that the insured owns the title described in the policy, subject only to the defects described in the insurance policy. The policy generally excludes claims that exist because the insured was not a bona fide purchaser or that could have been ascertained from a physical inspection of the property, including boundaries (“matters of survey”). The policy does insure against “off-record” risks, such as a grantor’s legal incompetence, forgery, and nondelivery of any document in the chain of title. When a title insurance company is liable, it may compensate the insured for the loss, acquire the outstanding claim against the title, or challenge it in court.

XIII. MORTGAGES

A mortgage is a security instrument that authorizes a lender (the mortgagee) to sell the mortgaged land (foreclose) to satisfy a debt if the borrower (the mortgagor) defaults.

A. Documentation

The mortgage secures the debt, which is evidenced by a promissory note. In some states, lenders more commonly use a deed of trust, rather than a mortgage. The only significant difference between them is that a deed of trust appoints someone other than the lender (a trustee) to conduct the foreclosure.

B. Foreclosure

The mortgagor and junior lienors have an equity of redemption that enables them to pay a defaulted loan in full to prevent foreclosure. If they do not exercise this right, the mortgagee can have the mortgaged property sold to satisfy the obligation. Any surplus from a foreclosure sale goes to any junior lienors, because their liens are eliminated by the

foreclosure, and then to the owner. If the sale does not produce enough proceeds to pay the foreclosed debt in full, the foreclosing mortgagee can sue for the difference between the debt and the foreclosure sale price (the deficiency), unless the jurisdiction has antideficiency legislation. If any rents from the property have been given as additional security, the lender also may collect them and apply them to the debt.

C. Junior Mortgages

When a junior mortgage is foreclosed, the land is sold subject to the senior liens. A junior mortgage is eliminated by a senior foreclosure sale. The junior mortgagee receives any surplus from the senior sale in preference to the mortgagor.

D. Transfers

Property subject to a mortgage is transferred subject to it. If the grantee assumes the secured debt, she becomes personally liable for it. If she does not assume liability, she merely takes “subject to” the mortgage. A transfer of the note always includes the mortgage, even if it was not expressly assigned.

■ PART THREE: RIGHTS RELATING TO LAND

XIV. MISCELLANEOUS PROPERTY DOCTRINES

A. Water

1. Stream Water

A riparian owner has an absolute right to use water when it does not affect the water’s flow or is used solely for domestic purposes. If the flow is affected and the use is nondomestic, the natural flow doctrine permits downstream users to enjoin the use, whereas the reasonable use doctrine balances the intended uses of the conflicting riparian owners. Western states follow the prior appropriation doctrine and grant permits to take water depending on the time of application and the intended use.

2. Underground Water

The absolute ownership rule allows surface owners to make any use of underground water as long as it is not malicious. The reasonable use rule limits surface owners to reasonable uses of the water.

3. Surface Water

The natural servitude rule prohibits landowners from diverting water that flows over their land. The common enemy rule allows owners to alter their land to drain water from it. The reasonable use rule allows owners to divert water as long as it does not unreasonably interfere with their neighbors' use of their land.

B. Oil and Gas

Traditionally, underground oil and gas were viewed as being analogous to wild animals. Because neither oil nor gas was within anyone's control and because both generally move about freely, the first person to extract them becomes the owner. In more recent times, legislation generally has preempted the common law rule of capture, and some courts have adopted the "fair share rule," which limits an extractor to a fair share of the oil or gas.

C. Support

1. Lateral Support

A landowner whose excavations cause neighboring land to subside is liable regardless of negligence unless he can show that the land subsided only because of the additional weight of improvements erected on it. If the excavator is liable, states are divided over whether compensation must be paid for the improvements.

2. Subjacent Support

An excavator is absolutely liable for injuries to land and buildings caused by the removal of subjacent support.

3. Modifications

Landowners may agree that one will furnish additional support to another's improvements or, conversely, that no duty of support is owed. Some jurisdictions require excavators to shore up neighboring buildings.

D. Freedom from Interference

1. Trespass

Trespass is an unprivileged intrusion upon another's land. It is actionable because it interferes with an owner's right to exclusive possession. Even without harm, a trespasser is liable for at least nominal damages.

2. Nuisance

A nuisance is an unreasonable use that substantially interferes with the use and enjoyment of another's land. Determination of whether a nuisance exists usually requires a balancing of the utility of the parties' actions, a comparison of the harm against the cost of correction, and a consideration of the nature of the locale.

E. Airspace

1. Use Rights

Title and the right to develop airspace may be severed from the surface. Absent severance of the airspace, the owner of the surface has the right to use it.

2. Invasions

Surface owners generally do not have a cause of action against flights in the public airspace above their lands. However, an overflight may constitute a trespass if it is too low, a nuisance if it creates too much disturbance, or a taking if the government operates the aircraft or the airport.

F. Fixtures

Personal property becomes real property when it is affixed to land with an intention that it become a permanent part of land and when it is specifically adapted to the land. When the same person owns both the land and the personalty, the personalty's conversion to a fixture may be significant because of inheritance laws, a mortgage on the property, property taxation, or an exercise of eminent domain. When the fixture is owned by someone other than the owner, such as by a tenant, the most significant issue usually is whether the fixture's owner can remove it.

G. Waste

The owner of a presently possessory interest in land that is less than a fee simple absolute owes a duty to the future interest owners and to concurrent owners not to harm the property by affirmatively damaging it or by failing to make normal repairs to protect it from deterioration.

XV. LAND USE

A. Authority to Regulate

Land use regulation is a state power that the state delegates to cities and counties. Some states also permit direct voter regulation by initiative or referendum.

B. Forms of Regulation

1. Planning

A comprehensive plan prepared by the local planning board often is a legal prerequisite to the enactment of land use laws. The plan consists of the community's goals and purposes concerning its physical development.

2. Zoning

A typical zoning ordinance divides the land it governs into use, height, and area districts. It regulates the size of land lots and buildings by minimum lot size, minimum floor space, floor to area ratio, and open space and setback requirements. "Cluster zoning" permits the owner of a large parcel to violate the usual area requirements if the standards are satisfied by the aggregate project. The "planned unit development" zoning classification may allow a mix of uses, as well as a clustering of density. For a "floating zone," the zoning ordinance describes the permitted uses but does not place any land in that category until an owner successfully seeks a rezoning for it. A "holding zone" temporarily prohibits intensive use of land while the community plans for the future.

Most zoning ordinances are cumulative; less intense uses, such as single family homes, are permitted in more intense zones, such as commercial. Zoning ordinances generally also include provisions for conditional uses (also known as special exceptions)—uses that are allowed in a zoning district only after discretionary review and the possible imposition of conditions. Zoning codes generally permit pre-existing uses to continue as nonconforming uses but may prohibit enlargement of those uses or their resumption after discontinuance for a period of time or may amortize such uses by permitting them to continue for only a limited number of years. Variances are available to property owners who otherwise would suffer unnecessary hardship because of special circumstances affecting their land. The local legislative body may amend its zoning ordinance as to any particular parcel. Contract or conditional rezoning involves a zoning amendment based on the landowner's agreement to specified conditions.

3. Subdivision Regulation

A local government may require a subdivider to dedicate streets in the subdivision to the public, to construct off-site improvements, or to dedicate land or to pay a fee for public uses, such as parks and schools.

4. Other Forms of Regulation

A local government may control the growth of its community by a building moratorium or by limiting the number of building permits it issues. It may protect historic buildings or districts by prohibiting construction, reconstruction, or demolition of structures. It may regulate the size and placement of billboards, although its right to ban them totally is unclear. It can delegate architectural approval to a design review board. Federal and state environmental protection acts may require a local government to consider and to mitigate adverse environmental impacts created by projects that it has the right to approve.

C. Judicial Review

1. Legislative v. Administrative (Quasi-judicial)

If a court determines that a particular action by a local government is legislative, the court will uphold it if it bears a rational relationship to a permissible state objective. If the action is administrative (quasi-judicial), substantial evidence must support it. Many courts reject the distinction between legislative and administrative actions. Additionally, a court will subject a land use action to more searching review if it is directed at a suspect or quasi-suspect class or if it impinges on a fundamental right.

2. Judicial Standard

A court will invalidate a land use regulation if it is not authorized by the state enabling act (*ultra vires*), involves an improper or standardless delegation of legislative power, is arbitrary, or was enacted or administered by improper procedures.

A court also will invalidate a regulation if it violates the federal or state constitution. For example, a court will invalidate an ordinance if it violates the first amendment, such as by overregulating signs, movie theaters, or churches or by intruding too far into family living arrangements. The just compensation clause of the fifth amendment

requires compensation when a regulation is so oppressive that it takes the owner's property. Equal protection principles may invalidate land use systems that exclude lower- and middle-income persons from residing in the community.

3. Remedies

When a landowner successfully challenges a land use regulation, the court will invalidate the law but usually will not award damages. In certain special situations, such as exclusionary zoning cases, a court may grant site-specific relief.