Property outline, Spring 2004. Professor Vincenti.

I. Leaseholds, landlords, and tenants

A. Leaseholds

1. Basic taxonomy

a) **Term of years:** for a fixed period, after which the leasehold expires--no notice is required. Death of either landlord or tenant has no effect on the duration. Unilateral power of termination is permissible.

b) **Periodic tenancy:** e.g., month-to-month, year-to-year. Timely notice is required for termination. Unilateral power of termination is permissible.

(1) Timely notice

(a) Year-to-year tenancies require six-month notice (under common law).

(b) Less than one-year tenancies requires notice equal to the length of the term or six months, whichever is smaller.

(2) The tenant must end his tenancy at the end--not in the middle--of a period.

(3) Death of either landlord or tenant has no effect on the duration.

c) **Tenancy at will:** necessarily terminable by either party (thus, unlike terms of years and periodic tenancies).

(1) Automatic termination in certain situations

(a) Death of either landlord or tenant.

(b) Conveyance by the landlord of the underlying property.

(c) Assignment by the tenant of his tenancy.

d) **Tenancy at sufferance:** arises when a tenant holds over after termination of his tenancy. Statutes will often dictate the nature of these tenancies.

(1) Landlord's rights

(a) Evict tenant and collect damages, or

(b) Consent to a new tenancy (expressly or impliedly).

(2) Lease terms

(a) Leases imposed on holdovers are on the same terms as the prior lease.

(b) Double rent is required from holdovers in certain situations by some statutes.

(c) The court may adjust--to the market--a holdover's rent.

(3) Cases

(a) *Crechale & Polles, Inc. v. Smith* (Miss. 1974): implied consent to a new tenancy where L fails to evict and accepts rent past the termination. By rejecting T's proposal for a new month-to-month tenancy, L "elected his remedy"--eviction. So when L later accepted a check for a month's rent from T, he had impliedly consented to the creation of a new, month-to-month tenancy.

i) The court could have interpreted L's response as "no new month-to-month tenancy: you can either get out, or stay and renew for the entire 5-yr. term." However, the court instead here interprets in favor of T.

e) **Cases**

(1) *Garner v. Gerrish* (N.Y. 1984): "tenancy at will determinable." The lease

language provided that the tenancy continued from May 1, and that T could terminate at a date of his own choice.

(a) **Lord Coke's rule:** a lease at the will of one party must also be at the will of the other party, too. The court says that this rule is, for one thing, based on the livery of seisin requirement, and so ought to be obsolete. One court has said such leases shall create a determinable life estate in T, terminable by T at will or at his death. Itc., the court says, holding otherwise would be repugnant to he parties' intentions.

i) N.b., if T in fact has a freehold here, the L does not owe T any landlord-tenant obligations.

2. Subleases and assignments

a) Taxonomy

Comment: Traditionally, courts took a formalist view in determining whether a transfer was an assignment or a sublet: if the transfer was for an interest in anything less than the entire lease term--even by a day--the transfer was a sublet. The modern rule looks primarily at the parties' intentions.

(1) Assignment: transfer of an entire leasehold interest. Assignment is analogous to feudal substitution--after T assigns to T1, T remains in PoC with L but is no longer in PoE with L, and T1 is in PoE with L and PoC with T.

(2) Sublease: tenant's transfer of a possessory interest in a leasehold; the tenant retains a reversionary interest. Sublease is like subinfeudation--after T sublets to T1, T remains in PoE and PoC with L, and T1 is in neither PoE or PoC with L, but is in PoC with T.

(3) Cases

(a) ***Ernst v. Conditt*** (Tenn. 1964): although T "sublets" to T1, and the instrument says T remains liable for the lease, the actual transfer is an assignment, the court says, because T did not retain any interest in the leasehold, and had no right of re-entry. Therefore it is T1, not T, who is liable for past-due rent.

b) Consent to sublet or assign

(1) Arbitrary refusal (the majority rule): where a lease contains an approval clause for subleases and assignments, the lessor my arbitrarily refuse to approve, "no matter how suitable the assignee and no matter how unreasonable the lessor's objection. This rule is <u>harsh</u>, but its harshness is often mitigated by courts through waiver and estoppel.

(2) The reasonableness requirement (the minority rule) (Restatement 2d § 15.2): a lessor can object to sublets and assignments only on commercially reasonable grounds.

(a) Arguments against a reasonableness requirement

i) The lessor's interests are protected with or without such a requirement.

ii) Inhibits freedom to contract and lease. I.e., the parties could have bargained for a reasonableness clause.

(b) Not applicable to residential leases: the reasonableness requirement does not apply to residential leases. (But how do we distinguish between commercial and residential landlords??)

(c) Cases

i) ***Kendall v. Ernest Pestana*** (Cal. 1985): consent to sublet or assign can only be withheld for a commercially reasonable reason. Itc., L refuses consent to assignment because the property's value has gone up--this is not a commercially reasonable objection because the tenant owns the property value increase. Saying the tenant owns the increase is a good rule because it furthers alienability.

ii) *Krieger v. Helmsley-Spear, Inc.* (N.J. 1973) (n1ap499): the focus of the reasonableness test should be only on the particular property at issue (so it doesn't matter if a prospective subletter is a tenant of another of L's properties).

iii) *Pay 'N Pak Stores* (Cal. 1989) (n1ap499): L's refusal commercially reasonable where prospective subletter was a competitor of L. Itc. might be distinguishable from *Pestana* and *Krieger* if you think that in those cases, L didn't stand to lose anything, whereas itc. L did stand to lose something. Vincenti suggests that the real question underlying all of these cases may be Who owns value appreciation?, or at least Who should get it?; Vincenti also reminds us to pay heed to effects of reasonableness determinations on the alienability of property.

(3) The Rule in Dumpor's Case: if L leases to T with an approval clause, and T assigns to T1 with L's permission, but T1 does not assume the lease obligations, then T1 may assign to T2 without L's permission. (Note that L is not in privity of contract with T1. The Restatement 2d, however, rejects the Rule and says T1 must get L's permission.)

(a) Hypo: what if Dumpor's does not apply and L accepts rent from T2--is that permission? Not per se, but it is strong evidence of permission.

B. Landlords and tenants

1. Delivery of possession

a) American rule: L has no duty to remove T for T1--T1 may have to do it himself.

b) English rule: L must remove T for T1.

2. Defaulting tenants

a) Tenants who default while still in possession

(1) Landlords' rights

(a) The common law rule: a landlord may repossess the property if he is legally entitled too--he must make a peacable entry.

(b) The modern rule: a landlord must use the judicial process to determine his rights against a defaulting tenant in possession. This may be done in a summary proceeding (which is quick, whereas the proceeding at common law would be an action for ejectment, which could take a long time). See *Berg*.

i) **Summary proceedings: s**ummary proceedings in most jurisdictions provide for a trial within 10 days of filing. However, the tenant can throw a lot of wrenches in the process to slow it down.

a. Would self-help be better, actually? Self-help would probably keep rent costs down. To protect against wrongful evictions, we could allow tenants to sue for injunctions and damages, or seek a

declaratory judgment.

(2) **Cases**

(a) ***Berg v. Wiley*** (Minn. 1978): landlord self-help against a defaulting tenant in possession is not permissible--the landlord must use the judicial process. The court weakens the common law rule, essentially abandoning it. For instance, although the landlord itc. reentered when the tenant wasn't there, the court held the entry was forcible--i.e., the landlord's entry would have been forcible had the tenant been there.

b) **Tenants who abandon**

(1) **The common law rule:** a tenant's breach does not permit the landlord to breach; i.e., there is not a mutual obligation. The landlord's only remedy is to sue the tenant for the entire period remaining in the lease--he doesn't have to mitigate by finding a new tenant, and perhaps he can't mitigate (because the defaulting tenant is still the tenant).

(a) **Forfeiture provisions:** a landlord can include a lease term allowing him to retake possession in case of tenant default. The landlord still wouldn't have to exercise this right in case of default (and reenter and/or mitigate damages)--he simply would be allowed to. Note that such a term would look only to property law, and would have no consequences for the contract aspect of the lease.

(2) **The modern rule:** a landlord must make a reasonable effort to mitigate his damages when a tenant abandons. See *Sommer*.

(3) **Surrender:** a tenant can offer to "surrender" his tenancy--either explicitly or impliedly. Abandonment without intention to return is an implied offer to surrender (but nonpayment of rent alone is not). The landlord can reenter at that point.

(a) **Landlord's reentry after a surrender offer:** the reentry could either be an acceptance of the offer (ending the lease) or the landlord could relet the property "on the tenant's account" (which is, effectively, damage mitigation). We determine what it is from the landlord's intent.

i) L can reenter without the intent to accept a surrender at first, and then change his intent at some later point, to accept the surrender.

ii) Note that if the rent has gone up, L may want to accept a surrender offer. However, L risks that the new tenant will default--and the original tenant will be off the hook.

(4) **Anticipatory breach:** a landlord can sue a defaulting tenant who's abandoned for anticipatory breach, seeking all damages into the future. Note that this is available only if the tenant has abandoned (because otherwise, there's no guarantee that the tenant will breach).

(5) **Cases**

(a) ***Sommer v. Kridel*** (N.J. 1977): a landlord must make a reasonable effort to mitigate his damages when a tenant abandons. In other words, the court looks to the contract aspect of the lease (in this way, landlords get a new right they wouldn't have in a strict property analysis of the lease--the right to reenter). Furthermore, L must put T's apartment into his vacant stock--

until a new tenant rents T's specific apartment, T is still on the hook (but L can't refuse to rent T's apartment, e.g., if the rent went down).

3. **The Covenant of Quiet Enjoyment**
   a) **Landlords' duties**

      Comment: Note that, except for the duty to abate nuisances, all of these duties can only be performed by the landlord--tenants have no power to do them.

      (1) Keep all agreements to repair.

      (2) Make repairs carefully.

      (3) Maintain common areas.

      (4) Perform all specific promises he had made in the lease.

      (5) Disclose latent (not patent) defects he knew or should have known of that existed when the lease was entered into.

      (6) Do not defraud or deceive tenants.

      (7) Abate nuisances that occur on the premises.

   b) **Tenants' remedies**

      (1) Stay in possession and sue for damages

      (2) Constructive eviction: occurs when the landlord has breached the CoQE, compelling the tenant to move out.

         (a) Tenants' burdens

            i) The tenant must actually move out; this is a risk for the tenant, because if he moves out, rents new property, and a court rejects his constructive eviction claim, he's on the hook for both leases (n.b., he's breached the original lease by abandoning). (A tenant could seek a declaratory judgment before moving out, but that's expensive and there's no summary proceeding for it.)

            ii) The tenant must move out due to a "permanent" problem. *Reste Realty* holds that "permanent" does not mean sustained (e.g., recurring basement flooding was enough to be permanent).

            iii) The tenant must move out within a reasonable time after his constructive eviction right comes into existence. "Reasonable time" depends on the circumstances.

   c) **Cases**

      (1) ***Reste Realty*** (N.J. 1969): constructive eviction despite some formalistic problems for the tenant. A latent driveway defect that could be seen as patent after tenant signed a new lease still satisfied constructive eviction requirements because the landlord promised to repair the defect. Recurring flooding was enough to satisfy the permanency requirement of a defect compelling constructive eviction. Tenant also moved out within a reasonable time, even though it was a long time, because she waited patiently for promised repairs and continually complained.

      (2) *Stewart v. Childs* (N.J. 1914) (cited at *Reste*, p527): a decision based strictly on property principles: there is no mutuality of obligation between landlord and tenant, so their promises are independent. Thus, if the landlord breaks to CoQE, the tenant is not excused from paying rent.

4. **The Implied Warranty of Habitability**

a) **Underlying theories**

(1) Landlords are in a better position than tenants to maintain habitability.

(2) Modern leaseholds are mainly residential, unlike in the past when they were mainly agricultural--tenants are no longer well-equipped for making repairs.

(3) **Illegal leases:** leases can be held to be illegal contracts if they violate public policy or statute. Minor, technical violations and violations that develop after the lease was entered into don't count. A tenant under an illegal lease is a tenant at sufferance--the landlord is entitled to the reasonable rental value of the premises in the condition they are in (this may be $0, of course). The illegal lease doctrine is superseded and made obsolete by the implied warranty of habitability.

b) **Landlords' duties:** a landlord must deliver to and maintain for the tenant premises that are safe, clean, and fit for human habitation.

(1) Covers both latent <u>and</u> patent defects--a tenant who enters with knowledge of a defect has <u>not</u> waived his rights under the IWoH.

(2) Covers common areas (and all other "essential facilities"--those vital to the use of the premises for residential purposes).

c) **Tenants' remedies**

(1) Withhold rent <u>while staying in possession</u> (note the difference between this and constructive eviction, where the tenant must move out).

(2) **Damages measures**

(a) <u>Contract measure</u>: the difference between the premises as warranted (i.e., as they <u>should have been</u>) and their actual value (as they <u>are</u>). Note that this means that a tenant will have to introduce (expert) testimony about what the rent would have been for the premises in the condition they were in and in the condition they should have been in.

(b) <u>Alternative measure</u>: the difference between the bargained-for rent and the value of the premises "as is." Note that if the bargained-for rent is a fair price, damages under this measure will equal $0 (see n4cp543).

(3) **Tenants' burdens:** the IWoH is a <u>warranty</u>--a tenant does not have to prove a defect was caused by the landlord's negligence. L will only be off the hook if he did not actually cause the defect (thus, this is nearly strict liability).

(a) <u>Housing code violations</u>: these are often sufficient to prove IWoH breach, but not always necessary. Typically, they will be considered prima facie evidence of IWoH breach.

d) **Limitations**

Comment: Note these limitations especially since the differentiate the IWoH from constructive eviction. The IWoH provides a better remedy than the CoQE and constructive eviction, but the IWoH is much more limited.

(1) The IWoH arises in every lease and can <u>not</u> be waived or bargained away.

(2) The IWoH applies only to <u>certain</u> residential leases.

(3) The IWoH covers only health and safety concerns.

e) **Cases**

(1) ***Hilder v. St. Peter*** (Vt. 1984): Pf. stays in possession and sue for IWoH breach (however, she could have moved out and still sued); she recovers back

rent, consequential damages, money for repairs, and punitive damages.

II. Servitudes

A. Licenses: permission to come on someone else's land. These are usually revocable by the grantor; however, if the licensor promises or indicates to the licensee that the license will be permanent or very long-term, and the licensee shows substantial reliance on the indication, the licensor will be estopped from revoking the license--the license effectively becomes an easement. A <u>right to use</u> servitude.

B. Profits: the right to take something from another's land; e.g., minerals, oil, timber. These come with a right to reasonable access. A <u>right to use</u> servitude, enforced at law.

C. Easements: the right to use another's land. These can be sold, can be determinable, and are <u>not</u> revocable.

1. Taxonomy

a) Affirmative easement: an easement that entitles the easement owner to do something on another's land (e.g., a right of way). A <u>right to use</u> servitude, enforced at law. These are much more common than negative easements.

b) Negative easement: an easement that entitles that easement owner to prevent another from doing something on that other's land. A <u>duty to refrain</u> servitude, enforced at law.

(1) English negative easements: in England, there are only four kinds of negative easements (although even those have been sharply curtailed).

(a) Types of negative easements in England

i) Against blocking your windows.

ii) Against interfering with air flowing to your land in a defined channel.

iii) Against removing the support of your building.

iv) Against interfering with the flow of water in an artificial stream.

(b) Underlying theories for limiting negative easements in England

i) England has no recording system--thus it's very hard for new owners to find out about negative easements.

ii) If negative easements are full-fledged easements, they could be acquired by prescription, the process of which would be difficult to administer.

iii) The English courts have difficulty viewing negative easements as property rights--they see them as promises, generally.

(2) American negative easements: in America, the list of negative easements is not necessarily closed. We don't have two of the problems England has with negative easements: we have a recording system and we categorically prohibit acquisition of negative easements by prescription. However, our courts, like England's, have trouble viewing negative easements as property rights, rather than promises. Typical American negative easements are conservation easements and solar easements. But American courts are reluctant to create negative easements; this, however, is mostly obviated by the availability of real covenants and equitable servitudes.

(a) Creation of negative easements: in America, negative easements can not be created by prescription or implication (whether from prior use or

strict necessity--these don't make much sense wrt. negative easements, anyway).

c) **Appurtenant easement:** an easement where the dominant estate and servient estate are adjoining. When either estate is sold, the easement goes with it
   (1) Dominant estate: the piece of land benefited by an appurtenant easement.
   (2) Servient estate: the piece of land burdened by an appurtenant easement.

d) **Easement in gross:** easements other than appurtenant easements--these are personal to the owner. These do not run with the land, they stay with the owner.
   Comment: To determine whether an easement is appurtenant or in gross, look at the language in the conveyance. See n4pp789-790.

e) **Quasi easement:** an "easement" where a single landowner uses one part of his land for the benefit of another part of his land.

2. Creation

a) **Express creation:** creation by deed or will. These creations are subject to the Statute of Frauds and must be recorded.
   (1) Express grant
   (2) Express reservation
      (a) The common law rule: you can not reserve an interest in property to a stranger to the title.
         i) Getting around the common law rule
            a. The seller could insist that the buyer convey an easement to the stranger.
            b. The seller could sell the property to the stranger and insist the stranger then sell to the buyer and reserve an easement for itself.
            c. The seller could convey an easement to the stranger and then sell to the buyer with express notice of the encumbrance.
      (b) The modern rule: the primary objective in construing a conveyance is to try to give effect to the intent of the grantor. See *Willard* ("In general, grants are to be interpreted in the same way as other contracts and not according to rigid feudal standards").
      (c) Cases
         i) ***Willard v. First Church of Christ, Scientist*** (Cal. 1972): rejects the common law easement reservation rule, because following it would give the buyer itc. a windfall and would frustrate the intent of the grantor. Of note itc. is that the buyer was not a BFP (the stranger's interest in using the property was in the chain of title) and there is not evidence that the buyer relied on the common law rule.

b) **Estoppel:** a license may become irrevocable by estoppel--and thus become an easement--if its grantor has acquiesced to investments made by the licensee. The licensee's investments do not have to be in the licensed land itself (e.g., in *Holbrook* the licensees of a roadway invested in their own home to which the roadway went).
   Comment: Easement by estoppel is analogous to the reliance interest in contract.
   (1) Cases
      (a) *Holbrook v. Taylor* (Ky. 1976): court estops licensor from revoking a

roadway entrance license where the licensees had built a home (on their own land) accessible only by the licensed roadway. The licensor does not get damages--that's the law; damages would be hard to calculate, for one thing, and the licensor acquiesced, for another. (N.b., the court rejected the licensees' prescription claim because their use of the roadway was neither adverse, continuous, or uninterrupted.)

(b) *Henry v. Dalton* (R.I. 1959): no easement creation by estoppel allowed, because it would lead to more clouded titles.

c) Implication

Comment: The law traditionally has not like implying easements--it derogates written instruments and the recording system. As such, court are usually more comfortable implying easements in favor of grantees than those in favor of grantors.

(1) From prior use

(a) Old rule: courts following the traditional rule will imply a grant of an easement, but will not imply a reservation of an easement without demonstration of strict necessity.

i) Underlying theory: implying a reservation of an easement would mean a buyer who takes a general warranty deed won't get all he bargained for. Whereas, implying a grant of an easement gives the buyer more than he bargained for, which is okay.

(b) New rule: an easement can arise by implication whenever it is inferred from the intentions of the parties to a conveyance. However, the prior use must have been apparent and continuous. Beyond that, the parties' intentions are determined by applying a multi-factor test to all the circumstances.

i) Multi-factor test

a. Whether claimant is conveyor or conveyee.

b. Terms of the conveyance.

c. Consideration given for the conveyance.

d. Whether claim is made against a simultaneous conveyee.

e. Extent of the necessity of the easement to the claimant.

f. Whether there will be reciprocal benefits.

g. Manner of the prior use.

h. Extent to which the parties knew or might have known about the manner of the prior use.

ii) Underlying theory: we assume a sort of mistake in drafting--there is an easement because of the parties' (presumed) intent, we say.

(c) Cases

i) ***Van Sandt v. Royster*** (Kan. 1938): Pf. had a backed up sewer pipe in his yard. Visibility is not the same as apparency--even if prior use of an easement is not visible, it may be apparent if you could have found out about it (itc., the sewer).

a. Remedies: since his neighbors have the sewer easement over his property, Pf. will have to fix the sewer line. However, through a kind of owelty, the neighbors have an obligation to contribute to

the repairs (although Pf. may have to take them to court to collect).

(2) **Necessity (without prior use):** although implied easement by strict necessity does not require prior use, it does require the alleged dominant and servient estates to have been in the same hands at one time.

(a) **Underlying theory:** based partly on intent and partly on policy--we should make land usable (thus the doctrine that an easement by necessity terminates when there no longer is necessity).

(b) **Cases**

i) ***Othen v. Rosier*** (Tex. 1950): necessity not available because at time of conveyance, grantor's lot was not landlocked--the grantor still owned 1000 acres of land surrounding the conveyed lot. (Note that there may be an easement by necessity somewhere, but not across the land of any of the parties before the court itc.)

a. **Other possibilities for easement creation itc.?**

1) Prior use: no--Texas follows the old rule, which will not imply an easement by reservation. But even under the new, *Van Sandt* rule, prior use must be apparent and continuous; itc., the prior use was described as "picking around hogwallows"--that might not do it.

2) Estoppel: estoppel requires an investment in improvements, which Pf. did not make itc. Also, an easement by estoppel probably won't follow the conveyance to Pf. (unless there had been a prior judgment concerning it, which there wasn't itc.). Furthermore, Texas may not recognize easements by estoppel.

ii) *McQuinn v. Tantalo* (N.Y. 1973): nearly absurd application of the strict necessity requirement--no necessity where landowner was landlocked but could get to his land by water.

d) **Private right of condemnation:** a mechanism by which an owner of landlocked property can condemn an easement on neighboring land by showing necessity. The dominant owner must pay the servient owner (whereas he does not have to pay for an easement by implication; that's because we assume that it's already been paid for when we assume it came about from the parties' intent).

e) **Prescription**

(1) **Old rule: the fiction of the lost grant:** formalist courts were reluctant to create an easement where there had been no consent between parties, so they assumed that an easement had been granted long ago, and the grant lost.

(a) **Permission:** under the lost grant theory, a claimant cannot be using the proposed easement with the permission of the landowner--otherwise the use is not adverse.

(b) **Acquiescence:** however, in order to be consistent with the lost grant theory, the landowner must acquiesce to the claimant's use. So, if the landowner objects to a claimant's use, he has evidence that he has not acquiesced--objection wrt. prescriptive easements is like ouster wrt. adverse possession.

(2) **Modern rule: adverse possession analogy:** most jurisdictions do easement

by prescription like they do adverse possession.

(a) To prevent an easement by prescription, a landowner must show either that (a) he effectively interrupted the claimant's use, or (b) the claimant stopped his use, or (c) he followed some statutory procedure for preventing prescription, or (d) he got a judgment declaring his right to use.

(b) Where the adverse possession analogy is used (and even, probably where the fiction of the lost grant is used), if you put up a fence to stop prescription, it had better be a big and sturdy one--if claimants use the property in spite of the fence, you've just proved adversity for them.

(3) Public trust doctrine

(a) Cases

i) ***Bay Head*** (N.J. 1984): the court declares that the public must have both (1) the right of access to tidelands through the dry-sand area and (2) the right to use the dry sand area--even if the dry-sand area is technically private property (itc., the owner, Bay Head, was held to be quasi-public; so, if Bay Head loses its leases, it will be required to take steps to insure public access).

a. Judicial takings: generally, the state must compensate private landowners when it takes their land. However, judicial takings have historically not been held to be state condemnations covered by Amendment V (but there are strong disagreements on this, even among SCOTUS).

1) Customary right doctrine: declaring a public right to use based on custom--a fiction that the private landowner never had his property free from the encumbrance of public rights to use.

(4) Cases

(a) ***Othen v. Rosier*** (Tex. 1950): no prescription because the use was not exclusive--rather, it was consistent with the actual owner's use (this rule, requiring exclusivity, is not the majority view, which doesn't require it). Also, the road was fenced and gated at one point, which may, in Texas, show permission since gating is a kindly thing to do in ranch country.

3. Assignability

a) Appurtenant easements: the benefit or burden of an appurtenant easement passes to an assignee of the dominant or servient land, respectively.

b) Easements in gross: traditionally, easements in gross could not be assigned. Modern courts are much more likely to allow such assignments, however. Assignments of commercial easements in gross are often allowed, but assignments of personal easements in gross may not be permitted.

c) Divisibility: traditionally, easements could not be divided into smaller rights of use. Modern courts will allow divisibility, subject to limitations (such as the one stock rule, which requires easements in gross to always be held as if by a single person--each holder has a veto against kinds of uses).

d) Cases

(1) ***Lutheran Conference*** (Penn. 1938): easements in gross can be assigned.

Furthermore, they can be divisible; however, the enterprise must remain whole (the one stock rule)--a partner can't extend the use (so, each partner effectively has a veto).

4. **Scope**
   a) **Expressly created easements:** the grant or reservation will determine the scope of the easement.
   b) **Implied easements:** the creating court will determine the scope of the easement, looking primarily at the scope of use prior to the conveyance at issue.
   c) **Prescriptive easements:** the creating court will limit the scope of the easement to the same general pattern of use as during the adverse statutory period. Typically, courts will narrowly limit the scopes of prescriptive easements.
   d) **Changes in use**
      (1) **Changes to the dominant estate:** traditionally, the scope of an easement can not increase if the dominant estate expands. If the use does increase after expansion, the servient owner can get an injunction (but note that such an injunction could require extensive administration by the courts and so might be disfavored). Modern courts, e.g. *Voss*, may not follow this rule, and instead use their equity powers to fashion an appropriate solution.
         (a) **Restatement 3d, Servitudes § 4.10:** the Restatement allows easements to change with technology--e.g., an easements with phone lines can be used for fiber optics, copper lines on an electrical easement can be replaced with ceramic ones
      (2) **Changes to the servient estate:** traditionally, the servient owner can't change the scope of the easement, period. The Restatement 3d allows for reasonable relocations of the easement, but requires the servient owner to incur all costs.
   e) **Cases**
      (1) ***Voss*** (Wash. 1986): although the court held that the dominant estate had expanded, the servient owner did not get an injunction of the dominant owners from using the easement for any parcel besides the original dominant parcel. Instead, the court employed its equity powers to allow the dominant owners to continue using the easement, but enjoined them from using their property for anything other than a single-family dwelling (otherwise, they lose the easement).
         (a) The servient owner should still be a little worried--does a "single-family dwelling" allow for servants, guests, horses, etc.?? Or aunts and uncles?? If those things became a problem, a court would likely invoke the rule of reasonableness--any use should be anticipatable.
5. **Termination**
   a) **Taxonomy of termination possibilities**
      (1) **Abandonment:** an easement terminates if the dominant owner abandons its use. To abandon, the the dominant owner must both (1) stop using the easement, and (2) intend to abandon the easement.
      (2) **Expiration:** an easement terminates if it was expressly created for a limited duration, or if its purpose has disappeared.

(3) **Express release:** an easement terminates if the dominant owner releases the easement to the servient owner.

(4) **Merger:** an easement terminates if the dominant and servient estates come into the same hands.

(5) **Estoppel:** an easement terminates if the dominant owner's conduct leads the servient owner to reasonably rely on the termination of the easement.

(6) **Prescription:** an easement terminates if the servient owner's use of his land is inconsistent with the easement and adverse to the dominant owner, for all of the statutory period for prescription.

(7) **Forfeiture:** an easement terminates if the dominant owner exceeds the scope of the easement in a way that can't be reversed.

(8) **Destruction:** an easement terminates if the servient estate ceases to exist.

(9) **Tax sale:** an easement terminates if the servient estate is sold by the state to pay the owner's tax debts.

b) Cases

(1) ***Preseault*** (Fed. Cir. 1996):

(a) Kind of interest: two of the rights of way were acquired through commissioner's awards that were silent on the kind of interest awarded; SCOTUS read this to be an easement. One was acquired in a voluntary transaction purporting to convey a fee simple; nevertheless, SCOTUS says this was an easement, too, because bargains with RRs weren't done with much free will, because of the near-certainty that your land would be condemned if you refused to sell.

(b) Scope of the easements: the easements do not include use for trails, SCOTUS says, looking at (a) the burden of such a scope on the servient estate, (b) the RR--a commercial enterprise not terribly interested in trails, and (c) the decisions of several state courts.

(c) Abandonment: it was abandonment when the RR tore up the tracks in 1975. It wasn't abandonment, however, when the RR stopped running trains on these rights of way five years before in 1970, because nonuse alone doesn't show abandonment--there must be evidence of intent to abandon as well.

i) The fact that the RR left bridges when it tore up the tracks is not inconsistent with abandonment--the RR had no obligation to return the easement to its original condition. Tearing up the tracks was enough to show intent to abandon. Also, the fact that the RR needed to get permission to abandon from the ICC but didn't isn't inconsistent with abandonment either--regulation by the government doesn't necessarily say anything about the property law consequences of RR's actions.

D. Covenants: promises that run with the land.

1. Taxonomy

Comment: When we eliminate the law-equity distinction, we eliminate the real covenant-equitable servitude distinction with it.

a) Real covenants: property rights--founded on promises--that run with the land (if the conditions for running are satisfied) and are enforced at law. These can be

affirmative or negative; respectively, real covenants are either duty to benefit or duty to refrain servitudes.

- **(1) When real covenants run:** to enforce a real covenant, you have to show that you have the benefit and that the person you're enforcing against has the burden.
  - **(a) Terms**
    - **i)** Horizontal privity: privity between owners of different estates.
    - **ii)** Vertical privity: privity between prior and subsequent owners of the same estate.
      - **a.** N.b.: an adverse possessor is not in privity of estate with the original owner.
  - **(b) First Restatement rule:** there must be horizontal privity for a burden to run, but no horizontal privity is required for a benefit to run. There must be vertical privity in either case.
  - **(c) Restatement 3d rule:** neither vertical nor horizontal privity required for either a benefit or a burden to run. As far as vertical privity, the Restatement 3d replaces that requirement with a distinction between affirmative and negative covenants: negative covenants are treated like easements for the purposes of running; affirmative covenants follow the traditional vertical privity rule, with the exception that burdens run to adverse possessors.
    - **i)** Life tenants: burdens run to life tenants, but their liability for nonperformance is limited to the value of the life estate.
    - **ii)** Lessees: only burdens that are more reasonably performed by the lessee run to the lessee.

b) Equitable servitudes: property rights--founded on promises that restrict use--that run with the land (if the conditions for running are satisfied) and are enforced at equity. These are duty to refrain servitudes.

- **(1) When equitable servitudes run:** to enforce an equitable servitude and get an injunction, you have to show four things, but not privity:
  - **(a)** That the person you're enforcing against had notice of the covenant you want to enforce.
  - **(b)** That the covenant was a promise.
  - **(c)** That the original parties intended the covenant to run with the land.
  - **(d)** That the covenant "touches and concerns" the land.
- **(2) Cases**
  - **(a)** ***Tulk v. Moxhay*** (Eng. Chancery 1848): the chancery court give Pf. what he wanted--an injunction--because it wants to prevent Df. from getting a windfall.

c) Common interest communities:

- **(1) Validity of restrictions:** the validity of the restrictions included in (a) the master deed, (b) association regulations, and (c) financial decisions by the developer or the association can all be challenged for validity.
  - **(a) Validity tests**

i) Public policy test
ii) Arbitrariness test
iii) Reasonableness test
iv) Business judgment test

(b) **Deference**

i) Master deed: the master deed is due great deference, primarily because it is likely to be relied upon by many community members.
ii) Community association regulations: these are due less deference than the master deed.

(2) **Cases**

(a) ***Nahrstedt*** (Cal. 1994): the court enforces a restriction against pets where the Pf. could not show the restriction was unreasonable, or that the restriction's harmful effects on her outweighed its benefits to the community as a whole, or that it bore no rational relation to the development as a whole, or that it was contrary to public policy. Reasonability, the court says, is to be determine wrt. the entire community, not wrt. to a single individual.

2. **Creation**

a) **Requirements for creation:** real covenants can not arise from estoppel, implication, or prescription. Equitable servitudes can arise from implication, but only in certain, limited circumstances. They can not arise by prescription--they are founded on promises.

(1) **Intention:** the parties must intend the covenant to run with the land.
(2) **Vertical privity:** there must be privity estate between the benefited party and the burdened party
(3) **Touch and concern:** the covenant must "touch and concern" the land with which it runs.

(a) **Professor Bigelow's test:** this (circular) test says that if the promisor's interest in the land is less valuable because of the covenant, then the burden touches and concerns; and if the promisee's interest in the land is more valuable because of the covenant, then the benefit touches and concerns.
(b) **Restatement 3d test:** the Restatement abandons the touch and concern requirement, but requires instead that the covenant not violate public policy.

i) **Examples of public policy violations**

a. Arbitrariness
b. Unconstitutionality
c. Restraint on alienation
d. Restraint of trade
e. Unconscionability

b) **Special cases**

(1) **Covenants not to compete:** some courts have said these run with the land. This might be an anomaly, though, because it seems to run counter to the rule.

(2) **Options:** options can run with the land.

c) **Cases**

(1) ***Sanborn v. McLean*** (Mich. 1925): the court finds a restriction on Df.'s property even though there was no restriction in Df.'s chain of title and Df. had no notice of any restrictions on other lots in the area. The court's decision could mean simply that when you buy property in a subdivision, you buy it at your own risk wrt. restrictions that are consistent with an observable use pattern in the subdivision. This case is not quite the same as *McQuade* or *Guillette*, where all of the deeds out from the subdivider contained reciprocal restrictions--here, only the first 21 deeds out, of 90, contained restrictions (and none of those were reciprocal). In other words, the court is essentially finding an implied promise from the grand plan.

(a) Where do we find the "grand plan"? See how the property is developed, look at the plat, consider parol evidence, look at brochures and ads, etc.

(b) Despite the result here, today it's usually best that a developer put restrictions in each deed and file a plat describing the restrictions in the record.

(2) ***Neponsit*** (N.Y. 1938): dispute over a deed provision requiring owners to pay to the subdivision a $4 fee for maintenance. The court decides that although the covenant involved may not be exactly proper in form, in substance it is good and should be enforced.

(a) Intended to run? The court finds that the parties intended the covenant to run with the land.

(b) Privity of estate? The court finds privity of estate even though the party seeking to enforce the covenant is a homeowners' organization that doesn't own any of the land--the property owners have looked to it "as the medium through which enjoyment of their common right might be preserved." That is, either the homeowner's association is the owners, or it represents the owners--either way that's enough, to this court, for PoE.

(c) Touch and concern? The court says this restriction touches and concerns the land even though it is an affirmative covenant to pay money--the covenant alters the legal rights of ownership, and the money goes to maintain the neighborhood, for the benefit of all owners.

(3) ***Caullett*** (N.J. 1961): the court removes a covenant, reserving a right in the grantor to build the first house on the land, because it is too ambiguous, doesn't touch and concern, and is a benefit in gross too personal to be alienable.

(a) Can this be solved? The court suggests using a right of first refusal on building the house. Alternatively, it might work to use an option to repurchase, for the developer. Most commonly, this is done by not closing until the house is built (this is called "package buying").

3. **Scope**

a) **Cases**

(1) **Hill v. Community** (N.M. 1996): a group home for AIDS patients does not violate a "single-family dwelling" covenant, the court says. The home is a

residence--in atmosphere, at least; it <u>is</u> a family--it's a family-like setting, at least, and the zoning ordinances define "family" in a way that includes the group home; and the Pf.'s argument that the home increases the traffic is dismissed as irrelevant by the court--a big, single family could impact the traffic just as much. The court bolsters its rationale by citing to the Fair Housing Act.

- **(a)** <u>FHA analysis</u>: violation of the FHA is determined by examining three factors:
  - **i)** Intent to discriminate
  - **ii)** Disparate impact from a rule or regulation
  - **iii)** Disparate impact from something other than a rule or regulation

(2) ***Shelley v. Kraemer*** (SCOTUS 1948): the Court will not enforce a racially restrictive covenant because it violates the Equal Protection clause of Amendment XIV. There's the requisite state action because the courts would be the ones enforcing the covenant if it was enforced.

- **(a)** The state action analysis isn't completely consistent with other rulings, e.g. *Bay Head*--but SCOTUS will bend its analysis in cases involving civil rights, sometimes.
- **(b)** Until the Civil Rights Act of 1966 and the FHA, racially restrictive covenants after *Shelley* may have still be "enforced" in an "order without law" way--residents might have chosen to abide by them.

4. Termination

a) Taxonomy of termination possibilities

(1) Change in conditions: according the Restatement 3d, a court may either modify or terminate a servitude if it is no longer possible, as a practical matter, to accomplish its purpose

- **(a) Cases**
  - **i)** ***Western Land Co.*** (Nev. 1972): covenants will not terminate as long as the original purpose of restrictive covenants can be accomplished and substantial benefit can inure to the restricted property. The covenants will stand even if the property would have a greater value in other uses.
    - **a.** Although because the covenant is enforced the interior lots gain value at the expense of the exterior lots, unencumbrance of the border lots would almost surely lead to the whole development being swallowed, in steps, by commercialization.
    - **b.** The owner here, who is seeking to terminate the covenant, argues that the <u>servient</u> property is not longer in its best-use--this is the wrong focus and the wrong argument. The focus must be on the <u>dominant</u> property. A better argument would be that the other owners are not following the covenant (actually, the owner here does argue this--he just can't show an extensive enough change).

(2) Waiver: a party seeking termination of a covenant can buy waivers from all those benefited by the covenant. This often will involve high transaction costs and holdouts. Or, if there has been a court order enforcing the covenant,

an owner seeking termination could buy the injunction from all those benefited (this has the same problems).

(3) **Abandonment:** a covenant beneficiary has abandoned if the requisite intention is shown.

(a) **Cases**

i) ***Pocono Springs*** (Penn. 1995): landowners may not abandon a fee simple with an unclouded title. The owners here tried to abandon one, by not paying taxes, by trying to give the land away, by ignoring letters about the land, and by not ever going on it; they even tried to give the land away--all to avoid having to pay homeowners' association dues (they could not use the property because it could not legally accommodate a sewer).

a. Allowing abandonment of a perfect fee simple would cause all sorts of problems: the Statute of Frauds and recording system would be compromised, it wouldn't be clear who would be liable for torts on the property, and, perhaps most importantly, it would be unclear how anyone could own the property ever again--how would title pass?

b. How to solve this problem? The owners could convey to a judgment-proof person, they could form a corporation and convey the land to it, or, if lots merge, they could give the land to a neighbor.

b) **Cases**

(1) *Rick v. West* (N.Y. 1962): West is a holdout--the only holdout, because all other owners have waived their rights under the covenant. Even so, the court enforces the covenant.

(a) The developer here does not face a lot of transaction costs in purchasing the injunction, but he does face a bilateral monopoly problem. Thus, this might be a good case for a damages remedy, or a reverse damages remedy (where the court orders an injunction, but requires the owners to pay the developer).

III. Land transfers

A. Contracts for sale

1. The statute of frauds

a) **Requirements:** what's required isn't exactly clear; these are the typical requirements (generally, if you cover each of these bases even a little, a court will say the SoF is satisfied).

(1) Names of the parties.

(2) Description of the property.

(3) Price of the sale.

(4) Signature of the "other" party--i.e., the one not trying to enforce the document.

b) **Exceptions**

(1) **Estoppel:** a party who can show substantial reliance on a promise to convey may get a court to enforce the promise even if there is no writing that will

satisfy the SoF.

(2) **Part performance:** if a party acts in a way that is "unequivocally referring to the agreement" and does something that a reasonable person wouldn't have done if not for a conveyance agreement, a court may enforce the promise even if there is not writing that will satisfy the SoF.

(3) **Restatement 2d of Contracts:** a unification of the part performance and estoppel exceptions: a party without a writing that will satisfy the SoF can get the conveyance enforced if he can show evidence of a promise and evidence that he's done something in reliance on that promise.

(4) **Cases**

(a) ***Hickey v. Green*** (Mass. 1982): even though Pf.'s only writing didn't identify the parties, didn't precisely identify the property, didn't have the seller's signature, and didn't identify the purchase price, the court enforced the promise to convey because Pf. had sold his own home in reliance on the promise.

2. **Duties and warranties**

a) **Marketable title:** a marketable title is "a title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent and intelligent person, one which such persons, guided by competent legal counsel, would be willing to take and for which they would be willing to pay fair value." In other words, title that doesn't carry a lawsuit with it.

(1) **Destruction of marketable title**

(a) Encumbrances: an easement, covenant, or private restriction will make title unmarketable title, unless the parties expressly say they will not. However, property that is actually in violation of a private restriction will destroy marketable title, even if the buyer is on notice of the restriction.

i) Utility easements: some courts say these destroy marketable title, some say they do not.

(b) Ordinances: a zoning ordinance will not destroy marketable title, unless the property is actually in violation of the zoning ordinance.

(c) Adverse possession: at least if time is not made of the essence, adversely possessed title does not destroy marketable title prima facie. See *Conklin*.

i) **Cases**

a. ***Conklin*** (N.J. 1978): an adverse possessor can either perfect record title (e.g., through an action to quiet title) or rely on the marketability of his title. The fact that the seller here could not have given adequate proof of title before closing doesn't matter here, because time was not made of the essence. As such, the adverse possessor is allowed to offer proof of marketable title in this suit, and the court's determination will relate back to a time before the closing. In order to prove marketable title, an adverse possessor must prove (1) the elements of adverse possession, (2) that claimants could not prevail in a lawsuit, and (3) that there is no genuine likelihood that anyone will ever assert a claim to the land.

(2) **Right to cure:** a party may contract for time to correct imperfections in the title, but corrections will not be allowed if they would mean the buyer wouldn't get what he had bargained for.

(3) **Equitable conversion:** courts in equity will "regard as done that which ought to be done"--a buyer is viewed as the owner from the date of the sale contract. The buyer has equitable title from that point forward, and the seller holds legal title in trust for the buyer. The seller gets an equitable interest in the purchase price at that point, too, which is secured in some jurisdictions by a vendor's lien on the property.

(4) **Cases**

(a) ***Lohmeyer*** (Kan. 1951): Pf. avoids a sale contract because the property is in actual violation of a noticed covenant and a zoning ordinance. Dfs. are not allowed time to correct the problems because there would be no way to correct without changing the nature of the property to an extent that the buyer would be getting something different than what he had contracted for.

b) **The duty to disclose defects:** most states have statutes that outline what defects sellers must disclose and how they must disclose them. Traditionally, a seller who misrepresents the condition of the property will normally be liable to the buyer for damages under the doctrine of deceit or “fraudulent misrepresentation.”

(1) **Buyer's burdens:** traiditionally,the buyer must prove four things to make out a prima facie case:

(a) That the seller made a false statement of material fact.

(b) That the seller know the statement was false.

(c) That the seller intended the buyer to rely on the statement.

(d) That the buyer suffered injury (e.g., the property was worth less than bargained for).

(2) **Non-disclosure:** traditionally, sellers were not liable for merely failing to disclose material defects they are aware of. Today, most states say sellers have an affirmative duty to disclose material defects of which they are aware (and that they are liable for damages to the buyer if the don't). Courts are especially likely to find the seller liable for nondisclosure where the seller has brought about the defect or condition.

(a) **Cases**

i) ***Johnson v. Davis*** (Fla. 1985): if a seller of a home knows of facts that materially affect the value of the property and that are not readily observable or known to the buyer, the seller has a duty to disclose them. Here, the seller did not disclose them, and the buyer's got his deposit back and avoided the sale contract.Courts are especially likely to find the seller liable for nondisclosure where the seller has brought about the defect or condition.

(3) **Hazardous waste:** CERCLA imposes strict liability for cleanup costs on either the current owner or any prior owner who owned the property during the time it was contaminated. The buyer has a duty to make all appropriate inquiry in finding out about hazardous waste on the property he's buying.

Some states impose duty to disclose waste on sellers.

(4) Cases

(a) ***Stambovsky v. Ackley*** (N.Y. 1991): owners who encouraged their home's haunted reputation were estopped from denying its ghosts' existence, since ghosts are typically known only to the onwers and so no prudent purchaser exercising due care is likely to find out about them.

c) The implied warranty of quality (IWoQ): this is developing law--the law is progressing beyond *caveat emptor*. Like products liability and wrongful discharge law, IWoQ law straddles tort and contract.

Comment: Implied warranties in real estate transactions are developing law--developing past the traditional rule of caveat emptor. This law straddles tort and contract (not unlike products liability and wrongful discharge law do).

(1) Limitations (buyer's burdens)

(a) Defects must be latent--not discoverable through reasonable inspection.

(b) Claimants must show unworkmanlike quality, as determined by the profession's standards.

(c) Reasonable time requirement: latent defects on which an IWoQ action is based must have shown up within a reasonable time after conveyances. Otherwise, builders would be insurers against defects.

(d) Builder's defenses

i) Intervening changes.

ii) Ordinary wear and tear.

(2) Disclaiming implied warranties: typically, we don't allow disclaimers of tort and public policy obligations, but do allow contract disclaimers.

(a) ULTA: ULTA allows general disclaimers wrt. commercial property, but not wrt. residential property; specific disclaimers, under ULTA, are valid wrt. any kind of property.

Comment: The ULTA warranties run with the land.

i) ULTA IWoQ: offers broad protection, but only covers new homes.

ii) ULTA implied warranty of suitability: offers only narrow protection, but covers both used and new homes.

(3) Cases

(a) ***Lempke*** (N.H. 1988): the court assembles IWoQ by picking characteristics from both tort, contract, and public policy. Most significantly, it holds that there is no privity requirement for suing on the IWoQ, and that pure economic loss is recoverable.

i) Rationale: the builder is the cheapest cost avoider; society is changing--people are more mobile and so houses are being bought and sold in short order; subsequent purchasers don't have a good opportunity to inspect, and they don't know much about construction besides; the builder already has a duty to build in a workmanlike manner, so a lenient IWoQ isn't a major extension; a privity requirement would encourage sham strawman sales for avoiding the IWoQ.

3. Escrows: parties to a real estate transaction may set up an escrow for the exchange

of money and title. An escrow agreement will not be part of the record unless one of the parties files a notice of it in the record.

a) If escrow is used, the buyer will not be able to get a home equity loan until the exchange is complete and out of escrow (and the seller may not be able to, either).

b) If the seller's mortgage is at a lower interest rate than is available to the buyer, the parties could agree to retain the seller's mortgage and pay it out of the escrow. The seller, however, might be leery of this, since if the buyer defaults on his payments into the escrow, the escrow will default on the seller's mortgage.

4. Merger: traditionally, once a real estate deal closed, the contract for sale merged into the deed, and so its covenants and warranties were no longer enforceable. This rule is changing, however--today, some courts say that certain covenants in the sale contract survive the closing. Thus, both contract and property law might apply throughout a real estate transaction.

B. Deeds

Comment: A deed is not title--but it is the best evidence of title.

1. Taxonomy of deeds

a) General warranty deeds: the grantor warrants good title and quiet possession to the grantee and anyone who takes from the grantee.

b) Special warranty deeds: the grantor warrants only that he (and just him) has not done anything since he owned the property to cloud the title. Special warranty deeds include the six standard warranties of title plus a list of all the encumbrances the grantor knows about.

c) Quitclaim deeds: the grantor gives no warranties--just passes title. The grantee gets whatever the grantor had, even if the grantor had nothing.

2. Elements of a valid deed

a) Names of both grantor and grantee.

b) Words of grant. A habendum clause might also be necessary in some situations (e.g., grants of life estates).

(1) The words of grant do not have to mention the sale price (or even that there was consideration given--but it's a real good idea to mention consideration, so that it can later be proved that the transaction was a purchase for value and not a trust assignment or a gift). Where tax stamps must be affixed to deeds, the tax stamps can be used to guess the selling price (but they can be manipulated, e.g., by affixing more than are required).

c) Description of the property.

(1) Metes and bounds descriptions: these must have a starting point (either an artificial or natural landmark) followed by distance and direction pairs, which must lead back to the starting point (else the description is invalid).

(2) Government surveys

(3) Plats

d) Signature of the grantor (the grantee's signature is not included--he's not promising anything).

e) Acknowledgement: the grantor swears before a notary--this is required before the transaction can be recorded.

f) Seal (only in some jurisdictions; where it is required, just about anything will

do).

- g) **Forgery and fraud:** a forged deed is invalid in the hands of even a BFP. A deed obtained by fraud will generally be invalid, but will be valid in the hands of a BFP who took from a fraud victim (this is because between the two, the BFP is the more innocent party).

3. **Warranties of title:** the standard warranties included in all general and special warranty deeds.
   - a) **The standard warranties**
     - **(1) Present covenants:** these are breached or not at the time of conveyance.
       - **(a) Covenant of seisin:** "I own it."
       - **(b) Covenant of right to convey:** "I have the right to sell it."
       - **(c) Covenant against encumbrances:** "There are no encumbrances."
     - **(2) Future covenants:** these may be breached anytime after the conveyance--but they must be actually breached before they can be sued upon.
       - **(a) Covenant of general warranty:** "I will defend you against lawful claims, and I will compensate you for any loss due to superior title."
       - **(b) Covenant of quiet enjoyment:** "You will enjoy the property free of concern."
       - **(c) Covenant of further assurances:** "I will execute any other necessary documents for perfecting the title."
   - b) **Cases**
     - **(1)** ***Brown v. Lober*** (Ill. 1979): because the SoL on the covenant of seisin has run, Pf. attempts to sue on the future covenants. He can't, though: his enjoyment has not actually been disturbed, thus those covenants have not yet been breached. It's not enough that someone is lurking out there with the legal right to disturb--they must actually disturb.
     - **(2)** ***Frimberger*** (Conn. 1991): latent violations of state or municipal land use regulations generally do not breach the warranty against encumbrances in certain situations--they definitely don't when:
       - **(a)** They do not appear on the land records, and
       - **(b)** they are unknown to the seller, and
       - **(c)** the agency charged with enforcement has taken no official action to compel compliance (at the time of the deed was executed), and
       - **(d)** they have not ripened into an interest that can be recorded on the land records.
     - **(3)** ***Rockafellor*** (Iowa 1922): though the covenant of seisin does not "run with the land," if it was breached at the time of conveyance, the grantee has a chose of action that can (and, without words to the contrary, will) be assigned to a later (remote) grantee.
       - **(a) Remedies:** where a remote grantee receives a chose on the covenant of seisin, the upper bound on his damages is what the original, breaching grantor got from his grantee--i.e., <u>not</u> what the remote grantee paid. (This follows from the analytical construct that has the original grantee's chose passing down the chain of title by assignment.)

i) **Parol evidence restriction:** the original grantor can introduce parol evidence as to the actual consideration given only if he is suing his grantee--not if he's suing a remote grantee. (Why? Because we say the remote grantee relied on the consideration recited in the record (itc., the actual consideration was in the original deed).)

4. **Delivery**
   a) **Actual delivery:** prima facie, a deed handed over is a deed delivered. This presumption is rebuttable with evidence that the parties had no intent to pass title.
   b) **Conditional delivery:** through certain mechanisms, a deed can be delivered but only take effect to pass title upon the occurrence of a condition.
      (1) In some jurisdictions, conditional delivery must be done through an escrow agent--the grantee can not hold the deed until the condition occurs. That is, if the grantee holds the deed, no parol evidence will be admitted wrt. conditions. This preserves the safety of both title and the recording system, and protects against fraud. See *Sweeney*.
      (2) In other jurisdictions, the grantee may hold the deed.
   c) **Cases**
      (1) ***Sweeney*** (Conn. 1940): owner wanted to give his land to his brother at his death, most likely to keep it from going to his estranged wife. He did this by giving deed #1, recorded, to his brother, and writing out deed #2, unrecorded, from his brother to him. These shenanigans ended up being pointless, because the court held both deeds to be delivered--citing that the purpose of deed #2 would be defeated if there had been no intent to pass title by it. The estranged wife takes.
         (a) What could the owner have done to keep his land from his estranged wife?
            i) A will would not prevent the wife from taking a forced share.
            ii) He could convey the land the him and his brother as joint tenants.
            iii) He could convey the land to his brother, and then his brother could convey a life estate to him. However, this might be viewed as an illusory transfer.
            iv) He could convey a future interest to his broth. However, this might violate the Statute of Wills because it looks to much like a testamentary transfer.
            v) He could put deed #2 in escrow, in order to effect conditional delivery.
            vi) He could set up a revocable inter vivos trust. However, in many states this would not prevent the wife from taking a forced share.
            vii) He could set up an irrevocable trust. While this would cut of the wife's right to a forced share, it is a gift transfer and thus has tax disadvantages.
            viii) He could convey to his brother, have his brother will the land to him, and trust his brother not to revoke that will.
         (b) **Forced shares:** by statute, a spouse can take a forced share of your estate (so, you can't completely disinherit your spouse). Forced shares are based on historical rights of dower (wife's right to part of her husband's estate) and curtesy (husband's right to his wife's entire estate). Forced share

rights can be waived in a prenuptial agreement.

(2) ***Rosengrant*** (Okla. 1981): owners gave deed to bank in escrow, to be delivered to donee at their death. The court held there to have been no delivery, and thus no conveyance, because the envelope containing the deed had both the owner's and the donee's name on it and because the bank's custom was to give deeds back to anyone whose name was on the envelope--thus the escrow delivery was revocable.

(a) Why hold revocable escrow transfers void?

i) They look too much like testamentary transfers.

ii) If there are no writings, and the grantors are dead, the revocability of the transfer would turn exclusively on the escrow agent's testimony.

iii) There's a better way to go about this--a revocable trust.

C. Financing

1. Mortgages

a) **Foreclosure:** a lender may "foreclose" a defaulting mortgagor's right to redeem his equity interest. Historically, <u>strict foreclosure</u> required the mortgagor to pay within a certain time or be barred. Now, foreclosure is is done by sale, with the proceeds going to the lender.

(1) **Judicial sales:** a lender to a defaulting mortgagor may ask a court to foreclose--the court will sell the land at a public sale, with the proceeds going to the lender. Judicial sales, compared to private sales, are expensive and time-consuming, and so lenders tend to avoid them (unless a deficiency judgment is likely to be needed); the outcomes and sale prices of judicial sales, however, are much more likely to be upheld than those of private sales.

(a) Statutes in some jurisdictions give mortgagors the right to buy back title from the judicial sale purchaser during some specified period <u>after</u> the sale.

(2) **Private sales:** foreclosure sales not administered by the courts; they arise from "power of sale" mortgages, which arise from the trust deed mechanism.

(a) **Trust deeds:** a mechanism for avoiding judicial sale--the mortgagor coveys title in trust as security for his debt; in case of default, the trustee (the lender or a third party) may sell the land without going to court (this is called "<u>power of sale</u>").

(b) **Seller's duties**

i) **Duty of good faith:** the lender must not discourage potential buyers.

ii) **Duty of due diligence:** the lender has an obligation to get a fair price.

a. How can a lender get a fair price?

1) Set an <u>upset price</u>, below which the lender will not sell. This price could be set, e.g., by reappraisal.

2) List with a realtor, and instruct him to reduce the price over time until the property sells.

iii) **Uniform Land Transaction Act (ULTA) duties:** ULTA requires a "commercially reasonable sale"--a sale conducted as if the owner himself were selling.

(3) **Deficiency judgments:** if the proceeds from a foreclosure sale don't cover the mortgagor's debt, the lender might be able to get a judgment for the difference. If a judicial sale was used, the price will likely be upheld, so the the lender is likely to get a deficiency judgment if there's a deficiency. If a private sale was used, though, the courts might scrutinize the sale and the lender's conduct closely.

(a) **Antideficiency statutes:** some jurisdictions prohibit deficiency judgments in certain situations (e.g., residential mortgages, private foreclosure sales) or limit their availability in certain ways (e.g., limitation of the judgment amount to (Principal Balance - FMV at Foreclosure)).

b) **Cases**

(1) ***Murphy v. Financial Development Corp.*** (N.H. 1985): lender, in power of sale foreclosure, breached its duty of due diligence by not attempting to get a fair price for the property. The lender did not, however, breach its duty of good faith because it fulfilled the statutory notice requirements and did not discourage potential buyers from attending the sale. Because only due diligence was breached, the lender's sale was not voided--this ensures security of title (which everyone involved in a foreclosure wants, so that the title is worth as much as possible). (If the lender had breached its duty of good faith, however, the sale would be voided as defective.)

2. **Land sale contracts (aka. contracts for deed):** in land sale contracts, the seller is the lender--the buyer purchases an agreement to convey once he has paid off the sale price, plus interest, in installments.

Comment: Land sale contracts closely resemble the agreements that were the historical origins of mortgages.

a) **Cases**

(1) ***Bean v. Walker*** (N.Y. 1983): the court refused to enforce terms in a land sale contract that allowed the seller-lender to either repossess or accelerate payments in case of default; instead, the court treats the land sale contract essentially as a mortgage. Thus, buyer had an equitable interest in the property that seller-lender had to extinguish through foreclosure (i.e., the seller-lender is really a mortgagor, and cannot use the contract's forfeiture remedies).

(a) Note that the forfeiture clauses may not be as punitive as the court treats them: the seller-lender may have taken a lower interest rate because of them, and the contract describes the accelerated payments as liquidated damages and rent.

D. Recording systems

1. **Assuring title**

a) **How do you assure title?**

(1) Search the grantee index back to the root, then the grantor index forward to the seller.

(2) Check for judgment liens; these might be in their own index.

(3) Check for mechanics' liens.

(4) Check the tract index.

2. **Indexes**
   a) **Taxonomy of indexes**
      (1) **Grantor index:** transactions indexed by the grantor's name.
      (2) **Grantee index:** transactions indexed by the grantee's name.
      (3) **Tract index:** transactions indexed by the tract description (e.g., a map).
   b) **Tract descriptions**
      (1) **Government surveys:** all public land was surveyed into rectangular tracts. Range lines run vertically, township lines run horizontally--each six miles apart. The 6 mi^2 tracts are called townships; townships are divided into 36 1 mi^2 sections, which are divided into 4 quarters, which are divided further into 4 quarters, and so on. Townships fall either east or west of the principal meridian, a range line, and either north or south of the base line, a township line; range and township lines are numbered sequentially, ascending from 1, from the principal meridian and base line, respectively. The 36 sections in each township are numbered sequentially, ascending from 1, right to left and top to bottom. Thus, these surveys can be used to describe specific tracts (e.g., NE4 Sec. 14-23S-14E describes the northeast quarter of section 14 in the township that is 23 township lines south of the baseline and 14 range lines east of the principal meridian).
      (2) **Metes and bounds descriptions**
      (3) **Plats**
      (4) **Mother Hubbard clauses:** a "dragnet" that catches all property not specifically described in a deed (e.g., "all of assignor's interest of whatsoever nature . . . whether or not specifically enumerated"). See *Luthi v. Evans*.
   c) **Cases**
      (1) ***Luthi v. Evans* (Kan. 1978):** subsequent purchaser was protected where the purchased property was caught by a "Mother Hubbard clause" but was not indexed because it wasn't described specifically. Thus, "a specific description of the property conveyed is required in order to impart constructive notice to a subsequent purchaser"; and, furthermore, Mother Hubbard clauses will not be effective as to subsequent purchasers who do not have actual knowledge of transfers caught in those clauses.
      (2) ***Orr v. Byers* (Cal. 1988):** subsequent purchasers was protected where the purchased property was recorded under a misspelled name ("Elliott" spelled "Elliot"). Seller's argument for applying *idem sonans*--that the buyers should have searched under similar spellings--was rejected.
         (a) This case may be somewhat limited, because here the encumbrance was a judgment lien, which would not have a property description attached to it in the record. Thus, itc. does not necessarily cover situations where there is an attached description (e.g., a mortgage, which, unlike a judgment lien, could be found in a tract index regardless of any misspelling).
         (b) *Idem sonans* does apply itc. in one sense--in buyers' favor: e.g., if O sells to "Elliot" and then "Elliott" sells, there title is unclouded unless a claimant can prove Elliot is not Elliott (i.e., that Elliot and Elliott are two different people).

3. **Recording acts**
   a) **Taxonomy of recording systems**
      (1) **Common law** (first in time is first in right): whoever purchases first wins. Regardless of notice, regardless of any recording (if available). Thus, subsequent purchasers are never protected (unless the equity exception applies).
         (a) **Equity exception:** equity refused to enforce equitable interests against subsequent BFPs if those interests were <u>prior</u>, <u>hidden</u>, and <u>purely equitable</u>.
      (2) **Race statute:** a subsequent purchaser is protected iff he records before the first purchaser and any other subsequent purchasers. Even if he's not a BFP.
      (3) **Notice statute:** a subsequent purchaser is protected iff he is a BFP from a record owner. Regardless of whether the first purchaser recorded, regardless of whether any other subsequent purchasers were BFPs or recorded.
      (4) **Race-notice statute:** a subsequent purchaser is protected iff he is (1) a BFP from a record owner and (2) records before the first purchaser and any other subsequent purchasers.
         (a) **Footnote 11:** some courts in race-notice jurisdictions have held that a subsequent BFP who records first is protected iff all prior conveyances in his chain of title are also recorded.
   b) **Notice**
      (1) **The bona fide purchaser:** a purchaser for value who purchased in good faith.
         (a) **Good faith:** taking without knowledge of clouds, non-disclaimed restrictions, and other problems.
         (b) **The shelter rule:** a person who takes from a protected BFP has the same rights as that protected BFP. This gives the protected BFP the benefit of his bargain--it protects his market.
      (2) **Actual notice**
      (3) **Constructive notice**
         (a) **Record notice:** constructive notice that arises when a transaction, restriction, lien, or other interest has been duly recorded.
            i) **Exceptions**
               a. **Wild deeds:** constructive notice is excused wrt. a title that is on the record but not actually in the chain of title.
               b. **Chronological anomalies** (quasi-wild deeds): courts are split on these--some say you're obliged to check for chronological anomalies, and some say you are not.
         (b) **Inquiry notice:** constructive notice that arises when there is information available that would lead a reasonable buyer to investigate the status of the title.
            i) **Possession:** if someone is actually in possession of property, the buyer is obliged to find out what the possessor's interests are. This is the primary type of inquiry notice.

a. **Cases**
   1) ***Waldorff*** (Fla. 1984): where mortgages mentioned specific condominium units, the mortgagees were deemed to have inquiry notice wrt. those units' titles because they were occupied. The mortgagees are obliged to ask the occupants about their interests, the court says.

ii) **Record references:** if a document in the record refers to a document that's not in the record, a buyer is obliged to inquire whether the referenced document affects the title.

a. **Cases**
   1) ***Paradise*** (Ga. 1974): where a prior deed mentioned another, earlier and unrecorded deed, the grantees are obliged to inquire about the nature of that earlier deed--even though that deed was presumed lost and there was no reason to believe the referenced deed gave anything besides a fee simple (although, in fact, it gave a life estate). (But who could the grantees have inquired <u>of</u>? It might be that no one knows the nature of the earlier deed!)

iii) **Memoranda of leases:** the authorities are split on whether a memorandum of a lease in the record obliges a buyer to inquire about the complete lease--some say it does, some say it doesn't.

(4) Chain of title anomalies

(a) **Estoppel by deed:** if A conveys to B land he does not own, but then later acquires title to it (from O, say), then A is estopped from denying he had not title when he sold to B--B is said to take as soon as A takes from O.

(b) **Cases**

i) ***Guillette*** (Mass. 1975): subdividing seller restricts all his land in an original deed out; subsequent purchaser is bound by such a restriction where it is in writing. Thus, a subsequent purchaser must check <u>every</u> deed out from the subdivider for restrictions. Each grantee is an intended beneficiary of the restriction and may enforce it against the others.

a. Does this change anything? Possibly not--in the "regular" title search, you've still got to go both back and forward, checking, at the very least, <u>all</u> of the deeds out for overlap. Itc. just adds an additional check, for restrictions. However, the courts are split on this topic--some do not bind subsequent purchasers to restrictions such as these (the argument is: why should you have to check for anything besides overlap wrt. those who are basically strangers to your title?).

b. *McQuade* (Mich. 1921) (n1p873): same situation as itc.

ii) ***Hughes*** (Minn. 1912): time of purchase of a deed with grantee's name left blank was the time that the grantee's name was filled in. So, although Df. conducted his transaction before Pf., Df. was a subsequent purchaser because he filled his name in and recorded <u>after</u> Pf. recorded. (Note that regardless of who turned out to be the

subsequent purchaser, the seller held the losing purchaser's purchaser price in constructive trust for that party.)

(5) Persons protected

(a) Purchasers: a grantee who has given valuable consideration for the property he's taken. Protection is usually available for subsequent purchasers who satisfy the requirements for protection.

(b) Donees: donees are usually not protected against prior and subsequent purchasers.

(c) Cases

i) ***Daniels*** (Ill. 1994): land sale contract buyer was held not a purchaser because he had not completed payment to the seller. Because the transaction was completed as a land sale contract, buyer had no deed to record; equitable conversion--i.e., that buyer became the equitable title-holder at the time of contracting--may have been a valid argument, but it wasn't raised below (however, that would not necessarily solve the purchaser problem).

ii) ***Lewis*** (Cal. 1994): buyers closed a real estate contract, then a film company recorded a lis pendens, then buyers started paying the purchase price and got a deed, then the lis pendens was indexed, then buyers paid the balance and invested $1.5m in remodeling the home. Even though they had not paid the complete purchase price before the lis pendens was both recorded and indexed, the buyers were protected--the court thinks it's silly and unfair to have different rules for those who finance through a seller and those who finance through a bank. It might be important to the holding here that the buyers did not have actual notice of the lis pendens when they closed.

c) Cases

(1) ***Messersmith*** (N.D. 1953): a subsequent purchaser will not be protected if his deed or a deed in his chain of title is not recordable. Here, the subsequent purchaser's deed was not properly acknowledged because the seller did not actually appear before the notary, but since the improper acknowledgement was not apparent from the face of the deed, the recorder accepted and recorded it. When the subsequent purchaser sold to a new buyer, that new buyer was not protected against the first purchaser because the deed his grantor took by was not recordable (even though it was, in fact, recorded--erroneously).