LaMar Jost
PROPERTY II: OUTLINE

# §1: LANDLORD/ TENANT LAW

## §1.1: LEASEHOLD ESTATES

I. General Overview

A. History: A leasehold estate is a possessory estate or a tenancy. The development of leasehold estates was different from the development of freehold estates (fee simple, fee tail, life estate, etc…) because:

1. A leasehold estate is not a freehold estate and has no characteristics of freehold estates. Lords and other wealth individuals did not want leasehold estates because they were not as valuable.
2. Leasehold estates were used as a way to avoid usury.
3. A leasehold estate in land was considered to be personal property because there was no requirement for livery of seisen.
    a. If the land could not be seisened it could not be personal property (not so anymore).
    b. Leasehold estates were sometimes called Chattel-real.

B. **G/R:** There are four categories (or three plus one) of leasehold estates:

1. Term of years;
2. Periodic estate;
3. Tenancy-at-will;
4. Tenancy at sufferance (or occupancy at sufferance; holdovers).

II. Term of Years

A. **G/R:** Term of Years: a term of years is an estate that lasts for some fixed period of time or for a period computable by a formula that results in fixing calendar dates for beginning and ending the term.

1. Once the term is created it becomes possessory.
2. The period for a term of years can be one day, two months, or 3,000 years; that is, any set duration for the lease is a term of years tenancy.
3. A term must be for a fixed period, but it can be terminable earlier by the happening of some event or condition.
4. Because a term of years states from the outset when it will terminate, no notice of termination is necessary to bring the estate to an end.
5. The death of the landlord or tenant has no effect on term of years estate.

B. **G/R:** A term of years lease can only be created by a specific document (i.e. the lease) and both parties have to agree to the specific duration or term of years.

1. The term can be for any specific duration; it does NOT have to be divisible by years.

2. There is no limit on how long a term of years can last.
    a. Caveat: most states have statutes requiring that agricultural leases can not exceed some number of years (usually 25 years) because if an agricultural lease lasts longer than that it brings back the issues of feudalism and serfs.
3. A term of years estate cannot be created by operation of law.

C. **G/R:** A term of years estates must have a specific commencement date if the leasehold is going to begin at some time in the future.
    a. Caveat: a specific commencement date is not needed if the tenant is beginning the lease on the day he finds the property.

D. **G/R:** All term of years estates must have a specific termination date.
1. The termination date can be anything that the landlord and tenant can calculate.
    a. Ex: until the 5th Anniversary of the tenants marriage; until the tenant or any measuring life is X years old; until a specific date, etc….

E. **G/R:** Termination: in order to terminate a term of years lease; the tenant does NOT have to give notice; notice is contained in the lease.

III. Periodic Estate (or tenanancy)

A. **G/R:** Periodic Tenancy: a periodic tenancy is a lease for a period of some fixed duration that continues for succeeding periods until either the landlord or tenant gives notice of termination.
1. Ex: "To *A* from month to month" or "To *B* from year to year."
2. If notice of termination is not given, the period is automatically extended for another period.
3. Under common law rules, 6-months is required to terminate a year-to-year tenancy.
    a. In some states, this has been changed by statute.
4. For a periodic tenancy less than a year, notice of termination must be given equal to the length of the period; but not to exceed 6-months.
5. The death of the tenant or landlord has no effect on the duration of the periodic tenancy.

B. **G/R:** A periodic tenancy is an estate that continues from period to period until it is terminated and can be created by agreement of the parties (landlord and tenant) or by operation of law.
1. A period can be from one day, to a week, to a month, to year, etc…

C. **G/R:** Holdovers: if the tenant holds over into another period the landlord has two options:
1. Treat the holdover tenant as a trespasser and evict; or
2. Treat the tenant as a holdover tenant and hold the tenant over for another period.

D. **G/R:** Termination: At common law, for the tenant to terminate the lease he had to give the landlord one period notice; except for year-to-year periodic tenancies then the tenant only had to give the landlord 6-months notice.

1. At common law, the tenant had to give a month's notice for termination of a month-to-month periodic tenancy.
2. Under the Uniform Landlord Act (ULA) the tenant has to give 30 days notice to terminate a month-to-month periodic tenancy.
3. The tenant must terminate on the correct date or he can be treated as a holdover.

III. Tenancy at Will

A. **G/R:** Tenancy at will: a tenancy at will is a tenancy of no fixed period that endures so long as both the landlord and tenant desire. If the lease provides that it can be terminable by one party; it is necessarily terminable at the will of the other as well *if* a tenancy at will has been created.

1. A tenancy at will ends, among other ways, when one of the parties terminates it.
    a. It may also end at the death of one of the parties.
2. Modern statutes normally require a period of notice—about 30 days or a time equal to the interval between rent payments—in order for one party to terminate a tenancy at will.

B. **G/R:** Death or Incapacity: a tenancy at will is a tenancy that is terminable at the will of either the landlord or tenant. It terminates automatically at death or due to mental incompetency because one party can no longer will that the tenancy continue.

C. **G/R:** Notice of Termination: most states have changed, by statute, the common law rule that the estate could be terminated instantly; usually, requiring a month or 30 days notice before termination.

1. This makes the leasehold estate very similar to a periodic tenancy.
2. A tenancy at will usually has be terminated at the end of each calendar month.
    a. If the tenant fail to give the correct termination date (either delineated by statute or common law) one view is that the tenancy is not terminated. The other view is that if the tenant leaves, that is giving notice of the termination and the tenant will only have to pay the next month's rent and the lease ends at the next coming termination date if the wrong notice is given.

D. **G/R:** At common law, if the estate was terminable by one party, it was implied that it was also terminable by the other party.

1. In some jurisdictions, this has been changed by case law.

E. **G/R:** a tenancy at will can be created expressly or by operation of the law.

1. Ex: if a term of years estate does not have a termination date; it becomes a tenancy at will.

F. **G/R:** Payment of Rent: If the tenant paid rent, and the landlord accepts the rent, the landlord cannot evict until the period of rent ends (makes the tenancy at will very much like a periodic tenancy).

1. This rule even applies when there is not an agreement to pay rent.

IV. Tenancy at Sufferance (Occupancy at sufferance: Holdovers)

A. **G/R:** Holdovers: a tenancy at sufferance arises when a tenant remains in possession (holds over) after termination of the tenancy.

1. Common law rules give the landlord confronted with a holdover tenant two options:
    a. Eviction (plus damages); or
    b. Consent (express or implied) to the creation of a new tenancy.

B. **G/R:** Eviction: if a tenant is evicted for an estate, he becomes a holdover tenant/ trespasser.

1. The holdover tenant is an occupant at sufferance. It is a defense to a landlord trespasser claim.
2. Until the tenant leaves, after evicted or when the lease expires, the tenant has no obligation to pay rent.
    a. Caveat: the tenant will usually have to pay the landlord for "use and occupation" of the land, which is usually what the rent was.

V. Leasehold Estate Rules

A. Cases: (1) *Garner v. Garrish:* the D rented an estate from a landlord (who subsequently died) and the lease stated that the lease would continue "for and during the term of quiet enjoyment" the landlord's executor subsequently tried to the evict the D and the court held D had a tenancy will which was terminable at the will or death of the tenant (D). (2) *Crechale & Poles Inc. v. Smith*: the P, landlord, and D, tenant, were engaged in negotiations to extend a lease and the lease expired without meeting an agreement, however, the D paid rent and P accepted, therefore converting the lease a periodic tenancy that was terminable at the end of the period.

B. **G/R:** Classical Rule: at common law, if the tenancy was at the will of one person (the tenant) it must be at the will of the other (the landlord).

1. At common law, when the lease is made to have and hold at the will of the lessee (tenant), this must be at the will of the lessor (landlord).

C. **G/R:** Garner Rule: if the lease unambiguously gives the tenant the right to terminate, and not the landlord, then the landlord does not have the right to terminate the lease.

1. A lease that grants the tenant the right to terminate at the date of his choice creates a determinable life estate (or life estate subject to condition subsequent) terminable at the will of the tenant (or his death or incapacity) [Garner v. Garrish].

D. **G/R:** Modern Rule: (majority view) modern courts look to the intention of the parties when entering into the lease and try and give credence to the parties' intent at the time of entering into the lease, even if they used the wrong "terms" in specifying the type of tenancy created.

E. **G/R:** a conveyance that grants the tenant an estate for the duration of some event creates a tenancy at will and not a term of years because there is no fixed termination dater measurable by the calendar [National Bellas Hess, Inc. v. Kalis].

1. Ex: "*L* to *T* for the duration of the war" creates a tenancy at will rather than a term of years.
2. Caveat: sometimes, like during war time, public policy may dictate another result.
3. However, as a general rule a term of years estate has to have: (a) a beginning point; and (b) an ending point.

F. **G/R:** Classical "Holdover" Rule: a landlord can hold a tenant, who does not vacate the premises at the end of the lease, over for another period, or treat the tenant as a tenant as sufferance (trespasser) [Crechale & Poles].

G. **G/R:** Holdover Rules: the common law (classical approach) is still used by a majority of courts today subject to 3 major exceptions.

1. General Rule: If a tenant is a holdover tenant the landlord has the option or "election" to:
    a. terminate the lease, that is, treat the tenant as a tenant at sufferance (trespasser); or
    b. treat the tenant as a holdover for another period, subject to the same terms as the original lease.
2. Exception: if landlord unambiguously states that he terminates the lease at the end of the period, then the lease is over.
3. Exception: if there are on-going negotiations between the parties at the time the lease expires; the landlord cannot automatically treat the tenant as a holdover for another year without notice.
4. Exception: if the tenant makes a reasonable attempt to leave and is only a holdover for a short period of time, the landlord cannot not hold the tenant over for another term, absent harm or injury to the landlord.

H. **G/R:** A tenancy from year to year is created by the tenant's holding over after the expiration of a term of years and the continued payment of the yearly rent is reserved for the landlord [Crechale & Poles].

1. By remaining in possession of the leased premises after the expiration of the lease, the tenant gives the landlord the option of treating him as a trespasser or tenant for another year.
2. Where a tenant, without a new contract, continues to occupy the property, which he has held under an annual lease, he becomes liable as a tenant for another year at the same rate and under the same conditions and terms.

3. It is the *duty* of the tenant when his period of tenancy has expired to surrender the premises to the landlord or else procure a new contract, and if he fails to do either, the landlord then has the option of treating him as a holdover or trespasser.

I. **G/R:** Duties of landlord with holdover tenant: After the landlord has exercised his option *not* to hold the tenant to another term, his right to hold him is lost.

1. On the other hand, if he has signified his election to hold the tenant for another term, he cannot thereafter rescind such election and treat the tenant as a trespasser.
2. The landlord's election, once exercised, is binding on the *landlord as well as the tenant*.
3. Absent evidence to show a contrary intent on the part of the landlord, a landlord who accepts rent from his holding over tenant will be held to have consented to a renewal or extension of the lease.

J. **G/R:** If the estate created is a periodic tenancy, the maximum time the landlord can hold the tenant over for is for another period.

1. If the landlord evicts the tenant, but accepts rent, then the tenancy becomes a month-to-month tenancy.
2. If the tenant offers a check to the landlord, with the intention being to create a month-to-month tenancy, and the landlord accepts the rent, then a periodic monthly tenancy is created by an implied contract (lease).

K. **G/R:** Statutes: it is not uncommon for statutes to create a remedy for the landlord in dealing with holdover tenants. The landlord's remedy for holdover tenants is sometimes double or triple rent for the holding over tenant.

1. One view is that such a statute eliminates the landlord's choice to treat the tenant as a trespasser.
    a. However, it still usually depends on what the landlord chooses to do.
2. If the statute reads "the landlords sole remedy is to…" then the common law choice of the landlord *is* eliminated altogether.

**§1.2: The Lease**

I. General Overview

A. **G/R:** a lease is both a contract and a conveyance.

1. A lease is a conveyance because it conveys land from the landlord to the tenant for "x" amount of years.
    a. The conveyance is usually a fee simple subject to condition subsequent (i.e. the condition being that the tenant pay rent).
    b. A lease transfers a possessory interest in land, therefore it creates property rights.
2. A lease is a contract because there is a lot promises by both the tenant and the landlord. The promises are usually referred to as "covenants" or sometimes "warranties."

a. Ex: tenant promises to pay rent and landlord promises to keep the premises in good repair.

3. In modern times, the property law of landlord and tenant has imported a lot of modern contract principles.

B. **G/R:** Lease v. License: a lease is a conveyance of property with the right of *exclusive* possession retained in the tenant. The right of exclusive possession gives the tenant the right to remove anyone from the property.

1. License: a license does not give the tenant (or possessor) the right to exclusive possession. It only gives them the right to use the property.

2. The difference between a lease and license is that with a license there is no exclusive right to possession.

a. Example of licenses: street/ hotel vendors are licensees. Dorms do are licenses because there is no exclusive right to possession in the student. Billboards are also a type of license.

II. Statute of Frauds

A. **G/R:** most states require that a lease, for more than a year, be in writing in compliance with the statute of frauds.

1. Some states require that all leases be in writing, however, without a writing parol evidence can be introduced to enforce a lease if it is not written and statute of frauds does not require a writing.

III. Selection of Tenants

A. Cases: (1) *Soules v. US Dept. of H.U.D:* P thought she was being discriminated against by D because of family status, had kids, brought suit under FHA because thought D, the landlord, was discriminating and court held there was not sufficient evidence of discrimination because of P's combative attitude and D was out of town, that is, there was a non-pretextual reasoning for inquiring about kids. (2) *Bronk v. Ineichen*: P brings suit under FHA claiming D, landlord, discriminated based on handicap because he evicted their hearing dog, but them, refusing to allow a dog on the premises. Ct. held insufficient evidence of whether or not dog was really needed.

B. **G/R:** Classical Rule: landlords were once free to discriminate as they wished in the selection of tenants—whether on grounds of race, national origin, gender, or whatever.

1. Today landlords are constrained from discriminating in the selection of tenants in a number of ways, namely the Fair Housing Act and §1982 of the U.S.C.

C. **Fair Housing Act** (42 U.S.C. §§3601-3619, 3631).

1. §3601: Declaration of Policy: it is the policy of the US to provide fair housing throughout the US.

2. §3603: Effective Dates of Certain Prohibitions: the FHA does not apply to:

a. Any single-family house sold or rented by an owner;

b. Rooms or units in dwellings of which the owner actually maintains and occupies at his residence.

3. §3604: Discrimination in the Sale or Renting of Housing: it shall be unlawful to:

(a) refuse to rent or sell, after making an offer to a person, based on race, color, religion, sex, familial status, or national origin.
(b) to discriminate against a person in the terms, conditions, or privileges of rental or sale based on a persons' color, race, religion, sex, familial status, or national origin.
(c) to advertise with respect to renting or selling a dwelling based on race, color, religion, sex, handicap, familial status or national origin.
(2)(A) to discriminate based on handicap.
(3)(A) discrimination based on handicap means a refusal to permit reasonable modifications for the handicapped person.

D. **42 U.S.C. §1982** (Civil Rights Act): All citizens of the US shall have the same right, in every state, as is enjoyed by white citizens to inherent, purchase, lease, sell, hold, and convey real property.

E. **G/R:** it is a violation of §1982, and FHA §3604, to not rent to a person based on race [US v. Hunter].

F. **G/R:** Discrimination based on national origin by a family renting out a basement apartment in their home is not a violation of the FHA but is a violation of §1982 [Shaare Tefila Congregation v. Cobb].

G. **G/R:** FHA prohibits all advertisements which contain a pattern of discriminatory content [Ragin v. New York Times].

H. **G/R:** The uses of discriminatory actions, although promoting integration, are still violations of the FHA [US v. Starret City Associates].

I. **G/R:** Test for Determining Discrimination: in determining whether an advertisement [FHA §3604(c)] or statement [FHA §3604(a)] indicates impermissible discrimination the court asks:

1. Whether an advertisement for housing suggests to an ordinary reader or listener that a particular race (or anything else prohibited) is preferred for the housing in question.

a. The ordinary reader is neither the most suspicious not the most insensitive of our citizenry.

J. **G/R:** Procedure Rules for FHA §3604 Claim: the burden shifting procedure employed in examining a §3604 claim is [the burden shifting does affect the fact the plaintiff still has the burden of proof; rather, it is the burden of production which goes back and forth between the plaintiff and defendant]:

1. The plaintiff, to make out the prima facie case, only needs to show:

a. that he is a member of the statutorily protected class; and
b. that he was rejected from renting house (the defendant only needs to allege *discriminatory effect* and need not show that the decision complained of was made with *discriminatory intent*).

2. The burden of production then shifts to the defendant to prove his actions were NOT discriminatory.
3. The burden of production then shifts back to the plaintiff to demonstrate that the defendant's actions/evidence was a pretext for discrimination by showing by a preponderance of the evidence (more than 51%) that the plaintiff was discriminated against.
[Soule].

K. **G/R:** Discrimination based on Handicap: FHA §3604(f) bars discrimination against any person in the terms, conditions, or privileges of a rental agreement because of a handicap of that renter.

1. To bring a suit under the handicap provision, the handicap must *substantially limit a major life function.*
2. Discrimination is a refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford such a person equal opportunity to use and enjoy a dwelling.
3. The landlord, when renting to a handicapped person must:
   a. make *reasonable* accommodations;
   b. which are *necessary* to afford the handicap person an equal opportunity to enjoy the housing.
   *[Bronk v. Ineichen].
4. Pursuant to the FHA "AIDS" is a handicap and refusal to rent to a person because of AIDS is discrimination [Baxter v. City of Belleville].
5. If a tenant has a mental disability that results in seeming threatening behavior the landlord must (a) try and make reasonable accommodations, or (b) demonstrate that no reasonable accommodations can be made before evicting the tenant [Roe v. City of Boulder].
6. If a renter has a mental disability that requires him to rely on a pet as a companion, the landlord cannot evict the tenant even if he as a no-pets policy because it is a violation of the FHA [HUD v. Riverbay].
7. Generally, courts are tougher on public housing then private housing renters.

L. **G/R:** Discrimination based on Family Status and Sex: FHA §3604(a) bars discrimination against any person in the terms, conditions, or privileges of a rental agreement because of the family status or sex of the renter.

1. Courts have held that a numerical occupancy restriction (either imposed by statute or the size of the dwelling) can be a basis for rejecting a renter without violating the FHA if the landlord can demonstrate that it is for business or economic purposes.
   a. There is not a bright line rule for occupancy and several different situations have been upheld as not violating the FHA family status provision [Glover v. Crestwood Lake].

2. Refusal to rent to an unmarried heterosexual couple because they are not married is not a violation of the FHA [Krushner].
3. Refusal to rent to a homosexual couple because the landlord objects to the couples sexual orientation is not a violation of the FHA [Krushner].
4. If the landlord rents to a female tenant and then demands sexual favors it is a violation of the FHA [Grieger v. Sheets].

M. **G/R:** State and local legislation: there are usually state statutes and local ordinances which are, in effect, the same anti-discrimination laws as the FHA but have different language. State and local measures may not operate to narrow the rights and remedies available under federal law, but they may and sometimes do have a broader reach, covering, for example, marital status and sexual orientation.

1. If the landlord has a policy requiring that the tenant disclose his monthly income before being rented to, it is not a violation of the FHA if the income requirements are applied equally to all perspective tenants. If the income requirements are not applied equally it could amount to discrimination based on wealth or be a pretext for discrimination, therefore, the requirements usually have to go to legitimate economic indicators [Harris v. Capital Growth Investors].
2. The "free exercise of religion clause" in the 1st Amendment to the constitution is not a legitimate excuse for discrimination [Smith v. Fair Employment & Housing Commission; Swanner v. Anchorage Equal Rights Commission].
3. Nothing in the FHA prohibits discrimination against lawyers when renting a premises [Kramarksy v. Stahl Management].

**§1.3: Delivery of Possession of a Leasehold Estate**

I. Deliver of Possession

A. Cases: (1) *Hannan v. Dusch*: P leased some property from D and when P went to take possession of the land there was holdover tenants on the premises and the dispute arose over whether it was the tenant or landlord's duty to remove the holdover tenant.

B. **G/R:** Once the landlord and tenant sign a lease, the tenant has a right to " legal possession" on the first day of the lease; however, the courts are split on whether the landlord has an implied covenant to deliver "actual possession."

C. **G/R:** English Rule: (majority view): the English rule implies a covenant requiring the landlord to put the tenant is possession of the property at the beginning of the lease.

1. In the absence of stipulations to the contrary there is in every lease an implied covenant on the part of the landlord that the premises shall be open to entry by the tenant at the time fixed by the lease for beginning his term.
    a. Such an implied covenant does not extend to the period beyond the day when the tenant's term begins. If after the first day of the lease, a stranger trespasses upon the property and wrongfully obtains or withholds possession of it from the tenant, his remedy is against the stranger and not the landlord.

2. The English rule looks more at the contract side of the lease (but does not deny the conveyance of a leasehold estate) in implying a covenant of delivery on the first day of the lease. Therefore the landlord has a *duty* to remove the old tenants.
3. The English rule only applies to leases given in the future and is designed to deal with the expectations of the renters. Thus, the rule only applies if the lease is signed *before* the term of the lease begins.
4. **Policy for the English Rule:** (a) the landlord has more knowledge about the lease, also has available to him defenses (at law) for dealing with holdover tenants, and the landlord has all the documents pertaining to the lease involving the holdover tenant. In other words, it is more efficient for the landlord to deal with the holdover.

(b) It is economically more efficient to put the duty on the landlord because the landlord is already at the starting point and is in a better position to remove the holdover tenant.
(c) The tenant has an *expectation* of going into possession on the first day of the lease, which makes up the foundation of the contract.
(d) The tenant will have to sign another lease or spend lots of cost in a motel and in storing his goods while judicial proceedings are being carried to remove the holdover tenant which is inequitable.
(e) If the tenant has a legal right to possession; he pays consideration (deposit and first month's rent) for the right to keep and have actual possession on the first day of the lease.
(f) Use and Occupation costs are the only possible remedy that can be collected by the tenant from the holdover tenant to reimburse him for the costs involved of not having actual possession (and possibly punitive damages).

D. **G/R:** <u>American Rule:</u> (minority rule): under the American Rule the landlord is not bound to put the tenant into actual possession of the demised premises; but is only bound to put him in legal possession, so that no obstacle in the form of superior right of possession will be interposed to prevent the tenant from obtaining actual possession of the demised premises.

1. If the landlord gives the tenant a right of possession he has done all that he is required to do by the terms of the ordinary lease, and the tenant assumes the burden of enforcing such right of possession as against all persons wrongfully in possession, whether they be trespassers or former tenants wrongfully holding over.
2. Under the American Rule, the tenant only has the legal right to possession and there is no implied covenant of delivery.

a. All the has a duty to do is hand over a document (i.e. the lease) that transfers legal possession to the tenant.

3. American rule deals more with conveyance side of the leasehold estate, therefore, the tenant now has an estate in land which is his responsibility.
4. Under the American rule, where the new tenant fails to obtain possession of the premises because a former tenant wrongfully holds over, his remedy is against such wrongdoers and not against the landlord, this is because the landlord has not

covenanted against the wrongful acts of third parties and should not be held responsible for such a tort unless he has expressly contracted for that obligation.
5. **Policy for American Rule:** (a) the landlord is not responsible for acts of third parties.

(b) There are no implied covenants in a lease (or conveyance of real property).
(c) Tenant has the legal right to possession and can use state law to remove or eject holdover pursuant to a summary disposition statute or forcible entry and detainer statute.
(d) If the tenant had wanted an express "actual possession" provision in the contract he could have requested or negotiated for an express covenant in the lease giving him actual possession.
(e) It is cheaper for the landlord if there is no implied covenant.
(f) It was a conveyance and therefore there cannot be any implied covenants.

D. **G/R:** Right of Access: if the tenant leases of piece of land from a landlord, and the land is landlocked and he cannot obtain access to, under the English rule, the landlord has failed to satisfy his duty to put the tenant in actual possession [Moore v. Cameron Parish School Board].

1. Caveat: unlike the holdover tenant issue, the courts may be more reluctant to grant the tenant relief because the tenant could have checked the deed and determined that there was not any easements into the property or that he had no access to it.

E. **G/R:** If the landlord fails to give the tenant the "legal right to possession," under both the American and English rule, the tenant may rescind the lease.

1. Ex: Landlord leases the same piece of property to two different tenants, then neither of the tenants have the legal right to possession and can rescind the lease.

**§1.4: Subleases and Assignments**

I. Subleases and Assignments

A. Cases: (1) *Ernest v. Conditt:* The P leased a piece of property to Rogers, with the lease stating that the tenant may not assign or sublet the premises w/out permission of the landlord. Rogers, w/permission, then sublet (as stated in the lease) the premises for the rest of the term to D who stopped paying rent. P then sued D for rent who said Rogers was obligated to pay it, and court held that it was an assignment and therefore D was obligated to pay. (2) *Kendall v. Ernest Pestana Inc:* The City of San Jose leased some property to the Perlitches, the Perlitches sublet the premises to Bixler, the Perlitches then assigned their interest in the sublease with Bixler to D. Bixler then attempted to sell his interest in the lease to P and D refuses for arbitrary reasons and P sues. Court held D could not refuse to allow P to alienate the property without a commercially reasonable standard.

B. **G/R:** Assignment: an assignment is a transfer of rights in all or part of the premises for the remaining amount of the *ENTIRE* term. A transfer of all rights from the grantor/assignor for the entire remaining term (THE WHOLE TERM) leaving no reversionary interest in the assignor

C. **G/R:** Sublease: an sublease is a transfer of rights in all or part of the premises for LESS then the entire term of the premises that leaves a reversionary interest in the grantor.

1. Even if the term of the sublease is just one day less then the remainder of the term; it is a sublease rather than an assignment.

D. **G/R:** Difference between Assignment and Sublease: the general rule as to the distinction between an assignment and sublease is that an assignment conveys the WHOLE term, leaving no interest or reversionary interest in the grantor or assignor. Whereas, a sublease may be generally defined as a transaction whereby a tenant grants an interest in the leased premises less than his own, or reserves to himself a reversionary interest in the term.

E. **G/R:** Privity of Estate: mutual relationship between two parties to the same right in property. A subtenant who is in privity of estate with the original lessor may avail himself of any covenants in the original lease which touch or concern the land.

1. A reversion, remainder, or future interests bring in privity of estate.
2. Ex: tenants in common, tenants by the entirety.
3. Basically, privity of estate is complementary interests in one piece of property.
4. Deals with the conveyance side of the lease.

F. **G/R:** Privity of Contract: the connection or relationship that exists between two or more contracting parties. Mutual or complementary interests in a contract.

1. Deals with the contract side of the lease.

G. **G/R:** A landlord can collect from ANY tenant on real or personal covenants in the lease if there is privity of contract.

1. The covenant to pay rent is an important *real* covenant in the lease.
2. A real covenant is a covenant which binds the heirs of the covenantor and passes to the assignees or purchasers.

H. **G/R:** A landlord recover on any *real* covenant (but not personal covenants) in which there is privity of estate.

I. **G/R:** The assignee has the primary obligation to pay rents. The assignor has the secondary obligation to pay rents.

J. **G/R:** Novation: a type of substituted contract that has the effect of adding a party, either as obligor or olbigee, who was not a party to the original duty. When a new contract is entered into; the contract with the former lessee is void and the former lessee has no obligations under the new contract.

L. **G/R:** Assignments and Privity: Privity of estate exists between the landlord and the tenant in possession of the property, now matter how many assignments have taken place.. Privity of contract always exists, absent novation, between the landlord and the original tenant, however, in the assignment the original tenant can create privity of contract can exist between the assignor and the assignee on the assignment (while privity of contract still exists between the landlord and the original tenant).

M. **G/R:** Subleases and Privity: if the original tenant subleases his property to a third party then:

1. Privity of contract and privity of estate still exist between the landlord and original tenant (which deals with the original lease).
2. Privity of contract and privity of estate exist (wholly apart from landlord and original tenant's privity of contract and estate) between the original tenant, the subleasor, and the subleasee with respect to the lease that they entered into which granted the sublessee the property for some term during the subleasor's whole term.
3. Therefore, if the sublessee fails to pay rents to the landlord, the landlord cannot sue the sublessee because privity of estate does not exist between the landlord and sublessee (privity of estate only exists between the landlord and the original tenant; and the original tenant and the subleasee).
4. If a sublease is signed with the landlord that states "in consideration for allowing this sublease, the landlord, allows the original tenant to sublease to the sublessee" and the sublessee and the landlord sign, then privity of contract exists between the two.

N. **G/R:** Third Party Beneficiaries to a Contract: the test for determining whether a third party to the contract exists is determined by the intent of the parties at the time the contract was entered into. If the intent of the parties was to benefit a third party, then he may have an action.

1. A landlord is usually a third party beneficiary in contracts involving an assignment or sublease.

O. **G/R:** Doctrine of Superior Title: the landlord's title to the property is always superior to that of a tenants because he is the owner of the property.

P. **G/R:** Classical Test for Determining Assignment or Sublease: if the instrument purports to transfer the original tenant's estate for the *entire* remainder of the term it is an assignment, regardless of its form or the parties' intention.

1. Conversely, if the instrument purports to transfer the original tenant's estate for *less* than the entire term—even for one day less—it is a sublease, regardless of its form or the parties intention.

Q. **G/R:** Modern Test for Determining Assignment or Sublease: the cardinal rule to be followed in construing deeds and other written instruments is to ascertain the intention of the parties [Ernst v. Conditt].

1. Under this approach, the courts abandon the technical rules (classical test) in the construction of conveyances and looks to the intention of the instrument alone in light of the surrounding circumstances.

R. Analytical Framework: if there is a problem on the exam involving assignments and subleases follow this analysis:

1. Determine whether the deed is an assignment or sublease using the classical rule.
    a. Use the modern rule as a possible counterargument for the other side. Remember, however, if the parties had a specific intent they would not be in the mess in the first place).
2. Determine if the covenant is an express/real or personal convent.
3. Determine if privity of contract and/or estate exists between the parties.
4. Then determine if the landlord will be able to collect from the party being sued.

S. **G/R:** The fact that there is an assignment, it does not release the assignor (or original tenant) from his obligation of real covenants, unless there is novation, because privity of contract still exists between the assignor and the landlord.

1. The obligations and liabilities of a tenant (lessee) to a landlord (lessor), under the express covenants of a lease, are not in anyway affected by an assignment or sublease to a third party, in the absence of an express or implied agreement or some action on his part which amounts to a waiver or estops the landlord from insisting on compliance with the covenants.
    a. This is true even though the assignment or sublease is made with the consent of the lessor.
2. Consent to a sublet has been held to include the consent to assign or mortgage the lease; and a consent to assign has been held to authorize a subletting. *[Ernst v. Conditt].

II. Restraints on Alienability

A. **G/R:** Approval Clause: if the lease contains an approval clause, that is, a clause which states that the tenant must secure the landlord's approval before assigning or subletting the premises, it is strictly construed as an being a restraint on the transfer of land.

1. The generally favors the free alienability of property and the common law rule, absent an approval clause, is that a leasehold interest is freely alienable.
2. Contractual restrictions on the alienability of leasehold interests are, however, permitted (i.e. approval clauses).
3. If there is a total prohibition on subleasing or assignments, most courts will enforce the restriction.
    a. However, if the prohibition is not expressly stated in the lease, the court will not imply such a prohibition.
4. **Policy:** such restrictions are justified as reasonable protection of the interests of the landlord as to who shall possess and manage property in which he has a reversionary interest and from which he is deriving income.

B. **G/R:** Classical Rule: (majority view): where a lease contains an approval clause (a clause stating that the lease cannot be assigned or sublet without the prior consent of the landlord) the landlord may *arbitrarily* refuse to approve a proposed assignee no matter how suitable the assignee appears to be and no matter how unreasonable the landlord's objection.

1. **Policy:** (a) a lease is a conveyance of an interest in real property, and the landlord, having exercised a personal choice in the selection of a tenant and provided that no substitute shall be acceptable without his prior consent, is under no obligation to look to anyone but the tenant for the rent.
(b) An approval clause is an unambiguous reservation of absolute discretion in the landlord over assignments of the lease. The tenant could have bargained for the addition of a reasonableness clause to the lease or paid consideration for a different clause. The tenant, having failed to do so, the law should not rewrite the parties contract for them.
(c) The courts should not depart form the common law majority rule because many leases now in effect covering a substantial amount of real property and creating valuable property rights were carefully prepared by competent counsel in reliance on the majority viewpoint.
(d) Tradition and public policy dictate that the landlord has a right under the circumstances to realize the increased value of his property.

(i) In a commercial lease, the landlord must specifically reserve the right in the lease to be able to capture the increased rent if there is a transfer of the leasehold.

C. **G/R:** Modern Rule: (minority view): where a lease provides for assignement only with the prior consent of the landlord, such consent may be withheld only where the landlord has a *commercially reasonable* objection to the assignment, even is the absence of a provision in the lease stating that consent to an assignment will not be unreasonably withheld [Kendall].

1. A restraint on alienation without consent of the landlord of a tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant CANNOT be withheld *unreasonably* [Rst. (2) Property §15.2(2)].
2. Test for Reasonableness: reasonableness is determined by comparing the justification for a particular restraint on alienation with the quantum of restraint actually imposed by it. The greater the quantum of restraint that results from enforcement of a given clause, the greater must be the justification for that enforcement.
3. Factors in Determining Reasonableness: the determination of whether the landlord's refusal to consent was reasonable is a question of fact. Some factors that the trier in fact may properly consider in apply the standards of good faith and commercial reasonableness are:

a. The assignee's history of damaging or destroying property;
b. the financial wherewithal of the prospective tenant, that is, the ability to the prospective tenant to pay rent, the inability of a tenant to pay rent is reasonable in both commercial and residential leases;
*(a) and (b) are the main two factors

c. legality of the proposed use (zoning ordinances, building codes, etc…;
d. need for alteration of the premises;
e. the nature of the occupancy; and
f. suitable of the use for the particular property.

4. Factors that are Unreasonable:

a. Denying consent solely on the basis of personal taste, convenience, or sensibility; and
b. denying consent in order that the landlord may charge a higher rent than originally contracted for.

5. **Policy for modern rule:** (a) *Conveyance Approach:* the necessity of permitting reasonable alienation of commercial space has become paramount in the increasingly urban society. The landlord may have an understandable concern about certain qualities of a tenant, particularly his reputation for meeting financial obligations; however, this justification does not go to the point of allowing the landlord to arbitrarily and without reason to refuse to allow the tenant to transfer an interest in leased property. (b) *Contract Approach:* In every commercial contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of his contract. Where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that discretion in accordance with good faith and fair dealing.

6. The modern rule/ Kendal rule only applies where there is a consent clause in the lease. An outright prohibition of an assignment or sublease will usually be enforced (majority view).

a. However, a small minority of states hold that a "no assignment/sublease clause" must be reasonably enforced.

7. Ex: it is commercially reasonable for a landlord to request and only accept a multiplicity of tenants; therefore the landlord can have reasonably commercial grounds for rejecting prospective tenants.

D. **G/R:** The reasonableness requirement ONLY applies to commercial leases; that is, no state has acted to create a reasonableness standard or requirement involving only residential leases.

E. **G/R:** It is commercially unreasonable for a landlord to withhold consent to an assignment for no other reason than to make more money (especially when he withholds the transfer because the potential assignee is a tenant in another building and the landlord does not want to lose his income) [Krieger v. Helmsley-Spear Inc.].

F. **G/R:** It is not commercially unreasonable when a commercial landlord withholds a lease to a prospective competitor [Pay 'N Pak Stores Inc. v. Superior Court].

H. **G/R:** Withholding a lease for moral purposes is not a sufficient commercial reason because if a person is going to engage in commerce, he must use commercially reasonable means [American Book Co. v. Yeshiva Univ. Dev. Foundation].

I. **G/R:** Rule in Dumpor's Case: where the landlord expressly consents to one assignment; the Rule in Dumpor's Case states that the covenant thereafter becomes unenforceable. The rationale being that the covenant is single, and once waived, the covenant is destroyed.

1. The rule has not been followed much by American courts and was rejected by the Restatement of Property.

**§1.5: The Tenant Who Defaults**

I. The Tenant in Possession

A. Cases: (1) *Berg v. Wiley:* D leased a building to P to be used as a restaurant. A dispute arose between D and P, with D contending that P had breached some covenants in the lease. While P was absent, D entered the leased premises and had the locks changed and evicted the tenant and shortly thereafter re-let the premises. The court held that the landlord could not resort to self help to evict the tenant.

B. **G/R:** Abandonment of Premises: if the tenant has no right to vacate the property but leaves anyhow, without giving the landlord notice, it is considered an abandonment of the premises.

C. **G/R:** Surrender of the Premises: if the tenant has no right to vacate the property, but gives the landlord notice and then leaves, it is considered that the tenant surrendered the premises. Surrender terminates the lease, provided that the landlord accepts the tenant's offer.

1. If the landlord accepts the tenant's surrendering of the premises, this extinguishes the tenant's liability for future rent, but not for accrued rent for past breaches of other covenants.
2. If determining whether the landlord has accepted a surrender, courts look to the intent of the landlord in retaking possession, without regard to whether the tenant is on notice that any re-letting is on the tenant's account.
    a. Under this intent test, one considers whether the landlord's actions are inconsistent with or repugnant to continuation of the original lease.

D. **G/R:** Abandonment or Surrender of the Premises: if the tenant abandons or surrenders the property the landlord may use self help because:

1. there is no threat for a breach of peace;
2. it would be a waste of effort, judicial activity, natural resources, and a danger to the property for the landlord to have to take legal action when no one occupies the premises.

E. **G/R:** Classical Self-Help Rule: the common law rule is that a landlord may rightfully use self help to retake the premises from a tenant *in possession* without incurring liability for wrongful eviction provided that two conditions are met:

1. the landlord is legally entitled to possession, such as where the tenant holds over after the lease term or where the tenant breaches a lease containing a reentry clause; and
2. the landlord's means of reentry are peaceable.

3. The tenant who is evicted by his landlord may recover damages for wrongful eviction where the landlord either had no right to possession or where the means used to remove the tenant were forcible, or both.

a. A landlord's reentry in the tenant's absence by picking the locks and locking the tenant out, although accomplished without actual violence, is usually considered forcible as a matter of law.

4. **Policy for Classical Rule:** the common law allowed for self help because it was cheaper and easier for the landlord than an ejectment action.

F. **G/R:** Modern Self-Help Rule: a landlord may *NOT* resort to self help to retake possession of leased premises from a tenant in possession; the only lawful means to dispossess a tenant who has not abandoned or voluntarily surrendered the property but who claims possession adversely to a landlord's claim of breach of a written lease is by resort to the judicial process.

1. The only lawful means to reenter a premises that is not abandoned or surrendered is by resort to the judicial process.
*[Berg v. Wiley].
2. A breach of the peace is not limited to a physical altercation; rather, a breach of the peace exists when there is the potential for real altercation. "Lock Out" procedures usually present the potential for a real altercation.
3. **Policy for Modern Rule:** the policy of the law is to discourage landlords form taking the law into their own hands, and its disfavor of self help to dispossess a tenant in circumstances which are likely to result in breaches of the peace.

a. The courts want to limit self help procedures to protect society from "undue violence."

G. **G/R:** Other Methods for Retaking the Premises When a Tenant Defaults:

1. Ejectment Action: a full blown judicial proceeding to eject the tenant. It is usually time consuming and costly; and therefore not the most effective and efficient method.
2. Summary Disposition Hearing: [Forcible Entry and Detainer]: a quick summary action with limited defenses, pre-trial motions, and has a special place on the docket (up the list) and is assigned to a lower court that has jurisdiction and can deal with the large number of cases.

a. The hearing usually ranges from 3-10 days on average to get a tenant out, however, in larger cities can last as long as 100 or so days.
b. If tenant is ordered by the court to quit the premises (leave) and still refuses then the Sheriff comes in and removes the tenant (that is, watches the landlord remove the goods). Having the Sheriff present and enforcing the court order lowers/ defuses the potential for physical violence.

3. The modern rule applies to commercial as well as residential leases.

a. **Policy:** tenants would not usually agree to a self help clause and if they do it could imply unequal bargaining power between the parties which goes to the reasonableness of the clause.

4. In some cases, self-help is still allowed in commercial leases, if a reentry clause is specifically stated in the lease, because commercial tenants are presumed to be in a more advantageous bargaining power situation.

H. **G/R:** Takings Clause: the constitutionality of a self help remedy, depriving the tenant of the leasehold without notice and judicial hearing is not clear although they could arguably violate the due process clause. Distress statutes, allowing self help seizure of the tenant's chattels, have been held to deprive the tenant of due process although the constitutionality of self help repossession has not been decided.

1. Although the 5th and 14th Amendments only apply to the government taking goods from individuals; authority still exists because the Supreme Court has allowed the courts to enforce the 14th Amendment in dealing with the landlord tenant relationship.

II. The Tenant Who Has Abandoned Possession

A. Cases: (1) *Sommer v. Kridel*: P leased an apartment complex to D. D paid the deposit and first month's rent, then ran into some bad luck (fiancé dumped him and discharged from the army) before he was to move in. D sent P a letter asking to let him out of the lease because of changed circumstances; however, D never heard back from P for over a year when he was served with process for rent. P did not try and rent out the property, terminate the lease, and even turned prospective tenants down who could've moved into the apartment and court held D wasn't liable because P did not mitigate the damages.

B. **G/R:** Classical Mitigation Rule: (minority view) the landlord is under not duty to mitigate damages because after lease is conveyed it is a tenant's leasehold estate and landlord cannot do anything to the tenant's property. The law also viewed it is as contrary to policy to force a landlord to undertake an affirmative duty.

1. The rule that the landlord is under no duty to mitigate damages caused by a defaulting tenant is based on principles of property law which equate a lease with a transfer of a property interest in the owner's estate.

a. Under this rationale the lease conveys to a tenant an interest in the property which forecloses any control by the landlord; thus, it would be anomalous to require the landlord to concern himself with the tenant's abandonment of his own property.

C. **G/R:** Modern Mitigation Rule: (majority view): A landlord is under a duty to mitigate damages caused by a defaulting tenant when he seeks to recover rents due from a tenant who has *abandoned* the property. The landlord's duty arises under the contract aspect of the lease because under contract law the non-breaching to a contract has an obligation to mitigate damages if the other party breaches the contract.

1. Courts emphasize the contractual duties of good faith and fair dealing.

2. As part of the landlord's cause of action (to recover rents), the landlord shall be required to carry the burden of proving that he used reasonable diligence in attempting to re-let the premises.
3. A landlord has satisfied his duty to mitigate damages if he has made a reasonable effort to rent/re-lease the premises.
4. Factors: in assessing whether the landlord has satisfactorily carried his burden are whether the landlord:
    a. Personally, or through an agency or broker, offered or showed the property to prospective tenants;
    b. advertised the premises in a local newspaper;
    c. obtained a realtor; or
    d. advertised the lease in some other forum.
5. Additionally, the tenant may attempt to rebut such evidence by showing that he proffered suitable tenants who were rejected.
6. Courts have allowed landlords to charge the current market rate (if it is an increase from the original lease) when the landlord is re-renting the premises while attempting to mitigate damages.
7. The landlord can lease the premises for longer than the term left on the existing defaulting tenant's term if he so desires.
8. The landlord only has to treat the defaulted lease as "vacant stock" and he does not have to rent the defaulted premises before other apartment, however, he cannot rent the defaulted premises last, he has to leave the choice to the prospective tenant and act reasonable.
*[Sommer v. Kridel].
9. Possible counterargument: the landlord may argue that when there is an absolute prohibition on assignments or subleases in the lease, then he should not have a duty to do something that the tenant is prohibited from doing (i.e. re-let the premises before the term is expired).

D. **G/R:** Surrender by the Tenant: (majority view) when the landlord *accepts* a surrender by a tenant, it terminates the lease and the tenant has no other obligations under the lease.
1. Minority view: other courts hold that accepting a surrender is in conflict with the mitigation rules and therefore the landlord should treat the premises as abandoned and mitigate damages.
*The language of the lease is important!

E. **G/R:** Recovery After Mitigation: as long as the landlord mitigates the damages from a defaulting tenant, there are two theoretical was the landlord can recover the shortfall from the defaulting tenant:
1. The old lease is continuing, therefore, the defaulting tenant is still liable for rent. Then when the landlord finds a tenant to replace the defaulting tenant, the old lease continues and the landlord acts as an agent of the defaulting tenant and assigns or subleases the old lease to a new tenant; or
2. The landlord can terminate the lease and recover damages. That is, when the landlord starts leasing to a new tenant, he creates a new lease and can then collect

damages from the defaulting tenant for unpaid rents up to the beginning of the new lease.

III. Landlord's Remedies and Security Devices

A. **G/R:** Means of Assuring Performance: the landlord has a number of means to assure performance of the tenant's duties. The principle concern of the landlord, of course, is the continuing payment of rent. The means available to the landlord to secure the rent may be provided by common law rule, statute, or by a clause in the lease.

B. Generally: A landlord generally has a remedy for:

1. physical damage to the premises;
2. any unpaid rent; and
3. consequential damages if the landlord has to incur expenses in a summary disposition process.

C. **G/R:** Unpaid Rent: The landlord's right to sue for back rent and damages occasioned by the tenant's breach of lease obligations is straightforward. If the tenant is in possession, the landlord may also terminate the lease and recover possession.

D. **G/R:** Security Deposits: lease provisions commonly require the tenant to make a security deposit at the time the lease is executed to assure the tenant's performance. The landlord is obliged to return to the tenant, upon termination of the lease, the deposit minus any amounts necessary to compensate for defaults by the tenant.

1. Upon the termination the lease, the landlord must return to the tenant the amount of the security deposit that exceeds the landlord's actual damages (i.e. cost of repossession and any unpaid rent). The tenant is due an accounting of the sum, that is, the landlord must provide in writing what deductions he has made from the deposit.
2. If the landlord's change during the tenant's occupancy, security deposits are usually transferred to the new landlord.
3. Statutes in some states require the landlord to pay interest on the security deposit. But there is no general common law rule that the landlord must pay interest (look at the Statute).

## §1.6: Landlord's Duties; Tenant's Rights and Remedies

I. General Overview

A. **G/R:** Dependant and Independent Covenants: At common law leases were governed by the law of assumpsit (the idea that covenants were mutually exclusive and implied) and covenants were assumed to be independent. Until the advent of the application of contract law in leases (about 40 years ago) covenants in leases were independent with one major exception: the landlord's duty not to interfere with the tenant's quiet enjoyment of the premises.

1. The tenant's covenant to pay rent was always dependant upon the landlord's performance of his covenant of quiet enjoyment. If the landlord breached his covenant, the tenant's obligation to pay rent ceased.
2. Today, all covenants in a lease are dependant.

B. **G/R:** Duties and Remedies: The landlord generally has the duty to provide (a) specific covenants; and (b) had an express or implied covenant of quiet of enjoyment of quiet enjoyment. For breach of the landlord's duties, the tenant had the remedies of (a) recovering damages, and (b) constructive eviction (termination of the lease).

II. Covenant of Quiet Enjoyment

A. Cases: (1) *Reste Reality Corp. v. Cooper*: P leased an apartment to D for commercial purposes. There was a defect in the wall that allowed the basement to be flooded every time it rained, D complained to P and P largely ignored the complaints (although the previous manager had promised to fix the problem). After a severe rainstorm the tenant gave notice and moved out and court held D was justified in moving out because P breached the covenant of quiet enjoyment.

B. **G/R:** Covenant of Quiet Enjoyment: a covenant on the part of the landlord promising the tenant that they shall enjoy the leased premises in peace without disturbance. A tenant has a right of quiet enjoyment of the premises, without interference by the landlord [Reste v. Cooper].

1. The covenant of quiet enjoyment can be expressly provided for in the lease. However, if not expressly provided, it is implied (almost always [49 states]) in the lease.
2. The covenant of quiet enjoyment can be breached by either actual eviction, partial actual eviction, or constructive eviction.

C. **G/R:** Actual Eviction: (a) *Before Taking Possession:* when the landlord conveys a leasehold estate that gives the tenant the legal right to possession; if the landlord did not deliver legal right to possession the tenant is under to obligation to pay rent. (b) *After Taking Possession:* if a tenant is physically evicted form the entire leases premises—either by the landlord or someone with superior title—the tenant's rental obligations cease. Having been deprived of possession of the entire premises, the tenant may treat the lease as terminated, and his liability for further rent under the lease is discharged.

1. Caveat: at common law, actual eviction only gave the tenant the right to terminate the lease, but in the absence of a covenant of quiet enjoyment he had no claim for damages.
2. Today, a covenant of quiet enjoyment is implied in every lease so if an eviction occurs (presumably wrongfully) the tenant may claim damages.

D. **G/R:** Partial Actual Eviction: if the tenant is evicted from any portion of the leased premises by the landlord, and therefore the landlord is violating his duty to give the tenant legal possession, the tenant's rent obligation abates *entirely* until possession thereof is restored to him (common law rule).

1. The tenant may stat in possession and refuse to pay rent.
2. Rst. (2) Property §6.1: the restatement views the common law rule as unfair to the landlord and adopts a rule of partial rent abatement, that is, the tenant must still pay rent for the part of the premises that the he possess.
3. If a third party enters the picture, that is the tenant is partially evicted by a third party with superior title, and the third party interferes with the tenant's use as contemplated by the parties, the tenant may terminate the lease or he may receive a proportionate rent abatement, that is, if the tenant remains in possession he only has to pay rents for the portion of the land he possess.

**Actual (or partial actual) eviction requires physical expulsion from *possession*. If the landlord changes the locks or bars entry, the eviction is actual. If the landlord interferes with the *enjoyment*, but does not bar entry, the eviction is constructive.

E. **G/R:** Constructive Eviction: where, through the fault of the landlord, there occurs a substantial interference with the tenant's use and quiet enjoyment of the leased premises, so that the tenant can no longer enjoy the premises as the parties contemplated, the tenant may terminate the lease, vacate the premises, and be excused from further rent liability.

1. A breach of the covenant of quiet enjoyment, whether express or implied, by the landlord gives the tenant the remedy of constructive eviction.
2. Under this rule, any act or omission of the landlord (or anyone with superior title) which renders the premises substantially unsuitable for the purpose for which it was leased (or which seriously interferes with the beneficial enjoyment of the premises) is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction.
3. The remedy or defense of constructive eviction for the tenant after the landlord has breached the covenant of quiet enjoyment relieves the tenant of his obligation to pay rent. In other words, the doctrine of constructive eviction serves as a substitute for dependency of covenants.
*[Reste Reality v. Cooper].

F. **G/R:** Elements of Constructive Eviction:

1. Substantial Interference: to have constructive eviction, the tenant's use and enjoyment (as distinguished from possession) must be *substantially interfered with*.

a. Substantial interference is measure objectively; it is what a reasonable person would regard as fundamentally incompatible with the use and enjoyment for which the parties bargained. Courts take into consideration:

(i) the purposes for which the premises were leased;
(ii) the foreseeability of the interference;
(iii) the potential duration of the interference;
(iv) the nature and degree of harmed caused (cannot be de minimus); and
(v) the availability of means to remove the interference.

2. Continuous Interference: the interference must be continuous, however, this does not just simply mean continuous but also encompasses continuous as meaning continuous as in continually reoccurring.

G. **G/R:** Tenant's Duties Before Asserting Constructive Eviction: before the tenant can assert the defense of constructive eviction, he must:

1. Notify the landlord of the problem and give the landlord a reasonable time/ opportunity to remedy or repair the problem;
2. If the tenant does not give the landlord notice of the defect, he most promptly (usually within a month) vacate the premises in order to maintain his constructive eviction defense.
    a. This gives the landlord notice of the defect and starts clock (for reasonable time to repair) and memoralization (evidence that the tenant made a request for the landlord to fix the defect).
    b. The tenant's right to claim constructive eviction will be lost if he does not vacate the premises within a reasonable time after the right comes into existence. The court will take into consideration the tenant's circumstances.
3. Under the doctrine of constructive eviction, the tenant cannot remain in possession and refuse to pay rent or receive damages.

H. **G/R:** The landlord cannot put a provision in the lease for the tenant to waive rights to recover for a latent defect (because such a clause would violate the implied covenant of quiet enjoyment).

1. Latent defects are defects which the tenant could not have seen even after using reasonable care in inspecting the premises for leasing the property.
2. A landlord can never waive the implied covenant of quiet enjoyment for latent defects or to common areas.
3. To breach the covenant of quiet enjoyment the latent defect must be a substantial and continuous violation [see rule F, supra].

I. **G/R:** Under any lease five years or more, there is a statute of frauds requirement.

J. Things that have been found to violate the covenant of quiet enjoyment:

1. Vermin, no heat, no lights, continuous flooding of the basement, not fixing the elevator in a building with lots of floors, no water, no plumbing, holes in the roof and walls, etc…

K. **G/R:** Acts of other Tenants: whether the acts of other tenants will suffice for constrictive eviction depends on whether the landlord can control the behavior of other tenants and can be regarded as at fault in not controlling it.

1. **G/R:** As a general rule, the landlord is *not* responsible for one tenant causing an annoyance to another tenant, even though the annoying conduct would be considerable viable for constructive eviction if the landlord did it himself and even though the landlord can legally control the other tenants conduct.
2. Exception: the landlord has a duty not to permit a nuisance on the premises.

3. Exception: the landlord has a duty to control common areas under his control and therefore if objectionable conduct takes place in common areas the conduct is attributable to the landlord.

L. **G/R:** There is no such thing as partial constructive eviction (except in New York).

M. **G/R:** If the tenancy is a tenancy-at-will, then either party can evict or vacate at their will and it is more difficult to assert the defense of constructive eviction. However, most times a tenancy at will is bumped up to a periodic tenancy, therefore allowing for the defense of constrictive eviction to be asserted.

III. The Illegal Lease

A. **G/R:** Destruction of the Premises: at common law, the tenant had an estate in land, and therefore the estate and the rights and remedies were associated with the land and not the building on the land. In turn, if the apartment complex burned down the tenant was still responsible for the terms of the lease (in the land).

1. Ex: If a tenant has on apartment on the 15th Floor of a building and that building burns down; at common law, the tenant still had a lease in the cubicle of air.
2. In modern times, if the house the tenant is leasing burns down, the lease is terminated.

B. **G/R:** Illegal Lease: At common law, if the tenant rented a building which was in an unsafe and unsanitary condition in violation of the housing and building codes the lease was considered an illegal contract made in violation of statutory prohibitions and therefore unenforceable [Brown v. Southhall].

1. The illegal lease doctrine does not apply if:
    a. the code violations occur after the making of the lease;
    b. to minor technical violations or to violations of which the landlord had neither actual nor constructive notice.
2. A tenant under an illegal lease is a tenant at sufferance and the landlord is entitled to the reasonable rental value of the premises, given their condition.

IV. Implied Warranty of Habitability

A. Cases: (1) *Hilder v. St. Peter:* D leased an apartment to P. After P moved into the apartment she found broken windows, no locks on the doors, the toilet was clogged with garbage and feces, some lights were inoperable, the roof was falling down, raw sewage leaked up from the ground, and the apartment did not have heat for sometime because the breaker was broken for the furnace. The court held the P breached the implied warranty of habitability by his willful and wanton conduct in failing to repair the demised property after being notified by the plaintiff tenant.

B. **G/R:** Implied Warranty of Habitability: a lease is essentially a contract between the landlord and tenant wherein the landlord promises to deliver and maintain the demised

premises in habitable condition and the tenant promises to pay rent for such habitable premises.

1. These promises constitute independent and mutual considerations; thus, the tenant's obligation pay rent is predicated on the landlord's obligation to deliver and maintain the premises in a habitable condition.
2. In the rental of any *residential* dwelling unit an implied warranty of habitability exists in the lease, whether the lease is oral or written, that the landlord will deliver over and maintain, throughout the period of the tenancy premises that are:
    a. safe;
    b. clean; and
    c. fit for human habitation.
3. The implied warranty of habitability is implied in tenancies for a specific time and tenancies at will.
4. The implied warranty of habitability covers all latent and patent defects in the essential facilities of the residential unit.
    a. Essential facilities are those facilities vital to the use of the premises for residential purposes.
5. A tenant who enters into a lease agreement with knowledge of any defect in the essential facilities cannot be said to have assumed the risk, thereby losing protection of the warranty.
6. The implied warranty of habitability cannot be waived, absent statutory provisions to the contrary (see Wyoming W.S. §1-21-1202(d)), by any written provision in the lease or by oral agreement.

*[Hilder v. St. Peter].

C. **G/R:** <u>The Landlord's Duties Under Implied Warranty of Habitability (IWH):</u> with the advent of the implied warranty of habitability in recent years, which is now the majority view, the landlord's duties include:

1. The landlord must do all things he expressly covenants to do;
2. the landlord must keep obligations under the doctrine of quiet enjoyment (and constructive eviction); and
3. under the IWH the landlord must:
    a. fix any substantial defect that affects the health and safety of the tenant.
        (i) the courts may look to housing codes to determine the standards of habitability and in the absence of housing codes the courts will apply the IWH test.
        (ii) <u>IWH Test:</u> whether the defect has an impact on the health and safety of the tenant. The term/test is referred to as habital in fact.
        (iii) Using the habital in fact test the courts can use the housing codes for standards, but if there is not a housing the court is free to apply its own test.
        (iv) Some of the most important things under the IWH test are walls, ceilings, adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance of the premises in genera.

(v) The tenant cannot sue for inconsequential things that violate the housing code (such as a hole in the screen or something of the like).

4. IWH Test: whether the housing is habitable for the tenant, that is, habitable in fact (see test) in that particular location.

D. **G/R:** Breach of Implied Warranty of Habitability: In determining whether a breach of the IWH has occurred the courts may look to any relevant or municipal housing code.

1. Courts may also make reference to the minimum housing code standards set by Congress.

2. A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of the IWH.

a. One or two minor violations standing alone which do not affect the health or safety of the tenant shall be considered de minimis and not a breach of the warranty.

3. The landlord is *not* liable for defects caused by the tenant.

4. Housing codes are not determinative, if the city or town does not have a housing code, the court in determining if there was breach should inquire into whether the claimed defect has an impact on the safety and health of the tenant.

E. **G/R:** Tenant's Duties Before Making use of the Implied Warranty of habitability: In order to bring a cause of action for breach of an implied warranty of habitability or withholding rent the tenant must:

1. First show that he notified the landlord of the deficiency or defect not known to the landlord and allowed a reasonable time for its correction.

2. After a reasonable time has passed, and the landlord has failed to correct the defect, the tenant can pursue the remedies available to him.

a. What constitutes a reasonable time depends on the facts, circumstances, and type of defect.

F. **G/R:** Determining Damages for Breach of an Implied Warranty of Habitability: because a lease of residential dwelling creates a contractual relationship between the landlord and tenant, the standard contractual remedies of rescission, reformation, damages, and specific performance are available to the tenant when suing for the breach of implied warranty of habitability.

1. Cause of action: the tenant can sue for specific performance with abatement of the purchase price for lack of the landlord's consideration).

2. Rent Abatement: the tenant can abate the rent by the fair market value of the demised property (reformation).

a. **Policy:** When the tenant withholds the payment of rent the burden and expenses of bringing the lawsuit is then on the landlord who can better afford to bring the action.

b. The tenant must then show (after the landlord brings the action) that the landlord had notice of the defect, affecting the tenant's habitability, existed during the term for which rent was withheld.

3. Repair and Offset: the tenant can make repairs, and then set off the price of the repairs in the next month's rent (reformation).
    a. When the landlord is notified of the defect but fails to repair it within a reasonable time and the tenant subsequently repairs the defect, the tenant may deduct the expense from future rent.
    b. **Policy:** this constitutes a more direct action by the tenant and the tenant solves the problem by himself (fixes the toilet, faucet, etc…) and is therefore more efficient.
    c. The tenant must notify the landlord before making any repairs because:
        (i) it notifies the landlord of the problem;
        (ii) allows the landlord to choose what he wants to do with his property; and
        (iii) the landlord may be able to fix the problem cheaper (landlord has maintenance men on retainer, superintendents, workers, etc…).
    d. In applying the repair and offset rule, courts have limited the amount recoverable to one or two months rent. If the repair is large the landlord must make them and the tenant can only make small repairs.
4. Rescission: the tenant can vacate the premises, and terminate the lease because of constructive eviction.
5. Specific Performance: because the implied warranty of habitability makes the covenants between the landlord and tenant mutual, if the landlord is to receive his consideration (rent) the landlord must supply the tenants consideration (a habitable dwelling) and therefore the tenant can sue for specific performance and ask the court to make the landlord supply his consideration to the tenant.
6. Damages: the tenant can also sue for damages and how much he receives will depend on which test the court apples (see rule G).

G. **G/R:** Measure of Damages: there are two main tests the courts use in determining how much to award a tenant after filing suit for breach of IWH:
1. Fair Market Value Test: (majority view): the measure of damages shall be the difference between the value of the dwelling as warranted (dwelling as warranted = DW) and the value of the dwelling as it exists in the defective condition (value of dwelling in defective condition = DDC)
    a. Formula: FMVT: (DW) – (DDC) = tenant's abatement amount.
    b. Ex: Rent is $400; the value of the property in the defective condition is $100. FMVT: ($400) – ($100) = $300 (amount of tenant's abatement).
    c. The rent agreed to in the lease is always the fair market value.
    d. The tenant has to prove the value of the property in the defective condition by bringing in an appraiser or realtor.
    e. In long-term leases, if the fair market value goes up, and the property stays in the same defective condition, the tenant may not have to pay any rent. However, most residential leases are not long term, in fact, the vast majority of residential leases do not exceed a year.
    d. The tenant will only be liable for the reasonable rental value, if any, of the property in its imperfect condition during his period of occupancy.

2. Percentage Reduction Test: (minority view): the agreed upon rent is reduced by a percentage equal to the percentage of the lease value lost be the tenant in consequence of the landlord's breach of the implied warranty of habitability.

a. Ex: Rent is $400, raw sewage is leaking up on half the property making that half inhabitable, the property is then only worth $200 because the percentage (50%) of the house is inhabitable.

b. **Policy:** it is cheaper for the tenant because he does not have to hire an appraiser or realtor to determine the "value of the dwelling as it exists in the defective condition" however, it is much harder to apply then the fair market value test.

3. Compensatory and Punitive Damages: compensatory damages are also allowed for a tenant's discomfort and annoyance arising from the landlord's breach of the IWH. Punitive damages may be available to a tenant in the appropriate case, that is, cases in which the breach is willful, wanton, or fraudulent in nature so as to make the appropriate award of exemplary damages.

a. Willful, wanton, or fraudulent breach may be shown by conduct manifesting personal ill will, or carried out under the circumstances of insult or oppression or even by conduct manifesting a reckless or wanton disregard of one's rights.

*[Hilder v. St. Peter].

H. **G/R:** Policy for the Implied Warranty of Habitability: there are several policy considerations that led the courts to adopt the implied warranty of habitability:

1. Supply a stock of habitable housing so everyone has a safe, sanitary, and healthy place to live.

2. The urban tenant is different from the rural tenant of 500 years ago because the sophistication of the dwellings has increased exponentially. Because urban housing is more sophisticated it is more difficult to fix, that is, the tenant is less able to control the surroundings.

a. In large apartment complexes, the heating and ventilation systems is beyond the physical repair of the tenants (huge boilers and furnaces) and is usually beyond their physical ability to repair because they are located in the boiler room and the tenant would have to trespass to fix the problem.

3. In large complexes the tenant has no incentive to make sure the problems are fixed because:

a. the large costs associated with fixing a complex system;

b. it not only helps the individual tenant but he would be gratuitously undertaking the job for the rest of the tenants; and

c. the tenant has the intent when entering a lease to purchase a package of goods (heat, water, light, etc…). The intent of the parties, at least the objective intent, is the tenant will receive goods and services in exchange for rent.

4. Because there is no shortage of tenants, and there is a shortage of good housing, the landlord is in a better bargaining position almost invariably. The tenant has almost no negotiation power in most modern leases (form leases) so the law must give landlord's incentives to better protect the tenants.

I. **G/R:** Warranties: (generally):

1. *Warranty Implied in Law:* a warranty implied in law means that the contract (lease) already has a warranty in it and the intent of the parties at the time of entering the contract is immaterial.
2. *Warranty Implied in Fact:* a warranty implied in fact is a determination of facts (by the trier of fact) in considering whether or not an implied warranty was in the contract based on the lease, negotiations, and intent of the parties at the time the contract was formed.
3. An implied warranty of habitability is implied in law and therefore, in most circumstances, it may never be waived. Thus, the landlord cannot not insert a provision or clause into the contract waiving the implied warranty of habitability.

J. **G/R:** the implied warranty of habitability does not apply to "niceties" such as a pool, gym, etc…because the tenant does not need those to live [Soow v. Wellner].

K. **G/R:** Commercial Leases: the implied warranty of habitability, in most jurisdictions, does not apply to commercial leases; however, the doctrines of constructive eviction and quiet enjoyment still apply to commercial property.

1. The IWH does not apply to commercial leases because the IWH was largely created to deal with unequal bargaining power. It is presumed that the parties in a commercial setting have equal bargaining power (however, there are some situations in which it could be argued that the IWH should apply, like in "Ma and Pa" stores.

L. **G/R:** Implied Warranty of Habitability and Other Doctrines: the implied warranty of habitability does not render pointless the other doctrines of constructive eviction, quiet enjoyment, and illegal leases because:

1. A good handful of jurisdictions have not adopted the implied warranty of habitability;
2. the warranty, even were generally applicable, commonly does not apply across the board to all residential leases; single-family residences might be excluded as may long term leases and agricultural leases;
3. and a majority of jurisdictions have declined to extend the implied warranty of habitability to commercial leases.

V. Retaliatory Eviction

A. **G/R:** Classical Retaliatory Eviction Rule: at common law, landlords had virtually unlimited freedom to terminate periodic tenancies and tenancies at will upon proper notice, and refuse to renew expired terms. The landlord's reasons were irrelevant and could be malevolent.

B. **G/R:** Modern Retaliatory Eviction Rule: today, whether by statute or judicial decision, most jurisdictions forbid retaliatory actions by the landlord [Rst. (2) §§ 14.8, 14.9].

1. A fairly common approach is to create a rebuttable presumption of retaliatory purpose if the landlord seeks to terminate a tenancy, increase the rent, or decrease services within some given period (commonly anywhere from 90-180 days) after a good faith complaint or other action by a tenant based on the condition of the premises.
    a. Retaliatory acts beyond the stated period are usually prohibited, but the tenant bears the proof.
2. The landlord's freedom to terminate tenancies is contrained by more than retaliatory eviction prohibitions, such as, anti-discrimination measures and rent control laws were they exist.

C. **G/R:** Policy and Other Points: If a landlord were allowed to evict a tenant for exercising his rights at the end of the tenancy it would create several disincentives.

1. If the landlord is evicting in bad faith, the result of retaliatory eviction would be to create disincentives for tenants who exercise their rights.
2. The policy the law tries to achieve is to create incentives for tenants to exercise their rights and discourage landlords from evicting on a retaliatory motive.
3. The landlord usually cannot evict the tenant for as long as he has a retaliatory motive. The landlord cannot raise rent or discontinue services either, or any other actions that would, in effect, cause the tenant to be fearful of exercising his rights.
4. If the landlord can demonstrate a non-retaliatory motive, it is a valid defense.

D. **G/R:** Proof Problems: the burden of proof for proving retaliatory eviction is on the party making the allegations (i.e. the tenant).

1. There is no physical way determining retaliatory damages.

VI. Landlord Tort Liability

A. **G/R:** Landlord Tort Liability: (majority view): At common law, the landlord was generally not liable in tort for the tenant's injuries (and perhaps injuries of third parties on the leased premises) unless the landlord breached the limited duties contained in the lease or the landlords conduct fell within one of the six exceptions to the general rule of landlord non-liability. [This was because the it was a conveyance of real property]. The six major exceptions to the rule of landlord non-liability are:

1. Latent Defects: if the landlord knows of a dangerous condition, and also has reason to believe that the tenant will not discover this condition and realize the risk, the landlord has a duty to disclose the dangerous condition. If the landlord does not disclose the condition, he is liable for injuries caused by the dangerous condition to the tenant or the tenant's guests.
2. Public Use: if the premises were leased for public use (i.e. store, restaurant, theatre, etc…) the landlord is liable for injury to members of the public if he:
    a. knew, or should have known, of the dangerous condition;
    b. has reason to expect the tenant will not remedy the condition before admitting the public; and
    c. fails to exercise reasonable care to remedy the condition.

**Some courts have limited the public use exception to leases only where a large number persons are to enter the premises at one time (concert hall, stadium, etc…).

3. Areas Retained under the landlord's control: if the landlord leases part of the property and retains control of common areas (such as halls, walks, elevators,) or areas under his exclusive control (boiler rooms, furnaces, etc…) the landlord is liable for physical injury if the landlord could have reasonably discovered the condition and made it safe.

4. Breach of Covenant to Repair: if the landlord expressly promises to repair and maintain the premises, and the landlord breaches the covenant to repair and the tenant or the tenant's guest is injured as a result the landlord may be held liable.

5. Negligent Repairs: if the landlord makes repairs, either by an express covenant in the lease or voluntarily, the landlord owes a duty of reasonable care and if he makes the repairs in a negligent manner, the landlord is liable to anyone who is harmed as a result thereof.

6. Duty Imposed by Statute or Ordinance: if the landlord is under a statutory duty to repair or maintain the premises and if he repairs the defect negligently or fails to repair the defect then he may be liable to anyone who is harmed as a result thereof.

**Remember, if there is an implied warranty of habitability problem on the test, and the tenant is injured, state that the tenant could possibly sue in tort under this exception.

B. **G/R:** Landlord Tort Liability, General Negligence Theory: (minority view): the landlord has a duty to act reasonable under all circumstances and breach of the general duty of care can result in liability for the landlord.

1. The common law exceptions to the general rule (see rule A) are factors to consider in determining if the landlord acted reasonable.

2. The court, in effect, flipped the common law rule on its head because it believed the common law rule was being swallowed up by exceptions.

3. The general negligence theory is based on general tort liability, or implied warranty of habitability, or strict liability and third party beneficiaries depending on the jurisdiction that adopted it.

*[Sargent v. Ross].

C. **G/R:** Criminal Acts of a Third Party: (a) Classical Rule: At common law, the landlord had no responsibility and could not be held liable for criminal acts of a third party.

1. Modern Approach: some courts have held that if a landlord can reasonably foresee the risk of criminals coming into the building by way of common areas under the control of the landlord, the landlord may be liable for physical harm caused by the criminal intrusion if the landlord fails to make the necessary safety precautions (putting in locks, maybe doormen, and other security measures). Moreover, if the attack occurs in the common areas, over which the landlord retains exclusive control (See Rule A, Exception 3) the landlord can also be held liable.

a. The landlord cannot misrepresent the nature of the premises either (i.e. say the building or apartment is safe when it is not) and the landlord is guilty of misrepresentation by letting the security depreciate overtime, that is, if a tenant moves into building and sufficient security methods are in place, the landlord cannot then discontinue the service.
*[Kline v. 1500 Mass. Ave.].

**§1.7: Tenant's Duties; Landlord's Rights and Remedies**

I. Tenant's Duty to Perform Express and Implied Covenants

A. **G/R:** Duty to Pay Rent: the tenant has a duty to pay any rent reserved in the lease.
1. At common law, the duty to pay rent was an independent obligation, not dependent on the landlord's obligations. Thus, if the landlord failed to repair, the tenant's rent was still due.
2. Modern Rule: (majority rule) the duty to pay rent is dependent upon performance of the landlord's obligations if the premises are residential. If the landlord does not perform, the tenant can terminate the lease and move out, withhold rent, or receive a rent abatement.
3. Illegal lease: if the rental agreement is illegal because the housing code forbids renting property in substandard condition, the tenant has no duty to pay rent, but the tenant must pay the reasonable rental value of the premises in their defective condition [Brown v. Southall Reality].

B. **G/R:** the tenant has a duty to perform any other express covenants in the lease, unless the covenant contemplates illegal use of the premises of which the landlord is aware.

C. **G/R:** Duty not to Damage: if the tenant substantially damages the premises by an affirmative act, the tenant is liable to the landlord. This is sometimes referred to as voluntary or affirmative waste. The damage must be substantial, with effects extending well beyond the tenant's term.

D. **G/R:** Duty not to Disturb other Tenants: absent an express covenant in the lease, there is no common law duty of a tenant not to make noise or otherwise disturb other tenants. The only duty of the tenant in this respect is not to commit a nuisance.
1. It is common, however, in residential lease (of apartments) to provide a covenant by the tenant that he will not substantially interfere with the enjoyment of other tenants of their apartments.

II. Tenant's Duty to Repair

A. **G/R:** Classical Rule: the tenant has an implied duty at common law to make minor repairs which arises out of his duty not to commit waste. The duty was to keep the property in substantially the same condition as at the commencement of the term, absence ordinary wear and tear.

1. Ex: the tenant was required to replace broken windows and doors, repair a leaking roof and things of the like, however, the tenant was not required to rebuild or restore the building.
*[Rumiche Corp. v. Eisenreich].

B. **G/R:** Modern Rule: if there is an implied warranty of habitability, then the landlord has the duty to repair, and the tenant generally does not have any duty to make repairs.

1. The tenant will have a duty to repair any damages caused by him or his invitees.
2. The building is the landlord's and he has a duty to make repairs for ordinary wear and tear on the building or damages from natural causes (i.e. fire).
    a. **Policy:** landlords, not tenants, are generally in the best position to maintain the premises.
3. Caveat: The implied warranty of habitability—which essentially negates the tenant's duty to repair—is based on the view that the landlord is in the better position to make repairs, however, the warranty does not apply across the board to all residential leases and seldom extends to commercial leases

C. **G/R:** Express Covenant to Repair: the tenant may expressly covenant to repair and maintain the premises and is his covenant is enforceable (unless the lease is unconscionable, the landlord has an implied duty to repair [implied warranty of habitability], or a duty is imposed by the landlord by statute). If the tenant covenant's without exception, the tenant is liable for repairs.

D. **G/R:** Destruction of the Premises:

1. Classical Rule: at common law, destruction of a building on the leased property did not terminate the lease or relieve the tenant of his obligation to pay rent.
2. Modern Rule: the tenant may terminate the lease if a change is condition is caused suddenly by a non-manmade force which makes the leased property unsuitable for the use contemplated by the parties. The primary reason being that a lease is a bargain for a building and not the land. Thus, the risk of fire is shifted from the tenant to the landlord.
    a. The landlord's fire insurance should cover the tenant's premises if it is destroyed by fire.

E. **G/R:** Waste: A leasehold estate is a transfer of property, fee simple determinable, with a reversionary interest in the landlord, and therefore, under the common law rule if the tenant damages the property or makes substantial changes, the landlord may have a cause of action against the tenant for waste.

1. Classical Rule: (minority view): the tenant is liable for substantial changes in the premises because the landlord is entitled to get the property back in same condition as they were leased.
2. Modern Rule: (majority view): the tenant is entitled to make changes in the physical condition of the leased property which are reasonably necessary in order for the tenant to use the leased property in a manner that is reasonable under all circumstances.

3. Courts usually decide cases of waste using a very factually oriented decision making process which takes into account the nature of the damage (repairs or additions), the lease, the items involved, and the intent of the parties.

III. Problem of Affordable Housing

A. Generally: the economy must be able to support a stock of housing that is affordable.

1. Posner says that as long as the economy can support housing, then an affordable, safe, and sanitary stock of housing will be available because of the market demands. Therefore, if the state or government imposes measures such as rent control it will upset the market conditions and may actually be more harmful to tenants in general [Chicago Board of Realtors v. City of Chicago].

## §2: TRANSFERS OF LAND

### §2.1: The Land Transaction

I. Overview of a Normal Land Transaction

A. **G/R:** Steps from in the normal land transaction from the seller to the buyer:

1. The seller decides to sell, and usually hires a real estate broker who sets the price and lists the property.
2. A buyer is found; and an agreement is made to buy the house in the form of a contract.
3. The buyer prepares a purchase offer (legal description, price, etc…) and the buyer sends the purchase offer to the seller with a down payment. If the seller agrees the purchase offer is signed and then the deposit is held by the broker. The buyer and seller then typically wait 30-45 days before closing while the buyer secures a mortgage and the title is searched.
    a. In some jurisdictions, the seller prepares the purchase offer.
    b. In order for the contract to be valid, it must have offer, acceptance, and consideration governed by normal contract law.
4. The majority of people then have to obtain a mortgage and if the mortgage is approved by the lender, the bank/lender will send a commitment letter to the seller, usually stating that the deal must close by a certain day.
5. Title Search: While the buyer is securing a mortgage, he will have someone investigate the title to make sure the title is valid and free from easements and encumbrances. This is done by different methods in different regions of the country because custom.
    a. South and East: an attorney searches the title history and then the attorney renders a title statement on the property. The attorney does the actual title searching to find the right documents and compile an abstract. He then examines the documents and checks out the title to make sure it is marketable (no reverter, easements, liens, etc…) and reports his findings to a buyer. There is usually a lawyer's "title insurance company" which insure the validity of the title.

b. Midwest (and large cities): *Abstract of Title:* an abstract of every land document is on public record. An abstractor then sends the pertinent document an attorney who issues a title statement on the land. The title abstract company prepares the abstract within their title plant (which has all the documents from the courthouse on record) and then sends the abstract to the buyer and sellers attorney. The company then sends the abstract to a title insurance company to get it insured.

c. West and the Rest: *Title Insurance:* a title insurance company has all land records on file. It then creates an abstract and has it reviewed (by an attorney) and then sends the abstract to the buyer with the title insurance statement. The title insurance company does the title searching and compiles the abstract. They have an attorney on retainer and bind themselves to insure the title after telling the buyer what the title is subject to (liens, easements, etc…). This combines the other two methods PLUS insures the validity of the title.

(i) Today, the buyer cannot get a mortgage without title insurance.

6. Other Things Going On (while mortgage and title search is occurring):

a. The bank will require the buyer to have the house appraised.

b. The buyer will have to check for "off record" things such as proscriptive easements, regular easements (a trial through the front yard), adverse possession, etc…

c. The buyer might want to have the property surveyed (older homes need a greater amount of inspection, newer homes need less).

d. Physical inspection of the house to make sure there is no new things being done to it which might have a mechanic's lien attached.

7. Closing Negotiations and Statements: the parities representatives get together before the actual closing and make adjustments and agree on all prices and other material terms.

8. Actual Closing: the buyer, seller, attorneys, brokers, bank representatives, and title insurance company all get together to close the deal.

a. the seller executes the deed;

b. the buyer executes the mortgage;

c. the mortgage lender delivers the money;

d. the title insurance company executes the policy;

e. then each respective party takes their proper thing and the deal is closed. [this is a "physical closing].

f. The closing can also be executed through an escrow account, usually through the title insurance company. Then afterwards the parties have to close the deed, mortgage, etc…by recording them.

9. After closing the parties need to file a 1099(B) tax form with the IRS.

B. **G/R:** Practice of Law: In some states, a lot of the aforementioned activities must be completed by a lawyer because it is deemed the practice of law to execute a conveyance of real property. The practice of law includes conveyancing, the preparation of legal instruments of all kinds, and in general, advice to all clients and all action for them in matters connected with the law.

1. Corporations are strictly prohibited from the practicing of law. [State v. Buyers Service Co.].
2. Generally courts say brokers can prepare simple real estate contracts but must refrain from inserting provisions in a contract that require the exercise of legal expertise.

C. **G/R:** The Broker's Role: almost all houses and a large percentage of other real property are sold through a broker. The seller signs a contract with the broker, giving the broker the right to list and show the property to prospective buyers and, if the property sells, to collect a commission out of the purchase price. The broker's commission may run from five to eight percent of the selling price.

1. An open listing with a broker creates a unilateral contract between the seller and the broker because the broker has to supply a buyer before the seller's duty to pay the commission arises.
2. Broker's Commission: (a) *Classical Rule:* a broker is entitled to a commission if she produces a customer ready, willing, and able to buy upon the terms and for the price set by the seller in the brokerage contract. Once the seller has accepted the buyer, the seller owed the broker a commission no matter if the deal actually is finalized or not. (b) *Modern Rule:* the broker is only entitled to the commission when the buyer completes the transaction by paying the contracted purchase price. If the sale falls through because of the buyer's fault the seller is not liable to the broker. If the sale falls through because of the seller's fault, however, the broker is entitled to the commission [Ellsworth Dobbs Inc. v. Johnson].
3. Types of Brokerage Companies:
    a. *Exclusive Agency Broker:* the broker is the only one who can earn the commission. The broker finds buyer then he gets the commission; however, if the seller finds a buyer, the broker is not entitled to the commission.
    b. *Exclusive Right to Sell:* the broker earns the commission if the property is sold, no matter who found the buyer (even the seller).
    c. *Multiple Listing Service:* if the seller's broker, works in conjunction with other brokers through a multiple listing service, the broker usually has to split that commission with the other brokers who participate in the multiple listing service (and vice versa).

## §2.2: The Contract of Sale

I. Statute of Frauds

A. Cases: (1) *Hickey v. Green:* P entered into an oral contract with D to buy a lot of land. P gave D's agent a check without the P's name on it and without a legal description. P told D that they were selling there house because they were going to but D's lot. D then got a better offer and said P's contract was unenforceable because it did not comply with the statute of frauds, however, the court held that the exception of part performance applied.

B. **G/R:** Statute of Frauds: the statute of frauds provides that no action shall be brought for a contract for the sale of land, or any interest in land or concerning land, unless the agreement upon which such action shall be brought is in writing, and signed by the party against whom enforcement is sought.

1. If the writing does not comply with the statute of frauds, the contract is unenforceable (which is different from void because the party can invoke exceptions to get around the statute of frauds).

C. **G/R:** Requirements to Satisfy Statute of Frauds: there four normal requirements that must be met to satisfy the statute of frauds in a contract involving a land transaction:

1. Identify the parties;
2. Description of the property;
3. All other essential terms to the contract (price, manner of payment, etc…);
4. Signed by the party against whom enforcement is sought (i.e. cannot make a conveyance with a blank for the name unfilled in the contract).

D. **G/R:** Description of Property: the description of the property in a land transaction is more important than anywhere else. Most courts require a "legal" description which usually has to be a description of the property as contained on the deed (a government survey or the zoning block [meets and bounds] are usually sufficient).

1. The description of the property must be more than just a street address.
2. The courts take a rigid stand on requiring buyers/sellers to include a legal description to satisfy the statute of frauds.

E. **G/R:** Classical Approach: classical courts usually treat each of the statute of frauds requirements separately and find that they are not mutually exclusive. Therefore, the classical court goes through the list of requirements independently and must find each requirement satisfied.

F. **G/R:** Modern Approach: Courts use the four elements to determine if the statute of frauds is satisfied, but are not as strict in enforcing the statute of frauds because they view it as a principle or concept rather than a list of elements.

1. If the contract is ambiguous, the court will allow parol evidence to determine the intent of the parties.
2. If all the elements were not met and parol evidence failed to disclose the intent of the parties, then modern courts will find that the contract fails the statute of frauds.

G. **G/R:** Exceptions of Statute of Frauds: there are three main exceptions to the statute of frauds:

1. Part Performance: A contract for the transfer of an interest in land may be specially enforced notwithstanding a failure to comply with the statute of frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by special enforcement [Rst. (2) Contracts §129].

a. The part performance exception allows the specific enforcement of oral agreements when particular acts have been performed by one of the parties to the agreement. There are two views on the part performance exception:

(i) The acts of the parties must substantially satisfy the evidentiary requirements of the statute of frauds. Hence, if the acts make sense only as having been performed pursuant to the oral contract (unequivocally referable to the contract of sale) they constitute part performance. Such acts included the buyer's taking possession *and* paying all or part of the purchase price or making valuable improvements to the land.

(ii) The other view is that part performance is used to prevent injurious reliance on the contract; if the plaintiff shows that he would suffer irreparable injury if the contract were not enforced, then the buyer's taking of possession alone is sufficient to set the court in motion.

2. Estoppel: estoppel applies where unconscionable injury would result from denying enforcement of the oral contract after one party has been induced by the other seriously to change his position in reliance on the contract.

1. Estoppel may also apply were unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute of frauds.

3. Failure of Deny Existence of Contract: Failure to deny that a contract was formed (by the party against whom enforcement is sought) either in depositions or testimony can be used as evidence at trial.

a. In some jurisdictions, failure to deny the existence of a contract, that is, admitting that there was a contract is enough to make the contract enforceable.

b. In other jurisdictions, failure to deny and detrimental reliance (promissory estoppel) have to exist before the contract can be enforced.

H. **G/R:** The statute of frauds applies to deeds, leases (over 3-years), mortgages, or any interest in real property.

**§2.3: Marketable Title**

I. Marketable Title

A. Cases: (1) *Lohmeyer v. Bower*: P entered into a contract to buy a house from D; the K provided that the deed would be from encumbrances, however, after the title search it was noticed that the previous owner had placed a restrictive covenant on the house and the house was in violation of the some zoning restrictions so P tried to rescind the K and the court held that P could rescind the K because the zoning violations and restrictions could subject P to litigation. (2) *Conklin v. Davi:* P contracted to sell D a piece of residential property and D refused to consummate the deal because part of the land contracted for was based on P's claim of adverse possession. The court held the contract was marketable and enforceable because it satisfied the K of sale.

B. **Marketable Title:** Generally: the concept of a marketable title is a relative concept to each contract.

1. If the contract is silent on a marketable title, then the marketable title is implied, and it has to "perfect." A perfect marketable title is one that is a free simple absolute, absolutely unencumbered.
    a. One must look at the land records (deeds) and property to determine if the title is marketable.
2. Almost all land contracts are not "perfectly" marketable, therefore, the seller usually provides in the contract of sale that they will provide a marketable title subject to all easements and encumbrances on record.
3. The defect in title must be more than a mere conjecture. The claim has to be colorable, that is, substantial and not fake or trifle.
*[Lohmeyer v. Bower].

C. **G/R:** Marketable Title: an implied condition of a contract for the sale of land is that the seller must convey to the buyer a marketable title. If the seller cannot convey a marketable title the buyer is entitled to rescind the contract.

1. 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 persons, guided by competent legal advice would be willing to take and for which they would be willing to pay fair market value.

D. **G/R:** Test for Marketable Title: A marketable title to real estate is on which is free form reasonable doubt, and a title is doubtful and unmarketable if it exposes the party holding it to the hazard of litigation and the reasonableness of the doubt must relate to the contract of sale [the contract sets the terms].

1. To render the title to real estate unmarketable, the defect of which the purchaser complains must be of a *substantial character* and one from which he may suffer injury.
2. Mere *immaterial defects* which do not diminish in quantity, quality, or value of the property contracted for, constitute no ground upon which the purchaser may reject the title.
3. Facts must be known at the time which fairly raise a reasonable doubt to the title; a mere possibility or conjecture that such a state of affairs may developed at some time in the future is not sufficient.
4. The determination of a marketable title is a question of law.

E. **G/R:** Standard for a Marketable Title: a title is unmarketable if it exposes the buyer or the party holding it to the possibility of litigation.

a. Any restriction or encumbrance can make a title unmarketable if it is not provided for in the contract of sale (even if the defect is de minimus or even beneficial to the buyer.

F. **G/R:** Unmarketable Title: (majority view): If there is any restriction or encumbrance which is not provided for in the contract of sale then the title is unmarketable.

1. *Minority View:* If there is a de minimus or beneficial restriction to the buyer which is not provided for in the contract of sale then the title is not rendered unmarketable.

G. **G/R:** Covenants: Restriction on the use of property, imposed by private covenant, makes the title unmarketable.

H. **G/R:** Zoning Restrictions: Zoning laws and subdivision restrictions generally do *NOT* make the title unmarketable. They are not considered encumbrances of the record.

1. Caveat: (majority view) the violation of a public land use or zoning regulation may make the title unmarketable because it subjects the buyer to the possibility of litigation.

a. A minority of courts hold that a violation of an ordinance does not render the title unmarketable.

2. The violation of municipal restrictions existing at the time of the execution of the contract for sale of real estate, are no such encumbrances or burdens on the title as may be availed by a buyer to avoid his agreement to purchase on the ground they render his title unmerchantable [Lohmeyer v. Bower (minority view).

3. **Policy:** requiring the buyer to make corrections to compensate for encumbrances would compel the buyer to take something he did not contract to buy.

I. **G/R:** Adverse Possession: (majority view): Unless "marketable title of record" is called for, many states hold that marketable title can be based upon adverse possession.

1. Adverse possession must be clearly proven and the seller must offer buyer written evidence or other proof admissible in court that the buyer can use to defend any lawsuit challenging title.
*[Conklin v. Davi].

2. *Minority View:* In a few states, marketable title cannot be shown by adverse possession unless a quiet title action has eliminated the record owner's rights.

J. **G/R:** the buyer is entitled to the kind of title stipulated for in the contract of sale [Conklin v. Davi].

K. **G/R:** Where because of an alleged defect in title, the buyer and seller litigate the issue, it will be the title as it exists at the time of the final decree or judgment that will control, not the title the seller may have had when the suit was commenced.

1. In all cases where the seller seeks to force a title upon the buyer, it is the seller's position, not at the commencement of the suit, but at its terminate which are to be regarded.

L. **G/R:** Insurable Title: provisions requiring title insurance as a condition precedent to acceptance of title are enforceable.

1. An insurable title is one which the title insurance company will pay for if there is a defect in the title; in most contracts for the sale of real estate, there is a clause stating the seller must deliver a "insurable marketable title."

a. A title company will usually only insure a title that is free from encumbrances or restrictive conditions.
b. However, situations can arise in which the title is insurable but unmarketable (and vice versa).

II. Remedies for Breach of Contract

A. **G/R:** Remedies for Breach of Contract: Unless a contrary intention is clearly manifested, payment of the purchase price and delivery of the deed are dependant promises. Neither party can place the other in default unless he himself tenders his own performance and demands that the other party perform. If one party breaches the contract, the remedies of the other party are rescission, specific performance, and damages.

B. **G/R:** Time in Real Estate Contracts: the nature of real estate contracts is that time is *NOT* of the essence; therefore, being late on the closing date is not a breach of the contract.

1. The buyer has a reasonable time after the closing date to finish or complete the closing.
2. If the seller (or buyer) determines that time is an important factor in the purchase of the property then a "time is of the essence" clause must be inserted into the contract and it must be made clear that the party wants to close on a specific date.

C. **G/R:** Recession: Upon breach by the seller or buyer the other party can rescind the contract.

1. Classical Rule: Upon a breach by the seller, the buyer may rescind and recover his (a) down payment, and (b) costs for title (i.e. the cost of title searches).
2. Modern Rule: allows buyer to recover down payment and title costs plus compensatory damages if any (see Rule E for rules on computing costs).

D. **G/R:** Specific Performance: land is considered unique and making money damages for failure to convey land is inadequate, therefore specific performance is used a lot.

1. Buyer's Rights: the buyer has a right to specific performance if the seller breaches the contract. Specific performance is an equitable remedy, however, and there are defenses available for the seller (undue hardship and changed circumstances).
2. Seller's Rights: the seller is also entitled to specific performance upon the other party's breach of contract. If there is a defect in the seller's title that is insubstantial and not material, the seller can enforce the contract with an abatement in the purchase price to compensate the buyer for the deficiency.

E. **G/R:** Measure of Damages: both the buyer and the seller have to option, upon breach by other party, to sue for damages rather than specific performance.

1. Seller's Breach: *Benefit of the Bargain Rule:* On the date of closing, the buyer is entitled to the difference between the contract price and market value of the land (Benefit of the bargain) plus any compensatory damages.
    a. *Formula:* Damages = fair market value – contract price (loss of bargain) + incidental and consequential damages.
2. Buyer's Breach: If the seller prefers to keep the land after a buyer breach he is entitled to the difference between the contract price and the market price on the date of closing plus consequential damages.
    a. *Formula:* Damages = contract price – fair market value + incidental and consequential damages.
3. 99% of the time, the house does not change in value.

III. Equitable Conversion

A. **G/R:** Doctrine of Equitable Conversion: the doctrine of equitable conversion is that if there is a specifically enforceable contract for the sale of land, equity regards as done that which ought to be done. In other words, equitable conversion is based on the idea that since either party can demand specific performance of the land sale contract the buyer is regarded as the owner and the seller is regarded as having a security interest in the payment of the purchase price.

B. **G/R:** Allocation of Loss: equitable conversion really deals with which party bears the risk of loss between the period when the contract was entered into and the closing date.
1. If the seller has an unmarketable title, he is not entitled to invoke the doctrine of equitable conversion.
2. The risk of loss is on the owner of equitable title (the buyer) and not the seller.
    a. Ex: The seller and buyer enter into a contract on June 1, and set the closing date for August 1. The house burns down on June 15. The buyer bears the loss and if the seller seeks specific enforcement he can get the contract enforced based on equitable conversion if he had a marketable title.
3. The doctrine of equitable conversion allocates the risk of loss on the buyer; however, the buyer can contract out of the risk of loss if he desires to. A common provision is: "Absent ordinary wear and tear, the seller bears the risk of loss with respect to the property."
    a. The buyer can also avoid any problems by getting insurance on the property at the time the contract is made, however, he must think of this ahead of time.

C. **G/R:** Other Rules: In the absence of an agreement to the contrary; there are two other rules that courts apply dealing with the allocation of loss. (a) 20 states follow the equitable conversion rule; (b) 15 states follow the Massachusetts Rule; and (c) 15 states follow the Uniform Vendor/Purchaser Act Rule.
1. Massachusetts Rule: If improvements are an import part of the consideration for the contract of sale *AND* they are materially destroyed (need both elements) the contract is not enforceable by *either* party. If the improvements are not an

important part of the contract or they are not materially destroyed, the buyer can seek an abatement of the damage costs from the purchase price, but the contract is still enforceable.
2. Uniform Vendor/Purchaser Act Rule: [§2-406 of the Uniform Sales Act]: If improvements are an important part of the contract and they are materially destroyed the *seller* [not either party like Mass. Rule] may not seek specific enforcement of the contract. If the improvements are not an important part of the contract or they are not materially destroyed, the buyer can seek an abatement of the damage costs from the purchase price, but the contract is still enforceable.
a. The risk of loss shifts when possession changes.

E. **G/R:** Equitable Conversion and Inheritance: equitable conversion has been applied in situations where on the parties to a contract for the sale of land dies and the issue arises whether the decedent's interest is real property or personal property.
a. If equitable conversion has occurred the seller's interest is personal property (right to the purchase price) and the buyer is treated as the owner of the land.

**§2.4: Duty to Disclose Defects**

I. Misrepresentation

A. Cases: (1) *Stambovsky v. Ackley*: failure to disclose that house was haunted was misrepresentation. (2) *Johnson v. Davis:* P knew house leaked, sold it to D on a sunny day, then took off, court held P misrepresented by omission.

B. **Generally:** there are four main types of misrepresentation:
1. Intentional affirmative misrepresentation: seller knows of the material defect and tells the buyer it does not exist [Stambovsky];
2. Intentional Omission misrepresentation: seller knows of the material defect but does not tell buyer, and the buyer fails to ask [Davis];
3. Negligent Affirmative misrepresentation: [broker]: broker does not know of the material defect but makes an affirmative misrepresentation with gross disregard for the facts (i.e. broker tells buyer not worry, there's no hole in the roof when actually there is one);
4. Negligent Omission: [broker] broker doesn't know of any material defects and does not make any representations about the property to the buyer.
**[#3 and #4 deal only with brokers].

C. **G/R:** Elements of Misrepresentation: there are three elements for misrepresentation by the seller to the buyer:
1. The seller has a duty to disclose when;
2. there is a material defect that affects the value or desirability of the home; and
3. the defect was not discoverable by the buyer.

D. **G/R:** Intentional Affirmative Misrepresentation: if the buyer asks of about a material defect, the seller is under a duty to respond honestly and sufficiently or the contract may be rescinded.

1. If the seller makes an affirmative misrepresentation to the buyer after the buyer inquires into a material defect it is grounds for rescission of the contract of sale. *[Stambovsky].

E. **G/R:** Intentional Omission Misrepresentation: (Modern/Majority Rule)when the seller knows of a material defect in the home and intentionally omits this fact to the buyer it is a misrepresentation and grounds for rescission of the contract of sale. That is, if the defect is material and latent, the seller has a duty to disclose. The duty to disclose only arises when the defect materially affects the value or desirability of the property [Johnson v. Davis].

1. Caveat: if the defect is open, obvious, and visible, the seller may not have a duty to disclose it to the buyer.
2. *Minority/Classical Rule:* caveat emptor (let the buyer beware), seller is under *no* duty to tell the buyer anything he does not ask about in purchasing the home.

F. **G/R:** Tests for Material Defects: a defect is material and affects the value of the property when it is more than ordinary. In each jurisdiction requiring disclosure, the defect must be material to be actionable.

1. Objective Test: (majority rule): an objective test of whether a reasonable person would attach importance to the defect in deciding to buy the property.
2. Subjective Test: (minority rule): a subjective test of whether the defect affects the value or desirability of the property to that particular buyer.

G. **G/R:** Duty to Disclose: a seller has a duty to disclose when the defect is:

1. not readily discoverable by the buyer, that is, a latent defect;
2. the defect materially affects the value or desirability of the property; and
3. the defect is known to the seller and not to the buyer.

H. **G/R:** Broker Liability: the broker is becoming increasing more liable in modern for failing to disclose material defects to the buyer.

1. Classical Rule: the broker represents the seller, and therefore is under no duty to disclose defects to the buyer.
2. Modern Trend: despite the fact the broker has ties to the seller; the broker still has an affirmative duty to disclose with respect to the buyer.
3. In cases involving a negligent affirmative misrepresentation and a negligent omission representation involving the broker, all states are in between the two extremes of the California and Alabama rules:
    a. California Rule: the broker is a professional, and therefore he has a duty to know of all material defects, and even if he doesn't know of the defects he has a duty to find out find out, and disclose all defects to the buyer.
    b. Alabama Rule: the broker does not have a duty to disclose anything to the buyer.

4. Agency Law: some courts apply the principles of agency law. That is, the broker is the agent of the seller, therefore, what the broker does (i.e. misrepresentations) the principle (the seller) can be held liable.

I. **G/R:** Classical Misrepresentation Rule: the doctrine of caveat emptor requires that a buyer act prudently to assess the fitness and value of his purchase and operates to bar the purchaser who fails to exercise due care from seeking the equitable remedy of rescission.

J. **G/R:** Modern Misrepresentation Rule: where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject of the transaction, nondisclosure constitutes a basis for rescission of the contract [Stambovsky].

K. **G/R:** Rule of Nondisclosure of Material Defects for the Sale of Real Property:

1. Majority Rule: full disclosure of all material facts must be made whenever elementary fair conduct demands it.
    a. The doctrine of caveat emptor no longer applies in the majority of jurisdictions and the seller of a home can be found liable for failing to disclose material defects of which he is aware.
    b. Where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer.
2. Caveat: where the parties are dealing at arm's length and the facts lie equally open to both parties, with equal opportunity of examination, mere nondisclosure does not constitute fraudulent concealment.
3. Duty of the Seller: where the seller of a home knows of facts materially affecting the value of property which are not readily observable and not known to the buyer, the seller is under a duty to disclose them to the buyer.
    a. This duty is applicable to all forms of real property, new and used.

L. **G/R:** Remedies: an increasing majority of states have put on the seller the duty to disclose all known defects, equating nondisclosure with fraud or misrepresentation. Caveat emptor is steadily being eroded. Where the seller breaches this duty the buyer can rescind the contract or sue for damages after closing.

M. **G/R:** "As Is" Clauses: an "as is" clause in a sales contract will be upheld if the defects are reasonably discoverable and there is no fraud.

1. Caveat: if there is a fraudulent misrepresentation or concealment of information by the seller, the buyer is not bound by the "as is" clause.

II. Merger

A. **Merger Definition:** if the contract of sale is executed, and then it is followed by a deed, only the promises that can be carried over to the deed are enforceable, the other promises not carried over to the deed are not part of the agreement.

1. Parol Evidence Rule: says that a party may not admit evidence of any prior document into evidence if the first document contradicts the material in the second document.

a. Merger is based on the parol evidence rule.

2. Merger basically means that if the promises are not in the deed (and they are in the contract) those promises that are not in the deed are *not* enforceable.

B. **G/R:** Classical Rule: the old doctrine of merger says that contract merges into the deed and once the deed is accepted, the deed is deemed the final act of the parties expressing the terms of the agreement.

1. The buyer can no longer sue the seller on promises in the contract of sale not contained in the deed, the buyer must sue the seller on the warranties, if any, contained in the deed.

2. **Exceptions:** there are recognized exceptions to the doctrine such as fraud and contractual promises deemed collateral to the deed (collateral promises are not subject to the parol evidence rule).

C. **G/R:** Modern Trend: the merger doctrine is now in disfavor and it becoming riddled with exceptions where the buyer does not intend to discharge the seller's contractual obligations by acceptance of the deed.

1. The usual way of avoiding the doctrine of merger is to say the particular obligation of the seller is an independent or collateral agreement.

D. Other ways to Solve Merger Problem:

1. Letter Agreement: put all the promises in the contract in a letter, to have the seller sign, all promises more specific than those in the deed will then be enforced because the letter is a contemporaneous writing which does not violate the statute of frauds because it is a collateral writing.

2. Possible Argument: (if there is no letter agreement): the deed only deals with the title and the contract of sale deals with other promises and thereof the deed was NOT a full integration of the agreement of the parties. Since the deed only constitutes a partial integration, the rest of the promises in the contract remain enforceable.

a. A party does not want to put all promises in a deed because it encumbers the heirs to the property and it is inefficient.

## §2.5: The Implied Warranty of Quality

A. Cases: (1) *Lempke v. Dagenais:* Owner of a home hires D to build garage, owner then sells to P and P notices garage is about to cave in, asks D to fix it and he agrees but never does so P sues for breach of implied warranty of workman like quality and the court grants P relief.

B. **G/R:** Implied Warranty of Workmanlike Quality: when a buyer, or subsequent purchaser of property, relies on the skill of a builder, the structure should be reasonably constructed to be reasonably fit for its intended use and an action may be brought fro breach of the implied warranty absent privity of contract.

1. Regardless of whether courts have found the implied warranty to based on contract or tort, many have found that it exists independently, imposed by operation of law, the imposition of which is a matter of public policy.
2. Implied warranties are not created by an agreement between the parties but are said to be imposed by law on the basis of public policy. They arise by the operation of law because of the relationship between the parties, the nature of the transaction, and the surrounding circumstances. Implied warranties are creatures of public policy that have evolved to protect purchasers of homes upon the discovery of latent defects.
3. **Policy:** the innocent purchaser should not suffer when the builder failed to construct a building in a workmanlike manner.
4. The requirement of privity of contract between the builder and homeowner is not required to maintain the action. To require privity between the contractor and homeowner in such a situation would defeat the purpose of the implied warranty of workmanlike quality and could leave innocent buyers without a remedy.
5. The contractor should not be relieved of liability for un-workmanlike construction simply because of the fortuity that the property on which he did construction has changed hands.
*[Lempke].

C. **G/R:** Remedies and Limitations: economic recovery alone is permiteed for breach of an implied warranty of workmanlike quality.

1. *Limitations:* the extension of the implied warranty of workmanlike quality is not unlimited; it does not force the builder to act as an insurer, in all respects, to a subsequent purchaser.
    a. The extension is limited to latent defects which become manifest after the subsequent purchaser has purchased the property which were not discoverable upon reasonable inspection at the time of purchase.
    b. The implied warranty of workmanlike quality for latent defects is limited to a reasonable period of time.
    c. The plaintiff has the burden of showing that the defect was caused by the defendant's workmanship.
    d. The builder can assert several defenses:
        (i) If the builder can demonstrate that the defects were not attributable to him, that they are the result of age or ordinary wear and tear, or that previous owners have made substantial changes he will not be liable.

D. **G/R:** Builder's Duty: the duty inherent in an implied warranty of workmanlike quality is to perform in a workmanlike manner and in accordance with accepted standards.

G. **G/R:** Privity of Contract: privity of contract is not necessary for the subsequent purchaser to sue a builder/contractor under an implied warranty of workmanlike quality for latent defects which manifest themselves with a reasonable time after purchase and which cause economic harm.

1. **Policy:** protect innocent buyers; consumer protection; latent defects do not manifest themselves right away; imposing only recovery on the first purchaser might encourage fraudulent sellers; and the builder is in a better position to guard against the financial risk posed by a latent defect.

## §2.5: The DEED

I. Warranties of Title

A. Cases: (1) *Brown v. Lober:* a subsequent owner attempted to transfer mineral rights to D but because of a defect in title he couldn't do so, so D sued P, the original owner, to recover because he was responsible for the defect in title.

B. **G/R:** Modern Types of Deeds: historically deeds were long documents which contained many covenants, today, however, short form deeds are available (usually pursuant to state statute) and these deeds are sufficient to complete a conveyance. There are five main types of modern deeds:

1. **Warranty Deed:** sufficient to make the conveyance and usually contains three covenants (traditionally there was six) or promises.
2. **General (full) Warranty Deed:** warrants title against all defects in title, whether they arose before or after the grantor took title. Basically states that the seller will forever stand and defend property against *any* claims against defective title.
3. **Special Warranty Deed:** contains warranties only against the grantor's own acts but not the acts of others. The seller will warrant against any claims for defective title which he caused, but not for every defect like the general warranty deed.
    a. Thus, if the defect is a mortgage on the land executed by the grantor's predecessor's in ownership, the grantor is not liable.
4. **Grant Deed:** basically says, "I hereby convey to you the land" and it may contain covenants afterwards. If there are covenants afterwards, it usually makes it a general warranty deed; and if it has special covenants, it makes it a special warranty deed.
    a. A grant deed without covenants is usually a quitclaim deed.
5. **Quitclaim Deed:** contains no warranties of any kind. It merely conveys whatever title the grantor has, if any, and if the grantee of a quitclaim deed takes nothing by the deed, the grantee cannot sue the grantor. The seller is basically conveying to the buyer the land in whatever status it may be (from nothing to a fee simple absolute absolutely unencumbered).

C. **G/R:** Contents of a Deed: there are four main elements to a deed:

1. **Granting Clause:** the granting clause contains:

a. names of the grantor and grantee;
b. consideration or consideration recessitation;
c. operative words of conveyance ("conveyance" and "warrants"); and
d. description of the property.

2. **Habendum Clause:** it basically restates the granting clause by stating "to have and to hold."
a. It is not really needed anymore and is not used in many modern deeds.

3. **Covenants:** covenants can be placed in a deed, or implied by statute. There are six basic covenants to every deed (see infra §2.5, I, Rule E).

4. **Execution of the deed by the grantor.**

D. **G/Rs:** Aspects of the of the Four Elements of a Deed:

D(1). Consideration: it is customary to state in a deed that some consideration was paid by the grantee, in order to raise a presumption that the grantee is a bona fide purchaser entitled to the protection of the recording acts against prior unrecorded instruments.

1. The parties do not have to assert the full amount or exact consideration given.
2. The words "for good and valuable consideration" are usually sufficient.
3. Reasons why you have to have a recessitation of consideration in the deed:
a. creates the presumption of a "resulting trust" and if no consideration is actually paid, parties usually recite consideration to avoid probems;
b. recording acts: in order to be protected by the recording acts the purchaser must be one of value, so it is necessary to recite consideration;
c. IRS and tax assessors want to know how much property costs. Some states require the seller/buyer to put the full amount in a deed (or another document).

D(2). Signature: the deed has to be signed by the *grantor*. It is not a contract, it is a deed poll, so it is not necessary for the grantee to sign it.

1. Indenture and Deed Polls: not used in America today because we have recording systems.

D(3). Requirements of Seal: the majority of states do not require seals (however, few still do).

1. Some deeds have a stamp "LS" [Lignum Sealigantee] which takes the place of a seal on some deeds.
2. If corporations are executing a deed they must attach the corporate seal.
3. There is no need to have the seal witnessed or attested if the seal is not required.
4. Generally today, the recording acts require that a deed be "acknowledged" by a notary, public official, or judge to prevent the forging of deeds.
a. In order to the record the deed, it must be acknowledged.

D(4). Delivery: in order for the deed to be valid, it must be:

1. Delivered; and
2. Accepted.
a. Acceptance is usually presumed at delivery if the buyer takes it.

D(5). Validity: the deed is valid between parties even if it is not recorded.

1. BUT if there is a lien, easement or something which is recorded against the property it is a superior title to the land then the unrecorded deed.
2. In order to protect the economy from secret conveyances, a deed has to be recorded to have "superior title" to the land which will make the purchaser bona fide.

D(6). Description: every deed, contract, mortgage, or lease has to have a description of the property. The description must be one of three types:

1. Metes and Bounds;
2. Government Survey; or
3. Plat.

**[SEE infra §2.5, I, Rule F].

E. **G/R:** Covenants in a Deed: the deed will contain covenants of title. There are potentially six covenants for the full warranty deed which are broken down into two triads.

1. **Triad One: Present Covenants**: these covenants speak of the moment in time the deed was transferred:
    a. Covenant of Seisin: the grantor warrants that he owns the estate that he purports to convey;
    b. Covenant of Right to Convey: (overlaps with covenant of seisin): the grantor warrants that he has the right to convey to property. In most instances this covenant serves the same purpose as the covenant of seisin, but it is possible for a person who has seisin not to have the right the right to convey (i.e. trustee may have legal title but be forbidden by the trust instrument to convey it, or if you had a fee tail you couldn't convey it [not a problem anymore]);
    c. Covenant Against Encumbrances: the grantor warrants that there are no encumbrances on the property. Encumbrances include among other things, mortgages, liens, easements, and covenants.
2. **Triad Two: Future Covenants:** these covenants speak as to a future date:
    a. Covenant of General Warranty: the grantor warrants that he will defend against lawful claims and will compensate the grantee for any loss that the grantee may sustain by assertion of superior title.
        (i) The grantor is basically saying he will forever stand, defend, and warrant against assertions of superior title.
    b. Covenant of Quiet Enjoyment: the grantor warrants that the grantee will not be disturbed in possession and enjoyment of the property by assertion of superior title.
        (i) This covenant overlaps with the covenant of general warranty and is often left out of the deed.
    c. Covenant of Further Assurances: the grantor promises he will execute any further documents required to perfect the title conveyed.
        (i) This covenant is the one most commonly left out in modern deeds.

F. **G/R:** Descriptions of Property in a Deed: Every deed, mortgage, contract, and lease recorded has to have a description of the property. The description must be one of three types (1) metes and bounds; (2) government survey; or (3) plat.

F(1). **Metes and Bounds:** is a description by reference to natural or artificial monuments and from the starting point, reference to directions and distances.

1. It is a call by call delineation of the outside boundaries of the property; and when it is done there is an enclosed piece of property.
2. The surveyor has to find a starting point by locating:
    a. a monument or deriving a starting point.
3. The steps for a metes and bounds description are:
    a. Find a starting point,
    b. find a line (the course and direction)
        (i) Ex: North 10 degrees 20'30" East.
    c. After the course and distance the surveyor uses as many lines and directions as needed to get back to the starting point by enclosing the property.
4. An alternative metes and bounds method is to find a straight line and enclose a big block of land and plot directions within the block.
5. Problems: using metes and bounds sometimes screws up the deeds because neighbors use each other's descriptions to describe different tracts of land.
    a. Ex: Smith's deed says: "10 degrees North of Jones' farm line" and the Jones' deed says: "10 degrees South of the Smiths' farm line."
6. Rule: monuments in metes and bounds surveys prevail over written descriptions.

F(2). **Government Survey:** the government survey started with the formation of our nation in the Northwest Territories. It broke the country into prime meridians and base-lines and describes the property with townships and ranges.

1. The square in between township and ranges is 36-miles squared and that piece of property is unique to that baseline and meridian.
2. The 36-mile square is broke down into 36, 1-mile squares called sections.
3. The sections are then broken down into any general geometric shape.
    a. Ex: N.W. Quarter; Section "X"; S.W. ¼ of N.W. ¼ quarter of section X.
4. It is a convenient way of describing a unique piece of property to a singular parcel of land.
5. Problems: there are two main problems with the government survey:
    a. It was projected on a flat scale and the Earth is round so every $4^{th}$ Township (north or south) a new corrected baseline had to be established to compensate for the earth's curvature. So now every $6^{th}$ township, section 6 is 200 feet off.
    b. Someone may not want a perfectly "square" piece of property that fits nicely into the government survey. However, metes and bounds descriptions within the government survey can be used to compensate this.

F(3). **Plat:** A plat description comes into being when a surveyor goes out and figures out the exact measurements of the land (used for sub-divisions and is therefore a lot a plat surveys in or around cities).

1. The surveyor takes a plot of land and establishes the dimensions for the plot of land and then takes the recording down to the county clerk and surveyor will have given a number (usually a lot number) to the sub-plots in the larger plot and then that description can be used as a legal discription.
    a. Ex: LOT 27; Laramie Subdivision, Laramie, WY

G. **G/R:** Covenant of Quiet Enjoyment: the covenant of quiet enjoyment only promises that no one will come in and *disturb* the title; "if and when" someone comes. In other words, if there is an encumbrance on the land, and no one disturbs possession the present owner of the land cannot sue the person who granted him the deed because no one has disturbed title.

1. However, the problem is that no one will buy the interest in the land with the encumbrance (usually only involves mineral rights below the ground because owner is not in actual possession).
2. Marketable Title Acts: most states have enacted statutes to the effect that if no one asserts a claim in land in "X" amount of years (usually around 40-years), their claims become stale and they lose the rights to the land.

*[Brown v. Lober].

II. Mortgage

A. Cases: (1) *Bean v. Walker:* P and D entered into an installment K and then P was injured near the end of the term of the contract and D repossessed all the land; the court held that an installment K is, in effect, a mortgage and that D had to foreclose before he could evict and repossess P's property.

B. **G/R:** Installment Contract: an installment contract is a contract of sale of which the payments are extended out over a period of time (usually between 5-30 years).

1. An installment contract is, in effect, a mortgage. When the breach of an installment contract occurs, however, it is more unfair to the promisee (mortgagee) because if forfeiture occurs near the end of the term of the contract the promissee loses a lot of money.

C. **G/R:** Earnest Money Contract: (sometimes called a marketing contract) is a contract of sale in which the possession of property is transferred at the time of the execution of the contract.

D. **G/R:** Equitable Treatment of Installment Contracts: a court will usually treat a promisee's installment contract as an equitable title in the land (based on equitable conversion) therefore before the promisor can remove a defaulting tenant he has go through a foreclosure action on the property before he can recover for the breach.

E. **G/R:** Equitable Ownership: the owner of real estate from the time of the execution of a valid contract for its sale is to be treated as the owner of the purchase money and the purchaser of the land is to be treated as the equitable owner of the land [Bean v. Walker].

1. The purchase money becomes personal property.

F. **G/R:** Equitable Title: the law of property declares that, upon the execution of a contract for the sale of land, the buyer acquires equitable title.

1. The seller holds the legal title in trust for the buyer and has an equitable lien for the payment of the purchase price.
2. The buyer, who is in possession, for all practical purposes, is the owner of the property with all the rights of an owner subject only to the terms of the contract.
3. The seller may enforce his lien by foreclosure or an action at law for the purchase price of the property, the remedies are concurrent.
4. Rule: while the legal title does not vest in the buyer until the terms of the contract are satisfied, he does acquire a vested equitable title at the time the contract is consummated.
    a. When the parties enter into a contract, all incidents of ownership accrue to the buyer who assumes the risk of loss and is the recipient of all appreciation of value.
    b. The status of the parties becomes like that of mortgagor and mortgagee.

G. **G/R:** Remedies for the Seller against a Defaulting Buyer in an Installment Contract: the seller of real property by an installment contract has three basic remedies against a defaulting buyer:

1. the seller can institute a mortgage foreclosure;
2. if the defaulting tenant (buyer) is willing to pay all back-pay *plus* interest; the contract can be reinstated as a matter of law; or
3. restitution, that is, allow the seller to rescind contract and then give the buyer back the money for reasonable improvements.

## §3: TITLE ASSURANCE

### §3.1: The Recording System

I. Common Law System of Recording

A. **G/R:** Common Law System of Recording: historically, the statute of uses controlled the common law recording system. It established a common law system of priorities which boiled down to:

1. First in time, first in right: whoever recorded the deed first owned the property.

B. **G/R:** Common Law System of Priorities: *[still important because in notice, and race/notice states, they default to the common law in certain situations]: they system of priorities is:

1. As between two legal interests: first in time prevails.
2. As between two equitable interests: first in time prevails.

3(A). As between a legal interest first recorded; and equitable interest recorded second: first in time prevails.
3(B). As between an equitable interest first recorded; and a legal interest recorded second: if the legal interest is for value without notice, the legal interest will prevail.

C. **Generally:** the authority for the modern recording system is premised on the two points of the common law:

1. The common law system of priorities in the basis of the modern recording system; and
2. Once you find the modern recording acts do not apply, you fall back on the common law.

II. Modern Recording System

A. Overview: the recording system provides a system for evidence of title (it does not provide title).

1. The recording system can only give an opinion, or assurance, of title.
2. If a party gets insurance on the title, then it is guaranteed.
3. There are three main types of recording acts:
    1. Race Statutes;
    2. Notice Statutes; and
    3. Race/Notice Statutes.

B. **Race Statutes:** (minority view, 2 states have race statutes): Under a race statute, as between successive purchasers, the one who records first prevails. Whether a subsequent purchaser had actual knowledge of the prior purchaser's claim is irrelevant.

1. In other words, a prior interest is not valid against a subsequent interest, if value was paid for the subsequent interest and it was recorded first (even if the subsequent purchaser had notice of the prior interest).
2. In other words, under a race statute, as between successive grantees to the same land, priority is determined sold by who *records first*. Whoever wins the race to record prevails over a person who has not recorded or who subsequently records.
3. **Policy:** (a) For the race statute: it is more efficient then the other two types; (b) Against the race statute: it is unfair to the prior interest.

C. **Notice Statutes:** (24-states have notice statutes): no prior interest is valid, as against a subsequent interest for value and without notice.

1. If the subsequent interest has notice of the first interest, then the prior interest prevails.
2. In other words, under a notice statute, a subsequent bona fide purchaser (for value) prevails over a prior grantee who fails to record. The subsequent purchaser wins under a notice statute if has *no actual or constructive* notice of a prior claim at the time of the conveyance.

3. **Policy:** (a) For notice statutes: more fair to the prior interest; (b) Against notice statutes: highly inefficient because have to go to court to determine if the second interest had notice.

D. **Race-Notice Statutes:** (24-states have race-notice statutes, including WY): A prior interest is not valid as against a subsequent interest for value without notice unless the prior interest recorded first.

1. If subsequent interest is to prevail against the prior interest he must have:
    a. paid value for the property;
    b. had *no* notice of the prior interest; and
    c. must have recorded the deed before the prior interest.
2. In other words, under a race-notice statute a subsequent purchaser is protected against prior unrecorded instruments only if the subsequent purchaser:
    a. is without notice of the prior instrument; and
    b. records before the prior instrument is recorded.
3. In other words, race-notice statutes, like notice statutes, protect only subsequent purchasers *without notice* of the prior claim. But they do not protect all such subsequent purchasers. The protect a subsequent bona fide purchaser *only if he records* before the prior grantee. Under race-notice statute, in order for a subsequent purchaser to win, he must both:
    a. be without notice; and
    b. when the race to record.

E. **G/R:** Notice: there are three types of notice that a purchaser of property can be charged with:

1. Actual Notice: the subsequent purchaser actually had subjective knowledge of the fact the prior purchaser had an interest in the property.
    a. This is a question of fact for the jury.
2. Constructive Notice: (constructive notice is a legal fiction created by the court for a legal purpose) if a deed is recorded it puts all subsequent bona fide purchasers on notice because there is an open book for everyone to look at and therefore if a deed is recorded a subsequent purchaser cannot claim he was not on notice of the fact of a prior purchaser (i.e. if deed is recorded all subsequent buyers on notice and it is the duty of the buyer to find out if the deed has been recorded).
3. Inquiry Notice: (legal fiction) Two-steps:
    a. The purchaser has notice (either actual or constructive) that someone else is on the property: a suspicious fact that would lead a reasonable buyer to make an inquiry into other facts; and
    b. Puts a duty on the buyer to inquire into the fact, which puts him on notice of the other fact. The buyer has a duty to examine the premises (look at the property) and then he could tell if someone else is on the property.
        (i) If a suspicious fact gives rise to a duty to find another fact, then the buyer is on inquiry notice.

(ii) Ex: I am looking into buying a home, and as I drive by I see Lance sitting on the porch drinking beer; that suspicious fact gives rise to the duty upon me to inquiry further and thus I am on inquiry notice.

F. **Examples:**

1. (a) X delivers a deed to A. (b) A records the deed. (c) X delivers another deed for the same property to B. (d) B records on the same day after A had recorded.

a. **Race Statute:** under the race statute, A wins because he recorded first. First in time wins.

b. **Notice Statute:** under a notice statute, A wins because be B was on constructive notice, however A wins because have to fall back on common law rule of first in time first in right.

(i) A notice statute does not solve the problem because it only protects against *unrecorded conveyances*. In this example A had recorded the deed, so had to fall back on the common law.

c. **Race-Notice Statute:** A wins because B had constructive notice and did not record first.

(i) Generally, if A records first and is first in time, he will almost always prevail.

2. (a) X delivers a deed to A. (b) X then delivers a deed to B for the same property. (c) B records the deed. (d) A then subsequently after B records the deed.

a. **Race Statute:** B wins because he recorded first.

b. **Notice Statute:** B wins because when he took delivery of the deed, the deed was protected by the recording statute because he had no notice of the delivery to A and he recorded first.

c. **Race-Notice Statute:** B wins because he paid value, had no notice, and recorded the deed first.

3. (a) X delivers deed to A. (b) X delivers subsequently delivers deed to B for the same piece of property. (c) A records the deed. (d) B subsequently records the deed after A.

a. **Race Statute:** B is subsequent purchasers, but recorded deed second so he is not protected by the recording acts. Default to common law and A wins because he was first in time.

b. **Notice Statute:** B wins because he was a subsequent purchaser without notice so he is protected by the recording acts and wins.

c. **Race-Notice Statute:** A wins because he paid value and recorded first.

**The time the subsequent purchaser acquires the interest is the time of notice.

4. (a) X delivers a deed to A. (b) X subsequently delivers a deed to B for the same piece of property but has actual notice of the conveyance to A. (c) B then

runs like a motherfucker to the courthouse and records deed first. (d) A subsequently records his deed.

a. **Race Statute:** B wins, paid value and recorded first.
b. **Notice Statute:** A wins, B had notice of the prior interest.
c. **Race-Notice Statute:** A wins; B paid value but had notice so he loses.

III. Searching Land Records

A. **Generally:** the purchaser brings the deed to the courthouse, a public official notarizes it, photocopies it, and then records it into volumes of indexes.

B. **Two Types of Indexes:**

1. Grantor-Grantee Index: an alphabetical listing, or list, of the conveyance for a particular period, usually one-year.

a. As the deeds come in they are recorded.
b. They are recorded into two indexes, a grantor index (alphabetical listing by grantors last name) and grantee index (alphabetical listing by grantees last name) and a description of the property is also entered into both indexes.

1(A). Steps for Searching a Grantor-Grantee Index:

a. Go to the grantee index (since you are searching to determine how the present landowner received the title you go to the grantee index first) for the current landowner's name and look it up by starting at the most current index and work backwards. You find "Jones to Smith, delivered 6/5/60; recorded 6/6/60."
b. Then look up Jones' name in the grantee index to find another link in the chain and you find: "Doe to Jones, delivered 3/2/30; recorded 3/3/30."
c. Then keep going back until you find a grant from the United States (the beginning of the chain of title). So you have found: "US to Doe (1902); Doe to Jones, Jones to Smith"
d. After create a chain of title with grantee index, go to the grantor index.
e. Then find Doe in the grantor index and look from the beginning of the chain of title (1902) to confirm that he did not convey it before he sold/conveyed it to Jones, and then do that for everyone else and can find all the mortgages, liens, easements, etc…
f. After searching the conveyances for until the present date by going down the grantee index and checking it back up the grantor index, you have established a chain of title.

2. Tract Index: as the land descriptions got better (government surveys and plat systems) the recording office began to keep track of a tract index. In a tract index, all the conveyances are recorded on the same card for the same parcel of land.

a. The tract index card for "Lot 1, Block 2, Heavenly Acres, Laramie, WY would then contain the following information:

(i) US to Doe: 1902;
(ii) Doe to Jones: 3/3/30;
(iii) Jones to Smith: 6/6/60;

IV. Land Records, Indexing, and Problems that Arise

A. **G/R:** Mother Hubbard Clause: a deed or other instrument in writing which intended to convey an interest in real estate which describes the property to be conveyed as "all of the grantor's property in a certain county" is a Mother Hubbard instrument.

1. Instruments of conveyance containing a description of the real estate conveyed in the form of a Mother Hubbard Clause have been upheld *as between the parties to the instrument.*
2. Such a transfer is *NOT* effective as to subsequent purchasers and mortgagees unless they have *actual knowledge* of the transfer.
*[Luthi v. Evans]

B. **G/R:** Conveyances of more than one Tract Land in a Single Instrument: a single instrument, properly executed, acknowledged, and delivered, may convey separate tracts of land by specific description and by general description being made specific where the clear intent of the language is to do so.

1. A subsequent purchaser who has *actual notice* or knowledge of such an instrument is bound thereby and take subject to the rights of the assignee or grantor.

C. **G/R:** Description Requirement: a description of property being conveyed will be considered sufficient if it identifies the property or affords the means of identification within the instrument itself or by specific reference to other instruments recorded in the office of the registrar of deeds.

1. Such a specific description of the property conveyed is required in order to impart constructive notice to a subsequent purchaser.
*[Luthi v. Evans].

D. **G/R:** Improper Indexing: in situations where an instrument of conveyance containing a sufficient description of the property conveyed is duly recorded but not properly indexed, the fact that it was not properly indexed by the registrar of deeds will not prevent constructive notice under the law.

1. The rule appears to be well established that in the absence of a statutory provision to that effect, an index is not an essential part of the record. In other words, a purchaser is charged with constructive notice of a record even though there is no official index which will direct him to it.
2. *Majority Rule:* an indexing mistake *DOES* put a subsequent purchaser on constructive notice.
3. *Minority Rule:* if recorder does not properly index, a subsequent purchaser is not on constructive notice.
    a. Caveat: with a mistake that is less severe or the purchaser has a reasonably opportunity to discover the mistake, the purchaser is on constructive notice.

E. **G/R:** Idem Sonans Rule: the doctrine of idem sonans is that though a person's name has been inaccurately written, the identity of such a person will be presumed from the

similarity of sounds between the correct pronunciation as written. Therefore, absolute accuracy in spelling names is not required in legal proceedings, and if the pronunciations are practically alike, the rule of idem sonans is applicable.

1. The rule does not have widespread appliciability in the area of real property law. Simply stated, the doctrine of idem sonans remains viable for purposes of identification; but has not been applied to give constructive notice to good faith purchasers for value.

a. The rule of idem sonans is inapplicable under circumstances where the written name is material. To be material, a variance must be such as has misled the opposite party in prejudice.

2. *Classical Rule:* if the name sounds alike a purchaser has to search against names that sound alike (idem sonans rule applies).

3. *Modern Rule:* idem sonans does not apply and therefore if the name is spelled wrong the subsequent purchasers are not on constructive notice.

a. The burden of spelling the name correctly is on the creditor and because the misspelled name is material in a real estate transaction the doctrine of idem sonans does not apply.

b. **Policy:** it would place too great of burden on the purchaser of property to comb through all the records with possible spelling variations when the simple alternative is to require the judgment creditors to simply spell the names of their judgment debtors correctly.

*[Orr v. Byers].

F. **G/R:** Judgment Liens: when a debtor suffers a judgment against him, a lien is entered in the clerk of courts office (not the office of the registrar) where there is a list of all judgments entered. So a purchaser to be thorough needs to search the land record office and the county clerks office.

G. **G/R:** Acknowledging a Deed: for a deed to be proper it needs to acknowledged by a public official because it helps prevent fraud and forgery. If the deed has to be signed in front of a public official it puts the grantor on notice that he is conveying his land (in case he was tricked or did not know what he was doing).

H. **G/R:** Improperly Acknowledged Deeds:

1. *Majority Rule:* if the deed acknowledgement is improperly patent (the acknowledgement is patent), the subsequent purchaser is not put on constructive notice.

a. Caveat: if the acknowledged deed is latent, then the purchaser has constructive notice.

2. *Minority Rule:* latent and patent acknowledged deeds give the subsequent purchaser notice of the defective deed.

a. If the purchaser goes down to the land records and finds that the deed is defective, then he is on actual notice of the defect. Therefore, it is like a catch-22.

3. This analysis makes a difference in the type of jurisdiction you are in, it is really only important in notice and race-notice statute jurisdictions.

a. It is not important in a race statute jurisdiction because you in those jurisdictions you can only record a non-defective deed.

I. **G/R:** Curative Acts: several states have adopted statutes that cure defective recordings in deeds; usually the curative act states that after "X" amount of years (usually ten years) and no one has complained within the 10-years, then the deed is cured of all defects.

J. **G/R:** Purchaser for Value: In all states (except Colorado and maybe Missouri) there is a requirement that for a subsequent purchaser to be protected by the recording statutes, he must be a "purchaser for value."

a. *For Value:* (is sort of like consideration) but it must be substantial (more than nominal) but it does not have to be the market price.

(i) The purchaser can still get a bargain; however something like $1 for a $1,000 piece of property will probably be considered nominal.

(ii) **Bottom Line:** must pay value for protection of the recording acts; if gifts or no value is given, then there is no protection by the recording acts, but the conveyance can still be valid.

## §4: PRIVATE LAND USE CONTROLS: THE LAW OF SERVITUDES

### §4.1: Easements

I. Overview

A. **G/R:** Easements: an easement is an incorporeal heridenament (not possessory) which give a party a right to *use* the land but not to possess it.

1. An easement is an interest in land that allows a person to *use*, but no *possess* the land.

a. Ex: one may have the right of egress or transgress but not possession.

2. An easement is an interest which a person has in land in the possession of another. A person cannot have an easement in his own land.

A(1). **G/R:** Quasi-Easement: an owner may make use of one part of his land for the benefit of another part, and this is clause a quasi-easement.

1. When one thus utilizes part of his land for the benefit of another part, it frequently is said that a quasi-easement exists, the part of the land which is benefited being referred to as the "quasi-dominant tenement" and the part which is utilized for the benefit of another part being referred to as the "quasi servient tenement."

B. **G/R:** Duration of an Easement: an easement can last as long (any length) as so may be desired, if it is not terminable at will.

1. An easement can be created, like any interest in land that is defeasible, that is it can be created for a term of years, a fee simple, etc…

2. If the easement is terminable (or revocable) at will then it is a license and not an easement because an easement is non-revocable.

C. **G/R:** Profit a Prendre: is the right to take something out of the land which is attached to the easement.

D. **G/R:** Types of Easements: there are two main types of easements (affirmative and negative) and then from those two categories they can be sub-divided into three groups:

1. Affirmative appurtenant;
2. Negative appurtenant; and
3. Affirmative in gross (there is no such thing as a negative in gross easement).

D(1). **Affirmative Easements:** someone has the right to take an affirmative action on the land.

1. Ex: Lot A (a landlocked parcel) and Lot B are located next to one another. There is a road crossing Lot B to get to Lot A. The owner of Lot A has an affirmative easement across Lot B because he has the right to do something on Lot B, namely, drive across it.

D(2). **Negative Easements:** a negative easement is a restraint on someone's use of the land.

1. Ex: Negative Easement for lateral support: Lot B (the dominant estate) is located up the hill from Lot A (the servient estate). Lot B has a negative easement for lateral support, therefore, the owner of Lot A could not dig out all of his land this collapsing Lot A. Thus the owner of Lot A has a negative easement because he is restrained from doing something, namely, digging up all his land.

D(3). **Appurtenant Easement:** means that the easement is attached to the dominant estate, the land, which burdens the servient estate for the benefit of the dominant estate.

1. Ex: Lot B is a landlocked parcel, and is located next to Lot A which has a road going across it so the owner of Lot B can get to his property.
    a. Lot B is the dominant estate because the benefit is attached to this land.
    b. Lot A is the servient estate because the burden (the road) is attached to this land.
2. An easement appurtenant benefits the owner of the easement in the sue of land belonging to the owner.
3. There is a dominant tenement as well as a servient tenement, and an easement appurtenant attaches to the dominant tenement and goes with it to successive owners.
    a. If an easement is appurtenant to a dominant tenement, it cannot be detached without the consent of both the dominant and servient tenement owners.

D(4). **Easement In Gross:** a person or entity to which the easement is attached rather than to the land.

1. Ex: Behind Lot B there is a fishing pond. The owner of Lot B gives A the right to walk across his land to get to the fishing pond, but he only gets to walk across the land.

a. A has an easement in gross because the easement is attached to him rather then the land.

2. An easement in gross does not benefit the owner of the easement in the use of land belonging to the owner, but benefits the owner without regard to ownership of the land.

D(5). **G/R:** If it is unclear which type of easement is intended by the parties, the law construes in favor of an appurtenant easement.

II. Creation of an Easement

A. **G/R:** Easement Creation: there are three ways to create an easement:

1. Express grant or express reservation;
2. Implied grant or implied reservation; and
3. Easement by proscription.

B. **Creation of Easement by Express Grant or Reservation**:

B(1). Express Grant: an easement can be created by an express grant: "I hereby grant to you an easement for…"

B(2). Express Reservation: an easement can be created by an express reservation: "I hereby grant to you an easement with a reservation to me for…"

B(3). Reservation: a reservation is a provision in a deed creating some *new* servitude on the land which did not exist before as an independent interest.

B(4). Exception: an exception is a provision in the deed that excludes from the grant *pre-existing* servitude on the land. An exception may also exclude from the gran some part of the aldn to which the grantor retains a fee simple.

B(5). **G/R:** Classical Rule: the grantor cannot reserve an interest in property to a stranger to the title (a third party).

1. A reservation allows a grantor's interest in property to pass to the grantee, but revests a newly created interest in the grantor.
2. The effect of a reservation should be distinguished from an exception, which prevents some party of the grantor's interest from passing to the grantee. The exception cannot vest an interest in the third party, and the excepted interest remains in the grantor.

B(6). **G/R:** Modern Rule: the primary objective in construing a conveyance is to give effect to the intent of the grantor from the four corners of the deed.

1. In general, therefore, grants are to be interpreted in the same way as other contracts and the classical rule is not valid or binding.

*[Willard v. First Church of Chirst].

C. **G/Rs:** Interpreting Easements:

C(1). "Of Right Away": A deed containing the words "O to A of right of way across O's property" is very fact dependant and can be interpreted as either a fee simple or an easement.

1. Ex: railroad "right-of-ways," if they are interpreted as easements, they are easements in gross and in some cases they may be interpreted as a fee simple.

C(2). **G/R:** Statute of Frauds: an easement is governed by the statute of frauds and therefore must comply with the requirements of the statute of frauds.

1. The general rule is that an easement is an interest in real property and must comply with the statute of frauds.
*[Holbrook v. Taylor].

D. **G/R:** Easement by Estoppel: (a fourth way of creating an easement) an interest is created by the facts and circumstances of the case and the court can enforce the easement without compliance of the parties.

E. **Easements Created by Implication**: there are three main types of implied easements:

1. An easement implied from a previous quasi-easement;
2. An easement implied from necessity; and
3. An easement implied from a plat (land discription).

*There can be implied reservations also.

**G/R:** Implied Easement: an easement is created by implication when it arises as from an inference from the intention of the parties to a conveyance of land. The inference is drawn form the circumstances under which the conveyance was made rather than from the conveyance. The easement may arise in favor of the conveyor or the conveyee.

E(1). **G/R:** a property owner cannot have an easement across his own property.

1. A property owner can have a quasi-easement in his own land.

E(2). **Creation of an Implied Easement from a Quasi-Easement:** there are four elements that have to be satisfied for a creation of an easement from a previous quasi-easement:

1. A common owner;
2. Apparent;
3. Continuous (from the previous quasi-easement); and
    a. continuous does not mean literally continuous, only continuous for the land.
    b. The first three elements are fairly easy to establish.
4. Reasonable Necessity.
    a. Reasonable necessity means it would be *highly beneficial* to the use and enjoyment of the property
    b. There are eight factors the court considers in determining if the easement would be highly beneficial:

(i) whether the claimant is the conveyor or conveyee;
(ii) the terms of the agreement;
(iii) the consideration given for it;
(iv) whether the claim is made against a simultaneous conveyee;
(v) the extent of necessity of the easement to the claimant;
(vi) whether reciprocal benefits result to the conveyor and the conveyee;
(vii) the manner in which the land was used prior to its coveyance; and
(viii) the extent to which the manner of prior use was or might have been known to the parties.
*[Rst. (1) §28].

E(2)(a). **G/R:** with an implied grant from a previous quasi-easement there is only a requirement of reasonable necessity.

E(2)(b). **G/R:** with an implied reservation from a previous quasi easement there is a split of authority with some courts requiring (a) strict necessity; and (b) some courts only requiring reasonable necessity.

E(3). **Implied Easement from Necessity:** there are two elements to create an implied easement from necessity:

1. Common owner; and
2. Strict Necessity.
    a. Strict necessity means strict but not to the absolute requirement of life or limb.
    b. **Policy:** put the land to use and do not waste it.
    c. The majority of courts hold that determining strict necessity is a matter of fact with a minority of courts holding that it is a matter of law depending on the circumstances.

E(3)(a). Right of Eminent Domain: the government has the right to take your land; if they pay you just compensation.

a. An implied easement kind of creates a right of private eminent domain.
b. Some states have statutes which say that anyone can get an easement to their land if it is landlocked, if they pay damages to the owner of the land across which the easement will run.

E(4). **Implied Easement by Conveyance with Reference to a Plat:** these types of easements arise in two situations:

1. Residential sub-divisions; and
2. Recreational sub-divisions.

E(4)(a). **Elements:** there are four elements for an implied easement with reference to a plat:

1. Common owner;

2. Lots and streets shown on a plat;
3. Conveyance with reference to a plat; and
4 Necessity:

a. *majority:* with respect to residential land courts generally only require reasonable necessity;
b. *minority:* with respect to residential land there are a minority of courts that require strict necessity.
**It is exactly the reverse with recreational land with the majority requiring strict necessity and the minority using a reasonable necessity standard.

F. **Creation of an Easement by Implied Reservation**

F(1). Classical Rule: for an easement to arise from an implied reservation there has to be absolute strict necessity.

F(2) Modern Rule: for an easement to arise from and implied reservation there has to be reasonable necessity taking into such considerations as:

1. the cost and difficulty in determining an alternative;
2. the price paid for the easements; and
3. whether there was a warranty deed (which is not conclusive but pertinent).

G. **Creation of an Easement by Prescription** (sort of like adverse possession).

G(1). **Elements of Easement by Prescription:**

1. Use;
2. Open, visible, and notorious;
3. Continuous and uninterrupted; and
4. Hostility by the claimant.

[(5) Acquiescence by the landowner: only a few states have this element which means that the other landowner must realize the easement exists].
*The first three elements are fairly easy to satisfy.

**4.3: Covenants Running with the Land**

I. Covenants in General

A. **G/R:** Affirmative Covenant: an affirmative covenant (a covenant is a promise) is promise do an affirmative act either (a) with regard to your property; or (b) to pay a sum of money with regard to you property.

B. **G/R:** Negative (restrictive) Covenant: a promise *not* to do something with regard to your property.

1. Ex: a promise to use the premises for no other purpose then residential

C. **Modern Example:** Condominiums: in each case the owner owns a cubical of air space with common ownership of the tennis courts, swimming pools, furnaces, heat, air-conditioning, etc…

1. *Negative Covenant:* only use the condo for residential purposes.
2. *Affirmative Covenant:* promise to pay an assessment (sum of money) for repairs and other things.

D. **G/R:** Enforcement of Covenants: the enforcement of a covenant can occur at law or in equity depending on what type of covenant it is and what the plaintiff is trying to enforce.

1. *Affirmative Covenants:* 99% of affirmative covenants are enforceable at law because an affirmative covenant is usually a promise to pay a sum of money and therefore the plaintiff will be suing for damages.
2. *Negative Covenants:* 99% of negative covenants are enforced in equity because a money damage is inadequate and the plaintiff is seeking an injunction or specific enforcement of the covenant.

II. Covenants Running with the Land

A. **Definitions:** Definitions for the Burden to Run:

A(1). **Intent:** the requirement that the covenant can be enforced against the "heirs, assigns, and successors" can be proved without putting those words in the deed if one can prove intent. But the easiest way to demonstrate intent is to put the words "heirs, successors, and assigns" in the deed.

1. Normally, it is presumed that the intent of the parties is present that they want the burden to run with the land.
2. However, if you don't want the burden to run with the land, it must be stated in the deed.

**Intent is seldom the issue.

A(2). **Privity of Estate:**

1. Horizontal Privity: horizontal privity is privity between the promisor and the promisee.
2. Mutual Continuing Privity: [common law only recognized mutual privity]: it arises in only a limited group of situations (Landlord and tenant and owner of a life estate and remainderment); the privity is mutual because there are successive simultaneous (two tenants in common) privity: owners of the fee and owners of the easement.
    a. In other words there needs to be a continuous on-going relationship.
3. Instantaneous Privity: as long as the promise was made AT THE INSTANT OF THE CONVEYANCE the covenant is enforceable.
    1. Ex: promisee and promisor deliver promise to build fence with the deed, which creates instantaneous horizontal privity.
4. Vertical Privity: "X" must succeed to the same piece of property (or part of it) for the same duration as the promisor. This is successive privity because X is succeeding to the land for an equal duration.

a. In other words, a transfer from the promisor to a succeeding person on the land to the same estate or part of for an equal duration creates vertical privity.

A(3) **Touch and Concern the Land:** courts do not want to enforce a covenant strictly because some covenants will be bad—so the covenant must affect the landowners interest in the land.

1. In other words, touch and concern the land deals with public policy. The court won't enforce a covenant that is for criminal activity, prostitution, anti-competitive clauses, etc…

A(4). **Notice:** actual, constructive, or inquiry notice.

B. **Definitions:** <u>For Benefit to Run with the Land:</u>

B(1). **Intent:** the promisee intends the benefit to run with the land to his successors, heirs, and assignees.

B(2). **Privity of Estate:** [there is no requirement for horizontal privity] and vertical privity only requires the successor to acquire some interest in the land (does not have to be for the same duration, just some interest).

B(3). **Touch and Concern the Land:** same definition.

C. **Elements for Burden of Covenant to Run:**

1. Intent;
2. privity of estate: horizontal and vertical;
3. touch and concern the land (i.e. not against public policy); and
4. Notice: the recording acts.

D. **Elements for Benefit of Covenant to Run:**

1. Intent,
2. privity of estate (not as stringent for vertical and there is no requirement for horizontal); and
3. Touch and concern the land.

*There is no requirement of notice.

E. **G/R:** If one has notice (actual) of a covenant, then the covenant is enforceable, despite the lack of horizontal privity, and the covenant can be enforced in equity [Tulk v. Moxhay].

1. It is generally accepted that intent is present when a party makes a conveyance of land to be binding on the heirs, successors, and assignees because that is what happens when land is conveyed.
2. Every restrictive covenant with respect to the land does almost always touch and concern the land.

F. **G/R:** Implied Reciprocal Restrictive Covenants: three elements have to be met to create an implied reciprocal restrictive covenant:

1. Common owner;
2. first person who purchased lot in sub-division made promise; and
3. there is a common neighborhood scheme.
    a. An implied pattern of development.