COMPARISON OF MASSACHUSETTS AND NATIONAL LAW

Professor Peter M. Malaguti
Phone: (978) 681-0800
Email: malaguti@mslaw.edu
Website: www.mslaw.edu/malaguti/

An electronic version of this packet is available on the Comparison TWEN site.

Property Section Packet

Fall 2014

Table of Contents

1. Expectations and Rules Page 2
2. Class Schedule Page 4
3. Outline for Real Property Page 6

I. Adverse Possession Page 6
II. Estates in Land Page 8
   Present Estates Page 8
   Future Interests Page 14
   Rule against Perpetuities Page 21

III. Restraints on Alienation Page 24
IV. Concurrent Estates Page 27
V. Landlord-Tenant/Assignments & Subleases Page 30
VI. Easements & Licenses Page 33
VII. Covenants Running With The Land Page 35
VIII. Statute of Frauds Page 37
IX. Time is of the Essence Page 37
X. Marketable Title Page 38
XI. Liquidated Damages Page 38
XII. Equitable Conversion Page 40
XIII. Mortgages Page 42
XIV. Deeds Page 46
XV. Recording
Please read Parts 1 and 2 immediately to learn what is expected of you, and the schedule we will follow.

For this Section (Real Property), we will use two volumes from the Emmanuel’s Bootcamp for the MBE series: (1) the Real Property Book (RP) and (2) the real property section (beginning at page 113) of Volume II of Emmanuel’s Essentials (EE). We will take do questions from both the RP and EE books. I have also attached my own outline to this packet, which proceeds in the same order as the RP book.

For our first class – Monday, October 27 – please read the Adverse Possession, Time is of the Essence, and Liquidated Damages sections of the RP book and the Adverse Possession section of my Outline. Do questions 1 & 17 in the RP book, and the Adverse Possession, Time is of the Essence, and Liquidated Damages questions on pages 115-118; 175-177 of the EE book.

I have placed several sets of a videotape series on Estates in Land on my web site – http://mslaw.edu/estates-in-land/. These tapes are about 12 to 14 hours in length, so you should start viewing them as soon as possible. I call your attention to the “Present Estate Flow Chart” followed by a written methodology, starting on page 12 of my outline, the “Future Interests Flow Chart” followed by a written methodology, starting on page 19 of my outline, and Malaguti’s Methodology: The Six Steps You Should Follow Every Time in Determining Whether A Contingent Interest Violates RAP, starting on page 23 of my outline. These will provide shorthand guides for in-class use when we begin Estates in Land in our second class.

Finally, I understand that the MPRE administration on Saturday, November 1 will conflict with my class on that day. I will ensure that the class is taped. If you take the MPRE, and only if you take the MPRE, you will receive a makeup opportunity for the quizzes on either Sunday, November 2 at 3 p.m. or Tuesday, November 4 at 6 p.m. The choice is yours.

1. **EXPECTATIONS AND RULES**

The first Property class on Monday, April 2 will cover Adverse Possession. I will give the first quiz during the first class, and there will be a quiz in each class thereafter.

My classes will consist of very short "mini-lectures," quizzes and reviewing assigned questions. As you answer each assigned question, please try to learn the law on each issue raised by the particular question. Part 2 of this handout – the Class Schedule – illustrates where we plan to be in each class. Although that schedule is not set in stone, please prepare accordingly.
The tested issues on each quiz will be taken from one or more of the issues involved in the questions which we will cover that class, or from a prior lecture or "mini-lecture." My quizzes are not multiple-choice quizzes. They will test your knowledge of the law. Therefore, you will help yourself on the quizzes by knowing and understanding the law pertaining to each question. I will give you the answers to each quiz immediately after you turn it in. The evening class quizzes will be different from the day class quizzes.

My policy on absences is strict. With only four exceptions, you will not be permitted to take a make-up if you miss a quiz. The exceptions are: (1) religious holidays, Sabbaths, or the like, (2) participation in an MSL sponsored activity on behalf of the school such as the ACS, BLSA or ALJ moot court/mock trial competitions, (3) having to take the MPRE on a class day, and (4) a significant health-related issue for either you or an immediate family member. Given that you will have 6 quizzes to achieve 3 meaningful scores, I don’t consider this policy to be unfair. Moreover, my policy is a product of numerous prior student complaints that their colleagues sometimes gain an advantage by securing extra time to take quizzes.

A note on quiz etiquette: To ensure a quiet atmosphere for those who need the entire allotted time to complete their quizzes, everyone will remain in their seats until the time has expired. Then everyone will pass in the answers at once.

I have written all the questions you will answer on your quizzes and on the final section exam. Therefore, rote memorization of questions will not be of much assistance in preparing for the quizzes and the final section exam.

One more thing on quizzes: while I can deal with students being a few minutes late for a particular class, I will not allow a student to take the quiz if he or she comes to class only for the purpose of taking the quiz. Please don’t expect to be allowed to take a quiz if you arrive with only 20 or 30 minutes to go in the class; it is disrespectful to both your classmates and me. You are free to come to the night class if you are unable to make the day class, and vice versa.

The final section exam will cover only the topics covered in the RP book and my outline attached to this packet.

Finally, you may find yourself furiously taking notes during mini-lectures because we will have to cover a lot of ground. I apologize in advance for the sometimes-frenetic pace. I encourage the use of tape recorders to ameliorate this problem. I also have attached an outline of the topics I plan to cover. This hopefully will help you get everything down.

Thank you and good luck.
2. **CLASS SCHEDULE**

This class schedule is an *estimate* of where I expect we will be at certain points. It is not a guarantee. We may move more slowly; we may move more quickly. It all depends on how the classes go. You are responsible for keeping ahead to ensure that you are prepared for every class, quiz and exam.

**MONDAY, October 27**

*Adverse Possession, Time is of the Essence, and Liquidated Damages*

RP Book: Pages 7-11; 54-55; 57-58
Outline: Pages 6-8; 37; 38

Questions:

RP Book: Questions 1, 17
EE Book: Pages 115-118; 175-177

Quiz #1

**WEDNESDAY, October 29**

*Lecture: Present Estates, Future Interests, and the Rule against Perpetuities*

RP Book: Pages 11-26
Outline: Pages 8-21

Quiz #2

**SATURDAY, November 1 (Combined Day/Evening Class, Double Class )**

*Questions on Present Estates, Future Interests, and the Rule against Perpetuities*

RP Book: Questions 2-6
EE Book: Pages 118-135

*Restrains on Alienation, Concurrent Estates, Leasehold Assignments and Subleases, Easements, Licenses and Covenants Running with the Land*

RP Book: Pages 26; 26-30; 31-41; 41-49; 50-53
Outline: Pages 24-26; 27-30; 30-31; 31-33; 33-34

Questions:

RP Book: Questions 7-15
EE Book: Pages 135-141; 143-147; 147-154; 154-156; 156-167

Quiz ## 3 & 4
MONDAY, November 3

Statute of Frauds, Marketable Title, Equitable Conversion, and Mortgages

RP Book: Pages 53-54; 55-58; 59-59; 59-63
Outline: Pages 35-37; 38-40; 40-42

Questions:

RP Book: Questions 16, 18, 19
EE Book: Pages 167-168; 168-173; 177-179; 179-188

Quiz #5

WEDNESDAY, November 5

Deeds and Recording

RP Book: Pages 63-69; 71-78
Outline: Pages 42-46; 46-49

Questions:

RP Book: Questions 20-30
EE Book: Pages 188-198; 199-213

Quiz #6

SATURDAY, November 8 (Final Exam)

Final Real Property Exam (9:30-11:30)
3. **OUTLINE OF THE AREAS WE WILL COVER IN CLASS**

**I. ADVERSE POSSESSION**

**Burden of proof:** The person asserting adverse possession has the burden of showing compliance with all of the law's elements, usually by a “preponderance of the evidence.”

**Elements**

1. **Open & notorious:** Most statutes of limitations don’t begin to run until the person with the right to sue either knows or should have known that s/he had a “cause of action” against the defendant. In adverse possession, no actual knowledge of the record owner is necessary. Instead, the statute of limitations will run as long as the trespasser’s possession is “open and notorious.” This requires that the trespasser’s use of the property be so visible and apparent that it puts the community (including the legal owner) on notice that someone is on the property and exercising ownership rights.

2. **Actual:** The trespasser must actually occupy the property, or place another on the property under his or her claim, e.g., a tenant.

3. **Exclusive:** Adverse possessors need not act alone. More than one person at a time may maintain an adverse possession. The key here is that the adverse possessor cannot share possession with the record owner. If the record owner maintains possession over the same tract of land as the trespasser, this element won’t be met.

4. **Hostile:** The trespasser’s state of mind is irrelevant. The hostility requirement is satisfied if the person maintaining the adverse possession is infringing upon the possessory rights of the record owner. All trespassers maintain an affront to the record owner’s right to exclude, and thus are hostile. Under the majority rule, therefore, any trespass satisfies this element.

5. **Continuous:** This element merely requires that all four of the other elements be met for the full statutory period, usually 20 years. The instant all five elements are met, the record owner ceases to be the owner and the trespasser becomes the owner.

**Additional Concepts**

- **Length of time required:** The statutory period (length of time) required to obtain title by adverse possession varies from state-to-state. You should assume the most common statutory period of 20 years unless a fact pattern tells you that the
applicable statute states otherwise. Most MBE fact patterns will tell you the applicable statutory period.

- **Constructive Adverse Possession / Color of Title:** This is an exception to the rule that the adverse possessor only gets that which s/he actually possesses. If an adverse possessor moves onto the land under a (1) defective deed or will, and (2) has a good faith belief that s/he owned the entire property described in the deed or will, then s/he will obtain all the property described in the deed or will rather than that which s/he actually possessed. Please understand that the adverse possessor must first have met all the elements of adverse possession for constructive adverse possession even to be considered.

- **Tolling:** Sometimes statutes of limitations are delayed in running because it would be unfair to run them against certain parties. If a trespasser begins an adverse possession against a minor (someone under the age of 18), someone lacking the mental capacity to file a trespass action (because of a physical or psychological reason), or someone confined to a penal institution (in some states, but not all), the running of the statute of limitations will be tolled. Here is the rule you'll have to learn for the bar examination:

First, tolling only occurs if one of the aforementioned disabilities existed at the commencement of the adverse possession. Second, the record owner will be given 10 years to file a trespass action after the applicable disability is removed or abates. So, if the record owner is 6 years old when the trespasser commences his adverse possession in 2000, the disability will be removed in 2012 when the record owner turns 18, and the record owner will have 10 years after turning 18 – until 2022 – to file the trespass action. Finally, in no event shall the record owner's disability shorten the usual statute of limitations. Assuming a 20-year statute of limitations, an adverse possessor cannot in any circumstances obtain title in fewer than 20 years.

- **Seasonal Use Doctrine:** If the property is appropriately considered to be one generally used only seasonally for the seasons in which the trespasser occupied it, then this will suffice. Obvious fact patterns invoking the seasonal use doctrine include beach houses, ski houses and farming activities.

- **“Quantity” of Title:** An adverse possessor obtains only that title of the person who could have evicted him, and no more. If a tenant has 50 years remaining on a 99 year lease when a trespasser commences an adverse possession, there will be 30 years left on the lease when the adverse possessor meets all the elements and obtains title. The adverse possessor will only get title to the remainder of the lease because only the tenant could have evicted him. It would not be fair to give the adverse possessor the landlord's title because the landlord could not have ejected the trespasser. Some call this concept “quantity of title” because it involves the amount of title the adverse possessor obtains.
“Quality” of Title: What happens when a trespasser acquires title by adverse possession to a property that is subject to a mortgage created by the owner from whom s/he took title? Can the bank enforce the mortgage lien against the new owner: the adverse possessor? To understand this you must first understand the theory of the “chain of title.” Successive owners of real estate do not have distinct titles of their own; they all own within the same chain of title. With each successive transfer or grant, a new title is not created. Instead, the old title just gets longer (adds another “link” onto the chain). The owner of a mortgage interest in a chain of title can enforce that mortgage within the chain of title, but not beyond it. Only three occurrences can break a chain of title and create/start a new one: tax takings (for failure to pay real estate taxes), eminent domain takings (sometimes called “condemnation”), and a taking by adverse possession. The last of these is the only one you will most likely confront on the bar exam. Since the adverse possessor breaks the chain of title when s/he meets all five elements, a mortgage from the broken chain cannot be enforced against the new owner by adverse possession, and beyond.

Easements by Prescription: An easement is a non-possessory right to cross over or use someone else’s property. An “easement by prescription” is an easement obtained by adverse possession. The law allows an easement, rather than outright ownership, over the strip if you satisfy each element of adverse possession on the strip except for exclusivity.

II. ESTATES IN LAND

1. General Concepts in Estates in Land:

   A. Ownership measured over time; you must account for possession at all points.

   B. Two or more people having interests in the same real estate at the same time.

   C. A word on Medieval logic.

2. Present Estates (Generally)

   A. Freehold
      
      1) Fee Simple
      2) Fee Tail
      3) Life Estate
B. Non-Freehold (Mostly Left for Landlord-Tenant Law)

1) Estate for Years
2) Periodic Tenancy
3) Tenancy at Will
4) Tenancy at Sufferance

3. The Freeholds (More Specifically)

A. Fee Simple

1) Definition

2) Five Powers of Fee Simple Owner:
   (a) Use
   (b) Abuse
   (c) Exclusive Possession
   (d) Reap the Fruits
   (e) Convey in Two Ways (inter vivos or by will/intestate distribution)

3) Characteristics

B. Types of Fee Simples

1) Fee Simple Absolute (FSA)
   (a) Definition
   (b) Characteristics
   (c) Potentially Unlimited Duration
   (d) How to Convey
      (i) Common Law (“to A and her heirs”)
      (ii) Modern Rule (Presume Fee Simple Absolute)
   (e) Examples

2) Fee Simple Determinable (FSD)
   (a) Definition
   (b) Characteristics
      (i) Potentially Lasts Forever (First “Stupid Rule”)
      (ii) Terminates Automatically
      (iii) “Clue Words” (“Until,” “So Long As,” “As Long As”)
      (iv) Upon Forfeiture Estate Goes Back to Grantor (Person Creating the Estate)
      (v) Distinguished from Covenants Running With the Land
3) Fee Simple Subject to a Condition Subsequent (FSSCS)

(a) Definition
(b) Characteristics
   (i) Potentially Lasts Forever (First “Stupid Rule”)
   (ii) **Does Not** Terminate Automatically: Must Be Terminated by Grantor (Re-Entry or Law Suit)
   (iii) “Clue Words” (“Upon Condition That,” “Provided That,” “But If,” “If It Happens That”)
   (iv) Upon Forfeiture Estate Goes Back to Grantor (Person Creating the Estate)

(c) Examples

4) Hybrid FSD/FSSCS
   (a) Ignore Clue Language
   (b) If all else fails, choose FSSCS
   (c) Examples

5) Fee Simple Subject to an Executory Limitation (FSSEL)

(a) Definition
(b) Characteristics
   (i) Potentially Lasts Forever (First “Stupid Rule”)
   (ii) Upon Forfeiture Estate Does Not Go Back to Grantor. It Goes To Another Grantee/Third Party (Someone Who Did Not Grant the Estate)

(c) Examples

(d) Final Caveats:

⇒ All Fees Simple Are Created Equal: Even though the FSD, FSSCS and FSSEL Are “Conditional” and Subject to Forfeiture, in the Eyes of the Law They Are the Equal of the FSA.

⇒ The “conditional” Estates Such as the FSD, FSSCS and FSSEL: These Types of Conditional Estates Are Not Limited to the Fee Simple; They Also Exist as to Other Present Freehold Estates Such as Life Estates.

C. Fee Tail
1) Definition
2) Characteristics
3) Forget About It

D. Life Estate

1) Definition
2) Characteristics
   (a) Three and One-Half (3½) Powers of Owner of Life Estate
      (i) Use
      (ii) Exclusive Possession
      (iii) Reap the Fruits
      (iii)½. Convey in **One Way** (Inter Vivos, but Not by Will/Intestate Distribution). Exceptions: Life Estate Pur Autre Vie, Mortgage.

3) Life Estate Pur Autre Vie

4) Mortgage on a life estate

E. Present Estates Flow Chart (on next page)
PRESENT ESTATES

Fee Simple

- "and her heirs" or no time limitation

- Conditional
  - Words of condition: "provided that," "as long as," "but if," etc.

- Unconditional
  - No words of condition

  - "Fee Simple Absolute"

- Fee Simple Determinable
  - Upon forfeiture, possession will not go to a grantee; it will go back to the grantor. Also, it terminates automatically (by operation of law)

Life Estate

- Limited to the length of a natural life

Non-Freehold Estate

- Estate for years, periodic tenancy, tenancy at will

Unconditional

- Life estates are almost always unconditional

Conditional

- Life estate determinable; Life estate subject to condition subsequent; Life estate subject to executory limitation – all are very rare

Fee Simple Subject to Condition Subsequent

- Upon forfeiture, possession will not go to a grantee; it will go back to the grantor. Also, it does not terminate automatically; the grantor must take some action (entry or a law suit) to terminate. Look for "action words."

Fee Simple Subject to an Executory Limitation

- Upon forfeiture, possession does not go back to the grantor; it will go to a grantee (unless the forfeiture creates a "gap," in which event it will go back to the grantor, and then later come back to a grantee).
F. Present Estates Methodology:

**Fee Simple**

1. Who has the present estate?
2. Is the present a fee simple, life estate or non-freehold estate?
3. If it’s a fee simple (“and her heirs” or no time limitation), is it conditional or unconditional? (If unconditional, it’s a fee simple absolute and you’re done. If conditional, continue.)
4. Upon breach of the condition and forfeiture, does possession go back to the grantor or over to another grantee? (If it goes over to another grantee, it’s a fee simple subject to executory limitation and you’re done. If it goes back to the grantor, continue.)
5. Does the breach of the forfeiture happen automatically (by operation of law) or are there “action words” requiring the grantor to take action to cause the forfeiture? If automatic, it’s a fee simple determinable; if action is required, it’s a fee simple subject to condition subsequent.

**Life Estate**

1. Who has the present estate?
2. Is the present a fee simple, life estate or non-freehold estate?
3. If it’s a life estate limited to the length of a natural life, is it conditional or unconditional? (If unconditional, If it’s unconditional, which it almost always is, you’re done. If it’s conditional, follow the same steps as above, beginning with no. 4.)

**Non-Freehold Estates**

**Estate for Years/Estate for a Term:** Definite beginning and ending; term fixed in advance; compliance with statute of frauds

**Periodic Tenancy:** Definite beginning and ending, but term automatically renews unless proper written notice is given; compliance with statute of frauds in Mass. but not multistate
Tenancy at Will: Personal estate for an indeterminate term; will continue until proper written notice is given; no compliance with statute of frauds necessary; tenancy does not begin until tenant takes possession.

4. Future Interests (Generally)

A. Reversion
B. Possibility of Reverter
C. Right of Entry for Condition Broken (Sometimes Called “Right of Entry” or “Right of Re-Entry”)
D. Remainder
E. Executory Interest

General Rules and Considerations

1. Common Law Conveyancing Rules:
   i. Executory Interests: Not Possible Before the Statute of Uses Was Enacted in 1535 (Effective in 1536). You Will Not Get Any Problems Predating 1536, So Always Assume That There Are Executory Interests.

2. The “Close the Circle” Rule:
   - Will Help You Know You Are Doing it Right. Use it as a check.
   - You must account for possession at all stages of the time line.
   - Rule: You Always Begin with a Fee Simple Absolute, and Must End with a Fee Simple Absolute. If You End with Less than a Fee Simple Absolute (E.g., a Life Estate), You must Find Additional Future Interests to Get Yourself Back to a Fee Simple Absolute.

First Step for Future Interests:

(a) The First Three Future Interests (A., B. and C.) Are Always Owned By, or in Favor Of, the Grantor (Person Creating the Estate)

(b) The Last Two Future Interests (D. and E.) Are Always Owned By, or in Favor Of, A Grantee (A Person Who Did Not Create the Estate)
5. Future Interests (Specifically):

a. Reversion

ii. Always Owned By, or in Favor Of, the Grantor (First “Stupid Rule” as to Future Interests)

iii. Always Occurs When the Grantor Conveys a Smaller Estate than That Which He or She Owns (E.g., Life Estate from Fee Simple)

iv. Reversion Fills in the “Gap Created When Smaller Estate Is Conveyed. Remember, You Always Begin with a Fee Simple Absolute, and Must End with a Fee Simple Absolute.

v. A Reversion Occurs by Operation of Law Rather than by the Express Language of the Grantor

vi. Examples

vii. All Reversions Are “Vested” (Not Subject to the Rule Against Perpetuities). The Two Types of “vested” Reversions:

viii. Indefeasibly Vested (Cannot Be Divested)

ix. Subject to Divestment:

x. Usually, When the Grantor Conveys a Smaller Estate Followed by a “contingent” Remainder

xi. Examples

b. Possibility of Reverter

i. Always Owned By, or in Favor Of, the Grantor (First “Stupid Rule” as to Future Interests)

ii. Stupid Rule: a Possibility of Reverter Only Occurs When the Grantor Conveys an Estate Equal to His Own. (Usually, Grantor Owns Some Type of Fee Simple and Conveys Some Type of Fee Simple. Remember, All Fee Simples Are Equal in the Eyes of the Law.)

iii. Always Follows the Grant of a Determinable Estate (Usually a Fee Simple Determinable)
iv. Examples (Distinguish from Reversion)

c. Right of Entry for Condition Broken (Sometimes Called “Right of Entry” or “Right of Re-Entry”)

i. Always Owned By, or in Favor Of, the Grantor (First “Stupid Rule” as to Future Interests)

ii. Stupid Rule: a Right of Entry Only Occurs When the Grantor Conveys an Estate Equal to His Own. (Usually, Grantor Owns Some Type of Fee Simple and Conveys Some Type of Fee Simple. Remember, All Fee Simples Are Equal in the Eyes of the Law.)

iii. Always Follows the Grant of a Subject to Condition Subsequent Estate (Usually a Fee Simple Subject to Condition Subsequent). This Is the Rule That Distinguishes it from the Possibility of Reverter.

iv. Examples

d. Remainder

i. Stupid Rule: Always Owned By, or in Favor Of, A Grantee (A Person Who Did Not Create the Estate)

ii. Stupid Rule: Remainders Only Become Present Possessory Estates upon the Natural Termination of the Prior Estate

iii. On the Expiration of the Prior Estate, the Interest “Remains Away” from the Grantor

iv. There can be no remainder immediately following a fee simple because a fee simple is supposed to last forever, and it cannot “naturally terminate.”

v. Examples

vi. Types of Remainders:

1. Vested Remainders

   a. Three-Part Test to Determine Whether a Remainder is Vested (Generally):
i. Born, and

ii. Ascertained/Ascertainable, and

iii. No Condition Precedent (Waiting for Prior Estate to “Naturally Terminate” is Never a Condition Precedent)

b. Types of Vested Remainders:

i. Absolutely Vested

   1. No Words of Condition Attached

   2. Even If There Is No Certainty That Person Owning Remainder Will Ever Get It.

ii. Subject to Partial Divestment

   1. Only Occurs When the Remainder Is Conveyed to a Group or Class of People (E.g., Siblings)

   2. Membership in the Group Remains Open.

   3. Remainder Is Subject to “Dilution” or “Diminution” as New Members Enter the Group or Class

   4. Examples

iii. Subject to Complete Divestment

   1. Person Owning Remainder Might Lose the Entire Interest upon the Happening or Non-happening of a Condition

   2. Vested Remainder subject to complete divestment is always followed by one of three interests:

      a. Executory Interest
b. Right of Entry

c. Power of Appointment

d. Examples

2. Contingent Remainders

a. To Be Contingent, Remainder must Fail to Satisfy One of the Elements of the Three-part Test for Vested Remainders

b. Hardest Part of the Test Is the Last: Trying to Distinguish Between a “Condition Precedent” (Which Makes Remainder Contingent) and “Condition Subsequent” (Which Makes Remainder Vested)

i. “Hurdle” or “Barrier” Theory

c. A Contingent Remainder May Become Vested If, and When, All Three Parts of the Test Are Satisfied

d. Examples

e. Executory Interests

i. Stupid Rule: Always Owned By, or in Favor Of, A Grantee (A Person Who Did Not Create the Estate)

ii. Stupid Rule: Executory Interests Never Become Present Possessory Estates upon the Natural Termination of the Prior Estate. They Always Cut Short, or Unnaturally Terminate, the Prior Estate. (This Distinguishes the Executory Interest from the Remainder.)

iii. All Executory Interests Are Contingent. Unlike Remainders, They Never Vest until They Become Present Possessory Estates.

Future Interests Flow Chart:
FUTURE INTERESTS

Owned by the Grantor

- **Reversion**
  Follows the grant of a smaller estate (life estate or non-freehold)

- **Possibility of Reverter**
  Follows the grant of an equal estate
  Follows a fee simple determinable

- **Right of Entry for Condition Broken**
  Follows the grant of an equal estate
  Follows a fee simple subject to condition subsequent

Owned by a Grantee

- **Remainder**
  Follows the natural termination of the prior estate

- **Executory Interest**
  Cuts short, or follows the unnatural termination of, the prior estate

Indefeasibly Vested Reversion

Possession is definitely going back to the grantor

Reversion Subject to Divestment

Possession may go back to the grantor, or it may not

Vested Remainder

The owner of the remainder is: (1) born, AND (2) born, AND (3) not subject to a condition precedent

Contingent Remainder

The owner of the remainder is: (1) not born, OR (2) not ascertained, OR (3) subject to a condition precedent

Absolutely Vested

No words of condition and remainder is not owned by an open class

Subject to Partial Divestment (Open)

No words of condition but remainder IS owned by an open class

Subject to Complete Divestment

There are words of condition, and the owner of remainder might lose entire interest upon breach of a condition occurring after assumption of possession
Future Interests Flow Methodology:

1. Is the future interest owned by a grantor or grantee?

   **Owned By a Grantor**

   1. Eliminate remainder and executory Interest; It’s either a reversion, possibility of reverter or right of entry for condition broken

   2. Does it follow the grant of a smaller estate or equal estate? If it follows a smaller estate it’s a reversion. If it follows an equal estate, it’s a possibility of reverter or right of entry.

      **If a Reversion:**

      Is the possession definitely going back to the grantor? If so, it’s “indefeasibly vested.” If not, it’s “subject to divestment.”

      **If Not a Reversion:**

      1. Does it follow a fee simple determinable? If so, it’s a possibility of reverter.

      2. Does it follow a fee simple subject to condition subsequent? If so, it’s a right of entry.

   **Owned By a Grantee**

   1. Does it follow the natural termination of the prior estate (a remainder), or does it unnaturally cut short the prior estate (executory interest)?

   2. If it’s an executory interest, you’re done.

      **If a Remainder:**

      1. Is the owner (1) born, AND (2) ascertained, AND (3) not subject to a condition precedent? If all three met, it’s a vested remainder. If not, it’s a contingent remainder. If it’s a contingent remainder, you are done.

      2. If it’s a vested remainder, are there words of condition? If yes, is the remainder owned by an individual or an entirely-closed class of persons? If yes again, it’s an absolutely vested remainder.

      3. If there are no words of condition, but the remainder is owned by an open class of people, it’s a vested remainder subject to open (partial divestment).
4. If there are words of condition, and the owner of the remainder might lose the entire interest upon a breach of condition occurring under assumption of possession, it’s a remainder subject to complete divestment.

6. **Rule against Perpetuities**

   1. **Definition:** an Interest in Real Estate must Be Certain to **Vest, If at All, Not Later than 21 Years after a Life or Lives in Being**, from the Date the Interest Was Created.

      a. Statute of Limitations Theory

      b. Purpose: Promote Commerce and Prevent the Clogging of Titles

   2. Interests to Which the RAP Applies

      a. Contingent Remainders

      b. Executory Interests

      c. Options to Purchase Real Estate

      d. Rights of First Refusal

      e. Powers of Appointment in a Will of Trust

   3. Rules to Follow in Applying RAP

      a. The Contingent Interest must Vest or Fail Within a Life in Being Plus 21 Years.

      b. In Regard to Contingent Remainders, You Don’t Always Have to Wait until the Prior Estate Ends to Know Whether it Will Vest or Fail. (Remember, contingent remainders vest once all elements of the three-part test are met.)

      c. Executory Interests Never Vest until They Are Present Possessory Estates.

      d. Examples

4. **The Words “If at All” Are Important.**

   a. This Means That Contingent Interests May Satisfy Rap by
Failing, as Well as by Vesting, Within a Life in Being plus 21 Years.

b. Don’t Fall into the Trap of Thinking That an Interest Can Only Satisfy RAP by Vesting.

c. Examples

5. Rules Regarding “21 Years after a Life or Lives in Being.”

a. All Lives Which Are Directly or Even Indirectly Connected to the Vesting of the Interest You Are Examining Are “Lives in Being.”

→ Usually Anyone Mentioned in the Grant

b. You Can Have a Class or Group Serve as the Measuring Lives as Long as the People in it Are Not So Numerous as to Prevent Practical Determination as to Who They Are, and When the Last One Dies.

i. Example: All Current in Habitants of NYC

ii. Example: All Students Who Previously Received the Grade of “A” in Comparison at MSL.


c. Persons in Gestation When the Interest Was Created Are Considered Lives in Being If They Are Subsequently Born Alive.

i. Another Name for “Lives in Being” Is “Measuring Lives.”

ii. The Lives in Being must Be Human Lives.

iii. For Measuring Purposes, the Lives in Being must Precede the 21 Year Period, Not Come after It.

iv. Every Person Is Conclusively Presumed to Be Capable of Having Children While They Are Alive Regardless of How Old They Are or Regardless of Medical Information That Conclusively Establishes Sterility.

d. The Place to Begin in Determining Whether Rap Has Been Violated Is to Determine When the “Statute of Limitations”
Begins to Run.

i. As Soon as RAP Starts Running Look for the Relevant Life or Lives in Being. There Are Four Situations for Which the Period Begins to Run:

A. Deed: when the deed effectively transfers title by delivery

B. Will: when the will becomes effective by death of the testator

C. Irrevocable Trust: like a deed; when the real estate is transferred into the trust

D. Revocable Trust: like a will; when the power to revoke is relinquished by usually death

e. RAP Deals with Possibilities, Not Probabilities. *If There Is Any Possible Chance*, Regardless of How Improbable That Chance May Be, That a Contingent Interest Might Vest or Fail More than 21 Years after the Death of the Measuring Life, Then it Will Be Deemed to Vest or Fail Too Late and Cause a Violation of RAP.

6. Malaguti’s Methodology: The Six Steps You Should Follow Every Time in Determining Whether A Contingent Interest Violates RAP.

1. Determine Whether You Need to Even Engage in a RAP Analysis.

   → contingent remainder, executory interest, option to purchase, right of first refusal, power of appointment in a deed or will

2. Determine When the Period Starts to Run.

   → Is it a deed, will, irrevocable trust or revocable trust?


   → Can have more than one; need satisfaction of the rule under only one.
Shortcut: immediately go to the life that has the most control over whether the condition is satisfied; this gives you the best chance of satisfying RAP.

Any life in being at the time of the “snapshot.”

If a class or group, it must be certain that all members of the class or group are lives in being; if not, no member of the class or group can serve as the measuring life, even if s/he is a life in being.

4. Determine the Latest that the Contingent Interest Will Vest or Fail.

This requires a careful examination of the condition affecting the contingent future interest. Contingent future interests can vest or fail before, at, or after the termination of the prior estate.

5. Answer the Following Question: Is There Any Chance That the Contingent Interest Will Vest or Fail More than 21 Years after the Death of the Measuring Life. If the Answer Is Yes, Then it Violates RAP. If the Answer Is No, it Does Not.

You must speculate here. RAP is violated if there is any chance of the subject future interest vesting or failing more than 21 years after the death of the measuring life, even an infinitesimally-remote possibility.

6. If the Contingent Future Interest under Examination Violates RAP, Cut It Out and Act as If It Never Existed (RAP Violations Occur Instantly upon the Grant).

“Trotsky” the offending contingent future interest.

“But if” language goes.

“As long as” language stays.

III. RESTRAINTS ON ALIENATION

Along with the right to convey or devise real estate comes one of the most important attributes of estates in land: the right to sell the land or make a gift of it (otherwise called the “right to alienate”). Over the centuries, courts have taken the position that an
unreasonable restraint on alienation is repugnant to the concept of fee simple ownership, and also troublesome in regard to life estates and non-freehold interests.

Restraints on alienation are broken down as follows:

1. **Direct Restraints vs. Indirect Restraints**

   *Direct restraints* advance the primary purpose of preventing someone from alienating his or her land. For example, the restraint in “to A and her heirs, provided that A not sell, convey or otherwise alienate her interest” is a direct restraint because the singular purpose of the restraint is to force A to continue to own the fee simple estate. On the other hand, the following grant is an *indirect restraint* because the primary purpose is to do something other than prevent alienation (its effects on the right to alienate are incidental): “to A and her heirs, provided that the property is used only for the purpose as a single family residence.” Indirect restraints generally are not violative of the rule prohibiting restraints on alienation.

   **Types of Direct Restraints**

   **The Disabling Restraint**

   As with all direct restraints, the disabling restraint prevents the owner from conveying or devising the property. The effect of the disabling restraint is to nullify any attempted conveyance. For example, if after receiving title under the grant, “to A and her heirs, provided that A not sell, convey or otherwise alienate her interest,” A conveys her interest to B, the person challenging the disabling restraint would seek a declaratory judgment that the grant to B is null and void.

   **The Forfeiture Restraint**

   The forfeiture restraint does more than set aside a conveyance that violates its terms; it causes a forfeiture of the interest of the person violating the restraint. For example, if the grant is “to A and his heirs, but if A attempts to convey to someone else, to B and her heirs,” the person seeking to enforce the restraint would seek a declaration that A has forfeited her ownership right by attempting to convey, and that B is now the rightful owner.

2. **Application of Restraints on Alienation to the Specific Estates**

   **Fee Simple**

   Both disabling and forfeiture restraints imposed upon fee simple ownership violate the rule prohibiting restraints on alienation, and will not be enforced. There are three exceptions of which you should be aware:
1. **Spendthrift Trusts**

The purpose of a spendthrift trust is to protect the corpus (res) from the improvidence or lack of sophistication of the beneficiary. Thus, a spendthrift trust prohibits creditors of the beneficiary from reaching the corpus to satisfy debts, and enables the trustee to exercise great discretion when deciding whether to pay income to the beneficiary. Although this might be considered a fairly direct restraint on alienation because the beneficiary is prohibited from taking his or her own income, the courts have held that it does not violate the rule prohibiting restraints on alienation.

2. **Rights of First Refusal**

A right of first refusal gives the option holder the right to match the terms of any good faith offers a property owner receives for the purchase of the subject real estate. While this might be viewed as a fairly direct restraint on alienation because the owner is required to sell to the option holder rather than some third person, courts have consistently held that the right of first refusal does not violate the rule prohibiting restraints on alienation.

3. **Defeasible Fees Simple**

Three out of the four types of fees simple are conditional. The conditions imposed mostly restrict the use of the property, e.g., only for residential purposes, only for farming purposes, etc. Such restrictions do not violate the rule prohibiting restraints on alienation. On the other hand, if the condition imposed in a determinable fee directly prevents alienation to a third person, then the determinable fee is invalidated under the rule prohibiting restraints on alienation. Thus, “to A and her heirs provided Blackacre is used only to teach the subject of estates in land” is a valid grant while “to A and his heirs, but if A attempts to convey to someone else, to B and her heirs” is an invalid grant under the rule prohibiting restraints on alienation. The condition contained in the latter grant will be unenforceable.

**Life Estates**

The majority of jurisdictions allow even disabling or forfeiture restraints on the alienation of life estates. However, such restraints are strictly construed.

**Non-Freehold Estates**

Anti-assignment and anti-subleasing clauses in leases are enforceable and do not violate the rule prohibiting restraints on alienation. That said, they are strictly construed – “assignment” does not mean “sublease,” and “sublease does not mean “assignment” – and the Rule in Dumpor’s case will apply: once the landlord waives the anti-assignment or anti-sublease clause it is waived for the remainder of the tenancy.
IV. CONCURRENT ESTATES

A. Two or more people owning the same interest in the same land at the same time.

B. Three types concurrent estates:
   
   ii. Tenancy in common
   iii. Joint tenancy
   iv. Tenancy by the entirety

C. Rights of cotenants arising with an interest
   
   i. All cotenants own an “undivided interest in the whole.”
   ii. All own the whole parcel
   iii. All can use the whole parcel

D. Severance: Individual cotenants in both the tenancy in common and joint tenancy can alienate (sell or convey) their interests, even without the permission of the remaining cotenants. Individual cotenants in the tenancy by the entirety cannot alienate their interests unless they meet the D.A.D. rule:
   
   i. Death
   ii. Agreement
   iii. Divorce

E. Right of survivorship: exists with the joint tenancy and tenancy by the entirety, but not with the tenancy in common.
   
   i. The right of survivorship means that on the death of a cotenant his/her interest doesn’t pass through a will or by intestate distribution. Instead, the surviving cotenants continue to own the real estate free of the interest of the dead cotenant.
   
   ii. The dying cotenant’s interest does not pass to the surviving cotenants. The other cotenants just become owners free of the interest of the dying cotenant.

   → Example: O to A and B as joint tenants. A gives a mortgage to M. A dies. Does B take subject to A’s mortgage to M?

   → B is free of A’s participation when A dies and the mortgage
ceases to encumber the property.

→ If B died instead, the mortgage would continue to exist, but on A’s whole interest in the property, not just on 1/2 interest.

**F. Tenancy by the entirety (TBE) can only exist between two legally married people.**

i. Forget about “common law marriages” unless you are told that they are recognized in a particular jurisdiction.

ii. It does not follow that a jurisdiction recognizes “untraditional” marriages or relationships merely because they allow life partners to receive health, retirement, disability or other benefits.

iii. Discussion about equal rights in tenants by the entirety estates.

→ Most states have abolished the tenancy by the entirety because its common law characteristics were based on rank sexism.

→ Other states have merely equalized the rights.

→ Updating old tenancies by the entirety.

→ Dower and curtesy, and the movement to abolish the concepts.

→ Cohabitation without marriage; what rights are there?

→ Upon divorce, property previously held as tenants by the entirety transforms into a tenancy in common.

**G. Recognizing Concurrent Estates: How do you know which of the concurrent estates you have?**

i. As with contracts and legislation, look to the words contained in the grant and determine whether there is a clear, unequivocal, unambiguous expression of the type of cotenancy intended.

   1. “As tenants in common” creates a tenancy in common.
   2. “As joint tenants” creates a joint tenancy.
   3. “As tenants by the entirety” creates a tenancy by the entirety.

ii. If the grant language is not absolutely clear, there may be a need to employ some rules of construction. Here are some:
1. If the right of survivorship is expressed, it cannot be a tenancy in common because the tenancy in common has no right of survivorship. (Massachusetts and Multistate)

2. In multistate law, a grant to a legally married husband and wife, which does not expressly created a tenancy in common or joint tenancy, is presumed to be a tenancy by the entirety. That is not the case in Massachusetts because the only way to create a tenancy by the entirety is to do so expressly. Mass. Gen. Laws, Ch. 184 sec 7.

3. In multistate law, if there is no survivorship expressed, and the grant is not to a legally married husband and wife, choose the tenancy in common over the joint tenancy. A tenancy in common is always preferred over a joint tenancy. In Massachusetts, since there is no presumption that a tenancy by the entirety exists between legally married couples, apply the tenancy in common over a joint tenancy rule even if the couple is legally married.

4. The word “jointly” creates a joint tenancy in Massachusetts (Mass. Gen. Laws, Ch. 184 sec 7), but not in multistate law. Multistate law treats the word “jointly” as a mere expression of an intent to create some form of cotenancy. If no right of survivorship is expressed, the preference for tenancies in common over joint tenancies applies.

5. A failed tenancy by the entirety B where the grantor attempts to create a tenancy by the entirety but cannot because the couple is not legally married B is a joint tenancy, not a tenancy in common. It would be unfair to deny the couple the right of survivorship which was undoubtedly a primary consideration in the attempt to choose a tenancy by the entirety.

6. Examples and hypotheticals.

   H. The “Unities” (TTIPP) or “PPIIT”

   i. Time
   ii. Title
   iii. Interest
   iv. Possession
   v. Person (Marriage)

   1. The **tenancy in common** always has at least one unity B unity of
possession B and can have as many as four (the first four, not the
unity of the person)

2. The joint tenancy always has four unities (the first four, not the
unity of the person)

3. The tenancy by the entirety always has all five unities

vi. Tracing the unities: examples and hypotheticals.

vii. When contenants cannot get along:

1. Partition
2. Physical division
3. Sale
4. Equitable accounting
5. Figuring damages

AN EXAMPLE OF CHARTING A QUESTION:

Question:
A, B, and C own as joint tenants. A conveys his interest to E. Then, C dies with a will
leaving his real estate to F. Who owns what?

Chart:

A JT B JT C
↓
E TC (B JT C)
F gets nothing because of survivorship.

E TC B
(1/3) (2/3)

B and E own as tenants in common, with E owning 1/3 and B owning 2/3 of the
undivided interest. I can just look at the chart and figure out exactly what happened
without having to re-read the facts.

V. LANDLORD-TENANT / ASSIGNMENTS & SUBLEASES

Assignment: a tenant conveys his or her entire remaining interest in the leasehold to an
assignee.

Sublease: a tenant conveys less than his or her entire remaining interest in the
leasehold to a sublessee.
Anti-Subleasing & Assignment Clauses:

- Allowed, but strictly construed
- Rule in Dumpor’s Case

Tenant/assignee/sublessee liable for rent if there is *either* privity of contract or privity of estate with the landlord.

Privity of Contract: a relationship through the tenancy; both the landlord and tenant are parties to the same tenancy.

Privity of Title/Estate: a relationship through the real estate; there is a *direct* line of possession between the landlord and tenant/assignee/sublessee (no “stopovers” of possession).

VI. EASEMENTS & LICENSES

A. A non-possessory interest in real estate.

B. *Profit a prendre*: An easement that allows you to extract minerals from the land, or timber.

C. Because easements and profits are interests in real estate, there must be a writing, signed by the party to be charged, which satisfies the statute of frauds. ([S•O•F])

D. DO NOT confuse an easement with a license. . . . A license is the right to occupancy, the right to occupy land which is a contract, not an interest in real estate.

   → No statute of frauds

   → No intended interest in real estate (a “mere contract”)

   → Generally, revocable at will (exceptions: 1. reasonable reliance/large expenditures, 2. reasonable time to remove property, 3. retrieving property after termination

E. Three Categories of Easements:

   i. How is it owned?

   1. **Appurtenant easements**: Benefits & burdens. The benefited parcel is called the dominant estate, the burdened parcel is called the servient estate. The
easement is not personal: stays with the land. Runs in perpetuity unless otherwise stated.

2. Easements in gross: "Personal" easements.

ii. How is it used?
   1. affirmative (affirmative act. . . the right to pass & re-pass)
   2. negative (can't use this section of land, for either a certain purpose or at all. . . sometimes referred to as "view" easments or "light & air" easements).

iii. How is it created?
   1. express easements: A writing signed by the party to be charged that expresses the intent of the grantor to create an easement.
   2. implied easements: A court will tell the parties they have an easement, whether they were aware of it or not.

   a. Easement by Implication:
      i. Common ownership
      ii. Quasi-easement
      iii. Quasi-dominate estate
      iv. Quasi-servient estate
      v. Reasonable necessity

   b. Easement by Necessity:
      i. Common ownership
      ii. Strict or absolute necessity

   c. Easement by Prescription:
      i. Easement by adverse possession. Only need four elements, not five like in adverse possession. All but “exclusive”. (Open & Notorious Continuous Actual Hostile)

   d. Easement by grant:
      i. Grantor sells a parcel of land along with
an easement that benefits the parcel of land sold.

3. Easement by reservation:
   i. Grantor sells to grantee, but reserves an easement in himself.

F. Duty To Maintain: The owner of the dominant estate. Liable in negligence. Owner of the servient estate can do anything he wants as long as it doesn't interfere with the non-possessory rights of the owner of the dominant estate.

G. The Scope of the Easement: Look to the express language of the easement. "Rule of reason."

H. Termination of the Easement:

→ Abandonment
→ Merger

VII. COVENANTS RUNNING WITH THE LAND

a. Covenants Running At Law:
   i. Intent: Look is to the express words of the grantor. If no language, look to see if the deed is recorded.

   ii. Touch & Concern: There are three scenarios in which covenants "touch & concern" the land:

      1. affects the characteristics & nature of the land
      2. all “use” restrictions "touch & concern" the land
      3. affects the value of the land

   iii. Privity of Title / Privity of Estate: If you are in the chain of title, you are in privity of title.

   iv. Three ways to break the chain of title:

      1. Adverse Possession
      2. Emminant Domain (condemnation)
      3. Takings for failure to pay real estate taxes (tax
b. Covenants Running In Equity:
   i. Intent: Look is to the express words of the grantor. If no language, look to see if the deed is recorded.
   
   ii. Touch & Concern: There are three scenarios in which covenants "touch & concern" the land:
       1. affects the characteristics & nature of the land
       2. all “use” restrictions "touch & concern" the land
       3. affects the value of the land

Notice:
   1. Actual
   2. Constructive
   3. Inquiry

c. Common Schemes
   i. Subdivision: A developer takes a large piece of land and divides it up into a number of parcels.
   
   ii. The developer wants the lots to essentially look the same.
   
   iii. You can have a common development scheme even if it is not directly referred to in the deed. Sometimes a uniform development plan can be inferred by the geographical relationship of the lots to each other.
   
   iv. Did the grantor initially intend a common development scheme.
   
   v. Look at the evidence. . . sometimes it is just geographical proximity

d. Appurtenance: Every lot in the subdivision has a benefit and burden. The benefits and burdens are reciprocal. All owners in the subdivision are allowed to enforce the common scheme.

e. Writing Requirement? (Massachusetts & Multistate)
VIII. STATUTE OF FRAUDS

A. The Statute: No action shall be brought . . . upon any contract or sale of lands, tenement or hereditaments, of any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Every state has a statute of frauds. It has either been adopted by statute or by common law. Most states have adopted it by statute. Massachusetts has adopted it by statute MGL C 259 § 1. Massachusetts has literally adopted the SOF word for word from 1677 English statute.

B. Two situations in real estate law in which the [S•O•F] will arise:
   i. Any contract or transaction involving an interest in real estate
   ii. A contract not to be performed within a year (far less common in real estate law).

C. Types of transactions coming under “interest in real estate”:
   i. a “purchase and sale agreement”; sometimes called a “contact for sale” or “contract of sale.”
   ii. Deeds. Must be in writing and contain essential written elements.
   iii. Mortgages.
   iv. Easements.
   v. Restrictive Covenants.
   vi. Leases.
   vii. Any other real estate interest.

D. Types of transactions coming under “within a year”:
   i. Agreement on Broker’s Commission that requires payout over an extended period.
   ii. Construction to build a structure that will require more than a year.
E. Where does the [S•O•F] fall in the realm of the law of contracts:

i. [S•O•F] not an element in the same sense that consideration, or offer and acceptance are elements

ii. You already presume that a K exists before you even begin [S•O•F] analysis.

iii. Therefore, failure to satisfy the [S•O•F] doesn’t even matter if both parties go ahead and fully perform the contract; the "NBA" rule: No harm, no foul.

F. Elements of the Statute of Frauds:

i. has to be in writing to be enforceable, signed by the party to be charged

ii. Identify the parties

iii. Describe the land (you can use parol evidence to ID parties & describe land). The land must be capable of being located (address sufficient).

iv. (Mass ONLY) The writing must contain all essential terms. (Essential term is one which, if omitted, would cause one of the parties not to enter into the K.

b. Is price an essential term? Most of the time it is, but not always.

c. Exceptions to the Statute of Frauds:

i. In multi-state law, there’s only one exception to the [S•O•F]: Part performance.

ii. For part performance you need one of the two following theories of part performance:

   a. “Unequivocal Referability”

   b. “Undue Hardship”

   i. Unequivocal Referability: There is only one explanation for the parties= performance: the existence of an oral contract.

   ii. Undue hardship: acts of performance are done in
reliance on an oral contract & an undue hardship would result if the contract is not enforced.

iii. Example:

iv. In Massachusetts, we essentially follow Undue hardship theory, and we call it “estoppel.” (The big MA case is Cellucci v. Sun Oil Co.)

IX. TIME IS OF THE ESSENCE

A. Must be stated in purchase and sale agreement to apply.

B. Otherwise, the closing can be within a reasonable time of that specifically stated in the purchase and sale agreement.

X. MARKETABLE TITLE

a. Marketable title: Involves the quality of the title that you own. Is the property subject to any defects or encumbrances? Does the title have a "cloud" on it?

   i. Much like equitable conversion it is a creature of the purchase and sale agreement. The concept arises when the P&S is born and it dies when the P&S dies.

   ii. An obligation that the seller has and the seller is required to deliver marketable title. It is an obligation contained in the purchase & sale agreement and dies when the P&S dies.

   iii. Therefore, a buyer must object to lack of marketable title before the deed is delivered.

b. When is a seller obligated to deliver marketable title? There are two circumstances:

   i. when the purchase & sale agreement expressly states so

   ii. implied in all P&S's unless expressly disclaimed

c. Under what circumstances does the seller NOT have to deliver marketable title?

   i. when there is no enforceable P&S agreement
ii. when it is expressly waived in the P&S agreement

d. "Marketable Title" is title that is reasonably free from doubtful questions of law or fact. (Maxim: You don't have to buy a lawsuit with the title, even if it's a lawsuit you're likely to win).

e. What creates unmarketable title?

i. **encumbrances:** A real estate interest in a 3rd person

ii. **defects:** (catch all category): Technical problems in the chain of title such as mistaken names on a deed, forgeries, typographical errors, mistaken descriptions of the real estate; incompetency of the seller, etc.

f. Marketable title creates a presumption: unless otherwise stated, Grantor agrees to give grantee a fee simple absolute.

→ Situation with mortgages:

*Sort of an exception to the marketable title rule:* If the Seller has a mortgage on the property, it is implied that he or she is allowed to use the proceeds from the sale to discharge the mortgage as long as the Seller takes adequate steps to protect the Buyer's interests. Of course, the parties to the P&S may expressly waive this implied rule.

### XI. LIQUIDATED DAMAGES

a. Reasonable pre-breach estimate of damages

b. Not penalty for failure to perform

c. Largely a factual matter; fact pattern will either be a “no brainer” – 50% or more – or will call for an answer that says something like “the outcome depends on whether the finder of fact finds that the liquidated damages clause was a reasonable pre-breach estimate of damages or a penalty for non-performance.”

### XII. EQUITABLE CONVERSION

a. Intimately connected to the "purchase and sale" agreement. It is born when the purchase and sale agreement is born, and it dies when the purchase and sale agreement dies.

d. The P & S dies when the deed is delivered
c. The transfer of title is not a single, solitary act. Title is transferred more gradually than that. Title is transferred in two stages:

d. When the contract (P&S) is signed, at that moment the buyer obtains rights in the property

1. Buyer gets "Equitable Title"
2. Seller retains "Legal Title"

3. Legal title is "personal property,"
4. Equitable title is "real estate."

5. Warning: Equitable conversion does not create a trust!!!

   a. No fiduciary relation at all involved in equitable conversion.

   b. The buyer/seller relationship is an "arm's length" relationship.

   c. The deed completes the process

e. On the bar exam, there are ONLY two situations that you have to worry about in regard to equitable conversion.

   i. Risk of loss
   ii. Death

   1. Risk of Loss:

   a. Multistate rule: As soon as the P&S is signed -- as soon as "equitable conversion" kicks in -- the risk of loss transfers from seller to buyer.

   b. Massachusetts rule: The risk of loss remains with the seller, unless the buyer has taken possession, at which time the buyer then assumes the risk of loss.

   2. Death:

      a. the contract is still enforceable.
b. If it is the seller who dies, the purchase price flow through the Seller’s will as personal property. Seller has "legal title" and legal title is "personal" property.

c. But if it is the buyer who dies, the property will flow through the Buyer’s will as real estate. Buyer has "equitable title" and equitable title is real estate.

XIII. MORTGAGES

A mortgage is an interest in real estate, and must be in writing, signed by the party to be charged [S•O•F].

a. A mortgage is a two part transaction: (involving two areas of law)
   i. Contract law (promissory note)
   ii. Real estate law (mortgage - used to secure to promise to pay)

b. Language:
   i. “Mortgagor”: the person who “grants” the mortgage; the person who borrows the money; the person who owns the home that the mortgage encumbers; the person who receives a bill every month and pays it.
   iii. “Mortgagee”: the bank; the person who “receives” the mortgage; the person who lends the money

c. Foreclosure - (bank's remedy): must comply w/due process:
   i. notify mortgagor
   ii. notify all other interested parties
   iii. must be conducted in a “commercially reasonable manner” so as to generate sufficient interest that will bring a fair price (advertise)
   iv. When a mortgagee forecloses, all subordinate interests are extinguished.
d. **Equity of redemption** - the right of the mortgagor, right up until the gavel falls, to redeem by paying off the entire mortgage balance together with all costs & interest.

e. **Priorities**: when foreclosure occurs and money is about to be doled out, who gets what? **Rule**: "*First in time, first in right.*" Subordinate interests are extinguished. There are three things that can change the order of priority:

i. **Subordination**: an agreement by the mortgagee to subordinate his mortgage to a subsequent mortgagee

ii. **Failure to record in a timely fashion**: Priority works off of when recording is made.

iii. **Purchase money mortgage (PMM)**: Mortgage taken out to purchase the property. PMMs take priority over all other mortgages "recorded at about the same time" regardless of the order of recording.

iv. Future Advances Clauses:
   
   → relation back to original mortgage
   
   → no new consideration necessary
   
   → true even with no contractual obligation to advance additional funds

f. Two theories of Mortgages:

i. Title theory (oldest - minority): a mortgage is more than a mere encumbrance or lien. The grant of a mortgage is a conveyance of title to the bank.

   → It is a conveyance of a "defeasible" title.

iv. Lien theory: A mortgage is an interest in real estate, but it is nothing more than an encumbrance or a lien on the title.

1. **Equity of redemption** applies to both theories. Some states are title theory states and some states are lien theory states. Only a handful of title theory states are left. Massachusetts is one of them.
g. Deficiencies:
   v. Liability under the law of contracts
   vi. Liability under the real estate law of mortgages
   vii. Third-party beneficiary situations
      1. “Assumes”
      2. “Takes subject to”

h. Mortgage substitutes:
   viii. Equitable Mortgage: Court calls a transaction a mortgage because it's fair to do so.
   ix. Installment Land Contract: Works the same as installment sales contracts.

XIV. DEEDS

a. A deed kills the seller’s obligation to deliver marketable title?

b. Types of deeds: In multistate law, there are three different types of deeds:
   i. General Warranty (or just Warranty): Gives the most assurances to the buyer. The grantor is protecting buyer from all encumbrances and problems that were created from the beginning of the world up until the time that grantor delivers the deed.
   ii. Special warranty The grantor is only going to protect the grantee from encumbrances and problems arising during the time the grantor had the property; NOT before the grantor owned the property.
   iii. Quitclaim (an "AS IS" deed). Does not give any covenants or assurances to the grantee.

f. Massachusetts Deeds:
   i. Warranty: for all intents and purposes the same as the multistate general warranty deed
   ii. Quitclaim: the functional equivalent of the multistate Special
g. The N.H. Quitclaim Deed: the Massachusetts Quitclaim Deed, not the multi-state Quitclaim. The N.H. statute reads the same, word for word, as the Massachusetts statute.

h. Covenants: There are as many as six (6) specific covenants found in a deed:

i. Present Covenants:

1. **Covenant of seisin**: Ownership. Grantor is saying "I own the property."

2. **Covenant of the right to convey**: Most of the time the right to convey is coterminous with the right of seisin. So if grantor doesn't own the property he's breached both the covenant of seisin and covenant of the right to convey. Also covers circumstances where grantor owns it, but lacks the right to convey for some reason.

3. **Covenant against encumbrances**: A lot like marketable title. The existence of an encumbrance causes a breach of the covenant against encumbrances.

ii. Present covenants are **breached**, if at all, **when the deed is delivered**. The cause of action accrues when the deed is delivered. The statute of limitations starts to run when the deed is delivered. In multistate law the statute of limitations is 6 years. In Massachusetts, the statute of limitations is 6 years, unless the document is signed under seal. Most deeds are signed under seal. A seal increases the statute of limitations to twenty (20) years in Massachusetts.

iii. Future Covenants: **(Only one substantive covenant; the others are more like remedies)**:

1. **Covenant of quiet enjoyment**: On the bar, it will probably take the form of an easement. An easement interferes with peaceful possession. The covenant of quiet enjoyment IS NOT breached by the mere existence of an easement - it is breached by the use of the easement.

2. **Covenant of general warranty**: (more correctly a remedy): The important thing to know here is what
remedy is provided, what damages it allows for.

3. **Covenant of further assurances:** Lumped together with the above covenant and don't really need to distinguish between them. Two step process:

   a. The grantor will have to do whatever is necessary to remove the problem at his own expense - hire lawyer, remove the encumbrance - assume all the costs plus attorneys’ fees to clear it up.

   b. If the problem cannot be remedied, damages will apply: the diminution in value as a result of the breach, but nor more than either the “consideration received” by the seller or the “consideration paid” by the buyer.

i. **Transfer of Title:**

Recording *never, never, never* transfers title, It only gives notice. Recording is not the vehicle that transfers title.

Delivery of the deed, simultaneously with intent & acceptance transfer title. There are three (3) requirements to transfer title:

Acceptance: always presumed unless there is an express repudiation. You do not need any evidence of acceptance, you presume that the person is going to accept the deed, UNLESS there is an express repudiation.

Intent: *Present* and *immediate* intent to transfer

Delivery: You don't need "classic" delivery on the bar exam. The bar examiners are going to give you something a little more fuzzy.

   a. If a grantee is in possession of the deed, it is presumed that the deed has been delivered to the grantee: the converse is also true: if the deed is in the possession of the grantor, it is presumed that the deed has not been delivered. This is a rebuttable presumption that can be overcome w/evidence.

   b. If the deed is recorded, it is presumed that the
deed has been delivered
c. to the grantee, this is also rebuttable.
j. Conditional delivery: Grantor is allowed to impose a condition upon
the enjoyment of the property, such as delaying the grantee's
enjoyment of the property. In order to do that you have to do two
things:
   i. Deliver the deed to a 3rd person (not controlled by grantor)
   ii. The grantor must relinquish all power to recall the deed

k. Escrow delivery: Involves finding someone trustworthy to hold the
documents and that would be the escrow agent. So, instead of the
seller giving the deed to the buyer, and the buyer giving the purchase
price to the seller while the title was searched and financing procured,
they would find a 3rd person who would enter into an agreement to be a
neutral and an agent for both. That's the escrow agent. The escrow
agent is given the deed and the purchase price, and agrees to:
   i. not give seller the purchase price until he or she informed that
title marketable
   ii. not give deed to buyer until the purchase price given to the seller

When all the terms and conditions are met, the escrow agent will then
release the deed and deliver the purchase price.

Relation back doctrine: In an escrow situation, the delivery of the title
will, if all terms and conditions fulfilled, "relate back" to the time
the deed was delivered to the escrow agent. So that's how we get
around this agency problem.

l. Description of the deed: There is NO REQUIREMENT that you have
to have a "metes & bounds" description. But when you do have one,
you have to "close the shape."
   i. Also, the land must be "locatable" - must be capable of being
located.

m. Estoppel by deed: An equitable concept... the doctrine of "after
acquired title." When a grantor, who doesn't have title, subsequently
obtains title, that grantor is estopped from claiming that he didn't have
title when he sold it to the grantee. This is estoppel by deed in the easy,
all or nothing sense. It also applies in gradations. (partial title)

i. In multistate law, estoppel by deed only works when the grantee is given a general warranty deed. It will not apply when the grantee is given a special warranty deed or a quitclaim deed.

ii. Massachusetts: Estoppel by deed applies to both warranty deeds & Massachusetts quitclaim deeds. (The functional equivalent of the special warranty deed).

XV. RECORDING

The law of recording is not difficult. But for most students, recording questions on the bar are even worse than estates in land questions. The secret of getting recording questions correct is CHARTING!

a. Reason for recording statutes: to prevent people from improperly selling or encumbering land.

b. Estoppel theory: failing to record may estop you from asserting the title you have.

c. Must properly record - you must record within the chain of title. If you record outside the chain of title, it's as if you didn't record.

d. Bona Fide Purchasers (BFP): some of the recording statutes protect only BFPs. You need two things to be a BFP:

   i. you must pay substantial value (not nominal value; not necessarily full fair market value; must pay a significant amount)

   ii. being "stupid": the BFP must lack actual knowledge or notice of the prior transaction

e. There are three ways in which the BFP can have notice:

   i. Actual notice: actual knowledge

   ii. Constructive notice: recording puts the whole world on notice by placing documents on public record

   iii. Inquiry notice: knowledge of such facts that would at least put the reasonable person on notice that further inquiry is required

   iv. In Massachusetts, there is no such thing as "inquiry notice," but it does
exist on the multistate exam

f. **Types of recording statutes:**

i. *“Notice” (“pure notice”):* A subsequent BFP prevails over a prior grantee who fails to record regardless of whether the BFP records himself.

→ Massachusetts is a "pure notice" jurisdiction. Most jurisdictions are "race notice" jurisdictions.

ii. *“Race-notice”:* The subsequent BFP prevails over a prior grantee who fails to record ONLY IF the subsequent BFP first records himself.

iii. *“Race” (“pure race”):* Anarchy! First to record wins. Period. You do not have to be a BFP to be protected.

The recording statutes are looking to protect the 2<sup>nd</sup> grant, not the 1<sup>st</sup> grant. It is never the 1<sup>st</sup> grant out that is the BFP. Compare grantees two at a time, not all together. Determine between the two, who the first grantee is and who the second one is.

How to tell the difference between the different recording statutes? Look at the language.

<table>
<thead>
<tr>
<th>Type</th>
<th>BFP Language?</th>
<th>“Who First Records”, “First” or “Prior” Language?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Race-Notice</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Race</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

In order to be protected you must properly record: within "the chain of title."

Chain of Title:

i. A→ B→ C→ D→ E When one person sells to another, there is not a new title with each subsequent owner. . . there is a mere lengthening of the “chain of title.” Titles get
longer & longer & longer.

ii. Chain of Title is broken by:

1. Abusive Possession

2. Eminent Domain (condemnation)

3. Tax takings for failure to pay real estate taxes

b. How title examiners use “grantor” and “grantee” indexes:

i. Registry divided into two sections:
   1. Document Books
   2. Grantor / Grantee books

ii. Document Books are kept in chronological, not alphabetical, order.

iii. Grantor / Grantee Books are kept in alphabetical, not chronological, order.

iv. Work the grantee index from present back to a starting point.

v. Work the grantor index from the starting point up to the present.

vi. Massachusetts: To get to the starting point, you go back 50 years to a deed that is "clean on its face."

vii. New Hampshire: To get to the starting point, the general rule is that you have to go back 35 years to a warranty deed.

viii. Creating a chain of title works great as long as the instruments are recorded “in the chain of title.” Trouble when they are not.

ix. Examples of situations where documents are not recorded in chain to title.
1. The three rules of figuring whether a document is recorded in the chain of title:
   a. Charting
   b. Charting
   c. Charting