Chapter 11
The Nature and Regulation of Real Estate and the Environment

LEARNING OBJECTIVES

After reading this chapter, you should understand the following:

1. The various kinds of interests (or “estates”) in real property
2. The various rights that come with ownership of real property
3. What easements are, how they are created, and how they function
4. How ownership of real property is regulated by tort law, by agreement, and by the public interest (through eminent domain)
5. The various ways in which environmental laws affect the ownership and use of real property

Real property is an important part of corporate as well as individual wealth. As a consequence, the role of the corporate real estate manager has become critically important within the corporation. The real estate manager must be aware not only of the value of land for purchase and sale but also of proper lease negotiation, tax policies and assessments, zoning and land development, and environmental laws.

In this chapter and in Chapter 12 "The Transfer of Real Estate by Sale" and Chapter 13 "Landlord and Tenant Law", we focus on regulation of land use and the environment (see Figure 11.1 "Chapter Overview"). We divide our discussion of the nature of real estate into three major categories: (1) estates; (2) rights that are incidental to the possession and ownership of land—for example, the right to air, water, and minerals; and (3) easements—the rights in lands of others.

11.1 Estates

LEARNING OBJECTIVE

1. Distinguish between the various kinds of estates, or interests, in real property that the law recognizes.

In property law, an estate is an interest in real property, ranging from absolute dominion and control to bare possession. Ordinarily when we think of property, we think of only one kind: absolute ownership. The owner of a car has the right to drive it where and when she wants, rebuild it, repaint it, and sell it or scrap it. The notion that the owner might lose her property
when a particular event happens is foreign to our concept of personal property. Not so with real property. You would doubtless think it odd if you were sold a used car subject to the condition that you not paint it a different color—and that if you did, you would automatically be stripped of ownership. But land can be sold that way. Land and other real property can be divided into many categories of interests, as we will see. (Be careful not to confuse the various types of interests in real property with the forms of ownership, such as joint tenancy. An interest in real property that amounts to an estate is a measure of the degree to which a thing is owned; the form of ownership deals with the particular person or persons who own it.)

Figure 11.1 Chapter Overview
The common law distinguishes estates along two main axes: (1) freeholds versus leaseholds and (2) present versus future interests. A freehold estate is an interest in land that has an uncertain duration. The freehold can be outright ownership—called the fee simple absolute—or it can be an interest in the land for the life of the possessor; in either case, it is impossible to say exactly how long the estate will last. In the case of one who owns property outright, her estate will last until she sells or transfers it; in the case of a life estate, it will last until the death of the owner or another specified individual. A leasehold estate is one whose termination date is usually known. A one-year lease, for example, will expire precisely at the time stated in the lease agreement.

A present estate is one that is currently owned and enjoyed; a future estate is one that will come into the owner’s possession upon the occurrence of a particular event. In this chapter, we consider both present and future freehold interests; leasehold interests we save for Chapter 13 "Landlord and Tenant Law".

**Present Estates (Freeholds)**

**Fee Simple Absolute**

The strongest form of ownership is known as the fee simple absolute (or fee simple, or merely fee). This is what we think of when we say that someone “owns” the land. As one court put it, “The grant of a fee in land conveys to the grantee complete ownership, immediately and forever, with the right of possession from boundary to boundary and from the center of the earth to the sky, together with all the lawful uses thereof.” Although the fee simple may be encumbered by a mortgage (you may borrow money against the equity in your home) or an easement (you may grant someone the right to walk across your backyard), the underlying control is in the hands of the owner. Though it was once a complex matter in determining whether a person had been given a fee simple interest, today the law presumes that the estate being transferred is a fee simple, unless the conveyance expressly states to the contrary. (In her will, Lady Gaga grants her five-thousand-acre ranch “to my screen idol, Tilda Swinton.” On the death of Lady Gaga, Swinton takes ownership of the ranch outright in fee simple absolute.)

**Fee Simple Defeasible**

Not every transfer of real property creates a fee simple absolute. Some transfers may limit the estate. Any transfer specifying that the ownership will terminate upon a particular happening is known as a fee simple defeasible. Suppose, for example, that Mr. Warbucks conveys a tract of...
land “to Miss Florence Nightingale, for the purpose of operating her hospital and for no other purpose. Conveyance to be good as long as hospital remains on the property.” This grant of land will remain the property of Miss Nightingale and her heirs as long as she and they maintain a hospital. When they stop doing so, the land will automatically revert to Mr. Warbucks or his heirs, without their having to do anything to regain title. Note that the conveyance of land could be perpetual but is not absolute, because it will remain the property of Miss Nightingale only so long as she observes the conditions in the grant.

Life Estates

An estate measured by the life of a particular person is called a life estate. A conventional life estate is created privately by the parties themselves. The simplest form is that conveyed by the following words: “to Scarlett for life.” Scarlett becomes a life tenant; as such, she is the owner of the property and may occupy it for life or lease it or even sell it, but the new tenant or buyer can acquire only as much as Scarlett has to give, which is ownership for her life (i.e., all she can sell is a life estate in the land, not a fee simple absolute). If Scarlett sells the house and dies a month later, the buyer’s interest would terminate. A life estate may be based on the life of someone other than the life tenant: “to Scarlett for the life of Rhett.”

The life tenant may use the property as though he were the owner in fee simple absolute with this exception: he may not act so as to diminish the value of the property that will ultimately go to the remainderman—the person who will become owner when the life estate terminates. The life tenant must pay the life estate for ordinary upkeep of the property, but the remainderman is responsible for extraordinary repairs.

Some life estates are created by operation of law and are known as legal life estates. The most common form is a widow’s interest in the real property of her husband. In about one-third of the states, a woman is entitled to dower, a right to a percentage (often one-third) of the property of her husband when he dies. Most of these states give a widower a similar interest in the property of his deceased wife. Dower is an alternative to whatever is bequeathed in the will; the widow has the right to elect the share stated in the will or the share available under dower. To prevent the dower right from upsetting the interests of remote purchasers, the right may be waived on sale by having the spouse sign the deed.
Future Estates

To this point, we have been considering present estates. But people also can have future interests in real property. Despite the implications of its name, the future interest is owned now but is not available to be used or enjoyed now. For the most part, future interests may be bought and sold, just as land held in fee simple absolute may be bought and sold. There are several classes of future interests, but in general there are two major types: reversion and remainder.

Reversion

A reversion arises whenever the estate transferred has a duration less than that originally owned by the transferor. A typical example of a simple reversion is that which arises when a life estate is conveyed. The ownership conveyed is only for the life; when the life tenant dies, the ownership interest reverts to the grantor. Suppose the grantor has died in the meantime. Who gets the reversion interest? Since the reversion is a class of property that is owned now, it can be inherited, and the grantor’s heirs would take the reversion at the subsequent death of the life tenant.

Remainder

The transferor need not keep the reversion interest for himself. He can give that interest to someone else, in which case it is known as a remainder interest, because the remainder of the property is being transferred. Suppose the transferor conveys land with these words: “to Scarlett for life and then to Rhett.” Scarlett has a life estate; the remainder goes to Rhett in fee simple absolute. Rhett is said to have a vested remainder interest, because on Scarlett’s death, he or his heirs will automatically become owners of the property. Some remainder interests are contingent—and are therefore known as contingent remainder interests—on the happening of a certain event: “to my mother for her life, then to my sister if she marries Harold before my mother dies.” The transferor’s sister will become the owner of the property in fee simple only if she marries Harold while her mother is alive; otherwise, the property will revert to the transferor or his heirs. The number of permutations of reversions and remainders can become quite complex, far more than we have space to discuss in this text.
An estate is an interest in real property. Estates are of many kinds, but one generic difference is between ownership estates and possessory estates. Fee simple estates and life estates are ownership estates, while leasehold interests are possessory. Among ownership estates, the principal division is between present estates and future estates. An owner of a future estate has an interest that can be bought and sold and that will ripen into present possession at the end of a period of time, at the end of the life of another, or with the happening of some contingent event.

**EXERCISES**

1. Jessa owns a house and lot on 9th Avenue. She sells the house to the Hartley family, who wish to have a conveyance from her that says, “to Harriet Hartley for life, remainder to her son, Alexander Sandridge.” Alexander is married to Chloe, and they have three children, Carmen, Sarah, and Michael. Who has a future interest, and who has a present interest? What is the correct legal term for Harriet’s estate? Does Alexander, Carmen, Sarah, or Michael have any part of the estate at the time Jessa conveys to Harriet using the stated language?

2. After Harriet dies, Alexander wants to sell the property. Alexander and Chloe’s children are all eighteen years of age or older. Can he convey the property by his signature alone? Who else needs to sign?

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### 11.2 Rights Incident to Possession and Ownership of Real Estate

**LEARNING OBJECTIVE**

1. Understand that property owners have certain rights in the airspace above their land, in the minerals beneath their land, and even in water that adjoins their land.

**Rights to Airspace**

The traditional rule was stated by Lord Coke: “Whoever owns the soil owns up to the sky.” This traditional rule remains valid today, but its application can cause problems. A simple example
would be a person who builds an extension to the upper story of his house so that it hangs out
over the edge of his property line and thrusts into the airspace of his neighbor. That would
clearly be an encroachment on the neighbor’s property. But is it trespass when an airplane—or
an earth satellite—flies over your backyard? Obviously, the courts must balance the right to
travel against landowners’ rights. In *U.S. v. Causby*, [1] the Court determined that flights over
private land may constitute a diminution in the property value if they are so low and so frequent
as to be a direct and immediate interference with the enjoyment and use of land.

**Rights to the Depths**

Lord Coke’s dictum applies to the depths as well as the sky. The owner of the surface has the
right to the oil, gas, and minerals below it, although this right can be severed and sold
separately. Perplexing questions may arise in the case of oil and gas, which can flow under the
surface. Some states say that oil and gas can be owned by the owner of the surface land; others
say that they are not owned until actually extracted—although the property owner may sell the
exclusive right to extract them from his land. But states with either rule recognize that oil and
gas are capable of being “captured” by drilling that causes oil or gas from under another plot of
land to run toward the drilled hole. Since the possibility of capture can lead to wasteful drilling
practices as everyone nearby rushes to capture the precious commodities, many states have
enacted statutes requiring landowners to share the resources.

**Rights to Water**

The right to determine how bodies of water will be used depends on basic property rules. Two
different approaches to water use in the United States—eastern and western—have developed
over time (see Figure 11.2 "Water Rights"). Eastern states, where water has historically been
more plentiful, have adopted the so-called riparian rights theory, which itself can take two
forms. *Riparian* refers to land that includes a part of the bed of a waterway or that borders on a
public watercourse. A riparian owner is one who owns such land. What are the rights of
upstream and downstream owners of riparian land regarding use of the waters? One approach is
the “natural flow” doctrine: Each riparian owner is entitled to have the river or other waterway
maintained in its natural state. The upstream owner may use the river for drinking water or for
washing but may not divert it to irrigate his crops or to operate his mill if doing so would
materially change the amount of the flow or the quality of the water. Virtually all eastern states today are not so restrictive and rely instead on a “reasonable use” doctrine, which permits the benefit to be derived from use of the waterway to be weighed against the gravity of the harm. This approach is illustrated in *Hoover v. Crane*, (see Section 11.6.1 "Reasonable Use Doctrine". [2]

**Figure 11.2 Water Rights**

In contrast to riparian rights doctrines, western states have adopted the prior appropriation doctrine. This rule looks not to equality of interests but to priority in time: first in time is first in right. The first person to use the water for a beneficial purpose has a right superior to latecomers. This rule applies even if the first user takes all the water for his own needs and even if other users are riparian owners. This rule developed in water-scarce states in which development depended on incentives to use rather than hoard water. Today, the prior appropriation doctrine has come under criticism because it gives incentives to those who already have the right to the water to continue to use it profligately, rather than to those who might develop more efficient means of using it.

**KEY TAKEAWAY**

Property owners have certain rights in the airspace above their land. They also have rights in subsurface minerals, which include oil and gas. Those property owners who have bodies of water adjacent to their land will also have certain rights to withdraw or impound water for their own use. Regarding US water law, the reasonable use doctrine in the eastern states is distinctly different from the prior appropriation doctrine in western states.

**EXERCISES**
1. Steve Hannaford farms in western Nebraska. The farm has passed to succeeding generations of Hannafords, who use water from the North Platte River for irrigation purposes. The headlands of the North Platte are in Colorado, but use of the water from the North Platte by Nebraskans preceded use of the water by settlers in Colorado. What theory of water rights governs Nebraska and Colorado residents? Can the state of Colorado divert and use water in such a way that less of it reaches western Nebraska and the Hannaford farm? Why or why not?

2. Jamie Stoner decides to put solar panels on the south face of his roof. Jamie lives on a block of one- and two-bedroom bungalows in South Miami, Florida. In 2009, someone purchases the house next door and within two years decides to add a second and third story. This proposed addition will significantly decrease the utility of Jamie’s solar array. Does Jamie have any rights that would limit what his new neighbors can do on their own land?


### 11.3 Easements: Rights in the Lands of Others

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**Definition**

An easement is an interest in land created by agreement that permits one person to make use of another’s estate. This interest can extend to a profit, the taking of something from the other’s land. Though the common law once distinguished between an easement and profit, today the distinction has faded, and profits are treated as a type of easement. An easement must be distinguished from a mere license, which is permission, revocable at the will of the owner, to make use of the owner’s land. An easement is an estate; a license is personal to the grantee and is not assignable.
The two main types of easements are affirmative and negative. An affirmative easement gives a landowner the right to use the land of another (e.g., crossing it or using water from it), while a negative easement, by contrast, prohibits the landowner from using his land in ways that would affect the holder of the easement. For example, the builder of a solar home would want to obtain negative easements from neighbors barring them from building structures on their land that would block sunlight from falling on the solar home. With the growth of solar energy, some states have begun to provide stronger protection by enacting laws that regulate one’s ability to interfere with the enjoyment of sunlight. These laws range from a relatively weak statute in Colorado, which sets forth rules for obtaining easements, to the much stronger statute in California, which says in effect that the owner of a solar device has a vested right to continue to receive the sunlight.

Another important distinction is made between easements appurtenant and easements in gross. An easement appurtenant benefits the owner of adjacent land. The easement is thus appurtenant to the holder’s land. The benefited land is called the dominant tenement, and the burdened land—that is, the land subject to the easement—is called the servient tenement (see Figure 11.3 "Easement Appurtenant"). An easement in gross is granted independent of the easement holder’s ownership or possession of land. It is simply an independent right—for example, the right granted to a local delivery service to drive its trucks across a private roadway to gain access to homes at the other end.
Unless it is explicitly limited to the grantee, an easement appurtenant “runs with the land.” That is, when the dominant tenement is sold or otherwise conveyed, the new owner automatically owns the easement. A commercial easement in gross may be transferred—for instance, easements to construct pipelines, telegraph and telephone lines, and railroad rights of way. However, most noncommercial easements in gross are not transferable, being deemed personal to the original owner of the easement. Rochelle sells her friend Mrs. Nanette—who does not own land adjacent to Rochelle—an easement across her country farm to operate skimobiles during the winter. The easement is personal to Mrs. Nanette; she could not sell the easement to anyone else.

**Creation**
Easements may be created by express agreement, either in deeds or in wills. The owner of the dominant tenement may buy the easement from the owner of the servient tenement or may reserve the easement for himself when selling part of his land. But courts will sometimes allow implied easements under certain circumstances. For instance, if the deed refers to an easement that bounds the premises—without describing it in any detail—a court could conclude that an easement was intended to pass with the sale of the property.

An easement can also be implied from prior use. Suppose a seller of land has two lots, with a driveway connecting both lots to the street. The only way to gain access to the street from the back lot is to use the driveway, and the seller has always done so. If the seller now sells the back lot, the buyer can establish an easement in the driveway through the front lot if the prior use was (1) apparent at the time of sale, (2) continuous, and (3) reasonably necessary for the enjoyment of the back lot. The rule of implied easements through prior use operates only when the ownership of the dominant and servient tenements was originally in the same person.

**Use of the Easement**

The servient owner may use the easement—remember, it is on or under or above his land—as long as his use does not interfere with the rights of the easement owner. Suppose you have an easement to walk along a path in the woods owned by your neighbor and to swim in a private lake that adjoins the woods. At the time you purchased the easement, your neighbor did not use the lake. Now he proposes to swim in it himself, and you protest. You would not have a sound case, because his swimming in the lake would not interfere with your right to do so. But if he proposed to clear the woods and build a mill on it, obliterating the path you took to the lake and polluting the lake with chemical discharges, then you could obtain an injunction to bar him from interfering with your easement.

The owner of the dominant tenement is not restricted to using his land as he was at the time he became the owner of the easement. The courts will permit him to develop the land in some “normal” manner. For example, an easement on a private roadway for the benefit of a large estate up in the hills would not be lost if the large estate were ultimately subdivided and many new owners wished to use the roadway; the easement applies to the entire portion of the original dominant tenement, not merely to the part that abuts the easement itself. However, the owner
of an easement appurtenant to one tract of land cannot use the easement on another tract of land, even if the two tracts are adjacent.

**KEY TAKEAWAY**

An easement appurtenant runs with the land and benefits the dominant tenement, burdening the servient tenement. An easement, generally, has a specific location or description within or over the servient tenement. Easements can be created by deed, by will, or by implication.

**EXERCISE**

1. Beth Delaney owns property next to Kerry Plemmons. The deed to Delaney’s property notes that she has access to a well on the Plemmons property “to obtain water for household use.” The well has been dry for many generations and has not been used by anyone on the Plemmons property or the Delaney property for as many generations. The well predated Plemmon’s ownership of the property; as the servient tenement, the Plemmons property was burdened by this easement dating back to 1898. Plemmons hires a company to dig a very deep well near one of his outbuildings to provide water for his horses. The location is one hundred yards from the old well. Does the Delaney property have any easement to use water from the new well?

**11.4 Regulation of Land Use**

**LEARNING OBJECTIVES**

1. Compare the various ways in which law limits or restricts the right to use your land in any way that you decide is best for you.
2. Distinguish between regulation by common law and regulation by public acts such as zoning or eminent domain.
3. Understand that property owners may restrict the uses of land by voluntary agreement, subject to important public policy considerations.

Land use regulation falls into three broad categories: (1) restriction on the use of land through tort law, (2) private regulation by agreement, and (3) public ownership or regulation through the powers of eminent domain and zoning.

**Regulation of Land Use by Tort Law**
Tort law is used to regulate land use in two ways: (1) The owner may become liable for certain activities carried out on the real estate that affect others beyond the real estate. (2) The owner may be liable to persons who, upon entering the real estate, are injured.

**Landowner’s Activities**

The two most common torts in this area are nuisance and trespass. A common-law nuisance is an interference with the use and enjoyment of one’s land. Examples of nuisances are excessive noise (especially late at night), polluting activities, and emissions of noxious odors. But the activity must produce substantial harm, not fleeting, minor injury, and it must produce those effects on the reasonable person, not on someone who is peculiarly allergic to the complained-of activity. A person who suffered migraine headaches at the sight of croquet being played on a neighbor’s lawn would not likely win a nuisance lawsuit. While the meaning of nuisance is difficult to define with any precision, this common-law cause of action is a primary means for landowners to obtain damages for invasive environmental harms.

A trespass is the wrongful physical invasion of or entry upon land possessed by another. Loud noise blaring out of speakers in the house next door might be a nuisance but could not be a trespass, because noise is not a physical invasion. But spraying pesticides on your gladiolas could constitute a trespass on your neighbor’s property if the pesticide drifts across the boundary.

Nuisance and trespass are complex theories, a full explanation of which would consume far more space than we have. What is important to remember is that these torts are two-edged swords. In some situations, the landowner himself will want to use these theories to sue trespassers or persons creating a nuisance, but in other situations, the landowner will be liable under these theories for his own activities.

**Injury to Persons Entering the Real Estate**

Traditionally, liability for injury has depended on the status of the person who enters the real estate.

**Trespassers**

If the person is an intruder without permission—a trespasser—the landowner owes him no duty of care unless he knows of the intruder’s presence, in which case the owner must exercise
reasonable care in his activities and warn of hidden dangers on his land of which he is aware. A known trespasser is someone whom the landowner actually sees on the property or whom he knows frequently intrudes on the property, as in the case of someone who habitually walks across the land. If a landowner knows that people frequently walk across his property and one day he puts a poisonous chemical on the ground to eliminate certain insects, he is obligated to warn those who continue to walk on the grounds. Intentional injury to known trespassers is not allowed, even if the trespasser is a criminal intent on robbery, for the law values human life above property rights.

**Children**

If the trespasser is a child, a different rule applies in most states. This is the doctrine of attractive nuisance. Originally this rule was enunciated to deal with cases in which something on the land attracted the child to it, like a swimming pool. In recent years, most courts have dropped the requirement that the child must have been attracted to the danger. Instead, the following elements of proof are necessary to make out a case of attractive nuisance (Restatement of Torts, Section 339):

1. The child must have been injured by a structure or other artificial condition.
2. The possessor of the land (not necessarily the owner) must have known or should have known that young children would be likely to trespass.
3. The possessor must have known or should have known that the artificial condition exists and that it posed an unreasonable risk of serious injury.
4. The child must have been too young to appreciate the danger that the artificial condition posed.
5. The risk to the child must have far outweighed the utility of the artificial condition to the possessor.
6. The possessor did not exercise reasonable care in protecting the child or eliminating the danger.

Old refrigerators, open gravel pits, or mechanisms that a curious child would find inviting are all examples of attractive nuisance. Suppose Farmer Brown keeps an old buggy on his front lawn, accessible from the street. A five-year-old boy clambers up the buggy one day, falls through a rotted floorboard, and breaks his leg. Is Farmer Brown liable? Probably so. The child was too young to appreciate the danger posed by the buggy, a structure. The farmer should have
appreciated that young children would be likely to come onto the land when they saw the buggy and that they would be likely to climb up onto the buggy. Moreover, he should have known, if he did not know in fact, that the buggy, left outside for years without being tended, would pose an unreasonable risk. The buggy’s utility as a decoration was far overbalanced by the risk that it posed to children, and the farmer failed to exercise reasonable care.

Licensees

A nontrespasser who comes onto the land without being invited, or if invited, comes for purposes unconnected with any business conducted on the premises, is known as a licensee. This class of visitors to the land consists of (1) social guests (people you invite to your home for a party); (2) a salesman, not invited by the owner, who wishes to sell something to the owner or occupier of the property; and (3) persons visiting a building for a purpose not connected with the business on the land (e.g., students who visit a factory to see how it works). The landowner owes the same duty of care to licensees that he owes to known trespassers. That is, he must warn them against hidden dangers of which he is aware, and he must exercise reasonable care in his activities to ensure that they are not injured.

Invitees

A final category of persons entering land is that of invitee. This is one who has been invited onto the land, usually, though not necessarily, for a business purpose of potential economic benefit to the owner or occupier of the premises. This category is confusing because it sounds as though it should include social guests (who clearly are invited onto the premises), but traditionally social guests are said to be licensees.

Invitees include customers of stores, users of athletic and other clubs, customers of repair shops, strollers through public parks, restaurant and theater patrons, hotel guests, and the like. From the owner’s perspective, the major difference between licensees and invitees is that he is liable for injuries resulting to the latter from hidden dangers that he should have been aware of, even if he is not actually aware of the dangers. How hidden the dangers are and how broad the owner’s liability is depends on the circumstances, but liability sometimes can be quite broad. Difficult questions arise in lawsuits brought by invitees (or business invitees, as they are
sometimes called) when the actions of persons other than the landowner contribute to the injury.

The foregoing rules dealing with liability for persons entering the land are the traditional rules at common law. In recent years, some courts have moved away from the rigidities and sometimes perplexing differences between trespassers, licensees, and invitees. By court decision, several states have now abolished such distinctions and hold the proprietor, owner, or occupier liable for failing to maintain the premises in a reasonably safe condition. According to the California Supreme Court,

A man’s life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. Where the occupier of land is aware of a concealed condition involving in the absence of precautions an unreasonable risk of harm to those coming in contact with it and is aware that a person on the premises is about to come in contact with it, the trier of fact can reasonably conclude that a failure to warn or to repair the condition constitutes negligence. Whether or not a guest has a right to expect that his host will remedy dangerous conditions on his account, he should reasonably be entitled to rely upon a warning of the dangerous condition so that he, like the host, will be in a position to take special precautions when he comes in contact with it. [1]

Private Regulation of Land Use by Agreement

A restrictive covenant is an agreement regarding the use of land that “runs with the land.” In effect, it is a contractual promise that becomes part of the property and that binds future owners. Violations of covenants can be redressed in court in suits for damages or injunctions but will not result in reversion of the land to the seller. Usually, courts construe restrictive covenants narrowly—that is, in a manner most conducive to free use of the land by the ultimate owner (the person against whom enforcement of the covenant is being sought). Sometimes, even when the meaning of the covenant is clear, the
courts will not enforce it. For example, when the character of a neighborhood changes, the courts may declare the covenant a nullity. Thus a restriction on a one-acre parcel to residential purposes was voided when in the intervening thirty years a host of businesses grew up around it, including a bowling alley, restaurant, poolroom, and sewage disposal plant. [2]

An important nullification of restrictive covenants came in 1947 when the US Supreme Court struck down as unconstitutional racially restrictive covenants, which barred blacks and other minorities from living on land so burdened. The Supreme Court reasoned that when a court enforces such a covenant, it acts in a discriminatory manner (barring blacks but not whites from living in a home burdened with the covenant) and thus violates the Fourteenth Amendment’s guarantee of equal protection of the laws. [3]

**Public Control of Land Use through Eminent Domain**

The government may take private property for public purposes. Its power to do so is known as eminent domain. The power of eminent domain is subject to constitutional limitations. Under the Fifth Amendment, the property must be put to public use, and the owner is entitled to “just compensation” for his loss. These requirements are sometimes difficult to apply.

**Public Use**

The requirement of public use normally means that the property will be useful to the public once the state has taken possession—for example, private property might be condemned to construct a highway. Although not allowed in most circumstances, the government could even condemn someone’s property in order to turn around and sell it to another individual, if a legitimate public purpose could be shown. For example, a state survey in the mid-1960s showed that the government owned 49 percent of Hawaii’s land. Another 47 percent was controlled by seventy-two private landowners. Because this concentration of land ownership (which dated back to feudal times) resulted in a critical shortage of residential land, the Hawaiian legislature enacted a law allowing the government to take land from large private estates and resell it in smaller parcels to homeowners. In 1984, the US Supreme Court upheld the law, deciding that the land was being taken for a public use because the purpose was “to attack certain perceived evils of concentrated property ownership.” [4] Although the use must be public, the courts will not
inquire into the necessity of the use or whether other property might have been better suited. It is up to government authorities to determine whether and where to build a road, not the courts. The limits of public use were amply illustrated in the Supreme Court’s 2002 decision of *Kelo v. New London*, [5] in which Mrs. Kelo’s house was condemned so that the city of New London, in Connecticut, could create a marina and industrial park to lease to Pfizer Corporation. The city’s motives were to create a higher tax base for property taxes. The Court, following precedent in *Midkiff* and other cases, refused to invalidate the city’s taking on constitutional grounds. Reaction from states was swift; many states passed new laws restricting the bases for state and municipal governments to use powers of eminent domain, and many of these laws also provided additional compensation to property owners whose land was taken.

**Just Compensation**

The owner is ordinarily entitled to the fair market value of land condemned under eminent domain. This value is determined by calculating the most profitable use of the land at the time of the taking, even though it was being put to a different use. The owner will have a difficult time collecting lost profits; for instance, a grocery store will not usually be entitled to collect for the profits it might have made during the next several years, in part because it can presumably move elsewhere and continue to make profits and in part because calculating future profits is inherently speculative.

**Taking**

The most difficult question in most modern cases is whether the government has in fact “taken” the property. This is easy to answer when the government acquires title to the property through condemnation proceedings. But more often, a government action is challenged when a law or regulation inhibits the use of private land. Suppose a town promulgates a setback ordinance, requiring owners along city sidewalks to build no closer to the sidewalk than twenty feet. If the owner of a small store had only twenty-five feet of land from the sidewalk line, the ordinance would effectively prevent him from housing his enterprise, and the ordinance would be a taking. Challenging such ordinances can sometimes be difficult under traditional tort theories because the government is immune from suit in some of these cases. Instead, a theory of inverse condemnation has developed, in which the plaintiff private property owner asserts that the
government has condemned the property, though not through the traditional mechanism of a condemnation proceeding.

**Public Control of Land Use through Zoning**

Zoning is a technique by which a city or other municipality regulates the type of activity to be permitted in geographical areas within its boundaries. Though originally limited to residential, commercial, and industrial uses, today’s zoning ordinances are complex sets of regulations. A typical municipality might have the following zones: residential with a host of subcategories (such as for single-family and multiple-family dwellings), office, commercial, industrial, agricultural, and public lands. Zones may be exclusive, in which case office buildings would not be permitted in commercial zones, or they may be cumulative, so that a more restricted use would be allowed in a less restrictive zone. Zoning regulations do more than specify the type of use: they often also dictate minimum requirements for parking, open usable space, setbacks, lot sizes, and the like, and maximum requirements for height, length of side lots, and so on.

**Nonconforming Uses**

When a zoning ordinance is enacted, it will almost always affect existing property owners, many of whom will be using their land in ways no longer permitted under the ordinance. To avoid the charge that they have thereby “taken” the property, most ordinances permit previous nonconforming uses to continue, though some ordinances limit the nonconforming uses to a specified time after becoming effective. But this permission to continue a nonconforming use is narrow; it extends only to the specific use to which the property was put before the ordinance was enacted. A manufacturer of dresses that suddenly finds itself in an area zoned residential may continue to use its sewing machines, but it could not develop a sideline in woodworking.

**Variances**

Sometimes an owner may desire to use his property in ways not permitted under an existing zoning scheme and will ask the zoning board for a variance—authority to carry on a nonconforming use. The board is not free to grant a variance at its whim. The courts apply three general tests to determine the validity of a variance: (1) The land must be unable to yield a reasonable return on the uses allowed by the zoning regulation. (2) The hardship must be
unique to the property, not to property generally in the area. (3) If granted, the variance must not change the essential character of the neighborhood.

**KEY TAKEAWAY**

Land use regulation can mean (1) restrictions on the use of land through tort law, (2) private regulation—by agreement, or (3) regulation through powers of eminent domain or zoning.

**EXERCISES**

1. Give one example of the exercise of eminent domain. In order to exercise its power under eminent domain, must the government actually take eventual ownership of the property that is “taken”?

2. Felix Unger is an adult, trespassing for the first time on Alan Spillborghs’s property. Alan has been digging a deep grave in his backyard for his beloved Saint Bernard, Maximilian, who has just died. Alan stops working on the grave when it gets dark, intending to return to the task in the morning. He seldom sees trespassers cutting through his backyard. Felix, in the dark, after visiting the local pub, decides to take a shortcut through Alan’s yard and falls into the grave. He breaks his leg. What is the standard of care for Alan toward Felix or other infrequent trespassers? If Alan has no insurance for this accident, would the law make Alan responsible?

3. Atlantic Cement owns and operates a cement plant in New York State. Nearby residents are exposed to noise, soot, and dust and have experienced lowered property values as a result of Atlantic Cement’s operations. Is there a common-law remedy for nearby property owners for losses occasioned by Atlantic’s operations? If so, what is it called?

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**11.5 Environmental Law (Omitted)**
11.6 Cases

Reasonable Use Doctrine

Hoover v. Crane
362 Mich. 36, 106 N.W.2d 563 (1960)

EDWARDS, JUSTICE

This appeal represents a controversy between plaintiff cottage and resort owners on an inland Michigan lake and defendant, a farmer with a fruit orchard, who was using the lake water for irrigation. The chancellor who heard the matter ruled that defendant had a right to reasonable use of lake water. The decree defined such reasonable use in terms which were unsatisfactory to plaintiffs who have appealed.

The testimony taken before the chancellor pertained to the situation at Hutchins Lake, in Allegan county, during the summer of 1958. Defendant is a fruit farmer who owns a 180-acre farm abutting on the lake. Hutchins Lake has an area of 350 acres in a normal season. Seventy-five cottages and several farms, including defendant’s, abut on it. Defendant’s frontage is approximately 1/4 mile, or about 10% of the frontage of the lake.

Hutchins Lake is spring fed. It has no inlet but does have an outlet which drains south. Frequently in the summertime the water level falls so that the flow at the outlet ceases. All witnesses agreed that the summer of 1958 was exceedingly dry and plaintiffs’ witnesses testified that Hutchins Lake’s level was the lowest it had ever been in their memory. Early in August, defendant began irrigation of his 50-acre pear orchard by pumping water out of Hutchins Lake. During that month the lake level fell 6 to 8 inches—the water line receded 50 to 60 feet and cottagers experienced severe difficulties with boating and swimming.

* * *

The tenor of plaintiffs’ testimony was to attribute the 6- to 8-inch drop in the Hutchins Lake level in that summer to defendant’s irrigation activities. Defendant contended that the decrease was due to natural causes, that the irrigation was of great benefit to him and contributed only slightly to plaintiff’s discomfiture. He suggests to us:
One could fairly say that because plaintiffs couldn’t grapple with the unknown causes that admittedly occasioned a greater part of the injury complained of, they chose to grapple mightily with the defendant because he is known and visible.

The circuit judge found it impossible to determine a normal lake level from the testimony, except that the normal summer level of the lake is lower than the level at which the lake ceases to drain into the outlet. He apparently felt that plaintiffs’ problems were due much more to the abnormal weather conditions of the summer of 1958 than to defendant’s irrigation activities.

His opinion concluded:

Accepting the reasonable use theory advanced by plaintiffs it appears to the court that the most equitable disposition of this case would be to allow defendant to use water from the lake until such time when his use interferes with the normal use of his neighbors. One quarter inch of water from the lake ought not to interfere with the rights and uses of defendant’s neighbors and this quantity of water ought to be sufficient in time of need to service 45 acres of pears. A meter at the pump, sealed if need be, ought to be a sufficient safeguard. Pumping should not be permitted between the hours of 11 p.m. and 7 a.m. Water need be metered only at such times as there is no drainage into the outlet.

The decree in this suit may provide that the case be kept open for the submission of future petitions and proofs as the conditions permit or require.

* * *

Michigan has adopted the reasonable-use rule in determining the conflicting rights of riparian owners to the use of lake water.

In 1874, Justice COOLEY said:

It is therefore not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress. *Dumont v. Kellogg*, 29 Mich 420, 425.

And in *People v. Hulbert*, the Court said:
No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other; and all other facts which may bear upon the reasonableness of the use. *Red River Roller Mills v. Wright*, 30 Minn 249, 15 NW 167, and cases cited.

The Michigan view is in general accord with 4 Restatement, Torts, §§ 851–853.

* * *

We interpret the circuit judge’s decree as affording defendant the total metered equivalent in pumpage of 1/4 inch of the content of Hutchins Lake to be used in any dry period in between the cessation of flow from the outlet and the date when such flow recommences. Where the decree also provides for the case to be kept open for future petitions based on changed conditions, it would seem to afford as much protection for plaintiffs as to the future as this record warrants. Both resort use and agricultural use of the lake are entirely legitimate purposes. Neither serves to remove water from the watershed. There is, however, no doubt that the irrigation use does occasion some water loss due to increased evaporation and absorption. Indeed, extensive irrigation might constitute a threat to the very existence of the lake in which all riparian owners have a stake; and at some point the use of the water which causes loss must yield to the common good.

The question on this appeal is, of course, whether the chancellor’s determination of this point was unreasonable as to plaintiffs. On this record, we cannot overrule the circuit judge’s view that most of plaintiffs’ 1958 plight was due to natural causes. Nor can we say, if this be the only irrigation use intended and the only water diversion sought, that use of the amount provided in the decree during the dry season is unreasonable in respect to other riparian owners.

Affirmed.
1. If the defendant has caused a diminution in water flow, an alteration of the water flow, and the plaintiff is adversely affected, why would the Supreme Court of Michigan not provide some remedy?

2. Is it possible to define an injury that is “not unreasonable”?

3. Would the case even have been brought if there had not been a drought?

11.7 Summary and Exercises

Summary

An estate is an interest in real property; it is the degree to which a thing is owned. Freehold estates are those with an uncertain duration; leaseholds are estates due to expire at a definite time. A present estate is one that is currently owned; a future estate is one that is owned now but not yet available for use.

Present estates are (1) the fee simple absolute; (2) the fee simple defeasible, which itself may be divided into three types, and (3) the life estate.

Future estates are generally of two types: reversion and remainder. A reversion arises whenever a transferred estate will endure for a shorter time than that originally owned by the transferor. A remainder interest arises when the transferor gives the reversion interest to someone else.

Use of air, earth, and water are the major rights incident to ownership of real property. Traditionally, the owner held “up to the sky” and “down to the depths,” but these rules have been modified to balance competing rights in a modern economy. The law governing water rights varies with the states; in general, the eastern states with more plentiful water have adopted either the natural flow doctrine or the reasonable use doctrine of riparian rights, giving those who live along a waterway certain rights to use the water. By contrast, western states have tended to apply the prior appropriation doctrine, which holds that first in time is first in right, even if those downstream are disadvantaged.

An easement is an interest in land—created by express agreement, prior use, or necessity—that permits one person to make use of another’s estate. An affirmative easement gives one person the right to use another’s land; a negative easement prevents the owner from using his land in a way that will affect another person’s land. In understanding easement law, the important
distinctions are between easements appurtenant and in gross, and between dominant and servient owners.

The law not only defines the nature of the property interest but also regulates land use. Tort law regulates land use by imposing liability for (1) activities that affect those off the land and (2) injuries caused to people who enter it. The two most important theories relating to the former are nuisance and trespass. With respect to the latter, the common law confusingly distinguishes among trespassers, licensees, and invitees. Some states are moving away from the perplexing and rigid rules of the past and simply require owners to maintain their property in a reasonably safe condition.

Land use may also be regulated by private agreement through the restrictive covenant, an agreement that “runs with the land” and that will be binding on any subsequent owner. Land use is also regulated by the government’s power under eminent domain to take private land for public purposes (upon payment of just compensation), through zoning laws, and through recently enacted environmental statutes, including the National Environmental Policy Act and laws governing air, water, treatment of hazardous wastes, and chemicals.

**EXERCISES**

1. Dorothy deeded an acre of real estate that she owns to George for the life of Benny and then to Ernie. Describe the property interests of George, Benny, Ernie, and Dorothy.

2. In Exercise 1, assume that George moves into a house on the property. During a tornado, the roof is destroyed and a window is smashed. Who is responsible for repairing the roof and window? Why?

3. Dennis likes to spend his weekends in his backyard, shooting his rifle across his neighbor’s yard. If Dennis never sets foot on his neighbor’s property, and if the bullets strike neither persons nor property, has he violated the legal rights of the neighbor? Explain.

4. Dennis also drills an oil well in his backyard. He “slant drills” the well; that is, the well slants from a point on the surface in his yard to a point four hundred feet beneath the surface of his neighbor’s yard. Dennis has slanted the drilling in order to capture his neighbor’s oil. Can he do this legally? Explain.
5. Wanda is in charge of acquisitions for her company. Realizing that water is important to company operations, Wanda buys a plant site on a river, and the company builds a plant that uses all of the river water. Downstream owners bring suit to stop the company from using any water. What is the result? Why?

6. Sunny decides to build a solar home. Before beginning construction, she wants to establish the legal right to prevent her neighbors from constructing buildings that will block the sunlight. She has heard that the law distinguishes between licenses and easements, easements appurtenant and in gross, and affirmative and negative easements. Which of these interests would you recommend for Sunny? Why?
Chapter 12
The Transfer of Real Estate by Sale

LEARNING OBJECTIVES

After reading this chapter, you should understand the following:

1. The various forms of real estate ownership, including fee simple, tenancy in common, and joint tenancy
2. The mechanics of finding, financing, and closing a real estate transaction
3. How adverse possession may sometimes vest title in real property despite the nonconsent of the owner

This chapter follows the steps taken when real estate is transferred by sale.

1. The buyer selects a form of ownership.
2. The buyer searches for the real estate to be purchased. In doing so, the buyer will usually deal with real estate brokers.
3. After a parcel is selected, the seller and buyer will negotiate and sign a sales agreement.
4. The seller will normally be required to provide proof of title.
5. The buyer will acquire property insurance.
6. The buyer will arrange financing.
7. The sale and purchase will be completed at a closing.

During this process, the buyer and seller enter into a series of contracts with each other and with third parties such as brokers, lenders, and insurance companies. In this chapter, we focus on the unique features of these contracts, with the exception of mortgages (Chapter 17 "Mortgages and Nonconsensual Liens") and property insurance (Chapter 15 "Insurance"). We conclude by briefly examining adverse possession—a method of acquiring property for free.

12.1 Forms of Ownership

LEARNING OBJECTIVES

1. Be familiar with the various kinds of interest in real property.
2. Know the ways that two or more people can own property together.
3. Understand the effect of marriage, divorce, and death on various forms of property ownership.

**Overview**

The transfer of property begins with the buyer’s selection of a form of ownership. Our emphasis here is not on what is being acquired (the type of property interest) but on how the property is owned.

One form of ownership of real property is legally quite simple, although lawyers refer to it with a complicated-sounding name. This is ownership by one individual, known as ownership in severalty. In purchasing real estate, however, buyers frequently complicate matters by grouping together—because of marriage, close friendship, or simply in order to finance the purchase more easily.

When purchasers group together for investment purposes, they often use various forms of organization—corporations, partnerships, limited partnerships, joint ventures, and business trusts. The most popular of these forms of organization for owning real estate is the limited partnership. A real estate limited partnership is designed to allow investors to take substantial deductions that offset current income from the partnership and other similar investments, while at the same time protecting the investor from personal liability if the venture fails.

But you do not have to form a limited partnership or other type of business in order to acquire property with others; many other forms are available for personal or investment purposes. To these we now turn.

**Joint Tenancy**

Joint tenancy is an estate in land owned by two or more persons. It is distinguished chiefly by the right of survivorship. If two people own land as joint tenants, then either becomes the sole owner when the other dies. For land to be owned jointly, four unities must coexist:

1. Unity of time. The interests of the joint owners must begin at the same time.
2. Unity of title. The joint tenants must acquire their title in the same conveyance—that is, the same will or deed.
3. Unity of interest. Each owner must have the same interest in the property; for example, one may not hold a life estate and the other the remainder interest.
4. Unity of possession. All parties must have an equal right to possession of the property (see Figure 12.1 "Forms of Ownership and Unities").

**Figure 12.1 Forms of Ownership and Unities**

<table>
<thead>
<tr>
<th>Unities</th>
<th>Joint Tenancy</th>
<th>Tenancy by Entirety</th>
<th>Tenancy in Common</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Title</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Interest</td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Possession</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Person</td>
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<td></td>
<td>✓</td>
</tr>
</tbody>
</table>

Suppose a woman owns some property and upon marriage wishes to own it jointly with her husband. She deeds it to herself and her husband “as joint tenants and not tenants in common.” Strictly speaking, the common law would deny that the resulting form of ownership was joint because the unities of title and time were missing. The wife owned the property first and originally acquired title under a different conveyance. But the modern view in most states is that an owner may convey directly to herself and another in order to create a joint estate.

When one or more of the unities is destroyed, however, the joint tenancy lapses. Fritz and Gary own a farm as joint tenants. Fritz decides to sell his interest to Jesse (or, because Fritz has gone bankrupt, the sheriff auctions off his interest at a foreclosure sale). Jesse and Gary would hold as tenants in common and not as joint tenants. Suppose Fritz had made out his will, leaving his interest in the farm to Reuben. On Fritz’s death, would the unities be destroyed, leaving Gary
and Reuben as tenants in common? No, because Gary, as joint tenant, would own the entire farm on Fritz’s death, leaving nothing behind for Reuben to inherit.

**Tenancy by the Entirety**

About half the states permit husbands and wives to hold property as tenants by the entirety. This form of ownership is similar to joint tenancy, except that it is restricted to husbands and wives. This is sometimes described as the unity of person. In most of the states permitting tenancy by the entirety, acquisition by husband and wife of property as joint tenants automatically becomes a tenancy by the entirety. The fundamental importance of tenancy by the entirety is that neither spouse individually can terminate it; only a joint decision to do so will be effective. One spouse alone cannot sell or lease an interest in such property without consent of the other, and in many states a creditor of one spouse cannot seize the individual’s separate interest in the property, because the interest is indivisible.

**Tenancy in Common**

Two or more people can hold property as tenants in common when the unity of possession is present, that is, when each is entitled to occupy the property. None of the other unities—of time, title, or interest—is necessary, though their existence does not impair the common ownership. Note that the tenants in common do not own a specific portion of the real estate; each has an undivided share in the whole, and each is entitled to occupy the whole estate. One tenant in common may sell, lease, or mortgage his undivided interest. When a tenant in common dies, his interest in the property passes to his heirs, not to the surviving tenants in common. Because tenancy in common does not require a unity of interest, it has become a popular form of “mingling,” by which unrelated people pool their resources to purchase a home. If they were joint tenants, each would be entitled to an equal share in the home, regardless of how much each contributed, and the survivor would become sole owner when the other owner dies. But with a tenancy-in-common arrangement, each can own a share in proportion to the amount invested.

**Community Property**

In ten states—Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin—property acquired during a marriage is said to be community property. There are differences among these states, but the general theory is that
with certain exceptions, each spouse has an undivided equal interest in property acquired while the husband and wife are married to each other. The major exception is for property acquired by gift or inheritance during the marriage. (By definition, property owned by either spouse before the marriage is not community property.) Property acquired by gift of inheritance or owned before the marriage is known as separate property. Community property states recognize other forms of ownership; specifically, husbands and wives may hold property as joint tenants, permitting the survivor to own the whole.

The consequence of community property laws is that either the husband or the wife may manage the community property, borrow against it, and dispose of community personal property. Community real estate may only be sold or encumbered by both jointly. Each spouse may bequeath only half the community property in his or her will. In the absence of a will, the one-half property interest will pass in accordance with the laws of intestate succession. If the couple divorces, the states generally provide for an equal or near-equal division of the community property, although a few permit the court in its discretion to divide in a different proportion.

**Condominiums**

In popular parlance, a condominium is a kind of apartment building, but that is not its technical legal meaning. Condominium is a form of ownership, not a form of structure, and it can even apply to space—for example, to parking spaces in a garage. The word **condominium** means joint ownership or control, and it has long been used whenever land has been particularly scarce or expensive. Condominiums were popular in ancient Rome (especially near the Forum) and in the walled cities of medieval Europe.

In its modern usage, **condominium** refers to a form of housing involving two elements of ownership. The first is the living space itself, which may be held in common, in joint tenancy, or in any other form of ownership. The second is the common space in the building, including the roof, land under the structure, hallways, swimming pool, and the like. The common space is held by all purchasers as tenants in common. The living space may not be sold apart from the interest in the common space.

Two documents are necessary in a condominium sale—the master deed and the bylaws. The master deed (1) describes the condominium units, the common areas, and any restrictions that
apply to them; (2) establishes the unit owner’s interest in the common area, his number of votes at owners’ association meetings, and his share of maintenance and operating expenses (sometimes unit owners have equal shares, and sometimes their share is determined by computing the ratio of living area or market price or original price of a single unit to the whole); and (3) creates a board of directors to administer the affairs of the whole condominium. The bylaws usually establish the owners’ association, set out voting procedures, list the powers and duties of the officers, and state the obligations of the owners for the use of the units and the common areas.

Cooperatives

Another popular form of owning living quarters with common areas is the cooperative. Unlike the person who lives in a condominium, the tenant of a cooperative does not own a particular unit. Instead, he owns a share of the entire building. Since the building is usually owned by a corporation (a cooperative corporation, hence the name), this means that the tenant owns stock in the corporation. A tenant occupies a unit under a lease from the corporation. Together, the lease and stock in the building corporation are considered personal, not real, property.

In a condominium, an owner of a unit who defaults in paying monthly mortgage bills can face foreclosure on the unit, but neighbors in the building suffer no direct financial impact, except that the defaulter probably has not paid monthly maintenance charges either. In a cooperative, however, a tenant who fails to pay monthly charges can jeopardize the entire building, because the mortgage is on the building as a whole; consequently, the others will be required to make good the payments or face foreclosure.

Time-Shares

A time-share is an arrangement by which several people can own the same property while being entitled to occupy the premises exclusively at different times on a recurring basis. In the typical vacation property, each owner has the exclusive right to use the apartment unit or cottage for a specified period of time each year—for example, Mr. and Mrs. Smith may have possession from December 15 through December 22, Mr. and Mrs. Jones from December 23 through December 30, and so on. The property is usually owned as a condominium but need not be. The sharers
may own the property in fee simple, hold a joint lease, or even belong to a vacation club that sells time in the unit.

Time-share resorts have become popular in recent years. But the lure of big money has brought unscrupulous contractors and salespersons into the market. Sales practices can be unusually coercive, and as a result, most states have sets of laws specifically to regulate time-share sales. Almost all states provide a cooling-off period, or rescission period; these periods vary from state to state and provide a window where buyers can change their minds without forfeiting payments or deposits already made.

**KEY TAKEAWAY**

Property is sometimes owned by one person or one entity, but more often two or more persons will share in the ownership. Various forms of joint ownership are possible, including joint tenancies, tenancy by the entirety, and tenancy in common. Married persons should be aware of whether the state they live in is a community property state; if it is, the spouse will take some interest in any property acquired during the marriage. Beyond traditional landholdings, modern real estate ownership may include interests in condominiums, cooperatives, or time-shares.

**EXERCISES**

1. Miguel and Maria Ramirez own property in Albuquerque, New Mexico, as tenants by the entirety. Miguel is a named defendant in a lawsuit that alleges defamation, and an award is made for $245,000 against Miguel. The property he owns with Maria is worth $320,000 and is owned free of any mortgage interest. To what extent can the successful plaintiff recover damages by forcing a sale of the property?

2. Miguel and Maria Ramirez own property in Albuquerque, New Mexico, as tenants by the entirety. They divorce. At the time of the divorce, there are no new deeds signed or recorded. Are they now tenants in common or joint tenants?

**12.2 Brokers, Contracts, Proof of Title, and Closing**

**LEARNING OBJECTIVES**

1. Know the duties of the real estate broker and how brokers are licensed.
Once the buyer (or buyers) knows what form of ownership is most desirable, the search for a suitable property can begin. This search often involves contact with a broker hired by the seller. The seller’s contract with the broker, known as the listing agreement, is the first of the series of contracts in a typical real estate transaction. As you consider these contracts, it is important to keep in mind that despite the size of the transaction and the dire financial consequences should anything go awry, the typical person (buyer or seller) usually acts as his or her own attorney. An American Bar Association committee has noted the following:

It is probably safe to say that in a high percentage of cases the seller is unrepresented and signs the contracts of brokerage and sale on the basis of his faith in the broker. The buyer does not employ a lawyer. He signs the contract of sale without reading it and, once financing has been obtained, leaves all the details of title search and closing to the lender or broker. The lender or broker may employ an attorney but, where title insurance is furnished by a company maintaining its own title plant, it is possible that no lawyer, not even house counsel, will appear. This being so, the material that follows is especially important for buyers and sellers who are not represented in the process of buying or selling real estate.

**Regulation of the Real Estate Business**

**State Licensing**

Real estate brokers, and the search for real estate generally, are subject to state and federal government regulation. Every state requires real estate brokers to be licensed. To obtain a license, the broker must pass an examination covering the principles of real estate practice, transactions, and instruments. Many states additionally insist that the broker take several courses in finance, appraisal, law, and real estate practice and apprentice for two years as a salesperson in a real estate broker’s office.
Civil Rights Act

Two federal civil rights laws also play an important role in the modern real estate transaction. These are the Civil Rights Act of 1866 and the Civil Rights Act of 1968 (Fair Housing Act). In *Jones v. Alfred H. Mayer Co.*, the Supreme Court upheld the constitutionality of the 1866 law, which expressly gives all citizens of the United States the same rights to inherit, purchase, lease, sell, hold, and convey real and personal property. A minority buyer or renter who is discriminated against may sue for relief in federal court, which may award damages, stop the sale of the house, or even direct the seller to convey the property to the plaintiff.

The 1968 Fair Housing Act prohibits discrimination on the grounds of race, color, religion, sex, national origin, handicap, or family status (i.e., no discrimination against families with children) by any one of several means, including the following:

1. Refusing to sell or rent to or negotiate with any person
2. Discriminating in the terms of sale or renting
3. Discriminating in advertising
4. Denying that the housing is available when in fact it is
5. “Blockbusting” (panicking owners into selling or renting by telling them that minority groups are moving into the neighborhood)
6. Creating different terms for granting or denying home loans by commercial lenders
7. Denying anyone the use of real estate services
   However, the 1968 act contains several exemptions:
1. Sale or rental of a single-family house if the seller
   a. owns less than four such houses,
   b. does not use a broker,
   c. does not use discriminatory advertising,
   d. within two years sells no more than one house in which the seller was not the most recent occupant.
   e. Rentals in a building occupied by the owner as long as it houses fewer than five families and the owner did not use discriminatory advertising
f. Sale or rental of space in buildings or land restricted by religious organization owners to people of the same religion (assuming that the religion does not discriminate on the basis of race, color, or national origin)

g. Private clubs, if they limit their noncommercial rentals to members

The net impact of these laws is that discrimination based on color or race is flatly prohibited and that other types of discrimination are also barred unless one of the enumerated exemptions applies.

**Hiring the Broker: The Listing Agreement**

When the seller hires a real estate broker, he will sign a listing agreement. (In several states, the Statute of Frauds says that the seller must sign a written agreement; however, he should do so in all states in order to provide evidence in the event of a later dispute.) This listing agreement sets forth the broker’s commission, her duties, the length of time she will serve as broker, and other terms of her agency relationship. Whether the seller will owe a commission if he or someone other than the broker finds a buyer depends on which of three types of listing agreements has been signed.

**Exclusive Right to Sell**

If the seller agrees to an exclusive-right-to-sell agency, he will owe the broker the stated commission regardless of who finds the buyer. Language such as the following gives the broker an exclusive right to sell: “Should the seller or anyone acting for the seller (including his heirs) sell, lease, transfer, or otherwise dispose of the property within the time fixed for the continuance of the agency, the broker shall be entitled nevertheless to the commission as set out herein.”

**Exclusive Agency**

Somewhat less onerous from the seller’s perspective (and less generous from the broker’s perspective) is the exclusive agency. The broker has the exclusive right to sell and will be entitled to the commission if anyone other than the seller finds the buyer (i.e., the seller will owe no commission if he finds a buyer). Here is language that creates an exclusive agency: “A commission is to be paid the broker whether the purchaser is secured by the broker or by any person other than the seller.”
Open Listing

The third type of listing, relatively rarely used, is the open listing, which authorizes “the broker to act as agent in securing a purchaser for my property.” The open listing calls for payment to the broker only if the broker was instrumental in finding the buyer; the broker is not entitled to her commission if anyone else, seller or otherwise, locates the buyer.

Suppose the broker finds a buyer, but the seller refuses at that point to sell. May the seller simply change his mind and avoid having to pay the broker’s commission? The usual rule is that when a broker finds a buyer who is “ready, willing, and able” to purchase or lease the property, she has earned her commission. Many courts have interpreted this to mean that even if the buyers are unable to obtain financing, the commission is owed nevertheless once the prospective buyers have signed a purchase agreement. To avoid this result, the seller should insist on either a “no deal, no commission” clause in the listing agreement (entitling the broker to payment only if the sale is actually consummated) or a clause in the purchase agreement making the purchase itself contingent on the buyer’s finding financing.

Broker’s Duties

Once the listing agreement has been signed, the broker becomes the seller’s agent—or, as occasionally happens, the buyer’s agent, if hired by the buyer. A broker is not a general agent with broad authority. Rather, a broker is a special agent with authority only to show the property to potential buyers. Unless expressly authorized, a broker may not accept money on behalf of the seller from a prospective buyer. Suppose Eunice hires Pete’s Realty to sell her house. They sign a standard exclusive agency listing, and Pete cajoles Frank into buying the house. Frank writes out a check for $10,000 as a down payment and offers it to Pete, who absconds with the money. Who must bear the loss? Ordinarily, Frank would have to bear the loss, because Pete was given no authority to accept money. If the listing agreement explicitly said that Pete could accept the down payment from a buyer, then the loss would fall on Eunice.

Although the broker is but a special agent, she owes the seller, her principal, a fiduciary duty. A fiduciary duty is a duty of the highest loyalty and trust. It means that the broker cannot buy the property for herself through an intermediary without full disclosure to the seller of her
intentions. Nor may the broker secretly receive a commission from the buyer or suggest to a prospective buyer that the property can be purchased for less than the asking price.

**The Sales Agreement**

Once the buyer has selected the real estate to be acquired, an agreement of sale will be negotiated and signed. Contract law in general is discussed in Chapter 8 "Contracts"; our discussion here will focus on specific aspects of the real estate contract. The Statute of Frauds requires that contracts for sale of real estate must be in writing. The writing must contain certain information.

**Names of Buyers and Sellers**

The agreement must contain the names of the buyers and sellers. As long as the parties sign the agreement, however, it is not necessary for the names of buyers and sellers to be included within the body of the agreement.

**Real Estate Description**

The property must be described sufficiently for a court to identify the property without having to look for evidence outside the agreement. The proper address, including street, city, and state, is usually sufficient.

**Price**

The price terms must be clear enough for a court to enforce. A specific cash price is always clear enough. But a problem can arise when installment payments are to be made. To say “$50,000, payable monthly for fifteen years at 12 percent” is not sufficiently detailed, because it is impossible to determine whether the installments are to be equal each month or are to be equal principal payments with varying interest payments, declining monthly as the balance decreases.

**Signature**

As a matter of prudence, both buyer and seller should sign the purchase agreement. However, the Statute of Frauds requires only the signature of the party against whom the agreement is to be enforced. So if the seller has signed the agreement, he cannot avoid the agreement on the grounds that the buyer has not signed it. However, if the buyer, not having signed, refuses to go to closing and take title, the seller would be unable to enforce the agreement against him.

**Easements and Restrictive Covenants**
Unless the contract specifically states otherwise, the seller must deliver marketable title. A marketable title is one that is clear of restrictions to which a reasonable buyer would object. Most buyers would refuse to close the deal if there were potential third-party claims to all or part of the title. But a buyer would be unreasonable if, at closing, he refused to consummate the transaction on the basis that there were utility easements for the power company or a known and visible driveway easement that served the neighboring property. As a precaution, a seller must be sure to say in the contract for sale that the property is being sold “subject to easements and restrictions of record.” A buyer who sees only such language should insist that the particular easements and restrictive covenants be spelled out in the agreement before he signs.

**Risk of Loss**

Suppose the house burns down after the contract is signed but before the closing. Who bears the loss? Once the contract is signed, most states apply the rule of equitable conversion, under which the buyer’s interest (his executory right to enforce the contract to take title to the property) is regarded as real property, and the seller’s interest is regarded as personal property. The rule of equitable conversion stems from an old maxim of the equity courts: “That which ought to be done is regarded as done.” That is, the buyer ought to have the property and the seller ought to have the money. A practical consequence of this rule is that the loss of the property falls on the buyer. Because most buyers do not purchase insurance until they take title, eleven states have adopted the Uniform Vendor and Purchaser Risk Act, which reverses the equitable conversion rule and places risk of loss on the seller. The parties may themselves reverse the application of the rule; the buyer should always insist on a clause in a contract stating that risk of loss remains with the seller until a specified date, such as the closing.

**Earnest Money**

As protection against the buyer’s default, the seller usually insists on a down payment known as earnest money. This is intended to cover such immediate expenses as proof of marketable title and the broker’s commission. If the buyer defaults, he forfeits the earnest money, even if the contract does not explicitly say so.

**Contingencies**
Performance of most real estate contracts is subject to various contingencies—that is, it is conditioned on the happening of certain events. For example, the buyer might wish to condition his agreement to buy the house on his ability to find a mortgage or to find one at a certain rate of interest. Thus the contract for sale might read that the buyer “agrees to buy the premises for $50,000, subject to his obtaining a $40,000 mortgage at 5 percent.” The person protected by the contingency may waive it; if the lowest interest rate the buyer could find was 5.5 percent, he could either refuse to buy the house or waive the condition and buy it anyway.

**Times for Performance**

A frequent difficulty in contracting to purchase real estate is the length of time it takes to receive an acceptance to an offer. If the acceptance is not received in a reasonable time, the offeror may treat the offer as rejected. To avoid the uncertainty, an offeror should always state in his offer that it will be held open for a definite period of time (five working days, two weeks, or whatever). The contract also ought to spell out the times by which the following should be done: (1) seller’s proof that he has title, (2) buyer’s review of the evidence of title, (3) seller’s correction of title defects, (4) closing date, and (5) possession by the buyer. The absence of explicit time provisions will not render the contract unenforceable—the courts will infer a reasonable time—but their absence creates the possibility of unnecessary disputes.

**Types of Deeds**

Most real estate transactions involve two kinds of deeds, the general warranty deed and the quitclaim deed.

1. **General warranty deed.** In a warranty deed, the seller warrants to the buyer that he possesses certain types of legal rights in the property. In the general warranty deed, the seller warrants that (a) he has good title to convey, (b) the property is free from any encumbrance not stated in the deed (the warranty against encumbrances), and (c) the property will not be taken by someone with a better title (the warranty of quiet enjoyment). Breach of any of these warranties exposes the seller to damages.

2. **Quitclaim deed.** The simplest form of deed is the quitclaim deed, in which the seller makes no warranties. Instead, he simply transfers to the buyer whatever title he had, defects and all. A quitclaim deed should not be used in the ordinary purchase and sale transaction. It is usually
reserved for removing a cloud on the title—for instance, a quitclaim deed by a widow who might have a dower interest in the property.

If the purchase agreement is silent about the type of deed, courts in many states will require the seller to give the buyer a quitclaim deed. In the contract, the buyer should therefore specify that the seller is to provide a warranty deed at closing.

When buyers move in after the closing, they frequently discover defects (the boiler is broken, a pipe leaks, the electrical power is inadequate). To obtain recourse against such an eventuality, the buyer could attempt to negotiate a clause in the contract under which the seller gives a warranty covering named defects. However, even without an express warranty, the law implies two warranties when a buyer purchases a new house from a builder. These are warranties that (1) the house is habitable and (2) the builder has completed the house in a workmanlike manner. Most states have refused to extend these warranties to subsequent purchasers—for example, to the buyer from a seller who had bought from the original builder. However, a few states have begun to provide limited protection to subsequent purchasers—in particular, for defects that a reasonable inspection will not reveal but that will show up only after purchase.

**Proof of Title**

Contracts are often formed and performed simultaneously, but in real estate transactions there is more often a gap between contract formation and performance (the closing). The reason is simple: the buyer must have time to obtain financing and to determine whether the seller has marketable title. That is not always easy; at least, it is not as straightforward as looking at a piece of paper. To understand how title relates to the real estate transaction, some background on recording statutes will be useful.

**Recording Statutes**

Suppose Slippery Sam owned Whispering Pines, a choice resort hotel on Torch Lake. On October 1, Slippery deeded Whispering Pines to Lorna for $1,575,000. Realizing the profit potential, Slippery decided to sell it again, and did so on November 1, without bothering to tell Malvina, the new buyer to whom he gave a new deed, that he had already sold it to Lorna. He then departed for a long sailing trip to the British Virgin Islands.
When Malvina arrives on the doorstep to find Lorna already tidying up, who should prevail? At common law, the first deed prevailed over subsequent deeds. So in our simple example, if this were a pure common-law state, Lorna would have title and Malvina would be out of luck, stuck with a worthless piece of paper. Her only recourse, probably futile, would be to search out and sue Slippery Sam for fraud. Most states, however, have enacted recording statutes, which award title to the person who has complied with the requirement to place the deed in a publicly available file in a public office in the county, often called the recorder’s office or the register of deeds.

**Notice Statute**

Under the most common type of recording statute, called a notice statute, a deed must be recorded in order for the owner to prevail against a subsequent purchaser. Assume in our example that Lorna recorded her deed on November 2 and that Malvina recorded on November 4. In a notice-statute state, Malvina’s claim to title would prevail over Lorna’s because on the day that Malvina received title (November 1), Lorna had not yet recorded. For this rule to apply, Malvina must have been a bona fide purchaser, meaning that she must have (1) paid valuable consideration, (2) bought in good faith, and (3) had no notice of the earlier sale. If Lorna had recorded before Malvina took the deed, Lorna would prevail if Malvina did not in fact check the public records; she should have checked, and the recorded deed is said to put subsequent purchasers on constructive notice.

**Notice-Race Statute**

Another common type of recording statute is the notice-race statute. To gain priority under this statute, the subsequent bona fide purchaser must also record—that is, win the race to the recorder’s office before the earlier purchaser. So in our example, in a notice-race jurisdiction, Lorna would prevail, since she recorded before Malvina did.

**Race Statute**

A third, more uncommon type is the race statute, which gives title to whoever records first, even if the subsequent purchaser is not bona fide and has actual knowledge of the prior sale. Suppose that when she received the deed, Malvina knew of the earlier sale to Lorna. Malvina got to the
recording office the day she got the deed, November 1, and Lorna came in the following day. In a race-statute jurisdiction, Malvina would take title.

**Chain of Title**

Given the recording statutes, the buyer must check the deed on record to determine (1) whether the seller ever acquired a valid deed to the property—that is, whether a chain of title can be traced from earlier owners to the seller—and (2) whether the seller has already sold the property to another purchaser, who has recorded a deed. There are any number of potential “clouds” on the title that would defeat a fee simple conveyance: among others, there are potential judgments, liens, mortgages, and easements that might affect the value of the property. There are two ways to protect the buyer: the abstract of title and opinion, and title insurance.

**Abstract and Opinion**

An abstract of title is a summary of the chain of title, listing all previous deeds, mortgages, tax liens, and other instruments recorded in the county land records office. The abstract is prepared by either an attorney or a title company. Since the list itself says nothing about whether the recorded instruments are legally valid, the buyer must also have the opinion of an attorney reviewing the abstract, or must determine by doing his own search of the public records, that the seller has valid title. The attorney’s opinion is known as a title opinion or certificate of title. The problem with this method of proving title is that the public records do not reveal hidden defects. One of the previous owners might have been a minor or an incompetent person who can still void his sale, or a previous deed might have been forged, or a previous seller might have claimed to be single when in fact he was married and his wife failed to sign away her dower rights. A search of the records would not detect these infirmities.

**Title Insurance**

To overcome these difficulties, the buyer should obtain title insurance. This is a one-premium policy issued by a title insurance company after a search through the same public records. When the title company is satisfied that title is valid, it will issue the insurance policy for a premium that could be as high as 1 percent of the selling price. When the buyer is taking out a mortgage, he will ordinarily purchase two policies, one to cover his investment in the property and the other to cover the mortgagee lender’s loan. In general, a title policy protects the buyer against
losses that would occur if title (1) turns out to belong to someone else; (2) is subject to a lien, encumbrance, or other defect; or (3) does not give the owner access to the land. A preferred type of title policy will also insure the buyer against losses resulting from an unmarketable title. Note that in determining whether to issue a policy, the title company goes through the process of searching through the public records again. The title policy as such does not guarantee that title is sound. A buyer could conceivably lose part or all of the property someday to a previous rightful owner, but if he does, the title insurance company must reimburse him for his losses. Although title insurance is usually a sound protection, most policies are subject to various exclusions and exceptions. For example, they do not provide coverage for zoning laws that restrict use of the property or for a government’s taking of the property under its power of eminent domain. Nor do the policies insure against defects created by the insured or known by the insured but unknown to the company. Some companies will not provide coverage for mechanics’ liens, public utility easements, and unpaid taxes. (If the accrued taxes are known, the insured will be presented with a list, and if he pays them on or before the closing, they will be covered by the final policy.) Furthermore, as demonstrated in *Title and Trust Co. of Florida v. Barrows*, (see Section 12.4.1 "Title Insurance"), title insurance covers title defects only, not physical defects in the property.

**The Closing**

Closing can be a confusing process because in most instances several contracts are being performed simultaneously:

1. The seller and purchaser are performing the sales contract.
2. The seller is paying off a mortgage, while the buyer is completing arrangements to borrow money and mortgage the property.
3. Title and other insurance arrangements will be completed.
4. The seller will pay the broker.
5. If buyer and seller are represented, attorneys for each party will be paid.

*Figure 12.2 Closing Process*
Despite all these transactions, the critical players are the seller, the purchaser, and the bank. To place the closing process in perspective, assume that one bank holds the existing (seller’s) mortgage on the property and is also financing the buyer’s purchase. We can visualize the three main players sitting at a table, ready to close the transaction. The key documents and the money will flow as illustrated in Figure 12.2 "Closing Process".

**Form of the Deed**

The deed must satisfy two fundamental legal requirements: it must be in the proper form, and there must be a valid delivery. Deeds are usually prepared by attorneys, who must include not only information necessary for a valid deed but also information required in order to be able to record the deed. The following information is typically required either for a valid deed or by the recording statutes.

**Grantor**

The grantor—the person who is conveying the property—must be designated in some manner. Obviously, it is best to give the grantor’s full name, but it is sufficient that the person or persons
conveying the deed are identifiable from the document. Thus “the heirs of Lockewood Filmer” is sufficient identification if each of the heirs signs the deed.

**Grantee**

Similarly, the deed should identify the grantee—the person to whom the property is being conveyed. It does not void the deed to misspell a person’s name or to omit part of a name, or even to omit the name of one of the grantees (as in “Lockewood Filmer and wife”). Although not technically necessary, the deed ought to detail the interests being conveyed to each grantee in order to avoid considerable legal difficulty later. “To Francis Lucas, a single man, and Joseph Lucas and Matilda Lucas, his wife” was a deed of unusual ambiguity. Did each party have a one-third interest? Or did Joseph and Matilda hold half as tenants by the entirety and Francis have a one-half interest as a tenant in common? Or perhaps Francis had a one-third interest as a tenant in common and Joseph and Matilda held two-thirds as tenants by the entirety? Or was there some other possible combination? The court chose the second interpretation, but considerable time and money could have been saved had the deed contained a few simple words of explanation. [2]

**Addresses**

Addresses of the parties should be included, although their absence will not usually invalidate the deed. However, in some states, failure to note the addresses will bar the deed from being recorded.

**Words of Conveyance**

The deed must indicate that the grantor presently intends to convey his interest in the property to the grantee. The deed may recite that the grantor “conveys and warrants” the property (warranty deed) or “conveys and quitclaims” the property (quitclaim deed). Some deeds use the words “bargain and sell” in place of convey.

**Description**

The deed must contain an accurate description of the land being conveyed, a description clear enough that the land can be identified without resorting to other evidence. Four general methods are used.
1. **The US government survey.** This is available west of the Mississippi (except in Texas) and in Alabama, Florida, Illinois, Indiana, Michigan, Mississippi, Ohio, and Wisconsin. With this survey, it is possible to specify with considerable exactitude any particular plot of land in any township in these states.

2. **Mettes and bounds.** The description of metes and bounds begins with a particular designated point (called a monument)—for example, a drainpipe, an old oak tree, a persimmon stump—and then defines the boundary with distances and angles until returning to the monument. As you can tell, using monuments that are biological (like trees and stumps) will have a limited utility as time goes on. Most surveyors put in stakes (iron pins), and the metes and bounds description will go from points where stakes have been put in the ground.

3. **Plats.** Many land areas have been divided into numbered lots and placed on a map called a plat. The plats are recorded. The deed, then, need only refer to the plat and lot number—for example, “Lot 17, Appledale Subdivision, record in Liber 2 of Plats, page 62, Choctaw County Records.”

4. **Informal description.** If none of the preceding methods can be used, an informal description, done precisely enough, might suffice. For instance, “my home at 31 Fernwood Street, Maplewood, Idaho” would probably pass muster.

**Statement of Consideration**

Statutes usually require that some consideration be stated in the deed, even though a grantor may convey property as a gift. When there is a selling price, it is easy enough to state it, although the actual price need not be listed. When land is being transferred as a gift, a statement of nominal consideration—for example, one dollar—is sufficient.

**Date**

Dates are customary, but deeds without dates will be enforced.

**Execution**

The deed must be signed by the grantor and, in some states, witnesses, and these signatures must be acknowledged by a notary public in order to make the deed eligible for recording. If someone is signing for the grantor under a power of attorney, a written instrument authorizing one person to sign for another, the instrument must be recorded along with the deed.

**Delivery**
To validly convey title to the property, the deed must not only be in proper form but also be delivered. This technical legal requirement is sometimes misunderstood. Delivery entails (1) physical delivery to the grantee, (2) an intention by the grantor to convey title, and (3) acceptance of title by the grantee. Because the grantor must intend to convey title, failure to meet the other two elements during the grantor’s lifetime will void title on his death (since at that point he of course cannot have an intention). Thus when a grantee is unaware of the grantor’s intention to deed the property to him, an executed deed sitting in a safe-deposit box will be invalid if discovered after the grantor’s death.

**Delivery to Grantee**

If the deed is physically delivered to the grantee or recorded, there is a rebuttable presumption that legal delivery has been made. That is, the law presumes, in the absence of evidence to the contrary, that all three conditions have been met if delivery or recording takes place. But this presumption can be rebutted, as shown in *Havens v. Schoen*, (see Section 12.4.2 "Delivery of a Deed").

**Delivery to Third Party (Commercial Escrow)**

The grantor may deliver the deed to a third party to hold until certain conditions have been met. Thus to avoid the problem of the deed sitting in the grantor’s own safe-deposit box, he could deliver it to a third party with instructions to hold it until his death and then to deliver it to the grantee. This would be an effective delivery, even though the grantee could not use the property until the grantor died. For this method to be effective, the grantor must lose all control over the deed, and the third party must be instructed to deliver the deed when the specified conditions occur.

This method is most frequently used in the commercial escrow. Escrow is a method by which a third party holds a document or money or both until specified conditions have been met. A typical example would be a sale in which the buyer is afraid of liens that might be filed after the closing. A contractor that has supplied materials for the building of a house, for example, might file a lien against the property for any amounts due but unpaid under the contract. The effectiveness of the lien would relate back to the time that the materials were furnished. Thus, at closing, all potential liens might not have been filed. The buyer would prefer to pay the seller
after the time for filing materialmen’s liens has lapsed. But sellers ordinarily want to ensure that they will receive their money before delivering a deed. The solution is for the buyer to pay the money into escrow (e.g., to a bank) and for the seller to deliver the deed to the same escrow agent. The bank would be instructed to hold both the money and the deed until the time for filing mechanics’ liens has ended. If no materialmen’s liens have been filed, then the money is paid out of escrow to the seller and the deed is released to the buyer. If a lien has been filed, then the money will not be paid until the seller removes the lien (usually by paying it off).

**KEY TAKEAWAY**

Most real estate is bought and sold through real estate brokers, who must be licensed by the state. Brokers have different kinds of agreements with clients, including exclusive right to sell, exclusive agency, and open listing. Brokers will usually arrange a sales agreement that includes standard provisions such as property description, earnest money, and various contingencies. A deed, usually a warranty deed, will be exchanged at the closing, but not before the buyer has obtained good proof of title, usually by getting an abstract and opinion and paying for title insurance. The deed will typically be delivered to the buyer and recorded at the county courthouse in the register of deeds’ office.

**EXERCISES**

1. Kitty Korniotis is a licensed real estate broker. Barney Woodard and his wife, Carol, sign an exclusive agency listing with Kitty to sell their house on Woodvale Avenue. At a social gathering, Carol mentions to a friend, Helen Nearing, that the house on Woodvale is for sale. The next day, Helen drives by the property and calls the number on Kitty’s sign. Helen and Scott Nearing sign a contract to buy the house from the Woodards. Is Kitty entitled to the commission?

2. Deepak Abhishek, a single man, lives in a race-notice state. He contracts to buy a large parcel of land from his friend, Ron Khurana, for the sum of $280,000. Subsequent to the contract, Khurana finds another buyer, who is willing to pay $299,000. Khurana arranges for two closings on the same day, within two hours of each other. At 10 a.m., he sells the property to Beverly Hanks and her husband, John, for $299,000. The Hanks are not represented by an attorney. Khurana hands them the deed at closing, but he takes it back from them and says, “I will record
this at the courthouse this afternoon.” The Hankses take a copy of the deed with them and are satisfied that they have bought the property; moreover, Khurana gives them a commitment from Lawyer’s Title Company that the company will insure that they are receiving fee simple title from Khurana, subject to the deed’s being recorded in the county register of deeds’ office.

At noon, Khurana has a closing with Abhishek, who is represented by an attorney. The attorney went to the courthouse earlier, at 11:30 a.m., and saw nothing on record that would prevent Khurana from conveying fee simple title. As the deal closes, and as Khurana prepares to leave town, Abhishek’s attorney goes to the courthouse and records the deed at 1:15 p.m. At 2:07 p.m., on his way out of town, Abhishek records the deed to the Hankses.

a. Who has better claim to the property—the Hankses or Deepak Abhishek?
b. Does it matter if the state is a notice jurisdiction or a notice-race jurisdiction?
c. A warranty deed is given in both closings. What would be the best remedy for whichever buyer did not get the benefit of clear title from these two transactions?


12.3 Adverse Possession

LEARNING OBJECTIVE

1. Explain how it is possible to own land without paying for it.

In some instances, real property can be acquired for free—or at least without paying the original owner anything. (Considerable cost may be involved in meeting the requisite conditions.) This method of acquisition—known as adverse possession—is effective when five conditions are met: (1) the person claiming title by adverse possession must assert that he has a right to possession
hostile to the interest of the original owner, (2) he must actually possess the property, (3) his possession must be “open and notorious,” (4) the possession must be continuous, and (5) the possession must be exclusive.

**Hostile Possession**

Suppose Jean and Jacques are tenants in common of a farm. Jean announces that he no longer intends to pursue agricultural habits and leaves for the city. Jacques continues to work on the land, making improvements and paying taxes and the mortgage. Years later, Jacques files suit for title, claiming that he now owns the land outright by adverse possession. He would lose, since his possession was not hostile to Jacques. To be hostile, possession of the land must be without permission and with the intention to claim ownership. Possession by one cotenant is deemed permissive, since either or both are legally entitled to possession. Suppose, instead, that Jean and Jacques are neighboring farmers, each with title to his own acreage, and that Jean decides to fence in his property. Just to be on the safe side, he knowingly constructs the fence twenty feet over on Jacques’s side. This is adverse possession, since it is clearly hostile to Jacques’s possession of the land.

**Actual Possession**

Not only must the possession be hostile but it must also be actual. The possessor must enter onto the land and make some use of it. Many state statutes define the permissible type of possession—for example, substantial enclosure or cultivation and improvement. In other states, the courts will look to the circumstances of each case to determine whether the claimant had in fact possessed the land (e.g., by grazing cattle on the land each summer).

**Open and Notorious Possession**

The possessor must use the land in an open way, so that the original owner could determine by looking that his land was being claimed and so that people in the area would know that it was being used by the adverse possessor. In the melodramatic words of one court, the adverse possessor “must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.” Construction of a building on the owner’s property would be open and notorious; development of a cave or tunnel under the owner’s property would not be.
Continuous Possession

The adverse possessor must use the land continuously, not intermittently. In most states, this continuous period must last for at least twenty years. If the adverse possession is passed on to heirs or the interest is sold, the successor adverse possessors may tack on the time they claim possession to reach the twenty years. Should the original owner sell his land, the time needed to prove continuous possession will not lapse. Of course, the original owner may interrupt the period—indeed, may terminate it—by moving to eject the adverse possessor any time before the twenty years has elapsed.

Exclusive Possession

The adverse possessor must claim exclusive possession of the land. Sharing the land with the owner is insufficient to ground a claim of legal entitlement based on adverse possession, since the sharing is not fully adverse or hostile. Jean finds a nice wooded lot to enjoy weekly picnics. The lot belongs to Jacques, who also uses it for picnics. This use would be insufficient to claim adverse possession because it is neither continuous nor exclusive.

If the five tests are met, then the adverse possessor is entitled to legal title. If any one of the tests is missing, the adverse possession claim will fail.

**KEY TAKEAWAY**

Real property can be acquired without paying the lawful owner if five conditions of adverse possession are met: (1) the person claiming title by adverse possession must assert that he has a right to possession hostile to the interest of the original owner, (2) he must actually possess the property, (3) his possession must be “open and notorious,” (4) the possession must be continuous, and (5) the possession must be exclusive.

**EXERCISE**

1. Tyler decides to camp out on a sandy beach lot near Isle of Palms, South Carolina. The owner, who had hoped to build a large house there, lived out of state. Tyler made no secret of his comings and goings, and after several weeks, when no one challenged his right to be there, he built a sturdy lean-to. After a while, he built a “micro house” and put a propane tank next to it. Although there was no running water, Tyler was plenty comfortable. His friends came often, they partied on the beach, and life was good. Five years after he first started camping
out there, an agent of the owner came and told him to deconstruct his shelter and “move on.” Does Tyler have any rights in the property? Why or why not?


12.4 Cases

Title Insurance (omitted)

Delivery of a Deed

Havens v. Schoen


[Norma Anderson Havens, the owner of certain farm property in Marlette, Michigan, in contemplation of her death executed a quit-claim deed to the property to her only daughter, Linda Karen Anderson. The deed was subsequently recorded. Subsequently, Linda Karen Anderson married and became Linda Karen Adams and died. Thereafter, Norma Anderson Havens and Norman William Scholz, a nephew of Havens who has an interest in the property as the beneficiary of a trust, brought a suit in Sanilac Circuit Court against Ernest E. Schoen, Administrator of the estate of Linda Karen Adams, deceased, and other heirs of James W. Anderson, the ex-husband of Norma Anderson Havens, seeking to set aside the deed or to impose a constructive trust on the farm property which was the subject of the deed. Arthur E. Moore, J., found no cause of action and entered judgment for defendants. The plaintiffs appeal alleging error because there never was a delivery of the deed or an intent by Havens to then presently and unconditionally convey an interest in the property.]

PER CURIAM.

In 1962, plaintiff Dr. [Norma Anderson] Havens purchased the Scholz family farm from the estate of her twin brother, Norman Scholz. She gave a deed of trust to her other brother Earl Scholz in 1964, naming her daughter Linda Karen Adams as the principal beneficiary. In 1969,
she filed suit against Earl and Inez Scholz and, in settlement of that suit, the property was conveyed to Dr. Havens and her daughter, now deceased. On August 13, 1969, Dr. Havens executed a quit-claim deed to her daughter of her remaining interest in the farm. It is this deed which Dr. Havens wishes to set aside.

The trial court found that plaintiffs failed to meet the burden of proving an invalid conveyance. Plaintiffs claim that there was never a delivery or an intent to presently and unconditionally convey an interest in the property to the daughter. The deed was recorded but defendants presented no other evidence to prove delivery. The recording of a deed raises a presumption of delivery. *Hooker v Tucker*, 335 Mich 429, 434; 56 NW2d 246 (1953). The only effect of this presumption is to cast upon the opposite party the burden of moving forward with the evidence. *Hooker v Tucker, supra*. The burden of proving delivery by a preponderance of the evidence remains with the party relying on the deed. *Camp v Guaranty Trust Co*, 262 Mich 223, 226; 247 NW 162 (1933). Acknowledging that the deed was recorded, plaintiffs presented substantial evidence showing no delivery and no intent to presently and unconditionally convey an interest in the property. The deed, after recording, was returned to Dr. Havens. She continued to manage the farm and pay all expenses for it. When asked about renting the farm, the daughter told a witness to ask her mother. Plaintiffs presented sufficient evidence to dispel the presumption. We find that the trial court erred when it stated that plaintiffs had the burden of proof on all issues. The defendants had the burden of proving delivery and requisite intent.

In *Haasjes v Woldring*, 10 Mich App 100; 158 NW2d 777 (1968), *leave denied* 381 Mich 756 (1968), two grandparents executed a deed to property to two grandchildren. The grandparents continued to live on the property, pay taxes on it and subsequent to the execution of the deed they made statements which this Court found inconsistent with a prior transfer of property. These circumstances combined with the fact that the deed was not placed beyond the grantors’ control led the *Haasjes* Court to conclude that a valid transfer of title had not been effected. The *Haasjes* Court, citing *Wandel v Wandel*, 336 Mich 126; 57 NW2d 468 (1953), and *Resh v Fox*, 365 Mich 288, 112 NW2d 486 (1961), held that in considering whether there was a present intent to pass title, courts may look to the subsequent acts of the grantor.
This Court reviews *de novo* the determinations of a trial court sitting in an equity case. *Chapman v Chapman*, 31 Mich App 576, 579; 188 NW2d 21 (1971). Having reviewed the evidence presented by the defendants to prove delivery, we find that the defendants failed to meet their burden of proof. Under the circumstances, the recording itself and the language of the deed were not persuasive proof of delivery or intent. Defendants presented no evidence of possession of the deed by anyone but the grantor and presented no evidence showing knowledge of the deed by the grantee. No evidence was presented showing that the daughter was ever aware that she owned the property. The showing made by defendants was inadequate to carry their burden of proof. The deed must be set aside.

Plaintiffs alleged none of the grounds which have traditionally been recognized as justifying the imposition of a constructive trust. See *Chapman v Chapman*, *supra*. A constructive trust is imposed only when it would be inequitable to do otherwise. *Arndt v Vos*, 83 Mich App 484; 268 NW2d 693 (1978). Although plaintiffs claim relief for a mutual mistake, plaintiffs have presented no facts suggesting a mistake on the part of the grantee. Creation of a constructive trust is not warranted by the facts as found by the trial court. There has been no claim that those findings are erroneous.

We remand to the trial court to enter an order setting aside the August 13, 1969, deed from Norma Anderson Havens to Linda Karen Anderson Adams purporting to convey the interest of Dr. Havens in the farm. The decision of the trial court finding no justification for imposing a trust upon the property is affirmed.

Affirmed in part, reversed in part, and remanded.

**DISSENT BY:**

MacKenzie, J. *(dissenting)*.

I respectfully dissent. The deed was recorded with the knowledge and assent of the grantor, which creates a presumption of delivery. See *Schmidt v Jennings*, 359 Mich 376, 383; 102 NW2d 589 (1960), *Reed v Mack*, 344 Mich 391, 397; 73 NW2d 917 (1955). Crucial evidence was conflicting and I would disagree that the trial court’s findings were clearly erroneous.
In *Reed v Mack*, the Court affirmed the trial court’s finding that there had been delivery where the grantor defendant, who had owned the property with her husband, recorded a deed conveying a property jointly to herself and the two other grantees, stating:

“We are in agreement with the trial court. The defendant-appellant, a grantor in the deed, caused the recording of the deed, the delivery of which she attacks. The recording of a warranty deed may, under some circumstances, be effectual to show delivery. A delivery to one of several joint grantees, in absence of proof to the contrary, is delivery to all. *Mayhew v Wilhelm*, 249 Mich 640 [229 NW 459 (1930)]. While placing a deed on record does not in itself necessarily establish delivery, the recording of a deed raises a presumption of delivery, and the whole object of delivery is to indicate an intent by the grantor to give effect to the instrument.” [Citations]

In *McMahon v Dorsey*, 353 Mich 623, 626; 91 NW2d 893 (1958), the significance of delivery was characterized as the manifestation of the grantor’s intent that the instrument be a completed act.

* * *

The evidence herein indicates that plaintiff Norma Anderson Havens, after she had been told she was dying from cancer, executed a quit-claim deed on August 16, 1969, to her daughter, Linda Karen Anderson. Plaintiff Havens testified that the reason she executed the deed was that she felt “if something should happen to me, at least Karen would be protected”. The deed was recorded the same day by plaintiff Havens’s attorney. Plaintiff Havens either knew that the deed was recorded then or learned of the recording shortly thereafter. Although plaintiff Havens testified that she intended only a testamentary disposition, she apparently realized that the deed was effective to convey the property immediately because her testimony indicated an intention to execute a trust agreement. Linda Karen lived on the farm for five years after the deed was recorded until her death in 1974, yet plaintiff Havens did not attempt to have Linda Karen deed the farm back to her so she could replace the deed with a trust agreement or a will. Plaintiff Havens testified that she approached her attorneys regarding a trust agreement, but both attorneys denied this. The trial judge specifically found the testimony of the attorneys was convincing and he, of course, had the benefit of observing the witnesses.
Haasjes v Woldring, 10 Mich App 100; 158 NW2d 777 (1968), relied upon by the majority, involved unrecorded deeds which remained in a strongbox under control of the grantors until after their deaths. The grantors continued to live alone on the property and pay taxes thereon. Based on the lack of recording, I find Haasjes distinguishable from the present case.

In Hooker v Tucker, 335 Mich 429; 56 NW2d 246 (1953), delivery was held not to have occurred where the grantor handed her attorney a copy of a deed containing a legal description of property she wished included in a will to be drawn by him and he subsequently mailed the deed to the grantee without the grantor's knowledge or permission. The purported delivery by mailing being unauthorized distinguishes Hooker from this case where there was no indication the recording was done without the grantor's authorization.

The majority relies on the grantee's purported lack of knowledge of the conveyance but the record is not at all clear in this regard. Further, if a deed is beneficial to the grantee, its acceptance is presumed. Tackaberry v Monteith, 295 Mich 487, 493; 295 NW 236 (1940), see also Holmes v McDonald, 119 Mich 563; 78 NW 647 (1899). While the burden of proving delivery is on the person relying upon the instrument, the burden shifts upon its recordation so that the grantor must go forward with the evidence of showing nondelivery, once recordation and beneficial interest have been shown. Hooker v Tucker, supra, and Tackaberry, supra. The trial court properly found that plaintiffs failed to go forward with the evidence and found that the deed conveyed title to the farm.

Factually, this is a difficult case because plaintiff Havens executed a deed which she intended to be a valid conveyance at the time it was executed and recorded. Subsequently, when her daughter unexpectedly predeceased her, the deed created a result she had not foreseen. She seeks to eradicate the unintended result by this litigation.

I am reluctant to set aside an unambiguous conveyance which was on record and unchallenged for five years on the basis of the self-serving testimony of the grantor as to her intent at the time she executed the deed and authorized its recordation.

I would affirm.

CASE QUESTION

1. Which opinion, the majority or the dissenting opinion, do you agree with, and why?
12.5 Summary and Exercises

Summary

Real property can be held in various forms of ownership. The most common forms are tenancy in common, joint tenancy, and tenancy by the entirety. Ten states recognize the community property form of ownership.

In selling real property, various common-law and statutory provisions come into play. Among the more important statutory provisions are the Civil Rights Acts of 1866 and 1968. These laws control the manner in which property may be listed and prohibit discrimination in sales. Sellers and buyers must also be mindful of contract and agency principles governing the listing agreement. Whether the real estate broker has an exclusive right to sell, an exclusive agency, or an open listing will have an important bearing on the fee to which the broker will be entitled when the property is sold.

The Statute of Frauds requires contracts for the sale of real property to be in writing. Such contracts must include the names of buyers and sellers, a description of the property, the price, and signatures. Unless the contract states otherwise, the seller must deliver marketable title, and the buyer will bear the loss if the property is damaged after the contract is signed but before the closing. The seller will usually insist on being paid earnest money, and the buyer will usually protect himself contractually against certain contingencies, such as failure to obtain financing. The contract should also specify the type of deed to be given to the buyer.

To provide protection to subsequent buyers, most states have enacted recording statutes that require buyers to record their purchases in a county office. The statutes vary: which of two purchasers will prevail depends on whether the state has a notice, notice-race, or race statute. To protect themselves, buyers usually purchase an abstract and opinion or title insurance.

Although sale is the usual method of acquiring real property, it is possible to take legal title without the consent of the owner. That method is adverse possession, by which one who openly, continuously, and exclusively possesses property and asserts his right to do so in a manner hostile to the interest of the owner will take title in twenty years in most states.
1. Rufus enters into a contract to purchase the Brooklyn Bridge from Sharpy. The contract provides that Sharpy is to give Rufus a quitclaim deed at the closing. After the closing, Rufus learns that Sharpy did not own the bridge and sues him for violating the terms of the deed. What is the result? Why?

2. Pancho and Cisco decide to purchase ten acres of real estate. Pancho is to provide 75 percent of the purchase price, Cisco the other 25 percent. They want to use either a joint tenancy or tenancy in common form of ownership. What do you recommend? Why?

3. Suppose in Exercise 2 that a friend recommends that Pancho and Cisco use a tenancy by the entirety. Would this form of ownership be appropriate? Why?

4. Richard and Elizabeth, a married couple, live in a community property state. During their marriage, they save $500,000 from Elizabeth’s earnings. Richard does not work, but during the marriage, he inherits $500,000. If Richard and Elizabeth are divorced, how will their property be divided? Why?

5. Jack wants to sell his house. He hires Walter, a real estate broker, to sell the house and signs an exclusive-right-to-sell listing agreement. Walter finds a buyer, who signs a sales contract with Jack. However, the buyer later refuses to perform the contract because he cannot obtain financing. Does Jack owe a commission to Walter? Why?

6. Suppose in Exercise 5 that Jack found the buyer, the buyer obtained financing, and the sale was completed. Does Jack owe a commission to Walter, who provided no assistance in finding the buyer and closing the deal? Why?

7. Suppose in Exercise 5 that Jack’s house is destroyed by fire before the closing. Who bears the loss—Jack or the buyer? Must Jack pay a commission to Walter? Why?

8. Suppose in Exercise 5 that the buyer paid $15,000 in earnest money when the contract was signed. Must Jack return the earnest money when the buyer learns that financing is unavailable? Why?