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Real Property Law

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THE CONCEPT OF OWNERSHIP

Property is one of the basic institutions of our society. The notion of private property is as old as history itself. It refers to property rights possessed by an individual personally, whereas public property refers to property rights possessed by a governmental unit. From the beginning of time, man has been motivated by an urge to possess and enjoy land, and this urge has developed into the concept of property as we now know it.

In early primitive societies, ownership of property was tribal or communal in nature, and the right of private property was limited to spears, clothing, and other personal articles. As today, the nature of property ownership was governed by the needs of the society, and at the time there was no necessity for clearly defined private ownership of land—life was very simple and there was no need to own land since it was so plentiful.

In England, after the Norman conquest in the 11th century, the notion of land tenure was introduced. This was a system of land ownership in which all land was owned by the king. Because he held the land as an individual and not on behalf of the people, land tenure was basically a form of private ownership. The king parceled out the land to nobles, who parceled it out to lesser nobles, and they in turn parceled it out to the serfs who actually worked the land. The king, in exchange for these bequests of land, received food, money, and men for military service. At that time a strong military was an absolute necessity, and much food, clothing, and equipment were needed to support the troops. Although

this procedure placed a great burden on the society, its members cooperated because of their desire for protection from enemy attack. In time, however, the need for a strong military decreased, and the lower classes began to insist on more rights. This pressure for land reform was a major factor in the signing of the Magna Carta in 1215 by King John.

During the Middle Ages in England, the Church accumulated vast amounts of property and became extremely wealthy, and in the early 1500's under Henry VIII there were violent reactions to Church control of property. Finally the powers of the Church had to be controlled by Parliament. This action marked the beginning of the body of English real property laws. When the colonists came to the New World, they brought with them English and European laws, customs, and traditions. Our system of laws today still reflects these influences.

It is useful to discuss the notion of ownership and what it really means. Ownership is not only possession of property, but also possession of the rights which accompany it. The most important of these rights include the right to exclude others from your property; the right to injure the land (to a limited extent); the right to build on the land (subject, of course, to local ordinances, zoning laws, and the like); the right to transfer (sell, give away, lease) the land; the right to determine and enjoy its use; and the right to subdivide. Ownership might be described as possession of this bundle of rights, which can belong to one person, or which may be divided up among several persons, none of whom is the absolute owner.

TYPES OF OWNERSHIP—ESTATES

Ownership of land can be divided into *estates*, which are defined as interests in land which are or may become *possessory*. Under this scheme, developed in early English law, two or more persons may have an estate (interest) in a piece of land at the same time. However, only one of these interests can be possessory at any one point in time. Any other interest in the land existing at the time is a *future interest*. Possession will take effect at some future date, either upon the happening of a specified event, or after a period of years, or at the will of the owner of the future interest. For example, suppose that you are renting a house and currently living in it. Since you presently have possession, your *leasehold estate* is a present possessory interest and you are treated much like the owner of the land. Your lease, however, does not constitute total ownership of the property; someone else owns an estate (interest)

in the property at the same time. This person is your landlord, and his interest differs from yours. For one thing, you have a present right to possession and he does not. In fact, if your landlord without your permission came onto the premises you had leased, your landlord would be trespassing. Your landlord's right to possession is a future interest, since he cannot take possession until your estate has ended (when your lease expires). Since your interest in the property is completely separate from your landlord's interest, he can sell his interest without affecting your right to possession. After the sale someone else owns the land and building and has the future estate, but your leasehold estate still exists and you still have the right to live in the building.

The greatest estate a landowner can have is a *fee simple absolute.* This estate can last forever because it is freely "inheritable". That means that when the landowner dies, the land will automatically go to that owner's *heirs,* and, when they die, the land will go to their heirs, and so on. In this way a piece of land can be owned by the same family indefinitely. However, a landowner can prevent heirs from getting the land, if that owner wants to, by selling the land before he or she dies, or by writing a *will* specifying that the land be given to someone other than his or her heirs after death. A fee simple can last indefinitely, but it is subject to the owner's control.

The other important characteristic of a fee simple is that it is not subject to any conditions. The only thing that will end a fee simple is a voluntary act by the owner, such as selling the land or giving it away.

There are various estates, less than a fee simple absolute, which are subject to conditions. These estates end on the happening of a future event at which time ownership of the land reverts to the *grantor.* For example, Smith sold some land to Jones for Jones to keep as long as the land is used as a baseball diamond. Smith has attached "strings" to the sale. If the land is used for any other purpose, ownership of the land reverts to Smith the moment its use is changed. The important thing to remember is that a landowner can transfer land conditionally, and if the condition is not met, the original owner has the right to regain ownership.

Another estate less than a fee simple absolute is the "life estate". A life estate, as the name implies, is an estate in land which is measured by someone's lifetime. For example, Alice gives property to Oscar for life and, upon Oscar's death, to George. Oscar has the property for as long as he lives, and he has most of the rights of ownership except that he cannot sell the land, because he does not own it. Oscar can only sell what

he owns, which is his life estate. If he did so, the buyer would get a life estate measured by Oscar's life. This is called a "life estate per autre vie". "Per autre vie" is French and means "for another life". Therefore, the buyer has a present right to possess the land only so long as Oscar is alive. When Oscar dies, George gets the land.

Oscar's interest, then, is called a life estate and George's interest is a future interest. George will take possession of the land following Oscar's death. This example illustrates the fact that two or more people can have an interest in the same property at the same time. Both Oscar and George own an estate in the land, and neither can defeat the other's interest. George can sell his future interest to Margaret, who will then own the same estate that George owned. But Oscar still has his life estate (which is unaffected by the sale), and Margaret cannot take possession of the property until Oscar dies.

Another estate in land which is less than a fee simple absolute is the leasehold estate, which will be discussed more fully later in the unit.

OWNERSHIP RIGHTS

The ownership of property entitles the owner to certain rights. The extent of these rights depends upon the type of ownership. One who owns land in fee simple absolute has the right to transfer the land to another; one who is merely a *tenant* has no such right. Remember, the whole idea of ownership is possessing not only the physical thing itself, but also the bundle of rights which accompany that ownership.

THE RIGHT TO USE

One of the most important rights of ownership is the owner's right to use the land as he or she pleases and to demand that others refrain from use to the contrary. An owner has the right to use not only the land itself, but also the air space above and the soil beneath the surface of the land. Although a landowner at one time was said to own all the land below and all the air above his land, today such ownership has been generally limited to that portion of the land beneath and the air above that the owner can reasonably be expected to use. For example, if Elizabeth owns land over which airplanes fly at 30,000 feet, she will not be permitted to stop the airplanes from using "her" airspace, since it is unreasonable for her to say that she can make use of space 30,000 feet up in the air. Also, there is a great social utility in flying airplanes; if each landowner could prevent flight over his or her land, flying would be difficult and few could afford it.

The right to use the land includes the right to make improvements, such as homes, driveways, and yards, but it is not an absolute right. This is because there may be some future owner's rights to consider. If, for

example, Sam only has a life estate in land (that means that someone else has a future interest in the same land), Sam can do only things to the land which will not injure the rights of the person who has the future interest. Even if Sam is the owner in fee simple absolute, there still may be restrictions on his use of the land in the form of local ordinances, zoning restrictions, promises made to surrounding landowners, and nuisance regulations, all of which will be discussed in detail later in the unit.

THE RIGHT TO SUPPORT

For now, however, let us concern ourselves with rights rather than restrictions. Another right of ownership is the right to support. If your neighbor's land somehow provides support for your land, the neighbor will not be allowed to interfere with that support. For example, if your house is on a hill, and your neighbor's land is on the downhill side, your neighbor will not be permitted to use his property in a way that may place your property in danger of sliding. Suppose further that a previous owner of the downhill lot had built a retaining wall on the boundary line between her property and yours so that she could remove the soil which was supporting your land and at the same time not place your property in danger. If the current owner decides he doesn't like the wall, and tears it down without any plans to substitute some other means of support for your land, you can sue him and the court will probably order that he provide some suitable support for your land. Also, you can recover money *damages* if your land has actually been harmed. When the support is destroyed by an act of nature, such as by an earthquake, that of course is not the neighbor's fault. In that situation, the owner, not the neighbor, will have to bear the expenses of whatever loss he suffers. Homeowners can purchase insurance to cover this type of loss.

If your land provides support for your neighbor's land, you have no right to interfere with that support; if you do, your neighbor can sue you and assert his own property rights. Remember, the rights of ownership belong to all landowners. For each right you possess, your neighbor has a corresponding obligation. Similarly, for each right your neighbor possesses, you have a corresponding obligation. A point of equilibrium is reached, where each landowner can assert his or her rights only to the point of infringing on the rights of a neighbor.

The type of support just discussed is known as "lateral support" because it refers to support from the sides. There is another type, known as "subjacent support", which refers to support from underneath. Prob-

lems of subjacent support generally arise when there is a division of ownership of the land. If, for example, Albert owns a piece of land and he sells the mining rights to Marcia, she cannot do anything to disturb the surface of the land. She cannot mine in a way which would cause a "cave-in". Marcia must see that the surface continually has adequate support. If he so chooses, Albert can *waive* or give up his right to the subjacent support, but the agreement to do so must be in writing.

THE RIGHT TO THE FRUITS OF THE SOIL

Landowners have the right to *exploit* the natural resources on their property. This means that if there are minerals, such as coal, iron, or gold, under your property, ownership gives you the right to mine and sell those minerals, or to sell the mining rights to another person. It also means that you have the right to cut and sell the trees on your land, or to sell or give that right to another. Another method of exploiting natural resources is to grow crops. Always keep in mind, however, that these rights are not absolute; they may be exercised only to the extent that local laws or someone else's rights are not violated.

THE RIGHT TO ALIENATE

Probably the most important right of ownership is the right to "alienate" the property. This gives the owner the right to sell or transfer the land to another person. Basically, there are two types of alienation—total and partial.

Total alienation means a transfer to another which completely disposes of the seller's interest in the property. After the transfer, someone else has become the owner of all the seller's rights of ownership. Total alienation is usually accomplished by selling the property, or by giving it away. Remember, total alienation means giving away all of your ownership in the property.

Partial alienation, on the other hand, means giving away less than all of what you own. Leasing or renting are two common methods of partially alienating property. The owner rents or leases his or her property only for a specific period of time, or for a specific purpose, but still retains certain rights in the land, such as the right to inspect the property, the right to collect rents, and the right to regain possession of the property at the end of the lease period. Can you think of any other rights a landlord might have?

The tenant also has rights in the property. The most important is the right to possess and use the property for the period of the lease. What other rights do tenants have? The rights and duties of both landlords and tenants will be discussed in greater detail later in the unit.

Some other types of partial alienation, which are not possessory in nature, are easements, profits, and licenses. An "easement" is a limited right to use the land of another. Normally, you have no right to use another's land, and in fact you can be arrested as a trespasser, if you do so. An easement gives you the right to use the land of another in a manner that is ordinarily prohibited by law. Suppose, for example, that you own a home which is close to a grocery store, and there are two ways to get to this store. One way is to follow a long winding road and the other way is to walk directly across the property of your neighbor. Crossing your neighbor's property without his permission constitutes a trespass and he can legally stop you from taking this shortcut. If, however, your neighbor gives or sells you an easement to cross his property, your shortcut to the store is no longer a trespass.

Another type of easement is an easement for light and air, or view. A neighboring property owner can grant you an easement stating that she will not build any structures on her property which will interfere with your view of the ocean. If she then does build a structure which cuts off your view, you can require her to move it.

Another type of easement may require the owner of the property to do something for the benefit of adjoining property owners. This latter type may require that the property owner build and maintain a fence or bridge.

Easements can be obtained in several ways, the most common of which is by *grant,* a process similar to a normal sale or gift of property. The owner of property gives or sells the easement to another, and the gift or sale is put in writing. The written document is then filed with the local county recorder's office. (Recording of deeds and grants will be discussed later in the unit.) An easement can also be created when property is sold if the seller keeps an easement in favor of himself or a third person. Suppose Jack sells his property to Susan, but inserts in the deed a provision which says that Susan gets all of Jack's rights in the property except that he keeps an easement to drive across the northwest corner. Susan will be the new owner of the property, but she will not be permitted to interfere with Jack's right to drive across the northwest corner. Does that seem fair to Susan? Does it matter that she knew that Jack was going to keep the easement when she agreed to buy the land?

Another way to obtain an easement, without a writing, is by prescription. An "easement by prescription" is created by using land owned by another for a certain period of time (it varies from state to state but is usually several years) without the owner's permission. The owner must know about the unauthorized use, and do nothing to stop it. For example, recall the earlier situation about owning property separated from a store by land owned by another. If, without the permission of the owner, you openly crossed the land to go to the store continuously for the number of years required by law, and the owner either knew or should have known that you were crossing the land, then you have gained the right to use that path to go to the store, and the owner can no longer stop you. You now have an easement by prescription to walk across that land.

An easement is a right to use land for some specific purpose, and the owner of the land can prevent attempts to enlarge that right. Suppose you have an easement to walk across your neighbor's land. That does not give you a right to build a road on the path. Your easement is enough of an interest in the land, however, to allow you to sue and enforce your right if either the owner of the property or some other person tries to interfere with your easement. Suppose that the landowner in the previous example builds a wall across the property to stop you from using the path after you have gained an easement. This is an interference with your right to use the land, and you can sue the landowner to force removal of the wall, or to make the owner put a gate in the wall for you to walk through.

Once you've obtained an easement, it is yours indefinitely (unless otherwise restricted, such as by a time limit). Even if you don't use it, you've still got it until such time as you clearly indicate your intent to discontinue its use. If, however, you later become the owner of the property on which you have an easement, the easement ceases to exist. This is because an easement is a right to use the land of another; if you own the land, it is not land owned by another. After you become the owner of the land, do you still need the easement? Isn't the right to use the land one of the rights of ownership?

"Profits" resemble easements in that they allow the holder of the profit to enter the land of another. Unlike easements, however, profits not only give the holder a right to use land owned by someone else, but also the right to take a natural resource, such as trees, oil, or coal, from that land. For example, Celeste owns a lot with many trees on it and Tom owns a home in the city. Celeste allows Tom to enter her property and take wood to burn in his fireplace. Tom then has a profit in Celeste's

land—a right to enter and take wood. Profits are obtained in the same way as easements, and they are normally of indefinite duration.

Another type of partial alienation is a "license". A license is a privilege—rather than a right—to enter the land of another. A license can be revoked by the landowner. It is like an easement in that it allows you to do something which you would otherwise not legally be permitted to do, but a license differs from an easement because it is not an interest in the land. The owner of the property can take away the privilege whenever and for whatever reason he chooses.

A ticket to the local amusement park is a license, since the owner of the property does not intend for you to receive an interest in the land, and it is unlikely that you expect to receive such an interest. Because you only have a license, the owner can make you leave whenever he wants you to. Is a ticket to a movie theater a license? Has the owner sold you an interest in the property? What can the owner do to you if you make too much noise while the picture is being shown?

THE RIGHT TO EXCLUDE

The right to exclude means, basically, that you as the owner of property have the right to keep others off that property when they attempt to enter without your permission. This right to exclude trespassers includes among other things the right to build fences, post signs, use force if trespass into your home is threatened, and bring lawsuits against those who refuse to respect your right to private property.

Suppose that, during your two-week vacation, a trespasser not only enters your land, but also sets up a tent and indicates an intention to stay. What can you do? You can of course, resort to violence, and "encourage" the trespasser to leave by using force; however, the law prefers that arguments be settled peacefully. Therefore, the law provides for a legal action called *ejectment,* through which you can lawfully throw trespassers off your land. Because you no longer have the use of the land that the trespasser is occupying, you've been dispossessed. Unless you can peacefully convince the trespasser to leave, your next course of action is a legal action to remove the trespasser. Your right to the land is superior to the trespasser's, and you can have the trespasser thrown off. You can probably also collect a reasonable rent for the period of time that you were put out of possession.

ACQUIRING OWNERSHIP

BY PURCHASE

The purchasing of property is a complicated procedure. The following is a general outline that shows the steps involved in any sale or purchase of property.

Typically, the first step in the purchase of property is to locate a real-estate broker. You tell the broker what kind of home you want, where you want it, and how much you are willing to pay. The broker then begins to search for your home. The broker's job is to bring together a willing seller and a willing buyer. Once that is done, and after the real-estate contract is signed, the broker has a right to be paid a commission. A real-estate contract is a legally enforceable agreement to purchase land and, usually, any building on the land. Absent legitimate circumstances beyond the control of the parties, the contract will be enforced according to its terms. Therefore, once the contract is signed, the parties are ordinarily obligated to go through with the sale.

If you, the buyer, have not obtained a home loan, the contract will probably provide that the sale is subject to your obtaining the necessary financing. If you've made an agreement with the present owner regarding appliances, repairs, guaranties, or other things, these agreements will be included in the contract. Any agreements not in the contract at the time it is signed are simply not enforceable. Because a real-estate contract is a contract concerning an interest in land, it must be in writing. (This will be explained more fully when the Statute of Frauds is discussed.)

While there are no formal requirements regarding what must be contained in a contract for the sale of property, it will normally be very

detailed since this is the last chance the parties have to spell out the details of the entire agreement. Once the contract is signed, the transaction will proceed only under the terms and only with the conditions and promises spelled out in the contract.

The next step is called the "escrow" process. The purchaser usually makes a down payment, and the seller gives the *deed* to the property to a third person, who is neither the buyer nor the seller. This third person, the escrow agent, holds both the deed to the property and the money during the escrow period. The escrow agent merely holds the deed, and has no claim or interest in the legal *title* to the property. In fact, the escrow agent's name is not even mentioned in the deed.

The purposes of an escrow period are: 1) to give any institutions which may be loaning money to the buyer an opportunity to determine whether the property is a worthy investment; 2) to give the buyer a chance to have the title "searched" to make sure that the seller really owns the property and that there are no hidden claims to or restrictions on (for example, an easement) the property; and 3) to enable the seller to pay any existing debts owed on the property that the buyer is not going to pay. At the end of the escrow period, if no problems have arisen, the buyer gets the deed and officially becomes the owner, and the seller gets the money.

Usually in real-estate purchases the buyer cannot afford to pay the full purchase price at the time the property is purchased. Generally the buyer makes a down payment, and the remainder is financed through a "mortgage". A mortgage is a conditional transfer of property in which the property acts as collateral for a loan to the buyer of the purchase price by a lending institution. A mortgage works in this way. The seller gives a deed to the buyer, and the buyer gives another deed to the bank or lending institution. The lender then gives the purchase money to the seller, and the seller drops out of the picture. At this point the bank legally owns the property, and the buyer has possession of it. The buyer begins making mortgage payments, and when the loan is repaid the lender deeds the property back to the buyer. At this point the buyer finally becomes the true owner of the property. Since it usually takes the buyer a long time to pay back the loan, home mortgages run for many years.

The mortgage itself involves two documents. One is the "promissory note". This document is in effect an "I.O.U." in which the buyer promises to repay the lender. The other document involved is a deed to the property. This deed states that the lender is the owner of the property.

This is done to insure that the lender will be repaid. What happens if the buyer stops making the payments? First, the lender will make every attempt to get the buyer to resume payment. Failing that, the lender will *foreclose* on the mortgage. This means the lender will sell the property at an auction. The lender can do this because it is the legal owner of the property. As a consequence, the buyer is left without a home. Suppose that the property is worth $25,000 and has a $20,000 mortgage. Because houses usually sell for less than full value at an auction the lender gets $15,000 for it. This means the lender has lost $5,000. The lender loaned the buyer $20,000 (the amount of the mortgage), but only got paid back the $15,000 auction price. Unless the buyer pays back the loan, the lender usually loses money. This is the reason that interest rates on mortgages are so high. From the lender's standpoint, a mortgage may be a risky transaction.

A variation on the ordinary mortgage is called a "title retention" purchase. In this type of arrangement, the seller keeps title to the property until the buyer repays the full price. The buyer is in possession of the property, but the seller remains the legal owner. After the buyer has paid the purchase price, the seller deeds the property to the buyer. The seller takes the place of the lending institution, and charges interest just as though the buyer had gone to a bank.

In the foregoing discussion of purchases, you have read about deeds and titles, and you may not have fully understood what they were. Specific definitions were purposely deferred until after you had gotten some general background in the whole area of buying and selling, in order that you might better understand what a deed does and how it fits into a larger scheme.

The Statute of Frauds requires that a transfer of any interest in land be evidenced by a writing. There are, however, a few exceptions—for example, the easement by prescription discussed earlier. The Statute of Frauds dates back to 17th century England. In 1677, "An Act for Prevention of Frauds and Perjuries" was enacted to prevent fraud and perjury in the enforcement of transactions. Prior to the enactment of the Act, details of transactions depended upon the memories of witnesses. The Act provided that before certain kinds of transactions could be enforceable, they must be evidenced by a writing, signed by the person against whom the transaction was to be enforced. One of the types of transactions covered by the Act was the *conveyance* of any interest in land.

In modern usage, the "Statute of Frauds" refers to statutes pat-

terned after the Act of 1677. Statutes of Fraud are in force generally throughout the United States. Since interests in land are specifically covered by the Statute of Frauds, easements, profits, leases for more than one year, sales, and gifts of property are generally required to be evidenced by a writing to be enforceable. When a Statute of Frauds requirement is referred to elsewhere in this unit it means simply written evidence of the transaction sufficient to satisfy the requirements of the Statute of Frauds. (The Statute of Frauds is also discussed in the unit on Contract Law.)

A "deed" is a formal written document by means of which title to property is transferred from one person to another. The person to whom the property is transferred is called the "grantee" and the person transferring the property is called the "grantor".

Although the specific requirements for a proper deed vary from state to state, there are some general requirements which are uniform throughout the country, and without which a deed will have no binding effect. First of all, as previously noted, the Statute of Frauds requires that a deed be written, and be signed by the grantor. Also, the deed must identify the parties to the sale, describe the location of the property being transferred, and list any promises or agreements made between the grantor and the grantee. This last requirement is a sensible one—spoken promises can easily be forgotten, but written promises that are made a part of the deed will last as long as land records are kept. Usually some mention is made in the deed of payment, although the law no longer requires that payment of money be referred to in deeds.

For many years, it was required that the deed be "delivered" to the grantee. This meant that after the sale was completed the seller had to give the deed to the buyer. Since "delivery" was merely a formality, courts now say that this requirement is satisfied if the grantor intends to transfer the property at the time of the sale.

Basically, there are three types of deeds: a general warranty deed, a grant deed, and a quitclaim deed. The "warranty deed" in most states guarantees that the grantor owns the property being transferred, that the title is *marketable,* and that if necessary the grantor will defend a lawsuit attacking the grantee's right to possession. If Albert sells property to Bess by a warranty deed, and Bess is later sued by Charles, who claims that he owns the land, it is Albert's responsibility to defend Bess' suit against Charles because Albert promised in the deed to do so.

A "grant deed" transfers the property, but contains none of the guaranties found in a warranty deed. The "quitclaim deed" transfers the

grantor's interest in the land, but the grantor does not guarantee that he or she has any interest at all. In effect what the grantor is saying is, "I transfer to you whatever ownership I have in this land, if I have any at all."

Could an owner sell the same piece of property more than once? If so, there would be many unhappy "owners" trying to take possession of the same land. To avoid this sort of chaos, a system for recording deeds and other documents concerning land has developed. Under this system, all land is divided into numbered lots, and accurate records are kept in county courthouses, recorder's offices, and elsewhere of who owns the property, who the previous owners were, any restrictions on the land such as easements, and whether there are any unpaid mortgages on the property. This system makes it fairly simple for a person planning to buy property to search the records and find out whether the seller really owns the property, or whether the seller has sold it to someone else. This gives the buyer an assurance that no one will later claim ownership of the property. Imagine that Ross sells property to Bob, and Bob properly records the transfer. Ross then sells the same property to Anne. Anne should have checked the land records before she bought the property, because the records would have shown her that Ross no longer had the right to sell the property. Since Anne failed to check the records and bought the property anyway, she actually bought nothing (except perhaps a lawsuit and a lot of unhappiness) because Ross had nothing to sell to her.

A deed doesn't need to be witnessed to validly transfer the property from the grantor to the grantee, but in most states a deed cannot be recorded unless it has been witnessed by a notary public or other similar public official. If a deed is not recorded, the grantor could unlawfully sell the land again to someone else—until a deed is recorded, the grantor is still the owner of record. However, once a deed is properly recorded, it is official notice to all, including other possible buyers, of who owns the property and of any restrictions on that ownership. This is because easements, profits, covenants between owners (to be discussed later), and mortgages can also be recorded. Recording the deed, then, is the final step in purchasing property. After the buyer has done that, the buyer can sit back and enjoy the benefits of property ownership!

BY WILL OR GIFT

Ownership of property can be acquired through a will. A will is a legal document by which a person disposes of property at death. Property can also be acquired by gift from the owner. Both of these transfers must also meet the formal requirements of deeds and, to be effective against other persons, must be recorded. If your Aunt Clara, for example, decided to give you some of her land, she'd have a deed drawn up, have it witnessed, give the deed to you, and then you would have it recorded. At that point you are the owner, just as if you'd bought the property.

BY ADVERSE POSSESSION

The final way to obtain ownership of land is by "adverse possession". Under this method ownership of land is forfeited if its owner stands by and takes no action to assert ownership rights when someone else occupies the owner's land, claims ownership of it, and visibly and continually uses the property for a prescribed period of time, which varies from state to state. This time period may be from 5 to 20 years.

The purpose underlying the doctrine of adverse possession is a strong social policy in favor of using land and exercising the rights and responsibilities of ownership. The rationale of this policy is that if an owner ignores his property for a long enough period of time, that owner should not be allowed to keep the property. This means that if an owner fails to inspect his property often enough he may lose it. For example, suppose you own land that Joe Camper has been using as his winter home, even though he doesn't own it. Had you examined the land, you would have seen Joe's cabin and the evidence of his occupation, but because you're busy, you don't bother to inspect. Ten years go by and you decide to build a ski resort on your property. You go to your land and find Joe there. You tell him to leave, but he refuses and finally he throws you off. If you sue to eject Joe, you will find that even though you are the owner of record, there is no way to get Joe off. Joe has become the owner of the property by this process of adverse possession. You now own nothing but a worthless deed. Acquiring land by adverse possession rarely happens these days, primarily because increased population has led to increased land use. Few owners let their land sit idle. When adverse possession does occur, the circumstances generally resemble the following examples. Tony thinks he owns a piece of land that really belongs to Nancy. Nancy also mistakenly believes the land is

owned by Tony. Because of this mistaken belief, Tony claims and uses the piece of property as his own. If this is done for a long enough period of time, Tony becomes the true owner by adverse possession.

Suppose Tom and Sam are neighboring homeowners. Because of a clerical error in the description of Tom's lot in his deed, Tom thinks his lot is 5′ wider than it actually is. Sam has never had his lot surveyed, so he also doesn't know the location of the real boundary. Tom now builds a concrete block wall between his lot and Sam's, along what Tom thinks is the boundary. Since Sam doesn't know where the boundary is, he assumes Tom built the wall in the right place. The wall is actually 5′ into Sam's lot. Tom now plants a flower garden along the wall, and waters it every day. If Tom lives there long enough, he will become the true owner of that 5′ strip of land by adverse possession.

JOINT OR SHARED OWNERSHIP

A person may acquire property together with one or more other persons, in which case that person is not the sole owner but rather has a share or part of the ownership. This means that the name of each owner is on the deed, and that the entire piece of property cannot be transferred without the consent of all. Individual interests or shares in the property may, however, be transferred by any one of the owners, and such transfer may have the effect of changing the form of ownership.

TENANCY BY THE ENTIRETY

One type of joint ownership is called "tenancy by the entirety". This is a *concurrent* form of ownership which can exist only between a husband and wife. The formal requirements for creating a tenancy by the entirety are that each party take ownership at the same time; under the same document of title; with the shares being equal in size; with identical rights to possession; and the document transferring the title must say the two are getting ownership as husband and wife. Under this form of ownership, each spouse is considered to be the owner of the entire piece of property, subject only to the condition that one spouse cannot use the land in a way that infringes on the other spouse's interest. The importance of this dual ownership is that when one spouse dies, the other owns the whole property as a sole owner. Because each spouse owned the whole thing, when one spouse died the interest of that spouse died also—leaving only one owner. This phenomenon is called the "right of

survivorship", because the survivor gets everything. If property is held as a tenancy by the entirety, divorce, death of a spouse, or a voluntary agreement by each spouse will end their concurrent ownership. This type of joint ownership is becoming increasingly less common, and does not exist in states which have community property.

COMMUNITY PROPERTY

"Community property" is a system of property ownership created in many states as the result of marriage. Generally, in states having this form of property ownership, property and other assets acquired by a couple after marriage become community property, owned in common by both the husband and wife. This applies also to property acquired with community funds (money earned by either the husband or the wife after the marriage), but does not apply to property acquired by either gift or inheritance—such property is considered separate property owned solely by the spouse acquiring it. Property owned by either spouse before the marriage is also considered separate property. For example, John and Mary got married in 1968 and began saving their earnings for a house. The house they purchased in 1972 is community property, acquired with community funds. If, however, Mary's wealthy aunt gave her an apartment building, the building is Mary's separate property. Although community property is by law to be managed and controlled by the husband, for both of them, Mary can control the rents from the apartment building, since it is her separate property and the income from it is her separate income.

JOINT TENANCY

Another type of shared ownership, quite similar to the tenancy by the entirety, including the right of survivorship, is the "joint tenancy". Like a tenancy by the entirety, a joint tenancy requires that the owners (there may be an unlimited number of them) take the property at the same time; under the same document of title; with the shares being equal; and with equal rights to possession. Also, like a tenancy by the entirety, joint tenancies have the right of survivorship. When one tenant dies, that tenant's interest disappears and the others still hold as joint tenants. This process continues until there is only one owner left. The last survivor gets the entire property as the sole owner. An attempt by a joint tenant to transfer his or her interest by a will at death is inoperative. Because a

joint tenant's interest expires instantaneously at death, there would be nothing to transfer.

Note that there can be any number of owners as joint tenants. It is not restricted to just two persons as is a tenancy by the entirety. Also, each joint tenant can transfer his or her share without permission from the other joint tenants. But when a tenant transfers his or her interest, the transferee does not become a joint tenant with the other owners. This is because of the requirement that joint tenants all receive their shares at the same time and by the same document of title. The transferee does, however, own the same size share as the original transferor, and the transferee has the same right to possession. The difference is that the transferee is not called a "joint tenant". What then is this new owner called? The transferee is a "tenant in common" with the other owners, who remain joint tenants with respect to each other.

TENANCY IN COMMON

Under a "tenancy in common", two or more persons hold interests in a piece of property, but they need not acquire under the same document of title, have equal shares, or acquire their interests at the same times. The most important difference with this type of ownership is that there is no right of survivorship. When one tenant in common dies, his or her interest still exists and passes to whomever that tenant has designated. The tenancy in common continues, with the new owner replacing the one who died.

Under all types of concurrent ownership, co-tenants are each entitled to share in the use, possession, and enjoyment of the entire property. Any rents received usually must be shared equally, as must the cost of necessary expenses. If, however, one tenant makes permanent improvements, the others are not obligated to pay their share unless they consented to the improvements in advance. This prevents a wealthy co-tenant from building expensive improvements and forcing the less wealthy tenants to sell because they can't pay their share.

LANDLORD-TENANT

This portion of the unit deals with the relationship created by a lease. A "lease" is a document by which an owner transfers a smaller possessory estate than he or she owns to a tenant-lessee for a period of time. The owner then has a future interest in the property. At the end of the term of the lease, the owner will again have the right to possession of the property.

As with the bulk of property law, landlord-tenant law has a background deeply rooted in 11th and 12th century England. The rules evolved in an agrarian economy, in which people did in fact rent land itself; the buildings on the land were not the primary purpose for which the land was rented. Many of these rules remained virtually unchanged, even though the people began to move into towns and villages and became less involved in farming.

Leasehold estates are generally classified according to their length or potential length. There are basically four types: tenancy for years; tenancy from period to period; tenancy at will; and tenancy at sufferance.

A "tenancy for years" is a lease agreement in which the beginning and ending dates of the term are fixed, and the lease automatically expires at the date set for termination. Although the name "tenancy for years" would seem to indicate otherwise, this type of estate can be created for less than a year. All that is necessary is that the term of the lease be certain from the outset, for example, "six months beginning today the 14th of October". There is often a maximum permissible term, and in many states farm leases are limited to a maximum of 51 years and urban leases to a maximum of 99 years.

A tenancy from period to period or "periodic tenancy" is one which

runs from year to year, month to month, or for any other such period, and it continues until proper notice of termination is given by either the landlord or the tenant. The beginning date of the period will be certain, but the ending date is uncertain until the termination notice is given. For example, suppose John rents from Joe on a month-to-month basis beginning January 1, 1972. If on January 1, 1973, John decides to move and gives proper notice to his landlord that he plans to end the tenancy, the termination date becomes certain upon such notice. Prior to January 1, 1973, the term of the lease was uncertain, and could continue indefinitely. Now, however, the lease has only 30 more days to run and will terminate on Febuary 1, 1973. This is because the tenancy was month to month, and notice has been given.

The space of time between the date of notice and the date of termination varies depending on the period of the tenancy, but the notice must be given at least the length of one period before actual termination. So, for a week-to-week tenancy, notice must be given at least a week before termination; for a month-to-month tenancy, a month before termination; and so on. However, if the period is yearly, then a 6 month notice is all that is required. Some states require that the notice be in writing, and even where that is not required, it is a good idea, since it will greatly lessen the chance of misunderstanding.

A "tenancy at will" is one which has potentially short duration, because it can be terminated at any time at the will of either party. Some states require a certain termination notice period.

A "tenancy at sufferance" describes the relationship which exists when a tenant stays on in the leased premises after the termination of the lease, without the consent of the landlord. When that happens the landlord has several options. The landlord can treat the holdover as a tenant, in which case the rental previously agreed upon simply carries over and the tenant is considered to have impliedly agreed to stay for a period equal to the prior term. A month-to-month tenant will then have impliedly agreed to stay for another month and pay the rent at the figure previously agreed upon. Another alternative is an immediate legal action to evict the tenant. The landlord also may choose to treat the holdover as a trespasser who is there without any right whatever, and sue for damages.

A leasehold is a possessory interest in land, and if it is for a period longer than one year, the Statute of Frauds requires that it be evidenced by a writing to be legally enforceable. Oral leases for less than one year

are enforceable without a writing, but putting the lease terms in writing helps prevent misunderstandings at some later date.

LANDLORD'S RIGHTS AND RESPONSIBILITIES

The landlord and the tenant each have certain rights and responsibilities regarding the leased premises, and these are defined by law or by *covenants* in the lease, or both. Since landlord-tenant law developed during a time when land, rather than dwellings, was being rented, some of the landlord-tenant rules make little sense when applied to an apartment dweller who rents only shelter and has little interest in the land beneath it. For example, when property is rented and neither the landlord nor the tenant make any agreements to the contrary, the landlord has no duty to make the property fit for habitation. The tenant takes the premises as they are. If repairs are necessary, the tenant must make them. This rule made sense in 12th century England, where it took no great degree of mechanical ability for a tenant to make necessary repairs, but in mid-20th century it is unrealistic to expect a tenant to be qualified to make repairs on the wiring, the plumbing, the plaster, the roof, and so on, particularly when the tenant would need access to areas controlled by the landlord to make such repairs. Therefore, some states have altered this rule by enacting building codes which set minimum housing standards. Other states have special legislation aimed at making rental dwellings fit places to live. For example, the California Civil Code requires that dwellings meet certain standards with respect to waterproofing, heating, lighting, and so on, and if these standards are not met the tenant can either have the repairs made and deduct up to one month's rent per year to cover the cost, or move out.

Generally a landlord must make it possible for the tenant to easily enter and occupy the premises, and must protect the tenant's right of "quiet enjoyment". This means that the landlord cannot commit any act that will give the tenant good reason to abandon the premises. For example, imagine that Mary's apartment is located below another apartment occupied by six overweight teenagers. These young people continually jump up and down, claiming to be doing the latest dance. Does that give Mary good reason to leave? But has the landlord caused it? Mary cannot say that the landlord has failed to fulfill his duty to protect her quiet enjoyment of the premises unless the teenagers happen to be his children. If the teenagers are his children, Mary can say that the noise is a violation of the landlord's duty to safeguard her quiet enjoyment, and that a *constructive eviction* has resulted. A constructive eviction means

the tenant is not actually thrown out, but might as well be since it is impossible to enjoy or use the premises. Because of the constructive eviction, Mary has the right to vacate the premises immediately without paying future rent and without having to answer to the landlord for breaking the lease. If, however, the teenagers are not the landlord's children, he has no duty to keep them quiet. If Mary abandons her apartment under those circumstances, the landlord can sue her for breaking the lease. Note that even if the teenagers are the landlord's children, they are not required to be perfectly quiet. Reasonable and ordinary disturbances must be tolerated.

Ordinarily, the landlord is not responsible for accidents suffered by tenants that are caused by visible defects in the premises. An exception to this general rule is the situation where there is a hidden defect which the landlord knows about but which is not likely to be discovered by a reasonable inspection. This is called a "pre-existing defect". The landlord will be held responsible for injuries to tenants, and their guests, caused by pre-existing defects. For example, Mary and Joan rent an apartment from Simon Landlord, and there is a rather large hole in the bedroom floor cleverly concealed by the carpet recently installed by Simon. Mary and Joan inspect the room, but don't discover the hole. Later Joan falls into the hole and breaks her leg. Simon is responsible.

The situation just described is one of the few exceptions to the general rule that "tort liability" (responsibility to pay for injuries) is not imposed on the landlord. Another exception is the situation where a tenant has leased a landlord's property for a purpose which will require admission of the general public—for example, a supermarket or art gallery. In such case the landlord has a duty to see that the premises are in a safe condition at the time they are leased. If the premises are unsafe, and someone is hurt, the landlord is liable.

Another exception to the "no tort liability" rule is that a landlord is responsible for keeping common areas such as hallways, stairs, and elevators in good repair, and the landlord may be held responsible if someone is injured by a defect which the landlord should have fixed. For example, Simon Landlord has a large apartment building, with stairs going to the upper three floors. Benny Tenant, walking up the stairs one night, trips on a loose step and is injured. Is Simon responsible for the injuries? The answer depends on whether Simon knew or should have known about the broken step. If the step came loose ten minutes before Benny's accident, Simon is probably not responsible because he is not required to inspect the stairs every five minutes. If, however, the step had

been loose for a week and Simon could have discovered it had he bothered to inspect the premises, he probably will be held responsible.

The landlord will not be liable for everything which happens in the common areas, but if the defect is visible, if it is in a common area, and if the landlord should have seen and fixed the defect, the landlord will be held responsible for injuries caused by it. Also, a landlord should be careful when making repairs, because if a landlord does a sloppy job and that causes an injury, the landlord is no better off than if he had completely ignored the problem.

In states that have enacted statutes requiring landlords to maintain rental premises in a condition of repair, failure to comply with such statutes will subject landlords to liability for injuries. This type of statute, while rare at this time, seems to be the trend in this area.

One last way a landlord may be held liable for injuries caused by defective conditions on the premises is when the landlord promises in the rental agreement to keep the premises repaired. In some states failure to abide by such a promise subjects a landlord to tort liability.

TENANT'S RIGHTS AND RESPONSIBILITIES

A tenant has a responsibility to notify the landlord of defects which develop in the tenant's apartment or room, since it is difficult for the landlord to know about such problems because the landlord is prohibited from entering rented premises to inspect without the tenant's permission. Absent covenants to the contrary, tenants ordinarily have no duty to maintain and/or repair rented premises. But the tenant does have a duty with respect to the premises not to permit "waste". That means the tenant must not let the premises be damaged permanently. For example, if a window is broken and the tenant takes no action to keep rain out until the landlord has time to fix it, any damage caused by the rain will be the responsibility of the tenant. What if the roof blew off? Should the tenant try to cover the whole house with something? It is very unlikely that the tenant would be held responsible in such a case. The rule is that if waste can reasonably be prevented, the tenant has a duty to do so. At some point, however, it becomes unreasonable to expect the tenant to take corrective measures. Remember, the tenant's interest in the property is only temporary. Although the tenant has an exclusive right to possession for a term, and can exclude others, including the landlord, the landlord is still the owner of the land and the buildings and, therefore, the landlord is the one who should properly be charged with the responsibility for major repairs.

If a tenant signs a lease in which the tenant agrees to make repairs, that tenant is still responsible for making only minor repairs. Here again, the tenant's interest in the land is not great enough to make that tenant responsible for major repairs. However, when the lease period ends the tenant will have to pay for any damage caused by failure to make minor repairs. Using the example just given, if the tenant had agreed to make repairs, the tenant would be obligated to replace the window, and the tenant would be responsible for the damage if he or she didn't do so.

Suppose Mary rents a small house, and covenants to make repairs. If the house burns down, is Mary required to rebuild it? Generally a covenant to repair does not mean a covenant to rebuild. Would it be reasonable to say that it did?

The tenant must pay rent to the landlord for the period of time that the tenant is in possession of the premises, even though there is no express provision in the rental agreement concerning rent. The amount of rent required, when not specified in the lease, is a reasonable amount based on the number of days the tenant is in possession. If the tenant fails to pay rent, the landlord can either sue for the reasonable rental value or have the tenant evicted.

Eviction is a legal process. A landlord cannot forcibly evict a tenant or remove the tenant's belongings from the premises. Only the sheriff can conduct an eviction, and only after obtaining a court order. For example, Mrs. Jones, having paid her rent for the first two months, does not pay her third month's rent on the date it is due. Mr. Smith asks her when she will be able to pay, and she says that she does not know. Mr. Smith then gives her written notice, which is required, telling her to pay her rent or leave the premises. After waiting the length of time required by statute, the landlord can obtain an eviction order against Mrs. Jones. If by then Mrs. Jones has not vacated the premises, and if she has no legal excuse for not paying the rent, Mrs. Jones must leave. If she won't leave the sheriff will be ordered to evict her. This process of eviction is available to a landlord any time a tenant breaks the lease by failing to perform the provisions of the lease.

The tenant's duty not to commit waste means that the tenant cannot destroy the property in any way. It also means the tenant cannot make changes to structures on the property without the landlord's permission. The tenant must return the property to the landlord at the termination of the lease period in the same condition in which the tenant received it at the beginning of the lease, except for ordinary and normal wear and

tear. Suppose Roberta leased an apartment which had six small rooms. She needed only five, but wished one room was larger. Roberta cannot, without her landlady's permission, knock out one of the walls and convert two small rooms into one large one. This is considered "waste" even though the construction job will cost Roberta a considerable amount of money, will make the apartment more pleasant, and will increase the value of the apartment.

Consider this situation. Dick's lease has ended, and he must move out. He packs his belongings and asks his landlord to help him remove the bookcase he had built into the wall just after he moved into the apartment. The landlord tells Dick that removing the bookcase will damage the wall and that, even though Dick has paid for the bookcase, he will have to leave it because it is now part of the apartment. Is Dick's landlord right? What would be fair?

Personal property purchased by tenants for their own use can be attached to the real property owned by the landlord in such a way that it becomes a part of the real property. Personal property that becomes real property in this way is called a "fixture". Tenants are allowed to remove their own attached items only if the removal does not substantially damage the real property to which those items are attached. In Dick's case, whether he can remove the bookcase depends on whether its removal will substantially damage the wall. If removal of the bookcase will not substantially damage the wall, Dick can remove the bookcase and make necessary repairs to the wall. However, if the removal will damage the wall so much that it can't be adequately repaired, he probably will have to leave the bookcase.

Landlord-tenant law has deep historical roots. Many of the rules were formulated as early as the 11th century, when society revolved around landowners, and those who actually worked the land had few legal rights. Naturally the rules favored the landlord's position. Today, however, state legislatures are beginning to enact laws which favor tenants. These legislatures seem to feel that strengthening the tenant's position will not harm the landlord. For example, by requiring a landlord to make repairs on his premises, the tenant is able to live more comfortably, and although the landlord must assume the repair costs, these costs are offset by tax deductions and by increasing the life of the property. Landlord-tenant law is moving toward equalizing the rights of the landlord and the tenant, and soon tenants' rights will be as extensive as those of landlords.

LIMITATIONS ON OWNERSHIP

Ownership rights are not absolute. The fact that you are the owner of property does not necessarily give you the right to use the property exactly as you please. You can assert ownership rights only to the point of infringing on the rights of a neighbor. Also, others may have an interest in your property, and the existence of those other interests may limit your property rights. Remember, ownership is like a bundle of rights, which can be transferred in whole or in part. When you've parted with only some of your rights, you are free to exercise the rights you've retained, but consideration must be given to the rights you no longer possess.

For instance, examine a typical mortgage situation. You as the buyer of property transfer legal title to the property to a lending institution in return for a loan of the purchase money. When the loan is repaid, the lender will re-transfer the property back to you, the original purchaser, and you then become the legal owner. A mortgage, then, restricts your property rights because you are not technically the owner. You have a right to possession of the property, but you cannot treat the property as if you were the sole owner. If you wish to sell the property before the mortgage is paid off, as often happens, you cannot simply ignore the mortgage. A buyer will not buy until you've agreed to pay off the mortgage or freed him or her from the obligation to do so. Also, since a mortgage serves to make the property collateral or *security* for the loan, you cannot do anything to the property which would lower its value. If it becomes necessary for the property to be sold at a foreclosure

sale, the lender is entitled to top-dollar, which will not be paid if you have lowered the value of the property. For example, an owner of land ordinarily has the right to cut and sell the trees growing on his property. But if your property is mortgaged, and cutting the trees will substantially lower its market value, then you cannot cut the trees. You cannot do what an owner normally has the right to do, because you do not yet legally own the property. The existence of the mortgage restricts your rights of ownership.

Consider the easement situation. Suppose you own a large piece of hillside property through which runs a well-paved road. There is a silver mine on the top of the hill, from which a winding road leads down to the highway. The road is inconvenient, and, in the winter months, dangerous because of snow and ice. The mine owner offers to pay you to allow his trucks to use the good road over your land, bypassing the bad road. Since this will not interfere with your use of the property, you agree. The mine owner, being a good businessman, wants to make the arrangement formal, and an agreement is written up by his attorney. This document is signed and then recorded at the county courthouse (recall that once the agreement is recorded, it serves as notice to all the world that someone else has an interest in your land).

Things go well for several years. Then one day you decide to construct a retirement community on your property, and since those big ore trucks would surely disturb the residents, you decide to put a building right across the road used by the trucks. Can you do this? What you've done is to grant the mine owner an easement to cross your land, and now you can't interfere with that right. You gave up part of your ownership rights to the property, and now you are permitted to use that particular piece of property only if your use does not interfere with the easement owner's right to use the land. The building would surely interfere with his rights, and your ownership rights are restricted to the extent that you cannot interfere with the rights of the easement holder.

Would selling your land solve the problem? No. The mine owner now has an interest in the land, and any new owner would have to take the land subject to the easement. If this seems unfair, remember that you, the land owner, originally had a choice, and you chose to part with an interest in your land. If at that time you didn't understand what you were parting with, you should have taken the trouble to find out. Now all you can do is offer to buy the easement back, or try to have it moved elsewhere on the property. If the easement holder refuses, you are stuck.

Transferring a profit (the right to take a natural resource, such as

firewood, from the land of another) can create a similar situation. By transferring an interest in your land, you restrict your own rights to use what you've retained. If, for example, you sell or give Sarah the right to enter your property and take firewood for her ski chalet at Bear Valley, she now has an interest in your property. Should you later decide to turn your property into a game preserve and fence it off, Sarah still has a right to enter and take firewood and you cannot interfere with that right. The granting of a license does not as seriously limit your property rights, since it can be revoked at will. If you had given Sarah only a license to take the firewood, she would have no interest in your land, and, after you turn your property into a game preserve, Sarah will have to get her firewood elsewhere. Licenses are revocable at the will of the grantor, and since they are not interests in the land, they can be given and taken away orally. Why is that? What about the Statute of Frauds?

Another way in which your ownership rights may be limited or restricted is by covenant. Suppose Pete owns two pieces of property. One fronts on a beach, and the other is directly behind it. Pete builds his home on the beachfront property and later decides that he'd like to sell the other lot but he'd also like to keep his view of the lovely mountains behind his beachfront home. Sam is eager to buy the back lot and agrees to put a covenant in the deed promising that he will not erect any structure on his part of the property higher than 27 feet. That promise restricts Sam's ownership rights, and if he later decides to build a 30-story apartment building, Pete will be able to stop him because of the promise. This is not an unfair burden on Sam because when he bought the land, he agreed to this limitation, and he probably paid less for the property because of it. Sam cannot fairly complain that he isn't allowed to use his land as he pleases—the agreement was his own doing.

What if Sam sold the property without mentioning his promise to Pete to the buyer? Because the deed containing the promise has been recorded, the sale won't change anything. Because the deed, with the covenant in it, was recorded, any buyer takes the property subject to that covenant. The buyer should check the record for transactions which affect that piece of property because the buyer is obligated by any restriction which appears on record. This also is fair, since Pete would not have parted with the land under any other circumstances. If Sam is now allowed to break his promise simply by selling the land, the agreement Pete made in the sale to Sam would be meaningless, and courts will not tolerate such a result. Covenants can seriously restrict ownership rights. To ignore them when purchasing property is unwise.

Mortgages, easements, profits, and covenants are not the only ways that rights of ownership can be limited. They are just a few examples. The important things to remember are that a property owner can assert his or her rights of ownership only to the point of infringing on the rights of ownership of neighbors, and that a landowner voluntarily limits his or her rights of ownership every time he or she transfers one of those rights to another.

GOVERNMENTAL RESTRICTIONS ON OWNERSHIP

In addition to private limitations and restrictions on ownership rights, there are other types of restrictions which can be classified as "government regulation".

URBAN PLANNING

In the early days of the United States, cities grew randomly according to need, and very little thought was given to any organized planning. There are, however, a few notable exceptions. Washington, D.C., for example, was developed from a master plan drawn up in 1791 by Major Pierre Charles L'Enfant and implemented by President George Washington and his Secretary of State, Thomas Jefferson. Major L'Enfant relied heavily on a checkerboard street pattern which, in this country, dates back to the plan drawn for Philadelphia by William Penn in 1682.

In spite of these early instances of true planning, most cities grew up without much thought about the future, and without much concern for things necessary to modern urban life, such as recreational facilities, schools, hospitals, transportation, and the like. As a result, the city planning done today in most major metropolitan areas consists of making compromises in existing faulty layouts. Ideally, a planning agency should be set up before a city or town begins to grow, so that such things

as streets, parking areas, public transportation systems, parks, playgrounds, business districts, and residential areas are carefully planned, guaranteeing that the city's growth will be well-balanced.

A city planning agency is called the "planning commission", and its purpose is to decide whether new construction should be allowed, to plan city growth, and to make the best use of existing conditions. Some planning commissions are only advisory, and have no way of enforcing their plans. The success of this type of agency depends to a large extent on the conscience of the community. If, for example, a large building is proposed which is totally out of proportion to the surrounding structures, the outrage of the community and not the authority of the planning commission may be the deciding factor as to whether the building ever gets built. However, in many larger communities, the planning commission actually has the power to approve or disapprove proposed structures, and development in general, and since the commission is typically composed of civic-minded individuals, who have the best interests of the community at heart, the existing character of an area is preserved to the greatest extent possible.

In the 1950's, the federal government, recognizing the problems of urban growth and the importance of redevelopment and new planning, enacted the U.S. Housing Act, which grants federal funds to cities to cover losses incurred in the acquisition, clearing, and resale of blighted urban areas. This program is of special importance in neighborhoods which grew without planning, particularly when it is unprofitable or impractical for individual property owners to perform large-scale remodeling or rebuilding. By purchasing and rebuilding large blocks of land, a city gets the chance to start fresh with a really comprehensive urban plan.

ZONING

A city is divided into sections, and the various sections are designated by the planning agency for business, manufacturing, residences, recreational areas, and open spaces. Then zoning ordinances are enacted by the local governing body. "Zoning ordinances" are local laws which specify that only designated types of development will be allowed in each area. If a builder wishes to build a factory in an area zoned for residential housing, that builder will not be allowed to do so, because his action would violate the building plan. This type of arrangement makes an area a comfortable place in which to live or work—residences are not close

to factories and large stores, and large businesses need not restrict their activities because of sensitive neighbors.

BUILDING PERMITS

In most urban areas, and also in many suburban and rural areas, new construction or major remodeling is not allowed without a proper permit from the local governing body. These building permits serve many legitimate purposes. They are a means of raising revenues, because frequently prospective builders and remodelers must pay a fee before a building permit is issued. Building permits also help maintain adequate health and safety standards. Local building codes generally specify certain minimum requirements for both new construction and remodeling jobs. Buildings must have certain types of frames, electrical wiring, minimum window areas, adequate lighting, ventilation, and so on, and in order to qualify for a building permit an applicant must show that the proposed building will meet the requirements of the codes. It is in the best interests of the public to have these codes, since they insure that some degree of control is exercised over builders. Can you imagine, for example, not having specific building requirements for the huge skyscrapers which are found in metropolitan downtown areas?

Issuing a permit is not the end of the process. During construction, the work is inspected to insure that the builder is working according to the plans. If the builder's failure to conform to the plans is significant, the building inspectors will refuse to approve the construction which has been completed. The builder will not get a certificate of compliance, which means nobody will be permitted to use the structure, or at least that part of the structure which does not conform to the building code. There may also be other penalties, such as a jail sentence or a fine, for failure to comply with the code, but refusal to issue the certificate of compliance is in itself a serious sanction, since the result is to make the building useless.

EMINENT DOMAIN

Your rights as an owner of property are always subject to the condition that you can be required to part with all or part of your property should public necessity demand that you do so. "Eminent domain" is the right of the government to acquire private property for public use. This right, however, must be exercised by the government in

accordance with constitutional requirements, and the government must follow procedures established by law.

The 5th and 14th Amendments to the United States Constitution forbid the taking of private property by the federal or state governments unless just and fair compensation is paid to the owner. Imagine, for example, that you own property in a valley through which runs a large stream. The government wants to construct a dam at the end of the valley, to form a lake for recreational purposes and also to provide electrical power for the community. The lake will cover a very large area, and your property will be under water and of very little use to you. The governing body responsible for the dam must start a legal procedure known as *condemnation proceedings* to buy the land from you and all of your neighbors who will be displaced by the lake. After the condemnation proceedings, you will be given fair market value (what the property would sell for on the open market) for your property. Should you object to the amount you receive, the property will still be taken, but you are entitled to an impartial hearing to determine whether the amount paid was fair.

Private property may be taken by the government for many reasons, including highways, public buildings, libraries, parks, and reservoirs. In these situations the "taking" would be complete. You get the money, and the public body becomes the absolute owner of the property. However, there are other types of "takings" in which the public body takes only a limited interest in the property, such as a right to use the property for a specific purpose. What would this right to use the property be called?

Suppose your town has a publicly owned power company, and this company wants to string wires across your property. Since you own not only the land itself, but also the soil beneath and airspace above it, the company may not string wires across your property without a right to do so, even if the wires do not touch the ground. Since it would be unnecessary for the company to take and pay for your entire property, the company will take and pay for only an easement over your land. The power company will then have the right to string the wires over your property. You will still be the owner of the land, and you may continue to use it as long as your use does not interfere with the easement owned by the power company. This, then, is only a partial "taking" of property.

Let us examine another example of partial "taking". You own land near the end of an airstrip, and planes fly very close to your land but never touch it. The inconvenience caused by these low-flying airplanes may be enough to require that the government compensate you for the

loss of the use of your airspace. The inconvenience may indeed be so intolerable that you simply cannot continue to live there, and, in that case, the entire property must be taken since the property is of no further use to you. This extreme example illustrates how land can be "taken" for public use, without actually putting or building anything on that land.

A "taking" by eminent domain must be distinguished from mere government regulation. If you lose property due to government regulation, you have no right to compensation. For example, suppose you own an orchard of orange trees, and your trees become diseased with orange tree blight. This disease spreads rapidly, and it kills the tree and any oranges growing on the tree. Therefore, this disease threatens the entire orange-producing industry. In order to protect orange growers, and the nation's economy, the government orders you to burn your trees. You must obey, and the government has no obligation to pay you for your loss. Does this seem fair? Keep in mind that your trees were going to die anyway. This way the government can be sure that the disease will not spread.

Here is another example. Howard buys two acres of land on the outskirts of town, intending to build a new factory on that location. Before construction begins, the town rezones the entire area for residential use. Consequently, Howard cannot build his factory, and the land is now useless to him. Was Howard's property "taken" by eminent domain? Or was it merely government regulation? Is there a public use involved? Does the land still have value? Couldn't Howard sell the land to a housing developer?

The difference between a "taking" and regulation is often hard to see. It is really a matter of degree. There are many factors to consider. The seriousness of the necessity involved—is it an emergency or not? The extent of the public need—how many people will benefit? The inevitability of the loss—will the item become useless anyway (like the diseased orange trees)? The value of the item before and after—is it still valuable to the owner in some way (like Howard's property)? The answer really boils down to a balancing of public need against private loss. If the public need is great and the private loss is great, it will probably be a "taking". If the public need is small and the private loss is small, it will probably not be a "taking" but rather merely a "regulation". In between these two extremes, it is arguable either way. In any event, if it is an emergency situation, with the private loss inevitable (the orange tree case), the government is not required to compensate for loss.

NUISANCES

It was mentioned earlier that property rights are not absolute. Because others also have property rights, you may not use your property in whatever way you please, since to do so may unduly disturb your neighbors.

A landowner is entitled to enjoy ownership without being subjected to loud noises, bad odors, dust, and other substances coming from neighboring properties. Since these types of disturbances do not involve a tangible physical entry onto the property, the landowner has no way to eject the intruder. For example, a neighbor plays her tuba on her front lawn every morning at 2:00 a.m. She is not physically trespassing on your land, but that does not make her conduct any less objectionable. However, the fact that this is not a physical trespass does not mean that you are powerless to stop the tuba playing. The loud noise is a *nuisance,* and since most towns have specific ordinances prohibiting nuisances, you can take appropriate legal action. A report to the authorities will probably be sufficient to get the nuisance stopped.

The key characteristic of a nuisance is that it interferes unreasonably with the right of property owners to enjoy their property. The adjoining property owners have a right to get the objectionable activity stopped, and may go to court if necessary to do so. Also, neighboring landowners have a right to be compensated for interference with their property rights. It is possible, however, if the activity complained of is vital to the community, that the nuisance may be permitted to continue, but adjoining property owners harmed in some way by the activity still must be compensated. Remember, not every minor noise or puff of smoke will be declared a nuisance—only those which unreasonably interfere with the rights of adjoining property owners. The tuba player will probably be permitted to play during the day because she too has property rights which cannot unreasonably be interfered with. You may also disapprove of the tuba playing at 2:00 in the afternoon, but it will be difficult to convince a court that you are harmed by it at that time of day.

The tuba playing was an example of a "private nuisance", one which disturbs only a few neighboring property owners. In addition to private nuisances, there are "public nuisances", which are interferences with the rights of the public at large, such as obstructions of the public highways, bridges, and rivers. In those cases the harm is suffered not merely by a few individuals, but by a large part of the general public, and any legal proceedings to have those activities stopped must be initiated by a gov-

ernmental body, as a representative of all the people. Creating a public nuisance is a crime, and the nuisance ordinance may thus be enforced in a criminal proceeding. (Nuisances are also discussed in the unit on Tort Law.)

ANTI-POLLUTION ORDINANCES

The pollution of our natural environment has become a very serious problem in recent years. Pollution, however, is by no means a new problem. Smoky air in Nottingham, England, is said to have caused Queen Eleanor, wife of Henry III, to move to Tutbury Castle. Pollution has become quite serious in recent years mainly because of greatly increased industrialization and the mobility of our society.

So far, air pollution has been the major target for governmental action. Because air pollution poses a severe health problem, various governmental bodies have set up commissions to study the problem, and in many areas, including nearly all major metropolitan areas, regulations have been enacted to control the amount of waste material pumped into the air.

While the majority of air pollution comes from cars, trucks, buses, and planes, the pollution from industrial areas cannot be ignored. Automobile-caused pollution can be somewhat controlled by the installation of pollution control devices which remove many of the wastes from the auto's exhaust. Similarly, there are regulations in many areas requiring factories to have "clean" smokestacks. This means that businessmen, much like auto owners, are required to install some type of equipment which will clean the exhaust from their factories.

Because anti-pollution regulations are often enforced by stiff penalties for failure to comply, they are restrictions on the rights of ownership. Such regulations restrict the landowner's activities to those types which meet the pollution-control specifications of the regulating body. If this seems unduly harsh, it is nevertheless justifiable. The residents of many industrial areas, both in this country and abroad, have discovered to their dismay that pollutants in the air can and do cause a reduction in visibility; irritation in the upper and lower respiratory tracts; and eye irritation. Also, air pollution is known to contribute to bronchitis, and is strongly suspected of contributing to lung cancer. In extreme cases, people have died or become very ill when the atmospheric conditions did not allow the air pollution to be blown away. Indeed, many people feel that the authorities are far too lenient with violators of pollution-control legisla-

tion. This view, however, seems not to consider the impact on the economy of forcing businesses to convert immediately to pollution-free factories, or of requiring the production of pollution-free automobiles. The ideal goal is to convert as rapidly as possible without causing undue hardships on businessmen, many of whom might be forced to close their businesses if forced to "clean up" too fast.

Water pollution in many areas is an equally serious problem. For many years people have been dumping their waste material into our nation's lakes and waterways. Many of our natural lakes and waterways are no longer pure enough to support marine life, and it is becoming increasingly difficult to find many of the forms of marine life which used to be plentiful in our waters.

To combat this problem, regulations have been passed in recent years which control the types of sewage and wastes which may be dumped into waterways. Here again rights of ownership are restricted. A property owner's right to use his or her land includes the right to use any waterways or bodies of water located on the property. If an owner chooses to pollute his or her own water supply, that owner may do so. But the problem is that water is a flowing substance. Even lakes and ponds flow underground. Therefore, when a landowner pollutes water, it is likely that this pollution flows on to and through property owned by others. These owners are then deprived of their right to use the water. Therefore, anti-water pollution laws are necessary. They keep a small group of people, the polluters, from ruining for the rest of us the beauty and usefulness of the nation's lakes, rivers, and coastlines.

Also, in recent years, the disposal of household waste has become a problem of tremendous proportions. Especially in urban areas it has become necessary to pass strict laws prohibiting the disposal of garbage anywhere but in specially designated areas. Uncontrolled garbage disposal could easily result in intolerable odors and, far more important, in widespread disease. Again these regulations can be thought of as restrictions on the rights of ownership, but it is difficult to deny that they are necessary.

TAXES ON PROPERTY

Property taxes, called "ad valorem" taxes because they are based on the value of the property, are a popular form of raising money to support local governments. The property itself serves as security for payment of the taxes because, if the property owner fails to pay the tax, the property

can be taken by the taxing authority and sold at auction. The money received is first applied to the amount of tax due, and then to any mortgages against the property which have not been paid; the excess, if any, is given to the former owner.

Such taxes are a restriction on ownership, because the owner either pays the property tax or loses the property. But governmental services such as police, fire, public health, and schools must be paid for, and since property owners benefit from all of these it is not unfair to require that they pay a portion of the amount necessary to support such services.

Generally the restrictions placed on the rights of ownership of landowners by government regulation are for the protection of the landowners themselves. Building codes and construction-permit requirements, zoning laws, nuisance ordinances, and anti-pollution laws are all designed to safeguard the health and well-being of property owners and all citizens in general. Similarly, property taxes and land taken by eminent domain are used to benefit the public. These types of government regulation are necessary, and they are in fact beneficial to everyone.

GLOSSARY

concurrent	existing together at the same time; acting in conjunction.
condemnation proceedings	the process by which property of a private owner is taken for public use without the owner's consent, but only after payment of just compensation; a forced sale to the government.
constructive eviction	occurs when a landlord, without intent to oust a tenant, does some act which deprives the tenant of the enjoyment or use of the leased premises; any disturbance by a landlord which makes the leased premises unfit or unsuitable for occupancy.
conveyance	the transfer of legal title to land from one person or group of persons to another.
covenant	an agreement or promise made in writing.
damages	the pecuniary compensation recovered by lawsuit by a person who has suffered loss or injury to his or her person, property, or rights through the unlawful conduct of another; compensation for loss or injury.
deed	a written document by which one person transfers to another the legal title to an interest in land.
ejectment	the judicial process through which possession of land is recovered from a person who is unlawfully occupying that land; an action to secure or regain possession of property.

estate	an interest in land; the right to present or future possession of property; the nature, extent, and quality of ownership that one has in land.
eviction	the expulsion of a person from property; the judicial procedure for recovering possession of property from a tenant.
exploit	to make use of; utilize.
fee simple absolute	the largest possible estate in land; an interest in land which gives the owner and the owner's heirs absolute and unconditional ownership rights to the property indefinitely.
foreclose (foreclosure)	termination of ownership of a piece of property and of all rights to it, caused by one who owns a mortgage; the sale of mortgaged property to obtain satisfaction of the mortgage out of the proceeds of the sale.
future interest	interest in land or other things in which the right to possession or enjoyment is future and not present.
grant	to bestow or give; to transfer property or an interest in property by deed.
grantor	a person who makes a grant; the person who is transferring property by grant.
heir	a person who is entitled by law to inherit the property and belongings of another who has died.
leasehold estate	the estate in land created by a lease which gives a right to the use and possession of land or certain premises, owned by another, for a determinate period of time.
marketable title	title that is free from defects, restrictions, doubts, or possible objections.

nuisance	anything that disturbs the use or enjoyment of life or property; unreasonable or unlawful use of property by the owner which causes substantial discomfort, inconvenience, or harm to others.
possessory	being in possession; characterizing possession.
security	an object given by a debtor to insure repayment of the debt by furnishing the person to whom the debt is owed with a resource to be sold or used in case of failure to repay the debt.
tenant	one who has the temporary use and possession of land owned by another; a person who pays rent to occupy land or a building.
title	the union of all elements which constitute ownership; ownership of land.
waive	to abandon or surrender; the action of voluntarily relinquishing a right, claim or privilege.
will	the legal statement of a person's wishes concerning the disposal of his or her property after death.