Topic 3: Rights and Interests in Real Estate

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I. General Introduction

A. Some historical notes

Under old Roman *allodial system*, a land owner had absolute title with little restriction on rights. In Colonial times, American land ownership came increasingly to be viewed in this manner (as prevails today).

But under the early European *feudal system*, every land "owner" (except the king) owed rents or services to a superior. So from the feudal system we get the idea that a series of parties can have interests in a parcel at the same time. Legal actions protecting people's rights in land were known under early English law as *real* actions; thus the name "real estate." [Laws relating to real estate in the U.S. today are largely enacted and enforced at the state level, and much of that body of law follows from English legal foundations. But laws in a few states stem from other European traditions, notably California (Spanish), Louisiana (French), and New York (Netherlands).] While laws in most European countries gave the public certain rights that restricted what private land owners could do (such as Scandinavian laws that required fences to have gates so that non-owners could move their herds through), American land owners had broad rights protected by the Constitution, as long as taxes were paid.[1]

B. The nature of rights in real estate: a nice opportunity to exercise critical thinking

Because real estate is immobile, it can not physically be "possessed" in the manner that small physical objects can. What is possessed is not the real estate itself, but rather *rights* to do various things on or to the physical real estate. (With personal property it generally is assumed that any meaningful rights are held by the party in possession.)

We describe a "bundle of rights," sometimes broadly defined as *use*, *exclusion*, *disposition*, and *the right to do none of these*. Of course, activities must be within the law (you can not throw rocks at cars from *your* land, or even operate a business out of your home in most cases).

To discuss rights in real estate, we should first identify what might be considered "real estate." Typically includes:

- Land and the main structural components of buildings
- Sub-surface/mineral rights, which can be owned by a party different from the owner of surface rights to the same land (the holder of sub-surface mineral rights was ruled also to own the right to steam from geothermal activity;[2] hydraulic fracturing or "fracking" designed to drain oil and gas from an adjoining property's underground reserve was found to constitute not just trespass but actual theft).[3]
- Air rights (can not block sunlight in some places), but there may need to be zoning or other protection. When the Eden Roc hotel sued its next-door Miami rival Fontainebleau for building a 14-story addition that blocked sunlight to Eden Roc's pool area during key afternoon hours, the court ruled that without a specific provision a land owner has no right to receive unobstructed light or air from across other parties' properties.[4]
- Wind rights (a court ruled that a water district could acquire farm land but leave the prior owner with the right to rent out small plots to wind power companies).[5]
- Water rights (land owners along navigable bodies usually have essentially unlimited use of water; in arid regions in the western U.S. *prior appropriation* theory may restrict water use by all but owners of land that was owned historically by people who were the first to use the water productively). Generally a city can buy land outside its borders and drill wells to pipe in water for its residents, as long as doing so does not cause harm to others who draw from that underground water supply.[6]

A 2022 Illinois Supreme Court case provides many insights on water rights. Holm owned two Grundy County parcels along the small Mazon River (*a.k.a.* Mazon Creek), whose irregular path runs from near Wilmington northward to Morris, where it flows into the Illinois River. Holm's more southern parcel had access along Oxbow Road; the more northern was land-locked. Holm kayaked from the south parcel to the north to dig fossils for sale to collectors, and then farther northward over part of the Mazon along other owners' land to harvest more fossils and unload on publicly owned land at the Pine Bluff Road bridge. Neighboring owners – whose land is so fossil-rich that part is a National Historic Landmark – filed suit to enjoin the use (including fossil harvesting) of portions of the Mazon that do not border Holm's land. The Illinois Department of Natural Resources classifies the Mazon as "non-navigable," meaning there is no public use ("easement") for navigation and recreation as there is on navigable waters. (Citing a 1909 Illinois ruling, the Court defined navigable as "must in its ordinary, natural condition furnish a highway over which commerce is or may be carried on in the customary modes … water enough in places for row boats or small launches does not render the waters navigable." My take: navigable = can handle barge traffic.)

Holm cited laws that allow owners of bordering land to use the whole surface of a non-navigable lake. (Illinois law seems to allow use of a lake that is not all public and does not border your land only if you are in the water, at least wading. Michigan's supreme court held that someone with a right to cross someone else's land to reach Lake Huron could walk along the beach on private land below the high water mark without being in the water.)[7] But the Court held that non-navigable riparian rights for rivers are different than those for lakes, in that the part of a river someone's land borders is clear (generally the land owner also owns the bed out to the middle of the river), while property lines in a lake can not be determined (it also stated that Holm had *stolen* fossils from the other owners' property). In fact, because rivers and streams interconnect, Holm's argument would allow any owner along an entire system to use the surface water along any other owner's land. So whereas Holm would have unlimited right to consume or divert water from a non-navigable body flowing past his land, since that would not involve trespassing on others' land, he can use the Mazon's surface water (like for kayaking) only along his own border.[8]

- Fixtures

Fixtures are personal property items that have become permanently connected to real estate, in a legal sense. Obvious examples: plumbing pipes, electrical wires, kitchen cabinets. Each is personal property when on a truck being delivered to a construction site, but becomes part of the real estate when it is seen legally as having been incorporated into the land. Often this connection relates to a firm physical attachment, but not always.

If an item is a fixture, then it should accompany a sale of the real estate without the buyer's need to specify it or pay for it separately from the agreed on price for the land, as identified through the land's legal description. (An entire building actually is an example of a fixture.) If an item *could* potentially be viewed as a fixture but the seller does not wish to sell it with the real estate, the contract to buy/sell should clearly state this information. (Whether an item is a fixture also is important for knowing, if a bank must foreclose on real estate, whether a particular item, like an expensive chandelier, is included in what can be repossessed. What constitutes a fixture also is important for knowing what is subject to local government's *ad valorem* real estate tax, or which insurance company should indemnify for damage if different policies cover real estate and personal property.)

How do we determine if an item is a fixture? Three basic questions are addressed in the standard case:

1) What were the parties' intentions? Intent often must be inferred by a court based on specific circumstances, and of course property transactors' original intentions can be difficult to establish many years after the fact.

When a mini mart buyer changed gasoline vendors, the oil company that had installed the tanks and pumps offered to either remove them or sell them to the store buyer at market value, but he argued they were fixtures that became his with the store purchase. A court ruled that the equipment was the oil company's personal property because that was the original parties' intent (oral agreement with prior store owner), and the buyer had been informed of the agreement by the prior owner – even though the equipment was firmly physically attached, and the agreement between the oil company and the store's earlier owner was not in writing.[9]

A court ruled that a garage door opener *mechanism* was a fixture even though it was attached only with a few bolts and the door could be opened by hand without using the opener, because the opener was *intended* as a permanent addition that would pass with the sale of the real estate. The issue was whether a ten-year stature of limitation for real estate cases or a longer limit for personal property should apply when parents claimed the opener was defective after the door fell and strangled their six year-old son.[10] (Even hand-held garage door *remotes* usually are viewed as fixtures intended to remain when a house is sold, as are door keys.)

But evidence of intent must be stronger than a seller's mere statement of what she had intended to do, if that intent was never disclosed to a buyer. A hot water tank and crystal chandelier (replaced with cheaper models), custom made window blinds, and two firmly affixed mirrors whose removal caused wall damage were ruled to be fixtures that should have remained when the home was sold, even though the sellers said they had installed those items intending to keep them – and indeed had brought the chandelier and mirrors along when they moved from earlier houses. The court noted that replacing the tank and chandelier was an admission that those items were necessary for full use of the property. It observed that the law's view of what constitutes fixtures had become more inclusive over time, stating that "luxuries of a given generation become the necessities of the next."[11]

2) How is the item *attached*? Permanently, as with mortar or bolts? And would there be damage to the remaining improvements, or damage to/destruction of the item itself, if it were to be removed?

Secure physical attachment usually is evidence that an item would be judged to be a fixture that should accompany the sale of the land; think of furnaces, or sinks and ceiling lights (often called plumbing *fixtures* and light *fixtures*). Custom-built grain storage bins were ruled to be fixtures rather than farm equipment (issue was whether the real

estate or business lender had a claim on the bins' value after farm went bankrupt); among the points a court raised was that trying to remove the bins from the concrete foundations to which they were bolted would have reduced them to a "mass of crude materials".[12] In another case a divorcing couple had installed a grain bin set in concrete on land where the wife had only a life estate; in ruling that the bin was a fixture that should remain for the party with the remainder interest (to be discussed later in this Topic) the court noted the husband's comment that moving it would cost about as much as buying a new one.[13]

3) Is the item specially *adapted* (sometimes called "constructive annexation") or *needed* for use with existing improvements (*e.g.*, old-fashioned removable storm and screen windows – a test of what is reasonable)?

Lawrence Paul bought a suburban Cincinnati property (97 acres of land, 17-room Tudor style stone mansion, barns, stable with living quarters) for $575,000 in 1971 from deceased Mr. and Mrs. Long's estate. The house at Alberly Manor, also called Long Acres, was built in 1926 by the grandparents of either Mr. or Mrs. Long. Paul let a Long daughter and her husband stay living in the house, rent-free, for three months after the closing. By the time he got possession numerous items that were shown with the property had been taken by Longs' four surviving children, and Paul sued for lost value. A court ruled that a few missing items were "furnishings" the surviving heirs had inherited under Longs' will. But some items were obviously fixtures that should have been left for the buyer, and some – including four statues that stood in a garden area – were also fixtures, though not as obviously so.

Paul may have feared the Long heirs would try to take items they saw as heirlooms, because in the purchase offer he took the unusual step of identifying specific "fixtures" to remain (included were plumbing, electrical, and carpeting, although not the statues). And the statues were not permanently physically attached; they could just be hoisted up without damaging the statues or pedestals. But the court noted that pictures of the statues appeared in the property appraisal, and that without the statues the pedestals, with protruding six-inch pipes for anchoring the statues in place, looked like they had been vandalized. It held the statues to be fixtures because they were part of the "character" and "visual effect" of the "elegant" and "sumptuous" property, essential to the owner's full "use and enjoyment." The judge ordered the Long heirs to pay Paul the money value of fixtures taken plus attorney fees, interest, and punitive damages (for taking the obvious fixtures); and ordered the bank acting as the Longs' trustee to pay money damages and interest, primarily for failing to maintain the property's landscaping.[14]

The question of statues a fixtures seems to have first been addressed in the U.S. more than a century earlier, when a court held that an outdoor statue and sundial were fixtures, even though each merely rested atop the stone base built for it and each could be moved without damaging the item itself or the base. It noted that the four-ton statue's weight alone secured it firmly in place, that having a raised stone base without the statue or sundial would create an "objectional deformity," and that the statue and sundial being made of the same red sandstone the house was built from showed the original owner's *intent* that they were permanent additions. The court even cited the French Napoleonic Code's holding that placing an otherwise movable statue in a niche specially built to hold it showed an intent that it was to be part of the real estate.[15] And for you Hollywood fans: when singer Adele was negotiating to buy actor Sylvester Stallone's Beverly Hills mansion for $58 million in 2022 she insisted that the poolside statue of boxer Rocky Balboa from movie fame remain as part of the transaction; reports did not specify whether she viewed the statue as a fixture or merely as personal property she wanted thrown in to seal the deal.[16]

Items that might not seem to be fixtures under the three criteria above have been found by courts to be fixtures in specific instances because of their relationship to the character of the property or the intent of agreeing parties:
- Makeshift greenhouse consisting of framing pieces (that had to be driven two feet into the ground) and plastic sheeting, bought used by a plant nursery and reassembled after three years in storage, was found to be a fixture because nurseries need greenhouses (issue was whether local real estate tax assessment should increase).
- Two china cabinets and a book case were ruled to be fixtures, because they were custom made for the house and firmly attached to the walls (issue was whether the divorcing spouse who got the house or the one awarded the furniture should get those items).[17]
- Bleachers that pulled out from school walls were found to be fixtures even though marketed as "portable" and not attached to the floors; issue was whether the statute of limitation laws relating to real estate or to personal property should apply when parents of an injured child claimed the bleachers were defective).

Items that might seem to be fixtures under the criteria above but were found by courts not to be fixtures:
- Above-ground swimming pool that local government included as real estate for tax assessment purposes because it had a deck built around it, but the court held that it was personal property since it could easily be taken apart and moved, and was served with water and electricity only by lines running from the house.[18]
- In a highly unusual case gutters on a house were found to be personal property because a home improvement loan for purchasing the gutters listed them as personal property, plus the particular judge noted that gutters wear out

and can be replaced without damaging the roof (but – gutters are firmly attached and are essential for channeling water from a home's perimeter to prevent flooding, so gutters certainly almost always would be seen as fixtures).

The Wisconsin court in the bleacher case was skeptical of the significance of "permanent" physical attachment more generally, noting that any type of improvement that can be assembled can be disassembled. [Some lawyers say that if you read enough cases, you can find one to support just about any position or any legal argument.]

When your ancient instructor worked in appraisal for a lending institution decades ago, local practice generally treated stoves as fixtures that stayed when houses sold unless otherwise specified, while refrigerators were not (reason may have been that moving a stove often would have required disconnecting it from a natural gas line).

Trees, shrubs, and lawns on residential lots are not fixtures technically (they are *fructus naturales*), but normally are considered part of the real estate that should not be removed (so "trees" is not a good example of something that is not a fixture, because they function the same way). But crops in a field normally are seen as personal property of the party that grew them (crops that have to be planted each season are *fructus industriales*).

Of course, as in so many situations, fixture issues arise only if three things happen: an "iffy" item is not specifically addressed in the sale contract ("chandelier does not stay," "offer contingent on large screen television staying"), someone is unhappy with the outcome, and the unhappy party is unhappy enough to take legal action. And in an interesting counter-example, a Florida resident moving back to his native Italy followed his broker's advice to sell his $3 million home "as is" so buyers would not expect upgrades to an outdated kitchen – but thought that obligated him to leave the furnishings, as well. On taking possession the buyers were shocked to find $75,000 worth of high-end furniture and art work. When told he did not have to leave those things the seller told the buyers: keep them, but leave food out for the stray cat that comes around (they did). They kept some of the furniture and gave much away.

While animals would not likely qualify as fixtures, a South Carolina broker related that houses in equestrian areas often sell with horses or other animals included in the agreements.[19] (1960s sitcom character Wilbur Post bought a house that came with a talking horse named *Mr. Ed.*) And a California broker told of a farm sale with animals that included an aggressive, 500-pound Russian boar that escaped into the brush just before the closing. The buyer was an outdoorsman who tracked and shot the porker, and served it at a housewarming party.[20]

(Including items that are clearly personal property in a real estate transaction can cause problems. A mortgage lender will not lend more based on the value of non-real estate items, and the seller of personal property, even if used, might be required to pay sales tax to a state government. The home sale contract form recommended by the Naples Area Board of Realtors® in Florida attempts to address that potential problem with a statement that any personal property transferred with the house is deemed to be of no value, left for the convenience of the parties. But the Illinois Department of Revenue states, in response to a question on garage sales, that "*Items purchased for use in Illinois from persons who make isolated or occasional sales and are not engaged in the business of selling tangible personal property at retail are not subject to use tax*," so paying sales tax would not seem to be required here. But selling an item for more than you paid for it/invested in it generates federal and state income tax on the capital gain.)

Finally, "trade fixtures" are business assets that routinely are allowed to be removed prior to the end of a commercial lease; the law treats them as intended to be personal property when the lease ends even though they otherwise meet the definition of fixtures, especially in terms of permanent physical attachment and damage that might be caused to the remaining property in their removal (although the tenant should compensate the landlord for damage exceeding ordinary wear and tear). Interestingly, a court ruled that windmill turbines are real estate and should be taxed accordingly, because of the permanent nature of their construction, and not trade fixtures as the power generating company that installed them had argued.[21]

Ancient Babylon's *Code of Hammurabi* seems to have recognized fixtures; law 41 states that a fence ("palings") put up on someone else's land becomes the land owner's property.[22]

II. Estates

If you hold an ownership or leasehold interest in real estate, then you hold an "estate." An *estate* is an interest in land that is (or at least may become) accompanied by right to occupy/possess the property. (One source defined an estate as a bundle of rights that accompanies title to land.) An obvious example of an estate holder is a traditional "sole owner" who holds the full bundle of rights.

But there are all kinds of other examples. Consider a party that holds only part of the bundle of rights (think of an apartment tenant, who has rights of use and exclusion but not disposition). You can even hold an estate that will potentially confer ownership on you in the future, but may end up having no value if certain events occur.

We can classify estates as *Possessory* (current interest) *vs. Non-possessory* (future or contingent future interest). [Helpful definitions: a *grantor* is the party that sells or gives an interest in real estate to a receiving *grantee*; a *lessor* is a landlord and a *lessee* is what we frequently call a tenant – although we will see in a few pages that "... tenant" also is used in describing one of multiple holders of the same ownership interest. In a later Topic we will see that a *mortgagor* is a borrower and a *mortgagee* is a lender.]

A. Possessory (sometimes called "present") interests – estate holder has right to currently possess and use the land

1. Freehold Estates (originated with the English feudal system; think of them as traditional ownership interests). Freeholds exist for an *indefinite* time period. ["Fee" means the interest can be inherited; the name comes from old English law, in which the king granted land to someone who then owed a "fee" to the crown in the form of money or services, such as soldiers for the army.]

a. *Fee Simple Absolute* – the most complete possible claim involving the bundle of rights in real estate. It is the type of estate we would expect to see conveyed in the typical sale of a home or corner investment property. The holder can use the real estate in any way that does not violate laws or applicable private restrictions (examples: with the proper permits could tear down all existing improvements or cut down all trees on the land), and can dispose of it at any time and to any party by gift, sale, or will. Sometimes just called "fee simple" or "fee." [Fee simple absolute is AD&D,* as explained below]

b. *Fee Simple Determinable* – "*so long as*" or something similar would be the operative words. The grantee holds fee simple (full ownership) unless and until some event occurs. If it occurs (example might be opening a bar when a condition was that alcohol never be sold on the land) the estate *automatically* terminates, and ownership goes back to the grantor or grantor's heirs (*possibility of reverter* becomes *reversion*). It is a "fee simple subject to an executory limitation" if a third party (remainder) rather than the grantor (reversion) gets ownership upon the condition being violated. [The fee simple determinable estate is AD&D* for the grantee, but under common law the grantor's reversion right can not be sold or left in a will; it must go back to the grantor or grantor's heirs, though in some cases it can be transferred to the grantee holding the current interest – in fact sometimes state statutes completely override the common law rule, perhaps even allowing the reversion or remainder to be sold to anyone.] Automatic termination means that once the condition is violated the grantor (or heirs) is seen by the legal system as the owner, even if it takes years for that fact to become clear, perhaps when the grantee tries to sell the land or get a mortgage loan and a title search discovers that the condition has been violated.

c. *Fee Simple on a Condition Subsequent* – similar to (b), but reversion is not automatic. The grantor (or grantor's heirs) must exercise the *right of entry* (take legal action to reclaim ownership). [AD&D]* Such an estate was created when a country club sold land in 1986, stipulating that at any time in the future, "at the option of the Grantor … ," ownership would revert to the grantor if a nine-hole golf course was not operated on the parcel for the public's benefit.[23] *Conditions carry great weight*; an 1829 ruling held that house seller Gray could reclaim ownership because buyer Blanchard violated a condition subsequent by putting windows into the north wall, even though the condition was thought to have been imposed initially to protect privacy for Gray's sister living on the lot to the north, and when Blanchard put windows in he had already bought her property.[24] (Agreeing to forego windows was a major concession at that time. Octagonal-shaped houses actually enjoyed a period of popularity in the mid-1800s because they let windows bring light and ventilation from all directions.)

b and c sometimes are referred to as "qualified" or "defeasible" fee estates (while a is "indefeasible") – they are present interests that are accompanied by future or potential future interests of other parties called "reversions" or "remainders." Judges can override reversion or re-entry rights; for example, in California they will not be enforced if there are "no actual or substantial benefit to the holder of the power" (sometimes called "trivial") or "changed conditions or circumstances".[25] Another reason could be that a reasonable period has passed without action having been taken (different reference sources or court cases show examples ranging from seven years to several decades), and in some instances the grantor must periodically take active steps to re-affirm the intent to keep the restrictions in place. Under Kentucky law any estate created after 1960 whose wording looks like fee simple determinable with a possibility of reverter will be treated as fee simple on a condition subsequent, which becomes fee simple absolute if the stated condition does not occur with right of entry exercised within 30 years.[26] Illinois retains both fee simple determinable and fee simple on a condition subsequent estates, but the law limits enforcement of the conditions to 40 years, even if they were created before the law went into effect in 1959.[27] When a north-west Chicago suburban owner sold land the deed specified that the estate was a fee simple on a condition subsequent; conditions included

the land being used as a single-family home for at least 39 years and the property taxes being paid. The grantor also reserved the right to repurchase the property if the grantee chose to sell within those 39 years, at a price equal to the appraised value or the highest offer from another buyer (a "right of first refusal").[28]

In the often-cited *Mahrenholz* cases a southeastern Illinois couple (Huttons) donated part of their farm land to the local school district in 1941 on condition the small plot was to be used "for school purposes only, otherwise to revert to Grantors," and a school was built there. After the Huttons had died and the farm sold, the district stopped teaching classes at the school in 1973, using the building only for storage. Years later the Huttons' son sold his possible interest in the school land to Mahrenholz, who had bought the main farm and later sued the district for repossession of that smaller parcel, arguing that the school purposes condition had been violated. The district averred that its estate was fee simple on a condition subsequent, such that the son had needed to take action to get ownership back, and had forfeited the right by waiting an unreasonable time, plus under common law the son could not sell a possible reversion (that interest could pass only to heirs – though an Oregon court had held that the sale to a third party of a possibility of reverter decades earlier had been valid).[29] But Illinois appellate court judges ruled that the district held fee simple determinable, such that if a condition was violated ownership of the school plot would automatically have reverted at that time to the son, who thus (probably unknowingly) would have conveyed fee simple absolute ownership of the school acreage to Mahrenholz. Yet after all that detailed legal reasoning the same court determined in a final 1989 ruling (after earlier 1981 and 1984 rulings) that because desks, sports gear, and other district property was being stored in the building the "school purposes" requirement was still being met, despite the building's having fallen into serious disrepair for a period before some improvements were made.[30]

A grantee who violates a condition under either of these estates *forfeits* the property; generally no compensation is paid. But such a payment would not be illegal. In a Kentucky (ironically) case with similarities to *Mahrenholz*, a farmer granted the local school district a fee simple on a condition subsequent on some land in 1926, specifying a right to reenter and reimburse the $500 the grantee had paid if the land was not used for "school purposes." When the district tried to sell the property in 1998 the grantor's heirs tried to exercise the right of entry with the $500 payment, but the court noted that far more than 30 years had passed since the estate was created (the district wanted to sell but did not want to have to accept that low amount).[31]

d. *Life Estate* – possession during life of *life tenant* ("ordinary life estate") [A]* or life of some person other than the designated life tenant ("life estate *pur autre vie*"). [AD&D]* So a life estate *pur autre vie* could exist past life tenant's death; life interest passes to life tenant's heirs (but terminates at death of person on whose lifetime the life estate is based – thus a life estate is not a fee estate, because ultimately it can not be inherited). A life estate *pur autre vie* could come into existence when O deeds land "to B, for the life of A," or when O deeds "to A for life" and then A sells this ordinary life estate (right to make ownership-like use during her lifetime) to C.

A deed conveyed land to a grantee for her "natural life," with the property to "revert to heirs of her body" at her death. A court ruled that the estate received was fee simple absolute, not a life estate despite the "for life" language, because what the grantee held was AD&D. (The main issue in the case was that a potential buyer had tried to back out of a purchase agreement when he believed that the grantee held only a life estate in the parcel.)[32]

[As with a qualified fee estate, a life estate must have a future interest associated with it ("reversion" or "remainder," discussed below). The life estate might be used to meet someone's need for a residence or income during his or her lifetime, or sometimes as a tool for controlling estate taxes. The life estate is sometimes called a "term of years." Trusts are increasingly being used instead of life estates.]

A life tenant can put the land to profitable use and keep the income, but typically must pay property taxes, and can not be unduly careless or "wasteful" to the detriment of the value the remainder party will receive. In fact an Illinois court ruled that failing to pay the property taxes is itself a form of waste.[33] Courts in the U.S. generally have held that life tenants can cut down trees to improve the land or use as firewood, but cutting trees to sell can constitute waste; a Georgia court ordered a life estate holder to stop selling timber, from land where commercial cutting had never been done before, when his children, with the remainder interest, sued charging waste.[34] But an Illinois court ruled that a remainder party could not stop her life tenant step-mother from selling as much timber as desired because the remainder had no immediate claim to the property and the will creating the life estate did not expressly prohibit cutting trees for profit. It further ruled that because the remainder had no immediate claim she could not collect damages under the *Illinois Wrongful Tree Cutting Act* (yes it exists) from the lumber company that cut more trees than agreed to.[35] And sisters with the remainder interest in their late father's estate demanded an accounting of assets from their step-mother with the life estate, but a Kentucky court ruled she could not be guilty of waste since the will gave her the right to deplete assets if her income was not sufficient to cover her living and medical costs.[36]

Important point: You can sell, give away, or leave in a will only the interest that you hold. (You have property rights even after you die; your heirs get them.)

* In brackets above, *A* means *alienable* (you can sell or give it away during your life), the first *D* means *devisable* (you can leave it in a will; the recipient will receive ownership through an *executor's deed*), and the second *D* means *descendible* (if you die without a will, the state will direct the property to your heirs via an *administrator's deed*). Do you see why an ordinary life estate is *A* but not *D&D*? [And a no-longer used form of estate called *fee tail* required the owner to leave the land to direct descendants and keep it in the family; it seems that fee tail would be descendible but not alienable or devisable other than through sale/gift or will transferring it to the holder's heirs. An "entail" is a will that prohibits heirs from breaking up a deceased party's estate.][37]

An interesting late 20th century case involved a French version of the life estate, called buying *en viager* (for life). In 1965 lawyer Andres-Francois Raffray contracted with 90 year-old widow Jeanne Calment to pay her 2,500 francs monthly during her remaining life, and then upon her death he would own her "apartment" unit in Arles. By the time Calment died 32 years later, recognized as being age 122 and the oldest living human ever, Raffray had been dead for a year, and his survivors had kept up their obligation to pay the monthly fee. Ultimately Calment received more than $184,000 in 1990s buying power, more than twice her unit's value. The Raffrays nonetheless were fond of the supercentenarian, who for her part opined that "in life, one sometimes makes bad deals."[38] They might have been less fond, perhaps feeling defrauded, if they had known that years later a longevity researcher would allege that the woman long known as Jeanne Calment was actually her daughter Yvonne. He believed that Jeanne died in 1934 and Yvonne reported herself as the one deceased – and assumed her mother's identity, just to avoid estate taxes.[39]

The freehold estate held by the fee-holding owner/lessor who has granted a lease to a lessee/tenant is called a *leased fee*. Real estate appraisers often must estimate the values of leased fee interests; the amount of rent the lessor gets to collect from the lessee has a major impact on the value of the leased fee estate, because when real estate is sold the buyer usually is obligated to honor the terms of any existing leases, can not change terms on the lessees.

2. *Nonfreehold* Estates (think of these as leasehold interests). Leaseholds exist for a *definite* (or at least limited) time period. There are four types (which we will discuss in more detail in our coverage of leases):

a. Estate for years (or for a stated period; lease should always be in writing if for more than one year)
b. Estate from year to year (or period to period, often has 30/60 days' required notice of intent to terminate)
c. Estate at will (lasts as long as lessor & lessee agree, but usually the law requires reasonable notice)
d. Estate at sufferance (tenant is still on the property while landlord is undertaking eviction procedures; an interesting example occurs when existing leases become void after a lender forecloses on a loan and becomes the owner of the mortgaged property, unlike when a property is sold – although residential leases that had original terms of no more than a year generally have to be honored)

B. *Non-possessory* (sometimes called "future" interests) – estate holder has the right, or a *possibility* of receiving the right, to possess the real estate in the future, at which time the interest will become possessory. Note that real estate has value only if the owner can possess (use) the property (and/or transfer this right to another party through a sale or lease). [So we can think of these as being at least *potential* future interests.] [As noted earlier, some state laws limit nonpossessory estates to perhaps 30 or 40 years in duration so there will not be uncertainty forever.]

1. *Reversion* (or "possibility of reverter") – ownership returns to the original grantor (or original grantor's heirs). Reversion can occur when:

a. a leasehold period ends
b. a condition is violated in a fee simple determinable or fee simple on a condition subsequent
c. a life estate ends, if
   i. reversion to the grantor is specified <u>or</u>
   ii. no provision is made for any reverter/remainder interest (so it reverts to grantor by default) <u>or</u>
   iii. there is a contingent remainder and specified condition is not fulfilled (see below)

2. *Remainder* – ownership passes to a third party after a life estate terminates. Can be:

a. *Vested* – certain to occur. "To P for life, with remainder to Q" or "to P for twenty years, then to Q."
b. *Contingent* – a condition must be met, or else ownership reverts to grantor. "To P for life, with remainder to Q so long as Q continues to use the land as a farm" (or so long as Q is still alive). If Q never farms, or stops farming (or dies before P does), ownership *reverts* to the grantor (or the grantor's heirs).

The reversion or remainder interest holder can prevent a life tenant from engaging in acts of "waste" (either direct "voluntary" or negligent "permissive") that would harm the value of the remaining interest. "Ameliorative waste" is the curious term used when property's value is actually *increased* by actions of a life tenant who has not obtained approval from all reversion or remainder parties. That permission would be important if a life tenant wanted, *e.g.*, to convert longstanding family farm land to a retail mall, with more financial but less sentimental value. In one case a building was destroyed in a hurricane; the court ordered the life tenant either to rebuild with the insurance proceeds received, or else put the money in the bank to benefit the remainder holders, and just collect the interest. But note that the holder of a reversion or remainder interest receives only the interest the original grantor had; if someone has a life estate in a parcel of land on which alcohol can not be sold, at the death of the named individual the remainder party gets a fee simple determinable "no alcohol" estate. A lessor can be seen as having a reversion interest in the land, with the ability to exercise the right of entry becoming operative when the lease period ends.

Someone who bought both a life estate and the remainder interest would effectively have fee simple ownership of the land (might be the reason for buying a life estate), though state laws can differ in how this result comes about; in Illinois a life estate generally can be sold only with the approval of any parties that hold remainder interests. (Laws in a few states recognize the "Lady Bird," or enhanced life estate, deed, through which a land owner grants a life estate to a third party yet keeps full control, including the right to nullify the life estate and sell a fee simple interest in the land. So the grantee has only a contingent life estate, not even a vested interest. This type of transfer can protect the property from the grantee's creditors and offer other financial planning benefits. The deed got its name from a 1960s legal writer whose examples used the names of President Lyndon Johnson's family members.)

III. Concurrent ownership of real estate

Ownership interests we have discussed (fee simple, life estate, remainder) may be held by one person alone ("estate in severalty"), or by two or more people as "cotenants."

We are not talking about divisions involving space (one person owns surface rights, another owns mineral rights) or time (one person holds life estate and another holds remainder interest). Cotenants *share* an undivided interest in the same estate. Example: husband and wife sharing fee simple ownership of a family home, or three siblings sharing a remainder interest that follows their mother's life estate in some farm land.

Cotenants own the whole tract, but own it together. (If one owned the north half and the other the south half, we would be discussing two neighboring parcels.) Ownership percentages may be equal, but do not always have to be. As discussed above with life tenancy, a cotenant can not engage in waste that would harm other cotenants' interests. A cotenant who pays for *needed repairs* generally can demand reimbursement from fellow cotenants, based on their proportional ownership interests. A cotenant who unilaterally decides to pay for *improvements* generally can not demand any payment from other cotenants, but when the land is partitioned (see below) or sold should collect for any value increase the improvement created – or pay the others if a poorly chosen "improvement" decreases value. A cotenant who chooses not to be present on the land generally is not owed rent by the occupying cotenant(s).

Methods of concurrent ownership:

A. *Joint Tenancy* (or Joint Tenancy with Right of Survivorship) – usually married couples own real estate this way, but they do not always (nor are spouses the only parties who own land as joint tenants). If the deed transferring title does not explicitly specify joint tenancy (might say "as joint tenants, with right of survivorship, and not as tenants in common"), then the law presumes *tenancy in common* (see below). Why? It seems reasonable to assume an owner would want his heirs, not cotenants, to inherit ownership (recall you can co-own land with an unrelated party). Also, the law looks skeptically at an ownership form that bypasses probate when the owner dies. (Feudal law presumed joint tenancy so that the overlord would eventually have fewer parties to deal with, and English law into the 1700s presumed joint tenancy to maintain large land holdings as a base for wealth and political power.) A mother and son received a deed granting them a house as "tenants in common, with right of survivorship." When the son died after having married and had children, the mother said that she was a joint tenant who should receive all of the son's half. But a court ruled that the two had been tenants in common, which comports with the idea that a deed should be especially clear in creating a joint tenancy – though a major consideration in this case was that "tenants in common" was stated before "right of survivorship.[40] Joint tenancy is not inheritable; it is not D or D.

For a joint tenancy to exist, four *unities* generally must be present:

1. *Time* – all joint tenants must acquire their interests at the same time and in the same transaction/with same document of conveyance. Exception: in Illinois, a current owner who decides to add a joint tenant can do so

by deeding to herself and other party(ies) as joint tenants (letting you do in one transaction what otherwise would take two). In a few states you must deed to a "straw man," who then deeds back to you and other(s) to convey ownership to all through the same document and thus keep the unity of time intact.

2. *Title* – all joint tenants must hold the same estate *e.g.*, fee simple or life estate (not one with life estate and one with remainder), and one joint tenant's interest can not be mortgaged separately from the others' interests.
3. *Interest* – all joint tenants must hold equal percentage interests: ½ each if two cotenants, ⅓ each if three cotenants, *etc*.
4. *Possession* – actually, it is equal *right* to possession that matters. For example, assume that three sisters inherit a farm as joint tenants. Only one ends up living on and operating the farm; this does not invalidate the others' joint tenancies. Also, it is very unlikely that an occupying joint tenant would be able to successfully bring an adverse possession (discussed later) action against others, because joint tenants are seen to represent each other's interests, and to have each other's permission to be there (joint tenant's use can not be "hostile").

(The mnemonic T-TIP, for time/title/interest/possession, sometimes helps in remembering the unities.) Joint tenancy can be terminated by mutual agreement of all joint tenants, or by unilateral action of one joint tenant who breaks one or more unities. Examples: joint tenant breaks unity of time by selling her share to an outside party, or breaks unity of interest by mortgaging her share, particularly if laws of the state in question treat a mortgage as a qualified transfer of ownership ("title theory") rather than a pledge of the property as collateral ("lien theory"). (A joint tenant does not need other joint tenants' permission to sell, mortgage, or otherwise change his interest, though there are consequences when such an action occurs.) In fact, under Illinois law a joint tenant who wants to end or "sever" the joint tenancy can deed his interest in the property to himself as a tenant in common, eliminating the former need for a "straw man" transaction in exercising the "right of severance."

When a unity is broken, the terminating cotenant (or her grantee) becomes a tenant in common with the others, who remain joint tenants with respect to their own shares. A childless divorcing couple signed an agreement to sell a ranch they owned and split the proceeds equally. When the husband died before any sale could take place the wife claimed that the entire ranch became hers because they had owned it as joint tenants. But a court ruled that the intent to divide their interests, as shown by the written agreement, ended the joint tenancy and made them tenants in common – so his half passed through his recent will to a nephew named to inherit his whole estate.[41]

B. *Tenancy in Common* – the type of cotenancy the law assumes in absence of explicit designation as joint tenancy. (The four unities need not be present; interests can be received at different times, and two owners' shares could be ½ and ½, but also could be ⅓ and ⅔, or ⅙ and ⅓ and ½ for three owners, or any other proportions. Upon the death of a cotenant, her share passes to her heirs or devisees, so tenancy in common *is* inheritable. Transfer of a share to an outside party does not terminate a tenancy in common.

If one or more joint tenants or tenants in common want to sever the co-ownership but one or more others do not, a lawsuit for *partition* may result. Courts tend to assume that *partition in-kind* would be preferred, with previous co-owners becoming tenants in severalty of the smaller resulting tracts, which those wanting cash then could sell. (Tenants in common sought a sale by partition of their land that contained a house and office building; because partition in kind would not be practical, a court ordered the less liquid co-owner to sell out to the co-owner that could buy without having to get a loan, for reasons that included a timely sale's preservation of value.)[42] But *partition by forced sale*, with previous owners simply receiving their proportional shares of cash generated by selling, often to an outside party, could be ordered if in-kind is impractical; forced sale may be necessary if the land contains, *e.g.*, a building that can not physically be split. And judges try to avoid outcomes that would be especially disadvantageous to any of the individual owners. Three of six relatives who owned three separate farm land parcels as tenants-in-common, with different ownership percentages, filed a suit for partition. The three wanted a forced sale, but a court noted that other owners (the petitioners' parents and brother) wanted to keep parts of the jointly owned land that bordered other land they owned individually. It ordered an in-kind partition that it acknowledged was unusual because the three petitioners, who had wanted individual cash payments, ended up in the less liquid situation of tenant-in-common ownership together of the remaining land.[43]

Financially struggling Franklyn Rist (FTR Farms) wanted to dispose of land he and Timothy Rist (Rist Farm) had bought for $1.75 million in 2011 as equal tenants-in-common. T. Rist proposed creating separate parcels: he would keep the 176-acre piece south of a stream that crossed the property, and give F. Rist the 135-acre north piece to sell, plus $215,000 for receiving the smaller tract. But F.R. turned those terms down and filed a suit for partition. Bids solicited by a court-appointed referee brought $1.62 million for the whole tract but only $1.6 million for the separate pieces, and the court ordered partition by forced sale of all 311 acres, despite T.R.'s offer to make F.R. whole if he could keep the south portion, and despite both Rists' objection to a partition sale at a price so far below what they

had paid. The ruling reasoned that if T.R. kept the southern land and gave money to F.R., his remaining value would be less than half of the higher amount the entire tract could be sold for, and the court said it could not legally approve a resolution that disadvantages any party relative to a market value settlement. It also stated that agreements involving "owelty" (equalization) payments are problematic because of the uncertainty of what a fair amount should be. (The court was not in a position to consider that T.R.'s investment value in the south piece surely was far above the amount indicated by "market" bids; and the Rists had borrowed heavily to buy the land – lenders' demand that they get the $215,000 may well have affected F.R.'s rejection of T.R.'s offer of the north land plus cash – so we must assume T.R. lacked the wherewithal or liquidity to outbid the winning buyer for the whole parcel.)[44]

[These two cases show that 1) you must choose carefully who you own real estate with, and 2) you should think twice before taking a dispute to court; reach voluntary agreements when you can.]

C. *Tenancy by the Entirety* – a special type of joint tenancy available to married couples in some states (including Illinois). Can make it easier to handle inheritance matters after a spouse's death, also protect property from spouse's creditors. A difference from joint tenancy is that one tenant by the entirety can not sell without the other's approval. To have a partition sale the couple must first divorce, after which they become tenants in common.

D. *Tenancy in Partnership* – a special type of joint tenancy available to business partners for their business real estate. Provides for right of survivorship and protection of business assets from partners' personal creditors. Also causes real estate to be property of the partnership itself, so heirs of a deceased partner have claims on money but not on specific real estate assets (life insurance can be a tool for providing money to deceased partner's heirs so the remaining partner can keep the business-related real estate).

E. *Community Property* – exists in only nine states (Illinois is not one). Idea is that any property, real or personal, acquired during marriage belongs to both spouses, even if only one supplied the funds to pay. Exception is if during the marriage one spouse gets some real estate by gift/inheritance.

F. *Condominium* – owner holds unit that she occupies in fee simple; holds a share of common areas as a tenant-in-common with other owners of units. A board of directors or owners' association elected from among unit owners sets and enforces *bylaws* and condo owner association policies, including fees that each unit owner must pay (typically monthly) to maintain commonly-owned areas and provide for eventual replacement of items like the roof shingles that relate to the entire property rather than to individual units. Because the "unit" in an apartment-like residential condo project usually is defined as the interior living space, even that unit's deck or patio usually is part of the common area owned jointly with other residents and maintained by the owners' association. The owners' association at an upscale New York City condo project (had some $100 million units) was to remain under the developer's control until 90% of the units had been sold or five years had passed since the first unit was sold, whichever occurred later. (The now-owner-controlled association sued the developer in late 2021 for $125 million for poor construction, and for alleged poor maintenance while the developer had decision authority.)[45]

Bylaws example: restrictions on pets, or sometimes controversial prohibiting of flying especially large American flags over noise concerns. Note that unpaid monthly fees generate a lien (a claim on property value) that allows the condo owner association to take possession of the unit and sell it to get the money – and that lien has priority over the claim of a mortgagee that lent some of the money the owner paid for the unit. [A type of condominium ownership called "time share" has become popular with resort properties in recent decades. Ownership form can be tenancy-in-common (ownership share = percentage of year you can occupy, often a week) or a complex series of mini-estates with remainder interests to co-owners. The right to use a time share unit actually might be structured as a license rather than real estate ownership, and financing terms can be much less favorable than those generally seen with typical types of condominium properties or detached houses; one report showed loans for time shares bought from the Marriott Vacations organization in 2022 carrying 12-year average maturities and 13.4% annual interest rates. Buyers often express regret over buying time shares, for reasons that include high purchase prices, ongoing maintenance costs, and difficulty in trading for space in other vacation properties. In early 2024 many owners were selling units for which they had paid $15,000 – $30,000 for $1, and agreeing to pay buyers' closing costs.[46]]

(While common usage might suggest that "condominium" means a multi-family residential structure with separately owned interior spaces – indeed, the word comes from the roots con + dominium = live together – condominium is actually a form of ownership, which can be applied to other types of structures as well. For example, in large cities there are parking garages with condominium ownership: an individual owns the space she parks in, and owns the ramps and driving lanes and other common areas as a tenant in common with other parking space owners.)

The Miami, Florida area saw many cases of "condo termination" following the summer 2021 collapse of a 13-story residential condominium building in which 98 people died. Developers made offers to buy older residential condo buildings so they could demolish them and build new upscale residential projects on the land – but the offers were conditioned on being able to buy all the units and not face holdout problems. Bylaws tend to require an affirmative vote from a supermajority of unit owners (usually in the 67 to 80% range – a Chicago ordinance requires an 85% supportive vote for a condominium "deconversion") to terminate a condominium arrangement, since doing so can have such significant financial and lifestyle impacts on all unit owners.

A somewhat humorous dilemma for association board members (perhaps not humorous to them) relates to the recent rise in popularity of pickleball, with banks of small courts often described by critics as congested and loud. A late 2022 news account told of controversies at many upscale Florida condo complexes, often with older owners. In one case an owner group sued the board for building three pickleball courts with reserve funds they felt were to have been earmarked for other uses. The board president, a lawyer, held that the expenditure was appropriate, was made only after residents had provided feedback, and included noise abatement features.[47]

But the need to deal with unhappy residents can actually make board membership physically dangerous. In late 2022 there were two separate incidents, one in Rome and one near Toronto, in which unit owners with long-running disputes with their condo boards went to board meetings and fatally shot numerous board members (three were killed in Rome; five were killed in Vaughn, Ontario where a sixth victim survived).[48]

G. *Cooperative* – similar in some ways to condominium, but not really a form of real estate ownership, because what the owner holds is stock (personal property) in a not-for-profit corporation that, in turn, owns the real estate. The stockholder gets a "proprietary lease" on the portion of the property occupied; *no deed is delivered when co-op ownership is transferred*. As with condominiums there is a board of directors, and rent or monthly fees typically must be charged to cover costs of maintaining common areas and making payments on a mortgage loan secured by the entire property. (Then an owner who borrowed some of the money to pay for the shares of stock, and secured by those shares, would have to make a separate monthly loan payment.) While it can apply to various property types, "co-op" is best known for its use with high-end multifamily buildings in New York City, with units sometimes selling for tens of millions of dollars. Residents' lifestyles and finances become intertwined, so the building's bylaws can place many restrictions on buyers, and co-op boards have wide power to deny individuals the right to buy shares, even without giving explicit reasons why an applicant is rejected, as long as they comply with fair housing laws (not discriminating based on race, age, gender, *etc*.). So a hopeful buyer might be turned down for financial reasons since owners are jointly and severally liable for common expenses (a typical provision is that the buyer can borrow no more than 80% of the purchase price for the stock), and some high-profile entertainers and former politicians have been turned down by co-op boards over concerns that their presence would attract crowds or publicity-seekers and disrupt the residents' tranquility. A condominium owners' association, or the development company in a time share project, might have a special right to purchase ("right of first refusal") when units are sold, giving it a somewhat lower degree of power over who can become a fellow owner than a co-op board would have.

H. *Syndicate* – fancy generic term for a group of people or organizations that combine money and managerial resources to own real estate together. Examples: general partnership, limited partnership, S or C corporation, Real Estate Investment Trust (see below). Sometimes done to shelter income from taxes.

I. *Illinois Land Trust* – a trustee takes legal title, while a beneficial owner has rights to occupy/possess and otherwise control the property. This arrangement can in some ways facilitate management and transactions, but also is criticized for allegedly allowing the beneficial owner hide his or her identity and possibly even hide property from creditors. Usually the arrangement lasts 20 years and can be renewed.

J. *Real Estate Investment Trust* (REIT) – a corporation that invests in and manages a portfolio of real estate (equity, debt, or both), remaining tax-exempt at the entity level (avoiding the double taxation of income that corporations usually face) by passing most income to shareholders as dividends. Heavy losses earned the REITs a bad reputation in the 1970s, then they made a comeback, and of course they generally suffered in the mid 2000s real estate market downturn – and were especially hard hit when 2020 Covid shutdowns raised concerns about future values of office and retail properties as many people worked and shopped from home. REITs often specialize in owning particular property types. Like mutual funds buy the stocks of other kinds of corporations, some mutual funds buy shares of multiple REITs, allowing a small investor to gain exposure to a diversified mix of income-producing real estate with a small amount of money. Income tax law changes passed in late 2017 created some new benefits at the individual REIT shareholder level. We will discuss REITs in more detail in our Topic 18 real estate investment coverage.

IV. Real estate interests other than Estates (will not result in right to occupy/possess and fully exclude others)
A. *Easement* – the right to make limited use of a specified portion of another person's land. Frequently it is the *right to cross over* someone else's property (or run pipes or power lines across it, or drain water onto it). Scope is usually limited to the specified use (right to drive along a 12-foot strip does not give the right to use other parts of that land, and right to use a beach does not convey rights to operate a jet ski rental business there). But the easement holder typically could take unspecified reasonable actions to preserve the value of the right (put down gravel so you do not have to drive through mud, cut down trees whose roots could interfere with underground pipes), and could use the easement in keeping with changing technology – like regularly driving a car on an easement that specified horse and wagon use when granted in 1913.[49] But when a McHenry County farmer bought lot 24 in a residential subdivision, and then used the subdivision's easement to a public road to get goods and livestock to his adjacent farm operation, the Illinois supreme court ruled that the farm use was a disallowed added burden on the easement even though he owned lot 24, because his farm was not part of the land the easement was to benefit.[50] And while a grantee could pave the dirt road where he had an easement to access his land, and even build a bridge over a stream, running power lines was a forbidden expansion of the easement's scope (despite changed technology).[51] Two types:

1. *Easement in gross* – involves the need to cross or use land owned by another party, but not in relation to another specific parcel. This type of right might be held by a government agency or a public utility firm; think of a power company's right to run its lines over/under your land, and go onto the property to maintain them. But a private party also could hold an easement in gross. A Kansas City restaurant bought an adjoining parking lot from lawyers who retained easements to use four spaces during business hours; the reserved rights were held to be easements in gross, such that even though they were not connected to ownership of any specific land the easements remained intact even after one lawyer moved his law practice far from the parking lot and had not used his two spaces for more than a decade.[52] The easement in gross stays in effect even when the "servient estate" – the land burdened with the easement – is sold to subsequent owners (thus we say that an easement "runs with the land"), and the holder of the easement sometimes can share its rights to use the servient estate with other parties as long as the burden on the servient estate owner is not materially increased – an electric utility that let AT&T use its power line easement to run fiber optic cable was found not to have created added burdens for the servient estate's owner,[53] and a power company with an easement to divert water onto private land could also allow third parties to anchor their docks on the bed of the resulting lake.[54] The servient estate owner usually is allowed to use the part of her land that any easement (in gross, or appurtenant as discussed below) runs on as long as the use does not impair the dominant estate holder; an example might be planting flowers in soil above where a buried pipeline easement runs.

2. *Easement appurtenant* – involves two (usually adjacent) parcels: the servient estate and a "dominant estate," sometimes called dominant and servient "tenements." (The easement itself is not an estate, but the land involved is someone's estate.) Usually we see a case in which the owner of the dominant parcel can not fully use or enjoy his land without the use of the servient parcel. Easement appurtenant also runs with the land, but with an easement appurtenant the future owners of *both* parcels are bound by the agreement. Common situations could include a shared driveway,[55] the right to cross an adjacent parcel to get access to a public road ("easement of right of way,"), and a solution to an "encroachment," such as a garage built one foot onto a neighbor's lot.

Interesting easement appurtenant example: a golf course (the dominant estate) had an easement that allowed for golf balls to land in yards of the related, surrounding housing development, and for golfers to enter unfenced yards to retrieve balls they had hit (they had to get owners' permission to enter fenced yards). But golf balls do not always enjoy easements. A manufacturer bought 23 acres of land from the operator of an adjoining golf course, and when errant balls were continually hitting the building, employee cars, and the workers themselves the firm sued to force the operator to reconfigure the course. The sale contract's requirement that the course operator maintain protective fencing was ruled to show there was no implied easement for balls to land on nearby properties.[56]

[Damage done by a poorly hit ball generally is not the legal responsibility of the golfer, unless that individual was acting intentionally or was especially careless – or the rules of the course or club required the player to pay for any damage done, in which case the golfer's personal liability insurance might pay. More typically the course's liability insurance might cover costs, or an affected home owner's insurance policy would pay for damages up to a specified limit. In early 2022 a Massachusetts family sued for almost $5 million, much of it for emotional distress, from the adjacent golf course after almost 700 balls landed on their lot over four years; the house was hit so many times by players on a curved "dog-leg" hole that 26 windows, all siding, and part of a deck had to be replaced. The country club refused to install netting the home owners had asked for, and its attempts to reconfigure the hole so balls would avoid the home's direction were unsuccessful. The house was the servient estate for an easement allowing for the "reasonable and efficient operation" of a golf course. In December 2022 a $3.5 million jury award in the home

owners' favor was overturned, with the case remanded for the lower court to determine whether the number of offending balls was reasonable under the circumstances.[57] One legal source stated that a home owner likely would bear "errant golf ball liability" if the house was built after the course already operated, just like a golf tournament spectator assumes the risk of injury, because the risk of balls hitting the house would have been obvious.]

An easement can be *affirmative* (*e.g*., permission to cross servient land) or *negative* (servient owner must refrain from certain acts, *e.g*., blocking a dominant parcel's sunlight or ocean view [a "scenic" or view or line of sight easement that requires leaving land vacant to preserve a neighboring owner's unobstructed view]; or can not develop land [a "conservation easement" that requires leaving land and any improvements in their current state]; or can not alter original improvements except in accordance with stated guidelines [a "historic preservation" easement that would let a local public body or private organization prevent future owners from making unapproved changes]). A negative easement also might prevent servient land's owner from excavation that could harm a dominant parcel's structural support. The grantor of a negative easement that lets others stop him and future owners of his land from, *e.g*., demolishing a historic building, might be able to get his assessed value for local property taxes reduced, and also claim the value lost through the restrictions as a charitable contribution to reduce his federal income tax. Former President/current candidate Donald Trump's donations of conservation easements on several golf courses have generated major income tax savings. These easements, given to local governments or private groups, assure that structures will not be built and that the course grounds will be open to the public for strolling or bird watching. Appraisals showed an easement given to the city of Doral, FL reducing the 184-acre Blue Monster golf course's value from $668 million if developable to $345 million with the restrictions, a $323 million loss that more than offset a $100 million gain Trump realized in 2022 on a hotel sale. But the Internal Revenue Service often challenges such easement donations and the supporting appraisals.[58] An Oak Park, IL owner can make a range of structural changes to her house, designed by famous architect Frank Lloyd Wright, but an easement the previous owner gave to a Wright preservation group requires her to keep two Wright-designed glass ceiling fixtures in place.[59]

How are easements created? Six ways:

a. *Agreement* – the owner of the servient tract agrees to the easement, for mutual benefit or for money paid. The servient estate owner delivers a "deed of easement" to the dominant estate's owner; the creation of an easement must be in writing in keeping with the statute of frauds (discussed later with contracts); plus it is important to have a document that can be recorded in public records (to be discussed with deeds and title).

b. *Grant or reservation* – the owner selling a fraction of a parcel explicitly *grants* an easement to the buyer or *reserves* one for himself in the deed that transfers ownership. Often for the purpose of gaining access to a road. The golf course situation noted above likely would result from the developer, who originally owned the land where the golf course and houses ultimately were built, reserving the right for balls to enter the private yards. With the easement as protection a golf business could bid to buy the land for the course without fearing later complaints or even lawsuits. A town sold oceanfront land to private owners in 1882 while reserving an easement for the public to bring boats and nets onto the beach for fishing, but a court ruled in 2021 that the town did not have the right to use the beach easement for public parking.[60]

c. *Implication by prior use* (implied grant or implied reservation) – the law views an easement to exist even though none was explicitly granted or reserved, because such an easement is deemed necessary for one owner to enjoy full use of her rights in the land without incurring unreasonable expenses. Requisite conditions:

- One parcel has been split into two, but no easement was expressly granted or reserved
- Prior to splitting parcel up, the seller had used the tract in question for the use allowed under the easement
- It is necessary for use to be allowed to continue, if the dominant owner is to get full benefit from his land

A sold his house and the land the house sat on to B, but retained land under which ten feet of the septic system piping ran. When A ordered B's grantee C to remove the piping from his land, a court ruled that C had an easement by implied grant to continue using that ten foot strip the same way that A had in supporting this essential system.[61]

d. *Implication by necessity* – easement necessary for reaching public road. It is similar to implication by prior use, involving two parcels that were once jointly owned. But with easement by necessity if one severed parcel ends up being landlocked (an easement is sought not just for convenience), its owner can cross the other severed parcel to reach a public road (specific previous use of the affected part of the property for road access is not a required condition). A convent that owned landlocked "tract 19" was ruled to have an easement by necessity to cross abutting "tract 18" to reach a road, because they had no other means of access, and had been given the land

by a donor that was once a co-owner of land that contained both tracts.[62] But a court that expressed skepticism about any type of implied easement held that two sellers who *retained* landlocked portions without specifically reserving easements were not entitled to easements by necessity over a nearby private road just because gaining access to a public road up a high bluff would be impractical and prohibitively expensive.[63] Yet in some states, courts will actually condemn easements over land that that was not jointly owned to prevent a parcel owner from being landlocked, usually with the dominant estate holder paying compensation to the new servient estate holder. However, the siting of the easement granted might not be the location desired by the landlocked owner.[64]

e. *Reference to subdivision plat* – plat maps may show easements for use of, or access to, public areas, like crossing a private owner's land to get to a jointly or publicly owned beach. A government entity takes or "condemns" easements through its *eminent domain* power (discussed later).

f. *Prescription* – after unauthorized use (which must be open, hostile, and continuous/uninterrupted) for a given time (usually 20 years in Illinois, but in some states or some situations can be as few as 5; can achieve by *tacking* onto earlier land users'/owners' holding periods), a trespasser who uses property may be entitled to a permanent easement. (Similar, in some ways, to gaining ownership through *adverse possession*, to be discussed in Topic 4. In adverse possession "exclusive" means the user keeps others away; in easement by prescription "exclusive" means only that the user claims rights independently of others' claims; more than one party can have easement rights on the same land.) *Open* (sometimes "open and notorious") means the user is engaging in the activity on the land openly such that an owner exercising reasonable care would be aware of what the user is doing.

In a case that illustrates what open use means: Smith's Vermilion County farm consisted of two separate parcels separated by railroad tracks. For more than 27 years he and his employees crossed over the railroad right-of-way in the same 30-foot wide spot to move farm equipment beteen the parcels. When Mervis bought the right-of-way in 1973 and put up a barrier to block Smith's crossing spot, Smith sued claiming he had an easement by prescription because of longtime continuous, hostile, and open use. Mervis claimed Smith failed the "open" test (the railroad had not had "notice") because the remote location meant only train crew members, not company management, could see what Smith was doing. But a court ruled that Smith's use over such a long period, which included removing bushes and maintaining the short road, was sufficient to meet the legal test of being "open."[65]

[For the finance crowd: an interesting aside relating to railroads, though not to real estate. A railroad worker noticed several unfamiliar people in business suits visiting the train yard, and then a financial executive asked the worker to do an inventory of railroad property. He surmised that the railroad was going to be acquired by a larger firm, so he and some relatives bought shares of stock, and call options on the railroad's shares. After an acquisition did occur the Securities and Exchange Commission filed an insider trading suit against the family, which had made more than $1 million on its combined investment. A federal court found the family not guilty.[66]]

However, an Alaskan was deemed *not* to have acted in an open and notorious manner in claiming a prescriptive easement – on an expanded area around a boat ramp where he had a legitimate easement – because he had avoided engaging in other activities on the area of land surrounding the ramp *when the land's owner was present*.[67] Another western court held that a city claiming a prescriptive easement to empty dirty reservoir water into a stream at the bottom of a private gully had not acted openly because the process occurred only once or twice yearly, lasted only a couple of hours, and was concealed from the owner's view by trees.[68] (Per one source,[69] in Illinois posting "Right of access by permission, and subject to control of owner" signs every 200 feet along the property border, and at every entry point, prevents others from claiming hostile use and gaining easements by prescription.)

Hostile means the user neither has nor seeks the current owner's express permission to be there; a user who has the owner's permission is not using the land hostilely. A Quincy, Illinois land owner was ruled to have met the "hostility" test for a prescriptive easement on a private road in front of his house (and full ownership by adverse possession of an adjoining strip of land) even though he had thought the road was city property; he and prior owners had used the road openly/continuously to get to a main road for more than 20 years while not recognizing, or even being aware of, the rights of the actual owner of the land the private road ran on. That owner agreed that there had been open and continuous use, but said it could not have been hostile toward her because the users did not realize her family owned it. But hostile means using the land in a manner incompatible with the actual owner's interests (acting like you have a right to do it); it relates to the land, not to who the user might have thought owned it.[70]

Continuous, for prescriptive easement purposes, means the user engages in the activity on a basis that is ongoing, in light of the circumstances. The Zuni People have traveled from their New Mexico base to sacred Arizona land every four years, going back at least to 1924 (the pilgrimage may date to ancient times). A federal court held that the repeated four-year cycle over decades met the continuity requirement for an easement by prescription on a fifty-

foot wide strip of land running for approximately twenty miles over land that a private party owns or leases.[71] A long-term lessee, and not just the owner of that leased parcel, typically can claim an easement by prescription on adjacent land after using it continuously, openly, and hostilely for the required time period.[72]

Perhaps the best easement by prescription example: In June 1975, after living in their Philadelphia house for 13 years, the Sprungs put a fence along their property line to stop neighbor Adshead from her long practice of crossing onto their driveway to make wide turns needed to park in her garage. Adshead sued seeking removal of the fence, saying she had an easement by prescription because she had used that neighboring drive openly, hostilely, and continuously since moving to her house in October 1949, easily exceeding Pennsylvania's 21-year requirement. Sprungs argued that Adshead's use could not have been continuous, because during sporadic periods after a 1950s divorce she had no car, but testimony showed that during those intervals visiting relatives and friends turned onto the abutting drive to park in the garage. The court stated that generally ongoing, rather than daily, use defined continuity. Sprungs then maintained that Adshead's use was not hostile, that they had allowed it as a "neighborly accommodation," but Adshead said she never received or asked permission from the Sprungs or the prior owners of that lot. Sprungs also argued that the use was not hostile because after a May 1975 repaving Adshead complied when told not to use the driveway. But the court said she was just prudently avoiding the fresh cement, noting that she resumed her use after the new paving had set. The court ruled that Adshead's actions had indeed given her an easement by prescription; the Sprungs had to remove the fence so as not to impede her use of that easement.[73]

How are easements terminated? Six ways:

a. *Agreement* – owner of dominant tract "releases" servient estate from the obligation in writing, for mutual benefit or for money.
b. *Abandonment* – failure to use or properly maintain the easement over a long period in a way that shows an intent to abandon (simply not using the easement is an insufficient condition for ruling abandonment). The documents that create an easement can even specify actions that would be deemed to constitute abandonment. A court ruled that a county had abandoned an easement for citizens to walk across the beach area on some private ocean-front lots when it passed an ordinance giving the public the right to use the easement area for recreational purposes, because that broader use exceeded the easement's clearly stated original intent.[74] Consolidated Rail lost an *easement determinable* (there also can be easements on a condition subsequent) on Urbana, IL land for failing after approximately twenty years to meet a condition that the servient land had to be used for railroad purposes.[75]
c. *Prescription* – owner of servient estate openly prevents dominant estate owner's use for a sufficiently long period, and the dominant estate owner does not take legal action to assert its rights.
d. *Merger* – dominant and servient estates come to be owned by the same party; you do not need an easement to cross or otherwise use your own land. Neighbors each had an easement to use the other's side of a six-foot wide strip between their lots, since 1888. In 1924 A bought both lots, and then by 1927 had resold to buyers B and C. In 1938 B put up a fence on the property line, and C sued alleging a violation of the longstanding easement. The court ruled that the 1924 purchase extinguished the original easement, too few years had elapsed to claim a new easement by prescription, and there was no basis for easement by necessity since C's concerns over having just three feet of access width (made coal delivery particularly difficult) related to convenience, not necessity.[76]
e. *Expiration* – the explicit time period specified for a particular easement ends. Longstanding easements giving about 65 non-Chippewa land owners access to their homes by crossing tribal lands near Lac du Flambeau in northern Wisconsin expired in 2013. After negotiations to renew the easements had dragged on for ten years tribal leaders barricaded four roads that crossed areas where the easements no longer existed, limiting residents' access and largely allowing only emergency services until a temporary agreement was reached with the U.S. Bureau of Indian Affairs and some title insurance companies in mid-March of 2023.[77]
f. *Fulfillment of purpose* – *e.g.*, an easement for heavy trucks to cross someone's land and avoid using a light-duty bridge during a construction project would be terminated when construction was completed.

B. *Profit a Prendre* – a nonpossessory interest that carries the right to *take* timber, crops, minerals, sand, fish/other animals, *etc*. from someone else's land. Holder has right to reasonable access. As with easements, can be either appurtenant or in gross. A profit appurtenant runs with the land, so future owners of dominant and servient estates are affected unless the right is terminated in the manner that easements can be terminated (agreement, prescription). An easement that also allows for taking something from the land is essentially the same thing as a profit a prendre. (A profit is like a lease to drill for oil, *etc*., except it runs with the land, and no ongoing royalties typically are paid. But a profit limits its holder to specified acts and thus is not the same as, *e.g*., owning the parcel's subsurface rights.) A profit also is inheritable and assignable, but not assignable to multiple parties – if B has a profit to take minerals from A's land, B typically can assign it to C instead of using it himself (while A still has the right to extract), but not to C, D, & E – or far more minerals likely would disappear than had been expected when the profit was conveyed.[78]

C. *License* – like an easement, but with important differences. (A fancy legal term for license is *usufruct*.) In fact, a license is not a real property interest. It is permission from a government entity or private owner to use land or a lake, hunt, make deliveries, *etc*. that does not run with the land, and generally can be revoked at any time (unless the land user perhaps has invested money or otherwise acted in reliance on the license, in which case the land owner might be required to keep the permission intact for a reasonable time under the legal doctrine of *estoppel*). A license can be written or oral (it is a personal property interest, so *statute of frauds* is not violated). Can be made permanent if the holder pays for improvements and the land owner consents (or at least does not object), or if the license holder acquires an interest in the land (*e.g*., mineral rights). Common examples: parking in a commercial garage, sitting in a stadium seat, getting verbal permission to walk across someone's yard or drive across their land. A *person*'s right to *stay* at a hotel could be a license or short-term lease, depending on how the agreement is worded. A *company*'s 50-year right to *operate* a hotel at the Savannah airport was ruled to be a license (personal property not subject to *ad valorem* real estate tax) and not a long-term leasehold (a real estate interest subject to property tax); the court noted that the firm could not assign or sublet its interest, and that any physical changes required the airport's approval.[79]

Easements, profits, and licenses are examples of a more general class of non-possessory interests called *servitudes*.

D. *Encroachment* – the siting of a building, fence, or other improvement partially on an adjoining owner's land (such as a building that was mistakenly built one foot over the neighbor's lot line). An encroachment is not so much an interest in real estate as it is a problem that must be dealt with so that it does not *become* some other form of interest, against the wishes of the owner whose land is encroached upon. (Building an improvement fully on your own land but too close to a neighboring parcel, thereby violating a setback requirement, also is classified as an encroachment – onto land that is supposed to be left vacant. Just like an encroachment onto neighboring land, it can create a "cloud" on title, meaning a troubling question regarding the strength of someone's ownership claim that usually must be cleared up, perhaps at a high cost in time and money, before the affected property can be sold.)

For example, if you return home after a vacation and find that your neighbor has built a garage that sits partially on your land, you should take action: make the neighbor buy the encroached-upon strip of land, sell him a permanent easement, or sell him a temporary easement or perhaps a license (which would not permit rebuilding on the same spot after the garage eventually falls down). A court likely would not force the garage's demolition, but instead would require the violator to pay you some appropriate amount of money, especially if the damage to your land is small and the cost of tearing the violating improvement down would be high – unless the encroachment was intentional or had a harmful impact. (But never say never; a court ordered the tearing down of a garage that sat entirely on the home owner's own land because it violated the local zoning law's four-foot setback requirement.)[80] If you do nothing (recall the real estate owner's right to do "none of the above"), the neighbor might eventually gain ownership of the affected strip by *adverse possession* (discussed later; it is big brother of easement by prescription).

The foundation of a three-story brick building sat right on the property line along the south border of a narrow Chicago lot, just ten inches from an adjacent two-story frame house at 4112 Monticello Avenue, so there was very little space between the two structures. The south wall of the brick building tilted outward several inches, actually hanging over the neighboring house and even touching a corner of its roof, causing inside damage to plaster and door frames. In an often-cited 1921 ruling the Illinois supreme court upheld a lower court order for the brick structure's south wall to be rebuilt despite the high cost, because of the harm the neighboring house suffered.[81]

But a century later an Illinois appellate court ruled in Chicago home owner Sershen's favor when neighbor Rachel sued to force him to remove the part of his garage that encroached over her property line by ten inches. The court held that the garage's improper siting was a one-time trespass (albeit with ongoing effects), and that a five-year statute of limitations on suing for trespass damage had passed. It also noted that the prior owner of Rachel's house had given Sershen oral permission to build the garage where he did, the cost to Sershen of moving the structure would be immense while the benefit to Rachel would be minor since the garage was near the alley at the back of the lot, Rachel was aware of the encroachment when she bought her house, and she did not complain about the garage location until she and Sershen had a dispute on an unrelated matter.[82]

More recently a land owner was permitted to keep paving and piping in place even though it partially encroached on a neighbor's land, and was not prevented from making additional use of that land, but had to pay damages to the neighbor. In denying the burdened neighbor's motion to force removal, the court noted that the offending uses had been in place for many years, and their location had resulted from an erroneous initial survey.[83] •

[1] Linklater, Andro. *Measuring America*. New York: Plume (Penguin). 2002. 233.
[2] *Geothermal Kinetics v. Union* (California appellate court, 1977).
[3] *Mission Resource v. Garza* (Texas appellate court, 2005).
[4] *Fontainebleau Hotel v. Forty-Five Twenty-Five* (Florida appellate court, 1959).
[5] *Contra Costa Water District v. Vaquero* (California appellate court, 1997).
[6] See *Lingo v. Jacksonville* (Arkansas trial court, 1975).
[7] *Glass v. Goekel* (Michigan supreme court, 2005).
[8] *Holm v. Kodat et al*. (Illinois supreme court, 2022).
[9] *Lee-Moore Oil v. Cleary* (North Carolina supreme court, 1978).
[10] *Albin v. Morton Southwest* (Texas appellate court, 1990).
[11] *Strain v. Green* (Washington supreme court, 1946).
[12] *Corning Bank v. Bank of Rector* (Arkansas supreme court, 1979).
[13] *Barron v. Barron* (Arkansas appellate court, 1981).
[14] *Paul v. First National Bank et al.* (Ohio trial court, 1976).
[15] *Snedeker v. Warring* (New York appellate court, 1854),
[16] Ashford, Joy. "Sylvester Stallone Says Adele Wouldn't Buy His House Unless Rocky Statue Stayed Behind." *USA Today*, June 20, 2023.
[17] *Ruby Ellen Brown v. Louis A. Brown* (Alabama supreme court, 1986).
[18] *Roberts v. New Windsor Assessment Board* (New York trial court, 1975).
[19] Friedman, Robyn A. "There's a Pub, a Horse Barn – and a Kangaroo Named Irwin." *The Wall Street Journal*, October 27, 2023, M10 (quoting broker Damian Hall).
[20] Friedman, Robyn A. "The Weird Things Sellers Leave Behind." *The Wall Street Journal*, November 24, 2023, M8 (quoting broker Mary Aronoff).
[21] *Wind Colebrook South v. Town of Colebrook* (Connecticut supreme court, 2022).
[22] From The Avalon Project (King, L.W., translator). *The Code of Hammurabi* (282 listed laws, produced in ancient Babylon in Mesopotamia *circa* 1750 B.C.). Lillian Goldman Law Library, Yale University Law School.
[23] Noted in *Carter Country Club v. Carter Community Building Association* (New Hampshire supreme court, 1986).
[24] *Gray v. Blanchard* (Massachusetts supreme court, 1829). Modern economists would be proud of that early 1800s state supreme court, which ruled for Gray on the grounds that third parties could not how much Gray valued having that restrictive condition, but he surely had been paid less for the house because of the restriction, and since he had bargained for that condition it should be enforced no matter what the reason was.
[25] *2010 California Civil Code*, Chapter 5: Powers of Termination (885.020, 885.030, 885.040). Like Kentucky, California has abolished the fee simple determinable, and conditions subsequent expire after 30 years unless the grantor files a notice of intent to preserve the restriction.
[26] The Kentucky state legislature abolished fee simple determinable on July 1, 1960. Someone who had granted a fee simple determinable or fee simple on a condition subsequent prior to 1960 (or that grantor's heirs) was given until July 1, 1965 to file a "Declaration of Intention to Preserve Restrictions on the Use of Land" to keep those earlier granted estates, and their restrictions, intact. *Kentucky Revised Statutes* 318, 218-221.
[27] Conditions lasting longer than 40 years that were in effect when the 1959 law was passed could be enforced until 1960. 765 *Illinois Combined Statutes* 330-4, 330-5, 330-5a.
[28] *Drayson v. Wolff* (Illinois appellate court, 1996).
[29] *State v. Tolke* (Oregon appellate court, 1977).
[30] *Mahrenholz v. Lawrence County Board of School Trustees (Illinois appellate court 1981, 1984, 1989).*
[31] *Stumbo v. Board of Education of Floyd County (Kentucky appellate court, 2001).* The Stumbo heirs argued that they actually held an option to repurchase the land, not a right of entry that would have terminated in 1990 since they did not file the needed declaration between 1960 and 1965.
[32] *Wayburn v. Smith* (South Carolina supreme court, 1977).
[33] *Hausmann v. Hausmann* (Illinois appellate court, 1992).
[34] *McClure v. Chastain* (Georgia trial court, 1962).
[35] *McKinney v. Mills* (Illinois appellate court, 2013).
[36] *Hammons v. Hammons* (Kentucky supreme court, 2010).
[37] Linklater, Andro. *Measuring America*. New York: Plume (Penguin). 2002. 58.
[38] See Whitney, Craig R., "Jeanne Calment, World's Elder, Dies at 122," *The New York Times*, August 5, 1997, B8 and "A 120-Year Lease on Life Outlasts Apartment Heir, *The New York Times*, December 29, 1995.
[39] Editorial Board. "Did Jeanne Calment Live to 122 Years Old, or Did Her Daughter Pull a Fraud for the Ages?" *Chicago Tribune*, January 7, 2019.
[40] *Camp v. Camp* (Virginia trial court, 1979).
[41] *Gebert v. Gebert* (California appellate court, 1979).
[42] *Wells v. Spera* (Vermont supreme court, 2023.
[43] *Smith v. Smith* (Nebraska appellate court, 2021).
[44] *FTR Farms v. Rist Farm* (Nebraska supreme court, 2020).
[45] Clarke, Katherine. "Developer of Manhattan Supertall Condo Says It Is 'Without a Doubt, Safe' Countering $125 Million Lawsuit from Condo Board." *The Wall Street Journal*, December 22, 2021.
[46] Jakab, Spencer. "How To Buy a Week in Paradise for $1." *The Wall Street Journal*, February 6, 2024, B12.
[47] Solomont, E.B. "Pickleball Is Pitting Neighbor Against Neighbor," *The Wall Street Journal*, December 2, 2022.
[48] Povoledo, Elisabetta. "A Gunman Kills Three in Rome, Shocking the City." *The New York Times*, December 12, 2022. Also Isai, Vjosa and Onishi, Norimitsu. "Five Killed in Shooting at Canadian Condo Building, Police Say." *The New York Times*, December 19, 2022.
[49] *McDonnell v. Sheets* (Iowa supreme court, 1944). That court rejected a lower court's holding that because cars were common by 1913, the horse and wagon wording meant the easement was to be used only for bulk goods deliveries like horse-drawn vehicles were still making then.
[50] *Miller v. Weingart* (Illinois supreme court, 1925). And an easement to reach a farm was "excessively burdensome" on adjacent agricultural land when the farm became an industrial site with up to 200 heavy trucks coming in each day, creating crop-harming dust; *Wall v. Rudolph* (California appellate court, 1961).
[51] *Kuras v. Kope* (Connecticut supreme court, 1987).
[52] *Tenampa v. Bernard* (Missouri appellate court, 2020).
[53] *Cousins v. Alabama Power* (Alabama supreme court, 1992).
[54] *Duke Energy v. Kiser* (North Carolina supreme court, 2023).
[55] As the late, great comedian George Carlin asked: "why do we park on driveways and drive on parkways?" https://www.goodreads.com/quotes/135354-why-do-we-park-on-driveways-and-drive-on-parkways.
[56] *Sierra Screw Products v. Azusa Greens* (California appellate court, 1979).
[57] *Tenczar v. Indian Pond Country Club* (Massachusetts supreme court, 2022).
[58] Rubin, Richard. "Trump's Golf Course Write-Off Could Hit $323 Million." *The Wall Street Journal,* January 25, 2024, A2.
[59] Bernstein, Fred A. "Greening Frank Lloyd Wright." *The Wall Street Journal*, January 26, 2024, M12.
[60] *Seaview v. East Hampton* (New York appellate court, 2021).
[61] *Lackey v. Joule* (Missouri appellate court, 1978).
[62] *Benedictine Sisters v. Ellison* (Texas appellate court, 1997).
[63] *Schwab v. Timmons* (Wisconsin supreme court, 1999). The court expressed skepticism about any type of implied easement.
[64] *Davis v. Culpepper* (Louisiana appellate court, 2001).
[65] *Smith v. Mervis* (Illinois appellate court, 1976).
[66] *SEC v. Steffes* (U.S. district court in Chicago. 2014).
[67] *HP v. Kenai River Airpark*, Alaska supreme court, 2012).
[68] *Downie v. Renton*, (Washington supreme court, 1932).
[69] Margaret R. Grossman and William M. Lopez, *Illinois Easement Law*, Circular 1202, College of Agriculture Cooperative Extension Service, University of Illinois, 1982.
[70] *Brandhorst v. Johnson* (Illinois appellate court, 2014).

[71] *Zuni Tribe of New Mexico v. Platt* (U.S. court for the District of Arizona, 1990).
[72] *Oberlander v. Hennequin III* (Montana supreme court, 2023).
[73] *Adshead v. Sprung* (Pennsylvania appellate court, 1977).
[74] *A Flock of Seagirls v. Walton County* (Florida appellate court, 2021).
[75] Consolidated also stopped providing rail service on a 29-mile stretch in western Indiana, and tore up the tracks, though it continued to pay property taxes on the right of way. Later it tried to sell the land to a rails-to-trails group. But based on the original deed of conveyance Conrail's right of way was ruled to be only an easement, which it had abandoned, such that ownership returned to the owners of the land on which the right of way ran. *Consolidated Rail v. Lwewllen* (Indiana supreme court, 1997).
[76] *Dimoff v. Laboroff* (Michigan supreme court, 1941).
[77] Kremer, Rich. "U.S. Files Trespass Lawsuit Against Town of Lac du Flambeau." Wisconsin Public Radio, June 1, 2023. https://www.wpr.org/united-states-files-trespass-lawsuit-against-town-lac-du-flambeau.
[78] See *Stanton v. Herbert* (Tennessee supreme court, 1918). The holder of a profit a prendre to extract sand and gravel from a Mississippi River island then assigned the right to three contractors that were all working on a huge government project during World War I. When the fee simple holder sued, the state supreme court ordered the requested injunction, and awarded damages because sand and gravel had been removed in quantities the fee holder "never dreamed of."
[79] *Chatham County v. Jay Lalaji, Inc*. (Georgia appellate court, 2020).
[80] *Leadville v. Rood* (Colorado supreme court, 1979).
[81] *Pradelt v. Lewis* (Illinois supreme court, 1921).
[82] *Rachel v. Sershen* (Illinois appellate court, 2011).
[83] *Bradford Land Company, LLC v. Montagnet Properties #2* (Louisiana appellate court, 2022).