# CHAPTER 1

# INTRODUCTION



## 1.1 PROPERTY

In general, "property" is something that belongs exclusively to someone, whether that "someone" is an individual, a family, a corporation, or other entity, either private or public. As territorial creatures, humans on this continent tend to protect what we consider to be our own property, to keep others from taking it away from us, and to assure ourselves of the entirety of what our property is. Writing descriptions of what we believe we own and the means by which we acquired it is one means of establishing our claims to that property, and this theme will reappear throughout this text.

There two distinct classifications of property, personal, and real, each treated separately and quite differently by our laws.

### 1.1.1 Personal Property

Generally, if it is movable, property is personal. If property is not land or interests in land, it is personal.

In terms of the law, there are both tangible and intangible forms of personal property. Movable, tangible items such as furniture, merchandise, and livestock fall into the category of "corporeal" personal property, meaning that it has a corpus, a body. However, we can also have intangible personal property. This includes intellectual property: the thoughts in our heads that result in great inventions and the results

of our research in the form of reports or other documents. Intangible personal property also encompasses representations of money, such as stocks and bonds.

### 1.1.2 Real Property

While there are various distinctions within each of the broad realms of personal and real property, we'll be addressing one very narrow category within the latter, focusing on land. This text is about real property and various ways that we describe it.

Real property, in contrast to personal property, is immovable either in fact or by law. It consists of land, buildings and other physical fixtures to the land, along with whatever rights can be exercised in relation to that land either inside or outside of the boundaries of the tract in the form of interests, which we will define in more detail in the following sections.

### 1.1.3 Ownership

*Black's Law Dictionary* defines *ownership* as:

> Collection of rights to use and enjoy property, including right to transmit it to others. . . . The entirety of the powers of use and disposal allowed by law . . . The right of one or more persons to possess and use a thing to the exclusion of others.

This description tells us that "ownership" is not synonymous with "possession." Instead, it includes not only "possession" but also the rights to prevent others from having possession and to exclude them from the property. "Ownership" also includes the right to sell or give away the property in a variety of ways, to divide the land, to put it in a will to future heirs, to allow some to enter the land and to prevent others from using or accessing it. Ownership even includes the right to "waste" land by physically destroying it.

This last right is, of course, limited to some extent by the various laws and regulations preventing us from doing harm to others. So while we may not be able to dump toxic materials onto our land because they will leach into the water table and affect others in our community, we can perhaps excavate a deep cavern or remove broad swaths of forest, actions that would prevent others from using the land for construction or other possible future uses.

In general, ownership provides us various powers of free action that are protected by the legal system. The exercise of this "sovereign right"

over our property is somewhat limited by local land use, zoning, and subdivision ordinances, but we have the right to appeal for waivers from such regulation. We are also required to act within a period of time defined by state law in order to protect our ownership from claims of ownership or use by others, a period of time known as a statute of limitation, which varies among the states.

### 1.1.4 Possession

Now to see the other side of the issue, we'll look at *Black's Law Dictionary* to see what it has to say about *possession:*

> . . . The law, in general recognizes two kinds of possession: *actual possession* and *constructive possession*. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. . . . *[Emphasis added]*

We have two basic flavors of possession: physical and legal. These may be the same, or they may differ considerably—and that has been the cause of many a battle between neighbors or long-lost claimants to real property.

Actual possession means that I am actually, physically on the land. Maybe I don't live on it, but I might be farming it, or cutting trees on it, or fencing it in for my cattle to roam. Or maybe I lease it to someone under the claim that I have a right to offer actual possession to someone else. The area that I occupy or use, or give someone else the right to occupy or use, is the area in my actual possession. This says nothing about my right to possession, merely that I do have it.

In contrast, constructive possession gives me the legal right to be on property even though I might not physically occupy the land. A deed gives me constructive possession; it transferred someone else's rights to possess the land to me, even if I never step foot on it. Perhaps I live in the Caribbean full time and never visit the land for which I have a deed in West Virginia. I still have constructive possession of that land through the deed that announces to the world (or to the world that cares to research it) that I have the right to be on that land when I wish without asking permission from anyone except perhaps those to whom I've given the right of actual possession through a lease or other agreement.

The term *possession* comes from the old English *seisin,* sometimes spelled *seizin*. The root of the ancient verbiage makes it clear that it is distinct from ownership, although one with *seisin* may also actually own the land.

## 1.2 TITLE AND INTERESTS IN REAL PROPERTY

If ownership is a collection of rights in land, *title* is the union of all the elements that make up ownership, a merger of all the rights in and to property. *Black's Law Dictionary* tells us that "Title is the means whereby the owner of lands has the most possession of his property," thereby uniting the concepts of both ownership and possession.

Much of the legal framework by which we use, own, and convey real property comes from European roots, some of it French (as Napoleonic law in Louisiana), some of it Spanish (as in California, Texas, and other areas formerly under Spanish rule), and much of it English. The most common is the English system, and that will be the primary focus of this text. Due to the various historical bases in different parts of the country, surveyors should always research and be familiar with laws in the areas where they practice.

Much of our legal system relating to real property and the language we use when discussing real property arises from English feudal roots. For this reason, that historic background provides useful context for understanding modern treatment of land and land rights.

### 1.2.1 The Concept of Title

Private ownership of land is a relatively recent concept in the history of humankind. The rise of royalty in Europe brought with it "ownership" of all the conquered land, meaning that the people actually residing on and working the land were merely there at the pleasure of the monarch.

The concept of a monarch or sovereign owning everything crossed the oceans to the New World, and all the explored and settled lands on this continent were claimed in the name of a monarch who never set eyes nor foot on it. This did not prevent kings and queens from granting lands to settle debts—as the king of England so famously did in granting Pennsylvania (literally, "Penn's Woods") to William Penn—or as favors to those who had provided special services or had particularly pleased the monarch. Of course, such grants ignored the fact that there were already people on the land, Native Americans who

had no concept of private land ownership and instead treated it as communal property to be kept in stewardship.

American property law and our language related to land are primarily based on the old English feudal system of ownership, which originated during Europe's Middle Ages. This was a method by which the monarch (who claimed ownership of all the land as holder of the crown) controlled all lands throughout the kingdom. Recognizing that it was impossible to control all the land alone, the monarch granted a feud—also called a fiefdom, a fief, a feoff, or a *fee*—to those who swore loyalty to the crown, or to the lords who in turn had sworn their loyalty to the monarch. This feud or fee was the right to possess the land, but not necessarily ownership of it.

The holders or possessors of the land thus granted were called *tenants,* and *tenure* described the terms of their right to hold the land (their *tenement*). Tenure might consist of a number of bushels of corn to be paid annually, or military service, or any other service or payment demanded by the distant owner. The tenant's rights to the land were also called his *estate,* forming the basis for the modern phrase *real estate*.

The modern term *estate* refers to the degree, extent, and nature of interest that an individual has in real property, with *interests* in land being that person's right, claim, legal share, or title in it. It may be that an estate contains less than full title or interest in land, a matter that will be discussed shortly.

Tenancy, or occupation and possession of land, could be of two sorts, free and unfree, with different rights or interests associated with each. *Free tenure* is the modern freehold estate, to which some of the centuries-old elements still apply. *Unfree tenure* is an estate of less than full ownership, having fewer terms of freedom in holding the title than are available to holders of free tenure. Current equivalents are leases and other limited interests in land. With an unfree tenure, the tenant, or possessor of the land, does not have the same rights of selling, dividing, or willing away the land as does a holder of free tenure.

In the feudal system, the tenant of the land was required to swear loyalty (*fealty*) to the grantor, the lord of the land (*landlord*). The ceremony of swearing fealty was called *homage,* an acknowledgment of the limited right to be on the land but not necessarily to own the land; more precisely, tenants had possession rather than ownership, and could not sell it without the lord's consent or pass it on to their heirs after the tenants' death. If a tenant wished to dispose of land to which he had been granted *seisin* (possession), the lord who had granted that possession (the landlord) retained the right of first refusal, called *primer seisin* (first claim of possession), as well as inheritance tax (*relief*) in

the form of a year's worth of yield from the land upon the transfer of real property interests to heirs of a deceased tenant.

A lord's dominion over the property (although technically held in trust for the monarch) was at the expense of his responsibility to protect the tenant's rights and to pay ransom (called *aid*) to restore those rights or retrieve land that was unjustly occupied. At the same time, the lord (or the crown) received a "fine for alienation," or a fee for the free and voluntary transfer of land (the current real estate tax), as well as reversionary rights to the land when the freehold tenant had no heir, a situation still called *escheat* from those early days of private land stewardship. In modern times, the state government in which a property lies gains ownership of it by escheat when a deceased landowner has no heirs and no will.

Terms of "unfree" tenancy included *wardship* and *marriage,* meaning guardianship of a deceased tenant's children until age 21 for boys and until 14 or marriage (whichever happened first) for girls. Under freehold estates, guardianship ended upon the heir turning 15, with the guardian making annual reports to the lord about the profits from the land. Wardship created a situation in which minors below the stipulated ages could not control inherited rights to land; the lord had an obligation to pay for the living expenses of his wards but kept all excess revenue. This system also required the lord's permission to marry, otherwise risking loss of any interests in land that would otherwise have been inherited by the tenant's heirs.

While the most common means of acquiring land rights was *tenure by chivalry* or *knight service* (requiring provision of fully equipped knights to serve 40 days of military service annually—an unpredictable any 40 days, and without the possibility of returning home if the 40 days were completed in the midst of battle), other services to the lord or monarch could also qualify. *Serjeanty* (service) tenure required personal service (perhaps arrows or horses for the militia, or meat for the king's palace), while spiritual tenure required provision of regular religious services. *Frankalmoign* (free alms) entailed a general duty to pray for the soul of the land donor without having to provide other religious services. Churches gained much of their vast holdings through providing various divine services to gain spiritual tenure.

In feudal times *socage* (pronounced *soak-idge*) was a land tenure gained in exchange for small and specific services (agricultural or nonmilitary in nature) or a land tenure for payment of rent in money. This made a tenure by socage much more certain and predictable than a tenure by knight service. Of the two original types of socage, the one remaining today is "free and common socage," in which the services

supplied in exchange for rights to land are certain, The certainty of the terms of free and common socage is in sharp contrast to the former *villein socage* or *villeinage* in which the services to be provided were not so certain and resulted in an "unfree" tenure that could not be conveyed by the tenant. Eventually, tenures by knight service were converted to free and common socage tenures.

*Leaseholds* are the most well known modern example of estates of unfree tenure. A lease, meaning any agreement that creates a landlord/tenant relationship, is a contract for exclusive possession of land for a specified period of time. At the end of the lease, all rights revert to the lessor (the grantor of the lease), the landlord. Our discussion of "less than freehold" and unfree estates as limited estates will provide additional examples.

### 1.2.2 Fee Simple

When we speak of *fee* in land (formerly the feudal *fief* or *feoff*), we are referring to title, which is the most complete bundle of interests in a tract of land. The term *fee* in and of itself merely notes that interests can be conveyed by a will, but conditions relating to a transfer by any means may be subject to prior specified terms and stipulations.

*Simple* means that there are no restrictions placed by others on the land—no liens, no mortgages—and so the interests are fully transferrable. As a result, when we speak of *fee simple* title, we mean a title that is free and clear of any restrictions that would prevent the grantee or new owner the right to use and dispose of the land in whatever way he or she wishes.

*Absolute* means that there have been no restrictions placed on the land by the *grantor,* the one who gave up the land—no rights of reversion or future interests exist. The new owner can convey the land to anyone by any means with no conditions attached to that transfer.

Therefore, *fee simple absolute* is the clearest title, subject only to those conditions agreed to or imposed by the new owner of the land, the recipient who is the *grantee* in the transfer transaction.

### 1.2.3 Limited Title

Title to real property may be qualified in a variety of ways, and in some instances a *limited title* provides less than 100 percent of the full ownership interests in a tract of land. This may be due to shared or joint ownership so that each partner in title has some percentage

of ownership and therefore no single partner has full and independent control over the property.

Condominium ownership is a combination of full fee simple title and limited title; the residential or commercial unit in the condominium is fully owned by the person or entity holding the deed, but ownership of the common areas is shared with every other owner in the condominium. This arrangement prevents any single person from single-handedly acting to dispose of the commonly owned property or to affect its use. Each member of the condominium holds a percentage of ownership interests in those common areas, interests that are both limited and protected by the very arrangement of this particular form of ownership.

***1.2.3.1 Fee Tail Estates*** *Fee tail estates* are limited interests first created during the feudal system, intended to keep property in a family line through successive generations. While most jurisdictions have voided statutes addressing this type of estate in order to eliminate it, fee tail estates were originally created by conveying to an individual and "the heirs of his/her body" to prevent property from going to stepchildren or non–family members after death of the grantee. This fixed line of succession could be a fee tail female (inheritable only by female heirs), fee tail male (going to male heirs), or fee tail general (male or female).

***1.2.3.2 Determinable Title*** *Determinable title* is another form of limited interest in real property. Language in deeds conveying determinable title includes phrases such as *so long as, while, during,* or *until*. These terms of limitation provide for automatic expiration of the purchaser's or grantee's fee simple title and reversion of rights on occurrence of a certain event. This reversion returns title to the grantor of the interests (the grantor being the one who granted the deed conveying interests) or that grantor's heirs (as stated in a will), successors (those receiving interests by means of other conveyances from the grantor), or assigns (those outside the will or chain of title to whom the grantor wishes to grant rights). While the grantee of a determinable title may convey his or her determinable interests, later grantees take title subject to the same conditions as established in the original conveyance even though the word *revert* is not necessarily present in any of the later deeds.

***1.2.3.3 Defeasible Title*** *Defeasible title* is a limited interest created by documents that specify a purpose or conditions under which the real property may be used. The main distinction between determinable title

and defeasible title is that determinable titles *will* revert when a certain event occurs, ceases to occur, or does not occur, while defeasible title *may* (or may not) revert. As with determinable title, defeasible titles will state the conditions triggering reversion, along with designation of the recipient of the reverting interests (which can be sold separately from the defeasible or determinable interests). Discerning the difference between determinable and defeasible titles can sometimes be tricky, and the context of the documents granting the original rights must be examined carefully in light of the language used at the time of the transaction and contemporaneous conditions.

A case that may help to illuminate the distinctions between forms of title as discerned from the written documents is *United States Trust Company of New York v. The State of New Jersey*.[1] The core of the dispute begins with a deed issued in 1894 to the United States for an area of Monmouth Beach, New Jersey, in exchange for $2,400. The acquisition came about to comply with an 1875 Congressional Act that provided funds to establish "sites for Life-saving or Life-boat Stations, Houses of Refuge, and sites for Pier-head Beacons."

Nearly a century later, the successors to the original 1894 grantors argued that the title had reverted to them because the United States had ceased to use the property as a lifeboat station in 1965. In that year, the United States vacated its use of the property, but permitted the state of New Jersey to use it for the same purposes as the United States had. In 1968, the United States deeded most of the parcel in question to New Jersey for $29,800. Nearly 20 years later, when the litigation began, the value of the beachfront property was well over six figures, and successors to the original grantors sought to regain this valuable site, basing their suit on deed verbiage that mentioned both the 1875 Act and the lifesaving station purpose.

However, the 1894 deed must be read as a whole to determine if in fact it did create a determinable title. The deed itself was of the boilerplate variety, a standardized form used for all such acquisitions in relation to the 1875 act. It did not contain any words limiting the rights acquired by the United States, and merely cited the act that provided the funding and impetus for the purchase, thereby establishing intent. Furthermore, the price paid in 1894 ($2,400) was well more than a nominal fee, or a sum that would merely satisfy the requirement for payment as an element of a valid contract. The court pointed to another transaction in the same time frame using the same boilerplate deed

[1] 543 A.2d 457, New Jersey Superior Court, 1988.

for a similar tract in North Carolina for which the United States paid only $100.

Finding no expressed intent for the property to revert to the grantor if the stated purpose ceased, no other language indicating limitations, and a payment of full fair market value, the United States Trust Company of New York was denied its claim of ownership (based on its interpretation of the 1894 deed as conveying only determinable rights), and the court confirmed full unfettered fee simple rights in the State of New Jersey.

***1.2.3.4 Life Estate*** Yet another form of limited title is a *life estate*. This is a set of interests conveyed to someone for the period of someone's life—whether that of the grantor, the grantee, or some other specified person. Sally can give Cousin Fred a life estate in the old homestead for so long as he lives, which means that anyone to whom Sally conveys the property must honor Cousin Fred's right to be on the land. At the same time, while Cousin Fred can treat the land as if he owns it, he can't do anything to destroy the future interests of Sally's successors and assigns; he can't subdivide and sell off part of the property, and he can't build a 43-story office building on it without Sally's permission. He can, however, lease the land to a gas company provided that the lease does not exceed Cousin Fred's own rights to be on the land either in terms of time or in terms of access to the site.

Sally can give Cousin Fred a life estate for so long as she lives, so that when Sally passes away, Fred's interests cease unless he is named in the will or he purchases the property from those who are named as heirs. Or Sally can give Cousin Fred a life estate for so long as Sally's husband lives, thereby possibly protecting her husband's and children's interests in the land while providing somewhat less assurance to Cousin Fred that he will be able to finish out his days in the house where he spent his childhood.

All of these scenarios are variations of the life estate, and they are all determinable estates. They cease to exist upon the end of a particular person's life, a very specific condition that definitively terminates the interests of the life estate grantee. It should be noted at this point that a life estate, in any of the forms described, is an example of "less than freehold" or "unfree" estate because of the reversion of rights to the grantor (or the grantor's heirs, successors, or assigns) upon termination of the specified period.

As a carryover from feudal days, we still use the terms *dower* and *curtesy,* each originally being a limited title in a spouse's real property. In English law, dower was a one-third interest allowed to a widow in her deceased husband's real estate, in the form of a life estate after his

death. At the same time, curtesy was the life estate given to a widower to any real estate owned by his deceased wife, but it was a full life estate interest rather than the mere fraction granted to women. Modern laws have changed both dower and curtesy from life estates to absolute fee interests in a deceased spouse's estate.

***1.2.3.5 Estate for Years (and Variations)*** Very similar to the life estate is the *estate for years,* which is granted for a specified and definite period time – whether for a month or for 2,000 years. The time of its termination is known, certain, and definite, no matter its length. In the United States, railroads often received these kinds of "unfree" tenures in land for periods of time probably considered semipermanent at the time of their creation, such as 50 or 99 years. The difficulty with such long tenures is that the parties—or their successors and assigns—often lose track of the need to renew them, and the grantee may actually be continuing use of the land long after the estate for years has expired. This gives rise to another form of interest in property that will be discussed under easements.

Most beneficial to the grantor, and not always so for the grantee, is the *estate at will,* a variation on the estate for years but a tenancy that may be terminated at any time by the lessor (the one who created the estate) or by the lessee (the one who enjoys the limited interest in the property). This is often a month-to-month tenancy.

An *estate at sufferance* is the lowest grade of estate in real property and the lowest form of unfree tenure, held by one who retains possession of land with no title at all, such as a tenant whose lease has expired. This hanger-on becomes a "tenant at sufferance" as long as the landlord/lessor "suffers" or permits him to remain on the property. An estate at sufferance differs from merely trespassing or squatting on property since the original entry was by the owner's permission.

***1.2.3.6 Quitclaims*** Finally in our discussion of limited interests, there is the *quitclaim* deed. Such a document merely releases or relinquishes any rights that the grantor may have in the land, but does not state that the grantor actually had those interests in the first place. There is no claim that the title being transferred is valid, no warranty or guarantee in the title to the land supposedly being conveyed. Therefore, if someone with a better (or more legally defensible) claim to title comes along, the holder of a quitclaim deed may not be able to retain the interests contained in his or her deed. Anyone can sell you the Brooklyn Bridge, but only one entity has legal title to it that will actually give you

ultimate true legal ownership of that structure. Thus, only one entity (the true owner) can provide anything other than a quitclaim deed.

### 1.2.4 Easements

*Black's Law Dictionary* defines the term *easement* as:

> An *interest* which one person has in the land of another. . . . An interest in land in and over which it is to be enjoyed, and is distinguishable from a *"license"* which merely confers personal privilege to do some act on the land. *[Emphasis added]*

While "interests" were discussed earlier, we have not yet defined *license,* and the distinction between a license and an easement is important. A license provides very specific rights that can be exercised by only a very specific party during a very specific time, and the rights granted by the license can be revoked if the terms of holding those rights are violated.

For example, a generic driver's license grants a single person a right to drive specific kinds of vehicles (generally only certain four-wheeled vehicles, and not big rigs, school buses, or motorcycles), and the license must be renewed on a regular basis. If the holder of a driver's license maneuvers a vehicle improperly enough times to earn numerous tickets and points, that license can be revoked by the state motor vehicle agency that issued it.

In terms of real property, a license may allow a lumber company to enter a tract of land over a certain route to cut certain kinds of trees (perhaps by size or species) in a specified area for a particular period of time, in exchange for a stated payment or perhaps provision of split logs for the landowner's fireplace. If the holder of the license cuts the wrong trees or does not make the proper payment, the licensor can revoke all rights. A license in land differs from a leasehold (the "unfree tenure" mentioned earlier) in that a lease transfers possession while a license merely excuses actions on land in possession of another that without the license would be considered trespass. The license is revocable at the will of the possessor of the land and conveys no interest in the land. When possessors are not the owners of the land, they may grant no licenses harming or lessening the interests of the owners.

Going a step further, the primary difference between a license and an easement is again that the license is subject to termination by the possessor of the land and conveys no real property interest, while an easement is not revocable and does create an interest in land. Otherwise,

while it is easy to point to examples of easements, it is not always simple to distinguish easements from the exercise of other rights. Easements can be in the form of the right to use a roadway across someone else's land, or the right to place a pipeline under the land owned by another, or the right to flood an adjoiner's property.

The parties to an easement are the *dominant estate* and the *servient estate*. The dominant estate is the one benefiting by the easement, the one with dominion and ability to exercise the easement rights, and is conveyed "together with" those rights. The servient estate is the one "subject to" the easement, the one burdened by the right of the dominant estate, the one that must allow and not interfere with the exercise of the easement rights.

There are numerous types of easements, the most common being *appurtenant* easements that travel along with the transfer of both the dominant and servient estates, whether or not the easement is mentioned in later deeds. They generally do not terminate until owners of both the dominant and servient estates agree to termination, unless conditions had been established as previously described for determinable and defeasible title. The term *appurtenant* refers to the attachment of the rights to the land.

In contrast to appurtenant easements are *in gross* easements that generally are nontransferable and cease to exist when the easement holder no longer owns or uses the dominant estate, due either to transfer of title or death. These are the personal easements in gross with which we are most familiar. One of the authors of this book received a call from an elderly lady complaining that her new neighbors would not allow her to use her driveway to get to her garage. It turned out that "her driveway" was actually a secondary means of access running over part of the adjoining lot (despite the presence of a separate means of less direct access to her garage that existed completely on her own property) that she had been using for over 40 years. The resulting agreement with the new neighbors was a *personal easement in gross* to my client, allowing her to continue use for as long as she resided in her house, a right not transferrable to her heirs or to anyone to whom she might rent or sell her house. The easement would terminate when she no longer lived there, even if she still owned the house, and was recorded in a deed clearly outlining these conditions, memorializing the intent and purposes of the agreement.

There are also *commercial easements in gross,* which, unlike personal easements in gross, can be transferred from one party to another for the same purposes, although the dominant estate must negotiate with the owner of the servient estate and possibly also seek regulatory

permission for such a transfer. The commercial form of an easement in gross terminates when the purpose for the easement terminates, and can be divided into fractional interests to provide percentage ownership to shared holders of the dominant estate in order to guarantee each a right to use a certain amount of an easement in terms of physical space. It also allows joint use, such as pole attachment agreements or sharing a trench (although in this last situation state law may require new negotiation with the owner of the servient estate).

As an example of a commercial easement in gross, Ms. A conveys a gas pipeline easement to Company X, which may convey its entire interest or only a portion of its interest to Company Y. Upon the demise of Companies X and Y or upon their transfer of interests to another company, the easement does not terminate as long as the use for which the easement was granted continues.

Because of the complexities involved with proper use and transfer of easements in gross and the changing burden that may be placed on the servient estate, the majority of jurisdictions rule in favor of appurtenant easements over easements in gross when there are questions as to the form or nature of the easements involved. Deed language must clearly define the intent of the parties in creating either form of easement, the allowable uses, and any conditions under which the easement will terminate or must be renegotiated.

Aside from these two main categories of easements, there are numerous qualifications describing easements. *Affirmativ*e easements allow the holder of the dominant estate to perform some action on the servient property, such as the right to install a water pipeline. *Negative* easements prevent the servient estate from performing some action that might otherwise be lawful, such as conservation easements that disallow buildings or tree removal in certain areas, or light easements that prevent construction exceeding a certain height that would obstruct natural light from entering windows in a building on an adjoining site. *Secondary* easements are appurtenant to the actual easement, and provide the right to do what is necessary to fully enjoy the primary easement itself, such as the right to maintain it. Even when not expressed, every easement includes such secondary easements, although it is, of course, in the best interests of all involved when the specific rights and limitations associated with an easement are committed to writing in clear and specific language.

A *right-of-way* is generally the right to use the land of another in a particular linear route, and the term is often used interchangeably with the word *easement*. In some contexts and jurisdictions, the term may also apply to the physical strip of land to which title has been granted

in fee simple or defeasible fee simple subject to a particular use, such as for a highway or railroad. The determination of whether *right-of-way* is meant as "easement" or as "strip of land" is often gathered from the full context within the documents creating rights-of-way or research into historical practice. This is one of the reasons why clarity of expression and intent are so important when writing descriptions: is a deed granting only a right to use a long linear tract, or is it granting full title in that strip of land?

The public or private status of a right-of-way, when the term is meant as "easement," establishes who may use it. For a public right-of-way, easement rights are given to the public in general and to every individual person to use the right-of-way for the purposes for which it was granted, such as in a public highway right-of-way, without any special permission needed for anyone to utilize it. Every driver of a motor vehicle has the right to drive on a public road right-of-way. Generally, public utilities have the right to occupy a public right-of-way without more permission than is required by state statutes and regulations.

But only certain named persons or entities have the right to use a private right-of-way. The whole world may not use a private way over privately owned land without permission; the risk is prosecution for trespassing. A utility also does not have the right to enter a private right-of-way without permission of the owners of the underlying title in that private way. Because public rights-of-way sometimes are relocated, the land often reverts to private ownership. A utility that is beneath a public way that has been vacated or terminated by some other means must now negotiate with the private owners of the land if it wishes to remain in place. There are often statutory provisions granting utilities time to negotiate or sometimes even the power to exercise eminent domain to condemn a right-of-way so that its facilities can remain in place. Again, the terms of an easement or right-of-way as expressed in the process of creating those rights are essential for determining who may use a right-of-way for what purposes, and in defining what protective measures have been put in place to protect both the dominant and servient estates as conditions change over time.

*Covenants* are promises between parties that are not in the form of conveyances, but generally have the effect of restricting use of one party's land for the benefit of the other party when recorded in a deed that transfers title to a property. For example, the owner of a development may place a covenant in deeds for the tracts within the subdivision that no garage may be constructed closer to the road than 50 feet from the rear property line, with the intent of maintaining a

certain look or upscale ambience in order to maintain high appraisal values. The covenant is a form of contract, and therefore differs from an easement in that breach of a covenant may result in punitive actions and damages, while abusing an easement may result in its termination.

***1.2.4.1 Recorded Easements*** Recordation of a document provides a means by which the world at large can discover the existence of a land transaction, in this instance for the creation of an easement. In written transfers of property including easement rights, those rights are created by *express grant*.

This method is exactly as the words plainly state: the grant of easement rights is expressed in words specifying the intent and extent of the easement. The express grant may be included in a deed for conveyance of full title that includes easement rights to which the property either is subject (servient) or is the beneficiary (dominant, and conveyed together with the easement rights).

Easements by express grant can be created by deed, by will, or by means of some other written document.

***1.2.4.2 Unrecorded Easements*** But sometimes the parties in a real estate transfer don't quite express their intent in the written transaction, although it is clear by the surrounding circumstances that certain easements were intended to be included in the conveyance. In such instances, easements may be created by *implied grant*. Strictly speaking, implied easements are based on the principle that when grantors sell some portion of their land rather than all of it (whether a subdivision of a parcel or one of several adjoining tracts), they grant by implication all the apparent and visible easements that they as the former landowners previously used in order to reasonably enjoy the portion now being conveyed. For this principle to apply, the area now subject to an implied grant must have been used prior to the subdivision of the overall tract as the means of passing between what are now the newly divided parts of that tract.

For example, Marla owns a parcel that she divides into three contiguous tracts, two of them (Tracts A and C) fronting on two different and parallel public roads, while the one in the middle (Tract B) has no direct frontage (see Figure 1.1). She leases out Tracts A and C to others, but lives on Tract B, and regularly crosses over Tract A to access Tract B. Since she owns both Tract A and Tract B, she does not have an easement over Tract A: an owner cannot have an easement in his or her own land, primarily because there is no need for permission from oneself to use one's own land. But when Marla sells Tract B to Dante, he won't

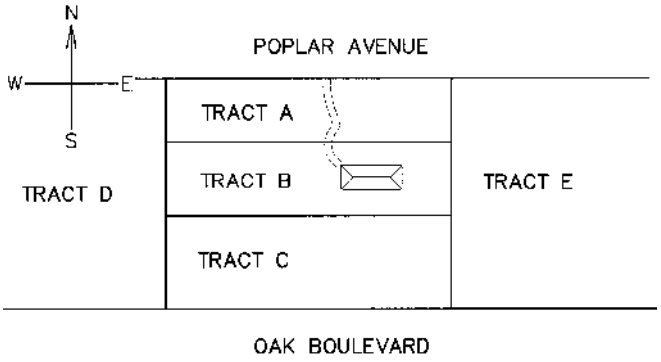



**FIGURE 1.1 The dashed line represents the path historically traveled to Poplar Avenue (a public road) from the house on what is now Lot B, creating an implied easement.**

have that same privilege to cross Tract A. Because it is a usual and well-established means of accessing Tract B, the right to use that path over Tract A is conveyed as an implied easement to Dante even though it is not specifically mentioned in the deed he obtains from Marla.

If the grantor keeps the land that is subject to the easement, it is an easement by implied grant, but if the grantor keeps the land that requires the easement, this is an *easement by reservation* because the grantor will reserve an easement to himself or herself. But usually this is a matter of strict or absolute necessity to use the property. If another alternative exists, most courts will not create implied reservations.

Because easements by implication can also be created through long, permissive, and equitable use (not overburdening the servient estate), the intention of creating an implied grant must be assessed on a case-by-case basis, looking at the particular facts surrounding the use of the property and the reasonableness of the use of the presumed easement.

Another means of unwritten creation of easement rights is by *presumption of lost grant*. Some jurisdictions presume that if landowners fail to object to use of their land by others, as if an easement existed, then the adverse users must have had a right to be on the property. The presumption of the "lost grant" is that at some point in the past the user of the presumed easement had been given the right to use the property. When no written documents exist, this presumption is particularly applicable to utilities, in the belief that someone must have requested service and the utility complied. Alternatively, for utilities with powers of eminent domain, it is generally assumed that condemnation has occurred and that the time set by the statute of limitations for claiming just compensation has passed.

In simplified terms, the distinction between the presumption of a lost grant and adverse use comes down to the question of "Which party must prove that the use was not permissive?" For a lost grant, it is the property owner (servient estate) who must prove that there was no agreement as to the use. For adverse use, it is the adverse user (presumed dominant estate) who must prove that the property owner had never granted permission.

***1.2.4.3 Statutory Easements*** Easements by *necessity* are a slight variation on the idea of easements by implication. At one time the landlocked parcel was part of a larger tract that had access to public roads. But now there is strict necessity for an easement—the property cannot be used without an access easement. Since division from common ownership of other land having road access creates a new landlocked status, generally the way of necessity is created at the time of the severance, although the specific way did not have to be in use at the time of that division (unlike implied easements). State laws prohibit creation of new landlocked parcels and impose easements by necessity, whether expressed or not, for reasonable enjoyment of tracts, making them usable. The concept of *reasonable* is very fact-specific, and often is the primary source of contention in establishing such easements.

But statutes addressing easements by necessity generally establish a means for a landlocked parcel to access public roads when the grantor has no remaining lands to allow the grantee to cross. In such situations, the owner of the landlocked tract has the force of law supporting a claim of right in negotiating with owners of adjoining lands for an easement providing the landlocked owner access to public roads.

Laws do not require that the shortest and/or most convenient means of access be allowed to the landlocked owner, only that *some* means be available over somebody's land due to necessity. Thus, many adjoining owners can refuse the right to cross as long as one agrees to allow the easement. The ultimate grantors of an easement by necessity over their lands can set the terms of location, width, and other conditions for use (perhaps involving erecting a new gate or locking an existing one).

Another means of creating an easement through the function of law is by *prescription*. This entails long and continuous use of property for a specific purpose in a manner that would allow the owner of the land to know that someone was using his land over a period of time established by state statute as sufficient to allow the owner of the land to evict the trespasser. The use is unrelated to any written document, but is carried out under a claim of right. The rights gained by such use are called *prescriptive rights*. The process of prescription is similar to

gaining rights by adverse possession, but reflects only the claim of a right to use the land rather than a claim of ownership.

Once the statutory period of time that would allow the landowner to evict the user of his land has elapsed, the prescriptive easement has been created without any written or recorded document. It is not until both parties acknowledge the situation, either on a friendly basis or under the threat of lawsuit, that the prescriptive rights are set down in writing and recorded in the hall of records to notify all who care to research the title records that the easement does exist.

The most forceful statutory means of creating easements is the exercise of the power of *eminent domain,* or the right of *condemnation*. Lawmakers at both the state and federal levels have identified certain entities that provide essential services to the public and have created statutes to define who may condemn and under what conditions; the prime considerations are public use and necessity. Government agencies may condemn easements when the purpose is to benefit the public. Therefore, a county may condemn land to create a new public road, but it cannot condemn land to create a new restricted-use parking lot just for police vehicles, an area that the public would not be permitted to enter. Each state has its own statutes establishing which utilities are so vital to public welfare that they are granted powers of eminent domain in order to carry out their public services. Therefore, while every state considers water an essential public utility, not every state considers cable television similarly important, so that the first utility may condemn easements while the second possibly may not.

While statutes acknowledge the establishment of easements by necessity, by prescription, and by condemnation, they do not necessarily require any documentation in writing of these statutory means of creating rights to use someone else's land. Instead, particularly in situations of necessity and prescription, the statutes define the conditions under which these means create legal rights, and these laws are the basis for arguments in lawsuits. Unfortunately, all too often a judge will rule that, yes, an easement does exist, but then forgets to order a deed to be written memorializing the location, size, and purpose of the easement so that it can be recorded as prevention of future duplicative litigation. Surveyors engaged in such cases should remind the lawyers involved that recording the outcome in the public records serves to preserve the court ruling.

#### *1.2.4.4 Distinguishing between Means of Creating Easements*

In the process of describing so many means of creating easements, some of the distinctions may have blurred. The case of *Custom*

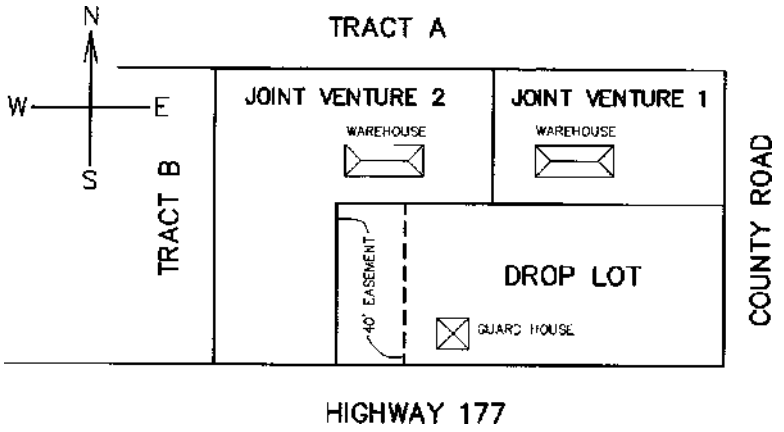



**FIGURE 1.2 Custom Warehouse v. Lenertz.**

*Warehouse v. Lenertz* (975 F. Supp. 1240, U.S. District Court for the Eastern District of Missouri, Southeastern Division, 1997) compares several of the methods we have covered and describes how the courts distinguish between them. Figure 1.2 shows the general relationship of the properties involved in this lawsuit.

Attempting to cover all the bases, Custom Warehouse argued it had the right to use an easement over land owned by Frederick Lenertz, Sr., by prescription, by implication, or by necessity. Custom Warehouse wanted the court to declare the "extent and parameters" of the easement it claimed and the location and condition of its deeded ingress/egress easement.

In 1985, Lenertz and his brother had bought about 21 acres from various members of the Howard family. This entire tract was undeveloped farmland, with a creek running through it. Highway 177 bounded it to the south, and a county road formed its eastern boundary.

Lenertz and his brother graded about 12 acres of their acquisition, and covered it with gravel to be a "drop lot" for semi-trailer trucks to pick up and drop off trailers for the nearby Procter & Gamble plant. They installed fencing and a guard shack at the only entrance, from Highway 177, for security purposes. The drop lot began operations in 1985.

Later that same year, Lenertz bought another tract, just north of the first acquisition. At the end of the year, Frederick Lenertz bought out his brother's interest in the northwest part of their drop lot so that he now fully owned that portion in fee by himself.

In 1986, Lenertz bought another 20.59 acres along the southwestern and northwestern edges of the original drop lot, and began grading this

along with his 1985 acquisition in order to build a warehouse to use in conjunction with the Procter & Gamble drop lot operations.

A few months later, a joint venture (JV-1) formed to buy Lenertz's land to the north of the drop lot (his 1985 acquisition) to build that warehouse. Lenertz held 40 percent interest in JV-1. Both Lenertz and his brother granted JV-1 a 30-foot-wide easement across the drop lot to provide access to Highway 177 across the land southeast of the JV-1 lands.

A second joint venture (JV-2) formed to buy the property south of JV-1's holdings, to build another warehouse. Lenertz and the two joint ventures (JV-1 and JV-2) executed a "Joint and Mutual Easement Agreement whereby, inter alia, a 40-foot easement was established to provide JV-1 and JV-2 access to Highway 177 along the westernmost border of the Drop Lot property (hereinafter referred to as to the 40-foot easement)." This new 40-foot easement was positioned along the west border of the drop lot, beginning at Highway 177 to the west of the guard shack at the entrance to the drop lot, then running northwestwardly along that western boundary of the drop lot, and ending at the northwestern boundary of the property near the southwest corner of the warehouse on the JV-2 property.

On the same day that the agreement was made, JV-2 obtained a loan from Jackson Exchange Bank, secured by the property, and Lenertz entered into a lease-purchase option that would allow the other JV-2 partners to buy his interests.

The site began operations in late 1986, with trucks coming in from Highway 177 by the guard house, but then following no prescribed path across the drop lot to get to the warehouses at the north end of the site, varying their routes to go around wherever other trailers were parked. Often, trailers were parked within the 40-foot-wide easement, making it unusable.

In 1992, Jackson Exchange Bank was declared insolvent, and the Federal Deposit Insurance Corporation (FDIC) took over its holdings. JV-2 defaulted on its loan, and the FDIC bought it in 1994. Then JV-1 defaulted on its loan, too, and the FDIC bought its land in 1995. Lenertz continued to operate his other warehouse until August 1995.

In October 1995, the FDIC appraised the two joint venture holdings for a foreclosure auction, to be sold "as is," "where is," and "with all faults." A survey showed only the 40-foot easement along the west edge of the drop lot to benefit the JV-1 and JV-2 lots, in accordance with the deeds. The easement was partly on graded surface and partly on sloping hillside, and the FDIC estimated a cost of $5,000 to improve the easement to make it usable.

Custom Warehouse, Inc., successfully bid on the JV-1 and JV-2 properties, based on the survey, paying a reduced price due to the easement problems. The FDIC had tried to acquire another easement from the Lenertz brothers, but an agreement was never reached (although the Lenertz brothers allowed the FDIC to access the warehouse by means other than the 40-foot easement).

In 1996, Lenertz bought all of his brother's interests in the drop lot, so that he held the entire tract in fee, under the name of FGL Holdings. Custom Warehouse tried to buy a new easement from Lenertz/FGL Holdings, who offered to sell one for $400,000. No deal was reached, but trucks were still allowed to drive in areas other than on the existing 40-foot easement. Lack of a suitable easement was the basis for Custom Warehouse's suit.

The first argument Custom Warehouse raised was for an easement by prescription across the drop lot. But there had not been a single location continuously used for the 10 years required by Missouri law. Further, the use of the drop lot had not been adverse. From 1986 to 1994 JV-1 and JV-2 had owned the warehouses, and Lenertz, as part owner, had permitted trucks to pass from one lot in which he had interest to another. If use begins permissively, it cannot become adverse. The location of a claimed prescriptive easement cannot be "based merely on speculation and conjecture."[2] Nothing was precise, ascertainable, or recognizable about the claimed easement's boundaries, as trucks varied their routes through the drop lot depending on the circumstantial parked location of other vehicles. None of the requirements for a prescriptive easement over the drop lot had been met.

Next, Custom Warehouse argued for an implied easement to cross the drop lot. Implied easements arise when a landowner conveys part of his land to someone else along with a specific passageway over the land that previously had been so open and obvious as to be considered permanent and running with the land (appurtenant).

But, in this case, there had never been any unity of title between the lots involved. In purchasing the lots beyond the drop lot, Lenertz had formed different corporate entities in which he owned different percentages, none being the same ownership he shared with his brother. Lenertz did not have controlling interest in either of the joint ventures or in his partnership with his brother, and he could not create an easement on his own. Lacking unity of title between the joint venture lots and the drop lot, there could be no implied easement.

[2]975 F. Supp. 1240 at 1246.

Finally, Custom Warehouse argued for an easement by necessity. Such an easement is created when one party has no means of access to his property from a public road. If one has a legally enforceable right-of-way, he has no right by necessity. Necessity is not a matter of mere convenience. Here, there was an enforceable right-of-way to Highway 177 by virtue of the 40-foot easement created by the Joint and Mutual Easement Agreement. Custom Warehouse argued that the existing easement didn't provide a "reasonable practical" way to access the warehouse or to use the docks in a "counter clockwise fashion." No one disputed that the condition of the existing easement was unsuitable. Instead, the argument was about its position, which would be more reasonable and practical across the drop lot from the southeast corner of the lot. However, as access did exist, no matter how difficult, the court denied any easement by necessity.

***1.2.4.5 Estoppels*** There are times when strict application of laws results in a less than fair outcome. In such instances, the concept of *equity* comes into play, tempering the absolute language of statutes and regulations to carry out the spirit of the law rather than the letter of the law in order to reach a fair or just result. Some states have separate courts for hearing cases of equity, which are either called Chancery Courts or Courts of Equity.

Related to the concept of equity is *estoppel,* which is a legal doctrine preventing one party from misleading another who had a right to rely on the first party's actions, and then taking advantage of the situation to benefit that first party. In other words, if your actions and words lead someone to believe one thing when the situation is different, and relying on your actions leads that other person to harm himself, the doctrine of estoppel will prevent you from the benefit that would have come from the misleading situation. One of the authors of this text had a client who had built a hot tub in what he presumed was his backyard, without the benefit of a survey. The neighbor helped the client build the hot tub, but as soon as it was completed, he notified the client that the hot tub was on the neighbor's property and not on the client's, forbidding the client from trespassing to use it. Because the neighbor knew where the property line was but the client did not, the neighbor's actions purposely misleading the client were frowned on by the court, which invoked the doctrine of estoppel to force the neighbor either to pay the cost of moving the hot tub or to come to an agreement about its use.

Easements can be created by *equitable estoppel,* particularly when no written document can be found to support the origin of the easement,

but long continuous use without protest by the servient estate has led the user of the land to believe that a true right exists.

The case of *Spawn v. South Dakota Central Railway Co*. (127 N.W. 648, Supreme Court of South Dakota, 1910) illustrates the application of estoppel when the railroad relied on the actions of the landowner to its own detriment and the landowner's benefit. The railroad had approached Mr. Spawn for permission to build its track across his land. There apparently had been an oral agreement between the parties, because Spawn offered $250 to the railroad if it would build a station near his property within the same public land section so that he could move his agricultural products to market more easily.

The railroad constructed its tracks, built the depot, and began running trains over Spawn's property. But Spawn suddenly decided that he should receive compensation for the use of his land to operate the trains, a detail that was not part of the oral agreements according to the railroad.

From this, we see the importance of written contracts and deeds in preserving evidence of transactions in real property, and laws do exist to enforce such documentation. However, when one party leads another to act in a way that will cause harm to that second party, the separate principles of equity and estoppel provide some protection. In this case, the court noted that the railroad had relied on the oral agreement, had completed all of its obligations under that agreement (building the station), and that Spawn had induced the railroad to cross his land by paying the railroad for that extra obligation. As the landowner, Spawn watched the tracks being constructed over his land, not an overnight process, and had every opportunity to stop construction. But he said and did nothing until after the railroad had made a heavy investment of time, labor, and materials.

While the court noted that writings showing the contractual agreement between the parties would have been more easily enforceable, the actions of both parties showed that the oral agreement had been consummated, and therefore could not be revoked. Its remedy was to decree that an easement in equity over Spawn's land did in fact exist; the means of its creation was equitable estoppel. There had been a clear and definite offer to the railroad for use of the land, reliance on that offer in laying the tracks, and detriment resulting from reliance on the offer, satisfying the three elements of estoppel.

***1.2.4.6 Terminating Easements*** So far we have discussed only creation of easements. But means of extinguishing or terminating them can also be by written and unwritten methods.

A common means of written termination by local governments is to pass an ordinance *vacating* an easement, and then to memorialize the vacation of the easement in the minutes of the meeting, which are part of the public record.

The dominant and servient estates to an easement may also agree to terminate the easement, extinguishing it by *mutual release*. To remove this easement from use by subsequent parties acquiring the rights of the dominant estate, the best means of termination is to create a written document signed by both parties and then record it in the relevant hall of records.

It is a common misunderstanding that *overuse* (increased burden) or *misuse* of an easement causes it to terminate. This is not entirely true. Imagine that an access easement exists to allow vehicles cross the servient estate to the dominant estate, and the use has always been exercised for two passenger vehicles per day. The owner of the dominant estate decides to tear down the house on her lot and build a warehouse, which will require 40 tractor-trailers to cross the servient estate on a daily basis. The easement does not suddenly terminate due to the increased burden and change in use. But the owner of the servient estate is entitled to an injunction to stop the new increased use while negotiations proceed for increased compensation or for limitation on the hours of truck traffic. If negotiations fail, the court may determine that the easement is being used improperly and terminate it—hopefully, with a decree that will be recorded to prevent any future use of the former access. But the overburdened easement will not terminate until that legal action is finalized.

Obviously, the written approach to extinguishing easements gives rise to fewer questions, if not eliminating them completely, but some situations are so rooted in common sense or common law (the latter meaning well known and understood legal concepts, not from statutes but from court decisions) that no written document is required for termination.

One of these principles is the termination of easements by *merger of title*. If the dominant and servient estates come under the ownership of the same person or entity, the easement will terminate with no action needed. The reason for this is that no one needs his own permission to use his own property. Easements being permissive to someone who does not own the property, they become unnecessary. Should the owner decide to sell either the former dominant estate or the former servient estate, the former easement will need to be created anew, as it extinguished automatically upon merger of title.

It may also happen that the servient estate is destroyed, so that it is impossible for the dominant estate to enjoy its easement rights. For instance, there may be buildings connected by a stairway between them that is located entirely on the servient estate but with easement rights granted to the dominant estate to use those stairs to access the upper floors of the dominant estate's building. If the servient estate burns to the ground, destroying the stairway in the process, the dominant estate is left with no easement due to *destruction of the servient estate*. The dominant estate cannot demand that the owner of the servient property rebuild stairs just to suit the desires of the dominant estate. No written document extinguishing the easement exists in this situation.

Finally, there may be an easement in the records, but it has not been used for a long time. We cannot, however, presume that an easement is *abandoned* merely because the right to use it is not exercised. The courts have stated again and again that nonuse is not abandonment. The dominant estate must have the intent to abandon its rights, and this is made evident by some action making that intent clear. For example, the owner of an access easement over a neighboring property who erects a fence with no gate at the place where the easement exists has made it clear that he does not intend to use the easement.

Abandonment is not accompanied by any written document, and it differs from vacation of an easement, which is accomplished through an official action such as is described above. It can be tricky determining whether abandonment has taken place in some situations, such as when railroads pull up the rails in their easements. Do they intend to repair and reinstall the tracks? How long is a reasonable time to expect that failure to replace the rails indicates abandonment? The answers can be determined only on a case-by-case basis.[3]

## 1.3 TRANSFERS OF TITLE AND INTERESTS

Whether the interests at stake are for use of real estate or for full title and ownership, there are numerous means of transferring and conveying these interests from one party to another. Once again, some history is useful in understanding the system in place today.

[3]The example of rail removal reflects only the physical aspect of railroad abandonment, as the legal process of abandonment is regulated by the federal Surface Transportation Board. However, when the regulatory process of railroad abandonment is complete, there is no written notice that abandonment has occurred.

### 1.3.1 Written Transfers and Conveyances

The system of record keeping known as a *cadastre,* basically an official register of the value, extent, and ownership of land for the purposes of taxation, began with the Domesday (also sometimes spelled Doomsday) Book. This was a survey of all the lands in England, ordered by William the Conqueror and completed in 1086, with the purpose of determining who held what lands in his kingdom and what taxes should be paid to him as the sovereign. Churches, lords, tenants on the land—all owed the sovereign ruler some form of payment for the privilege of holding the land on which they resided and/or worked.

Patents were written announcements of the regal grant and release of claims, decrees that served as the original deeds from the crown to private landholders. In the United States, we still refer to the original release of a sovereign right to land as a patent, whether from a king, from a federal agency, or from a state. This is the first private ownership of the tract, and it is not uncommon in some areas to have to trace the chain of title or rights of ownership backwards from the current written document all the way to the original patent in order to determine the intent of the parties to that first transaction. It is, after all, what the parties to the transfer of real property wrote down as their intent that must guide all later attempts to locate a tract on the ground or to establish the actual interests conveyed.

Once released to private rather than sovereign ownership, two forms of written transfers could then transfer title and other rights in land to an assigned individual or entity. These two forms survive today, with similar purposes and similar names to their historic predecessors.

The *indenture* is a document transferring rights to land between two or more parties—the minimum of two being the grantor, or one who grants the rights away, and the grantee, who accepts and takes over the rights formerly held by the grantor. There can be multiple grantors and multiple grantees, depending on shared rights. With the indenture, there is a mutual exchange, the grantor transferring real property in exchange for the "consideration" provided by the grantee. Consideration, which provides the motivation or inducement for the transfer to be completed, can be in the form of money, cattle, or a promise for certain actions. When real property transfers took place between family members in certain parts of our country, it was not unusual that "one dollar, love, and consideration" provided adequate indication of a completed contract, serving as the necessary "benefit to one party and detriment to the other."


This Indenture,
and forty seven. Between Henry Burkhard Junior of the District of Spr
Liberties
and Elizabeth his wife as well for and in consideration of the su
well and truly paid, the receipt whereof is hereby acknowledged, as of the payment of the yearly rent and taxes, and perfo
heirs and assigns, is and are to be paid and performed, Have granted, bargained, sold, aliened, enfeoffed, released and
common and not as joint tenants All that certain Lot or piece of Ground situate on the North side o
Garden in the County of Philadelphia Containing in front or breadth on the said Green Street Nine
angles with the said Green Street Thirty feet three inches narrowing on the West line thereof to the breadth of Sixteen feet
Twenty one feet Nine inches more or less and containing in breadth on the rear or North end of the said Lot at a right angle with
Ground of the said Henry Burkhard Junior and Southward by Green street aforesaid
Deed Book W 6 page 296 &c granted and conveyed unto Sarah Abigail Gardner in fee And the said Sarah Abigail Gardner by Indenture
Burkhard Junior in fee And the remaining part of the said Lot or piece of Ground above described being the Western most part

**FIGURE 1.3 An 1832 "indenture" deed.**

In the days before scanning and copying machines, all documents had to be written by hand, and the indenture document had to be produced in a form that allowed both parties, the grantor and the grantee, to have a copy of the deed upon completion of the real property transaction. It was common to have a desk allowing two scriveners to sit opposite each other at the same desk, writing out the same document simultaneously. If there were multiple parties to the transaction, all of the copies of the document were still written on the same long piece of paper or parchment, which would be cut apart with a wavy or saw-toothed (indented) line upon completion and signing of the duplicate documents (see Figure 1.3). Sometimes a word or phrase would be written between the copies and the cuts made through these writings.

Whether merely indented or also bearing cut writing, if there were ever questions as to the authenticity of documents, the various pieces could be compared to see if they fit together. A perfect fit proved the validity of the claim. Proof of authenticity was particularly important for this kind of transfer, as the grantor promised that the transferred rights were his to convey and that he bore the burden of making the grantee whole if that promise proved to be false, but the grantee was also bound by any conditions set out in the deed. The indenture has evolved

into the modern day *warranty deed,* and some more recent examples still open with the language, "Know all ye men by this indenture. . . ."

In contrast to the promises entailed by indentures and warranty deeds was the *deed poll*. In this transfer of real property title and interests, only the party executing it was bound by the deed, and not the grantor or the grantor's successors. There was no promise made that the grantee would be made whole if the grantor turned out not to have any interests to transfer. For this reason, instead of the wavy or indented line allowing copies of the indenture deed to be matched up to prove a claim, a single copy of the deed poll, containing no binding conditions and signed only by the grantor, was cut straight across the top ("polled"). The presence of any conditions would require the grantee also to sign the deed as indication of accepting those conditions, and therefore an indenture would be required.

The modern version of the deed poll is the *sheriff's deed* or the *quitclaim deed*. In such transactions, the grantee takes the risk that the grantor has the right to make the transfer for which the grantee has paid to acquire. Thus, there can be many deeds to sell the Brooklyn Bridge, but only one (from the true owner) will take the form of the indenture deed, while all the others will take the form of a deed poll or quitclaim deed with no guarantee of actual title, interest, or right being conveyed.

Written transfers include *wills,* which are an expression of the deceased's desire or "will" that his or her property will be disposed of in a particular manner. The words of a will are "words of command, and the word 'will' so used is mandatory, comprehensive, and dispositive in nature."[4] The lack of a will can result in default of an estate to the government in an escheat process that automatically occurs when there are no will naming heirs to convey the property and no statutorily defined heirs (such as spouses or immediate family).

Statutory proceedings (meaning fulfillment of processes permitted and outlined by law) can also result in transfers of title or changes in boundaries—presumably written if the judge has remembered to include the appropriate instructions in the final decree. Adjoining landowners disputing the line between them have the legal option to have their argument decided by a court-appointed panel of impartial *boundary line commissioners* or *processioners* (the term varying in different states). The court appointees are then charged with examining evidence of the boundary line, including deeds, plans, testimony, and physical visits to the site, in order to produce a written report. The disputing adjoiners have the option to accept the opinion expressed in

[4]*Black's Law Dictionary.*

the report or to turn it down and pursue litigation. The end result of either of these choices should, of course, be a written commemoration of the boundary location to prevent the same arguments over the same line arising between future owners of the same lands.

Multiple owners of a tract may have difficulty dividing it equitably between them, such as when a family of multiple siblings has inherited a large tract of land that varies in quality. Some of it may be suitable for agriculture, some of it may be suitable for timbering, some of it may be suitable for no economically beneficial use. Squabbles over how to divide the land fairly are sometimes settled by dividing the land according to its value and sometimes by establishing size of allotted subdivided portions of the whole. To accomplish either of these outcomes, the multiple owners can petition the court in accordance with the procedures outlined by state statutes, and request *partition* (sometime the executor of a will may make this request). The affected parties can either accept or reject the suggested partition. Whether the report is accepted or the division is finalized through litigation, the judgment establishing the new lines should be formalized in a written description and recorded to prevent future disagreements.

### 1.3.2 Unwritten Transfers and Conveyances

While a written document is the preferred means of transferring interests or full title in real property, there are recognized means of transfer without that formality. When the interests at stake are simply use of the property rather than full fee title, prescription and estoppel can create easement rights to continue an already established use of someone else's land. Both of these means have been described previously.

Unwritten transfers of title can occur even when no will exists, primarily through rights of survivorship, whether by marriage (dowry and curtesy) or joint ownership arrangements that automatically transfer the interests of the deceased party to the remaining partners.

But when claiming ownership of land without any written support, the claimant often must prove *adverse possession*. While we have mentioned "possession" earlier, we haven't discussed the various forms of possession, "adverse" being just one of many. The most obvious form of possession is *actual possession,* which merely states that someone physically occupies land but says nothing about the right to be there. When actual possession is not based on any written document or identifiable form of inheritance that would have transferred title to the possessor, there is no "color of title," the "color" being even the faintest hint of a right to the possession. In contrast to actual possession is

*constructive possession,* meaning that the one claiming ownership has a document supposedly granting the right and title to the real property, whether or not that person actually physically possesses the land.

When actual possession and constructive possession are held by different people with no agreement between them such as a lease or life estate, problems can arise: who has the greatest right? It is then that the claim of adverse possession comes into play. The one with actual possession must show that there was some legally acceptable reason for entering and occupying the land, that it was not merely a matter of squatting on the land with no rights but that there was some ambiguity in the written record giving rise to the belief that the actual possession was appropriate. There is a long list of requirements for proving the validity of an adverse possession claim for title of land in the courts (an action called *quieting title*).

Adverse possession must include the following elements:

- *Open*. It is not hidden or secretive.
- *Notorious*. It is noticed and known in the vicinity.
- *Hostile*. It is without permission and is against the claims of the "true owner."
- *Continuous for the statutory period of time*. Each state sets its own period of time during which the "true owner" has the obligation to eject the adverse possessor (or chain of adverse possessors who tack their time together to perfect a claim) or risk losing rights to the land after the statute of limitations has run.
- *Exclusive*. The adverse claimant fully and exclusively exercises full dominion over the property, preventing the "true owner" from exercising any rights without the adverse claimant's permission.
- *Color of title*. Laws in different states vary as to whether this is a requirement or merely an added condition supporting the validity of the adverse claim.
- *Payment of taxes*. Laws in different states vary as to whether this is a requirement or merely an added show of the validity of the adverse claim. Some states presume that no one would pay taxes on land he didn't own while elsewhere we note that tax collectors are indiscriminate about who pays the tax bill as long as it is paid.

The states differ in opinion as to whether an adverse claim to real property can ripen if it is based on a mistake, but all states bar claims based on fraud and provide protection against the running of the statute

of limitations for those under specified disabilities. This protection is generally extended to minors or mental incompetents, but other disabilities sometimes include incarceration or active service in the military. Each state's statutes must be consulted to identify qualifying disabilities within that specific jurisdiction.

Once the adverse claim has been settled in court and the title has been quieted in the formerly adverse claimant (now the new "true owner"), a description of the quieted land must be recorded in order to prevent a repeat of the same litigation. Because an adverse claim is likely to have been for a portion of a property rather than a complete tract, the formal line as established by the court must be clearly described. In such situations, generally some lack of clarity in a prior description gave rise to the problem in the first place.

There is no question as to the ability of government entities and school systems to adversely possess against private owners: they can. But there is a difference of opinion as to whether or not claims of adverse possession can succeed against government entities and schools. Most often, the winning defense of the government or school is that it holds the land for the greater public good, and therefore a member of that public cannot claim against the rest of the public with which he or she shares rights. Exceptions favoring the adverse claimant occur most often when the land is not being held for public use, such as a storage lot for municipal vehicles from which the public is prevented from entering. Additionally, the federal government acknowledged long ago that some of the early surveys of public and government lands were not so accurate, and therefore allowed for owners adjoining public lands held by the Department of the Interior to settle the common boundaries through adverse possession under very specific circumstances. (See 43 US Code §1068, "Lands held in adverse possession; issuance of patent; reservation of minerals; conflicting claims.")

*Practical location* of a boundary differs from adverse possession in that neither of the parties on each side of the line is sure of the location of the line between them, and the presence of some ambiguity in the language of their deeds (perhaps references to features that no longer exist, or some missing dimensions) prevents documents from solving the question. Over time, the two sides have come to honor a line that both agree is the common boundary, not because they mean to change what is written but merely to settle what they believe is the location of the boundary. This is a practical location, a line to which each side exercises complete dominion as true owner. This may, in fact, effect an unintentional, unwritten change in the boundary, but it

can be perfected by a written *boundary line agreement* that fixes and memorializes the practical location for all future parties on both sides. It is not the intent of practical locations and boundary line agreements to alter the written record, but instead to clarify it. Any intentional change in known boundaries must go through the process of subdivision or consolidation as regulated by local land use agencies.

Of course, certain acts of nature can alter boundaries as well. The most well known act increasing land holdings are *accretion* (the gradual and imperceptible increase of land due to natural causes, such as deposits from a river or ocean) and *reliction* (the gradual exposure of land through the retreat of water through natural processes). The actual increased land mass from the process of accretion is *alluvion,* but the terms are often used interchangeably.

Generally, in these gradual natural processes along navigable, tidal, or commercial waterways, boundaries move along with the changes in the water's edge if the body of water was referenced in the deed by which the landowner adjoining the water gained title. Without the stated intent of contact with the water, the ownership may lie with someone else. State statutes address the ownership of alluvion when the water body involved is navigable or tidal in nature. The sovereignty of the states in submerged lands is a relic from English law, when the monarch held them in trust for the public to allow use for navigation as "highways and byways" and for agriculture.

The opposite of the gradual increasing processes of accretion and reliction is *avulsion,* a sudden decrease in land due to erosion of the banks or shoreline. In such instances, the boundaries of a parcel that had been described in reference to the body of water generally freeze at the location immediately prior to the sudden event. Causes may be storms, dam breaks, or changes in stormwater management that reroute water. The question of what is "sudden" and what is "gradual" in order to establish boundaries is often hotly contested, and courts answer it based on the specific facts of a given case.

### 1.3.3 Statute of Frauds

Eventually, feudalism waned and true private land ownership was possible with more freedom to transfer real property interests. And, eventually, there were disputes about whether those interests had actually been transferred or if there were restrictions and conditions attached to the land. In 1677, the English Parliament passed a law entitled "An Act for Prevention of Frauds and Perjuries," its purpose being to prevent

injuries caused by frauds in the absence of a written document spelling out the terms and conditions for a variety of transactions, transfers of real property interests being one of these. The text of Section IV of this statute (29 Charles 2, Chapter 3) reads as follows:

> And be it further enacted by the authority aforesaid that no action shall be brought . . . (4) . . . upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

The language of this statute presents the requirement for a signed and written document using language we know to be derived from feudalism: tenements and hereditaments. The language clearly addresses any and all interests in real estate, from ownership to any lesser form of possession, except if the agreement for rights in land is to last only a year or less.

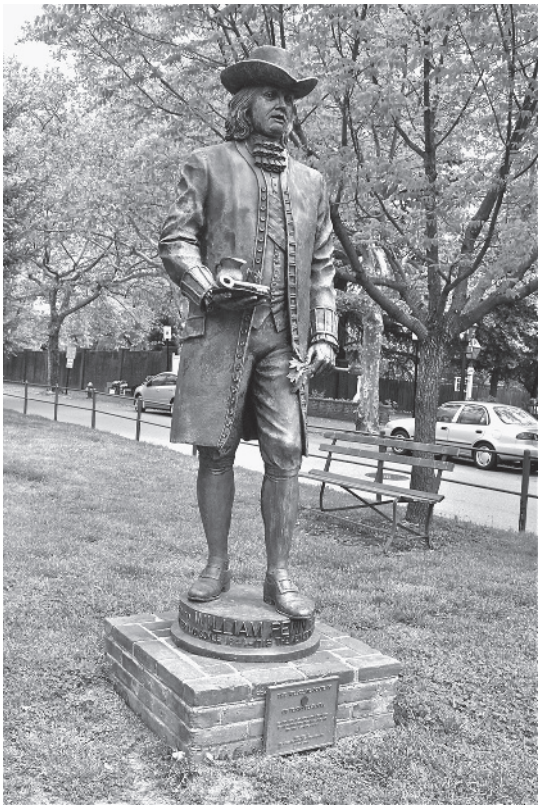
While this may seem to say clearly that all transfers of any interest must be in writing (and most of our states have adopted similar statutes), there are, in fact, varying interpretations and applications of the Statute of Frauds in the United States. Some states interpret and apply it to make all oral agreements for interests in real property void, while others states say that the Statute of Frauds merely means that no action (lawsuit) shall be brought before the courts regarding oral agreements. Obviously, this difference of opinion can affect at least the application of estoppel and equity in the different states.

Another aspect of the statute that varies regards the signatures; some states require a signature from only the party who is "charged therewith," referring to whichever party has been assigned an identified responsibility in the document. In some states this is interpreted to mean that only the grantor or lessor must sign, while others deem any real property transaction unenforceable if not signed by both parties.

If we refer back to *Spawn v. South Dakota Central Railway Co*., it is obvious that having the agreement committed to writing would have avoided the dispute. But the case also provides an example of an exception to the Statute of Frauds. When there is performance (even if only partial) on a presumed contract, those actions can serve as evidence of that agreement. Different judges in different courts in different states may, of course, vary in their opinion of adequate proof of a contract before deciding that one did exist.

## 1.4 DEEDS

Before the era of general literacy, possession of land was possibly the only evidence of title, with proof of transfers possibly only in the memories of the witnesses to the change in occupation. To memorialize the transfer of physical possession of a freehold estate to a new owner, a symbolic ceremony known as *livery of seisin* involved the feoffor (grantor) giving the feoffee (grantee) some physical thing to represent the land, such as a stick or a handful of earth from the newly acquired real estate, or perhaps a key (the statue in Figure 1.4 commemorates



(a)

**FIGURE 1.4a–c This statue of William Penn stands in the rear yard of the county courthouse in New Castle, Delaware. The upper plaque reads: "The citizens of New Castle Delaware presented to WILLIAM PENN (1644–1718) the key of the fort, one turf with a twig upon it, a porringer with river water, and soyle." *[Punctuation added]* The lower plaque is from "The Welcome Society of Pennsylvania" because this area used to be part of Pennsylvania.**

(b)

(c)

**FIGURE 1.4 (*Continued*)**

such a ceremony). The word *livery* comes from the same root as the word *deliver,* while "seisin" means "possession of the freehold estate." If the ceremony took place on the land, this was termed *livery in deed* ("deed" here referring to "the act" of delivery) and if it took place not on the land but in sight of it, this was termed *livery in law.*

As reading and writing became more commonly held skills, the ceremonial "livery of seisin" began to be accompanied by a written version, a document we term a *deed* (providing evidence of the action or "deed"). Written memorialization was used particularly when the limitations of the estate granted were numerous. The language employed attempted to capture all the intent of the ceremony, severing the

stated interests from the grantor and transferring them to the grantee. However, the written deed originally was simply evidence of title and was not the conveyance itself. A writing was not legally required until the enactment of the Statute of Frauds. Eventually, the document replaced the ceremony entirely.

With the historical background we've covered, we can now translate the intent and meaning of more modern documents that continue to use language originating in feudal days. This language can apply to transfers of both full title and partial interests such as easements. Let's look at one example to decipher its intent from the language it uses.

> Know all ye men by this indenture on this fourteenth day of May in the year of One Thousand nine hundred and twenty . . . for consideration of five thousand dollars paid by the party of the second part, that the party of the first part does grant, bargain, sell, alien, enfeoff, release, assign, convey, and confirm unto the party of the second part, his heirs and assigns the hereinafter described property. . . .

We already know from the word *indenture* that this is a warranty deed, one that assures the grantee or recipient that the grantor will stand behind the agreement and contract.

But why are so many other words used in this opening? Couldn't they have been condensed into fewer and more modern terms? In fact, deeds often do employ fewer words these days, but in the process a little of the full and historic impact of the intent has been lost. Each of the words has a unique meaning, a different connotation from the others used in the opening of the deed, and each tells us more about the purpose and effect of the document. (This is not to say that we should continue to employ the full ancient recitation—surely, that language can be replaced with more concise and equally expressive verbiage!)

- *Grant:* Bestow with or without compensation; transfer by deed or writing especially for "incorporeal interests" (having no physical aspects) such as reversionary rights
- *Bargain:* By mutual understanding, contract, agreement, and/or negotiation
- *Sell:* Exchange for valuable consideration
- *Alien:* Transfer to another party (as in alienating oneself from the land)
- *Enfeoff:* Grant possession (as in *fee* or *feoff*)

- *Release:* Give up any right, claim, or privilege
- *Assign:* Transfer for a specific purpose
- *Convey:* Pass or transmit title to another
- *Confirm:* Give assurance, clear away doubts, and approve

Let's look at how these terms interact. If a property is assigned but not aliened, then only an easement has been conveyed; we know that full title is not restricted to specific use of the property and that lack of alienation means that the grantor might retain interests. If a property is granted but no sale is mentioned, we know that there has been no compensation paid, raising questions as to whether full title has passed or merely some lesser interest.

So we see that choice of words in the opening lines of a deed is an important factor in understanding the intent of the parties, every bit as significant as the words chosen to describe the actual land in which interests are being transferred.

Deeds are contracts, and must therefore follow the rules defining the enforceability of any contract. Enforcing the Statute of Frauds consequently prevents some of the problems of oral agreements for transfer of full or partial interests in real property. Depending on the title or interests held by the grantor, the form of the deed will be either a warranty or a quitclaim deed. While the warranty deed provides a guarantee as to the validity of the grantor's rights and interests that he or she is conveying, the quitclaim deed, even lacking that warranty, may in fact convey equally valid title. It all depends on the title held by the grantor, despite the lack of any implication that he or she has good title; the quitclaim deed serves to transfer any interest that the grantor does have at the time that the deed is executed between the grantor and grantee, and that could be nothing at all or it could be full fee simple title.

### 1.4.1 Legally Sufficient

As contracts, deeds must identify the grantor and the grantee, contain words showing the intent of the parties to transfer the property, and contain a description that is *legally sufficient*. This last phrase means that the deed identifies a property adequately so that it can be uniquely identified (not confused with any other property) and so that a surveyor can locate it on the ground. The courts do not imagine that the general public is able to understand the geometry and references in a deed description.

However, for a surveyor to be able to locate a tract, the description must be clear, complete, and concise. The writer of a description must first determine what the description is intended to accomplish, and then make sure that the words accomplish that intent. Writers of descriptions should not rely on mathematics to establish intent of their documents, but instead should preserve the evidence of the boundaries through references to physical markers and features or other record evidence. More will be said on this matter later.

### 1.4.2 Abstract of Title

A title search is an examination of records of title to determine whether the presently conveyed title to the property is "good" or if there are defects in the title. The title examiner making the search is looking for anything that would affect the marketability of real property. For instance, the presence of liens (claims against the title in order to satisfy debts) affects marketability in that the satisfaction of the debt may require sale of the property to raise the necessary repayment funds. The existence of liens and other pending litigation (*lis pendens*) mean that title is not "clear." Other conditions affecting marketability of real property are the presence of easements, conditions, restrictions, and covenants; consistency in the record; and lack of access to public roads.

Rather than provide complete copies of all documents relevant to the marketability of a searched property, the title examiner generally provides an *abstract of title,* a condensed version of the history of the land's title. The process of "abstracting" means that the title examiner has reported on only those documents that individual believes to be relevant and significant, and only those portions of those documents the examiner considered important. For this reason, what may be important to a surveyor, who seeks information about the location, configuration, and size of a property, possibly will not appear in the abstract.

Furthermore, the examiner's work includes only a search of public records. There may be privately held records, such as utility location maps, that are not in government offices and therefore not considered public records, but the contents of such records definitely affect interests in property. Surveyors relying on abstracts of title should recognize the limitations of those reports and consider conducting their own additional research.

A further complication for surveyors is that title searching does not always reach back to the origin of a parcel, and so the abstract of title may not provide adequate references for surveying purposes. A scrivener's or typographical error occurring further back than the title

search began is likely to go undetected, and consistent re-recording of the same erroneous information can satisfy the title searcher's standards. The number of years that title searchers will go back in the records may be dictated by local standards, or by state statute in those jurisdictions where marketable title acts are in place. Under such circumstances, a state's enactment of a Marketable Title Act required all persons and entities with any interest in real property to file records within a given number of years of that enactment, attempting to create a clean slate by bringing everyone's real property records into public awareness.

### 1.4.3 Recordation

Recordation refers to the process of creating a public record of transferred real estate interests and ownership. The process of recordation is meant to protect parties acquiring title from other claims to the same interests, allowing anyone to review the written record in order to determine the ownership of land or any claims of rights related to it, that record including deeds, agreements, easements, mortgages, liens, and pending litigation. Other documents found in the public records can include highway plans (for establishment or for cessation/vacation of a state or county road), subdivision and development plats, notices, and wills.

Generally, recordation occurs at the county level for local transfers of real property interests. Requirements regarding acceptance of documents for recording (which may vary between states and even between counties within a given state) can include but are not limited to the following: mandatory contents for recordation; required format for recordation; fee for recordation (including transfer taxes); signature of and acknowledgment by the owner/grantor; approval by the land use agency having authority for subdivisions; and acceptance when dedications are represented on plats.

#### *1.4.3.1 Notice*

*Black's Law Dictionary* defines *notice* as:

> Information; the result of observation, whether by the senses or the mind; knowledge of the existence of a fact or state of affairs; the means of knowledge. Intelligence by whatever means communicated.

While the Statute of Frauds mandated the existence of some form of writing to convey real property or any interests in it, it was the earlier passage of the *Statute of Enrollments* under King Henry VIII in 1536

that required the grantee of a freehold estate (one gaining full seisin of the property) to record (*enroll*) acquisition of title within six months of execution. Its purpose was to prevent secret transfers of title that could easily be a source of fraud against the grantee.

This statute required deeds for "bargain and sale be made by writing indented sealed and enrolled in one of the King's courts of record at Westminster" or presented to "two justices of the peace, and the clerk of the peace of the same county or counties [where the property was situated]."[5] It came on the heels of the *Statute of Uses*,[6] also passed in 1536, primarily enacted to raise revenues for the king and addressing those who had the use of lands held by another (including in the long list of such interests estates for years, life estates, future in tail interests, and rights of dower and of curtesy). The Statute of Uses acknowledged a legal estate in the one who had the use (and the holder of these interests was taxed accordingly), presumably as a means to prevent fraud.

Until the passage of the Statute of Frauds, writings were not a requirement in the transfer of real estate interests. That meant that public *notice* of the change in owners of real property interests was possible only if the new owner immediately took possession of the land in a manner that was observable and noticeable. Such possession would give *actual notice* to the public, something physically observable. Two basic types of actual notice are *express notice* ("which brings a fact directly home to the party"[7] ) and *implied notice,* which provides the means to acquire the knowledge, but not the information itself, such as providing a reference to a deed without quoting the pertinent parts of that deed. *Constructive notice* includes any "information that inquiry would have elicited,"[8] and includes implied actual notice.

There is yet another form, *statutory notice,* provided by the enactment of legislation. Ignorance of the law is not an acceptable defense in the courtroom, and we are all presumed to know the laws guiding our livelihoods because we have statutory notice of them.

***1.4.3.2 Racing to Record*** It should be remembered that title to real estate does transfer between parties who have contracted through a deed whether or not that document is recorded and filed with a public authority. The purpose of recordation is to establish a uniform approach to settling disputes between various claimants to land within a

[5] 27 Henry VIII, Chapter 16, 1536.
[6] 27 Henry VIII, Chapter 10, 1536.
[7] *Black's Law Dictionary*.
[8] *Black's Law Dictionary*.

given jurisdiction, although there is no uniformity between the various states' statutes regarding document recordation. There are, however, four basic categories of recordation acts, all designed to provide notice to the public.

1. **Pure race statutes**
   In some states, the first purchasers of real estate to properly record their deeds will have precedence over all other conveyances from the common source of title (having won the race to the registry of deeds). Because it is possible to record a conveyance even if one has notice of an earlier but unrecorded conveyance, some states employ this approach only for certain conveyances such as mortgages or oil and gas leases in order to preserve equity, although others apply it to all transactions.
2. **Period of grace statutes**
   When transportation and communication were difficult and time consuming, this kind of act was implemented to provide protection to the first recipients of title for a set period of time to allow an adequate chance to record deeds. This is now combined with one of the other forms of recording acts.
3. **Race-notice recording statutes**
   In order to prevail under this kind of act, a later grantee of a parcel must be a *bona fide purchaser* (one who has paid consideration for the full value of the land rather than receiving the property as a gift or inheritance), must record prior to an earlier grantee, and must be without either actual or constructive notice of a prior unrecorded deed or mortgage. (If the earlier grantee records first, this is presumed to give constructive notice to the later grantee.) This kind of statute presumes good faith on the part of the junior grantee as to true lack of notice in the execution of the transaction. The junior grantee of a parcel previously sold to someone else will prevail only if he is unaware of the prior transaction *and* he records his interest prior to the senior grantee.
4. **Pure notice statutes**
   These acts are meant to protect junior grantees against earlier unrecorded conveyances if the junior grantee is a bona fide purchaser *and* has no actual or constructive notice of the prior conveyance (which may or may not have been for full consideration and value). Anyone having notice of unrecorded instruments is barred from claiming better rights based strictly on compared dates of recordation. The difference from race-notice acts is that

the junior grantee is protected when the senior grantee records *after* the grant to the junior grantee is executed and *before* the junior grantee records, or even if the junior grantee does not record at all.

To summarize, the rule as to which document is senior is established by a state's statutes. In states where pure race acts are in force, whoever is first to record a document has senior rights. In states where pure notice acts are in force, a subsequent grantee who is a bona fide purchaser without notice of a prior transaction may prevail even if not the first to record. Many states combine these concepts in race-notice acts to overcome some possible inequities that can occur with strict application of one form or the other.