**EASEMENTS**

Easement → a right enjoyed by one person over the land of another. The right will interfere with normal ownership rights (**Municipal District of Concord v Coles**).

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**IS THERE AN EASEMENT?**

Assess the 4 elements of an easement

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**HOW WAS THE EASEMENT CREATED?**

4 ways easements can be created;

1. Express grant or reservation
2. Implied grant;
3. Prescription;
4. Rights under statute

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**CAN EASEMENT BE ENFORCED UNDER TORRENS SYSTEM?**

Look to Part 8 of the RPA

*needs to be registered

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**INDEFEASIBILITY**

Sections 67 & 69 (RPA)

Breskvar v Wall

Frazer v Walker

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**EXCEPTIONS**

An exception must apply

Section 69 (RPA)

Golding v Tanner
WHAT IS AN EASEMENT?

DEFINITION

❖ ‘A right enjoyed by the owner of one piece of land to carry out some limited activity (short of taking possession) on another piece of land’ (*Municipal District of Concord v Coles*).

❖ Incorporational Hereditament ➔ easements are not possessory interests, but they are “inheritable”.

❖ Example ➔ the right of a landowner to use a driveway running over the land of another landowner.

EASEMENT DISTINGUISHED FROM RESTRICTIVE COVENANTS

❖ Easements may exist at law or in equity, restrictive covenants only confer equitable rights.

❖ Easements may be acquired by prescription; restrictive covenants require express intention.

❖ Easements can confer the right to enter another’s land; restrictive covenants cannot.

❖ Restrictive covenants can grant rights that may not be conferred by way of easement (e.g. the right to a view).

❖ Restrictive covenants generally concern modes of development, character of buildings and preservation of views.

IS THERE AN EASEMENT?

INTRODUCTION

This case concerns an easement over <servient> land for the benefit of <dominant> land. This easement takes the form of <insert type of easement>. An easement is a ‘right enjoyed by the owner of the dominant tenement to carry out some limited activity (short of taking possession) on the land of the servient tenement’ (*Municipal District of Concord v Coles*).

FOUR ELEMENTS OF AN EASEMENT

To establish a valid easement, the four elements discussed in *Re Ellenborough Park* and approved in *Riley v Penttila* must be satisfied.

1. “Dominant and Servient Tenement”

There must be both a “dominant” and a “servient” tenement. In this case, <dominant> is the dominant tenement as the owner is using <easement> over the <servient> land for <purpose>.

❖ There must be a parcel land that is “burdened” by the easement (servient) and a parcel of land that “benefits” from the easement (dominant) (*Municipal District of Concord v Coles*).

❖ If the right of interest conferred is not in some way attached to a dominant tenement, the right is a personal right and not a property right – it will amount to nothing more than a license (*A Victor Leggo Co Pty Ltd v Aerosols of Australia*).

❖ An easement cannot benefit the public at large and thus the common law ‘does not recognise easements in gross’ - (*Besmaw Pty Ltd v Sydney Water Corp*).

(a) “Dominant Tenement”

❖ For a valid easement, the dominant tenement need not be expressly defined, the court may have regard to the surrounding circumstances to identify the dominant tenement (*Re Maiorana and the Conveyancing Act*).

(b) “Servient Tenement”

❖ For a valid easement, it is essential that there should be a servient tenement which can be defined and pointed out (*Woodman v Pwllback Coillery Co Ltd*).
| Facts | A portion of the second floor on a multi-storey building was leased to the plaintiff ‘together with the right in common with the lessor…to use all common entranceways, stairways and lifts for access and egress from the demised premises’. To reach the stairs, the plaintiff needed to walk across the ground floor. |
| Issue | The instrument did not expressly mention the ground floor – is the easement valid? |
| Held | The easement was not void because of the lack of definition of the servient tenement. The servient tenement was held to encompass the ground floor generally, subject to the right of the lessor to confine it. |

2. **“Accommodate the Dominant Tenement”**

The law of easements developed to ‘facilitate the occupation, use and enjoyment of particular land, and the primary question asked by the courts has to be to what extent does the easement perform these functions (Harada). The critical question for the court will be whether the easement is ‘reasonably necessary for the enjoyment of the dominant tenement’ (Clos Farming Estates Pty Ltd v Easton).

- Is the easement reasonably necessary?
  - Example → if the dominant tenement is surrounded by the servient tenement and the dominant tenant must move through the servient tenement in order to reach the road (Gallagher v Rainbow).

The easement accommodates the dominant tenement because <easement> is reasonably necessary for the enjoyment of <dominant’s land>.

- Need not be adjoining → while the tenements need not be adjoining, the tenements must be physically close to one another (Gallagher v Rainbow).
- Benefit need not be limited to the dominant tenement → a right of way may be a valid easement even though it is capable of benefiting any passer-by who is completely unconnected to the dominant tenement (Re Ellenborough Park).
- If subdivision → there is a presumption that an easement attaches not only to the dominant tenement as a whole, but also to all its component parts during a subdivision (but not during an amalgamation) (Gallagher v Rainbow).
  - In other words, → if the dominant tenement subdivides, both owners of the subdivided land will enjoy the benefit of the easement.

3. **“Must be Owned by Different Persons”**

As no person can acquire rights against himself (Roe v Siddons), the common law provides that for a valid easement to be present, the owners of the dominant and servient tenements must not be the same person (Post Investments v Wilson).

- Rule → No person can acquire rights against himself or herself (Roe v Siddons). ‘[T]he position at common law is that where land has been subject to an easement…for the benefit of other land, and thereafter the dominant and servient tenements come into the ownership and possession of the same person, any easement over…the servient tenement is extinguished by operation of law’ (Post Investments Pty Ltd v Wilson).
- Torrens Land → ‘a person may be the proprietor of an easement and the servient land that is subject to the easement and accordingly a person may grant an easement to himself or herself’ (Real Property Act 1886 (SA) s 90C(1)).
  - Any Torrens title easement is ‘extinguished by the amalgamation of the dominant and servient land’ (Real Property Act 1886 (SA) s 90C(3)).

4. **“Must be Capable of Forming the Subject-Matter of the Grant”**

The easement must not be expressed in terms which are too ‘wide and vague’ so as to make the easement incapable being granted.

- Rule → Grantor must be capable of granting the easement and the grantee must be capable of receiving it.
  - Q: The critical question is whether the easement is expressed in terms which are too ‘wide or vague’ to constitute an easement.
  - Examples:
    - Ius spatiiandi → the “privilege of wandering at will over all and every part of another’s park or field” is sufficient to constitute an easement (Riley v Penttila).
    - Right of Prospect → this right is ‘too indefinite’ to be considered an easement (Aldred’s Case).
- Right to an Undefined Flow of Air → such a right can amount to an easement if created by express grant or reservation (Commonwealth v Registrar of Titles (Vic)).
- Right to Park → accepted as a valid easement (Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets).
- Right to use whole land for recreational purposes → held to be a valid easement (Tujilo v Watts).

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**WHAT TYPE OF EASEMENT IS IT?**

**NB:** An easement may take any of the following 5 forms;

1. Right of Way
2. Right of Support
3. Right of Light and/or Air
4. Fencing Easement
5. Floating Easement

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**RIGHT OF WAY**

- **Rule** → The courts will enforce such an easement when the terms are ‘clear and unambiguous’ (Barry v Fenton).

- **Right-of-way carries with it ‘those ancillary rights which are necessary’** for the proper use and enjoyment of the easement (Westfield Management v Perpetual Trustee) and may include –
  - The right to construct improvements on the easement area (Sertari Pty Ltd v Nirimba Developments);
  - The right to pave, seal or construct a road for vehicles (Clifford v Dove);
  - The right to repair or maintain the easement site (Auerbach v Beck);
  - The right to illuminate the right of way (Owners of Strata Plan 48754 v Anderson);
  - The right to load and unload motor vehicles in the easement area (Deanshaw v Marksall).

- **‘Nature of the Route’** → The court will consider, when relevant, the nature of the route.

- **Examples;**
  - A right of way along a footpath will not be sufficient to allow for car traffic on that route (St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)).
  - An easement allowing for ‘horse and cart traffic’ will be insufficient to allow for modern road traffic because modern vehicles cannot manoeuvre the passage without damaging the surrounding grass (Walker v Bridgewood).

- **‘Purpose’** → Court will consider the purpose for the right of way.

  - **General Rule** → The uses to which an easement may be put include all uses which are compatible with the physical nature of the servient tenement (Elliot v Renner).

  - **Example** → If an easement’s purpose is to allow for deliveries to a business, that easement will permit the parking and loading/unloading of vehicles carrying deliveries to the business (Elliot v Renner).

- **Obstruction** → A right of way easement may be granted subject to an obstruction (Spear v Rowlett).

  - The onus of removing the obstruction lies on the grantee of the easement (Spear v Rowlett).

- **Height and Width of Right of Way** → If there is no express grant to the contrary, a right of way does not extend in height – it only extends as far as is required for the reasonable needs of the owner of the dominant tenement (McMahon v McMahon).

  - What constitutes “reasonable” will be a question of fact (Manly Properties Pty Ltd v Castrisos).

- **Duty to Repair** → lies on the grantee, even when the right of way is not physically fit at the time (Staley v Pivot Group Pty Ltd (No 2)).

- **The words ‘a free and unrestricted right of way’ in an instrument shall imply a ‘full and free right and liberty to and for the proprietors for the time being…’** (RPA s 89 and Sch 5).

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**RIGHT OF SUPPORT**

- **Rule** → A fee simple title to land entitles the owner to a right of support of neighbouring land (Byrne v Castrique).

  - Applies only to Land in ‘Natural State’ → the right applies only to land in its natural state and does not apply to any additional buildings or structures erected on the land (Stoneman v Lyons).
RIGHT OF LIGHT AND/OR AIR

❖ Rule → Australian law allows for easements in regard to the right to light or air (*Commonwealth v Registrar of Titles (Vic)*).
  ➢ Not by Prescription → Right to light by prescription has been abolished via statute (*Law of Property Act 1936 (SA)* s 22).
  ➢ Can be Created by Express or Implied Grants → rights to light or air may still be validly created via either express or implied grant (*Commonwealth v Registrar of Titles (Vic)*).
    o Test → How much light/air is required by the dominant tenement ‘for the ordinary purposes of inhabitancy or business’ (*Colls v Home and Colonial Stores Ltd*).
  ➢ A right to air may still be created by prescription (*Webb v Bird*) or by express grant (*Commonwealth v Registrar of Titles (Vic)*).

FENCING

❖ Rule → Fencing easements bestow upon the landowner a positive obligation to construct and maintain a fence on their own property.
  ➢ Example → to keep animals out of the dominant tenement’s land (*Coaker v Willcocks*).

FLOATING EASEMENT

❖ Rule → Floating easements may be created when conferred rights do not attach to any particular part of the servient tenement’s land.
  ➢ Example → An easement granting the use to common entranceways, stairways and lifts for the purpose of accessing the land (*State Transit Authority of NSW v Australian Jockey Club*).

HOW WAS THE EASEMENT CREATED?

NB: An easement can be created in six ways:
(1) Express grant or reservation;
(2) Implied grant;
(3) Implied reservation;
(4) Prescription;
(5) Rights under statute; or
(6) Equity

EXPRESS GRANT OR RESERVATION

This is an easement by express grant because <servient> has granted the easement to the <dominant> and the grant is consistent with the proprietary interest of the <servient>.

❖ Rule → Any legal person may grant or reserve an easement to the extent that such a grant is consistent with their proprietary interest in the servient tenement.
  ➢ GENERAL LAW → an express grant or reservation may only be conveyed by deed (*LPA (SA)* s 28(1)).
    o General law equitable easements are possible (*Walsh v Lonsdale*).
  ➢ TORRENS SYSTEM → an instrument creating an express grant or reservation that is registered takes the effect of a deed (*RPA s 57(3)).
    o Failure to comply with the statutory requirements may still give rise to an equitable easement (*Barry v Heider*).
  ➢ COMMON LAW → no easement can exist by reservation unless a conveyance, containing a reservation, is executed.
  ➢ A mortgagee exercising a power of sale may grant an easement (*LPA s 47(1)(a)).

(a) Statutory Requirements – Legal Easement

❖ Easements are not binding on any registered proprietor subsequently acquiring land bona fide for value, unless entered on the Certificate of Title (*RPA s 84*).
An easement granted shall be entered on the original and duplicate CT for the dominate and servient lands by the Registrar-General (RPA s 88).

Creation and transfer of an easement shall be executed in the appropriate form (RPA s 96).

**IMPLIED GRANT**

*Applies only to subdivided land!*

An easement under an implied grant will arise in the following circumstances;

- Under the rule in *Wheeldon v Burrows*;
- General words imported into conveyances;
- Implication from the description of the land; and
- Derogation from grant.

<table>
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<tr>
<th><strong>Wheeldon v Burrows (1879) LR 12 Ch D 31</strong></th>
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**Wheeldon v Burrows Easement**

This is an easement by implied grant, that being the type established in *Wheeldon v Burrows*. Such an easement will exist when a parcel of land is granted through subdivision and, prior to the severance, the granted land had the benefit of a particular right. This easement is based on the principle that a grantor should not derogate from their grant (*Kitching v Phillips*).

→ Has there been a subdivision?
→ What was the benefit that existed prior to the grant?
  - This benefit must be continuous in the sense that it is permanent (*Steven v Adams*).
  - Must be a feature of the land that is ‘neither transitory nor intermittent’ (*Stevens v Adams*).
    - **Examples**;
      - Right of way over a made-up road (*Hansford v Jago*);
      - Easement of watercourse (*Watts v Kelson*);
      - Right of light (*Phillips v Low*).

Furthermore, it must be established that the easement is ‘necessary to the reasonable enjoyment of the property granted’. This is a less stringent test than that applied to easements of necessity and an easement that is ‘probably’ necessary or even ‘convenient’ will satisfy this test (*Daar Pty Ltd v Feza Foundation*).

→ Is the easement sufficiently necessary?
  - Must be either;
    - Necessary to the enjoyment of the benefited land; or
    - Necessary to the enjoyment in a reasonable manner of some permanent feature or part of the land (*National Trustees, Executors and Agency Co*).

Lastly, the easement must have been used by the grantors for their benefit at the time of the grant.
Was the easement being used by the grantors right up until granting the land?

This <easement> likely satisfies the requirements of a Wheeldon v Burrows easement by way of implied grant.

The Rule in Wheeldon v Burrows

- **Rule** → an easement may be impliedly granted when part of a parcel of land is granted and the granted land had, prior to the severance, the benefit of a particular right or 'quasi-easement' (*Wheeldon v Burrows*).
- **Based on principle that a grantor should not derogate from their grant** (*Kitching v Phillips*).
  - Rule operates when:
    - A part of a parcel of land is granted (subdivision);
    - Prior to the severance of the part granted, that land had the benefit of a continuous and apparent easement:
      - Must continuous in the sense that it is permanent (*Steven v Adams*).
      - Less stringent test than applies to easements of necessity, and an easement that is 'probably' necessary for the enjoyment of the land or part of it, or even 'convenient' for its use, will usually satisfy this rule (*Daar Pty Ltd v Feza Foundation Ltd*).
    - Prior to and at the time of the grant, the easement was used by the owner of the land for the benefit of the land granted (not a personal benefit).

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<tr>
<th><strong>Cuzeno Pty v Owners SP 65870 [2013] NSWSC 1385</strong></th>
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<td>Cusenzo became the owner of a lot and then transferred ownership to another company (“Topdaze”). Lot was located on the ground floor of a commercial/residential development. Since 2009, a café had operated on the lot and had used a grease trap located in the basement underneath the lot. The grease trap and the associated pipes were located on a common area. Cusenzo argued that the transfer of the lot to them gave rise to an implied Wheeldon v Burrows easement for the benefit of the grease trap.</td>
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<tr>
<td><strong>Issue</strong></td>
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<tr>
<td>Did this amount to a Wheeldon v Burrows easement?</td>
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<td><strong>Held</strong></td>
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<td>Not a Wheeldon v Burrows easement because the original owner of two parcels of land had not been using an easement for a grease trap at the time of the subdivision. Held that it was an easement of necessity. The Supreme Court of NSW granted an owner of an easement over an area of common property where the owner installed a grease trap for the operation of a café.</td>
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**General Words Imported into Conveyance**

- **Rule** → easements can be imported into conveyances through the use of ‘general words’ (*LPA s 36*).
  - **Exception** → section 36 does not apply when the conveyance expresses a clear contrary intention (*LPA s 36(3)*).

**Implication from the Description of the Land**

- **Common Law Rule** → an easement may be impliedly granted by virtue of the nature in which land is described in a conveyance or contract of sale.
  - **Example** → a parcel of land that is described as ‘bounded by’ a road will impliedly grant a right-of-way over the grantor’s land to access the road (*Dabbs v Seaman*).
  - **This rule applies to Torrens land in SA.**

**IMPLIED RESERVATION**

**Applies only to subdivided land!**

- There are 2 circumstances in which a reservation of an easement may be implied;
  - Easements of Necessity (strict necessity + at the time of severance + must exist at the time of transfer); and
  - Easements by Common Intention.

**Easements of Necessity**
NB: Undecided whether an easement of necessity can exist under the Torrens System.

- **Rule** → easement of necessity will be implied when a parcel of land cannot be used if not for the easement.
  - Example → when the property is landlocked and otherwise could not access the road (*Russell v Pennings*).
  - **Rule** → the easement must be ‘absolutely necessary’ (*Bolton v Clutterbuck*).
    - If there is another way to access the land (however impractical) there will be no easement implied (*McLernon v Connor*).

- A right of way by necessity cannot be established over another’s land if the person intentionally cut off direct access to the road (*Harris v Flower*).

**Easements by Common Intention**

- **Rule** → easement may be implied when it is necessary to give effect to the common intention of the parties under a grant of property.
  - There must be a ‘common intention of the parties that the land be used for a particular and defined purpose’ (*RJ Finlayson Ltd v Elder Smith & Co Ltd*).

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<th><strong>Re State Electricity Commission (Vic) and Joshua’s Contract</strong></th>
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**EASEMENTS BY PRESCRIPTION**

An easement by prescription may be acquired when a proprietor has enjoyed and exercised a right over adjoining land continuously, peacefully and for a long period of time (*Delohery v Permanent Trustee Co of NSW*).

An easement by prescription, that being the type codified by the doctrine of lost modern grant and the Prescription Act 1832 (UK) may be established in South Australia (*Prescription Act 1832 (UK); Doctrine of Lost Modern Grant; Healy v Dawkins; Golding v Tanner; RPA s 84*).

Under these authorities, a person who had used an easement continuously for 20 years “as of right” acquires the easement by prescription. The owner of the servient tenement must not have changed during the 20-year period, (*Golding v Tanner*). Once the owner of the servient tenement does change, the period resets.

- **Q:** Has the dominant tenement satisfied the time period?

The servient owner must have had either actual knowledge, constructive knowledge or the means of knowledge of the use of the easement by the dominant owner.

- **Q:** Did the servient owner have knowledge?

There is no requirement that the person use the easement with any frequency, however the easement must have been used in such a nature and with such frequency as to indicatethe dominant owner is asserting a right (*White v Taylor (No 2)*). The person must have used the easement as if it were their own thus if they are using it because the neighbor is doing it as a favour then the test will not be satisfied (*A-G v Horner*).

- **Q:** Has the easement been used in a way which shows the dominant owner is asserting a right?

It must be shown that the servient owner ‘acquiesced’ in the user. In other words, the servient owner must have tolerated the use by the dominant owner by ‘abstaining from any such interference for such a length of time as renders it reasonable for the courts to
that he shall not afterwards interfere to stop the act being done’ (*Dalton v Angus*). The onus for proving that the servient tenement did not tolerate the use lies with the servient owner (*Gangemi v Watson*).

> Q: Did the servient owner tolerate the use by the dominant owner?

As this is not registered on the CT, it would not be enforceable against the registered proprietor (*RPA* ss 83, 85) and any subsequent purchaser of the servient land would not be bound by the easement unless it is registered (*RPA* s 84).

The issue now becomes one of registration. The servient owner is the registered proprietor in fee simple of the land and thus enjoys indefeasibility (*RPA* s 69; *Fraser v Walker*; *Breskvar v Wall*).

For the easement to be registered, an exception to indefeasibility needs to be established. The in personam exception provides that indefeasibility does not free the RP from interests with which he has burdened his own title (*Bahr v Nicolay*; *Fraser v Walker*)

To establish an in personam exception there must be a known cause of action (*Grgic*) and arguably unconscionability (*Vassoss*) however courts are moving away from the unconscionability requirement.

> Go to indefeasibility and exceptions section!

**Final Advice for prescription easement** ➔ lodge a caveat and attempt to negotiate with the servient owner and enter into a contract under which consideration would be provided by the dominant owner in return for the registration of the easement on the CT of the servient tenement.

- What is a Prescription Easement? ➔ the method of giving legal recognition and effect to [an easement] which has continued unchallenged for so long that to deny it legal recognition would, it is said, amount to injustice (*English Law Reform Committee*).

- Rule ➔ an easement may be acquired by prescription when a proprietor has enjoyed and exercised a right over adjoining land continuously, peacefully and for a long period of time (*Delohery v Permanent Trustee Co of NSW*).
  
  ➢ Must establish the following:
  
  ▪ The exercise was ‘as of right’;
  
  ▪ Easement will not arise unless the enjoyment is ‘as of right’ (*Hanna v Pollock*).
  
  ▪ Question of Fact (*Bishop v Springett*).
  
  ▪ Servient owner had knowledge, constructive knowledge, or means of knowledge, of the user;
  
  ▪ Servient owner acquiesced in the user;
  
  ▪ Servient owner must ‘abstain from any such interference for such a length of time as renders it reasonable for the courts to that he shall not afterwards interfere to stop the act being done’ (*Dalton v Angus*).
  
  ▪ Onus of proving otherwise rests with the servient owner (*Gangemi v Watson*).
  
  ▪ User was against the fee simple owner;
  
  ▪ User was ‘without force, without secrecy and without permission’.

  ➢ Relies on **doctrine of lost modern grant**.

  ▪ Doctrine of Lost Modern Grant ➔ the easement will be implied if the use has been for 20 years (or more).
  
  ▪ Almost ‘un-rebuttable’ because it is based on the presumption that the servient tenement owner would not have allowed the use for that long if they did not allow it.
  
  ▪ Doctrine applies in all Australian jurisdiction (except Tasmania) (*Fernance v Simpson*).
  
  ▪ In SA – prescription easements may exist alongside Torrens land provided there has been no change in the registered proprietor of the servient tenement during the use of the easement (*Golding v Tanner*).

- Easement need not be used with any frequency, but the frequency with which it is used must indicate that the dominant owner is asserting a right (*White v Taylor (No 2)*).

- A mistaken belief by the dominant owner as to his rights will not rebut a presumption of a prescriptive easement (*Bridle v Ruby*).

<table>
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<tr>
<th><strong>Golding v Tanner (1991) 56 SASR 482</strong></th>
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</table>
Did this amount to an easement by prescription?

Held

The *Prescription Act 1832* (UK) applies in SA. Easement by prescription granted to G.

‘Both under the doctrine of lost modern grant and the doctrine of prescription, the presumption is that the long user is in exercise of a grant or right which was in existence at the commencement of the required period of user. Such a grant or right clearly could not prevail against a registered proprietor who took bona fide for value after the commencement of the period of use. I do not think that there is anything in the sections dealing with easements or in the other provisions of the [RPA] which modifies that consequence of the principle of indefeasibility’.

‘It follows that when, as in the present case, there has been the same registered proprietor of the servient land throughout the requisite period of user, the easement can be enforced by order in personam against such registered proprietor’.

### EASEMENTS UNDER STATUTE

- Legislation may create an easement (*RPA ss 67, 83-85*).

### EASEMENTS AT EQUITY

- **Rule**: easement will only stand in equity if consideration is provided and if the terms of the easement as sufficiently clear and defined (*Brownsea v National Trustees, Executors & Agency Co of Australiasia Ltd*).
  - Must be in writing (*LPA s 26*).

### CAN EASEMENT BE ENFORCED UNDER TORRENS SYSTEM?

#### EXPRESS EASEMENTS MUST BE LISTED ON THE MEMORANDUM OF TRANSFER

- An express easement cannot exist under Torrens system if there is no memorandum of transfer (*RPA s 96*).
- Any easement created by express grant must also be registered on the certificate of title (*RPA s 84*).

**Exception to the Rule**

- An exception applies if the creation of the easement concerns the subdivision of land (*RPA Part 19AB*).
  - Easement will be created if an application for subdivision is made to the Registrar-General (*RPA s 223ld*); and
  - Upon depositing the plan for the subdivision to the LTO, the easement is created (*RPA s 223le*).

#### DOES THE ACT APPLY TO EASEMENTS CREATED BEFORE LAND IS BROUGHT UNDER TORRENS SYSTEM?

- **Rule**: there is no SA authority, however it is suggested the rule in *Jobson v Nankervis* applies (involved identical NSW provisions).
  - Rule: RPA does apply to easements created before the land was brought under the Torrens system (*Jobson v Nankervis*).

#### CAN PRESCRIPTIVE EASEMENTS BE ENFORCED OVER TORRENS LAND?

- **Rule**: considered a ‘debateable issue’ (*Gartner v Kidman*).

**The Argument that they Cannot**

### Anthony v Commonwealth

Held

I think that [the Act] does indicate a legislative intention inconsistent with the acquisition by prescription of easements adverse to a registered proprietor. It appears that in s 84 [SA Act] it is assumed that an easement created by express grant but not entered on the certificate of title is binding upon the registered proprietor who grants it. But the fact that this provision is made in relation to easements created by express grant or
Transfer and that no similar provision is found in relation to easements claimed to have arisen by prescription is, in my opinion, significant…in my opinion, to the view that a private easement not based on any actual grant and not notified on the certificate of title is not effective against the registered proprietor.

The Argument that they Can

- This case distinguished Anthony v Commonwealth.

Golding v Tanner

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<tbody>
<tr>
<td>[Anthony v Commonwealth] considered that an easement based upon prescription does not satisfy the description of an easement ‘granted or created’. At that time, however, the Registrar-General’s authority under the section was to ‘enter the memorial of the instrument granting or creating such a right of way or easement’ upon the title. The section, as it then stood, clearly restricted the Registrar’s authority to easements granted or created by instrument. In 1985, however, the section was amended to remove the reference to an instrument and it seems to me that the word ‘created’ freed of its association with the word ‘instrument’ is apt to include an easement based upon prescription or lost modern grant.</td>
</tr>
</tbody>
</table>

EFFECT OF INDEFEASIBILITY

SERVIENT TENEMENT HAS INDEFEASIBILITY

‘The Torrens system of registered title is not a system of registration of title but a system of title by registration’ (Breskvar v Wall). Upon registration of the <interest>, <person> has received indefeasibility (RPA ss 67, 69). Indefeasibility provides <person> with a legal interest that is ‘immune from adverse attack’ and ‘secure and conclusive…subject only to the interests registered on that title’ (Frazer v Walker; Breskvar v Wall). <person’s> title is thus indefeasible unless as exception applies.

EXCEPTIONS TO INDEFEASIBILITY

If fraud, → see the “indefeasibility and exceptions” notes above!

Exception: In Personam

Unlike in other Australian jurisdiction, the SA Act contains a specific provision for the in personam exception (RPA s 71(d)-(e)). Indefeasibility ‘in no way denies the right of a plaintiff to bring against a registered proprietor a claim in person, founded in law or equity’ (Frazer v Walker). To apply, there must be a recognised cause of action (Bahr).

Q: What is the recognised cause of action?

  - Examples:
    - Undue influence (Johnson v Buttress).
    - Duress (Crescendo Management Pty Ltd v Westpac Banking Corporation).
    - Estoppel (Barry v Heider).
    - Unconscionable dealing (Parker v Mortgage Advance Securities Pty Ltd).
    - Wife’s special equity (Garcia v National Australian Bank Ltd).
    - Breach of fiduciary duty (Chan v Zacharia).
    - RP has undertaken to be bound by a prior unregistered interest (Bahr v Nicolay (No 2)).

If promissory estoppel → In this case <person> has relied on <person’s> promise to <person’s> detriment. <Person> has a recognised cause of action in promissory estoppel as it would be unconscionable for <person> to assert an unencumbered title. In this case, <person> holds legal title subject to <person’s> unregistered interest (Bahr).

EXTINGUISHMENT OF EASEMENTS
**General Rule** → an easement may be extinguished by release, either ‘express…or by circumstances occurring from which a release must be presumed’, by unity of ownership and possession, and by obsolescence (*Treweeke v 36 Wolseley Road*).

### EXTINGUISHMENT BY RELEASE

**Express Release**

- **Rule** → mutual agreement between the parties will bring an end to an easement.
  - Requires a deed for the express extinguishment of an easement (*LPA s 28(1)*).
  - **Torrens System** → certain conditions must be met (*RPA s 90B(1)(c)*).
    - May apply to the Registrar-General in an approved form.

**Abandonment**

- **Rule** → abandonment of the easement will bring an end to it (*Treweeke v 36 Wolseley Road*).
  - Must be considered in the circumstances of the case.
  - Courts require evidence of the intention to abandon the easement (*Treweeke v 36 Wolseley Road*).
  - Mere lack of use is insufficient (*Wolf v Freijabs’ Holdings Pty Ltd*).

### EXTINGUISHMENT BY UNITY OF OWNERSHIP AND UNITY OF POSSESSION

- **Rule** → if the owner of the servient tenement becomes the same owner of the dominant tenement, the easement will be extinguished.

### EXTINGUISHMENT BY OBSOLESCENCE

- **Obsolescence** → ‘if a time comes when the purpose for which an easement has been granted can no longer be achieved, then in that sense the easement has become ‘obsolete’…The term ‘obsolete’ means ‘no longer relevant to the circumstances presently obtaining’ (*Re Eddowes*).
  - Requires there be no intention to extinguish the easement, but that the circumstances no longer support the existence of the easement.
  - Example:
    - Right of way was established to access commonly owned stables. Over the years, vast improvements were made to the area to make the stables more readily accessible. Held → the improvements made it ‘unreasonable for the plaintiff to intrude on the servient tenement’ any longer (*Walker v Bridgewood*).