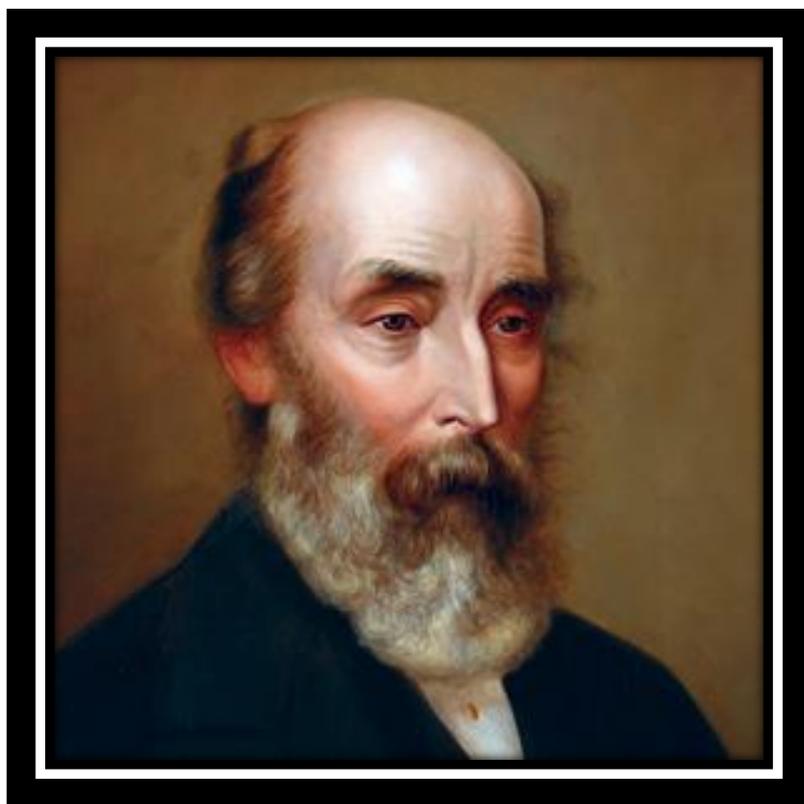


LAWS 4107

Land Law



SAMPLE EXTRACT

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Indefeasibility

- ❖ s 68(1) – RP has an indefeasible title (subject to exceptions; subject to other registered interests).
 - ❖ s 134 – registration proof of title (no inquiries required) & notice of unregistered interests irrelevant.
 - ❖ s 199 – RP cannot be ejected/deprived of land except in limited circumstances (fraud).
 - ❖ s 202 – purchasers protected from fraud/error of registered title.
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- ❖ Example: A forges deed of transfer from B to C; C then pays A; C now RP.
 - Immediate (s 68) = C gains indefeasible title upon registration.
 - Deferred (s 134) = C cannot gain indefeasible title, but is root of future good title.

Torrens methodology:

- ❖ At least one party registered.
- ❖ RP has immediately indefeasible title unless an exception applies (*Frazer; Breskvar*; TLA s 68).
- ❖ If both are registered then apply rule to party whose title is being questioned.

GIBBS v MESSER [1891] Vic (Lord Watson) PC

M (RP) left DCT & POA with C (solicitor), C forged transfer to 'Cameron', then secured mtg from Mc, G registered mtg, C absconded. M sued G, called for cancellation of CT & issue new title free from mtg, or allow access to assurance fund.

- **Deferred indefeasibility – Mc can create indefeasible title** (though mtg invalid; new CT in favour of M).
- **Those who deal with a forger (not RP) do not transact on faith of register & cannot through registration of a forged deed acquire valid title**, although they can pass valid right to 3rd party BFPV.

FRAZER v WALKER [1967] NZ (Lord Wilberforce) PC

Mr/s F (RPs), subject to mtg, Mrs F gave mtg to R. Mrs F forged husband's signature & registered mtg. No payment so R sold to W & transfer registered (R & W acted in good faith). W sued Mr F. Latter argued signature forgery & mtg & sale occurred without his knowledge. Claimed declaration that interest not affected & mtg was null.

- **RP's title indefeasible even if void instrument involved (registration cures any defect)**, principle of registration protecting RPs from adverse claims does not deny right of a plaintiff to bring a claim *in personam*.
- **Deferred indefeasibility only applies to facts of *Gibbs v Messer***

BRESKVAR v WALL (1971) Qld

B (RP) gave mtg to P (registered). To secure loan B executed transfer ('purchaser' blank) & gave to P with TDs. P inserted W's name & registered. P (agent of W) sold to A. B lodged caveat (absolute) once aware; A unable to register. B sued W, P & A; notified Registrar. B called for declaration that original transfer for security purposes only (memorandum void under *Stamp Act* & W only trustee), cancellation of registration & amendment to CT; or W transfer to B.

- **BARWICK CJ: Torrens is title by registration.** B has equity (unregistered interest) due fraud.
- **MCTIERNAN J: W's title good against all except B (fraud)**, s 48 recognises equitable interests (A as BFPV held equitable interest – right to register) but **conduct of B meant priority of prior interest lost.**
- **MENZIES J: if fraud by transferee or exception applies the transferee's title is 'defeasible'**, W's registration removed B as RP but left right to impeach, **by executing blank form B breached *Stamps Act* s 53 allowing W to become RP.**
- **WALSH J & GIBBS J: BFPV has an equitable estate in land before registration** (priority still lost if only mere equity).

ANZ v BARNES (1994) NSWSC (Young J)

After dissolution a company gave mtg in favour of ANZ (unaware of dissolution) & registered.

- **Despite registration the mtg conferred no interest to ANZ due to fiction of the company.**
- Fictitious transferee cannot impede right of true owner to be restored (*Gibbs v Messer*).

REGISTRAR OF TITLES v ESPERANCE LAND COMPANY [1899] WA

A sold portion of land to H (received CT) & remainder to S. Error by Registrar gave S entire land on CT. S transferred title to E (BFPV). E argues while error may have been rectified if realised prior to transfer, once held by 3rd party without fraud then they cannot be required to relinquish CT.

- CHIEF JUSTICE: disagrees with E (TLA s74 allows for error rectification) & argues **TLA s202 (no interpretation will result in ejectment by BFPV) does not apply to situation where land concerned is not well-defined. Therefore, E wrongfully retained CT & should be ordered to deliver for rectification.**
- STONE J: agrees with CJ, TLA s 74 (protector of prior CT holder) controls application of s 202.
- HENSMAN J: agrees with CJ, notes judge has discretion regardless of s76 (did not want to create a broad principle as to amendment of CTs through court order – need to treat each situation differently).

MBF v FISHER (1984) QSC (McPherson J)

Land registered under 3 persons (TiC). Lease to MBF for 3 years (registered). MBF notified (22/10/80) of exercise of option to renew commencing 01/02/81, land sold to F (31/10/80). F aware of exercise, but Registrar issued new CT without lease. In course of cancelling prior CTs, Registrar omitted to include lease ('lease expired').

- MBF has no rights deriving from lease as F holds CT free from all interests.
 - RPA s 18 provides lease <3 years can be registered if in proper form.
 - *Mercantile Credits v Shell* (1976) held **protection of registration extends to right of renewal if contained.**
- **Registrar has power to cancel an existing CT & replace it with a fresh one (s 44).**
- **Registrar alone has discretion to correct errors (s 11(4)) & not court** (unless power limits exceeded).
- *Canadian Pacific Railway v Turta* held **exception to indefeasibility in favour of a prior CT available only if two subsisting CTs exist** (law since *Breskvar v Wall*), otherwise every interest on a cancelled CT would have claim over RP.
- No personal equity available due to lack of fraud; transferee unaffected by actual or constructive notice of unregistered interests (s 134). **Wrong description of land exception does not apply; only to incorrect boundaries/parcels of land.**

Redemption

“Redemption is the very nature & essence of a mtg...it is inherent to the thing itself” (upon repayment of debt the land & use/enjoyment must be as free as if it had not been security) – Lord Macnaghten (*Noakes v Rice*).

“Clogging” the Equity:

- ❖ Total extinguishment of right to redeem.
- ❖ Postponement of the right to redeem.
- ❖ Collateral advantages given to the mortgagee (over & above the right to payment of principal/interest).
- ❖ Miscellaneous clogs.

Total Extinguishment of the Right to Redeem:

- ❖ *Samuel v Jarrah Timber* [1904] UK – S secured mtg over JT's debenture stock, loan agreement contained option allowing S to purchase whole/part of stock at any time within first 12 months, S exercised option to purchase prior to notice of intended repayment. Held: option rendered mtg irredeemable (**exercise effectively converted mtg to a transfer**), purpose of preventing oppressive agreements in unequal bargaining relationships.
- ❖ *Reeve v Lisle* [1902] UK – Held: to be a clog the **offensive term must be part of the mtg transaction** itself & not a separate/independent arrangement.

Postponing the Right to Redeem:

- ❖ *Fairclough v Swan Brewery* [1912] UK – F lessee of hotel, SB secured loan by mtg over lease with final instalment six weeks before end of lease, F could not repay early without consent, trade tie for duration of mtg. Held: mtg irredeemable (**time left on lease meant redemption was of no advantage to mortgagor**).
- ❖ *Morgan v Jeffrey* [1910] UK – M borrowed from J on security of mtg over pub, J could demand repayment on giving 6 months notice, M could not redeem for 28 years, trade tie for 31 years, M sought to repay after 13 years. Held: **postponing for 28 years & lack of similar provision preventing mortgagee from demanding repayment is unreasonable**.
- ❖ *Knightsbridge Estate Trust v Byrne* – K wished to pay off loan from B (insurance company), contract stated repayments would be made over 40 years (2x a year), K argued clog on redemption. Held: postponement acceptable (loan between companies usually a permanent investment, competent advisors, **no likelihood of oppression, normal commercial agreement, freedom of contract**).

Collateral Advantages given to Mortgagee:

- ❖ A clog where advantage endures after redemption of property.
- ❖ A clog where advantage is unconscionable.
- ❖ *Noakes v Rice* (1902) UK – R (RP of 26 year lease of hotel) gave mtg to N over lease, R could redeem at any time on repaying debt, trade tie for duration of leasehold whether or not repayment had been made. Held: trade tie a clog. Lord MacNaughen: **when the money secured by mtg is paid off, the land & the owner must be as free as if it was never used as security**.

- ❖ *Toohey v Gunther (1928)* HCA – T placed deposit on G's property for sale, T declined to complete sale due to discovering trade tie (mtg & bond with TB extending past repayment, TB entitled to retain DCT until obligations under bond discharged), G rescinded & forfeited deposit.

Knox CJ: once registered the sale would be indefeasible & therefore unaffected by notice of unregistered interests (trade tie; TLA s134).

Isaacs J: the tie was a clog as it extended beyond redemption & therefore invalid.

Higgins J: bond separate to mtg.

- ❖ *Biggs v Hoddinott* – B (RP of hotel), mtg with H redeemable in 5 years (no right to redeem early without consent), trade tie for 5 years, B redeemed early with H's consent.

Romer J: on a mtg you cannot clog equity of redemption by contract, but the **transaction entered into was a reasonable & proper one** (great principle that a man shall abide by his contracts ought to be adhered to by this court).

- ❖ *Krelinger v New Patagonia Meats* – NPM borrowed from K, NPM could repay mtg anytime within 5 years giving one month notice, K could not demand repayment before 5 years, K granted right of 1st refusal, NPM redeemed after 2.5 years, K sought to enforce right. Held: the **right was a pre-condition to the mtg** (i.e. it was a condition to agree to the mtg but not a term of it) & therefore valid – a 'fair and business-like' arrangement.
- ❖ *Santley v Wilde [1899]* UK – S (lessee of theatre for 10 years) borrowed from W, loan repayable over 5 years in quarterly instalments, S to pay W 1/3 of profits for whole of lease term, mtg redeemable on repayment of loan & all other monies covenanted to be paid. Held: 1/3 agreement part of the mtg, **condition of 'all monies paid' did not extend past redemption**, not unconscionable as the investment was risky for W (nature of theatre).

Miscellaneous Clogs:

- ❖ Covenants in nature of penalties.
 - Covenant to repay a greater amount than advanced on default = can be viewed as a penalty therefore not enforceable (possible to link amount of interest to CPI or foreign currency to protect purchasing power provided not unconscionable).
 - Covenant to pay a higher interest on default = can be viewed as a penalty therefore not enforceable (though can reduce if obligations observed; or if penalty applies prospectively).
 - Covenant to pay whole principal & interest on default ('acceleration provisions') = unless a general pre-estimate of mortgagee's potential loss they are a penalty & unenforceable.
- ❖ Undue influence & unconscionable dealing (mortgages are regulated by general equitable principles).

Statutory Protection for Mortgagor:

- ❖ Australian Consumer Law (ACL).
- ❖ National Credit Code.

Mortgages Priorities

General Law:

- ❖ Prior legal vs subsequent equitable (prior legal prevails subject to exceptions – *Whipp*).
- ❖ Prior equitable vs subsequent legal (subsequent legal prevails if BFPV – *Pilcher v Rawlins*).
- ❖ Prior equitable vs subsequent equitable (*Rice v Rice*).

Torrens System:

- ❖ Registered v registered (1st registered prevails – TLA s53).
- ❖ Registered v unregistered (Torrens methodology – TLA s68, Frazer).
- ❖ Unregistered v unregistered (general law – *Rice v Rice*).

Tabula in Naufragio (plank in a shipwreck):

- ❖ X grants legal mtg to A (\$100), equitable to B (\$100), equitable to C (\$100) - only worth \$275.
- ❖ C can purchase A's legal mtg & tack on equitable mtg (take priority over B).
- ❖ Only possible if C had no notice of B's mtg at time of acquiring mtg.
- ❖ Only applies in general law where there is a legal mtg.
- ❖ Does not affect priority under Torrens System (TLA s53, *Matzner v Clyde Securities*).

Tacking of Further Advances:

- ❖ X grants legal mtg to A for advance (\$100), mtg to B (\$100), A advances again on mtg (\$100).
- ❖ A can tack on further advances on legal mtg if no notice of intervening mtg.
- ❖ Unconscionable for a party with notice to continually increase interest.
- ❖ Only applies in general law where there is a legal mtg.
- ❖ Does not affect priority under Torrens System (TLA s53).

- ❖ If mtg contemplates making of further advances, then it is pursuant that the mortgagee can tack on subsequent advances provided it is without notice at time of execution & before making such advances (*Hopkinson v Rolt*) – contractual basis of tacking (discretion to advance in this case).

- ❖ Actual notice required (*Central Mortgage Registry*) – caveat is not notice.
- ❖ Affects priority under Torrens System (contract law affects all mortgages regardless of registration).

- ❖ *West v Williams (1899)* UK – argued rule in *Hopkinson* did not apply due to being contractually bound to advance. Held: **Hopkinson rule applies regardless of discretion (if mandatory then mortgagee is protected from breach of contract for failing to make advance on basis of notice).**

- ❖ *Matzner v Clyde [1975]* NSW – Held: *Hopkinson* based on justice/fair dealing & therefore **applies to all dealings including Torrens, distinguish West as advances increase value of property thereby improving interest of subsequent mortgagees** (building) & so mandatory advances can be tacked, expenditure could be considered to be of a mortgagee in possession (first charge).
 - Each case to be considered on its own merits.
 - Mortgagee in possession is not considered as potential owner to spend what they like.
 - Mortgagee ought not be allowed to burden property out of proportion with sum borrowed.
 - Ought not to be allowed expenditure disproportionate that debt would hinder redemption.
 - Radical alteration to nature or useful purpose of property not allowed.
 - Mortgagor cannot load security with expenditure not represented in enhanced value.
 - Mortgagor not entitled to recover increase in value resulting from mortgagee's expenditure.