

Doctrine of Tenure and Doctrine of Estates

Doctrine of Tenure

- Doctrine which emanated through the feudal system in England (a hierarchical pyramid in which all power emanated from the Crown)
- People given the right to hold land – given tenure by the Crown in relation to land
- Land held directly or indirectly as tenant of the Crown (cf. native title)
 - No concept of absolute ownership of land
 - Therefore, in order to describe the level/kind ownership, three estates development (see below) – possible to own the estate as a thing, separate from the land itself
- Limited practical significance

Doctrine of Estates

- Because you can't own the land, all you can own in land is the estate
- Estate in fee simple: Most extensive, absolute right in relation to land that you can have in our system
 - Upon the death of the holder, the tenant in fee simple would descend to lineal and collateral heirs
 - Disposal: by inter vivos disposition (transfer or conveyance to another person), or by way of will
 - Conveyancing in medieval times – livery of seisin – handing over a small portion of dirt as symbolic of transferring the land
- Life estate: interest in land ends on the holder's death
 - Ordinary life estate – gives the holder a right to reside in the property and receive in the income from the property. No power to grant any interest that lasts beyond their lifetime
 - Estate dependent on the life of another – “to A during the life of B” – A holds the rights associated with an ordinary life estate, for as long as B lives
 - Section 4 of the *Succession Act* – worded broadly to enable the testator to dispose of property to which he or she is entitled
 - Section 3 – property – includes any ‘valuable benefit’ – view is taken that valuable benefit would include life estates and estates dependent on the life of another
- Estate in fee tail: someone with the fee simple would grant A a fee tail, allowing A to do with the land what they want during their lifetime. Upon A's death, the land would transfer to a designated heir
 - Extinct in NSW: *Conveyancing Act* sections 19 & 19A
 - Still exists in SA

The Creation of Legal & Equitable Interests in Land

Requirements for Creation of a Particular Proprietary Right

- Essential/substantive requirements: what package of rights has the grantor intended to create?
 - Fee simple – exclusive possession forever
 - Life estate – exclusive possession for duration of measuring life
 - Lease – exclusive possession for a certain term
 - Easement – right, accommodating dominant land to use, or restrain use of, servient land in a manner not inconsistent with servient owner's continuing ownership
 - Profit à prendre – right to enter servient land and remove the soil or its natural produce
- Formal requirements: how much that intention be manifested?
 - E.g. must a document be used; if so, what type; is a particular form of words required?

Words of Purchase and Words of Limitation

- Words of purchase; words of limitation
 - To A and his heirs
 - To B and the heirs of her body
 - To C for life
 - To D for the life of X

Conveyancing Act 1919 (NSW) – section 47

- (1) In a deed it shall be sufficient in the limitation of an estate in fee simple to use the words in fee or fee simple without the word heirs, or in the case of a corporation sole without the word successors, or to use the words in tail or in tail male or in tail female, without the words heirs of the body, or heirs male of the body, or heirs female of the body
- (2) Where land is conveyed to or to the use of any person without words of limitation, such conveyancing shall be construed to pass the fee simple or other the whole estate or interest the person conveying had power to dispose by deed in such land unless a contrary intention appears by such conveyance
- (3) This section only applies to deeds executed after the commencement of this Act

Succession Act 2006 (NSW) – section 38

- (1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interests of the testator in that property to that person
- (2) This section does not apply if a contrary intention appears in the will

Legal and Equitable Interests

Legal Interests

- Interests that were recognised by a court exercising legal jurisdiction prior to the passing of the *Judicature Acts* (i.e. when equity and law were separate courts)
- Deed: *Conveyancing Act* – section 23B(1)
- Certain short-term leases: *Conveyancing Act* – section 23D(2)
- Implied leases and easements
- Statutory tenancy at will

Equitable Interests

- Interests that would have been recognized by the court exercising equitable jurisdiction (Court of Chancery)
- NB: Fiona Burns' list of equitable interests on p 5&6 of class notes – focus on:
 - Right of purchaser under a valid agreement for sale of land
 - Right of mortgage...
- Written and signed instrument: section 23C(1)(a)
 - Section 41 – *Real Property Act*
- Contracts for the sale of land or go grant an interest in land
 - Which are enforceable: s 54A(1), (2); and
 - In respect of which equity would decree specific performance: *Lysaght v Edwards, Walsh v Lonsdale*
- Declaration of trust: section 23C(1)(b)
- Resulting or constructive trust: section 23C(2)
 - E.g. purchase price resulting trust – presumed where legal title taken in a manner that does not reflect respective contributions to purchase price and no operable presumption of advancement
- Vendor's or purchaser's lien
- Equity of redemption on grant of a general law mortgage

General Law Priority Rules

- The general law priority rules apply to land in the absence of statutory intervention
- Subject to registration schemes:
 - Section 184G *Conveyancing Act* [Old System land]
 - Sections 41-43A; 45; 118 *Real Property Act* [Torrens title land]
- The Torrens indefeasibility provisions alter the operation of competing legal interests, or competing legal and equitable interests
- Some of these principles, outlined below, will remain:
 - Section 43A attempts to protect the bona fide purchaser for value without notice
 - The equitable vs. equitable principle of first in time, but for postponing conduct, remains relevant when examining competing equitable unregistered interests. However, what amounts to postponing conduct (e.g. failure to a caveat) will be slightly new

Prior legal v later legal

- Where two or more legal interests in one parcel of land are inconsistent with each other, priority depends on the date of the creation of the interests
- This is an application of the 'nemo dat quod non habet' rule (a person cannot convey an interest that he or she does not have)
- Since most legal interests are created by deeds, for practical purposes priority depends on the date on which the deeds creating the interests came into operation

- The general rule is that the holder of the legal interest takes priority
- It is open to the later equitable interest holder to show that the conduct of the earlier legal interest holder has been such that the legal interest ought to be postponed to the equitable interest
- The categories of postponement are not closed, but four are well settled:
 - The legal owner has expressly created the equitable interest
 - The legal owner has been a party to some fraud that has led to the creation of the equitable interest
 - The legal owner's act of gross negligence (usually in relation to title deeds) has allowed the equitable interest to be created: *Northern Counties of England Fire Insurance Co v Whipp (1884)* 26 ChD 482
 - Where the legal owner entrusts an agent with the title deeds with limited authority to raise money on them and the agent exceeds the authority by creating a security for a larger sum in favour of a person who had no notice of the limitation.
 - The legal interest is bound by the interest so created to its full extent, not merely to the extent authorized
 - Where the title deeds themselves are not handed over to an agent or someone else, but rather some document which on its face appears to entitle the holder to a beneficial interest in the land or to get the legal estate vested in him or her
 - Where the evaluation of the conduct of the legal owner is based on estoppel – the legal owner is estopped from asserting his or her legal title against the holder of the equitable interest

NB in Torrens Title Land in this course, it's unlikely that you'll have regard to this general law priority rules, because where there's a prior legal interest (i.e. a registered interest) it's indefeasible under the Torrens system except in the case of a statutory exception, which is where you will look instead.

- Legal interest prevails if taken by a bona fide purchaser for value without notice
- Purchaser: this refers to the party identified by the words of purchase. Purchase here does not connote passing of money
- Value: this refers to consideration in money or money's worth. It need not equal the full value of the property but it must be more than merely nominal
- Good faith: the requirement of good faith stems from the words 'bona fide.' It is usually satisfied by proving lack of notice but nevertheless remains a separate criterion
- Without notice
 - Actual notice – within own knowledge: *Barnhart v Greenshields*; section 164A(1)(a) **Conveyancing Act**
 - Constructive notice – would have come into notice if searches inquires and inspections had been made as ought reasonably to have been made: section 164(1)(b) **Conveyancing Act**
 - Search title documents: Old System
 - Inspection of land to ascertain who is in possession: *Hunt v Luck*
 - Where there is no interest to find, there can be no constructive notice from failure to search: *Kemmis v Kemmis*
 - Imputed notice – if agent has actual or constructive notice: section 164(1)(c) **Conveyancing Act**

NB: the rule in *Wilkes v Spooner [1911] 2 KB 473* – The protection afforded to a bona fide purchaser for value without notice of an earlier equitable interest can also be claimed by [can "shelter"] someone taking a legal estate from such a person, even if the successor had notice of the equitable interest (or was a volunteer). Protection cannot be claimed by a trustee repurchasing property sold in breach of trust or fraudulent party repurchasing property acquired by fraud and then sold to a bona fide purchaser.

- Facts: Father carried on business of a pork butcher at Premises #1 under a lease that restricted him to that use. Father carried on business as a general butcher at Premises #2 under a lease from a different landlord
 - Father assigned the lease and sold the business in regard to Premises #2 to his Apprentice. Father granted to the Apprentice a restrictive covenant in respect of his lease of Premises #1 limiting the use to that of a pork butchery. [Covenant benefitted Lease of Premises #2 and burdened Lease of Premises #1]
 - Father negotiated with Landlord of Premises #1 a surrender of his lease and the grant of a new lease to Son, allowing use of the land as a general (and not just a pork) butchery
- Issue: was son bound by the Father's restrictive covenant burdening his lease of Premises #1 in favour of Premises #2?
 - Priority contest between those having an interest in the lease in Premises #1
- Held: son not bound
- Reasoning: The surrender of the lease of Premises #1 to the Landlord was a transfer of the legal lease to the Landlord. The Landlord was a bona fide purchaser of that legal estate for value (the grant of a new lease to the Son) without notice of the equitable interest of the Apprentice in the lease (the benefit of the restrictive covenant)
 - Landlord is now holding the father's lease free of the prior equitable interest of the apprentice
 - The Landlord took free of the restrictive covenant, as did the Son, who took a legal interest from the Landlord (the new Lease)
 - The son could "shelter" behind the protection of the landlord, even through the son had notice of Wilkes's earlier interest

Exception to the rule in *Wilkes v Spooner*: when a trustee has sold property in breach of trust or a person who acquires property by fraud cannot rely on the being a bona fide purchaser of the legal estate without notice.