

1 - Introduction

- **Things from IPCL:**

- › **Doctrine of Tenure**: land is not owned absolutely by us but the Crown who grants us with estate.
 - land held directly or indirectly as tenant of the Crown (cf native title)
 - Imperial Acts Application Act 1969 (NSW): this Act removed the subinfeudation
 - s 36 (freely alienable inter vivos; no subinfeudation)
 - s 37 (free and common socage without incident of tenure for benefit of Crown)

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- › **Requirements for creation of a (particular) proprietary right**

- › 1. Essential/Substantive requirements

- What package of rights has the grantor intended to create? Eg:
 - fee simple [exclusive possession forever]
 - life estate [exclusive possession for duration of measuring life];
 - lease [exclusive possession for 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 a prendre [right to enter servient land and remove the soil or its natural produce]

- › 2. **Formal requirements**: like writing requirement!

- How must that **intention** be manifested?
- eg, must a document be used; if so, what type; is a particular form of words required?

- › **Law/Equity distinction**

- **Legal and equitable interests must be distinguished: different rules as to formal requirements.**

- Also it matters because of priority rule contexts.
- How do we know if legal or equitable? Its based on history.
- All interest in land: fee simple, life estate etc can be all both legal or equitable interest depending on how they met the formal requirements.
- Restrictive covenant can only be under equity and not law. An interest in land created in late 19th century. Also, equity of redemption – for mortgagors.

- **Legal interests e.g. :**

- › deed: Conveyancing Act 1919 (NSW), 23B(1) : **not examined in this unit**
- › certain short-term leases: s 23D(2) : **this also applies in Torrens!!!! Thus examined.**
Makes the title legal in Torrens for general law priority contest, but does not mean it is indefeasible. So it is that for the purpose of general law priority rules the **unregistered title is legal but not indefeasible.**
- › implied leases and easements by law: legal even though Torrens, but not indefeasible again.
- › statutory tenancy: s 127 of CA applies to Torrens.

- **Equitable interests, eg:**

- › written and signed instrument: s 23C(1)(a)
 - **but** s 41, Real Property Act 1900 (NSW) : not possible to create equitable interest in land in absence of consideration and just with written and signed document. **Corin v Patton case.**
- › contracts for the sale of land or to grant an interest in land : **Chan v Cresdon case shows that this principles applies in Torresn Title system. (our focus of study is more to this part)**
 - which are enforceable, so need to rely on CA s 54A(1), (2); **and**
 - in respect of which equity would decree specific performance
 - eg Lysaght v Edwards; Walsh v Lonsdale
- › declaration of trust: s 23C(1)(b) of CA : in writing/signed writing.
- › resulting or constructive trust: s 23C(2) : no writing is required for CT and RT.

- eg 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 (ie. Pay together but only one is named under register of Torrens system)
- > vendor's or purchaser's lien : rising **by operation of law i.e. not consensual between parties**; not paying everything yet, so I hold a lien over the land I transfer legal title of to the purchaser, until the purchase price is fully made.
- > grantee of option: Grantee of an option, having paid an option fee, will acquire an equitable interest in land
- > equity of redemption on grant of a general law mortgage in Old System (here, mortgagee holds the deed of mortgage – mortgagee being the legal owner). Mortgagor has equitable title – so any further mortgage will be equitable mortgage.
- > A **profit a prendre** which is in writing but no in the form of a deed
 - *Tutorial 2 - profit a prendre: where an owner of land actually gives a person a right to come onto his/her land to take something from the land (without buying or leasing the land) e.g. chopping down trees, collecting flowers, shooting/taking animals from the land. This is defined as a profit a prendre.

> **General Law Priority rules**

• **IF there is not inconsistency legal interests:**

e.g. A=owner of land in legal fee simple v B=legal lessee (tenant) with legal lease in the land. A's interest in the land remains (still the owner in fee simple) but B is entitled (and is not inconsistent with A's interest) to the term of the legal lease to reside in the land.

• **If there is inconsistency:**

e.g. two people claiming fee simple in the land - only one person will succeed, and the legal rule is that first in time prevails

Sources of Priority Rules: main concern to unregistered Torrens title.

> general law priority rules (for **two unregistered titles**)

- Categorized by reference to

1. order of creation of interests and
2. the nature of the interest (legal; equitable; mere equity)

> subject to registration schemes: (**ie. Registration is the best position!**)

- Real Property Act 1900 (NSW), ss 41 – 43A, 45, 118 [Torrens title land]

> General law priority rules

1. **prior legal v later legal:: nemo dat rule**

2. **prior legal v later equitable:** prior prevails **except when postponing** conduct such as fraud creating the later equitable interest. Or holding out of an agent, so the person taking later interest from the agent.

Walker v Linom case: holder of the prior person does not get into the title deeds. Allowing the third party to represent them as true owner and some1 take equitable title from it. **Then the holder of prior is postponed.**

- Note: the first two categories **not usually an issue in Torrens as if the prior is legal**, usually they are **dealt with indefeasibility title due to their registration quite often.**
- **Example of postponing conduct here:**
 - Prior legal owner expressly created the subsequent equitable interest
 - Earlier legal interest holder was party to fraud
 - Legal interest holder, grossly negligent in failing to inquire after, obtain or retain possession of the **title deeds**, thereby allowing another person to pose as the legal owner. - **Northern Counties of England Fire Insurance Co v Whipp** (1884):
 - the negligence of the postponing conducts must be gross, c.f. mere negligence for prior equitable v later equitable, since prior legal is harder to beat.
 - Legal holder entrusted the title deed to an agent, with limited authority to raise money, who then exceeds this authority.

- Legal holder, although not parting with the title deeds, handed another person a document appearing to give that other a beneficial interest in the land, - so armed the other.
 - Based on estoppel. The legal owner is estopped from asserting his legal title against the holder of the equitable interest.
3. **prior equitable v later legal**: bona fide purchaser without notice then later win.
- **In Torrens**: it happens when s43A (unregistered legal interest) of RP applies.
 - **Notice is as per s164 CA** – below.
 - **Extension of protection to a third party getting legal interest.**
 - **Case: Rule in Wilkes v Spooner [1911] 2 KB 473**
 - Fact:
 - ›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 (this was because A was worried that #1 might become a general butchery= ie. competition) in respect of his lease of Premises #1 limiting the use to that of a pork butchery. (the restrictive covenant = father hold legal lease of #1, and out of that legal lease granted a restrictive covenant=a form of equitable interest to A).
 - ›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 (i.e. double cross A)
 - Issue/held: Was Son bound by the Father’s restrictive covenant burdening his lease of Premises #1 in favour of Premises #2? No.
 - ›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).
 - ›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 though** the Son **did have notice of the Apprentice’s equitable interest (or even if he was a volunteer)**
 - **›But** 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. this would be a laundering of the legal estate).
 - Note that the mechanism is similar for **s43A RP**.
4. **prior equitable v later equitable**: most common in **Torrens**. Usually unregistered title is equitable, but not always, so here it is usually about two unregistered interest competing. The court searches for the better equity; more meritorious equity. The court often though will look at the **postponing conduct**(act/neglect contributed to the later holder acquiring its interest without notice of earlier interest) of prior that lead the later to believe no such prior interest existed. The important factor is whether prior has lodged a **caveat**: where unregistered interest is protected to prevent the registration of whatever that will extinguish prior interest.
- **(Note: no bona fide purchaser without notice principle when the competing later interest is equitable)**(BFPWN is for later legal interest competing)
 - **But usually those with notice cannot usually win prior interest.**
 - **exception** where later win despite notice:
 1. **Earlier holder waiving the right to prevail**
 2. **Later holder believing that earlier interest has ceased to exist).**

5. prior mere equity v later equitable (or legal).

› **Notice:** Conveyancing Act, s 164 – actual (if you know of facts/knowledge) – constructive (if you not made reasonable prudent person would inquiry – what you should have known) – imputed (if your agent had actual or constructive notice)

- if the later have notice of prior interest, the prior wins.
- **Except:** caveat is lodged giving notice of interest **and then withdrawn after.**
- This is expressly stated in category 3 of the general law priority rules in above. As the category needs bona fide **without notice** for later interest to win.
- For category 2 and 4: where prior win unless of some kind of fault/postponing conduct. The rule does not really talk about notice. But!!! The holder of later interest cannot claim that the prior is guilty of fault, if they had notice of the prior notice.
- **Constructive notice: to what degree?**
 - **Searching the documents:**
 - In **Torrens** you need to search the Register! – but not company register (Finaly case)
 - In **Old System:**
 - Search of the title documents
 - for **old system land**, search of title deeds back to a good root of title at least 30 years old: Conveyancing Act, s 53
 - Inspection of the land to ascertain **who is in possession** (eg, a tenant) or who is using it (eg, holder of an easement): rule in **Hunt v Luck [1902] 1 Ch 428**

- **Words of Purchase and Words of Limitation: at common law (Note: at A's death only then his heir could be determined)(since corporation had no life, it could not take a life estate; and since it had no heirs, words of limitations are meaningless)(c.f. sole employer of a corporate = you can die, so words of limitations were 'and his successors')**

› Words of purchase = italics / Words of limitation = bold

› “*to A and his heirs*”= this is the magic word to grant a fee simple! (cf “*to A in fee simple*” will infact only give life estate to A)(to A = give life estate)(A forever = life estate given only)

› “*to B and the heirs of her body*” (given B a fee tail)

› “*to C for life*” (give life estate)

› “*to D for the life of X*” (give life estate of life of X)

› “*to E*” (give E life estate)

⇒ **this is all changed** by **CA 1919 NSW s 47: not in use itself but good to know (this is for inter vivos)**

(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 conveyance shall be construed to pass the fee simple or other the whole estate or interest the person conveying had power to dispose of by deed in such land unless a contrary intention appears by such conveyance. (ie. **Getting fee simple unless contrary intention is shown**) (note: **for Torrens title, interests in land are transferred by executing and registering a form, and words of limitations have never been required.**)

(3) This section applies only to deeds executed after the commencement of this Act (i.e. 1930)

⇒ **Succession Act 2006 (NSW), s 38 (this is for wills) : similar to CA s47.**

› (1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.

› (2) This section does not apply if a contrary intention appears in the will.