

- **NON-FREEHOLD:** These estates **EXIST FOR A SPECIFIC PERIOD OF TIME** and incorporate **leasehold interests**

Seisin (freehold)

- One of the basic requirements for all **freehold estates** is that they carry 'seisin'.
- **Seisin' refers to the combined attributes of ownership and possession.**
- It is defined as '*formal legal ownership of a freehold estate in land, as opposed to mere beneficial ownership (ie equitable ownership which we look at further in this course) or possession of land.*'
- In early feudal times, seisin denoted simply possession of land.
- However, it came to mean ownership of the estate a person held in land.
- Thus, **title which confers both ownership and possession** will hold seisin and is therefore capable of being treated as a 'freehold' estate.
 - Historically, means a person holds estate in a free status
 - Freehold estates exist for an indefinite period of time
 - Holder of freehold is always seised of the estate
- **Seisin:**
 - **Situation where a holder has both title AND possession of the land**
 - **Distinguishes freehold from leasehold**

RECALL: Categorization

Possessory Title:

This confers a title to land capable of attracting adverse possession when the limitation period is satisfied and the occupation is in the manner of a true owner.

Possession alone does not confer **seisin** and does not place this title into the freehold category.

Possessory + Ownership Title: (estate)

This confers a title giving the holder both possession and ownership and this is the foundation of **seisin**.

This type of title will come within the **FREEHOLD** category.

Possessory + Limited Ownership Title: (estate)

This confers a title giving the holder both possession and ownership and therefore **constitutes an estate** – however, because the ownership is limited in time for a specific duration – **the ownership is insufficient to constitute seisin**. Therefore, this type of title will come within the **NON-FREEHOLD** category of estates.

Ownership Title + No Possession:

This confers a title where the holder does not have an immediate right to possession. They hold immediate ownership rights but possession is deferred until a future date.

This title does not constitute an estate and is known as A **FUTURE INTEREST**.

*** It is important to remember that a title which only confers possession or which only confers ownership cannot be described as an estate. It must be defined as either a title or an interest.

CREATING COMMON LAW ESTATES

In this section we will examine the nature and formal requirements for the creation of different common law estates.

To create a specific estate at **COMMON LAW**:

1. **precise words of limitation need to be set out**

- Different estates can only be created according to the wording used by the grantor.
- **Careful consideration needs to be given to the wording** because it will determine the character and duration of the estate.

AND

2. **statutory provisions need to be complied with.**

FEE SIMPLE ESTATE CHARACTERISTICS

- The fee simple is the highest form of common law freehold estate over land that can be created.
- The fee simple is **INHERITABLE AND INDEFINITE IN TIME**
 - **fee** = refers to the fact that the estate is **inheritable**
 - **simple** = refers to the **unrestricted character of those who may inherit**.

Modern meaning of fee simple

- A fee simple estate is for “almost all practical purposes, the equivalent of full ownership of the land” (*Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656)
- A fee simple confers “the lawful right to exercise over, upon, and in respect to, the land, every act of ownership which can enter into the imagination” (*Commonwealth v New South Wales* (1923) 33 CLR 1 at 42).

TRANSFER A FEE SIMPLE = NEED TO HOLD A FEE SIMPLE

- A transferee can only transfer a fee simple estate where he or she holds such an estate.
- If the estate is of a lesser form, the transferee may only transfer the lesser form of the estate.
- See Nemo dat principle (below)

TRANSFER - CONDITION

- The fee simple may be transferred where the **appropriate words of limitation** are set out.
- These words describe the form of estate which is to be transferred.
- Where a person holds a fee simple estate and wants to transfer it to a third person, the conveyance should **clearly indicate that the full fee simple estate is being transferred**.

TRANSFER - PRESUMPTION

The Fee Simple is created where:

- **EXPRESSLY granted, OR**
- **PRESUMED to be created where grantor holds a fee simple and character of the granted estate is not set out: s 60(1) Property Law Act 1958 (Vic) => see inter-vivos below**

INTER VIVOS; BY WILL

- Historically, ‘heirs’ necessary
- Modern law, **fee simple estate continues whether or not there are heirs**.

May dispose of estate:

- 1 . inter vivos (during one’s lifetime), or
- 2 . by testamentary devise (by will).

- At common law, the correct form of words for an **inter vivos (during one’s lifetime)** disposition of a fee simple
 - was originally the use of the word ‘heirs’. Hence, a conveyance of a fee simple estate from A to B would read ‘to B and her heirs’. The reference to the word ‘heirs’ provided sufficient indication of an intention to pass the fee simple estate.
 - **The common law position in Australia has now been modified by statute. In most states a conveyance of an estate without the correct words of limitation will be assumed to be that of a fee simple — provided the transferee held a fee simple in the first place.**
 - = Hence, dispositions which do not comply with the common law requirements will be assumed, **in the absence of a contrary intention**, to transfer a fee simple estate.
 - All Australian states now set out that a **testamentary (will) disposition of an estate, which does not clearly evince an intention to pass a fee simple, will nevertheless be deemed to pass such an estate**.
- Y Where land comes under the **Torrens system of land registration**, the strict requirements at common law for the words of limitation are **inapplicable**. Provided the transfer application indicates an **intention to convey a fee simple estate**, this will **automatically occur upon REGISTRATION**.

FEE TAIL ESTATE

- A fee tail was an estate which was **inheritable**, however the category of those capable of inheriting (becoming 'entailed') was restricted - **usually to male heirs**.
- This estate has now been **abolished** in all states.
- Statutory provisions prohibit the creation of the fee tail estate and any attempt to create it in Victoria **will automatically be read as an attempt to create a fee simple estate**. See s 249 of the PLA for this restriction.
- Following the enactment of these statutory prohibitions and restraints, **very few fee tail estates remain in existence in Australia**.

LIFE ESTATE

CHARACTERISTICS (shortest form of a freehold estate)

- A life estate is a freehold estate which **will endure (=durer) for the duration of a life**.
- **NOT INHERITABLE**, BECAUSE IS RESTRICTED TO LIFE BUT STILL REGARDED AS '**INDEFINITE**'. (Exists indefinitely because uncertain when a person will die)
- **The Life Estate can only be created EXPRESSLY**.
 - Must use **words of limitation** indicating estate is to be restricted to a specific life
 - – can be **life of grantor or life of a third party**: CB 5.13

Υ **BE CAREFUL**: As the statutory provisions now presume that in the absence of a clear intention a fee simple estate will be presumed to have passed, a grantor wishing to create a life estate must ensure that **clear and specific words are used**.

Proprietary rights:

- Tenant hold usual proprietary rights, including the right to possession of the property and the right to deal with property. May take annual profits from the estate, called emblements and a number of different rights over timber.
- The tenant may also **dispose** of the estate, however the donee or purchaser will only take an estate for the length of the relevant life (an estate pur autre vie). The tenant however has a duty of leaving the estate unimpaired for the remainderman which is defined as the **doctrine of waste. (see below)**

SA VIE (NOT INHERITABLE)

- A life estate sa vie may be created where the estate is conveyed to a person and the **appropriate words of limitation set out that it is to exist for the duration of that person's life. (grantee's life)**
- The **appropriate words of limitation** are words that evince (=manifeste) an intention to confer an estate which is **limited by a life**.

PUR AUTRE VIE (INHERITABLE)

- A life estate pur autre vie may be created where the estate is conveyed to a person and the **appropriate words of limitation set out that it is to exist for the duration of a third person's life**, that is, a life other than that of the grantee.
- A life estate pur autre vie, being a life estate, was considered not inheritable at common law.

Υ **Statutory provisions now entitle the life estate pur autre vie to be devised under a will. Wills Act (Vic) s 4.**

- As the life estate is, in substance, a limited estate, it creates the need for interests which are described as '**future interests**'. These interests determine what happens with the life estate once the life upon which it is based ceases. Difficulties associated with the creation of future interests are discussed in more detail later in this topic.

Example

- John gives all of his interest in 'Blackacre' to Jane for the duration of her life. In this example, Jane has a life interest because John has specifically limited the estate to a life duration; **it cannot pass on to a successor in title and it will cease upon her death**.
- Alternatively, if John gave all of his interest in 'Blackacre' to Jane for the duration of his life, Jane will have a life estate, but **if John is still alive at the date of Jane's death, the estate may pass on to her successors in title**.

DOCTRINE OF EQUITABLE WASTE

- Because of the general doctrine that persons can only dispose of such interests as they have, owners of estates less than freehold cannot as a rule deal with the whole interest in the land.
- However, the owner of a lesser estate will at some point be entitled to possession –the person is then described as holding an interest in possession.
- The exercise of the right of possession can (on occasion) cause injury to the interests of the holders of future interests (eg. *if someone degrades the land; doesn't upkeep the building* etc.).
- **To protect future interests the doctrine of waste was developed => the owners of limited interests are limited in their use of the land (applies to tenants –periodic or fixed term –also).**

Traditionally four categories of waste:

1. Voluntary waste

- commission of acts harming the property eg. *Mining*.
- Acts of the life tenant that caused damage;
- Life tenant was **impeachable**

2. Permissive waste