

**Has a proprietary interest in land been validly created or transferred?**

A proprietary interest in land will be validly created or transferred if both the applicable 'substantive' and 'formal' requirements are met.

**Substantive requirements**

Statement of principle

While the legislature may create novel forms of proprietary rights by statute (*Yanner v Eaton*), for a property dealing between private individuals to be valid, **the grantor must intend to vest in the grantee a bundle of rights that corresponds with a recognised category of property rights (*King v David Allen*)**.

*King v David Allen:*

- Contract granting the plaintiffs the sole right to affix posters and ads on the walls of a theatre did not create a proprietary interest in land as it did not correspond to any recognised category
  - No lease (no right to exclusive possession);
  - No easement (benefited grantee not land owned by grantee)
  - Thus the right could not be enforced against third party lessee (not a party to contract)
- Rather the contract created a licence (personal permission to do something which would otherwise be unlawful) – a personal right
  - Entitled only to remedy in contract against King (defendant) who breached implied term that he would not disable himself from carrying out his contractual obligation

The interests in the land that the grantor may intend to vest

[If does not fall into any category, must show that by excluding each possibility]

**(1) Fee simple: intends to grant exclusive possession for infinite duration [freehold estate]**

- Full and direct rights to possession and use of the land and its profits, as well as full rights of disposition (*DKLR Holdings*)
- Its holder may dispose of the estate *inter vivos* or by testamentary disposition
- Ends when current holder dies without will (intestate) and with no next of kin; goes to the Crown under *bona vacantia*

**(2) Life estate: intends to grant a right to exclusive possession for the duration of the holder's life or the life of another (an estate *pure autre vie*) [freehold estate]**

- An estate *pur autre vie* often arises not pursuant to a direct grant but as a result of the holder of a life interest conveying the estate to another person
- The life tenant can transfer the interest during the life estate (incl. mortgages)
- At the conclusion of a life estate (when the life tenant dies):
  - If there is a remainderperson, that person takes up the estate in fee simple (gets the 'remainder' interest, the fee simple in remainder)
  - If there is no remainder, the interest automatically reverts to the feofor (the owner of the fee simple) (i.e. has fee simple in reversion)

**(3) Fee tail: exclusive possession for a lifetime, but estate restricted to the tenant's lineal descendants (i.e. cannot be alienated) [freehold estate]**

- Abolished in NSW (cannot be created; converted automatically into fee simple): CA, ss 19, 19A

**Engaging in dealings in choses in possession:  
(A) Transferring ownership through abandonment and appropriation**

Ownership of a chose in possession will be transferred where the original owner *abandons* the chattel and it is subsequently *appropriated* by a finder (*Re Jigrose*).

**First, abandonment**

There is abandonment if the owner *intends* to relinquish her possession of, or property in, the goods (*Re Jigrose*).

- I.e. the chattel is no longer in the owner's possession, and the owner does not propose to seek it out and has no further interest in ownership (*Jigrose*)
- This intention is perhaps most clearly shown by throwing the goods away (*Jigrose*)
- E.g. *Re Jigrose*:
  - Intention to abandon made out where cl 28.3 of a contract for the sale of a farm provided that property not removed from the farm was to be deemed to be abandoned, and the plaintiff left \$20,000 worth of hay on the land
  - 'cl 28.3 seems to me to be equivalent to the vendor representing that it has no further interest in the chattels, neither in possession nor in ownership'

C.f. losing goods: such intention is lacking if the owner has merely lost the goods (*Jigrose*)

**Second, appropriation**

Title is not automatically transferred on abandonment: it will pass when the finder 'appropriates' the chattel by taking it as the finder's property (*Jigrose*)

- That would require, in the context of an occupier, a manifest intention to exercise control over the chattel (*Jigrose*)
  - An intention to exclude others is an exercise of control over the chattels (*Jigrose*)
- E.g. *Jigrose*: the purchaser's act of putting a padlock on the barn with the hay in it constituted an exercise of control over the hay – made out the "appropriation" requirement

[NB abandonment effective before appropriation: possible for chattel to be abandoned, extinguishing former owner's property rights, and appropriation by a third party not having yet occurred]

### Legal property: (2) Equitable assignment of legal interests

Where the statutory assignment of legal property fails (e.g. non-compliance with s 12), that assignment may still be recognised and enforced in equity (*Corin v Patton*)

- Effect: original owner retains legal title but equity regards that legal title as being held on trust for transferee (i.e. equitable title vests in assignee) (*Corin v Patton* (Deane J))

### Voluntary assignments

#### (1) The test

A voluntary assignment will be effective in equity where the donor has done all that is necessary to place the vesting of the legal title **within the control of the donee** and **beyond the donor's recall or intervention** (*Corin v Patton* (Deane J); *Costin v Costin*; affirming *Anning* (Griffith CJ))

- Effectively the same test endorsed in Mason CJ and McHugh J's joint judgment in *Corin*
- This test applies to all forms of legal property
- Note: element of 'beyond recall or intervention' becomes live when third parties involved
  - E.g. courier, postal service, solicitors – consider who the third party works for

#### (2) Application of test: Torrens Title land

Donor has done all that is necessary for her to do to effect a transfer when she has (*Corin v Patton*):

- (1) Delivered to donee (or donee's agent) an instrument of transfer in registrable form (signed and executed); and
- (2) Made any relevant certificate of title available to the donee or the registering authority
  - Reason: by virtue of possession of COT, gift can be thwarted (*Corin v Patton*)
  - Not satisfied by Mrs Patton in *Corin v Patton*:
    - No steps taken to arrange for COT's production by mortgagee bank
    - Gave no authority for mortgagee to hand COT to Mr Corin for registration
    - She could have compelled production of the COT but Mr Corin could not
  - Satisfied in *Costin v Costin* (majority):
    - Donor authorised and directed his solicitors to produce the COT and 'if his solicitors had acted as he had directed, the legal title would have passed'
    - C.f. Sheller JA: not satisfied as the release of the COT required the joint authority of the deceased and the appellant (joint tenants)

Not beyond the donor's recall if her authority to a third party is revocable until acted upon (*Costin*)

- Not satisfied in *Costin v Costin*:
  - Donor's authority to the solicitors to produce the COT was revocable until acted upon
  - As the authority not acted upon before donor's death, it was revoked upon his death

Other steps:

- Execution of transfer by donee: **donee only**
- Lodging the transfer documents to Land Titles Office: **either donor or donee**
- Registration: **Land Titles Office only**

**Third, priority rules under SGA 1923 (NSW)**

(Assuming the SGA is engaged: Topic 2)

**Starting point: *nemo dat quod non habet* (SGA, s 26(1))**

Where a person sells goods of which she is not the owner and without the authority or consent of the owner, the buyer prima facie acquires no better title to the goods than the seller had (s 26(1))

- (c.f. contract for sale of goods which seller does not yet own but assumes she will be able to procure – often the case in sale of unascertained commodities or future specific goods)

**Exceptions to the *nemo dat* rule**

**Exception 1: owner “estopped” by its own conduct (SGA, s 26(1))**

**Owner may be precluded by its own conduct from denying seller’s authority to sell (s 26(1)) by:**

(1) Estoppel by representation: positive acts which misrepresent that the seller is the owner or has authority to sell (*Goldring*); or

- E.g. *Eastern Distributors Ltd v Goldring* [1957]:
  - M signed hire-purchase documents which misrepresented that C owned M’s van
  - M was “precluded” from denying C’s right to sell: M armed C with documents which enabled C to misrepresent that he was the owner and had the right to sell

(2) Estoppel by negligence: inaction or an omission to correct the appearance that the seller has the right to sell (*Marac*)

- Only where “failure to disclose its interest would be in breach of a duty owed by it to the purchaser who has bought from a seller w/o title” (*Marac* majority, c.f. Kirby P dissent)
- **Duty** arises where, having regard to the situation in which the transaction occurred, as known to both owner and buyer, a reasonable person in buyer’s position would have expected an honest and responsible owner to make ownership known (*Marac*; affirming Lord Wilberforce’s dissenting judgment in *Moorgate*)
  - “known to both parties” relates to the situation of the transaction, not to each other’s actual existence and interests (*Marac* McHugh JA)
  - *Marac*: no duty to prevent lessee from misrepresenting right to sell in absence of:
    - A register of motor vehicle hire-purchase agreements; and
    - **Any relevant transaction known to both owner and acquirer** (B did not know of sale, no reason to suspect K would improperly sell vehicle)
- **Breach** by failing to act reasonably. Alleged breaches by lessor in *Marac* in failing to:
  - Exercise powers to prevent garaging at Kerr’s residence – no breach, company cars often used for private purposes of employees, etc.
  - Prevent registration in different company’s name – arguable
  - Require indelible labels evidencing ownership – “interesting allegation”
- **Causation**: breach caused buyer to purchaser under the mistaken belief (*Marac*)
  - *Marac*: breach [2] did not cause loss as defendant did not sight registration certificate because purchase

**Consequence: buyer acquires a “real title” from its purchase (not a mere “metaphorical title” by estoppel), which is binding on a subsequent purchaser for value without notice (*Goldring*)**

- Actual notice includes wilful blindness (*Worcester Works*) and actual notice of agent
- Does not include constructive notice (*Manchester Trust*)
- E.g. *Goldring*: where M estopped from denying C’s right to sell, purchaser from C acquired title, and subsequent purchaser from M did not acquire title as M had no title left to pass