

SAMPLE OF NOTES:

Nec vi

- Not by force, peaceable
- Possession must have occurred without violence
- Possession must be peaceful and not achieved through violence or intimidation
- Possession is not peaceable if the owner by reasons of the adverse possessor's conduct was frightened to go to the law
- *Shaw v Garbutt*: Owner turned away from land by man wielding a gun (not adverse possessor)
 - No reason why owner could not have gone to law to assert his rights
 - Since the option existed, it could not be said he had been kept out of possession by force
 - Should not be taken literally
 - Synonymous with uninterrupted possession
 - Possession may not be established by force at the outset

Nec clam

- Not secret, open
- Possession must be open and visible to the true owner and public
- Possession must be noticed by the documentary owner who is reasonably careful in the management of his interest
- Possession can be established even in case where documentary title holder did not know of adverse possession
- Fencing is clear evidence to the world of some form of occupation

Nec precario

- Not by consent, adverse
- Possession must be adverse, meaning it is without consent of the paper title holder
 - Reverts to lease or licence if consent is given
- Without consent of the paper title owner
- If consent is given, possession is no longer adverse in nature and may revert to a licence or lease
- Must be proper acknowledgement of title by possessor and would require a written offer or arrangement by possessor to take a licence or lease the land
 - Blanket application of implied licence doctrine is rejected by English courts
 - Previously was required that possession had to be inconsistent with the purpose for which the documentary title holder intended to use land

SAMPLE OF SUMMARY AT THE BOTTOM OF THE NOTES

Substantive Requirements for a Valid Easement

1. **Dominant and servient tenement must exist**
 - (Need not be contiguous) An "easement in gross" (without a dominant tenement) is generally not recognized at common law, but can be statutory (eg, **s187A Local Government Act 1989 (Vic)**)
2. **Easement must accommodate/benefit the dominant tenement**
 - Must benefit the land itself, not just the owner personally It should make the dominant tenement a better and more convenient property Not a right providing a purely commercial advantage unrelated to the land (eg, *Hill v Tupper*)
3. **Dominant and servient tenement must not be owned and possessed by the same person**
 - If unity of ownership occurs, the easement is extinguished
4. **Right must be capable of forming the subject matter of a grant**
 - Must be sufficiently precise, certain, and have permanence
 - Not too vague (eg, a view, general flow of air)
 - **Right of Amusement:** Historically problematic, but now recognized if it provides a definable benefit and is not *jus spatiandi* (right to roam at large)
 - *Re Ellenborough Park*: Right to use a private park for residents was a valid easement
 - *Riley v Penttila*: Recreational rights to enjoy a common reserve for specific lot holders were valid
 - Recreational rights can arise by prescription (*Mulvaney v Jackson*)

Creation of Easements

1. **Expressly – by grant or reservation (in law or equity)**
 - **Legal Easement:** By deed (s52 Property Law Act) For Torrens land, ideally registered (**s42(2)(d) TLA** - paramount interest, but registration provides indefeasibility)
 - **Equitable Easement:** Unregistered but valid agreement, or implied intention
2. **Impliedly – (a) by grant; (b) by necessity; (c) by common intention; or (d) by construction**
 - **2(a) Implied Grant (Rule in *Wheeldon v Burrows*)**
 - Upon grant of part of land, quasi-easements that were continuous, apparent, and necessary for reasonable enjoyment of the granted part will pass to the grantee
 - Cannot be used to imply a reservation for the grantor (unless by necessity)
 - *McGrath v Campbell*: Involved contemporaneous transfers, no implied easement due to Torrens system and lack of unconscionable conduct

