| **SUBJECT** | **NAME** | **RATIO** | **FACTS** |
| --- | --- | --- | --- |
| Ad Coelum/Airspace | **Kelsen v Imperial Tobacco Co [1957] (UK QB)** | * *Usque ad coelum*
* Property interest in airspace
* Can get injunction because of trespass, not just nuisance
 | * Leasehold for whole land, not just building
* Neighbouring sign overhanging by 8”
 |
| **Bernstein (Lord of Leigh) v Skyviews [1977] (UK QB)** | * Limits ad coelum to a height required for ordinary use and enjoyment of land
* Uses reduction to absurdity 🡪 satellites in space
 | * Mad about plane taking photo of property
* Claims was trespass
 |
| **Manitoba v Air Canada [1980] (SCC)** | * Air and airspace not subject to ownership by anyone 🡪 *res osmium communis*
* No property rights/legislative jurisdiction to airspace above ordinary use/enjoyment
 | * Manitoba wants to tax Air Canada planes using airspace
 |
| Fixtures & Chattels | **Re Davis (1954) (Ont. HC)** | * Look at object + degree of affixation
	+ If object of affixing is to improve freehold = fixture
	+ If object of affixing is better enjoyment of chattels = chattels
		- Test from *Haggert v Brampton (Town)*
 | * Built-in bowling alleys = fixture or chattel?
* Not high degree of affixation
* CHATTELS
 |
| **La Salle Recreations v Canadian Camdex Investment Ltd [1969] (BCCA)** | * Test from *Stack v Eaton*:
1. Articles not attached to land other than own weight are not part of the land unless they are intended to be
2. Articles affixed to land (even slightly) are part of land unless intended to continue as chattels
3. To change *prima facie* character of articles look at degree of annexation + object of annexation
4. Intention of person affixing article is material only so far as it can be presumed from degree + object of annexation
 | * Carpets purchased on conditional sale and not registered in LTO
* Villa purchased from La Salle (went bankrupt), Camdex holds the mortgage
* FIXTURES
 |
| **CMIC Mortgage Investment Corp v Rodriquez** | * A thing affixed to real estate will be presumed fixture unless evidence shows it as affixed for purpose of making better use of it as a chattel
	+ A thing not affixed to real estate will be presumed chattel unless evidence shows that its presence on property is intended to make it an integral part or an enhancement of property as a whole
		- An object’s affixation or non-affixation will raise a rebuttable presumption as to its legal character
* *Royal Bank of Canada v Maple Ridge Farmer’s Market Ltd* rules:
1. Chattel 🡪 If item is unattached (except by own weight) and can be removed w/o damage to item or land
2. Chattel 🡪 If item is only plugged in and can be removed without damage/alteration to item/land
3. Fixture 🡪 If item is even minimally attached (ie/ cannot simply be unplugged)
4. Fixture 🡪 If item would be useless without a certain removable part (entirety including removable part = fixture)
* The item will be a fixture if it loses its essential character unless attached to a permanent premises of which it formed part
* The converse is also true 🡪 if an item can be detached without damage or alteration, and retains its essential character without the attached part, then it will be a chattel
1. Tenant’s Fixture 🡪 A fixture may only be removed if it is a tenant’s fixture, provided the premises are restored (to original condition)
2. Purpose Test 🡪 In very exceptional circumstances not covered by these rules the court should have resort to the purpose test.
* Ex/ a mobile home may be resting on the land by its own weight but it may be clearly established that it was intended to be a fixture
 | * Cover-All buildings 🡪 #1 had buried cement block foundation = fixture
	+ #2 🡪 cement blocks sitting on ground ∴ fixture or chattel?
* CMIC held Rodriquez’ mortgage
* Cover-All repossessed #2
* CHATTEL
 |
| **Elitestone Ltd v Morris [1997] (UK)** | * Object brought onto land can be classified under one of three things:
1. Chattel
2. Fixture
3. Part + parcel of the land itself
* #2 and #3 = treated as being a part of the land
* *Snedeker v Warring* 🡪 a thing may be as firmly fixed to the land by gravitation as by clamps or cement 🡪 its character may depend much upon the object of its erection
* Bungalow couldn’t be moved without complete destruction ∴ could not have intended to remain as a chattel
 | * Bungalow on pillars 🡪 for about 50 years
* Landlord wanted as a chattel to increase rent
* Assumption that bungalows owned separately from land
* FIXTURE
 |
| Water – Riparian Rights | **Johnson v Anderson [1937] (BCSC)** | * Riparian rights prevail over unrecorded water
	+ *Water Act* trumps riparian rights but doesn’t eliminate them 🡪 if unrecorded water with no licence can use riparian rights
* Unauthorized diversions of water cannot negatively impact riparian owner’s right to use unrecorded water
 | * Both didn’t have licence
* D diverted stream that flowed through P’s property
* P was using for domestic purposes
* Was unrecorded water in stream
* P granted injunction
 |
| **Schillinger v H Williamson Blacktop & Landscaping [1977] BCCA** | * Riparian rights to the use of water no longer exist in BC
	+ Riparian rights, if any, can exist only for a person lawfully using the water 🡪 only way to acquire the right to the use and flow of water in any "stream" is under the provisions of the Water Act
 | * D construction upstream resulted in silt in P’s fish farm
* P had licence for Hairsine
* Also diverted from unrecorded Barres Creek w/o licence 🡪 this was creek where silt was
* P unsuccessful
 |
| **Steadman v Erickson Gold Mining Corp [1989] (BCCA)** | * Riparian rights exist except where explicitly stated that they do not (i.e. where there is a license)
* P has a right to use and enjoy the water until the Crown issues a license in respect of that water
	+ Until that has happened P is entitled to claim that D must not make the water unusable
* If groundwater 🡪 right to use as long as don’t contaminate it
* If flowing 🡪 can use unrecorded for domestic purposes and have right to have it not be contaminated
 | * D’s construction contaminated P’s water 🡪 piped to house from spring on his land
* P used unrecorded water mainly for domestic purposes
 |
| Accretion & Erosion | **Southern Centre of Theosophy Inc v South Australia [1981] (Aus)** | * Doctrine of accretion covers changes that are gradual and imperceptible 🡪 includes windswept sand
	+ Fairness 🡪 can lose land to erosion so should be able to gain from accretion
* Doctrine still applies to property whose boundary is a line on a plan that is not directly expressed to be the water's edge
 | * P has land on Lake George
* Over time 20 acres of sand added
* P still wanted to be lake front 🡪 argued doctrine of accretion should apply
* P success 🡪 accreted land = its property
 |
| Access by Riparian Owners | **North Saanich (District) v Murray [1975] (BC)** | * Riparian owner has right to access and regress from water
* Right = private right
* Cannot interfere with public right of navigation or put down anything which disturbs the foreshore
 | * P owned land that fronts the sea
* D lessee of foreshore
* P constructed wharfs on and across the foreshore with pilings driven into soil
* D claims wharfs = trespass
* D wins
 |
| Support | **Cleland v Berbarick [1924] (Ont. CA)** | * Land owner has right to have land left in natural plight and condition
	+ Without interference by the direct or indirect action of nature facilitated by the direct action of the owner of the adjoining land
 | * Beach, D drew quantity of sand from his beach
* P had adjoining lot, D’s removal caused sand to be washed away from his beach
* For P
 |
| **Bremner v Bleakley [1924] (Ont. CA)** | * Owner of land is entitled to all the natural advantages belonging to that land ∴ to all things which in the course of nature may be deposited thereon
* Damaged must be directly caused by D's actions or else it is not actionable
* No evidence, but for the hole, the sand would have returned
* Do not actually have title in dirt 🡪 absurdity
 | * D dug trenches in beach on their land
* Winds swept sand from P’s beach caught in D’s holes and couldn’t be swept back with wind
* For D
 |
| **Gillies v Bortoluzzi [1953] (Man. QB)** | * Landowner entitled to lateral support for land in natural state but not entitled to support for weight of a building
* May not be entitled to lateral support but are entitled to vertical support for building 🡪 digging under basement of building removed vertical support
	+ Removal of vertical + lateral support gives a cause for action
	+ Removal of vertical support = trespass
 | * D excavated basement
* Wall of P grocery store on adjoining land collapsed into basement
* Excavation went below basement of P’s store
* For P
 |
| **Rytter v Schmitz [1974] (BCSC)** | * Right to vertical support and right to lateral support of your land in its natural state
* **Vertical 🡪** duty to give vertical support to buildings next to you if you excavate below level that the neighbour’s building goes to
* **Lateral 🡪** common law right to lateral support BUT when you put a building on this you are no longer entitled to support by the adjacent land unless you get an easement
* Cases leaning towards and independent right of vertical support
 | * P owns building
* Excavation next door caused loss of lateral support and subsidence 🡪 no more support for building
* Claims D dug over property line
* For P
 |
| The Transfer – When is it Operative? | **Re Fraser [1974] (BCCA)** | * Holder of life estate in personalty owes fiduciary duty to preserve the estate for the ultimate recipient 🡪 widow can’t encroach if not granted the right
* Must look at whole of will to determine intention of testator
 | * Had succession duties
* Will said wife would get life interest in estate and property
* Rest and residue would go to Senior Housing Society
* Can widow encroach upon the personalty?
 |
| **Ross v Ross [1977] (NSSC)** | * Physical delivery of a deed to the grantee is not necessary to constitute effective delivery
* Execution = delivery as long as all requirements for validity are met
* If the transferor intended to be immediately and unconditionally bound by the deed then physical delivery of a deed to the grantee is not necessary to constitute effective delivery
 | * L to convey property to Ross (grandson)
* Deed was signed, witnessed and attested to 🡪 L said she would register it herself
* Died before she registered it, kept it in her purse
* Was there delivery of deed?
* For grandson
 |
| **Zwicker v Dorey [1975] (NSSC)** | * A deed of conveyance which has condition that it shall only become operative upon death of grantor is a testamentary document ∴ not operative as a deed
* A deed may be delivered absolutely so as to be immediately operative, or it may be delivered as an escrow so as to become operative upon the happening of a stipulated event, but a deed signed by the grantor and held to be delivered on his death is not validly delivered as an escrow
	+ Intention of grantor is important
 | * D given certain properties but deed was not to be recorded until Z died
* Z also conveyed this land to others
* P arguing the original deed to D was a testamentary disposition ∴ not valid
* For P
 |
| **MacLeod v Montgomery [1980] (Atla. CA)** | * To complete a gift effectively, the donor is obliged to do what can be done
	+ Equity will not force a volunteer to complete that which is incomplete
* In jurisdictions where something + transfer document is required for registration 🡪 need to provide both for gift to be complete
 | * P = granddaughter
* D was going to transfer land to P as gift 🡪 transfer document delivered to P as soon as executed
* Needed duplicate title in order to register 🡪 never given to P
* P went to court to try and compel the duplicate title
* For D 🡪 gift not complete
 |
| Proprietary Estoppel | **Zelmer v Victor Projects [1997] (BCCA)** | * Doctrine of proprietary estoppel can be a basis for cause of action
* *Crabb* test:
	+ When A to the knowledge of B acts to his detriment in relation to his own land in the expectation, encouraged by B, of acquiring a right over B’s land, such expectation arising from what B has said or done, the court will order B to grant A that right on such terms as may be just
 | * P negotiated for water supply reservoir on D’s land
* D thought it was going to be in a different location than it was built
* P asked multiple times and D said it was okay
* P got easement
 |
| **Crabb v Arun District Council [1976] (CA)** | * **Three situations where estoppel applies**:
1. Where there is a binding K that will not insist on strict legal position --> equity will hold to the K
2. Short of K, if make a promise that will not insist upon strict legal rights, then even though the promise may be unenforceable in point of law for want of consideration or writing, if he makes the promise knowing or intending that the other will act upon it, and he does act upon it --> equity will not allow him to go back on promise
3. *Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his struck legal rights -- knowing or intending that the other will act on that belief -- and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied --> the cases show that this equity does not depend on agreement but on words or conduct*
 | * P owned land 🡪 only access was through D’s land
* Subdivided land, had right of access for one parcel
* Though would get right for the other, but D decided to prevent access to demand for money
* P got right of access
 |
| Aboriginal Title | **Delgamuukw v British Columbia [1997] (SCC)** | * **Test for AT:**
1. Pre-sovereignty occupation
2. Continuity between pre-sovereignty and modern times (not unbroken)
3. At sovereignty, exclusive occupancy (could be jointly exclusive)
* **Test for infringement of AT justification:**
1. Infringement must be in furtherance of legislative objective that is compelling and substantial
2. Infringement must be consistent with special relationship between A and Crown
* Inalienable to anyone but Crown
* Only federal government can extinguish AT
* **AT = right to exclusive use and occupation of land**, more than the right to engage in specific activities
	+ Uses are not restricted to those grounded in practices, customs, and traditions integral to distinctive aboriginal cultures
	+ **Inherent limit** = uses must not be irreconcilable with the nature of the group’s attachment to that land
 | * Claim over large area of land.
* Originally looking for ownership but changed to AT and self-government
* Government saying AT nothing more than a bundle of rights
* P had claims dismissed, new trial ordered
 |
| **Mitchell v MNR [2001] (SCC)** | * **How to define AR (look at *Van der Peet*):**
	+ Nature of action that appellant is claiming was done pursuant to right
	+ Nature of governmental legislation/regulation alleged to infringe right
	+ Ancestral traditions and practices relied upon to establish right
* Rules of evidence to be flexible in AR cases
* Crown sovereignty can act to overrule legitimate AR that are incompatible with it
 | * Tried to bring goods across border without paying duty
* Claimed AR to trade that exempted him
* No AR
 |
| **R v Marshall; R v Bernard [2005] (SCC)** | * Applied *Delgamuukw*
* **Occupation** (for AT)= must establish regular use of a defined piece of land for a certain purpose
	+ Becomes difficult for nomadic peoples
	+ Can still get AR even if can’t establish AT
 | * Charged with cutting down trees on Crown land without a permit
* Asserted AT
* No AT
 |
| **William v British Columbia [2012] (BCCA)** | * **AT must be shown on a site-specific approach**
* Occupancy requires regular and intensive presence at a particular site
	+ Nomadic groups can prove title to specific sites connected by broader areas where AR can be exercised
 | * Land claim in interior
* Nomadic aboriginal group
* Territorial vs site-specific approach
* AT territorial claim fails
 |
| Registration of Title | **R v Kessler (1961)** | * Zoning bylaws do not need to be registered to have effect
	+ Bylaw affects the land itself 🡪 not the land title
* Registration may be refused unless the instrument sought to be registered conveys an interest in land
 | * K argued that failure of city to register zoning bylaws under terms of *LTA* should exempt the RO of any real property from application of bylaw
* Should be registered because affect use of land
* Bylaws don’t need to be registered
 |
| **Skeetchestn Indian Band v British Columbia [2000] (BCSC)** | * **Cannot register AT as an estate or interest in land ≠ registerable because it is inalienable (inalienable ≠ marketable)**
* Nothing can be registered unless the registration is authorized by statute
	+ Cannot file *lis pendens* or caveat because what S is claiming is not registerable
* AT not derived from fee simple
	+ *Sui generis* 🡪 does not lend itself to categorization
	+ Not alienable
	+ Not an interest in land contemplated by *LTA* (only accommodates CL and equitable interests)
* Incompatible with Torrens system of priorities 🡪 AT predates sovereignty ∴ would always take priority
 | * Registrar refused to register *lis pendens* and a caveat relating to S’s AT claim
* Lands had been privately owned in FS and registered under *LTA*
* S alleges proposed Kamlands development will interfere with AT and seeking AT, declaration that titles held by Kamlands are null and void, injunction
 |
| Role of the Registrar | **Re Land Registry Act, Re Evans Application [1960] (BCSC)** | * **Registrar has right to refuse to register until boundaries clarified**
* Registrar does not have to perpetuate errors ∴ not compelled to register
	+ Can attempt to clarify boundaries
	+ Has an option not an obligation to correct register
	+ Must be satisfied of a good safe-holding and marketable title before issuing CIT
* Not duty of registrar to determine boundaries or adjudicate property rights 🡪 courts
 | * Plan deposited, lot dimensions as ‘more or less’
* Through series of transactions E gets property and has to register
* Registrar refuses because uncertainty of boundaries
* Registrar not compelled to register
 |
| **Re Land Registry Act and Shaw [1915] (BCCA)** | * **Registrar must be satisfied after examination of title deeds that a *prima facie* title has been established by applicant**
	+ Need to produce title that does not require further evidence 🡪 if something more needed to be shown ≠ *prima facie* title
	+ Evidence here of S’s action put a blot on title ∴ not *prima facie*
* Not for registrar to judge whether the act of the agent was valid or not except for the fact that the invalidity of the transfer/voidability of the transfer appears on the face of the documents
	+ S trying to exercise two capacities at once 🡪 buyer and seller
 | * S had power of attorney over father
* S applied to register an assignment of mortgage from father to himself
* Registrar refused to register until notified by father
* Registrar can refuse
 |
| **Heller v British Columbia (Registrar, Vancouver Land Registration District) [1963] (SCC)** | * Section of *LTA* says registrar "may" do things 🡪 no duty imposed
* Can exercise limited power of cancellation/correction where error has occurred but doesn’t have to act
* Powers are limited by words “so far as practicable, without prejudicing rights conferred for value”
	+ Registrar cannot adjudicate upon contested rights of parties for the determination of which it would be necessary to receive and weigh evidence 🡪 can only act upon material in own records
* Any questions of title to land in relation to fraud go to courts
 | * H executed deed transferring interest to wife and she registered
* H then tried to cancel because registrar did not have the duplicate COT
* Was held by C 🡪 H had transferred him one half interest in property
* Registrar refused to correct error
* Registrar does not have to correct
 |
| The Assurance Fund | **McCaig et al v Reys et al [1970] (BCCA)** | * **To claim against Assurance Fund:**
1. Deprivation of land or interest therein
2. Occasioned by operation of statute (*Land Registry Act*)
3. Loss occasioned by fraud, misrepresentation, or some wrongful act in the registration of any other person as owner or having interest in land
4. Barred from bringing action for rectification of the register
* In CL equitable interest is lost where person is a bona fide purchaser for value ∴ M would not be successful under CL so he cannot claim that operation of act caused the loss
 | * M has unregistered option
* Jabin acts to extinguish rights of M by deceit and fraud
* Goes to innocent third party for value without notice
* AF claim does not succeed but gets damages
 |
| General Principle of Indefeasibility | **Creelman v Hudson Bay Insurance Co [1920]** | * A certificate, while it remains unaltered or unchallenged on register is one which every purchaser is bound to accept
* **Register is conclusive** 🡪 AG can launch investigation but if another gets CIT before this happens it is too late
 | * HB brought action for breach of K of sale against C (purchaser)
* EIFS registered to HB
* C argued that HB could not hold real property unless it was required for purposes of company
* C must accept COT
 |
| Statutory Exceptions to Indefeasibility | **Carr v Rayward [1955] (CHARGES)** | * **CIT in BC is subject to some statutory exceptions which may cause something unregistered to become an encumbrance**
* A mechanics’ (builders) lien is effective against lands even if filed in land registry office after owner for whom the work done sells the land and purchaser has obtained CIT from LTO
 | * C did plumbing, filed lien before completion of work but after land had been sold to B and CIT issued to B
* B did not know about work, original owner didn’t pay
* C suing new owner to get paid
* C entitled to payment
 |
| **Winrob v Street [1959] (BCSC) (BOUNDARIES)** | * **Indefeasibility or conclusiveness does not extend to the location on the ground of the boundaries as depicted in the registered map or plan**
* Lawyer not responsible for ascertaining dimension
* Instead of relying on plan that is registered should get a survey
 | * P bought land where led to believe hedges were boundaries
* City asserted ownership to some of it
 |
| **Gibbs v Messer [1891] (Australia) (FORGERY)** | * **Deferred indefeasibility**
	+ C’s title defeasible by A despite registration but if C sold in good faith and for consideration to D, D’s title would be indefeasible
	+ A should recover title, because although both A and C were innocent of B’s fraud, C actually dealt with fraudster B, and A had no involvement
 | * M is RO 🡪 husband gives CIT to lawyer who concocts transfer to fictitious person
* C then arranges with the D’s for a loan to be secured by mortgaged from fake person
* C takes money and disappears
* M gets EIFS back, mortgage void
 |
| **Frazer v Walker [1967] (New Zealand) (FORGERY)** | * **Immediate indefeasibility**
	+ C’s title was derived from and upon its registration, not from B’s defective title ∴ C’s title is indefeasible
* Once C became the registered holder of the fee, C keeps the title, and A should be the innocent victim left to seek monetary compensation from B and/or the assurance fund
* Court felt that to preserve public confidence in the Torrens system, it was more important to protect C’s registration of title
 | * F had EIFS with mortgage
* Mrs. F arranges mortgage with 2nd respondents and forges Mr. F’s signature on transfer form (null deed)
* Stuff happens and Mr. F claims mortgage and sale occurred without his knowledge
* F does not get EIFS back
 |
| **Gill v Bucholtz [2009] (BCCA) (FORGERY)** | * **Immediate indefeasibility applies to EIFS when there is a bona fide purchaser for value**
* *Nemo dat* preserved for registered charges (s. 25.1(1)) --> cannot gain an interest from a void instrument ∴ have no interest to give
* **Three principles from the provisions of the *LTA*:**
1. Indefeasible quality of title as long as it remains ‘in force and uncancelled’ subject to the exception that as against a titleholder who has participated to any degree in a fraud in acquiring title, the true owner can recover title under s. 23(2)(i)
2. Does not give a registered charge the indefeasible quality given to the EIFS interest
* Registration of charge = rebuttable presumption of entitlement
1. Preserves the *nemo dat quod non habet* principle for interests less than EIFS
* S. 25.1(1) exception only applies to bona fide purchasers for value in EIFS
* No Assurance Fund 🡪 need to insure personally
 | * G = RO, GG gets transfer of G’s land from fraudster that she is working with
* GG become RO and grants mortgage to B (registered)
* GG makes second mortgage but before registered G files a caveat
* None of mortgages had knowledge of the fraudulent root of title
 |
| **First West Credit Union v Giesbrecht [2013]** | * Emphasize distinction between void and voidable transactions
	+ Forgery = void
	+ Fraud = voidable
* S. 25.1(1) only applies *nemo dat* to void as opposed to voidable transactions
	+ In *Gill* transfer that proceeded mortgages was void ∴ mortgages based on that also void
* Transfer not void but voidable for fraud ∴ mortgages survive
 | * Claimed victim of fraudulent misrepresentations
* Seeking to set aside mortgage and get company returned
 |
| Notice of Unregistered Interests | **McCaig v Reys [1970] (BCCA)** | * **Applies s. 29(2) of *LTA* 🡪 except in case of fraud in which participated is proposing to take from RO a transfer/charge on land is not affected by a notice, express, implied, or constructive of an unregistered interest affecting the land**
* Subject to limitation of knowledge + some form of dishonesty to make sure section applies
 | * Same facts as above
 |
| **Hudson’s Bay Co v Kearns And Rowling [1895] (BCCA)** | * **Fraud not presumed or imputed 🡪 R was careless but his acts were not out of the ordinary course of a pending deal**
* S. 29(2) protects unless the purchaser, with actual notice, acts to directly bring himself within the act to prejudice the holder of the unregistered interest 🡪 tantamount to fraud and purchaser will be estopped from invoking Act’s protection
 | * K owed HBC money so mortgaged her land
* K sold property to R
* R did not inquire why title deeds were not available
 |
| **Vancouver City Savings v Serving for Success [2011] (BCSC)** | * **Fraud requires more than knowledge of unregistered interest**
* Requires:
1. Sufficient, actual knowledge of adverse interest
2. Circumstances must remove the petitioner from regular course of business
* **S. 29(2) again**
* **P did not try and interfere with tenants when mortgage was granted 🡪 no suggestion acted out of the normal course of business or had ulterior motives**
 | * CC had two unregistered leases with D
* P advanced loans to CC and registered mortgage
* CC went bankrupt and P wants to foreclose with vacant possession
* D claim that P knew about their leases
 |
| In Personam Claims | **McRae v McRae Estate [1994] (BCCA)** | * **If CIT notes that interest is held ‘in trust’ that is sufficient notice to subsequent purchasers of the trust**
* Imputed notice is sufficient 🡪 F was ∴ bound by the trust and the trust was not subverted by intervening conveyance to F
 | * Father left in will land to wife for her life and remainder to three kids 🡪 W held ‘in trust’
* W transferred to F
* When F died left to wife and siblings
* Siblings discovered father’s will and wanted to transfer from W to F set aside
 |
| Registration: Charges | **Dukart v Surrey (District) [1978] (SCC)** | * **Any charge included in a trust, properly registered in LTO, will also be validly registered despite its absence from the face of the CIT**
 | * Residential lots with easement to Foreshore Reserve (FR)
* FR were held in trust subject to easements
* Surrey acquired FR on tax sale and registered interest with not reference to trust
 |
| **Crédit Foncier v Bennett [1963] (BCCA)** | * **Registration of charge creates a rebuttable assumption of entitlement that can be overturned by contrary evidence**
	+ Registered charges ≠ indefeasible if can be shown that it was created due to fraud, etc.
	+ Even if a bona fide purchaser holds the charge it is not indefeasible
* **Mortgage is security for amount owing** 🡪 A fraudulent mortgage cannot bind the true owner who owes nothing
 | * D holder of EIFS, Allan of Todd Investments forged a mortgage for D in favour of T
* A sold to friend S who did not notify D of assignment
* S sold to P
* P notified D
* D ignored because thought it was a mistake
* P sued D for personal judgment and foreclosure
 |
| **Canadian Commercial Bank v Island Realty [1988] (BCCA)** | * **The bona fide purchaser for value of a charge who gets the charge under a valid instrument from the holder of the EIFS is deemed to be entitled to that charge upon registration**
* Entitlement is not rebutted by pre-existing unregistered charges
* It was discharge not AA’s mortgage that was fraudulent ∴ AA did not take under void instrument
 | * IR has second mortgage
* C (lawyer) forged a discharge of IR’s mortgage and registered AA as holder of second mortgage
* C fled BC with AA’s money
* Insufficient funds to pay back both mortgagors on bankruptcy
 |
| Failure to Register | **Sorenson v Young [1920]** | * Action failed because easement was not registered ∴ the EIFS of the RO could not be successfully challenged
* Legislative changes after this case 🡪 can now sell land with reserved interest
 | * P owned Lot 1 and Lot 2
* Sold L1 to R, reserving a right of way
* R sold to D who claimed no knowledge of P’s right of way
* Built fence to block access
 |
| Except Against the Person Making It | **Yeulet v Matthews [1982]** | * **Judgment creditor cannot take a greater interest than judgment debtor has**
* S. 20 “except against the person making it” means that the judgment creditor’s interest is subject to unregistered interest which would operate against the judgment debtor
 | * D held equitable mortgage by deposit of duplicate CIT
* Her son was mortgagor
* Song had judgment registered against him by P
* D did not register equitable mortgage interest
 |
| **Martin Commercial Fueling v Virtanen [1942] (BCCA)** | * **Despite mischief which might arise with sales to friendly third parties just before a judgment is registered, the legislature has not acted upon it and the rule in *Yeulet* remains**
 | * JD agreed to sell on Oct. 21
* Four days later judgement was registered
* Sale not closed until Nov. 6
 |
| **L&C Lumber Co v Lungdren [1942] (BCCA)** | * Purpose of s. 20 is to protect purchasers for value without notice and enable them to rely on the register
	+ Should not be taken literally and was found to not rule out unregistered interests
	+ D found to have interfered with LC’s property rights
* A cannot take from C what A has transferred to B and B has transferred to C
* D also found to have broken K
 | * D sold lumber on land to M, M assigned rights to LC
* Neither M or LC were registered
* M gave notice in writing to D of transfer
* When LC went to cut, D would not allow entry
 |
| Prohibited Transactions | **International Paper v Top Line [1996] (BCCA)** | * **An interest which is prohibited by statute cannot be enforced by the grantee/transferee**
 | * IP to lease from TL but did not register
 |
| Applications to Register | **Rudland v Romilly [1958] (BCCA)** | * If bona fide purchaser of an EIFS applies to register their interest before an application to register a *lis pendens* is received by the registrar, the prior application to register EIFS will take priority
* A person contracting with RO although may not require IT until actually registered, will nevertheless be given considerable protection after lodging documents and making application to register
 | * D conveyed land to L for value, L applied to register (Dec. 14) and then executed deed to P
* L got COT on (Dec. 29) free of charges and immediately tried to register deed from L to P
* D filed *lis pendens* on Jan. 16
* P had not yet received CIT
 |
| **Breskvar v Wall [1972] (Aust. HC)** | * **If there are 2 competing equitable interests, the equity which will prevail is that of the party who acted blamelessly and in good faith**
	+ If a party by their conduct enables a representation to be made upon the faith of which another innocent party acquired an equitable interest, that party’s equity will be postponed (giving blank signed transfer deed = stupidity)
* A K of sale of an EIFS is an equitable interest which will at least receive some protection prior to being registered
 | * P was RO in EIFS
* Transfer issued by P with no name listed as transferee
* DP inserted name of grandson Wall (DW)
* DW sold to Alban after being registered
* Transfer executed on Nov. 7; caveat lodged by P on Dec. 13; transfer registered on Jan. 8
 |
| The Fee Simple**Words of Purchase** = indicate the person(s) to whom the interest is transferred**Words of Limitation** = indicate the quantum of the interest in land which is transferred | **Tottrup v Ottewell Estate [1969] (SCC)** | * **No longer necessary to say ‘and his heirs’ it is sufficient to say so to transfer an EIFS**
* Rule in Shelly’s Case 🡪 ‘and his heirs’ = word of limitation
* When wording is clear don’t look at surrounding evidence of intention 🡪 this is probably not law anymore (now can look at surrounding circumstances construing a will)
 | * Two twins have identical wills
* P only child of one
* Contained phrase to F and his heirs, executors, and administrators
* Words no longer necessary
* P argued words and his heirs were words of purchase rather than limitation
 |
| Problems of Interpretation - Repugnancy | **Re Walker [1925]** | * **Cannot give an EIFS and simultaneously control the alienation of that interest from the grave**
* Court will attempt to give effect to testator’s wishes as much as legally possible 🡪 ascertain what part of the intent predominates (will reject subordinate repugnant intent)
* Restraint on alienation is repugnant to granting of EIFS
 | * Deceased left estate to wife
* Anything undisposed of in W’s life was left to others
* Wanted will construed so W got LE and the rest got remainder
 |
| **Re Shamas [1967]** | * **When construing will, surrounding circumstances at the time it was made are relevant in determining the interest which the testator intended to grant**
* If intent is clear, the language and form used are unimportant
* Intended LE for wife and an entitlement to encroach on capital
 | * Deceased created will, wife ran business when he died
* D left everything to W until last child turned 21 (unless she remarried) then she would get same share as kids
 |
| **Cielein v Tressider [1987] (BCCA)** | * **Condition restraining absolute gift will be inconsistent with the absolute character of the gifted interest ∴ repugnant and void**
* Absence of intent to create LE indicated intention to create absolute interest
 | * Deceased left personalty and residue to CL partner Rich and his realty
* Had 5 kids from prior marriage
* D qualified gift of realty saying upon sale I would be divided equally between her son and 5 kids
 |
| Words Formerly Creating a Fee Tail | **Rule in Wild’s Case** | * If grantee has children at the time a will is made, the grantor is presumed to have intended to create a co-ownership **🡪 word of purchase**
* If grantee has not children at time will is made, then grantor is presumed to have intended to create a fee tail **🡪 word of limitation**
 | * Grant made by will to RW and his wife, and after their death to their children
 |
| Equitable West in LE | **Vane v Lord Barnard [1716]** | * **Life tenants are liable for equitable waste**
 | * Castle to son but maintained LE without impeachment for waste
* PO’d at son so stripped castle
 |
| **New Westminster (City) v Kennedy [1918]** | * **One in possession will be restrained from using his legal power unfairly (unconscientiously) so as to destroy or depreciate the subject-matter**
 | * Owner stripping house before it was to be sold at tax sale
 |
| Liability for Taxes, Insurance, etc. in LE | **Mayo v Leitovski [1928]** | * **Life tenant has a fiduciary relationship with the holder of a remainder in fee simple and may not do anything to injure the property or overcome the rights of the remainderperson**
* Life tenant can do nothing during the continuance of her estate to impair the estate in remainder, and on the other hand, the remainderperson cannot do any act which will affect the life estate
 | * P had EIFS in remainder
* D elderly woman who could not pay taxes ∴ tax sale
* Daughter purchased house in tax sale then assigned title to D
* D tried to register but P challenged D’s ability to defeat his remainder
 |
| Future Interests – Vested and Contingent | **Browne v Moody [1936]** | * Date that W dies is when capital would be divided 🡪 defined as present gift coupled with a postponement of the date of payment
* Vesting of capital takes place at death of testator
* **Whether or not a future interest is vested will be measured at the time that the testatrix dies, not at the death of a preceding life estate**
* **Preference of early vesting**
* Contingency of leaving issue ≠ gift over but is a divestiture clause (it is resolutive, does not prevent vesting but not absolute)
* Rule 🡪 a gift of remainder will be treated as vested if:
1. It is postponed in the will solely for the convenience of the testator’s estate
2. It is postponed by the creation of some prior interest such as a life estate
 | * B died and left fund with income to be paid to son W during lifetime
* Upon his death, divided .5 to granddaughter and other .5 to daughters in equal shares
* If daughter predeceased B or W and left an issue, “child of person so dying shall take the interest to which their mother would have been entitled”
* Interest vested or contingent?
 |
| **Phipps v Ackers [1842]** | * **Rule = gift subject to condition precedent with gift over if not satisfied is to be treated as vested subject to divesting**
 |  |
| **Re Squire [1962]** | * **Interest is vested unless condition precedent to vesting is expressed with reasonable clearness**
* ***Vawdry v Geddes* 🡪** presumed to vest when it is separated from rest of estate and no gift over
* ***Saunders v Vautier*** *🡪* absolute vested gift made payable at a future event with direction to accumulate income and pay it with the principal courts will not enforce trust
* ***Wheedon v Lea*** 🡪 when/upon ≠ condition precedent (rather than if)
 | * Trustee holding property until two grandsons reach 30
* Vested (take out at 21) or contingent interest?
 |
| **Re Carlson [1975] (BCSC)** | * Give effect to testator’s intent
* **Principal intention to keep the whole of residue intact until C turns 21 but inconsistent with providing percentage to other kids**
* **Court prefers early vesting**
* Found that the main intent was to provide for C until 21
* Not vested until 21 because testator was not willing to have other children share on an equal basis from the date of death 🡪 only get the residue after been used for YS
 | * Testator survived by widow, son, daughter and youngest son
* Left estate in trust for education of YS
* Upon YS turning 21 to be split between the three children
* Vested immediately or on 21st bday
 |
| Equitable Future Interests**CL REMAINDER RULES DO NOT APPLY** | **Re Robson [1916]\*\*** | * **Estates create equitable future interests rather than CL future interests**
* Legal title vests in executors 🡪 presumption of trust
 | * Testator devised land to use of daughter for life and on death to ‘the use of such of her children as shall attain the age of 21 years’
* When daughter died 2 children 21+ and 2 under 21
* Did 21+ take in exclusion of others?
 |
| Conditional and Determinable Interests – Uncertainty / Restraints on Marriage and other Personal Restraints | **Noble v Alley [1951] (SCC)** | * If a restraint is so construed so that it is such a substantial restraint upon alienation, the restrictive clause will be “repugnant to the very conception of ownership” and therefore void. (in the case of the slightly degree of race or blood within the category of Jewish, etc.)
* A contingent condition must be sufficiently precise and distinct from the outset so that the Court knows what precisely how the contingent condition will become vested (or the estate determined—although this case is a bit different)
* ***Tulk v Moxhay*** *🡪* private law town management that prevents using land for certain purposes
* ***Clayton v Ramsden***🡪 Jewish parentage = void for uncertainty
* ***Clavering v Ellison*** 🡪 court must see from beginning, precisely and distinctly, upon the happening of what even tit was that the preceding estate was to determine
 | * Private summer resort where not allowed to sell to anyone but white people
 |
| **MacDonald v Brown Estate [1995]** | * **Testator’s motive is important**
* When assessing whether a condition is void due to public policy, the motive of the testator – whether coercive/punitive or supportive – is relevant
 | * Testator gives shares until niece becomes widowed or divorced from present husband
* If doesn’t happen goes to grand-nephew
* Void for public policy?
 |
| **Canada Trust v Ontario (Human Rights Commission) [1990] (Ont CA)** | * **Value of allowing individuals to dispose of their property as they see fit is not an absolute right, it is balanced by public policy concerns**
	+ Considers briefly value of allowing testator to dispose of property as they wish. But, LS was so at odds with present social values that to allow it to continue was “inimical to the public interest”. The trust was premised on the notions of racism and religious superiority and flies in the face of social values in which equality rights are constitutionally granted. However, testator’s freedom to dispose of his property through a charitable fashioned as such had to give way to current principles of public policy.
	+ Public policy was informed by statute, Charter, and international law. Commitments to anti-discrimination. This decision was made on the basis that this was a public charity (the decision did not go so far as to include private family trusts)
 | * Scholarship created that was only for white, protestant people
* Void for public policy?
 |
| Creation of Concurrent Interests - CL | **Re Bancroft, Eastern Trust Co v Calder [1936]** | * **Bequest to a number of persons without accompanying explanatory words creates a joint tenancy**
* Courts don’t like JT 🡪 when worlds like ‘equally’ or those which demonstrate that testator intended to divide property are used it will lead to a TIC
 | * Testator survived by widow; two sons; one daughter 🡪 one predeceased daughter had two kids
* Shares given to kids ‘equally’
* When stated that share should carry on to grandkids did not use ‘equal’
 |
| Creation of Concurrent Interests - Equity | **Robb v Robb [1993] (BCSC)** | * **Absent words of severance, the CL presumption of JT will prevail if the equitable exceptions to the presumption are not established an no legislation otherwise alerts the presumption**
* Exceptions to presumption:
1. 2+ people purchased land providing unequal shares of purchasing price (if equal JT)
2. Commercial transactions (survivorship incompatible with commercial partnership)
3. 2+ people lend money on a mortgage and the mortgagor transfers the property 🡪 *prima facie* JT of house but if one of mortgagees dies equity would compel other JT to hold mortgage in trust for deceased’s estate so would not lose security for repayment of loaned
 | * Mr and Mrs lived in a co-op
* Children wanted to vary will
* Mrs purchased co-op but Mr gave her California property later as consideration
* Were JT
 |
| Share of Profits/Expenses | **Spelman v Spelman [1944] (BCCA)** | * **Cotenants have no right to share in one another’s labour profits so long as the profits do not arise through the exclusion of one cotenant from using the property**
 | * Husband and wife owned two properties
* One rooming house he ran while she was away
* The other on the island
* W left and H didn’t pay profits from either property
 |
| **Mastron v Cotton [1926]** | * **General rule** 🡪 one joint tenant, unless ousted by his cotenant, may not sue for use and occupation. The court may make all allowances with the goal of doing complete equity between the parties. What is just and equitable depends on the circumstances of the case. For instances, if one tenant makes improvements which increase the selling price, the other tenant cannot take advantage of that without being submitted to allowances. If one tenant pays more than her fair share of encumbrances, she is entitled to an allowance for such surplus.
* **An ouster** of one joint tenant by another may include violent conduct (*Dennis v McDonald*) which entitled the partner who was ousted in claiming a sum in occupation rent from her violent partner.
* What is just and equitable depends on the circumstances of the case
 |  |
| Severance – Destruction of One of the Unities | **Stonehouse v British Columbia (AG) [1962] (SCC)** | * **Severed** 🡪 operated ‘except as against the person making the same’
	+ **Deed operated as an alienation of Mrs**
	+ Interest transferred destroyed JT
	+ Became a TIC from the execution of the deed
 | * Mrs conveyed all her interest in her daughter without telling Mr
* Deed remained unregistered
* Severance?
 |
| **Sorenson Estate v Sorenson [1977]** | * **Right of survivorship operates automatically taking precedence over any will**
* **To sever a JT there must be an explicit agreement to sever**
* The trust document was found to be a severance 🡪 after that H and W held as TIC
* Lease and partition proceedings were not found to be severance
 | * Husband and wife are JT with a disabled son
* Separated, have a bunch of dealings
* Wife makes a trust for benefit of son
* Sever JT?
 |
| Partition and Sale | **Harmeling v Harmeling [1978] (BCCA)** | * **Scope of discretion** 🡪 meaning of ‘may’ in statute?
* ***Prima facie* right of a JT to partition or sale of lands 🡪 the court should compel partition or sale if there is no sufficient reason why order should not be made** (each case to be considered in light of the particular facts)
* Husband would be ousted from home if order stood and did not have money at 70 to start over
* **Can refuse order if justice requires it**
 | * Married, had fish farm, sold it for retirement house
* Wife left for another guy
* Came back and wanted order of sale so she could have money
 |