PROPERTY

LAW 211

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# Chapter 5: Registration of Title

**Principles embodied in the LTA:**

1. Compulsory title registration
2. The creation of an indefeasible title in the registered owner
3. Certainty and facility in the proof of title by reference to a certificate issued by the registrar and made conclusive by law
4. The abolition of the doctrine of notice
5. Provision of an assurance fund to provide indemnity for persons deprived of their interest in the land by operation of the Act

**What can be registered?**

* Generally, only those interests which are recognized as interest in land at CL and equity can be registered under the LTA
* Registrable interests that did not exist in CL include: caveats, certificates of pending litigation, judgements
* **Cannot** register equitable mortgage (when duplicate indefeasible title is handed over to lender), beneficiary interests (s.180 says that the trustee should be registered to protect these beneficiary interests), sub-agreement for sale, aboriginal title (see Skeetchestn)
* Common law and equitable interests are marketable and therefore included

**Basic Scheme of Registration**

Two categories:

1. The legal fee simple
2. All other registrable interests, the latter being called “charges.”

**Skeetchestn Indian Band v British Columbia (2000)**

Ratio: The Torrens system is designed to register interests in land that have a clear identity recognized by the rules of property law. Aboriginal title is not derived from fee simple – it is sui generis and does not lend itself to categorization. **Aboriginal title is therefore not registrable**.

**Strata Property Act Section 239**

If you bring a strata plan to the land title office, you may **subdivide**. May not be subdivided if it would establish a strata corporation.

**Strata Property Act Section 244**

Provides the **requirements for a strata plan**, including who it must be signed and endorsed by. Basically, you must show where the boundaries between lots are, number them, show the buildings, and use a surveyor. Must be signed by the person applying to deposit the plan and each holder of a registered charge. Parking lots, storage areas etc. must be designated as common property and not as a lot. Must be endorsed by an approving officer.

**Charges**

Charge means an estate or interest in land less than the fee simple and includes an encumbrance.

**Encumbrance**

An “encumbrance” includes a judgement, mortgage, lien, Crown debt or other claim to or on land created or given for an purpose…

## 

## Requirements for Registration of Title: Section 159 of the LTA

The registrar must register the title claimed by the applicant if the registrar is satisfied that:

1. **The boundaries are sufficiently defined by the description or plan on record**; and
2. **A good safe holding and marketable title** in fee simple has been established by the applicant

“Safe holding” means a title conferring possession that is safe from attack and cannot be displaced.

“Marketable” means a title that is freely alienable, and not so defective that a reasonable purchaser could refuse it.

In addition to satisfying these requirements, an applicant must

1. Ensure that the documents supporting the application are attested and executed as required
2. File a completed property transfer tax form. There is no separate application form.

Once all the requirements are satisfied, the application is scrutinized by an examiner of titles. If satisfied, the title is now ready for registration. The final step in the process involves the production of an indefeasible title. It will include all information about the land, including all charges etc. to which the land may be subject.

A duplicate indefeasible title cannot be issued if the title is subject to either a registered mortgage or an agreement for sale. If a duplicate indefeasible title is issued, and thereafter an application to register either a mortgage or agreement for sale is made, the duplicate must be produced to the registrar for cancellation.

**Transfer Inter Vivos**

Procedure is basically the same as that for initial registration. The Registrar must be satisfied that there is a sufficient description of the land, etc. etc. The applicant must also produce the duplicate indefeasible title if one has been issued.

**Transmission on Death**

Title to the deceased’s real and personal property passes by law to the executor, who holds the property in trust for the benefit of those entitled by will or on intestacy. The personal representatives secure registration of themselves as the fee simple owners in a fiduciary capacity. Following the administration of the estate, the personal representatives transfer title to the appropriate beneficiary, who may then secure their own registration as owner.

## Registration of Charges

If the Registrar is satisfied that the applicant is entitled to be registered as the owner of a charge, the registrar must register it. A charge may be denied to the applicant if:

1. A good, safe holding and marketable title to it has not been established by the applicant, or
2. The charge claimed is not an estate or interest in land that is registrable under the Act.

Satisfaction may be gained by looking at:

1. An instrument from a fee simple owner creating a charge (ie. a mortgage) in favour of the applicant
2. An assignment to the applicant of an existing charge (ie. a lease)
3. By the creation of a sub charge (ie. a sub-lease) in favour of the applicant.

On an application to register a mortgage or agreement of sale, any duplicate indefeasible title must be surrendered for cancellation.

### Caveats

A caveat may be lodged by any person who claims to be entitled to an interest in registered land.

As long as a caveat remains in force, the registrar must not:

1. Register another instrument affecting the land
2. Deposit a plan of subdivision or allow any change in boundaries affecting the land

A caveat lapses after two months. There is a possibility of lodging one further caveat after an initial caveat has been withdrawn.

### 

### Certificates of Pending Litigation

Any person who has commenced or is a party to a proceeding may register a certificate of pending litigation in the same manner as a charge is registered. The owner will be notified by the registrar. This would happen in instances of contested wills, divorce, foreclosure, etc. Nothing can be changed about the register until the certificate of PL is cancelled, unless officially directed. This does not apply to a caveat, an indefeasible title or charge subject to the final outcome of the proceeding, certificate of judgement, builders lien, or any other involuntary charge. Anything registered before the end of the proceedings is subject to the final outcome of the proceeding if what was registered is affected by that outcome.

### Judgements

1. Type of judgement that can be registered:
   1. If a plaintiff obtains a money judgement against a defendant, the plaintiff may register the judgement in the same manner as a charge
   2. A judgement which affects the title will not be registered in this manner, but its impact will be reflected by a direct alternation of the title relating to that land.
2. Manner of registration:
   1. A judgement is registered by its being endorsed in the register in the same manner as a charge. The registrar will then notify the owner of the interest or charge.
   2. If the owner alleges he is not the debtor, the registrar can investigate and make an order accordingly
   3. A judgement appears on the register in the same way as any other charge.
3. Effect of registration:
   1. Court Order Enforcement Act
      1. The judgement forms a lien and charge on the land of the judgement debtor

## Role of the Registrar

* Has the responsibility of deciding if an applicant has a “good safe-holding and marketable title.”
* They have the power to make corrections

**Re Land Registry Act, Re Evans Application (1960) BCSC**

Upon her husband’s death, Mrs. Evans applied to have the joint title registered in her own name. The Registrar refused because the description of the boundaries of the property were not definite. They were described as “66 feet, more or less,” which is too indefinite. The plan on file gave no dimensions for the lot. The error of registering title for this property was repeated in successive certificates of title, but this Registrar took it upon himself to refuse to perpetuate the error. It is his prerogrative to establish a good safeholding and marketable title at any time.

**Re Land Registry Act and Shaw (1915) CA**

|  |  |
| --- | --- |
| F | The petitioner’s father had given his son power of attorney to sell and dispose of his property, and the petitioner applied to register an assignment of a mortgage from his father to himself, which was executed by himself as attorney in fact for his father. The district registrar refused to register the assignment until notified by the father. |
| I | Can a power of attorney assign a mortgage to himself? |
| R | * A transfer by a fiduciary to himself is prima facie voidable. * You cannot use power of attorney to grant yourself a mortgage or transfer any interest without full disclosure, fair consideration, and good faith on the part of the transferee, the onus of which is on him to prove. * The district registrar is not a mere machine for making registration. He must exercise his discretion in determining if the applicant has established a prima facie title * **The registrar will presume equitable conduct in determining whether a prima facie title exists but will not disregard a “palpable blot on the face of the title.”** |

**Property Law Act s. 27**

The decision in Shaw is now codified in the Property Law Act. A power of Attorney cannot sell to himself or herself unless the power of attorney expressly authorizes it or the principal ratifies it.

**Heller v BC (Registrar, Vancouver Land Registration District) 1963 SCC**

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| F | Mr. Heller owns land, executes a deed transferring the property to his wife. Wife takes deed to transfer office and it is registered, but this is done in error because the duplicate indefeasible title is with Mr. Heller. Mr. Heller then sells off some land to a buyer and gives buyer the duplicate. Buyer tries to register and the registrar says no. Registrar refuses to correct the register. |
| I | Should the registrar be compelled to exercise his statutory power to correct the register? (Ie. remove Mrs. Heller’s name and reinsert Mr. Heller’s name?  What is the registrar’s power to make changes to the register? Reviw section 383.  Who has what interests in land in law and in equity? |
| A | * Registrar has a discretion whether to act. If she chooses not to this is likely unappealable. * **As soon as an error starts to affect substance and title, that matter is decided to be ultra vires the constitutional duties of the registrar. These issues are reserved for Courts.** * If the registrar had acted differently he would have acted beyond his jurisdiction. * Evidence shows Mr. Heller transferred property by deed to Mrs. Heller and no evidence of fraud was adduced against Mrs. Heller. She is therefore protected by section 20 as the registered owner in fee simple. |
| C | **The only way you could defeat the registration and the indefeasibility of that title, is within the exceptions listed in section 23 (including fraud). Because there was no evidence of these exceptions, her registration had to be respected.** |

**Section 282**

The registrar may cancel registration, and instrument etc. or may make a correction at his or her discretion.

## The Assurance Fund

“Part 20 of the Land Title Act establishes an Assurance fund out of which, if certain preconditions are satisfied, a person may be able to claim compensation for the loss of an interest in land. There are few reported cases where the fund was held liable. If claims are made they are generally settled without litigation.”

**Section 296: Requirements for a person to qualify as a “claimant” and recover from the Assurance Fund**

Claimant has to show:

1. He/she was deprived of an interest in land because of the conclusiveness of the register
2. The loss was a result of the intervention of LTA into what would have been a different result at common law
3. The loss is the result of fraud or a wrongful act
4. The claimant is barred from bringing an action for other remedy for the recovery of land, or rectification of the registrar by the act.
5. The claimant must sue the wrongful party, and join the Minister as a nominal party defendant. If the wrongful party absconds or is dead, or cannot pay the full amount, then you can claim from the Minister and the Assurance Fund.
6. There is a three-year limitation after discovery of deprivation

**Section 297: Protection of Purchaser in good faith and for value**

1. In this section, “transferee” means a transferee who, in good faith and for valuable consideration, acquires an estate or interest in land less than a fee simple estate.
2. Despite anything to the contrary in this Act, no transferee is subject to a proceeding under this Part in respect of an estate or interest in land of which the transferee is the registered owner, for
   1. Recovery of land
   2. Deprivation of land, or
   3. Damages in respect of land on the ground that the transferor may have been registered as owner through fraud, error or a wrongful act, or
   4. May have derived title from or through a person registered as owner through fraud, error or a wrongful act

Plain language: the person who ends up being the registered owner, as long as he paid for the interest and land and was in good faith, won’t be liable to pay damages or give back the land due to Section 297. It is the transferor who acted fraudulently or in bad faith – as such, the transferee should be protected.

## Fault of Registrar: Section 298:

A person who sustains loss or damages due to an omission, mistake or misfeasance of the registrar, will be able to proceed in the Supreme Court against the minister and recover from the assurance fund.

Limitation Period: within three years after the loss or damage is discovered by the claimant.

**Section 303: Limitation of liability of assurance fund**

The assurance fund or the minister as nominal defender is not under any circumstances liable for compensation for loss, damage, or deprivation

1. Suffered by owner of undersurface rights, or an equitable mortgage by deposit of duplicate certificate of title
2. Occasioned by
3. Breach by a registered owner of a trust
4. A misdescription of boundaries
5. Improper use of a sea of a corporation
6. Dissolution of corporation
7. Provisional certificate of title
8. If the land in question may have been included in 2 or more grants from the Crown
9. Error or shortage in area of a lot in an air space parcel
10. If the plaintiff, or the person through or under whom the plaintiff claims is in any way **negligent, careless in causing the loss, or imprompt or improper in dealing with it if they had notice**

**McCaig et al. v Reys et al.**

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| F | Farwest sold a ranch of 650 acres to South Transport. South Transport (McCaig) sold to Reys by sub-agreement of sale. Reys offered an option to sell back 24 acres in a written instrument; McCaig agreed. The option was never registered because the Registrar first required subdivision, which required Farwest’s consent which was not forthcoming. Reys then sold by sub-agreement to Rutland. Rutland knew of the option, said they would honour it, and registered their title. Rutland, through their principal officer Jerome, then sold to Jabin without notifying Jabin of the option. Jabin took title bona fide and for value, and because he did not have notice of the option he thus acquired a good safeholding and marketable title. |
| I | Is McCaig able to be paid out from the Assurance Fund? |
| A | In order to succeed against the Fund, a claimant must show:   1. That he has been deprived of land or an estate or interest therein (Yes) 2. The loss was occasioned as a result of the operation of the statute (No) 3. That the loss was occasioned by fraud, misrepresentation, or some wrongful act (yes) 4. That he is barred from bringing an action for rectification of the register (Yes)   McCaig did not lose his interest due to the operation of the statute, and therefore no claim against the Assurance Fund can succeed. He would not have been successful at common law because he lost his equitable interest to a bona fide purchaser.  **The bona fide purchaser of realty without notice of prior equitable interests has always been protected in equity.**  The operation of the Act was not the cause the loss. |
| C | McCaig successful against Reys for breach of contract and Jerome for fraud; unsuccessful against the Assurance Fund. |

**Royal Bank of Canada v British Columbia (1979) BCSC**

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| --- | --- |
| F | Walsh became a registered fee simple owner, deposited certificate with RBC as security for present and future loans. Walsh granted a registered mortgage to the Bank of Nova Scotia without duplicate; Land Registry Office reported it was on file although it could not be located. RBC loaned Walsh money after the registration of the BNS mortgage. When they could not recovery the loans from Walsh they made a claim against the Assurance Fund. |
| I | Can RBC seek relief from the Assurance Fund for a mistake? |
| A | * The plaintiff relied on the fact that it would not have advanced further loans on its equitable mortgage if it had known that the Bank of Nova Scotia held a mortgage * Those who seek to rely on equitable mortgages must accept the risks inherent in such securities * The registrar owed no duty to RBC. S. 47 states that the holder of an equitable mortgage does not entitle the holder to registration under the Act. Person alleging loss must show that the loss flowed naturally and directly from the Registrar’s mistake – that is not the case here. Chain of liability is too tenuous. |
| R | No case can be founded upon procedural error solely on the part of the Registrar.  **Those who seek to rely on equitable mortgages must accept the risks inherent.** |

**Gordon v Hipwell (1952) BCCA**

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| --- | --- |
| F | Hipwell came to BC from England and bought some land from Gordon with diamonds that he had smuggled into Canada. He was registered as fee simple owner of the land. He later went back to England. After his departure, the diamonds were seized by the RCMP. Gordon field a caveat against Hipwell’s title. Mrs. Hipwell got the caveat removed acting under power of attorney. The power of attorney had actually been removed but the Registrar did not know. She sold the land to a bona fide purchaser for value without notice. Gordon claimed against the Assurance found. Court found that his interest was a “permanent caveat” (no longer exists) that the Registrar should not have removed. |
| I | Is the LTR liable for erasing the caveat? |
| A | **Registrar should not have removed the caveat.** |
| C | Gordon successful against the Assurance Fund. |

# 

# Chapter 6: The Effect of Registration

**Section 23: Effect of indefeasible title**

(2) An indefeasible title, so long as it remains in force and uncancelled, is conclusive evidence at law and in equity… that **the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple** to the land described in the title, subject to:

1. Reservations in the original crown grant
2. Federal or provincial tax, default of which can result in a lien
3. Municipal charge
4. A lease 3 years or under with actual occupation
5. A highway or public right of way (easement)
6. A right of expropriation or to an escheat under an Act. Under the Escheat Act **if someone owns property and dies without a will the administrator of the estate cannot find a next of kin then the property goes back to the Crown**. Can be goods, real property, bank accounts.
7. Builder’s lien, caveat, charge, judgement, lis pendens
8. Improper boundaries (Re Evans)
9. Fraud, including forgery, in which the registered owner has participated in any degree
10. A restrictive condition imposed on the land by the Forest Act

## Crown Reservations: Section 50

(a) A disposition of Crown land **reserves the right for the government to resume any part of the land that is deemed necessary to make a road, canal, bridge, or other public work** – but no more than 1/20 part of the whole land, and nowhere a building has been built or a garden made. They may also access and draw geothermal, mineral, gas, water, construction materials (gravel, timber); giving compensation.

(b) A disposition of Crown land conveys no right, title or interest to geothermal resources, minerals, coal, petroleum, gas, or highways.

**Agricultural Land Commission Act**

The Act reserves certain tracts of land which cannot be used for non-farm purposes. It may not be subdivided unless approved by the commission.

**The General Principle of Indefeasibility**

**The registration of title is conclusive evidence at law and in equity of ownership** (s 23). Allowing investigation of the right of a person to appear on the register when she holds a CIT would defeat the purpose of the statute. Only way to challenge conclusiveness is through exceptions in s23 (Creelman).

**Creelman v Hudson’s Bay Insurance Co. (1920)**

|  |  |
| --- | --- |
| F | Hudson Bay (seller of land) brought an action for breach of contract of sale against Creelman (purchaser).  Creelman’s defence: argued that HB was not using land for the purpose the federal government gave it and therefore they had no power to hold or dispose of the land. |
| A | HB has a registered estate in fee simple – it doesn’t matter what they are using the land for.  Every purchaser is bound to accept the certificate of title if it remains unaltered and unchallenged upon the register.  Investigation about root of title would defeat purpose of registration through the LTA. |
| C | Appeal dismissed – Creelman bound to accept certificate and comply with obligations under the contract to purchase. |

## Indefeasibility and Adverse Possession

Pre 1970s – Title By Adverse Possession

* Basis: the title holder could evict the trespasser from the property within a statutory limitation period. If the limitation period was allowed to expire, the right to evict was lost.
* If the trespasser met the requirements of the common law doctrine, they could acquire title
* Limitation period for Crown was 60 years from dispossession, Limitation period for everyone else was 20 years from dispossession
* Requirements of common law for proof (on a balance of probabilities): open and notorious, adverse, exclusive, peaceful, actual, and continuous: nec vi (no violence) nec clam (without secrecy), nec precarium (without permission).

Post 1970s – Adverse Possession

* **S. 23 protects a registered owner’s indefeasible title from any claim of adverse possession**
* Doctrine largely eliminated, with saving clause for rights acquired (by meeting the above requirements) before 1975, and for adverse possession against the first owner
* *Land Act* S. 8 exempts Crown land from any claim of adverse possession regardless of length of possession

**Adverse Possession: Section 23**

(3) Squatter’s rights abolished for both private and crown land subject to small window before 1975 if first crown grant

## Encroachment: Section 36 Property Law Act:

The legal boundary lines of a property that appear on a plan in the Land Title Office have to be applied to the surface of the earth. Mistaken application can result in a neighbour encroaching over the boundary line.

**This section gives the court the power to**

1. **transfer the piece of property that’s occupied (with compensation), or**
2. **give an easement to it (with compensation), or**
3. **have it be removed.**

It only applies to buildings apparently, but has been extended to include fences, sidewalks, septic tank, retaining wall, stone patio, and koi pond.

Courts interpret this section is a way that promotes an equitable solution to a bad situation.

**Courts use equity, balance of convenience, and justice to attain a good result. Pay attention to:**

* Financial cost
* Hardship to the parties
* Conduct of the parties including knowledge and malice/intention of the encroacher
* Value of the property
* Extent of the encroachment

**Statutory Exceptions to Indefeasibility**

Section 23 provides a list of qualifications on that absolute title and which serve to define the scope of the rights of use and enjoyment rights of the owner:

1. All lawfully executed Crown or Public Body qualifiers
   1. In the original Crown grant – conditions, reservations, exceptions
   2. Taxes, liens, rates assessment charges whenever lawfully levied and charged
   3. Public rights of way easements, expropriations, escheats
2. Common-law and equity Charges and encumbrances on the EIFS both corporeal (life estates and leases with a term exceeding 3 years) and incorporeal (future interests, mortgages, easements, restrictive covenants profits)
3. Statutory permitted charges (lis pendens, caveats, judgements, builders’ liens, Agricultural Land Commission Act)
4. Actual boundaries of property
5. Fraud and forgery

## Leases – Section 23.2.d

* If the term is **less than 3 years, the lease does not have to be registered.**
* Lease or agreement to lease will be honoured as in rem rights for up to three years even though it’s not registered, as long as there is actual occupation
* Leases longer than three years must be registered to grant in rem right
* Rationale: prefer not to clutter up system by registering large number of short-term leases

**Charges and Other Entries – Section 23(2)(g)**

1. Lien gets priority over any judgement, executions, attachments, and receiving orders recovered, issued, or made after that date
2. Liens are subject to limitations set out in their enabling statutes. **Builders Lien Act limits claims to those made within 45 days of certification of completed work, amongst other time limits**(**Carr v Rayward**)
3. In BC a new owner’s liability is limited to 10% of the contract if acting in good faith, if acting in bad faith (they knew the contractor was not paid) then new owner liable for full cost.

## Builder’s Liens

If you perform work on someone’s property and you are not paid for that work, you have a right as a worker to put a lien on the property for the amount owed for the contracted work. Historically known as a mechanic’s lien. See No. 2 Above.

**Carr v Rayward**

|  |  |
| --- | --- |
| F | The plaintiff did plumbing work on the defendant’s house. The plaintiff filed a builder’s lien before work had been completed but **after** the house had been sold to the defendant. They buyer was registered as owner in fee simple title before the lien was registered by the plaintiff as a charge on the indefeasible title. |
| I | Was the lien a valid charge on property without notice being given to purchaser? |
| A | The Land Title act expressly limits indefeasibility subject to a list of factors in section 23, one of which is builder’s lien. |
| R | As the Builder’s Lien Act allows this registration and section 23(2)(g) authorizes this qualification on the indefeasibility of the registered estate in fee simple. |
| C | Plaintiff won – defendant liable to pay for the work done. |

## Boundaries – Section 23(2)(h)

**No indefeasibility with regard to boundaries.**

For each parcel of land, there are two fundamental documents

1. Certificate of indefeasible title: describes the legal title including various charges – lawyer’s expertise
2. The map or plan: depicts the parcel and its physical dimensions – surveyor’s expertise

**Fowler v Henry**: instead of relying on the map in the LTO, a survey should be undertaken

**Winrob v Street:** a conveyancer/lawyer advises the client on the state of the title, but has no duty to ascertain or advise on the dimensions of the property.

## Fraud and Forgery – Section 23.2.i

When the registered person participated in fraud, their indefeasible title is actually subject to a claim from the person defrauded.

**If you are on title because of fraud or forgery, your title is not indefeasible, but rather defeasible.**

Fraud: any underhanded bad faith dealings between the seller and the buyer with regard to sale and transfer of piece of property.

Forgery: forging signature or forcing someone to sign… non est factum.

The section is silent as to what happens when a fraudster sells fraudulent acquired property and his/her transferee is an innocent party who becomes registered.

## Void Instrument: Section 25.1

(1) “Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a **void instrument** does not acquire any estate or interest in the land on registration of the instrument.”

(2) Even though an instrument purporting to transfer a fee simple is void, a transferee who

1. Is named in the instrument
2. In good faith and for valuable consideration, purports to acquire the estate

Is deemed to have acquired that estate on registration of that instrument.

(3) Extends protection to fee simple holders of **registered instruments** that have been deemed void before the coming into force of the section.

**Only bona fide purchasers for value registered fee simple holders are protected, all other BFPV registered interests only have a rebuttable presumption of entitlement.(Credit Foncier, Gill v Bucholtz**).

**In the context of land titles, fraud/forgery committed in one of four ways:**

1. The seller fraudulently misrepresents the property in a way that is a material breach of contract. If the buyer/registered owner shows this she can show this the seller is compelled to repay the price and take back title;
2. The buyer fraudulently misrepresents facts that induce the seller to sell. Buyer then goes on title. The seller claims he has been fraudulently induced to enter the sale. Section 23.2.i. allows a court to restore registered title to the seller;
3. A third person (x) forges the registered owner’s signature (y) and secures registration as owner X. X sells and transfers to Z (who is bonda fide and for value buyer) using a transfer form that is not a forgery: X is the registered owner; Z takes transfer using a validly executed instrument. Section 20 governs: Y must look to the assurance fund.
4. A third person representing her/himself as the registered owner forges the owner’s signature on the transfer form and secures registered title for the buyer. The buyer/registered owner has secured registration under a void deed – section 25.1 governs.

**Gill v Bucholtz**

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| F | The property was owned by Mr. Gill. Someone coincidentally having the name of Ms. Gill transfers the property into her name, assisted by someone else. The estate in fee simple is then in Ms. Gill’s name. She got on title as a result of having a transfer form that said “To Ms. Gill, love Mr. Gill.” This was forged, and was therefore a void instrument. Under 21.2.3.i Mr. Gill would have been able to recover, but Mr. Gill doesn’t know what’s happening. Ms. Gill gets a $50 000 loan from a Mr. Bucholtz. After two or three other mortgages are put on the property, Mr. Gill figures out what’s happening. He goes back on title as he is entitled to do. |
| I | Does indefeasibility apply to Mr. B’s interest in land? It’s registered on the title. |
| A | The Act does not purport to validate every grant of interest carried out by a fraudster who is a registered owner, nor to protect every person relying bona fide on the register.  The mortgagees did not acquire an interest in the land because they were granted a charge by a person who had no interest to give.  Mortgages are always subject to a state of accounts – when you have a mortgage you’re using the land as security for a debt of the person who is on title. If Mr. Gill is on title, there is no debt. |
| R | **Charges are defeasible – nemo dat applies.** |
| C | Appeal allowed, mortgages to be cancelled as encumbrances on the plaintiff’s title. |

**First West Credit Union v Giesbrecht: Void vs. Voidable**

**Fraudulent misrepresentations might render the transfer voidable, but until it has been set aside, the transfer stands as valid. Evidence of fraud can rebut the presumption of validity.** The Court emphasized difference between fraud as forgery and other types of fraud that render a transaction voidable. You have to be previous registered owner to be “a person deprived of land” pursuant **Section 23(2)(i),** to claim that a transfer is void, or it has to be a forgery which makes it void *per se*. Other types of fraudulent actions, like misrepresentation make a transfer voidable, but not *void*, and so it stands in effect until it is made void.

## Notice of Unregistered Interests: Section 29

Section 20: there is no interest in land unless it is registered.

Anyone dealing with or taking from a registered owner a transfer of land or any lesser charge on the land is not affected by a notice (express, implied, or constructive) of an unregistered interest affecting the land or charge other than

* 1. Lease <3 years
  2. An interest, the registration of which is pending
  3. The title of a person against which the fee simple title is void under section 23(4)
* **McCaig**: the Courts are unwilling to let people use the LTA as an instrument of fraud and hide behind it to get rid of unregistered interests.
* **Greveling**: If an agent commits fraud on behalf of registered owner, then that fraud is attributed to the registered owner.
* **Hudson Bay Co, Re Saville Row**: Fraud requires direct proof and cannot be presumed
* **Hudson Bay**: if express notice occurs before purchase and sale agreement then the Court can deem it be fraudulent since it can be read as deliberately trying to bury the unregistered interest through registration
* **City Savings; McCaig**: There must be an element of dishonest conduct that goes beyond mere notice. Ie. in McCaig Jerome made a promise to honour the option; Jabin would have been safe even if he knew about the option after signing.

**Hudson’s Bay co. v Kearns and Rowling**

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| F | Kearns was a registered fee simple owner. She owed the Bay some money, so she agreed to secure her debt by mortgaging her home. She sent the Bay’s solicitor her certificate of title. The mortgage was not prepared for 15 months. In this time Kearns sold the property to Rowling. Rowling searched the title, found it clear. The transfer was registered at the LTO even though the duplicate title was not on file. |
| I | Can an equitable mortgage by deposit of title deeds acquire a better title than a purchaser for valuable consideration? |
| A | An intending purchaser who enters upon and proceeds with his purchase after *express notice* of an unregistered title or equity might be estopped from claiming the benefit of section 29.  A purchaser who is in good faith should not be deprived of the protection intended by section 29.  **Fraud must be proven by clear and indisputable evidence.** |
| C | Rowling is protected |

**Szabo v Janiel Enterprises** (Cited in Vancouver City Savings)

There must be something more than knowledge of an unregistered adverse interest. There needs to be some conduct that constitutes some form of dishonesty.

**Vancouver City Savings Credit Union v Serving for Success Consulting**

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| F | City Centre was the registered owner of a hotel in Victoria. The defendant leased the pub in the hotel under an unregistered lease for 5 years with an option to renew for an additional 5 years.  City Centre then took a mortgage from City Savings for 5.1 million. City Centre defaulted on their loans. They wanted the tenants removed.  The Respondents claimed the right to remain as tenants under their unregistered lease, arguing that the plaintiffs knew of the rentals, because they were adding revenue to the hotel. They argue that the plaintiff’s conduct in seeking vacant possession despite their knowledge of the tenancies amount to “fraud” under s. 29. |
| I | Can knowledge of a competing claim constitute equitable fraud? |
| A | The notice of an unregistered interest before closing bars the purchaser from protection of the Act.  Fraud cannot be resumed.  Decides that the reasoning in Szabo is correct in how it interprets Kearns – **before a finding of equitable fraud can be made there must be evidence of actual notice coupled with some act of dishonesty or deceit on the part of the person seeking the protection of s. 29.**  Fraud is a principle of common morality (Stiles v Tod Mountain Development)  **To prove equitable fraud:**   1. **Knowledge sufficient to cause a reasonable person to make inquiries; AND** 2. **Something more (deliberate dishonesty, ulterior motive) beyond the ordinary course of business dealings** |
| C | Judgement for the plaintiff. There is nothing to suggest that they acted in bad faith when they provided the mortgages. |

**Greveling v Greveling**

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| F | Mrs. Greveling was the registered fee simple holder. She made a transfer to her husband, Mr. Greveling, which was unregistered. She then sold the property to Blackburn, who secured registration. The lawyer who acted for Blackburn was also Mrs. Greveling’s lawyer. He knew of the transfer to Mr. Greveling. |
| I | Could Mrs. Greveling’s lawyer’s knowledge of her transfer to her husband be imputed to Mr. Blackburn? Is this fraud? |
| A | Roberts JA   * If the registered owner derives his title bona fide for value, his certificate protects him. He cannot be said to be a bona fide purchaser UNLESS his lawyer was concealing the knowledge of the transfer from him, or the lawyer did not think the transfer could be enforceable anyway. Title protected by s. 29 if he is bona fide.   O’Halloran JA   * Blackburn was fraudulent because his lawyer had actual knowledge of the fraud. “Notice to the solicitor is notice to the client.” |
| C | Court was split 2:1. Mr. Greveling found to have a valid claim against his wife, but not Mr. Blackburn. |
| R | **Knowledge of the agent is imputed to the principal, unless the principal is a victim of the fraud himself.**  A purchaser cannot use the Statute as an instrument of fraud. |

**McRae v McRae Estate**

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| F | Mr. Fraser owned 650 acres of land, divided into 3 lots. He dies and leaves the land to his wife, in trust, in effect for her life, and then to his three Children as remainder. Mrs. Fraser was then the registered owner, and it said “in trust” on the title. In 1949 she transferred the property to her son Farquhar. He was registered as the fee simple owner, without any notation. He died in 1989 and left the lots to his wife and siblings.  In 1990 the siblings found out about the terms of their father’s will and the possible significance of the 1949 transfer.  The trial judge ordered that the 1949 transfer be set aside and the land be vested in Mr. Fraser executors and disposed of according to law.  Wife appealed. Argued that he was a bona fide purchaser for value without actual notice of his mother’s breach of trust. |
| A | * An amendment to the Land Registry Act in 1913 made it mandatory for a notation of a trust to appear on the certificate of title. * Farquhar had notice under the LTA that there was a trust. His failure to carry the trust forward onto his title does not defeat the trust. |
| R | **A person is presumed to have full knowledge of everything registered in the title, including “in trust.”** |

## Registration: Charges

**1. Meaning of Registration**

**LTA s 197 – Registration of charges**

(1) must be entitled to register as owner of the charge

(2) Registrar may refuse to register charge if

a) Good, safeholding + marketable title has not been established or

b) Charge is not a registrable interest/estate

**LTA s 180 – Recognition of trust estates**

Requirements for registration

1. Trustee’s title may be registered but particulars of the trust must not be entered in the register
2. Registrar must include name and address of the personal representative, a reference by number to the trust instrument, and any other information they deem necessary.
3. Registrar must add endorsement containing ‘in trust’ in registering trustee’s interest
4. Trust instrument must be filed with the application for registration of title
5. If a trust is outside of BC or property in trust is outside of BC, then a copy of the trust instrument must be provided
6. A copy certified under (5) has the same effect as the original
7. **If a trust is registered that property cannot be disposed of or mortgaged or otherwise dealt with unless expressly authorized by law/instrument or by order from Supreme Court (does not apply to dealings done by the Trustee himself)**

**Dukart v Surrey (District)**

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| F | The land in question was developed for residential lots. The developer put a foreshore reserve (beach) into a trust, with a trust notation. It created a special type of easement. Surrey acquires the foreshore through tax possessions (trustee was not paying taxes), the certificate of title did not mention a trust. Surrey wanted to enhance the facilities by installing a toilet in front of Dukart’s house; Durkart sought an injunction. Surrey argued that the easement was not registered and therefore it is of no effect. |
| L | S. 276 LTA: when land is sold on a tax sale, title is purged of all charges, with the exception of any easement registered against the land. |
| I | Did Dukart’s easement survive the tax sale? |
| A | * Section 25(a) of the Municipal Land Act: interest and restrictive covenants – two kinds of registration. There is nothing in the municipal act that requires that it must be registered as a charge in the charge section of the indefeasible title. The word registration is not defined in the statute, so the court has a broad power to determine what constitutes registration. Things that are given in trust (equitable interests) are registerable under s.180.   **Depending on the legislation it is possible for certain things to be registered through a trust – look at the legislation closely.**  **If the registration has the words “in trust,” you need to look at the trust agreement.**   * Easement was validly created through the trust document. There was a trust notation. The provision for the registration of charges in no way precludes expressly or by implication the registration of a such a trust instrument which includes reference to a charge. Let’s not sterilize the definition of registration. |
| C | In favour of Plaintiff – easement is valid. |

**Section 26: Indefeasibility and Conclusiveness of Charges**

1. A registered owner of a charge is deemed to be entitled to the interest created by the instrument – there is a rebuttable presumption of entitlement to the interest
2. Registration of a charge does not constitute a determination by the registrar that the instrument creates an estate or interest in the land or that the charge is enforceable

**Charges are not indefeasible or conclusive.**

**Section 27: Notice Given of Registration by Charge**

Registration of a charge gives notice, from the date and time the application for the registration was received by the registrar, to every person dealing with the title to the land affected of

1. The estate or interest in respect of which the charge has been registered, and
2. The contents of the instrument creating the charge so far as it relates to that estate or interest, but not otherwise.

**Credit Foncier v Bennet**

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| F | Bennets have an estate in fee simple. Allen (officer of Todd Investment) forges a mortgage from Bennetts to Todd (registered). Allen sells mortgage to Stuart (who is innocent) for more money, who then assigns it to Credit Foncier. Allen makes a profit from this sale. Stuart also makes a profit. Credit Foncier demands payment of mortgage from the Bennetts. The Bennetts don’t do anything right away because they think it must be a mistake. The bank tries to foreclose. |
| I | Does Credit Foncier have a mortgage against Bennetts by virtue of the registration (section 20)?  Can the Bennett’s get their indefeasible title clear? |
| A | The mortgage is registered as a charge. The question then, is if the mortgage gets indefeasibility then the charge would be within the scope of s. 26 and they could seek recourse through the Assurance Fund.  The court says the mortgage cannot be successful because:   1. With a charge, there is a rebuttable presumption that you hold the interest because of the interpretation of the word “deemed.” The registered owner of a charge shall be “deemed” to be entitled unless proven otherwise. In this case the presumption is rebutted because Credit Foncier came to be registered because of a fraud. 2. Credit Foncier would not have succeeded even if the mortgage had been valid. A mortgage is only security for the amount actually owing. No loan had been made to the Bennetts, and therefore the mortgage secured nothing. The onus is on the assignee of a mortgage to check the amount actually owing. **You only owe what the state of accounts is on the charged mortgage.** At common law, the Bennetts owe Credit Foncier nothing because it was a mortgage without any debt. |
| R | **The registration of a charge creates a rebuttable presumption of entitlement, taken to be until it is disproved.**  A mortgage is only security for the amount actually owing. |

**Canadian Commercial Bank v Island Realty**

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| F | C was the director of Park Meadow, also a solicitor. There were two mortgages on title to Park Meadow: 1st to Imperial, 2nd to Island Realty. C wanted a third mortgage for himself so he went to Almont. Almont agreed to give money to C only if the second mortgage to Island Realty was discharged. Because it is a third mortgage, it has third priority – therefore, the equity would not be very strong. C fraudulently causes registration of a false discharge of Island’s mortgage – he forges it. Almont checks the charge and sees that the charge is discharged. They give C the money for the mortgage and C disappears. Park Meadow goes bankrupt. The trial judge decided that Island Realty should get priority over Almont. |
| I | The question is over who gets the money from the sale of the land. |
| A | * Does not agree with the trial judge – the consequence of such a conclusion would be to remove the protection provided by the Act for mortgagees who acquired their interest bona fide and for value, a result which runs counter to the purpose of the LTA. * Principle in **Credit Foncier** is not applicable because unlike the void mortgage in that case, the mortgage to Almont was valid. This case says that Credit Foncier is restricted to its exact facts. * Almont has priority and gets paid out. Almont did not register their charge through fraud, and so gets protection. Island Realty gets screwed because although they were fraudulently discharged, Almont did not take their position through fraud. |
| C | Appeal allowed. Almont’s mortgage declared valid and to have preference and priority to the interests of Island Realty. |
| R | **Bona Fide purchasers for value of charges are presumed to be entitled to their interest.** |

Aside:

What about leases? What if the forgery is for a long lease? The forger puts themselves on title as the holder of the long lease and then sub-lets or assigns the full lease to someone else. Here you still have to do the full investigation if you are following Credit Foncier: you would have to contact the holder in fee simple. This often happens when a forger is the family member of the fee simple holder and is taking advantage of that fee simple holder’s absence.

**Priorities in Judgements: Section 28**

Judgements against the registered owner jump ahead in priority to previous judgements against that owner (chapter 5).

“Quit prior est tempore potior est jure.” = he who is first in time is first in law

Other charges are governed by **first in time, first in right regarding date of application to register.**

“If 2 or more charges appear entered on the register affecting the same land… the charges have priority **according to the date and time the respective applications for registration of the charges were received** by the registrar, and not according to the respective dates of execution of their instruments.”

# Chapter Seven: Failure to Register

## The General Principle – Unregistered Instrument

**Section 20(1):** Except as against the person making it, an instrument purporting to transfer, charge, or affect land or an interest in land **does not operate to pass an interest**, either at law or in equity, in the land **unless the land is registered in compliance with this Act.**

* Rights in personam are enforceable despite lack of registration. Can indirectly create equitable interests in the property.
* Rights in rem are only enforceable against third persons, when registered

Despite the explicit wording of section 20(1), courts can give limited effect to an unregistered interest in equity to prevent fraud, for example. A legal estate would only take effect on registration.

### “Except As Against the Person Making It”

In personam obligations are not enforceable against third parties. **It means that personal obligations, which are sometimes called personal equities, can be enforceable even if they are contained in an unregistered instrument, but only against the registered owner who made the instrument.** By making the instrument, the person was bound to perform the obligation in it, regardless of its lack of registered status, according to 20(1). However, the person making the instrument could expressly require registration of the instrument as a condition precedent to enforceability of the obligation, to avoid 20(1).

An obligation in an unregistered instrument is not enforceable against an innocent purchaser of the land who bought without notice from the registered owner who had previously made the unregistered instrument. In equity, **the bona fide purchaser for value without notice takes free of prior equitable interests.** Registration is critical because priorities of interests in land are determined by the chronological order of registration of instruments rather than their creation.

**Right to Apply for Registration: Section 20(2)**

Everyone benefited by an unregistered instrument has a right to apply for registration.

### Exception: Short Term Leases

* Do not have to be in writing
* Do not require registration and cannot be registered
* Section 20(3) gives the tenant in actual occupation under an unregistered short-term lease both in personam and in rem rights
* A tenant in actual occupation under a lease of three years’ duration or less including options for renewal can enforce the lease against the landlord or against an innocent purchaser from the landlord, even after the purchaser becomes registered as the fee simple holder

**Section 180**

Land Title office staff note an application to register on the register, and the note serves as notice to the world of the application. If the application is successful, upon completion of registration, it is backdated to the application. If the staff rejects the application, the notation would be removed from the register.

**Sorenson v Young**

*Illustration of Section 20*

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| F | Sorenson owns a piece of property and decides he wants to subdivide. He goes through the formalities and gets it subdivided into two. One parcel he lives on, one parcel he sells to someone named Roche. Contained within the deed that passed to Roche was a reservation of a right of way. The easement was not registered on title. Roche then sells the lot to Young, who puts up a fence that prevents Sorenson from using the right of way. |
| I | Is the easement that was in the original conveyance form effective even though it was not registered? (Can Sorenson use s. 20 or 29 of the LTA?) |
| A | * The conveyance mentions that there is meant to be a right of way for the Plaintiff. However, that easement actually needs to be registered independently. Relief is barred by section 20. * Sorenson says to look to the deed – but the Court says it doesn’t matter if it’s not on the deed |
| R | Paradigmatic example of the importance of section 20 – if you don’t comply with the section, you’re in trouble  **Bona fide purchasers for value are protected upon registration from being subject to unregistered interests.**  Nowadays, approval of a subdivision requires sufficient highway to provide necessary and reasonable access to all lots, which should prevent a recurrence of this problem. |
| C | The unregistered interest was extinguished. |

**Section 181: Interest or Right Reserved to Transferor**

**A response to the Sorenson decision**

1. On an application to register a person as owner in fee simple of land under an instrument by which a registerable **interest is reserved** (easement, restrictive covenant, other condition) by the original transferor, **must be registered** as a charge against the new indefeasible title.

This means that if you want to have a charge listed on the indefeasible title, you have to register it as a charge. If proper procedure is not followed, **the burden of the risk of loss is on the transferor.**

### Judgements and Prior Unregistered Interests in Land

Under general land registration principles, it would seem that the judgement would take priority over the unregistered interests. However, the courts would apply the common-law principle that a judgement creditor could not take any greater interest than the judgment debtor actually had – nemo dat. Therefore, they rank after prior unregistered interest in the same land. Can only seize and sell what the person actually has – subject to the state of accounts. Subsequently created or registered interests rank after the registered judgement. **See Yeulet.**

**Yeulet v Matthews**

*Registered judgements competing with prior unregistered interests in land*

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| F | The defendant loaned money to her son and held as security for the loan an equitable mortgage by deposit of duplicate certificate of indefeasible title from her son. His land was security for the loan. Subsequent to the equitable mortgage the plaintiff registered a judgement against the son because he wasn’t paying his mortgage. The defendant’s interest (ie. equitable mortgage) is not registrable (see Ch. 5). Mom says that she has a prior interest in land, but plaintiff says that doesn’t matter because he is the one with something registered on title. |
| I | Should the registered judgement be given preference over an unregistered interest in land?  Which interest takes priority: an unregistered equitable mortgage (interest in land) that came first or a registered judgement (not an interest in land) that came later? |
| A | * The argument of the judgement creditor was that the precedent cases deal with litigation between judgement creditors and holders of charges or transferred which, though registered, were registrable. Here, the equitable mortgage is not registrable. * Judge: the holder of an equitable mortgage would be able to register upon successful enforcement of the charge by foreclosure anyway. The Courts are not trying to draw a distinction between registrable/non-registrable. * **Registered judgements do not gain a superiority over an unregistered interest in land.** * This looks inconsistent with s. 20: when you get a judgement, you’re registering it against the actual interest that the registered holder has. You can’t get more than that – you can only get the economic interest of the judgement debtor. The judgement is not related to an interest in land, it’s just a statutory right. This is not enough. **Interest in land trumps judgement.** |
| C | The equitable mortgage and charge of Mrs. Matthews has priority over the judgement. |
| R | Judgement creditors are “subject to the equities,” **because of nemo dat they can only collect after all prior unregistered and registered interests have been satisfied**. The relevant date for prior interest is the date of execution. |

**Court Order Enforcement Act – codification of Yeulet**

Section 86(3)

From the time of its registration the judgement forms a lien and charge on the land of the judgement debtor specified in the application referred to in Section 88 in the same manner as if charged in writing by the judgement debtor under his or her signature and seal,

* 1. To the extent of his or her beneficial interest in the land [nemo date]
  2. If an owner is registered as a personal representative or trustee, to the extent of the interest of a beneficiary who is a judgement debtor, and
  3. Subject to the rights of a purchaser who, before the registration of the judgement, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgement.

**Martin Commercial Fueling v Virtanen**

The court found that a transfer took priority over a registered judgement even though the transfer’s closing and its registration were subsequent to the registration of the judgement. The relevant time is the agreement of purchase and sale.

## Unregistered interest in land – an exception within s. 20

**L&C Lumber Co v Lungdren**

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| F | The appellant owned a parcel of land with a forest on it. She transferred a profit-a-prendre (right of taking identified natural products from the land) to MacDonald, giving him an in rem right to go onto the land and take number. MacDonald does not register the interest. However, MacDonald assigned his rights to the respondent company who gave notice to the appellant. An assignment is written. Neither the profit nor the assignment was registered. The appellant refused to allow assignee access to the property pursuant to rights under the profit asserting it was an unregistered interest in land. |
| I | Can the assignee (L&C Lumber) of an interest in land use the “except as against the person making it” exception against the grantor Mrs. Lungdren? |
| L | S. 20: you can’t sue for an interest in land unless it’s registered; except where you have given the interest at common law you have to facilitate the transfer. |
| A | * **For an assignment to be effective, you have to tell the debtor that the transfer has taken place** (section 36). * The exception in s. 20 applies to assignees in circumstances where the debtor has been advised. The reason: because it an assignment the assignee steps into the shoes of the assignor. They become the same identity of the assignor for the purposes of this section. Therefore, this cloak protects the assignee just as much as the assignor. |
| R | **Unregistered interests are transferable to third parties to original agreement**. Section 20 should not be read literally to exclude third-parties to contracts which buy a party’s rights.  Section 20(1) does not invalidate for all purposes all rights contained in an unregistered instrument purporting to create or transfer an interest in land. |

**Carlson v Duncan**

*Not in lecture, kinda confusing, probably don’t worry about it.*

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| F | Herrling granted all the timber, standing or fallen, on his land to Kelliher and his heirs, with a right to enter on the lands and cut and take away timber at any time. This grant was registered. Herrling then sold the fee simple to Agassiz, who transferred it to the appellant. Kelliher died intestate and his heirs quit-claimed their interest to the respondent. The quitclaim was not registered. The respondent entered on the land and commenced cutting timber. The appellant sued, seeking an injunction, damages for trespass and an accounting. Failed at trial. |
| I | What is the nature of the interest transferred by the Kelliher agreement? Chattels or interest in land? |
| A | There was no intention to treat the timber as chattel. The trees were not fallen, they were free standing. There is an authority for saying that where the parties agree that the things are meant to be immediately withdrawn, the property becomes a mere warehouse and the contract a sale of goods – that is not so in this case, an indefinite amount of time was given. |
| C | They unregistered transfer from the heirs of Kelliher to respondents conveyed no interest in land by reason of s.20 and therefore they unlawfully entered upon it and cut timber. |
| R | Whether a contract relating to timber constitutes a sale of chattels or relates to an interest in land depends upon the terms of the contract (see above). |

## Enforcement of Non-Compliant Leases

**International Paper Industries v Top Line Industries**

*Consequence of failure to register prohibited transactions*

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| F | The tenant company owned a building on land that it leased from the landlord. They agreed that the landlord would purchase the building and move it to another property, where the tenant would lease a portion of that property including the building. The parties drew up a 4 year lease that was unregistered/unregistrable because they attached an illegal subdivision to it.  Things go bad. At the end of the 4 year lease the tenant tried to exercise their option to renew. The Landlord said that the lease was unenforceable because it violated s. 73 of the LTA which said that a person can’t subdivide land for the purpose of leasing it and that no instrument that contravenes the section could be registered. **Essentially, the landlord wanted to get out of the lease by pointing out that the lease was never registered.** The tenant stopped paying rent. He put aside the rent instead of paying it. |
| I | Does a lease, which is in contravention of s. 73 and therefore unregistrable, still create in personam rights and obligations between a landlord and tenant? |
| A | * This is an unenforceable agreement because **s. 73 requires subdivision to be formal**, and the need to register can only happen in respect of a formal subdivision. * **S. 73 says that an instrument made by a person in contravention of the section is not registrable** * An important purpose of s. 73 is to ensure that municipal authorities retain control over subdivision as a means of regulating land development according to public interest. * Another objective is to ensure the operation of the Torrens system in BC. If it were possible for land owners to subdivide at will, the system that relies on the register would break down. * The legislators did not specify that an agreement entered into in contravention of the act is void. * Because the subdivision didn’t technically occur, they couldn’t have registered the lease without the subdivision occurring first * The illegality of the subdivision here is serious. The failure to comply with registration flowed from the fact that there was a failure to legally subdivide. * The contract is therefore unenforceable and invalid. Therefore, the tenant doesn’t pay rent either. |
| C | S. 73 precludes the Tenant from relying on the lease or enforcing personal or proprietary rights. Tenant may be able to sue under other branches of law. |

**Legislative Response to Top Line: Section 73.1**

**It reversed the decision of TopLine** by restoring the possibility of in personam enforcement of leases of portions of raw land, despite lack of subdivision, saying that there needs to be actual mischief before you can say a contract is unenforceable.

“A lease or an agreement for a lease of a part of a parcel of land **is not unenforceable between the parties** to the lease or agreement for lease by reason only that (a) the lease or agreement for lease does not comply with this Part, or (b) an application for the registration of the lease or agreement for lease may be refused or rejected.”

# Chapter Eight: Application to Register

Context:

* Application to register and actual registration are distinguishable
* Actual registration happens after the documents have been reviewed and the registration has been approved.

## Priority of Caveat or Certificate of Pending Litigation: Section 31

If a caveat has been lodged or a certificate of pending litigation has been registered against the title to land,

* The caveator or plaintiff, if that person’s claim is subsequently established by a judgment or order or admitted by an instrument duly executed and produced, is entitle to **claim priority for that person’s registration of title or charge so claimed over a title, charge or claim, which was applied to be registerd after the date of lodging of caveat or registration of the CPL.**
* The date of application of caveat is filed in the Registrar and used as the effective date of registration if the caveat/lis pendens yields an interest or judgement in the property.

**Section 288: Effect of Caveat**

As long as a caveat lodged with the registrar remains in force, the registrar must not

1. Register another instrument affecting the land described in the caveat, unless the instrument is expressed to be **subject to the claim of the caveator**, or
2. Deposit a plan of subdivision or otherwise allow any change in the boundaries affecting the land described in the caveat, unless consented to by the caveator

An instrument expressed to be subject to the claim of the caveator may be registered or deposted, unless the claim of the caveator**, if successful**, would, in the opinion of the registrar**, destroy the root of title of the person against whose title the caveat has been lodged.**

## Rules Regarding Certificate of Pending Litigation: Section 215

A person who has commenced or is a party to a proceeding may register a certificate of pending litigation against the land in the same manner as a charge is registered.

* A copy of the pleading or petition must be attached.
* On registration of a CPL the registrar must mail a copy to the owner
* The land affected must be described satisfactory to the registrar

**Section 216: Effect of Registered Certificate of Pending Litigation**

After registration of a CPL the registrar must not make any entry in the register that has the effect of dealing with the land described in the CPL until registration of the CPL is cancelled in accordance with this act.

Exceptions:

* An indefeasible title or a charge if the instrument supporting the application **is expressed to be subject to the final outcome of the proceeding**
* Priority or postponement agreement
* An assignment of a charge registered before the CPL was registered
* A builders lien or any other involuntary charge

**Effect of CPL if prior application is pending: Section 217**

Despite section 216, the registrar may make an entry in the register to complete the registration of an indefeasible title or charge that was applied for before an application to register a CPL was received.

Conditions:

* If applicant is a party to the proceeding – subject to its outcome
* If not a party, then the CPL must be cancelled and the CPL applicant must be notified
* If the CPL relates to the following proceedings then prior applications are subject to its outcome regardless of the party’s involvement:
  + A charge, to enforce, foreclose or cancel a registered charge
  + A Family Law Act proceeding respecting the division of property
  + A Wills Variation Act proceeding

**Rudland v Romilly**

*Choosing between competing equities in Torrens*

|  |  |
| --- | --- |
| F | The defendant transferred interest to Lindsay which the defendant alleges was fraudulently induced. At the time of the allegation Lindsay was already the registered owner. Lindsay sold and transferred the property to Rudland who is in good faith and gave value. The plaintiff applied to register her interest. After Rudland’s application to register, but before registration is effective, the defendant files a lis pendens saying that the transfer to Lindsay was fraudulently induced. The plaintiff sued to have the lis pendens removed in order for her application to proceed to registration – forthwith and before adjudication on the action between Lindsay and Romilly. The plaintiff’s title under the transfer form had not been registered when the lis pendens was placed as a charge on the certificate of indefeasible title. |
| I | Is Rudland’s in rem right subject to the outcome of the lis pendens? |
| A | Page 12: conditions of the circumstances where an application will take priority   * A certificate of lis pendens is only a form of notice, and a notice which is only given after the whole transaction of purchase has been completed cannot affect the title of an honest buyer. * The plaintiff dealt with the registered owner of the property in good faith and without notice of the unregistered interest which the defendant claims in the property. She also provided good consideration. * She is a bona fide purchaser for value. * The plaintiff acquired here interest in land prior to the commencement of litigation, and also applied to register that interest when she had a right to. Such a right cannot be defeated after her rights were acquired and sought to be registered. |
| C | It is reasonable to relate an application to register with an actual registration |
| R | In the absence of fraud a clear right to registration is the same as registration where (4 conditions below) |

**4 Relevant Conditions (Re Savaille-Row)**

1. The person claiming such a right is a bona fide purchaser for valuable consideration
2. The right has been acquired and the registration of that interest was applied for prior to the filing of the certificate of lis pendens, and
3. Such a purchaser is not made a party to the Lis, if he were the matter would then be “Before the court”
4. In the case of an agreement for sale or mortgage the plaintiff has failed to give the purchaser or mortgagor notice and taken the proper proceedings by way of equitable execution or otherwise.

## Application for Registration of Charge: Section 155:

1. If registration of the fee simple has been applied for by an application that is pending, the application for registration of a charge must await the result of the application for registration of the fee simple.
2. If the Charge rights date to Crown grant before June 1, 29121, then subsequent persons claiming under that right can just register
3. You can apply for a charge but it has to be approved by the director and “suited to the circumstances”

**Section 198: Registration of person creating charge**

An instrument purporting to create a charge executed by a person who is entitled to be the registered fee simple holder must not be registered unless the person has first been registered as the owner of the fee simple.

**Breskvar v Wall**

|  |  |
| --- | --- |
| **F** | Breskvar has EIFS and borrows money from Petrie in exchange for a signed transfer form as a security for the loan – with no transferee named in the transfer form (ie. “in blank”). Petrie fraudulently inserted the name of his Grandson Wall on that transfer form, and Wall secures registration as the registered owner in fee simple though this transfer form was voidable. This transfer form wasn’t a forgery – Breskvar voluntarily signed the form. It was a fraud as Petrie was not authorized by Breskvar to insert a name. Wall sells the interest to Alban.  Things that happened after in order:   1. Transfer form executed from Wall to Alban (Nov 1968) 2. Breskvars apply for a caveat (Dec 68) 3. Alban applies for registration of title Jan 69 4. B’s caveat is registered March 69 5. Wall is registered on title |
| **I** | Whose registration should be preferred?  Given that Breskvar has been negligent, and Alban (who is the bona fide purchaser for value) has not secured registration, who is entitled to registration of the estate in fee simple to the land? Alban or the Breskvar’s? |
| A | * The application should be what counts OR equity should be what counts * If it’s the application, then the Breskvar’s should be able to go to the assurance fund.   BUT THEYRE NOT because if you are negligent or you do something wrongfully, you have removed yourself from eligibility from relying on the assurance fund |
| R | Where the equities are equal, first in time prevails (here equities are not equal).  **A caveat only grants a caveator an equitable interest in property (in personam against party involved in dispute).**  You are not eligible to rely on the assurance fund if you are negligent. |

# CHAPTER 9: THE FEE SIMPLE

**Words of Purchase:** the entity(ies) that you are giving the interest to

**Words of Limitation:** the interest that you are giving or receiving

**Property Law Act Section 19: Words of Transfer**

1. In the transfer of estate in fee simple, it is sufficient to use the words “in fee simple” without the words “and his heirs”
2. **A transfer of land to a person without words limiting the interest transferred passes the fee simple or the greatest estate that the transferor has the power to transfer**, unless the transfer expressly provides that a lesser estate or a particular interest is being transferred.

**Land Title Act: Section 186**

(4) A transfer of freehold estate for valuable consideration and in the approved form [form A] operates to transfer the freehold estate of the transferor to the transferee **whether or not it contains express words of transfer**.

(5) If no express words of limitation, then fee simple

(6) if express words of limitation then transfer of freehold estate in accordance with limitation

(7) if express reservations or conditions then transfer of freehold estate subject to the reservation or condition

(8) Transferor cannot pass an estate greater than that which the transferor is the registered owner of

**Tottrup v Ottewell Estate**

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| --- | --- |
| F | Fred and Frank are twins who made wills that leave everything to one another. Fred dies, and the property goes to Frank. Frank dies, and the property is left to Fred. However, Fred is dead. Frank’s sisters, brothers, and niece are still alive. Fred’s daughter (the niece) says that because of the legislative changes that say that you don’t have to use the words “and his heirs,” the fact that they are used here in his will means that these are words of purchase, not of limitation. Thus, the property should be left to Fred’s heirs, ie. his daughter/Frank’s niece as sole heir. |
| I | In the phrase “his heirs, executors and administrators absolutely and forever” indicating by description who is the beneficiary of Frank’s estate or is the phrase indicative of the interest in land (and personalty) ie. an estate in fee simple? Are they words of purchase or words of limitation? |
| A | * These precedents have a long shelf-life, and they continue even though the statute has been amended. People keep using “and his heirs” because they’re afraid to say “in fee simple” because for 1000 years saying that would give the person a life estate * If Fred wanted to leave to his daughter he could have done so * Fred is the word of purchase, “heirs” are the word of limitation * Fred isn’t alive, so the rules of intestacy are followed and Frank’s heirs inherit |
| C | Frank’s heirs inherit based on the rules of intestacy. Had Fred said “to Fred *or* his heirs” the estate would have passed to Fred’s daughter. **A will is an ambulatory document, it has not effect, traction, and attaches to nothing until the testator dies.** |

## Wills, Estates, and Succession Act

**Meaning of particular words in a will – “heir” and “next of kin” determined by rules of intestacy – WSA 41.1/2**

1. This section is subject to a contrary intention appearing in a will
2. A gift of property in a will to persons described as “heir” or “next of kin” of the will-maker or of another person takes effect as if it had been made to the person among whom and in the share in which the estate of the will-maker or other person would have been divisible if the will-maker or other person had died without a will [heir determined by rules of intestacy.]

*It is probably the law in Canada now that a court is entitled to look at surrounding circumstances in constructing a will (p. 9-9).*

## Words of Repugnancy

Repugnancy occurs, often, when the words in a will create an impossibility in law. Usually this happens when a person uses words that leave a fee simple to a beneficiary, but also impose conditions on it. Fee simples are unconditional freeholds, conditions therefore are repugnant to the idea of a fee simple.

**Courts have typically used two approaches of construction:**

1. The gift to the beneficiary prevails (gift of fee simple) and the gift over fails as repugnant
2. The first named takes life-estate only, so the gift over prevails
3. Sometimes, all that is given to a first taker is a life-estate, but the life-tenant is given a power of sale, which may be exercised at any time during the currency of his estate [not really repugnancy as there is no conflict].

Interprets the effect of the words “undisposed of” in a will

* it purports to give an estate in fee simple to the deceased’s widow, but it is not given that clearly.

**Re Walker**

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| F | John Walker left his wife “all my real and personal property” with exceptions of his watch and jewellery.  His will included a clause that said “should any portion of my estate still remain in the hands of my said wife at the time of her decease undisposed of by her such remainder shall be divided as follows…”  When the widow died her estate was valued at $38 000.  John’s heirs are suing his widow’s heirs. |
| A | Principle: if you give an estate in fee simple, you cannot qualify it because that flies in the face of the nature of fee simple.  Words of purchase: wife. Limitation: estate in fee simple. Further directions are repugnant.  Would be okay if the word of purchase was “wife” and limitation was “for life.” **A life estate is really what he was trying to go for**, but he gives the land to her absolutely in the will. The words of limitation for a life estate are missing – “for life.”  Court is looking at the words of limitation.  Page 11 – not enough to make a construction. |
| C | Her gift must prevail and the attempted gift over must be repugnant and void. |
| R | **Each will should be constructed on its own terms.**  If the language of the will conflicts, then the will must be constructed by the court. |

**Re Shamas**

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| --- | --- |
| F | Self-made will. Will says: all will belong to my wife until the youngest is age 21. If she marries again, she will have her share. If not, she will have the whole thing and will pass the rest on to her children when she dies. |
| I | What are the words of purchase and what are the words of limitation? |
| A | This was a life estate to the widow with the remainder passing to her kids in equal shares, subject to remarriage in which case she will take equal shares with her kids and the right to encroach upon the capital of the estate until the youngest child turns 21.  The court looked at what the guy was trying to do. The court constructs the will according to the circumstances.  **The words can be construed to say that she can encroach on capital, but not that that can be limited.** |
| R | Case stands for the idea that rules of construction should give way to an attempt to construe each will according to the circumstances of that particular will.  The will should be looked at as a whole, each provision must be read in light of every other provision taken in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that constructed intention.  **Go to the testator’s armchair. Don’t use the rules of construction to defeat the testator’s intention.** |

**Cielein v Tressider**

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| --- | --- |
| F | Mr. Van Essen and Mrs. Rich lived together for over 10 years. The appellant, Mr. Rich’s son lived with them. Van Essen had 5 children from a former marriage. He left a will that Mrs. Rich was to have the realty and all other assets; but, upon the sale or disposal of the real estate the proceeds shall be divided equally between her son and his children. The lower court judge decided that Mrs. Rich got a life estate and on her death the property was to be sold and the proceeds divided. Mrs. Rich appealed. |
| I | Is this a repugnancy? |
| A | The handwritten clause is a repugnancy because it flies in the face of what is an estate in fee simple.  The clause drawn by the testator in which the children are mentioned constitutes a restraining on the otherwise absolute gift of the property to Mrs. Rich which is a repugnancy that cannot be supported by law. |
| C | There are no words of limitation that could construct a life-estate. **The fall back is an estate in fee simple, which he gave to her completely** |

**Fee Tails**

Fee tails were converted into fee simples (or greatest interest held by grantor/testator) by statute after they were abolished. (PLA Section 10).

# CHAPTER 10 - LIFE ESTATES

Classic words of purchase and limitation are:

* + “to A for life”
  + to A for life of B”
* Still relevant: some people want their spouses to be taken care of after death, so they provide a life estate in their will. Spouse still gets to enjoy the property during their lives, then afterwards the children get to split up the property.

## How to Create a Life Estate

1. By the act of the parties [requires express words]

* A life estate may last for the life of the holder of the estate, or it might last for the life of some other person (pur autre vie).
* If a life estate is to be created, it should be done expressly (ie. “To A for Life, “ “to A for the life of B”)
* If not expressly stated, then s. 19(2) of the PLA assumes greatest estate possible is passed in inter vivos transfer, and WESA s. 41(3)(b) assumes the same for wills.

1. By Statute (WESA, Family Law Act, Land (Spouse) Protection Act)

* Wills, Estates, and Succession Act: provides an option whereby the surviving spouse may opt to purchase the spousal home from the deceased’s estate, with relieving provisions to assist the surviving spouse in financing the purchase. Spouse retains the chattels in the house.
* Family Law Act: upon the breakdown of a relationship, **a spouse may apply to the Supreme Court of BC to obtain an order for the other spouse to move out of the home that was previously shared**. This does not create any interest in the home in favour of the applicant and is merely a temporary measure pending the division of the family assets.
* Land (Spouse Protection) Act: pertains to a situation where one spouse owns the property but the two spouses live in it together; non-owning spouse can make a filing on the title (called a Homestead), so that the property cannot be sold by the owning spouse without the written consent of the non-owning spouse. On the death of the owning spouse, there is a life estate in favour of the surviving spouse. **Supersedes any testamentary intention, the homestead takes precedence over the will and can’t be touched until the life tenant dies.** Subject to to liability of the land for foreclosure or the payments of debts.

## Rights of a Life Tenant

1. Occupation, use, and profits

The holder of a legal life estate is entitled to occupy and use the property and to retain any profits from its exploitation. A life tenant must pay the applicable taxes on the property, mortgage interest payments, minor upkeep and repairs, but might not be responsible for insurance premiums.

Remainderman is responsible for “capital outlays”: major repairs.

1. Transfer Inter Vivos

(Gives life estate pur autre vie)

1. Devolution on Death

The ordinary life tenancy ends with the death of the life tenant. Same with estate pur autre vie. If A predeceases the autre vie then his interest devolves on death just like any other real property.

A may dispose of the estate for the life of B by will to a beneficiary, who will hold the life estate until B dies.

Obligations of a Life Tenant (to those entitled in reversion or remainder)

Whenever there is a life estate, there is a remainder (the person to whom the property reverts upon the death of the person for whose life the life estate is made).

The remainder is entitled to have the land pass into their possession, on the termination of the life estate, in substantially the same form as it was when it was received by the life tenant.

## Obligation #1: Waste

* 1. **Permissive Waste:** “fair wear and tear.” Tenant is not responsible for this waste unless expressly provided for in the instrument creating the interest.
  2. **Voluntary Waste:** A life tenant is liable for voluntary waste, which is waste that results from their activities. They may be required to pay damages to the remainderman, and could be restrained by an injunction.
     1. **Ameliorating waste:** even though a change for the better is technically waste, if it improves the land it will not render the tenant liable in damages.
     2. **Burn –** Four Categories of Waste
        1. Timber – no cutting
        2. Mines and Minerals – no mining
        3. Demolishing or altering buildings
        4. Changing the use to which the land is put
  3. **Equitable Waste:** the creator of a life estate may expressly permit the tenant to commit voluntary waste. The life tenant is then said to be “unimpeachable for waste.” However, a Court in equity might still restrain the tenant from making an unconscionable use of the legal right.

**Vane v Lord Barnard (1716)**

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| --- | --- |
| F | Defendant created a life estate in Rudy Caste for himself with the remainder passing to his eldest son. After taking some displeasure in his son he got two hundred workers together and stripped the castle of all the lead, iron, glass doors and boards completely wrecking the place. |
| C | Court ordered an injunction to stop the waste, and also an injunction to repair the castle. |
| R | While the tenant was unimpeachable, he committed unconscionable waste and was therefore liable to repair the building. |

**Section 11 – Law and Equity Act**

An estate for life without impeachment is presumed not to have conferred on the life tenant permission to commit equitable waste, unless an intention to confer that right expressly appears in the instrument.

## Obligation #2: Liability for Taxes, Insurance, etc.

**Mayo v Leitovski**

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| --- | --- |
| F | Leitovski left a life estate to his parents. They all lived on a farm together. His dad died, his mom inherited the life estate. Then, he left the farm and transferred his fee simple title, subject to his parent’s life estate, to Mayo.  His mom could not pay taxes, so the house was foreclosed and put up in a tax sale. The widow’s daughter bought the house from the tax sale. She subsequently transferred the title to her mom and her mom applied to have it registered as a fee simple, thereby extinguishing the remainderman’s interest. |
| R | **A life tenant is obliged to pay taxes on the property, and has a fiduciary duty to the remainderman to preserve the property as is.**  A life tenant cannot screw the remainderman out of their interest by defaulting on the taxes and then subsequently purchasing the property in a tax-sale. |
| C | The reaminderman’s future interest is restored, and the title will pass to him upon the defendant’s death. |

# CHAPTER 12: FUTURE INTERESTS

Major policy foci in property law:

1. A property owner’s freedom to decide what to do with his/her interests in property balanced by
2. The state’s right (representing the interests of the general community) to control that freedom by disqualifying dispositions that create
   1. Undue restraints on the alienation of that interest (re Walker): inconsistent with the concept of the interest
   2. Interests that are uncertain in meaning
   3. Interests that are against public policy: can be a vehicle for a constraint on proprietary freedom
   4. Interests that are unlawful “perpetuities” ie. vest “too far” into the future: the law wants the vesting of an interest to take place within a recognized period of time.
   5. Positive covenants intended to “run with the land (ie. are imblued with property rights binding on successors in title). Restrictive covenants are able to “run with the land” if they fulfil the legal requirements for their creation (centrally, not to impose active performances on the owner of the servient tenemaent).

Remainders and Reversions – the interest is vested in the present, but the possession is vested in the future. That is why this is a future interest.

**Nature of Future Interests**

When the title to an interest in land is divided into smaller interests, invariably one or more persons have the immediate right to possession of land, while others only have a future right to possession.

A future interest is one by which possession will or may be obtained at a future time.

## Vested Interests

- You may have a vested interest without having possession

- Refers to the fact that a person is fully and absolutely established as the holder of a right, benefit, or privilege in an identified thing or property – there is no precondition on A taking the estate or interest, other than the termination of the preceding estate.

- A person who is expecting to become vested will likely have to fulfil or satisfy a precondition before she is actually vested; eg. “To A in fee simple if she turns 21 years of age” or “To X for life remainder to A if he turns 21 years.”

* **Vested in interest**: incorporeal, owner holds the right to future use of land, they do not have control of the land at that time
* **Vested in possession**: corporeal, holder has an immediate corporeal possession to the property

**Contingent Interests**

* An interest is said to be contingent ie. non-vested in interest, when it is **dependent on the occurrence of some event** (ie. a contingency) which may or may not occur. It is subject to a condition precedent which must be satisfied before it can become a vested interest.
* An interest is contingent and non-vested until

1. The property is identified
2. The identity of the grantee or devisee is established (so **gifts to unborn children and descendants are contingent**)
3. The right to the interest (as distinct from the right to possession) does not depend on the occurrence of some event; and
4. In the case of a class gift (ie. “to my children”), the exact share of each member of the class is ascertained

* Suspensive Interests: contingent, subject to vesting once a pre-condition is met (fee simple conditional)
* Resolutive interests: vested, subject to divestment (fee simple defeasible upon condition subsequent)

## Early Vesting

Whether an interest is vested or contingent will depend primarily on the wording of the document. In many cases it will require construction by the courts. **In the case of ambiguity**, the courts prefer early vesting where the construction leads to the conclusion that an interest is vested.

**Browne v Moody**

*Presumption of Early Vesting*

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| --- | --- |
| F | A fund was created by the testatrix before her death. In her will, she tells the trustee to take the fund containing $100 000 and pay the income from that fund to her son George. When her son dies, divide the $100 000 between George’s daughter and her three daughters.  She says that if any one of the beneficiaries (other than George) dies before George, and they have children of their own, then that share is to go to that child.  It seems that Browne wanted to protect George – the women have to wait for George to die. |
| I | Do the daughters and granddaughter take a vested interest as soon as Browne dies, or do they have to wait until George dies. |
| A | * While there is a postponement of the distribution, that doesn’t mean that there is a contingency – it is the same as saying “to George for life, remainder to the 4 women” * If one of the daughters dies leaving issue before George dies, then their interest is divested – so it must be vested to begin with * A gift over implies early vesting |
| R | **Court creates a presumption of early vesting of a remainder interest after a life estate;** the existing of the prior estate (eg. Life estate) does not prevent the vesting of the remainder interest. Future interest is vested at death of testatrix.  Start off by construing the document, favouring early vesting. If there is something that compels otherwise – that is relevant. |
| C | The interest is vested. |

**Phipps v Ackers (1842)**

Ratio: the rule may be applied when there is a **gift to a person when or if a specified event** occurs (eg. The attainment by the donee of a specified age), with a gift over if the event does not occur. In such a case on the application of the rule, the interest of the first party may be treated as vested **subject to divesting/resolutive**.

**Festing v Allen (1843)**

*Seemingly contrary to Phipps*

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| --- | --- |
| F | Land was transferred to trustee to hold for Mrs. Festing for life, and on her death for her children “who shall attain the age of 21 years,” with a gift over “for want of any such issue.” Children took no interest on Mrs. F’s death as they had not reached 21 years. |
| C | Contingent interest – no gift to anyone who does not answer the whole of the requisite description. |
| D | Example of court not favouring early vesting  Consider distinguishing Festing from Phipps on the grounds that in Festing the recipient had not yet been determined, whereas in Phipps it had. |
| R | **The presence of a gift-over seems to indicate to the court that the interest was contingent**. |

**Re Squire**

*Vesting of interest based on no gift over*

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| --- | --- |
| F | Canada Trust was asking the court to help them out with the construction of the will of the deceased. The deceased leaves two grandsons an estate. It specifies that the trustee will retain possession and accumulate the income of that estate, and then give the estate and the income to the grandsons when they turn 30. However, if they go to college, they can use some of the money during their studies. |
| I | Do the children have to wait until they turn 30 for the interest to vest? If this is the case, they can’t use the rule in Saunders. |
| L | Saunders v Vautier: Where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime, and pay it with the principal, the beneficiaries can end the trust if:   1. They are sui juris: of full legal capacity (at least 19) 2. They show the property (or assets) is fully vested in the beneficiary |
| A | * Meeting the age of 30 is not a contingency – it’s a future interest. It is the enjoyment of the interest that is contingent. * When the granddad died, the kids got a vested interest * It would just go back to the testator’s estate if they don’t reach 30 * Granddad gave them entire interest – there was no condition. * There was no gift over, which also suggests that the interest was vested. * The fact that they had an education fund and right to encroach also suggests that the interest is vested. |
| R | **If the interest is vested, the rule in Saunders applies and the beneficiary can end the trust**. If interest is contingent or defeasible or if any other person may, by possibility, have an interest in the trust, this principle does not apply. |
| C | The interest is vested. |

**Re Carlson**

*Early Vesting*

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| F | Testator died, and is survived by his wife, his son Paul, daughter Janice, and son Chris.  His will leaves property to all children – 10% to Paul, and 90% to be split between Janice and Chris. He wants to provide for his youngest son, so the will also says: “hold the residue of my estate in trust for the education, maintenance, and advancements of Chris, and to use such portion of income and/or capital for the said tasks.” This means that the money and the estate is to be kept until Chris is 21, which will pay for his maintenance and education. All of this is in a trust.  Janice wants her share right away. She argues that her 45% was vested in her the Court the day her dad died. |
| I | Are the interests vested or contingent upon Chris turning 21? |
| A | * The Court says that the gifts to Janice and Paul can only occur when Chris turns 21. This is money that is in the residue of the estate. We don’t know the size of the estate when Carlson died. If you give vested interest to Paul and Janice as of the date of death, that would not square with Carlson’s wishes, assuming there wasn’t a heck of a lot in the estate. When Carlson wrote the will, his desire was to ensure that there was enough capital to support Chris. This major concern may not be realized if Janice and Paul get their interest vesting as of the time of death. It might deplete the estate too considerably to satisfy Carlson’s primary objective. * Chris takes a vested interest right away. His interest once he’s turned 21 gets converted into a three-fold interest. * The intention was to keep the residue intact until Chris turned 21. The will should be construed accordingly. |
| R | **Where the intention is clear, the presumption of early vesting can be rebutted.**  Perrion et al v Morgan: “I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will, read in the light of the circumstances in which the will was made. |
| C | Janice lost. If she were to get her 45% right away, it would be an obstacle to looking after Chris. |

## Types of Future Interests

### Reversions

A reversion is the interest that remains with the transferor who has not exhausted the whole of the interest by transfer. Land will revert to the grantor. It is a **vested interest**.

Ie. A (an owner in fee simple) transfers Blackacre “to B for life.”

Here, B gets a vested life estate but the grant to B does not exhaust the entire fee simple. A gets the reversion in fee simple.

### Rights of Entry

**Arises in a transferor when he conveys an apparent absolute interest, but adds a condition subsequent, which will divest the interest of the transferee in favour of the transferor and his heirs.**

Ie. A (owner in fee simple) transfers Blackacre to “B in fee simple, but if B marries C, blackacre is to be returned to A and his heirs.”

Here, B gets a fee simple subject to a condition subsequent and A has a future interest which is known as a right of entry.

When 6 years has passed since the condition is broken, an action to recover possession is lost.

The words of limitation will note that the grantor is placing a condition on the conventional estate:

**Magic Words: on the condition that, subject to, but if**

### Possibility of Reverter

**A possibility of reverter arises when a transferor creates a determinable interest. Instead of creating an absolute interest, a transferor may create a determinable interest.**

Ie. “To A in fee simple *until she is called to the Bar.*” “To B for life until he is called to the Bar”

‘A’ - **the transferor -** will recover the interest if the words of limitation are met. The right to bring an action is barred after 6 years.

A possibility of reverter can arise only after a determinable fee simple. If it’s a determinable life-estate, it would be a reversion.

**Magic Words: as long as, until, while, during = determinable interest**

**Section 8: Property Law Act**

*Disposition of Interests and Rights*

Allows rights of entry to be vested as future interests in third parties.

### Remainders

**Remainder**: a future interest in respect of which possession is postponed until some prior freehold estate expires. The validity of a remainder, whether vested or contingent, is subject to 4 restrictive rules which make it void ab inito.

### PLA Section 8.2

**RIGHTS OF ENTRY** **CAN BE VESTED IN THIRD PARTIES**.

**POSSIBILITY OF REVERTER CANNOT BE VESTED IN THIRD PARTIES.**

### Remainder Rules

* **ONLY APPLY TO INTERVIVOS TRANSFERS – DO NOT APPLY TO TESTAMENTARY: If it’s testamentary, there is a trustee/executrix, cite Re: Robson** below**. All the interests are equitable and therefore the remainder rules don’t apply.**
* The validity of a remainder is subject to four restrictive rules. **If these rules are not satisfied, the remainder is either void from the outset (ab initio) or becomes void subsequently**.

|  |  |  |
| --- | --- | --- |
| **1** | **A remainder must be supported by a prior estate of *freehold* created by the same instrument as the remainder.** | Policy: no gap in seisin allowed. A grant could not purport to convey seisin in a freehold estate and simultaneously postpone delivery.  It is not possible to create a springing interest. Eg. To B and his heirs if B reaches 21.  VOID AB INITIO |
| **2** | **A remainder must be limited so as to be capable of vesting, if it vests at all, at the latest at the moment of termination of the prior estate of freehold.** | Policy: no gap in seisin allowed.  The remainder is valid provided there is no gap in seisin between the vesting of the future interest and the termination of the preceding freehold estate.  In this case, you’ll **wait and see** whether the contingency is fulfilled prior to the termination of the prior freehold estate.  Eg. To B for life, remainder to the first child of B to reach 21. There may or may not be a gap in seisin - wait and see.  To B for life and one year after his death, to B’s child. Void ab initio because there would inevitably be a gap in seisin.  = VOIDABLE |
| **3** | **A remainder is void ab initio if it takes effect in possession by prematurely defeating the prior estate of free hold.** | Derived from the common law principle that only the transferor or his heirs could take advantage of a **CONDITION SUBSEQUENT – RIGHT OF ENTRY**.  Is a premature defeating of an interest and giving to a third party a remainder of that interest – creates shifting interest.  In CL you could get around this rule by using a determinable limitation instead of a condition subsequent.  Eg. To A for life but if she marries X then to B in fee simple.  At CL = VOID. **SECTION 8 PLA HAS ELIMINATED THIS RULE.**  **ALL GOOD - you can use a right of entry to defeat a prior estate of freehold.** |
| **4** | **A remainder after a fee simple is void ab initio.** | This is a shifting interest and so forbidden by the CL.  **Section 8: Rights of Entry can be vested in third parties – can be remainders. Reverters still cannot.**  Eg. To A in fee simple as long as he lives in BC, otherwise to B = Void  To A in fee simple, but if she lives outside BC then to B = Valid |

**Natural Termination of Remainders**

* A contingent remainder that is valid under the common-law rules will self-destruct if the contingency attached to the remainder is not met before the expiration and termination of the prior freehold interest.
* In other words, a remainder had to vest before the expiration of preceding vested interest.
* EG. To A for life, reminder to B if he turns 21. A died before B turned 21 then B lost her remainder even if she was 20 years, 11 months, and 27 days old
* This loss was attributed to and described as the result of a “natural destruction of the remainder.”

**Premature or Artificial Termination**

A contingent remainder may also be destroyed by the premature termination of the prior supporting estate (ie. through surrender or merger).

**How to Avoid the Remainder Rules**

Use a trust to create equitable future interests.

**Re Robson**

*Characterization of testamentary interests in property (including future interests) as “equitable”*

|  |  |
| --- | --- |
| F | A testator devised land to the use of his daughter for life and on her death, to the use of such of her children as shall attain the age of 21 years. At the time the daughter died, she had two children over 21 and two children under 21. |
| I | Do the children over 21 take to the exclusion of the children under 21 due to a gap in seisin? |
| L | Section 162 WESA: land and personal property devolve in the deceased’s personal representative – ie. is held by the executor in trust for the claimants to the deceased’s estate and therefore those claimants are beneficially entitled. |
| F | Dispositions in a will are equitable given the wording of Section 162. **Future interests in a will are equitable future interests** (and so not subject to the common law remainder rules for determining their validity. **They are still subject to the rules for determining the validity of conditional and determinable interests and the rule against perpetuities.** |

Is this law? The textbook says that it does not appear to have been followed or referred to.

## The Rule In Wilds

## [when will says “to B and his children”]

Rule of construction: When will says “to B and his children” you must look at the time of the execution of the will”

1. if the beneficiary **had kids at the time of the will** then the “and his children” **were words of purchase**, creating a current interest in both the beneficiary and his kids (co-tenancy). The question would then be whether it was a tenancy in common or a joint tenancy. The common law would presume joint tenancy, but Property Law Act section 11 replaced it with **presumption of tenancy in common**.
2. If the beneficiary **did not have kids at the time of the will** then the “and his children” **were words of limitation**, creating a fee tail. But fee tails were abolished, so it is presumed to be the highest estate the testator can give (PLA 19(2)).

**Alienability of Future Interests**

Property Law Act Section 8:

The following may be disposed of:

* A contingent, executory, or future interest in land, or a possibility coupled with an interest in land, whether or not the object of the gift, the limitation of the interest, or the possibility is ascertained
* A right of entry on land, immediate or future, vested or contingent.

WESA Section 41:

* A person may, by will, make a gift of property to which he or she is entitled at law or in equity at the time of his or her death, including property acquired before, on, or after the date the will is made.

## Registration of Future Interests

Section 172(a) of the LTA:

* If two or more persons are owners of different estates or interests in the same land, by way of remainder or otherwise, the first owner of an estate of inheritance must be the registered owner.
* Thus, the person holding the common-law fee simple absolute, or fee simple determinable, or fee simple defeasible upon a condition subsequent is registered as the holder of the estate in fee simple.
* All other interests in land are registered as charges: life estate, reversion, remainder, possibility of reverter, right of entry (Section 10.4 PLA)

Section 180

* If land vests in a personal representative or a trustee, that person’s title may be registered, but particulars of a trust created or declared in respect of that land must not be entered in the register.

# Chapter Thirteen: Qualifications on Conditional

# And Determinable Interests

So, even if the form of qualification in the property disposition is recognized in law, **the contents of the qualification and how it has been stated may upset the validity of the disposition**. Accordingly, the law requires:

* **Clarity** in what the grantee must do or the circumstances that must prevail for the grant to vest
* That the conditions, limitations or circumstances must, as determined by the courts or legislation, accord with societal standards of appropriateness – i.e. so called “**public policy**”
* **A time during which the property interest must vest.** This is to prevent complicating control of the land that could result in the land stagnating in inefficient use or accumulating in one group (usually a family)

**A person disposing property can impose qualifications on interests using, as appropriate, one of 4 ways/forms:**

* Covenants running with the land (We don’t deal with this)
* **Conditions precedent: “To A, if….” (suspensive condition)**
* **Condition subsequent: “To A, but if…” (resolutive condition)**
* **Determinable limitations: “To A, until (while, as lng as….)” (Limitation)**

## Tests of Validity

The test for the validity of the content of qualifications set out in a covenant, condition or limitation is determined according to 4 things:

1. Whether it is **uncertain** (are there too many ‘not sure’ instances?)
2. Whether it is against **public policy**
3. The non-vested (contingent) interest may only (possibly) vest at a time too far distant in the future – ie. not within the time limits set by law in the **rule against perpetuities**
4. Whether it restrains **alienation** (or repugnancies) already considered in **Re Walker, Shamus**, etc.

### 1. Uncertainty – Differing Tests

The test for determining whether a condition is uncertain depends on whether it is a condition subsequent or a condition precedent.

That is to say, the degree of clarity required in the disposition of the future interest differs according to whether:

1. the condition is precedent (suspensive): i.e. is it possible to say with certainty that the wording of the qualification enables one to determine whether the beneficiary of the future interest disposition is or is not a member of the class or meets the precondition described (See **Canada Trust**). This test is sometimes described as the “individual ascertainability” test – there is enough meaning to enable you to say of a person whether s/he satisfies the qualification or does not satisfy it (“not sures” likely count as “is not” though it is also arguable that too many of them means that the condition does not meet the clarity standard). To the extent you can do this, the words describing the qualification are regarded as sufficiently clear or certain;  or
2. The condition is subsequent (resolutive): i.e. is the condition such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it is that the preceding vested estate is to determine” (See **Noble**). Unlike (1) it requires conceptual or semantic clarity from the wording used to frame the resolutive condition.

Consider what might be the underlying reason for treating them (conditions precedent and conditions subsequent) differently?

We shall now review some cases that give context to these tests and show the result of their application on the validity of the disposition

### Relevant Legislation

The policy of the BC Legislature is reflected and laid down in:

1. Section 11(3) of the Land Act (page 13.2): Crown can set requirements that an applicant personally occupy and reside on Crown land and/or perform work on Crown land.
2. Section 222 of LTA (page 13.46): bar on registration of covenants that restrict sale, ownership, occupation or use of land based om “sex, race, creed, colour, nationality, ancestry or place of origin of a person”.

### Uncertainty and Conditions Subsequent

**Noble v Alley**

|  |  |
| --- | --- |
| F | Owner of land put restrictive racial covenant on it prohibiting its transfer to any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood etc. The purchaser refused conveyance of the title without a court declaration that the clause was invalid. |
| R | **“where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine”**  **Racial terms are uncertain. If clause is a condition subsequent permitting divestment of interest then condition must meet a stringent level of certainty.** |

**Canada Trust Co** – *Discussed under public policy as well*

|  |  |
| --- | --- |
| F | White supremacist leaves charitable fund for only white males. |
| R | A condition will be void for uncertainty if it is not possible to say with certainty that any proposed beneficiary is or is not a member of the class or what event may trigger or terminate the estate. |

### Uncertainty and Conditions Precedent

**Re Allen**

|  |  |
| --- | --- |
| F | The testator left the property to the eldest son of his nephew. The condition was that he “shall be a member of the Church and an adherent to the doctrines of that Church.” |
| I | Test of certainty for a condition precedent (qualifications in a **determinable** treated the same way). |
| A | * If you get an individual who clearly meets that test, then that condition will not fail. * If the son of the nephew turns out to be the archbishop, you’d throw the case out because it would be absurd to say that he is not an adherent. However, it could be ambiguous with someone else. * It’s an individual ascertainability test that is applied when it is applied to a condition precedent * Courts suggests use of a “reasonable standard” in assessing whether compliance with condition is possible |
| R | **The test for certainty is way more relaxed for conditions precedents**: if you are dealing with religion and a condition precedent, certainty is tested against the personal qualities and circumstances of grantee/devisee. |

**Re Messenger – Uncertainty**

|  |  |
| --- | --- |
| F | Husband and wife were separated when he died. In his will he bequeathed to his wife a life interest in realty “while she resides in Vancouver.” In view of the separation she had not resided and had no intention of doing so. |
| R | “Resides” is uncertain. The Court characterized it as a condition subsequent; and so the Court simply wiped out the offending condition and gave her the life estate. |

**Re Tuck’s Settlement Trusts**

You can use a third-party adjudicator to cure uncertainty. If it is unclear to the adjudicator, then the clause is uncertain.

Here, a Chief Rabbi was asked if a condition precedent was uncertain.

### Restraints on Alienation

**Blackburn v McCallum; Re: Walker**

* Restraints on alienation of fee simple is regarded as repugnant to an essential characteristic of the estate: transferability
* Objections to general restraint are founded on economic public policy that supports the free flow of goods and services
* Exceptions:
  + **Restraint on alienation okay if limited in time** – ie. testator required no disposal of the land in question for 25 years and during that period no encumbrances
  + **Restraining alienation to a particular class is okay** – provided reasonable, ie. relatives

**Trinity College School v Lyons**

Court supports the rule that any pre-emptive provision fixing a price without reference to future increases in value may be void as in substance amounting to a restraint on alienation.

Restraints on alienation can be of issue – with contractual provisions, look to their substantive effects.

### Public Policy

Religious faith clauses are not against public policy

Must be sufficient to warrant overriding freedom to policy

**MacDonald v Brown Estate**

|  |  |
| --- | --- |
| F | A testator directed that a share of his estate was to be held in trust until his niece becomes widowed or divorced from her present husband  When she got divorced or widowed the trustees were to pay her the capital  Otherwise she was only to get the annual income arising from the estate. |
| I | Is this condition on marital status valid? |
| L | Re: Kennedy Estate: condition of not smoking is valid. |
| R | * Motive is important: Here to be supportive, not to promote divorce. Thus, the clause here is okay. * **If the motive was to promote divorce, this clause would be invalid on the grounds of public policy.** |
| C | The condition is valid because the motive was to protect the beneficiary, rather than manipulate relationships between people. |

**Canada Trust Co v Ontario**

|  |  |
| --- | --- |
| F | Leonard died, and in his will established a trust to provide education scholarships  He put in a clause to exclude all who are not Protestant Christians, of the white race, of British nationality, and all who do not owe allegiance to any foreign authority.  There is also clause that limits the amount available to female recipients. |
|  | Is this scholarship valid? |
| A | * “The promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of Ontario” * Public policy gleaned from a variety of sources: provincial and federal statutes, official declarations of government policy; human rights codes and the Constitution. Also global trends evidenced in international treaties. |
| C | Public policy will be considered in relation to this kind of clause.  **This clause contravenes public policy.** This money was held in trust by the university: if you have a charitable purpose trust, then the doctrine of **Cy Pres** kicks in, which allows the trustee to propose a different charity that is in line with the testator’s wishes. The testator was a generous person at heart, so they just took out the clause and continued the scholarship. |

**Statutory Equality Provisions**

* Section 15 (equality clause” of the Charter)
* B.C. Human Rights Code [RSBC 1996] c 210
  + Purposes:
    - to prevent discrimination prohibited by the Code
    - To foster a society free of impediments “to full and free participation in the economic, social, political and cultural; life of BC”
    - Forbids discrimination in accommodation, service and facility; in purchase of property; in tenancy premises - “because of the race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sex, sexual orientation, or gender identity or expression of that person or class of persons” – section 8
* Section 222 of Land Title Act – prohibition on covenants that restrict sale, ownership, occupation or use of land based on sex, race, creed, colour, nationality, ancestry or place of origin: registrar empowered to cancel the covenant.

**IF INVALID, DETERMINE**:

## Effect of Invalidity – (From Jarmen *On Wills*)

The result of a void condition varies according to

* The nature of the property (land or personalty)
* The nature of the condition (suspensive/precedent or subsequent/resolutive or limitation)

Land: A void condition or qualifying limitation (estate determinable):

* precedent (suspensive) and qualifications as limitation results in a void grant/devise;
* subsequent (resolutive) renders the grant valid as an estate absolute (i.e. the offending condition is struck out of the grant)

Personalty: A void condition

* precedent: If the suspensive condition is
  + impossible or illegal in the sense of *malum prohibitum* (i.e. constitutes a misbehaviour or reprehensible conduct) the grant/devise is effective as absolute (the offending condition is struck from the grant rendering the grant a transfer of an absolute interest). You’d strike out the condition and it would give an absolute interest to the grantee.
  + a critical (from grantor’s/devisor’s perspective) part of the grant – its raison d’etre  - and has become impossible (by act of God) or is malum in se (inherently wicked - as in a requirement to murder, say) the entire gift/grant/devise is void – i.e. no transfer takes place.
* subsequent (and limitation?) renders the grant of the interest absolute (i.e. the offending condition is struck out out of the grant). Limitations are treated the same was as suspensive conditions

# CHAPTER 14: RULE AGAINST PERPETUITIES

**Apply the rule against perpetuities to all contingent future interests.**

**The rules (common law now supplemented by statute) set the time period in which non-vested or contingent future interests must vest in order to be valid**

* Remember to distinguish between contingent interests and contingent vesting – we are here concerned with the vesting of the interest.
* The modern perpetuity rule is significantly modified by the **Perpetuity Act sections 6 and 8**
* If the interest violates the modern rule, you look to see if it is saved by the Perpetuity Act.
* England, Nova Scotia, Manitoba, and Saskatchewan have all abolished the rule against perpetuities.

Repeat: **the rule is concerned only with contingent/non-vested future interests and their need to vest within a determined (by the modern rule) period.** If the future interest is vested at the date of the grant or death of the testator the rule against perpetuities does not apply.

The first step is to decide whether the contingent future interest complies with the modern rule.

If it doesn’t, you turn to the Perpetuity Act.

## Step One: Does the Contingent Future Interest Comply with the Modern Rule?

**The Modern Rule at Common law**

**No interest is good unless it must vest, if at all, no later than 21 years after some life in being at the creation of the interest.**

3 elements:

1. **The concept of certainty of vesting:**
   * Look at when the interest is created. That point in time is when transfer or transmission under a will takes place.
2. **The period within which vesting must take place:** ie. lives in being (which includes a fetus) plus 21 years (who are the people alive at the time the interest is created [time of transfer/time of death] plus 21 years
   * Consider all conceivable circumstances of vesting – it could be any person, it’s all hypothetical
   * Simply think of anyone who was alive at the time of the creation of the interest, and speculate about their deaths
   * Are there any circumstances where that interest won’t vest within 21 years of that hypothetical person dying
3. The requirement that, from the date that an instrument creating the disposition takes effect (ie. on death in the case of a testator or of the transfer by a grantor), it must be absolutely clear that vesting, if it is to happen, will take place within the period. This requirement is known as the “certainty in vesting.”

**If it doesn’t vest within that time period, then it violates the rule against perpetuities.**

Examples

1. To A for life remainder to the first child of A to reach the age of 21 years – at date of transfer A is one month old.
   * Valid. A has to be a life in being. A has 21 years to meet the contingency. There is no possibility of that interest not vesting if it is to vest it all – it is certain to vest.
2. To A for life, remainder to the first child of A to marry. At date of transfer A is married with 10 children who will all wed within the next 3 months.
   * Void. You can hypothesize that after the gift is given A may have another child; that child is not a life in being. We don’t know if they will actually marry. There is no certainty.
3. To A for life, then to A’s children for their lives, remainder to A’s grandchildren. At date of transfer A is 85, has 5 living children and no grandchildren.
   1. Void – fertile octogenarian. See page 14.14. It can’t be fulfilled as a matter of guarantee within the 21 years.

**The “Royal Lives Clause” or Equivalent**

* Solicitors sometimes get around the certainty of vesting requirement through a “royal lives clause.”
* **You’d only use the Royal Lives Clause nowadays when you want more than 80 years because now we have the Perpetuity Act**
* The common law allowed the setting of time *through a process of defining actual lives extant at the date of the transfer* and adding an additional 21 years when the last person in the group dies
* Thus, the draftsperson of the deed/will may stipulate that the contingent future interest in the document, if is to vest, must do so “within the lives of the lineal descendants of Her Majesty Queen Elizabeth II alive at the date the instrument takes effect.”
* Under an appropriately worded clause one can “wait and see” whether the future interest actually vests at the latest 21 years after the last descendant in the group (living at the time of the grant/death of testator) dies.

## Step Two: Is the Invalid Contingent Interest Saved by the Perpetuity Act?

**Perpetuity Act Section 7**

* Provides that an **interest which must vest (expressedly or impliedly) if at all not later than eighty years from the date of its creation** does not violate the CL period of 21 years after a life in being.
* A Royal Lives Clause is still available to a draftsperson as a means of avoiding the certainty of vesting requirement under the modern rule
* Section 7 allows you to specify a period of up to 80 years – but you have to specify it in the instrument: “the contingency, if it is to vest at all, must vest within 60 years.”

**Application of Remedial Provisions Under the Perpetuity Act**

* If there is no “royal lives” clause or period set within the parameters of section 7, section 3 may remediate the common law consequence of invalidating a non-vested future interest in one of 5 ways – depending on the circumstances.

**Section 3: Order in Which Remedial Provisions are Applied**

* 1. Section 14. Rebuttable presumption that men are always able to have children. Presumption that women can’t have children after age of 55.
  2. Section 9 “Wait and see”
  3. Section 11. Age reduction.
  4. Section 13. General cy pres.

### Section 14: Capacity to Have Children

In a disposition with a non-vested future interest section 14 presumes 4 matters:

* **A male is presumed capable of procreating children at 14 years and over** that age. Indefinite fertility is a rebuttable presumption.
* A female is presumed **capable of procreation at the age of 12 years or more and under the age of 55** years. Also applies to adoption.
* In the case of any actual living person, evidence that shows that a person will not be able to have a child at any time relevant for the purpose of applying the Rule (note the section does not cover technological innovations since the act was passed before females could have children above 55 years)
* The presumptions in 1 and 2 **apply to adoption**

Practice problem: “To A for life, then to A’s children for their lives, remainder to A’s grandchildren”. A is eighty, has 5 living children but no grandchildren. Void at common law because of the “fertile octogenarian hypothesis, valid because that hypothesis cannot be constructed.

* + To A, vested.
  + To children who were living, vested.
  + Void at law under the modern rule – **even though she is 80, she is regarded under the common law as still fertile.** You could hypothesize that she could have a child that is not a life in being. Is there a guarantee that that child will produce grandchildren within the next 21 years? No. Therefore, void.

### Section 9 & 10: “Wait and See”

* **Section 9** enacts that a gift is presumed to be good until actual events establish that the non-vested future interest is incapable of vesting within the period. In other words, **the “wait and see” doctrine applies**
* **Section 10** sets out the period of waiting as follows
  + **The statutory lives** (see below) plus, at the demise of the last in the group, 21 years, or
  + Where appropriate (eg. **if there are no statutory lives**) a fixed period of eighty years
* **Section 10** also gives a list of statutory lives:
  + The grantor
  + Beneficiaries
  + Donee of a power of appointment (in some cases the settlor/testator nominates a person to appoint beneficiaries)
  + Parents and grandparents of beneficiaries
  + The holder of any prior interest
  + the person named as taking a gift over
  + unborn spouses.

“Wait and see” effectively remediates most non-vested, future interests

Practice Problems:

* 1. “To A for life, remainder to B for life, remainder to A’s first child to marry.” A, age 40 years, is married and has two children aged 10 and 5 years. A’s parents are alive and B is alive.
     1. [Void at common law because A could have another child, and that child is not a life in being. That child that is born would have to marry, and that could happen outside of the 21 years if you kill off all the lives in being].
     2. Saved under wait and see if A has another child before the age of 55.
  2. To A for life, reaminder to such of his children as are alive at the widow’s death.” A is alive, his wife is alive and they have two children.
     1. [Void at common law – “unborn spouse” situation. The current wife could die, but he could have another marriage and have more children. The second spouse was not alive at the time that this disposition was created. You can hypothesize the marriage of someone who has not been born yet].
     2. Unborn spouse provision legitimizes the whole thing
  3. “To the University of BC if it ceases to operate a faculty of law.”
     1. [Void at common law].
     2. Allowed under the wait and see because you can be given 80 years when the particular body does not have a life.

### Section 11: Age Reduction

* Only applies to age contingencies
* This section allows with respect to non-vested interests by reason of **age to reduce the prescribed age in the instrument by taking into account the age of the contingent beneficiary** and reducing the required age to a number that brings it within the 21-year limit of the common law rule – i.e. to that age which would make the contingent, future interest valid.
* Where there are two gifts in the same instrument the reduction applies independently to each to each group.

### Section 9: Cy Pres

* If none of the remedial provisions operate to save the contingent interest the court is given power under the Act to rewrite the disposition so that it complies with the rule against perpetuities – **but only if the rewriting can be made to conform with the general intention of the donor/testator.**

Example: “To A for life remainder to his first child to reach the age of 30 and marry”. A is alive but has no children.

* At the end of the wait and see period there are two children alive: the older is 32 and unmarried and younger is 19 and married. Here each child complies with only one of the two criteria specified as contingencies.
* The gift will be okay if the court can decide which is the contingency that was uppermost in the testatrix’s desire - age or marriage - and then give effect to that dominant contingency. If the court is unable to make that determination the non-vested future interest would be declared void.

# Chapter Eleven: Co-Ownership

It is possible for two or more persons to have simultaneous rights to possession of property. When there is this **“unity of possession”** the property owners are known as co-owners, and are said to have concurrent interests.

Today there are two types:

1. Tenancy in common
2. Joint tenancy

## Tenancy in Common

* When two or more people, by virtue of the interests they own, are **simultaneously entitle to possession of property**. They can have different shares of the property (60/40, 70/30).
* Their **“unity of possession”** entitles each one in conjunction with the other to possession **of each and every part of the property.**
* Tenants in common are treated in the same way as single owners, and on death their interest in the tenancy in common passes by will or on intestacy in the same way as any other real property. Same with inter vivos transfers.
* Shareholding (which can differential - 1/3 for A, 2/3 for B) is important for determining share of contribution towards the cost of maintenance, repair of each co-owner and of profit and capital when the property is disposed of.
* As a co-owner (tenant in common or joint tenant) A may hold only own 1/3, but s/he can access and enjoy any part of the property

## Joint Tenancy

* Also has unity of possession
* Has a characteristic of jus accrescendi, and thus is treated differently than tenancy in common
* Jus accrescendi = right of survivorship. The survivor gets the entire property.
* In a joint tenancy all the joint tenants are treated as one person.

Two essential elements of a Joint Tenancy:

### Right of survivorship (*jus accrescendi*)

* The right of survivorship provides that upon death of one joint tenant the other joint tenant take on **full and absolute ownership** of the fee simple.
* However, either tenant may act in their lifetime, either jointly or unilaterally, **to sever the joint tenancy and convert it into a tenancy in common.**
* The right of survivorship **takes priority over the normal rules of descent on death**, and so a joint tenancy **cannot be severed by will**.

### The Three Unities

1. Unity of Title: Co-owners must derive their titles from **the same instrument** (transfer or will).
2. Unity of Interest: The interests of the joint tenants in the property **must be the same** (split equally). This means there must be equal shares in the same type of proprietary interest (ie. estate in fee simple, or leasehold – but NOT one co-owner holding as fee simple owner and the other as lessee)
3. Unity of Time: The interests of the joint tenants must **vest simultaneously.**

## If you want to convert your JT into a Tenancy in Common

At least one of the joint tenants must “sever” one of the unities. This may be accomplished by:

* One of the joint tenants could transfer the interest to himself or herself (PLA s. 18).
* The parties may mutually agree to sever
* HusOne party may be her/his conduct lead the other to believe s/he is in agreement with a severance of the joint tenancy relationship to a tenancy in common

Note: failure to properly sever a joint tenancy leaves the right of survivorship intact even if one joint tenant has changed her/his mind but only indicated this orally or even in writing without a legally recognized formal severance.

* If you want to have a joint tenancy, you have to satisfy the three unities. If you want to break the joint tenancy, you break one of the unities. If you break the joint tenancy, you have a tenancy in common.

The law presumes **tenancy in common**, unless expressly provided for by the instrument creating the co-ownership.

**Sorensen v Sorensen**

|  |  |
| --- | --- |
| F | Husband and wife held several pieces of property as Joint Tenancy. They decide to split up and enter into a separation agreement where they agreed to sell one of the properties to fix up the matrimonial home. The matrimonial home was to be leased to the wife for her lifetime for $1 a year.  The wife then diagnosed with terminal cancer, and in order to provide for her mentally ill son she executed a trust deed, declared transfers of the lots which were not to be registered until her death, commenced an action for partition of the lands, left the property to her son in her will, and made a declaration to sever JT. |
| I | Did she effect a severance of the JT? (If she did not, the husband gets entire property as survivor) |
| A | * The lease by the husband to wife did not sever the tenancy * The conduct of the parties was not intended to sever the title * There was no severance except for the declaration of trust for the son - this gift, although only of equitable title, severs the joint tenancy * The execution of a will by one joint tenant cannot sever joint tenancy: if the titles were not severed the will was ineffective to give the wife’s interest in the properties to the son * Bringing an action alone for partition where the action is subsequently discontinued is not sufficient to constitute a severance * A statement of intention to sever not accepted by the other joint tenants does not effect a severance |
| C | The only act that severed the titles was the gift to the son by declaration of trust of the wife of the beneficial interest in the titles. |

## Partition and Sale

Partition means the physical division of property between the co-owners so that each becomes an owner in severalty of a particular part. At common law, co-owners could, by agreement and suitable transfers, physically subdivide the property so that each became an individual owner. This is still possible.

**Section 6 PLA: Sale of Property Where Majority Requests It**

If one co-owner wants to partition the property, the court must do so unless it sees good reason to the contrary.

**Harmeling v Harmeling**

*The Basis on Which a Court May Refuse Partition*

|  |  |
| --- | --- |
| F | An elderly married couple are joint tenants of a property. The wife leaves and lives in a motor home with another man. After leaving, she started proceedings for partition and sale. |
| R | Affirms Section 6 – a Court should grant a partition by request from one party unless there is sufficient reason not to. |