History of the Rule of Law 2

A. Cujus est Solum Ejus est Usque Ad Coelum et Ad Inferos 3

1. Ad Coelum 3

Common Law 3

Kelsen v Imperial Tobacco Co 3

Bernstein v. Skyviews 3

Manitoba v. Air Canada, SCC 4

Legislation 4

2. Ad Inferos 4

B. Fixtures 4

Re Davis [1954] O.W.N. 187 (H.C.) 4

La Salle Recreations Ltd. v. Canadian Camdex Investment Ltd. (1969) B.C.C.A. 5

CMIC Mortgage Investment Corporation v. Rodriguez, (2010) BCSC 308 5

Elitestone Ltd. v. Morris [1997] 2 All E.R. 513 (H.L.) 6

C. Water 6

1. Riparian Rights 6

The Development of British Columbia Law 6

Water Act 7

The Conjunction of Common Law and Statutes 7

Johnson v. Anderson [1937] 1 D.L.R. 762, 51B.C.R. 413 (S.C.) 7

Schillinger v. H. Williamson Blacktop & Landscaping, aff’d (1979) C.A. 7

Steadman v. Erickson Gold Mining Corp. (1989), C.A. 8

2. Percolating Water 8

3. Ownership of the Beds of Watercourses, Lakes and Ponds 8

4. Accretion and Erosion 8

Southern Centre of Theosophy Inc. v. South Australia (1981), P.C. 8

5. Access by Riparian Owners 9

North Saanich (District) v. Murray (1975), 54 D.L.R. (3d) 306 9

D. Support 9

Cleland v. Berbarick aff’d (1916) C.A. 10

Bremner v. Bleakley [1924] 2 D.L.R. 202 (Ont.C.A.) 10

Gillies v. Bortoluzzi [1953] Man.Q.B. 10

Rytter v. Schmitz (1974), B.C.S.C. 10

A. Real and Personal Property 11

B. Reasons for Studying the Law of Real Property 11

1. Dispositions 12

2. Use of Land 12

C. Some Basic Principles of Land Law 12

1. Tenure 12

2. Corporeal and Incorporeal Interests in Land, and the Doctrine of Estates 12

3. Legal and Equitable Interests 13

Origin of Equitable Interests 13

Development of the Use 13

The Statute of Uses 13

Emergence of Modern Trust 14

4. Freedom of Alienation 14

Freedom of Disposition 14

Restraints on Alienation 14

D. Relationship Between Real and Personal Property 14

1. Tenure 14

2. The Doctrine of Estates 15

Re Fraser, [1974] BCCA 15

3. Alienability 15

4. Devolution on Death 15

E. The Relevance of English Law 15

A. Crown Grant 15

B. Inter Vivos Transfer 16

1. The Contract or Executory Stage 16

Q’s on p 4.6 16

2. The Transfer – Form, or Executed Stage 16

Writing and Sealing 17

Registration – Prescribed Forms 17

Standard Forms 17

3. The Transfer – When is it Operable? 17

Ross v Ross (1977) NSSC 18

Zwicker v Dorey (1975) SCC 18

MacLeod v Montgomery (1980) Alta C.A. 19

4. Transfers to Volunteers 19

C. Will or Intestacy 20

D. Proprietary Estoppel 20

Zelmer v Victor Projects, BCCA 20

Intellectual Property 20

# History of the Rule of Law

* **Rule of Law**: autonomous, complicated system of judges who, with the assistance of lawyers, decide rulings and understand the process of rationality; freedom as long as we comply with it
* Righteousness is the core value that has remained the same throughout: Mesopotamia customs 🡪 Bible’s rules; Jews 🡪 Jesus and Christians 🡪 influence on Western legal system
* Greeks first to implement democracy, but voter eligibility limited and trials swayed by emotion 🡪 Roman autonomous law system applied Greek natural rules to laws and catalogued them
* **Maxims/Rules of Equity**: principles established to have some degree of autonomy, to determine decisions in a court of equity (Roman origins)
* History of property has changed from communist ownership to private rights/ownership (and personal labour that determines what you own – Locke)
* Historical changes in society: hunter-gatherer 🡪 pastoral, stock-tending 🡪 agricultural 🡪 commercial
* Historical changes in law in society: pre-legal customs 🡪 proto-legal 🡪 fledged relatively 🡪 autonomous
* As economic system moved from Agricultural 🡪 Mercantilist 🡪 Capitalist, seisin became less useful and was replaced with interests (with rights as an organizing principle)
* **Common law** started by Henry II c. 1200 when all courts + their decisions/traditions were united
  + Three courts of common law: Exchequer, Common Pleas, King’s Bench; they develop a system and used reasoning, and those traits make the common law system autonomous
  + Disaffected litigants petitioned to the King and formed the Court of Chancery (**Equity**), led by Chancellor (applies what he believes to be good conscience); **Rule of Man**
* If the regnum disagreed with court decision, he could counter it; he’s ordained by God to do justice (**canon law**)
* **Judicature Act** of 19th century eliminated a lot of small courts, established a central system of judicial governance (**Royal Courts**)
  + Let Queen’s Bench and Court of Chancery fuse together and be officiated by one judge
* Rule by these courts is an oligarchy (not the best representation of the public) who apply law instrumentally (used for a desired goal) instead of autonomously (fairly applied)

Chapter I: The Legal Concept of Land

* Property rights are **real rights (*in rem*)**, right of the person entitled to property to avail against the world; can be enforced against anybody
* Different from **personal rights (*in personam*)**, rights between two parties who are contractually connected to each other (or connected by law, as in Torts)

# A. Cujus est Solum Ejus est Usque Ad Coelum et Ad Inferos

## 1. Ad Coelum

### Common Law

#### Kelsen v Imperial Tobacco Co

* Three different types of legal relationships in this case:
  + Fee simple (held by Improved Industrial Dwellings; real right)
  + Tenant lease (P from Industrial Dwellings; real right)
  + Implied bare license (given by P to D to allow “PP” sign to be put up; personal right)

|  |  |
| --- | --- |
| Facts | IID owned 3 properties in fee simple. P was a tenant of 2, D of 1. D put up a sign on its property that encroached upon P’s airspace by an overhanging 8’’. P had originally allowed the sign to hang there, so no nuisance. Change of heart possibly due to someone offering P 75 L/yr to put up a smaller sign. |
| Issue | Was D trespassing on P’s property? |
| Discussion and Analysis | - Court: Since the tenant lease hadn’t explicitly indicated that P only leased the volumetric cube of the unit (not counting air above), then the airspace above the building is also under his possession |
| Ratio | *Ad coelom* Maxim: Whoever owns the soil owns to the heavens above and to the depths below. Airspace is land, and it is an *in rem* right. |
| Holding | D was trespassing in P’s airspace. |

#### Bernstein v. Skyviews

|  |  |
| --- | --- |
| Facts | D took aerial photos of P’s house and offered to sell them back to P. P wanted the photos confiscated, citing invasion of privacy and trespass. |
| Issue | Does aircraft movement through the upper regions of airspace count as trespass? |
| Discussion and Analysis | - P argument: Ownership of airspace to unlimited heights (by *ad coelom* maxim)  - Above airspace is public space, through which any aircraft can legally pass |
| Ratio | Airspace rights extend only up to the “ordinary use and enjoyment” by the owner. Anything above that is not considered trespass on privately owned land. |
| Holding | There is no trespass. The maxim is limited. Invoked *Civil Aviation Act*. |

#### Manitoba v. Air Canada, SCC

|  |  |
| --- | --- |
| Facts | Province of Manitoba wanted to charge a sales tax on all goods flying over or landing in the province. |
| Issue | Can airspace be owned? |
| Discussion and Analysis | - Air cannot be delineated or demarcated (except according to the *Land Title Act*)  - Right of a province to tax is limited to within its own lands/borders |
| Ratio | Air cannot be owned above “ordinary use and enjoyment”, and thus cannot be used to collect tax revenue. But limitations can be placed on who can occupy it. |
| Holding | Followed *Bernstein*. No ownership. No collection of taxes from D. |

### Legislation

* ***Land Title Act*** ss.138-143: After too many deeds given out and things were getting chaotic, a land registration system was set up where the Registrar of Land Titles is in charge of divvying up privately owned land into volumetric **air space parcels**
  + “Airspace constitutes land” doesn’t account for height
  + S. 139: Title to airspace is recognized and can be transferred
  + S. 140: A grant of an airspace parcel to a guarantee does not allow that grantee to interfere with the grantor’s interest in land or remaining airspace parcels
  + Title: owner of airspace parcel receives a separate title, which does not normally appear as a charge on the surface landowner, but will appear as an easement if one is required to access the airspace
* **Easement** (the right to use someone else’s land for a specific purpose) is a real right that transfers from owner to new landowner
* ***Strata Property Act*** allows definition of volumetric air parcels and the subdivision of airspace into even smaller parcels that can be sold to private owners (e.g. condos)
  + Strata corporations made up of private landowners govern these parcels
  + Each strata lot owner gets a series of rights (access, support, services)
  + **Bare land strata plan** permits the subdivision of the horizontal plane only
  + **Building strata plan** allocates strata lots to individual owners (vertical)
  + Title: includes both the condo and a part-interest in the common area; no separate title for land on which the condo building sits
* ***Civil Aviation Statutes*** recognize airspace rights by parties other than the owner

## 2. Ad Inferos

* ***Ad inferos*** clause of the Accursian maxim altered in modern society; now, in a vertical section of land, the top layer can be owned by the landowner, the layer of earth below (which could hold mineral wealth) by the government (vested in govt since Royal prerogatives in the 16th century)

# B. Fixtures

* Maxim: What is land is also what is affixed to land.
* **Mortgage**: Loan with real security; if borrower doesn’t pay, the lender can come in and take the land and all its fixtures, and be paid back in full

#### Re Davis [1954] O.W.N. 187 (H.C.)

|  |  |
| --- | --- |
| Facts | The widow wants to consider the bowling-alleys in her estate as fixtures of the property, and thus to increase the value of her dower after her husband’s death. |
| Issue | Are removable bowling-alleys fixtures of the land or chattels? |
| Discussion and Analysis | - The alleys were attached by bolts/clips to the floor; sold on conditional sales contracts (so equipment may be removed on default)  - Degree of affixation: not much permanency |
| Ratio | To be a fixture, the object needs to be affixed for the better use of the building. |
| Holding | The bowling-alleys are not part of the real estate, and their value should be deducted from the calculation of the dower. |

* **Degree of affixation**:
  + How well is the object affixed to the building
  + Consider how easily it can be removed, how permanent the object is
* **Degree of annexation**:
  + If object is to improve the freehold, even if only slightly affixed = part of realty
  + If object is for the better enjoyment of a chattel =/= part of the realty

#### La Salle Recreations Ltd. v. Canadian Camdex Investment Ltd. (1969) B.C.C.A.

|  |  |
| --- | --- |
| Facts | Villa borrowed money from mortgagee D to operate its hotel. To finish its floors it buys carpets, borrowing more money from P to pay for the carpets over time. Conditions stipulate that V doesn’t get title in the carpets until it pays in full. It goes bankrupt and defaults on its payments, so D gets the land. D sells it to White Spot, then P demands the rest of the payment for the carpets. P/R; D/A. |
| Issue | Are these carpets chattels or fixtures? |
| Ratio | To be a fixture, the object being annexed is fixed for better and more effectual use of the property. |
| Holding | The carpets are fixtures. Allow the appeal. Dismiss P’s action with costs. |
| Misc. | Procedural History: Original trial: Held that the carpeting never became a fixture since they’re lightly affixed (only by their weight) and easily removed. |

* **Conditional Sales Act** requires registry of fixtures, not of chattels; if P had registered, there would be no case
* Private intention for chattel vs. fixture doesn’t really matter in deciding these cases

#### CMIC Mortgage Investment Corporation v. Rodriguez, (2010) BCSC 308

|  |  |
| --- | --- |
| Facts | D’s case argued by Cover-All. P held a mortgage on D’s property. D bought but did not pay for Cover-All #2. D did not intend Cover-All #2 as a fixture, just Cover-All #1 (whose blocks of concrete were below ground). Cover-All took away #2 claiming it was chattel, but P opposed since they said it was part of the land (and thus within P’s claim on the land through the mortgage). |
| Issue | Does P get Cover-All #2 as well as Cover-All #1? |
| Ratio | Item attached to a structure will become fixture if it loses its essential character. |
| Holding | Cover-All #2 wasn’t firmly attached to the ground and was intended to be a portable stable, so it is chattel, and Cover-All gets to recover it. |

* TV example: sitting on a cabinet box = chattel; hanging on the wall, = arguably a fixture
  + Attached to a structure that is attached to the building = not chattel
* ***Stack v. Eaton* principles** for determining if something is chattel or a fixture:
  + If not attached to the land (rest on own weight) and can be removed without damage or alterations to the fixtures or land, item = chattel (unless intended to be land)
  + If plugged in and can be removed without damage or alteration, item = chattel
  + If even slightly affixed to the land, item = fixture (unless intended to remain a chattel)
  + If piece can be removed but then whole thing loses its essential character, whole thing = fixture
  + If item = fixture, it may be removed when tenant leaves premises if shown that it’s a tenant’s fixture
  + Objective test: Consider the *prima facie* character, object and degree of annexation

#### Elitestone Ltd. v. Morris [1997] 2 All E.R. 513 (H.L.)

|  |  |
| --- | --- |
| Facts | Bungalow had been resting in place on concrete pillars since 1945. D lived in it and didn’t consider it to be chattel, but P wanted to evict him. P/R; D/A. |
| Issue | Is the bungalow part of the realty? |
| Discussion and Analysis | - H.L. justice supported a threefold classification for objects brought onto land: if it’s not part of the land, it’s chattel. If it’s part of the land and affixed to the land, it’s a fixture. Otherwise, it’s part and parcel of the land itself  - To determine when building materials brought onto land cease to be chattels and became part of the composite structure of the bungalow, 3 criteria:  1. Degree of annexation; 2. Object/purpose of annexation; 3. Whether the fixture is treated as part of the land (like houses)  - The fact that the individual bits of material were brought onto the land to sit without any attachment other than gravity is irrelevant; it matters more that they form a structure with a permanent purpose of shelter |
| Ratio | When D’s bungalow was built, each piece became part of the structure, which was itself part and parcel of the land. The bungalow is considered to be part of the land. |

# C. Water

## 1. Riparian Rights

* **Groundwater**: water below the ground, which is percolating
* Sources of water rights:
  + *Water Protection Act*: Purpose to foster sustainable use; property in and the right to use and flow of water is vested in BC govt, private rights must be approved under *Water Act*
  + *Land Act*: Waterbed rights
  + *Land Title Act*: Rights upon accretion or erosion

### The Development of British Columbia Law

* Where legislation intrudes upon common law, the legislation is strictly enforced over CL
* CL: Riparian owner has proprietary rights in flowing and percolating water
  + Acquisition of interest in water is not based on prescription – must be registered
  + Right to use and enjoy water flow, quantity, and quality in its natural state
  + Right to use the water for domestic purposes while on your property, even if your use affects the rights of other riparian owners
  + Obligation to not cause injury to other riparian owners by diminishing the flow, quantity, and quality of their water
  + Use of water must be connected to the property where the water exists
  + Limited irrigation purposes
* **Common Law riparian rights**: rights related to the use of water, taken from English CL
  + Incidental right for every owner of real property bordering a stream to have water flow to him in natural state, quantity, level and quality
  + Entitled to make certain uses of water; not exclusive, subject to each other’s rights
    - No material injury to fellow riparian owners
    - Not for uses unconnected to riparian property
    - If supply exhausted through ordinary use, cannot complain
    - Domestic purposes only
    - Restrictions on irrigation – “amount adjudged reasonable” and returned with “no diminution other than that caused by evaporation and absorption”
    - Cannot grant use to another
  + In BC, statutory scheme has eroded CL riparian rights:
    - Right to use and flow vested in Crown
    - Domestic use of **unrecorded** water (= not regulated under license) is permitted

#### Water Act

* Governs riparian rights, which can only exist for the person lawfully using the water
* To acquire right to use and flow of water in any BC stream, need to follow *Water Act* provisions
* A **license**’s priority is determined by the date, and license holders can **divert** their water to other users and expropriate land on which to construct pipelines to divert water

### The Conjunction of Common Law and Statutes

#### Johnson v. Anderson [1937] 1 D.L.R. 762, 51B.C.R. 413 (S.C.)

|  |  |
| --- | --- |
| Facts | D diverted the flow of a stream that naturally would go through P’s property and that P used. P had no water license. D had a license that allowed diversion but it did not authorize such a diversion that used more water than permitted. |
| Issue | If neither party has a proper license, what happens in a riparian dispute? |
| Discussion and Analysis | - Unless there are records or licences granted with say otherwise, P still has the right to use the water flowing by or through his land  - If D had not diverted the water, P would have rightfully made use of the water flowing by/through his land without interfering with the water rights of D |
| Ratio | *Water Act* provides that the riparian owner can get clean flowing water on his land and has a remedy against wholly wrongful and unauthorized diversion. |
| Holding | Requests approved for D to demolish the works that divert the natural course of the creek to allow it to resume its rightful course through P’s property, and to restrain D from further diversion of the natural course of that creek. |

#### Schillinger v. H. Williamson Blacktop & Landscaping, aff’d (1979) C.A.

* If it can be proved that the fish cultivation was strictly for commercial, and not domestic, purposes, then the Barres Creek diversion is not legal

|  |  |
| --- | --- |
| Facts | P accused D of adding silt to P’s lawfully used water, thus making it unfit for use in P’s industrial fish cultivation business by killing his fish. D had riparian rights. |
| Issue | Is P entitled to divert the water for his business? Can P claim damages from D? |
| Discussion and Analysis | - Barres Creek flows into and converges with Hairsine Creek downstream from the point of diversion authorized by P’s water license |
| Ratio | P didn’t have in his water license permission to divert and use water from Barres Creek (unrecorded water), just from Hairsine. (*Water Act* s. 3) |
| Holding | No and no. |

#### Steadman v. Erickson Gold Mining Corp. (1989), C.A.

* Private riparian rights can exist between riparian owners in regards to unrecorded water
* Under CL, mechanical/industrial uses are not valid reasons for using water
  + Too much pollution, which counters the right to unimpeded flow of water

|  |  |
| --- | --- |
| Facts | P gets water piped from a small, spring-fed dugout on his land to his house. D built a road immediately up the hill, contaminating P’s water. P sued for nuisance.  A/D: Erickson ; R/P: Steadman |
| Issue | Is P entitled to use the water and sue D for damages without a license? |
| Discussion and Analysis | - D: P had no right to sue in nuisance since he didn’t have a water license and thus had no right to use the water or divert it  - Ground water is not covered by the Water Act, but poisoning it gives P grounds to sue for nuisance and for D to be held liable in nuisance  - Appeal court can’t say if the water is groundwater, so treating it as if it is  - D: P used water for more than domestic purposes; but diamond saw, not works  - Distinguished from *Schillinger* – P using water for legitimate domestic purpose |
| Ratio | P, notwithstanding that his right to the water might be lost in the future if the Crown issues a license in that respect, is entitled to it for now and can claim against D who interfered with that use. |
| Holding | Appeal dismissed. P doesn’t need to own the water in order to have the riparian right to use and enjoy it safely. |

## 2. Percolating Water

* In CL: Riparian owners’ rules did not extend to **percolating water**, that flows through soil or in an unascertained channel 🡪 Became property of first person to draw it to surface lawfully
  + In BC, this has been affected by both *Water Act* and *Water Protection Act*

## 3. Ownership of the Beds of Watercourses, Lakes and Ponds

* By common law, the river and lake beds on non-tidal and non-navigable waters were owned by the riparian owners up until the middle line of the river (*ad medium filum* doctrine)
  + Land bordering a non-tidal and navigable body water: no right to the water bed
  + Owner has the right to the use, flow, and quality of the water for domestic purposes, subject to the rights of all other riparian owners (esp. water coming undiminished)
* ***Land Act*** s. 55 statutory modification excepted when specifically granted or where those rights were never taken away (s. 56)

## 4. Accretion and Erosion

* **Doctrine of** **Accretion**: Process by which land bordering a tidal water body increases due to soil, sand, etc.
  + Must be gradual and imperceptible, can be produced by human action other than owner
  + Only produced by natural substances, though they need not be carried by water
* **Erosion**: Process by which land bordering a tidal water body decreases due to permanent withdrawal/retreat of the waters
* Riparian owners entitled to an increase by accretion, or can suffer decrease by erosion (*Land Title Act* s. 94-96), so must register new plans to show change in boundaries

#### Southern Centre of Theosophy Inc. v. South Australia (1981), P.C.

* Since there was a connection between Lake George and the ocean, there were quasi-tidal effects in the lake that led to longshore drift and then accretion (between 1911-1980)

|  |  |
| --- | --- |
| Facts | A’s the proprietor of a perpetual lease for 500 acre land to the west of Lake George. The lake’s high-water mark marks the land’s eastern boundary but, since it’s receded over the years due to accretion (buildup of sediment) partly caused by construction, another 20 acres are exposed that A intends to claim. A/P: Southern Centre; R/D: South Australia |
| Issue | If a definition of a land border is dependent on the now-changing boundaries of a lake, does the newly accreted land belong to the owner of the lease? |
| Discussion and Analysis | - Trial judge: used doctrine of accretion to grant proprietor the accreted land  - Appeal judge: doctrine of accretion could not apply to property whose boundary is delineated by a line on a plan that’s not expressed to be the water’s edge (rather, a thick wavy line drawn on a map) |
| Ratio | The Doctrine of Accretion supports A’s claim to the newly exposed land. |
| Holding | This court supports the original decision of the trial court in favour of P. |

## 5. Access by Riparian Owners

* Riparian owners have a **right of access** from ownership of land abutting water
  + Right of access is distinct from public right of navigation, does not depend on ownership of waterbed
  + Right to anchor vessels on the shore
  + Must not impede navigation or access by building a structure on the foreshore
  + A pier/causeway is acceptable means of access as long as no interference with foreshore owner’s rights

#### North Saanich (District) v. Murray (1975), 54 D.L.R. (3d) 306

|  |  |
| --- | --- |
| Facts | A constructed a wharf on and across the foreshore (delineated as the land between high water and low water mark) adjacent to his land. R claims trespass. R/P: Foreshore owner; A/D: Riparian owner |
| Issue | Does a riparian owner have the right to construct structures upon the foreshore? |
| Ratio | “In the exercise of his right of access a riparian owner must not … put down anything which disturbs the foreshore.” |
| Holding | Appeal dismissed. No, and the owner of the foreshore (aka the district) could claim in trespass. |

# D. Support

* Things you can have on your property that belong to public until you capture it: air, smog, wildlife, sunlight, fish (though animals are now highly regulated)
* With a building applying pressure downward, if it collapses it’s only partly due to the excavation in the neighbour’s property
* **Subsidence**: gradual caving in or sinking of an area of land
* In BC, you were entitled to both lateral and vertical support after 20 years; allowed lateral support of an artificial weight through a prescriptive easement of support; Abolished in 70’s
* **Lateral support**: soil support
* **Vertical/subjacent support**: subsurface owner’s duty to support surface owner
  + Can be extended to vertical support for a building by applying the rules of trespass rather than the support doctrine (because removal of vertical support requires trespass underneath the soon-to-collapse building)
* Violating the right of/rule to lateral and vertical support is actionable per se.

#### *Cleland v. Berbarick* aff’d (1916) C.A.

|  |  |
| --- | --- |
| Facts | P blamed D for the destruction of his property when D excavated sand and bank from his own property, which greatly facilitated the action of wind and water on P’s property. D blamed his wife. |
| Issue | Is D liable for affecting neighbour P’s land if most damage was by the elements? |
| Ratio | *Sic utere* maxim: The right of the owner of land is to have that land left in its natural condition without interference by the direct or indirect action of nature. Neighbours must not interfere with or prevent this enjoyment.  *Sine quo res* maxim: Support is part of the land itself, must remain with the land, not an easement. |
| Holding | D removed more sand from his own property than he originally claimed, so his excavation is responsible for the inroad upon P’s land. Affirmed on appeal. |

#### Bremner v. Bleakley [1924] 2 D.L.R. 202 (Ont.C.A.)

|  |  |
| --- | --- |
| Facts | D dug holes on his property. Wind blew sand from P’s property into D’s holes. It was unable to be returned to P’s original property. D started selling the extra sand. P wanted it back. P/R; D/A. |
| Issue | Do parts of land that have lost support still belong to the original landowner’s land? |
| Discussion and Analysis | - No evidence that, even if the holes didn’t exist, the sand would have been brought back to R’s lands  - *Reductio ad absurdum* argument: it is ridiculous to designate every grain of sand as R’s chattel |
| Ratio | The owner of land is entitled to all the natural advantages belonging to that land, and therefore to all things which in the course of nature may be deposited thereon. You don’t own anything on your property until you capture it. |
| Holding | Appeal upheld in support of D. |

#### Gillies v. Bortoluzzi [1953] Man.Q.B.

|  |  |
| --- | --- |
| Facts | D didn’t shore up the side of the excavated hole to protect the adjacent buildings from collapsing. P was a tenant in the first building to collapse into the excavated pavement. His grocery store got trashed, and he sued for damages. D accused P of negligence in overloading the wall and floor of his store. D blamed the collapse on heavy winds, and began a counter-claim. |
| Issue | Is D liable to P for vertical and lateral support? |
| Discussion and Analysis | - Earth below the base of the building wall was falling into the excavated hole, and there were marks from the excavator on the wall  - Judge found: Excavation extended to under the bottom of the wall 🡪 Removed vertical and lateral support of the wall 🡪 Caused collapse; Not possibly caused by P’s overloading or heavy winds  - **Lateral support** doesn’t include support for additional weight of any structures on the land unless: a) obtained by easement or prescription, or  b) it can be shown that subsidence would have occurred even without those structures |
| Ratio | D is liable for any excavation on his own lands if it weakened lateral support needed to maintain the soil on the adjacent P property in its natural state (citing *Cleland*). |
| Holding | D guilty of trespass on land on which P’s building was standing and of negligence. |

#### Rytter v. Schmitz (1974), B.C.S.C.

|  |  |
| --- | --- |
| Facts | D excavated his lot by digging at property line 🡪 Soil removal caused loss of lateral support for P’s property 🡪 Subsoil fell away 🡪 No support under side of P’s building 🡪 Chimney and west wall collapsed into hole. D claimed to only have excavated over the property line after the collapse, when he was cleaning up and it was necessary to excavate on P’s land to install proper shoring. P sued for deliberate trespass too, claimed D’s new shoring and then inaction actually aggravated the damage. |
| Issue | Is P entitled to lateral and vertical support? Can P sue D for removing support? |
| Discussion and Analysis | - P: Has right to register a judgment/commence an action in order to gain the right to lateral support  - Judge: There was deliberate trespass by D when he excavated 4-5 ft over the property line into P‘s land. Also, he wasn’t careful when he was digging the hole. |
| Ratio | D cannot deal with his land in a way that interferes with the lateral or vertical support of P’s property. Common border is not necessary for this duty. |
| Holding | In favour of P, who was awarded damages. |

Chapter II: General Principles of Land Law

* Ownership = ***dominium jus utendi, fruendi et disponendi*** (to be used, enjoyed, and disposed of)
* Property and ownership are coterminants
* Sources of Real Property Law:
  + Reception of English law in BC occurred in 1858 (*Law and Equity Act*, s. 2): now all British statutes and case law in existence before 1858 are of legal force and effect in BC
  + 1870: BC passed the *Land Registry Ordinance*, creating **Torrens Land Registration System**
  + 1871: BC joined Confederation
* Property rights are under provincial jurisdiction via the common law, equity, and statutes:
  + *Land Act*: Deals with Crown land, Crown grants (s. 50), the 7 land districts, surveying
  + *Land Title Act*: Sets up the BC Torrens land registration system, requires that all transfers be made on the prescribed form (Form A) and on a single page (s. 185)
    - S.185 doesn’t apply if another statute allows or Registrar accepts different form
  + *Property Law Act*: Deals with statutory provisions, land issues, etc.

# A. Real and Personal Property

* **Realty**: land or real property; fixed and static; two types:
  + **Corporeal interests** (tangible, where you have right to possession of land)
  + **Incorporeal** (intangible, where you have right to the use; e.g. easements, right of way, covenants, profits *a prendre*, mortgages)
* Real property comes with real rights (*jura in rem*), entitles taking action for trespass, nuisance, negligence, etc.
* **Personalty**: all types of property other than land; can be moved around; two types:
  + **Chose in possession** – tangible; chattels
  + **Chose in action** – intangible; IP, money, stocks, etc.
* Personal property operates under absolute/**allodial ownership** (owner is absolute)
  + No concept of tenures: Instead, Courts create equitable interest, which creates estates (e.g. car leases)
  + Freely alienable both *inter vivos* or upon death
  + No registration required for a completed gift of personal property
  + Holder of a life estate in personalty owes fiduciary duty to preserve the estate for the ultimate recipient

# B. Reasons for Studying the Law of Real Property

* Land law has 2 main purposes:
  + 1. To control how land is disposed of (sale, will, gift, etc.)
  + 2. To control how land is used

## 1. Dispositions

* **Disposition** can be done *inter vivos* (between living people) or after one party died
* Can be sold in a contract of sale, or gifted, or disposed of by will

## 2. Use of Land

* Law of torts directs the Common Law usage of land: nuisance, trespass, negligence
* Law of contracts governs use of land: e.g. protecting interests of a neighbourhood, restrictive covenants
* Fed and prov statutory restraints (e.g. airspace, environment, agri. uses), municipal regulations (e.g. zoning)

# C. Some Basic Principles of Land Law

## 1. Tenure

* Started from Guillaume le Conquereur and the feudal system
  + Granted “**estates**” to tenants, which are “time in the land”
* Technically no one owns land; people just own an **interest** in a piece of land (from Crown)
* 4 types of freehold tenures (pg 2-5) all eventually united to become **socage**
* All fee simples are held directly from the Crown, due to **sub-infeudation** from pre-1290
* *Tenures Abolition Act 1660*: Abolished all incidents connected with socage except:
  + **Forfeiture** – right for Crown to claim land of person guilty of high treason
  + **Escheat** – right of lord to claim land of tenant who died with no one to succeed his interest (= modern intestacy) or who committed a felony
* **Doctrine of tenure**: rules for allocating land rights and corresponding obligations
* **Doctrine of estates**: rules to describe duration of splitting property to give/sell/lease to others

## 2. Corporeal and Incorporeal Interests in Land, and the Doctrine of Estates

* These first four types of estates are **freehold estates** (developed within feudal system)
  + Exclusive ownership held for an indefinite amount of time
  + Absolute ownership is by Crown; landowners merely hold a time in the land
* **Fee simple**: Almost equivalent of absolute ownership due to the freedom to dispose of interests /property *inter vivos* (from 1290 *Statute of Quia Emptores*) and by will on death (from *Statute of Wills* 1540) (e.g. person without heirs wasn’t forced to let land revert to original grantor)
  + “Fee”: Estate was inheritable, did not die with present owner
  + “Simple”: No qualification on what heirs could inherit (e.g. descendants, also ascendants and collaterals)
* **Fee tail**: limited disposition so just direct descendants can inherit; now prohibited in BC (*Property Law Act*, s. 10)
* **Life estate** is an estate that only lasts for the lifetime of the holder
  + During that lifetime though, the holder is entitled to use, enjoy, and dispose of it
  + Possessor in fee simple has given the holder a portion of his infinite time/interest in land
* **Estate Pur Autre Vie** is measured by some other life; e.g. testator in his will may direct his executors to hold all his real property on trust to pay annual income to his wife until his wife’s death, and upon that even to divide it up among his children equally
* **Leasehold estates**: set time possession has been carved out of landlord’s indefinite duration
  + Developed outside of the feudal system
  + Writ of ejectment protected tenant against dispossession by landlord or 3rd party
  + Today, lease is treated as an interest in land (realty)
* **Future interests** can be corporeal or incorporeal; e.g. an interest that prevents you from taking immediate possession of a property because of a pre-existing interest to someone else
  + Holder of a fee simple can create a number of estates in succession
  + Includes a land interest without actually holding the land
* **Reversion**: when tenancy is done, the owner gets the property back
* Example: Dennis possesses Blueacre in fee simple and gives Mallory a life estate on the land. M can sell her estate to Fred, but he only gets the life estate *pur autre vie* for M’s lifetime. If F sells it to Rosalyn, F is out of the picture, and R keeps it until M dies. D has a reversion/future interest so can still dispose of the land to Kristi (who has the remainder in fee simple) after M’s life estate is finished (because of *Nemo Dat*). K does not have the right to possession; she now gains an interest in land. D granted Connor a right of way in Blueacre, so after it passes to K, he still has this incorporeal interest in Blueacre’s land.

## 3. Legal and Equitable Interests

### Origin of Equitable Interests

* **Legal interest**: one assured through common law and good against the world
* **King’s Bench** defeated the other common law courts, led to law of contract and of tort
* Lord Chancellor adapted CL into Court of Equity; Secretary of State of all depts.; “keeper of King’s conscience”

### Development of the Use

* **Use** created where holder of legal title was compelled by Lord Chancellor to hold the interest for another person
  + Survival of the Use guaranteed by **joint tenancy**, which ensured that the estate would never come to an end through the **right of survivorship**
    - If A transferred his interest to X and Y to the use of A, when A died X and Y would take absolute title by right of survivorship and there was no succession of the legal title – and no estate tax
  + Allowed someone to dispose of property after death
  + Provided women with an independent means of support
* Process of creating Use: **feoffment**; modern version is the trust
  + Example: If F, the freeholder in fee simple, transfers the land to T “to the use of B”, T gets the legal interest (thus is now the new freeholder in fee simple) but would hold freehold interest for B’s benefit. B gets the equitable interest.
  + F = **feoffor** (settler); T = **feoffee to uses** (trustee); B = ***cestui que use*** (beneficiary)
* **Equitable interest** is an interest protected by the Court of Equity that “*cestui que use*” (“he to whose use” a land is held) acquired
  + Better to call something equitable as opposed to just legal because, under the Court of Chancery/Equity, there are likely more rules applicable to protect the property owner
* Chancellor can impose on the trustee a **fiduciary duty** (act with utmost good faith in duty to beneficiary) to create and transfer Use to a beneficiary, so beneficiary avoids paying feudal taxes
* **Seisin**: possession and occupation of a freeholder for a period of time; this is what you have when you move from a feudal system to an allodial (abuttal) one
* Court of Chancery eventually split up *jus utendi* (for Trustee) *et fruendi* (for Beneficiary), which are the interests given by the Settlor who holds the seisin
  + Common Law courts didn’t recognize the beneficiary’s rights to enjoy the land

### The Statute of Uses

* Created by King Henry VIII, it eliminated Uses, and eliminated the feoffee to uses by turning the equitable title of the *cestui que use* into a legal title (thus putting seisin into the *cestui*)
  + This is called **executing the use** (automatic transfer of legal title from T to B)
  + Now it means that B has to pay taxes, since she holds both legal and equitable title now
* If there were two Uses, Statute did not eliminate the second Use upon a use
* For creating trusts and avoiding Statute of Uses: F grants the title unto T for the use of T, who can then pass it on in **trust** for B; Essentially the same as the Use, but a double transfer; the first time it’s granted to T as a Use, it’s been executed; the second time it’s granted as a trust, the Statute is exempt
* B can exercise *in rem* rights (recognized by equity) if T misappropriates property in order to get it back

### Emergence of Modern Trust

* Doctrine of **constructive notice** (what a transferee ought to have known if there had been made the investigation a reasonable person would have made) can protect equitable interest
* Maxim: ***Nemo Dat Quod Now Habet*** = “One cannot give that which one does not have”
* Beneficial and equitable are generally interchangeable, except:
  + T has a legal title, but B has a beneficial interest and an equitable estate in fee simple
  + B can transfer that estate to B2, so that B no longer has beneficial interest; B2 does now
  + So when T sends money from his trust/asset to B, B becomes T2; now T has legal interest, B/T2 has equitable interest, B2 has a beneficial interest
* If Blackacre was sold to A, A becomes Equity’s sweetheart (***bona fide* purchaser of value**) as a protected innocent. A gets the fee simple, but B can bring a claim against T.
* Equitable doctrine of notice:
  + Express/actual notice: what the transferee really knows
  + Implied notice: what the transferee’s agent knows
  + Constructive notice: what transferee ought to know if he had made reasonable inquiries

## 4. Freedom of Alienation

* **Freely alienable**: We can sell and dispose of [land] whenever we want, at lowest cost possible
* Transfer of property is facilitated by:
  + Freedom of disposition: power of the current holder of property to dispose of it
  + Limitations on restraints of alienation: limit power of owner to impose restraints on the freedom of alienation of a transferee
  + Mechanisms of transfer: simple and straightforward transfer process (pg 2-21 to 2-24)

### Freedom of Disposition

* *Abolition of Tenures Act* (1660): Converted knight-service into socage tenure
* Widow’s right to **dower** (life interest in 1/3 of deceased husband’s realty) imposed some restriction on a married man’s right of alienation, until dower was abolished in 1925

### Restraints on Alienation

* **Direct restraints on alienation**: Finding a way to say that the person you gave your property to can’t dispose of your property to anyone
* A long series of future interests could prevent alienation, but restricted by 1) courts making a series of life interests within a family impossible, and 2) Statute of Uses rule against perpetuities
* **Strict settlement** was mostly for nobles to keep land within their family
* **Documentary conveyance**: Grants possession to someone, while retaining ownership and right to use a land
  + Can grant your estate in fee simple in remainder to another person: **release**
* Modern System has: Registration of documents (All documents relevant to a parcel of land are on file) and Title registration (quasi-Torrens system) to protect purchaser
* Mirror principle: register of title reflects accurately and completely all estates/interests that may affect the land
* Curtain principle: registry is only source of info for a prospective purchaser; all estates/interests that do not appear on title are irrelevant

# D. Relationship Between Real and Personal Property

## 1. Tenure

* Never applied to personalty and is now of no significant in relation to realty

## 2. The Doctrine of Estates

* **Allodial ownership**: absolute, which excludes doctrine of estate; well established in cases of **fungibles** (property consumed in use, like a case of beer!)
* It’s cool to have a succession of legal titles (equitable interests) and free alienability in personalty; that’s what most of today’s trusts are like, shares and bonds instead of land

#### Re Fraser, [1974] BCCA

* **Encroachment**: adding an extra burden or restriction

|  |  |
| --- | --- |
| Facts | The deceased in his will named R as executor and trustee and gave his wife a life interest in his estate and property. The rest and residue of the estate and property he gave to a charity.  A: Minister of Finance on behalf of widow; R: Fraser the trustee and executor |
| Issue | Could there be life estate in personalty? Does the widow have a power to encroach upon the personalty during the term of her life interest? |
| Discussion and Analysis | - BCSC: Held that R couldn’t prevent A from encroaching upon the personalty, and that she had no fiduciary duty to preserve the personalty for the charity (ruled in R’s favour)  - CA: The charity gets a vested interest in the remainder of the estate but enjoyment of this won’t happen until after A dies; while she’s alive she is still entitled to revenue derived from the *corpus* (i.e. enjoyment of the life interest in the personalty)  - Testator appointed a trustee in order to ensure that the remainder of his estate goes to the charity as he wanted after his wife dies. Testator never explicitly mentioned that he intended encroachment  - A didn’t take an absolute interest in the personalty after the testator died, but it’s subject to an executory bequest to the charity after her death |
| Ratio | - *Re Bangs Estate*: Personalty can be the subject of a life estate with a gift over, but it cannot be encroached upon by the estate holder. |
| Holding | Appeal allowed with no costs, original assessment restored. |

## 3. Alienability

* Transferors tried to impose direct restraints on alienation; found that the Courts treated them as they did restraints on land

## 4. Devolution on Death

* On death, property may pass by will or in default of a will according to general rules of law (**intestate succession**), usually in a statute

# E. The Relevance of English Law

* *Law and Equity Act*, s. 2: English statutes and court decisions apply in BC today in theory
* *Statute of Quia Emptores* and the *Statute of Uses* remain part of theoretical foundations of land

Chapter IV: Acquisitions of Interests in Land

# A. Crown Grant

* **Grant** and transfer form and deed can be used interchangeably
* As a result of *Land Title Act*, 90% of lands in BC are owned by Provincial Crown, except:
  + Federal Crown lands (e.g. public harbours, national defence lands, railway lands)
  + Privately owned lands (though Crown still “owns” fee simple lands)
  + Aboriginal title lands (granted via treaty or lands contingent on settlements)
* Can transfer land to a private citizen/company through **Crown grant**, enabled and operated under the *Land Act*
* Crown grant will set out terms and conditions of a lease/right-of-way/license of occupation
* If you get a fee simple Crown grant, *Land Act* s. 50 establishes what rights the Crown still holds to your land:
  + Right to take up to 1/20 of property (unused land) for public works
  + All subsurface rights: oil, gas, minerals
  + Right of someone with a valid water license to come unto land and exercise rights under that license
  + Right to take certain materials (e.g. grave, stone, timber) for use in public works

# B. Inter Vivos Transfer

* ***Inter vivos* transfer**: transfer among the living
* **Agency**: Agents’ contract involves a Principal (owner) and an Agent (who receive the “Listing” agreement of the estate in fee simple); If successful, it moves on to the “**interim**”, or contract, step

## 1. The Contract or Executory Stage

* Transfers equitable interest
* **Contract of Purchase and Sale**: agreement between vendor and purchaser to form legally binding K:
  + Equitable interests passes: vendor becomes a trustee for the purchaser (beneficiary) of the transferred estate; vendor retains legal interest until completion (registration)
  + Rights of vendor: Vendor retains right to possession until purchase money is paid; Vendor has right to purchase money and can sue for breach of contract or impose lien on property if unpaid
  + Obligation of Purchaser: Purchaser must pay purchase money. Purchaser has right to sue for specific performance. At CL, purchaser bore risk of loss, but *Contract of Purchase and Sale*, s. 6 holds that vendor bears risk of loss until completion. Purchaser should ensure that insurance begins upon completion, when both legal and equitable interest have transferred.
* *Law and Equity Act*, s. 59(3): A contract respecting land or a disposition of land is not enforceable unless these three requirements, the three P’s, are met: **Property, Price, Parties**
  + There must be writing that indicates the valid K has been made and gives a reasonable indication of the subject matter, and must be signed by the party being sued or agent
* Predecessor was s. 1(1) of the ***Statute of Frauds*** (pg 4-5, 4-6)

### Q’s on p 4.6

1. B didn’t sign, so he’s not one of the persons charged. A would not win.
2. If mode of payment isn’t a material term, A would win because B signed the document. Since B is the one that gave away the property, he’s exposed himself out there and made the agreement enforceable.
   * If the mode of payment is a material term, then it wasn’t included in the writing by B, so A wouldn’t win.
3. A’s written letter to B is now a written memorial (includes the material terms) that proves that A and B had an enforceable agreement. B would win. If A had just said “I’ve found a higher offer”, then B wouldn’t win.
4. XYZ had written nothing except for the cheque for A, administrator of D’s estate. This is not enough to make A liable since there is no reference to Blackacre (a material term) on the written memorial (i.e. the cheque).

(i) A’s receipt is a written memorial with all the material terms, so XYZ would win.

(ii) If we put the cheque XYZ signed and the receipt A signed together, we have one complete written memorial. But they would need to refer to each other. As it stands, A would not win.

## 2. The Transfer – Form, or Executed Stage

* Completion: carries out the binding contract reached at the Executory State, and transfers the legal interest from the vendor to the purchaser; Under Torrens, completion = Form A **registration**
* Historically involves a ceremonial physical **livery of seisin** (“Enter upon this land and may God bring you joy”), that could just be giving a handful of dirt
* ***Land Transfer Act***, s. 185: Transfer must be in writing, in prescribed form and on a single page (Form A)
  + S. 185(20)(a)(b): Registrar has discretion to accept **other forms** and/or historical docs. for registration
  + S. 43-45: Officer’s signature required to certify identity of transferor as person named in title (individual, corporation, or personal agent) (**witnessing**)
  + S. 186(2): Words of Form A deemed to be words in Part 1 of ***Land Transfer Form Act*** with the meaning given in Column 1 of Schedule 2 (**meaning of words**)
  + S. 186(4): Form A legally transfers interest even **without express words of transfer** (i.e. X transfer to Y)
  + S. 186: All the necessary info of a deed is contained in a transfer form, but it does need to be handed over to the transferee
* There must be a written **memorial** signed by people **charged** (both parties), which ensures enforceability
  + E.g. D wants to sell C X for $1 mil. If D is not charged in a written memorial, then D can take C’s money without giving him the property. In this case, Equity tells D he is honour-bound to give C the land since C has paid him and he took the money. D is allowed to not take the money and not give C land X.
  + Must include what is expected

### Writing and Sealing

* **Seals** provide authorization of contracts/agreements
* With advent of *Statute of Uses*: documentary transfer became standard (instead of livery of seisin)
* **Deed/grant**: transfer document under seal; No seal = no transfer of land
* ***Property Law Act*** s.15(1), s. 16

### Registration – Prescribed Forms

* ***Property Law Act*** ss. 4-7
* ***Land Title Act (LTA)*** s. 39, s. 185(1)
* Go to the **Land Title Office** and register in the bin for Blackacre, which will now say that the Buyer is the owner with an estate in fee simple in a public document that shows all the interests in Blackacre that currently exist

### Standard Forms

* Next development: **standard forms**
* ***Land Transfer Form Act*** ss. 2-4
  + **Form A** is required to transfer a freehold estate, includes: identities of the parties involved, the property being sold, settled price, consideration, freehold estate transfer (e.g. fee simple, with or without conditions), execution, and any other terms regarded by the parties as **material** (anything that is so important that it needs to be clarified and settled in writing)
  + Relatively simple form, but qualified by other documents that preserve legal underpinnings
* **Covenant**: agreement between transferor/covenantor and transferee/covenantee
  + *Land Transfer Form Act* helps make it simpler, by including just the simple standard forms of Column 1 of Schedule 2; Column 1 covers what Column 2 means

## 3. The Transfer – When is it Operable?

* This area is normally dealt with under contract law (becomes significant for gifts)
  + Under CL, deed takes effect immediately after “signed, sealed, and delivered” (intention given)
  + Under Torrens system, there must be a physical act
* According to Part 3 of the *LTA*, an unregistered instrument does not pass estate
* S. 20 of the ***Land Title Act***, interpreted:
  + If you want an estate in fee simple that you purchased from D, that estate in fee simple will not give you what it says it’s giving you (in the transfer form) unless you proceed to register it at the Land Title Office
  + Significant because ownership is a real right, special *vis a vis* all the rights in legal system
  + Cuts down on litigation: by making clear the interactions between the vendor and the buyer
  + Exception: You’re buying from D and want to sue D on that document on a dispute regarding transfer. You can sue D even though your title hasn’t been registered, by relying on your contract and the transfer form D already gave you. This is because D, as person “making [the transfer]” (you don’t sign it in any meaningful capacity, just to show you’ve received it), is the significant person in the transfer document.
  + Land Title Office is a public place for anyone to look inside the Blackacre bin in the computer system
  + In Common Law system back in the day, you did not need to hand over deeds to registration.
  + If there was a gift of interest in land from A to B, is there any difference from a contract?
  + If A sells to B and A backs out, it’s a breach of contract if they had an enforceable contract.
  + By actually giving the duplicate (the transfer form) and thus getting registered, it’s the point of no return
* Example: A (registered owner) 🡪 B (doesn’t register), so then A 🡪 C (does register)
  + Under CL: B is protected by *Nemo Dat* (A couldn’t give to C what didn’t have, because it was with B)
  + Under Torrens: C’s interest prevails
  + B is vulnerable to a third party. May have a claim against A, but no claim against C.
* **Gift**: Voluntary and intentional transfer of property without consideration, normally not enforceable by donee; required steps for a completed gift (not a personal property gift):
  + Intention: Donor has the mental capacity to know he’s parting with ownership. All words and actions must be unequivocal. There should be matter of evidence: circumstances, relationship, size of gift
  + Acceptance: Donee accepts if it’s anything short of outright refusal, within reasonable time
  + Delivery: Transfer of possession or equivalent
  + Registration: Donor must have done everything needed in order for the transfer to take place (includes delivery of deed and registration)

#### Ross v Ross (1977) NSSC

|  |  |
| --- | --- |
| Facts | Grandmother wants to grant land to her grandchildren. She wanted to make sure her daughters didn’t challenge this. During her lifetime, she executed a deed (under seal) and made it clear that she is transferring it to her grandson. She is then asked if she wants to have this deed recorded, but she says it’s unnecessary and she’ll do it herself. She takes the deed, doesn’t tell anybody what she’s done (not even the grandson), and puts it in her handbag. After she died, they found the deed in her bag and she had not recorded it. |
| Issue | Did the fact that she did not transfer the deed to her grandson eliminate the delivery of Blackacre? |
| Discussion and Analysis | - Court will attempt to fulfill intention of grantor (based on the circumstances, their behaviour) |
| Ratio | Appropriate execution (“signed, sealed, delivered”), and not necessarily physical delivery of a deed, is sufficient to satisfy effective transfer. |
| Holding | She didn’t need to hand over the document in order to effect a delivery of an estate/interest in land. |

#### Zwicker v Dorey (1975) SCC

|  |  |
| --- | --- |
| Facts | Mr. Zwicker executed a deed under seal under which he transferred a large amount of land to stepson D with a clause not to register it until Z’s death. The deed was never handed over. Z conveyed promised lands to himself and new wife P. After Z died, P claimed Z gave her everything. |
| Issue | Who was the land conveyed to? |
| Discussion and Analysis | - P was trying to create a will but used the wrong instrument (used a deed)  - If gift, there must be explicit notification of the transfer of funds |
| Ratio | A document operative upon death is not a deed but a testamentary document. The court looked at intention at the time of transfer. |
| Holding | The deed was meant to be testamentary and effective upon Z’s death. So title passes to P instead. |

#### MacLeod v Montgomery (1980) Alta C.A.

* In a land title system, when you are registered, it means that your name is inserted as the holder of the estate in fee simple in the Blackacre bin. In that bin there is also a **duplicate indefeasible title**. If there is an application to change title, that duplicate must be with the registrar.

|  |  |
| --- | --- |
| Facts | D owned a parcel of land, acquired from her late husband. He was fond of P his granddaughter, so after he died, D executed a document that was like Form A to transfer the estate in fee simple to P. D reserved to herself a life interest. In this case, the duplicate had been taken out of the registrar and was in the hands of D’s lawyer. D executed the transfer form, and hands that document to P. D says she’ll get her lawyer to send P the duplicate indefeasible title. After D died, P presented just the transfer form and asked for it to be registered. P handed in the common law equivalent of a deed, and claimed it was a transfer form. Registrar refused and demanded the duplicate. P/R; D/A. |
| Issue | Does execution of the land transfer form (surrogate of deed) Form A by the donor constitute a gift? |
| Ratio | In a land title system in a gift, to make the transfer complete, the donor must deliver to the registrar the transfer form (to the transferee) AND must make available the duplicate. Equity will not force a volunteer to complete that which is incomplete. |
| Holding | Appeal allowed. There was no completed gift. Trial judgment at trial set aside, action dismissed. |

## 4. Transfers to Volunteers

* **Volunteer**: someone who hasn’t given consideration for a land but still receives a valid transfer of legal title; e.g. receiver of land as a gift, or a transferee (The term volunteer is more accurately used to describe the giver)
  + Blackacre is registered in V’s name. If T had given it away inappropriately, B can get it back from V.
* Presumption of resulting trust: A 🡪 B (A has transferred legal title but retained equitable title; B holds in trust A)
* Presumption of advancement: Husband 🡪 Wife, or Father 🡪 Child (A has transferred title absolutely)
* ***Property Law Act*** s.19: No need to use specific language to state gift, can use supporting documents
  + Does not change presumption of resulting trust, just eliminates need for specific language
* Pre-*Statute of Uses*: A transferred to B (volunteer)
  + Equity presumed that B now held to the use of A (resulting use)
  + If B wished to claim an absolute interest (which includes equitable interest), the onus was on B to prove that was A’s intent (A would have said “unto and for the use of B”)
* *Statute of Uses*: A transferred to B (volunteer)
  + It was presumed B now held on resulting Use of A
  + The Use was executed and legal title was back with A
  + B still had to show intent to make it an absolute gift
* The Trust: Unto and for the use of B on trust for C
  + Confirm the location of legal title, and by analogy, the resulting uses
  + Presumption of resulting trust for the transferor
    - “Result” in **resulting trust**: means to bounce back; an implied trust
  + But also said that the fact that the transfer was to the use of the transferee was a sufficient indication that the transferee was intended to have an absolute title
* If A gives land to B: CL says that B is the new owner if A has given the legal title to B; **absolute transfer**
  + Equity assumes there was no voluntary transfer of the equitable interest for nothing in return; it bounces back to A, and B only has the legal title and rights to control and administer (fruendi) Blackacre
  + Now: even better method is to bring in more evidence

# C. Will or Intestacy

* Transfer of both real and personal property from a dead person, *per mortus causa*: by a **will** (testamentary; transfers through just dying), or by **intestacy** succession (the ***Estate Administration Act*** tells who gets what)
* According to ***Wills Act***, ss. 3-4, to sign a will the testator must be over 16, have two adult witnesses, and there must be a trustee/representative/executor in whom the property is vested
* **Transmission**: pass of the interest in land to the personal representative of the deceased
* As soon as you die, your property forms a deed and vests in your personal representatives, who are charged with the orderly administration of the estate
  + Personal representative holds legal title, and the heirs and legatees have beneficial interest
* ***Sui juris***: full legal capacity
* To **call for a trust**: to call for a legal title to come to a trustee

# D. Proprietary Estoppel

* Where it would be inequitable for D to assert his rights, P can claim proprietary estoppel as a cause of action. The following conditions must exist:
  + P must have made a mistake to his legal right
  + P must have expended money or act on faith of his belief
  + D must know of his legal right and that it’s inconsistent with P’s claimed right
  + D must know of P’s mistaken belief of right
  + D must have encouraged P in expenditure of money or other actions either implicitly or by abstaining from asserting his legal right
  + D’s actions were unconscionable, inequitable, or unjust equitable fraud
* In *Kelsen*: Imperial Tobacco not successful under proprietary estoppel because there was no active encouragement from Kelsen, and Imperial Tobacco didn’t rely on his promise to their detriment

#### Zelmer v Victor Projects, BCCA

|  |  |
| --- | --- |
| Facts | P want to build a well. The land they want to use is higher ground and is owned by D. They meet with Mr. Bennett, who controls D, and Mr. Tomlinson an engineer and make a deal to build a reservoir. P prepare to pay and D tells them not to worry and to start building. D then changed his mind and argued the reservoir was in the wrong location. P/R; D/A. |
| Issue | Is there proprietary estoppel? Was P entitled to an easement in respect of the reservoir? |
| Discussion and Analysis | - No contract since it was for nothing  - No transfer form |
| Ratio | P acted upon an actual promise, based on D’s words and conduct taken as a whole, to his detriment. |
| Holding | Appeal dismissed. Agreed with trial judge that there was proprietary estoppel. |

# Intellectual Property

* *Desny v Wilder*: Can there be property interest in an idea?
  + Ratio: No inherent property in ideas, only those published or expressed in permanent form.
* *International News Service v AP*: Is there property in news? Does news become common property if published?
  + Ratio: There is quasi-property to the extent as to prevent unfair competition. No property in the facts of a news story except between competitors.
* *CCH Canadian Ltd. v. Law Society of Upper Canada*: Did D breach copyright by allowing library patrons to photocopy publishers’ work?
  + ***Copyright Act*** objectives: to balance public interest in dissemination of works (recognizing creator’s rights and giving due weight to their limited nature), and to obtain just reward for creator