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# CHAPTER V – REGISTRATION - OVERVIEW

## C. THE ROLE OF THE REGISTRAR:

The registrar is charged with the responsibility of deciding in the case of each application whether the applicant has a **“good safeholding and marketable title”** (ss. 169, 187, 197).

The registrar has the power to **make corrections** under ss. 382(1)(c) and 383. This is a discretionary power and the registrar has no duty to correct errors. This power is limited to corrections that do not take away the rights of a bona fide purchaser. (*Heller*)

An applicant for registration that has been rejected **can appeal the decision** of the Registrar (Part 21, ss. 308-314)

The registrar’s duties under the act are not administrative or clerical only **but also judicial** (*Re Evans*).

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” (*Shaw*).

### RE: LAND REGISTRY ACT, RE EVANS APPLICATION: judicial role of registrar, need clear boundaries to register title

FACTS:

The Evans had a joint tenancy of a lot of land subdivided from a larger parcel. In the plan of the larger parcel there was no stated dimensions but was “reputed to be 66 feet wide, more or less”

When Mr. Evans died, his wife applied to register the title in her name solely.

The registrar refused the registration because he felt that without proper boundaries, there might be a risk of overlap in registration of title of the two adjoining lots.

HELD:

The Registrar’s decision is upheld

RATIO:

The registrar is obliged to act judicially in determining if a clear, good safe-holding and marketable title exists before he can issue a certificate of indefeasible title.

Any person has the right to show that the whole or any portion of the land is by wrong description of boundaries or of parcels improperly including in the registrar.

### RE LAND REGISTRY ACT AND SHAW: registrar will presume equitable conduct, unless “palpable blot on the face of title” [registrar not mere machine]

FACTS:

Son, acting under power of attorney granted to him by his father, the registered fee simple holder of the estate, granted himself a transfer of a mortgage. In effect, he signed as both the transferor and the transferee.

The district registrar refused to register the assignment until notified by the father.

HELD:

Registrar’s decision was upheld.

RATIO:

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”.

*Shaw* is now codified in Property Law Act Section 27.

### HELLER V BRITISH COLUMBIA (REGISTRAR, VANCOUVER LAND REGISTRATION DISTRICT): a registrar is not under a duty to enforce the right of a party through correction

FACTS

Mr. Heller was the registered fee simple owner of land and transferred it to his wife. She secured registration. Later, he applied to the Registrar to have his wife’s registration cancelled and his own registration reinstated, because the registrar had erroneously assumed that the duplicate certificate of title was on deposit in the Land Registry Office. In fact, it was in the possession of one Cuff, who Mr. Heller had transferred a one-half interest in the property.

The Registrar refused to correct Mrs. Heller’s registration.

Trial judge overturned decision, the Court of Appeal overturned the trial decision, and then Mr. Heller Appealed to the Supreme Court.

HELD:

Appeal dismissed.

RATIO:

Registrar has a limited power to correct or cancel a registration when he discovers that an error has occurred. This is at his discretion, and he is not under a duty to enforce the right of a party through correction.

It is no part of the function of the registrar to adjudicate upon contested rights of parties. He can only act upon the material given to him.

A Registrar’s decision not to act might not be appealable.

## 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 by able to claim compensation for the loss of an interest in land. Few reported cases where the fund was held liable. If claims are made they are generally settled without litigation.***

Land Title Act

#### ***Remedies of person deprived of land***

#### ***296. Requirements for a person to qualify as a ‘claimant” and recover from the Assurance Fund.***

Deprived of any estate or interest in the land because of the **conclusiveness of the register**, in the circumstances where **the claimant would have been successful had the Act not been passed [common law]**.

In consequence of **fraud or wrongful act of a person other than the claimant as owner of the land** (ss 2(a)(ii)**)**.

Must be **barred from bringing an action for other remedy** for the recovery of land, or rectification of the registrar by the Act (usually due to conclusiveness of registration and protection of *bona fide* purchasers) (ss 2b).

**You must sue the person who caused the loss, and join the Minister as a nominal party defendant**.If the fraudulent party **absconds** or is dead, or cannot pay the full amount (must prove certificate of judgment and reasonable steps to collect), then you can claim from the Minister and the Assurance Fund (ss 3-7).

Three year limitation after discovery of deprivation (ss 8)

#### ***Protection of purchaser in good faith and for value***

297.

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
   * recovery of land,
   * deprivation of land, or
   * 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
   * may have derived title from or through a person registered as owner through fraud, error or a wrongful act.

#### ***Fault of Registrar***

298.

1. "**Solely or partially**, as a result of an **omission, mistake or misfeasance of the registrar**" [new]
2. Limitation period: within 3 years after the loss or damage is discovered by claimant

#### ***Limitation of Liability of assurance fund***

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

Suffered by owner of undersurface rights, or an equitable mortgage by deposit of duplicate certificate of title

Occasioned by

Breach by a registered owner of a trust

A misdescription of boundaries

Improper use of a sea of a corporation

Dissolution of corporation

Provisional certificate of title

If the land in question may have been included in 2 or more grants from the Crown

Error or shortage in area of a lot in an air space parcel

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.** (p 5 041)

### McCAIG ET AL. V. REYS ET AL. 1) loss 2) fraud 3) barred from rectification 4) by operation of statute (would have succeeded in CL). Where equities are equal the law prevails

FACTS:

Farwest sold land to South Transport (headed by Mr. McCaig). South Transport sold to Reys by sub-agreement. Reys offered option to sell back 24 acres in a separate instrument; McCaig agreed. 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 option, said they would honor it, and registered their title. Rutland (through the actions of their agent Jerome) then sold to Jabin **without notifying** Jabin of the option. Jabin took title **bona fide and for value without notice**.

HELD/ RATIO:

Final transaction with Jabin extinguished any rights McCaig or South Transport would have had. McCaig cannot claim against Assurance Fund. McCaig is awarded damages against Rutland.

In order to succeed against Fund, claimant must show:

1. Deprived of land or an estate or interest therein 🡪 YES
2. Occasioned by fraud, misrepresentation, or some wrongful act of any other person as owner 🡪 YES
3. Barred from bringing an action for rectification of the registrar 🡪 YES (Jabin’s registration of indefeasible title)
4. Loss was occasioned as a result of the operation of the statute (would have succeeded at common law) 🡪 NO, McCaig cannot succeed in his claim
   1. Deprived of his interest by breach of contract of Reys (must ensure option is exercisable when granting it) and fraud of Rutland/Jerome (active deceiving of Jabin), not Jabin or the LRO.
   2. Bona fide purchaser without notice (Jabin) has always been protected in equity
   3. Jabin has superior title both in equity and law.

Where equities are equal, the law prevails.

### ROYAL BANK OF CANADA V. BRITISH COLUMBIA (ATTORNEY GENERAL) no case can be founded solely on a procedural error on the part of the Registrar

FACTS

Walsh became 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. When RBC could not recover loans from Walsh, it made a claim against the Assurance Fund.

RBC said the Registrar's "mistake or omission" in accepting the Bank of Nova Scotia mortgage when the certificate of title was not deposited in the Land Registry Office caused RBC to suffer a loss. If Registrar/office had not been negligent they would have known that certificate was not at the Office and would have informed Bank of Nova Scotia. RBC would have found out about deceitful conduct of Walsh and would not have advanced further money to him.

HELD:

RBC cannot recover from the Fund.

Registrar owed no duty to RBC. S. 47 of Act expressly states that holder of an equitable mortgage does not entitle the holder to registration under the Act. Person alleging loss must show that loss flowed naturally and directly from Registrar's mistake 🡪 not the case here, chain of liability is too tenuous ("Such a mistake should not have been made and that if the Registrar had not made a mistake it would fortuitously have learned of Walsh's deceitful conduct and avoided loss" etc.)

RATIO:

No case can be founded on procedural error solely on the part of the Registrar.

Those who seek to rely on equitable mortgages must accept the risks inherent.

Strict adherence to the Torrens systems provides certainty and security and makes this type of litigation unlikely.

Where the equities are equal, the legal title prevails. Both RBC and Nova Scotia were blameless in their conduct, but Nova Scotia had *in rem* rights, while RBC only had an equitable mortgage (and therefore only *in personam* rights).

### GORDON V HIPWELL

FACTS:

Hipwell came to BC from England. He bought some land from Gordon, paying with diamonds he had smuggled into Canada. Hipwell was registered as fee simple owner of the land. He later went back to England.

After his departure the diamonds were seized by RCMP. Gordon filed a caveat against Hipwell’s title on July 16, 1948. In February 1949, 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 *inter alia* against the Assurance fund. Court found his interest was a “permanent caveat” (no longer exists).

HELD:

Court said LTR was liable for improperly erasing caveat.

# CHAPTER VI: REGISTRATION OF TITLE

#### ***There is nothing in the Land Title Act, which compels registration, except in the case of an initial Crown grant (s 54).***

## Effect of indefeasible title

#### ***23***. ***(2) An indeafeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, 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* *(resources, lien, lease under three years, highways, expropriation, caveats charges, boundaries, fraud):*

1. Reservations in the original Crown grant
2. Federal or provincial tax, default of which can result in a lien on the land
3. Municipal fee
4. A lease 3 years or under with actual occupation [should always inspect the land]
5. Highway or public right of way
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 and 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. Builders lien. **If the builders are not paid they can file a lien on the title, which could lead to a sale of the property**. With the Builders Lien Act they have the right to against the land, and therefore against the registered owner. Holdback is retaining 10% - and each subcontractor down the chain becomes a trustee. A lien can be filed at any time within 45 days after the work has been completed, abandoned, or termination of the construction contract.
8. Improper Boundaries. (*Re Evans*)
9. Fraud, including forgery, in which the registered owner has participated in any degree;
10. A restrictive condition imposed by the *Forest Act*.

#### ***(3)*** ***= Squatter’s rights aboligshed for both private and crown land subject to small window before 1975 if first crown grant.***

#### ***50.******Crown reservations: minerals, water/riparian rights, construction material, 1/20th of the land for public works with compensation. (p. 6-4, 6-5).***

**Agricultural Land Commission Act**

All land issued after June 29 1973 is subject to this Act. The Act reserves certain tracts of land which cannot be used for non-farm purposes (i.e., subdivision, removal of soil or placement of fill) [s. 1,16,20,21,28]. All land deemed to be agricultural land issued after 1973 must bear an endorsement of being subject to the Act on its title (s 60). All land before 1973 is subject to it by implication and without endorsement.

## The General Principle of Indefeasibility

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

### CREELMAN V. HUDSON BAY INSURANCE CO certificate of title provides indefeasibility

FACTS:

Hudson Bay (vendor) brought action for breach of contract of sale against Creelman (purchaser).

Creelman's defence: Under federal statute, Hudson Bay could not acquire or hold real property unless it was required for the purposes, use or occupation of that company; since Hudson Bay did not acquire land under these requirements, it had no power to hold or dispose of land. Trial judge found for Hudson Bay, Creelman appealed.

HELD:

Appeal dismissed. Creelman bound to accept certificate and comply with all their obligations under the contract

RATIO:

"Certificate [of title] which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept"

To claim otherwise would "defeat the very purpose and object of the statute of registration"

## Indefeasibility and Adverse Possession

Title by adverse possession ("squatter's title") – pre 1970s

* Basis: if land owner did not bring action to recover possession of unregistered land from occupier within a specified period of time defined by statute, the right to do so was lost
* Adverse possession had to be: hostile, actual, continuous, exclusive, open and notorious
* Allowed for efficient allocation of land resources
* Wrongful occupier would thereafter have possessory title, which the Court protected
* *Statute of Limitations*: had to bring action against private individual within 20 years, against Crown within 60 years
* Provisions applied to unregistered land only; title cannot be acquired by adverse possession against registered land

Adverse possession – post 1970s

1. Doctrine largely eliminated, with saving clause for rights acquired before 1975, and for adverse possession against the first owner
2. No claim in adverse possession against Crown land
3. Recent example: *Re Land Title Inquiry and CPR (2002 BCSC)* – CPR succeeded in claim; ownership not clear (i.e. whether Crown or private land); Crown did not even appeal

Other points

* General qualification in s. 2(a), (b) of *Limitation Act* preserves right of Court to apply equitable doctrines
  1. **Doctrine of acquiescence** – true owner makes it seem like he will not insist on his true rights
  2. **Doctrine of inexcusable delay ("laches")** – true owner does not attempt to retain his interest in time

1. s. 36 of Act addresses specific concerns **regarding encroachment or enclosure**
   1. Court may, on its discretion (*Kelsen*):
      1. 1) *grant an easement* (with compensation),
      2. 2) *vest title* (with compensation),
      3. 3) *require removal* (injunction against encroaching party)
   2. Case law indicates that s. 36 requires the Court to take a broad, equitable approach to disputes ("determining a balance of convenience between the parties")
   3. Equitable doctrine of *acquiescence* or *proprietary estoppel* is relevant.

## Statutory Exceptions to Indefeasibility

Exceptions set out in s. 23(2); can be divided into **three categories**

1. Reservations in Crown grants
2. Public rights e.g. taxes, right to expropriate
3. Restrictions operating in favor of private individuals (the focus of this section)

#### Leases – Section 23(2)(d)

* Lease or agreement to lease will be honored 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.
* Example: 2 year lease with option to renew for 2 years has to be registered. Based on total term, not initial term of lease
* 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 judgment, 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 limited to 10% of contract if acting in good faith. If acting in bad faith (knew contractor not paid) then new owner liable for full cost.

### CARR v RAYWARD s23 provides a builders lien limits indefeasibility

FACTS:

Carr took a contract to do plumbing and filed his lien before the completion of the work, but after the land had been sold to the defendant, Bell, and a clear certificate of indefeasible title issued in his name.

HELD:

Defendant lost. He was liable to pay for work done.

RATIO:

Land Title Act expressly limits indefeasibility subject to list of factors in section 23, of which builders lien is one.

#### Boundaries – Section 23(2)(h) – indeafisibility does not extend to the location on the ground, survey should be undertaken, conveyancers have no duty to ascertain or advise on the dimensions of the property

For each parcel of land under the Torrens system, there are **two fundamental documents**:

1. **Certificate of title**: describes the legal title including the various charges and refers to related documents
2. **The Map or Plan** that depicts the parcel and its physical dimensions

Indefeasibility and boundaries

* refers to the conclusive *legal effect* of the title,
* does **not** extend to the location on the ground of the boundaries as depicted in the registered map or plan (*Phillips v Keefe,* 2012 BCCA 123)
* a survey should be undertaken (*Fowler v Henry* 1902)
* Surveyors determine boundaries by applying a hierarchy of evidentiary factors

Role of Conveyancer

1. a conveyancer is a lawyer in charge of ascertaining the status of the legal title
2. In *Winrob v Street* the plaintiff sued his conveyancer in professional negligence for not checking the accuracy of the plan for the land he had purchased. The Map was wrong in its dimensions and the plaintiff’s new fence and hedge extended 26 feet onto City property, the City charged rent. Plaintiff wanted to claim rent and loss of lot size from defendant.
   1. Conveyancers have no duty to ascertain or advise on the dimensions of the property, which are outside the lawyer’s expertise.
   2. The client must give and the conveyancer must accept a special instruction to become responsible for verifying dimensions.

#### Fraud – Section 23(2)(i)

1. Indefeasibility is subject to "the right of **a person deprived of land** to show fraud, including forgery, in which the registered owner has participated in any degree

Example: A (innocent owner of the fee) to B (fraudster) to C (innocent victim)

Should A be able to recover Blackacre from C?

1. At common law, *nemo dat*: a void instrument leads to a series of void transactions
2. In a Torrens system: *two approaches reflected in case law*
   1. **Immediate indefeasibility** (see *Frazer v. Walker*)
      1. Application of general Torrens principles
      2. If purchaser has not participated in forgery/fraud, he has guarantee of indefeasibility as soon as he is on title (i.e. the indefeasibility is immediate)
      3. Example: C is protected. A will have to seek recovery against the Fund
   2. **Deferred indefeasibility** (see *Gibbs v. Messer*)
      1. Forgery treated as an exception to general Torrens principles
      2. Person taking title through a forged instrument, even if completely innocent, does not have indefeasible title
      3. However, he can give good root of title to a subsequent purchaser (i.e. the indefeasibility is deferred until such a purchaser takes place)
      4. Example: A could recover property from C, but if C transferred FS to D, D would then have indefeasible title. A will have to claim against Fund. C has no protection!

Legislature of BC tried to resolve the uncertainty in the law from the conflicting approaches through Section 25.1 of *Land Title Act*

25.1 (1) Subject to this section, a person who purports to acquire land or an estate or interest in the land **by registration of a void instrument does not acquire** any estate or interest in the land or registration of the instrument. [***deferred indefeasibility, nemo dat***]

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

1. is named in the instrument, and
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. [***immediate indefeasibility***]

25.1 (3) extends protection to fee simple holders of *registered* instruments that have been deemed void before the coming into force of the section (25.1).

Only BFPV Registered Fee Simple Holders are protected, all other BFPV registered interests only have a *rebuttable presumption* of entitlement (*Credit Foncier Franco-Canadien v Bennett, Gill v Bucholtz*)

In *First West Credit Union v Giesbrecht* 2013 BCCA, 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.

### GILL v BUCHOLTZ all BFPV interests lower than FS only give rise to *rebuttable presumption of entitlement* / First West Credit Union note (void vs voidable)

FACTS:

Gill is the victim of fraud on the part of B. B then takes out a mortgage on the property payable to Bucholtz. Gill discovers fraud, files a caveat and lis pendens. Gill has his property restored but sues Bucholtz to get mortgage off title.

Bucholtz win at trial, trial judge thinks *LTA* grants immediate defeasibility for all bona fide registered property interests. Gill appeal

HELD:

Appeal allowed.

RATIO:

Only bona fide purchasers for value registered owners (fee simple holders) have immediate indefeasibility and are protected from innocent victim of fraud previous registered owner. All lower interests are subject to deferred indefeasibility, *nemo dat* applies and since their interests were granted by a void instrument, then they only get a *rebuttable presumption of entitlement*.

In *First West Credit Union v Giesbrecht* 2013 BCCA, 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 – curtain principles abolishes equitable doctrine of notice (replaces with “notice+”)

The abolition of the equitable doctrine of notice is one of the hallmark principles of the Torrens System (“curtain”).

Land Title Act s 29 says that despite any rule of law or equity to the contrary, a person contracting or dealing with or taking or proposing to take 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)

However, the case law shows the Courts being unwilling to let people use the Land Title Act as an instrument of fraud and hide behind it to get rid of unregistered interests (*McCaig*).

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1. Privy Council in *Assets Company vs. Mere Roihi* said that Torrens Act meant actual fraud, dishonesty of some sort, not constructive or equitable fraud. It’s not just behaving negligently or carelessly, it is actual fraud or dishonesty, deliberately carrying out the purpose.
2. **If an agent commits fraud on behalf of registered owner, than that fraud is attributed to registered owner.**  The agent must be acting FOR the principal in committing the fraud. If the principal is the victim of the fraud, then that is not attributable. This is called ***imputed notice*** (*Greveling*).
3. Agent must be acting in the scope of authority of the principal for it to be attributable
4. Fraud requires **direct proof** and cannot be presumed (*Hudson Bay Co*, *Re Saville Row*).
5. Fraud in equity is a principle of common morality. (*Stiles v Tod Mountain Development*)
6. Several important themes from cases
   1. What is the effect of the timing of the notice?
      1. If express notice occurs ***before*** purchase and sale agreement then the Court can deem it to be fraudulent since it can be read as deliberately trying to bury the unregistered interest through registration. (*Hudson Bay*)

*Prior to negotiations—During negotiations but prior to K—****After K but prior to completion [breaking point]****—Prior to application—Prior to registration*

* 1. Does notice in and of itself constitute fraud if the purchaser subsequently seeks to disregard unregistered interest ("notice") OR must there be an element of dishonest conduct that goes beyond mere notice ("notice plus")?
     1. In BC, has to be more than notice (i.e. "notice plus") (*City Savings*); *McCaig* – promise to honor option, Jabin was safe even if he knew about option after signing.
  2. Must notice be express or can it be constructive?
     1. *Szabo* constructive might be enough, but has to be "constructive plus" (+ timing or + fraud)

### HUDSON’S BAY CO. V KEARNS AND ROWLING (1895) fraud requires direct proof, BPFV is protected from any kind of notice, except express notice of unregistered interest before purchase and sale agreement, in which case something more than purchase is needed

FACTS:

Kearns agreed to mortgage her property with Hudson’s Bay Co as security for her debt, delivered title deeds to their solicitor. Mortgage documents took 15 months to prepare.

In the meantime, Kearns sold Fee Simple to Rowling.

Rowling did not know about unregistered interest until after he made the first payment, and then he should have known something was fishy but went ahead with the second payment and registered.

ISSUE:

Whether an equitable mortgage by deposit of title deeds can acquire a better title than a purchaser for valuable consideration

HELD:

Rowling is Protected.

RATIO:

Fraud requires direct proof.

Purchaser for value is protected under Torrens system from any kind of notice, *except express notice of unregistered interest before purchase and sale agreement* in which case something more than just that notice is needed (*Vancouver City Centre*).

### VANCOUVER CITY SAVINGS CREDIT UNION v SERVING FOR SUCCESS CONSULTING 2011 BCSC something more (deliberate dishonesty, ulterior motive) than actual notice of unregistered interest is required to constitute equitable fraud

FACTS:

City Centre bought a hotel in Victoria which had the ∂’s business in it under an unregistered lease for 5 years with an option for 5 more years.

City Centre then took a mortgage from City Savings (π) which was registered on the title.

City Centre defaulted.

City Savings foreclosed, and wanted to evict the ∂s to appease the purchaser

∂s agreed that while their interests were only enforceable against City Centre, that for the π to require them to vacate would constitute equitable fraud since they had actual knowledge of their unregistered interest before they loaned City Centre money and definitely before they registered.

ISSUE:

Is actual notice of unregistered prior to registration enough to constitute equitable fraud if the registered party seeks to extinguish the interest after?

HELD:

Plaintiffs get their declaration and order of eviction.

RATIO:

Something more (deliberate dishonesty, ulterior motive) than actual notice of unregistered interest is required to constitute equitable fraud.

The critical time to assess the party’s knowledge is before purchase or at the latest before registration.

Equitable fraud is a principle of common morality (*Siles*)

Constructed notice triggers a higher duty to ascertain existence of unregistered interest on the part of the purchaser (*Szabo*)

Something beyond the ordinary course of business dealings is required for fraud.

### GREVELING v GREVELING 1950 BCCA – knowledge of agent (lawyer) is imputed to the principal unless the principal himself was a victim of fraud.

FACTS:

Mrs. Greveling was the registered fee simple holder. She made a transfer to her husband, Mr. Greveling, which was unregistered. She subsequently sold the property to Mr. Blackburn, who registered. Mrs. Greveling’s lawyers was also the acting lawyer for Blackburn. Mr. Greveling sued his wife and Blackburn.

Court split in 2:1 majority. The majority found that Mr. Grievling had a valid claim against his wife, but not Mr. Blackburn.

ISSUE:

Could Mrs. Grievling’s lawyer’s knowledge of her transfer to her husband be imputed to Mr. Blackburn. If so, does this constitute fraud on his part?

HELD:

Roberts J. A.:

Blackburn bona fide purchaser for value, not fraudulent. Either his lawyer was acting fraudulently with Mrs. Grievling, in which case he would conceal the relevant information and so his knowledge cannot be imputed to Mr. Blackburn, or he honestly believed the transfer to Mr. Greveling was no good, in which case there was no conscious intent to defraud anyone and so Greveling was bona fide for value.

O’Halloran J.A.

Blackburn was fraudulent. If lawyer (or other agent) has knowledge of fraud, then it is imputed to his principal (Blackburn). It does not matter if the lawyer has financial interests in the fraud going through, just that he did not perform an *essential* part of his employment as Blackburn’s solicitor, and withheld knowledge of an unregistered transfer. This constitutes fraud. “What a solicitor knows, the client must be clearly taken to know” – *Rolland v Hart* .

Section 44 of *LTA* provides that no registered owner shall be affected by any notice unless he has notice of any person as against which the certificate of title is void under 38(2).

RATIO:

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.

### RE SAVILLE ROW PROPERTIES LTD (1969) BCSC – the onus is on the party alleging fraud to prove fraud. Law will presume against fraud.

FACTS

Eldred gives an option to purchase to Ian H. Frew & Associated Ltd (the “plaintiffs”). Eldred then sells the property to the “petitioner” (the “defendant”). The defendant completes the purchase and applies for registration. He then finds out that the plaintiffs applied to register their option. LRO asks plaintiffs to amend their application. Plaintiffs do not amend. LRO rejects their application to register the option. Plaintiffs commence action against Eldred, file a *lis pendens* in the LRO. The defendant has his registration denied. Plaintiffs allege in their affadavit that the defendant knew of their option, which the defendant admits, and that the defendant knew that the plaintiffs thought their option was a valid and subsistiting option through the defendant’s registration. Plaintiffs do not allege fraud but say there are suspicions of fraud.

ISSUE

Is the petitioner a bona fide purchaser for value?

HELD.

Registrar’s decision reversed, lis pendens removed. While the defendant knew of the option, he also knew that it had been rejected and so cannot be inferred to have acted in bad faith merely because it tries to rely upon the provisions of the statute.

RATIO.

The onus is on the party alleging fraud to prove fraud. The law will presume against fraud.

## “In Personam” Claims”

Absent fraud, a registered owner still may be attacked by persons claiming an interest in the land (*Pacific Savings*). For example, a mortgager who is foreclosed on can redeem their mortgage if allowed to do so by court order and reclaim their property.

In *BC*, the Land Title Act Section 180 allows for the registration of trusts on the title. Any subsequent transferee to a registered owner “in trust” is deemed to have full knowledge of the trustee’s obligations and cannot collapse the trust through registration (*McRae v McRae*). The purchaser is subject to all registered interests (Section 23).

*Bona Fide* purchasers, however, are protected absolutely.

### PACIFIC SAVINGS AND MORTGAGE CORP. v. CAN-CORP DEVELOPMENTS [1982] a registered owner might be attacked by a person claiming an interest in the lands described in the title.

FACTS

The appellant/mortgagors granted a mortgage to the respondent/mortgagees. The mortgageees commenced foreclosure proceedings on November 24, 1980 and obtained a court order on September 28, 1981. On Cctober 1, 1981, a certificate of indefeasible title was issued to the mortgagees.

Then, the mortgagors gave notice that they want to redeem (pay back the loan). On October 13, 1981, they filed a notice of motion to re-open the final order, and obtained from the Court Registry a certificate of *lis pendens*. The *lis pendens* was filed in the LRO on November 20, 1981.

The mortgagees found a purchaser for the property and accepted the purchase on November 20 (same day *lis* was filed).

Trial judge refused to reopen the final foreclosure order. The mortgagors appealed.

HELD:

Appellants get their house back if they can redeem all monis due.

RATIO:

The statue does not bestow conclusive indefeasibility to the registered owner, only *bona fide* purchasers for value. Registered owner is still subject to the outcome of *lis pendens* and the Court can deem his title no longer in force and cancelled.

A registered owner might be attacked by a person claiming an interest in the lands described in the title.

### McRAE v McRAE ESTATE: a person is presumed to have full knowledge of everything registered in the title including “in trust”.

FACTS:

Farquhar Fraser Sr. acquired 647 acres of land at $1 each divided into 3 lots in the early 1900s from the Crown. He leaves it to his wife, in trust, in effect for her life, and then to his three children John, Catherine and Farquhar as remainder. Mrs. Fraser was the registered owner, and it said her name “in trust” on the title. In 1949, she transferred the property to her son Farquhar Fraser Jr for a dollar and other valuable consideration. He registered as the fee simple owner, without any notation on his title. He died in 1989; by will he left the lots to his wife, and his brother John and Catherine.

Sometime in 1990 John and Catherine found out about the terms of their father’s will and the possible significance of the 1949 transfer. They commenced proceedings. The trial judge ordered that the 1949 transfer be set aside and that title to the lots be vested in Farquhar’s executors to be disposed of according to law. His wife appealed.

Counsel for Farquhar argued that he took clear title to the district lots free of the testamentary trust as he was a *bona fide* purchaser for value without actual notice of his mother’s breach of trust.

HELD:

Decision upheld. Since in BC trust can be registered, as “in trust” next to the R.O’s name, Farquhar is statutorily deemed to have knowledge of his mother’s role as trustee for the property and therefore of her breach of trust.

This statutory provision regarding trusts preceded the 1948 transfer.

RATIO:

A person is presumed to have full knowledge of everything registered in the title, including “in trust”.

## B. REGISTRATION: CHARGES

Two ways to register a charge under Land Title Act:

Section 197:

1. must be entitled to register as owner of the charge:
2. registrar can refuse registration of charge if:
   * 1. applicant does not establish good, safeholding and marketable title
     2. the charge claimed is not a registrable estate or interest under the Act

Section 180 (trust estates, p 6-55)

* Trustee’s title may be registered but particulars of the trust must not be entered in the register
* Must include reference by number to the trust instrument and any other info the Registrar deems necessary to identify the estate of the testate or intestate
* Must add words “in trust”
* Trust instrument must be filed with the registrar with the application for registration of title
* If trust is outside of BC or property in Trust is outside BC then a copy of the trust instrument must be provided
* Copy under 5) has the same effect as the original
* If a trust is registered that property cannot be disposed of or mortgaged or otherwise dealt of except if
  + Expressly authorized by law or by the instrument creating or declaring the trust
  + An order has been obtained from the Supreme Court
* 7 does not apply to dealings done by the Trustee himself
* Rules for registering a new indefeasible title in the name of the trustee or giving an endorsement as trustee:
  + Beneficially entitled to land and
  + Must present an instrument creating or declaring a trust
* Must present an instrument that modifies trust to modify it on application to the registrar.

### DUKART v SURREY (DISTRICT): middle interpretation: interest in a trust document is considered registered

FACTS:

1. Land developed for residential lots
2. Developer transferred foreshore reserves to a trustee, with a trust notation
3. Foreshore reserves purchased by municipality of Surrey on a tax sale; no trust notation entered
4. Surrey built public toilets along Dukart's unregistered easement
5. s. 25 of LRA (now: s. 276 of LTA) provided that when land is sold on a tax sale, title is "purged" of all charges, with exceptions that included "any easement registered against the land"
6. Issue: Did Dukart's easement survive the tax sale?

REASONS:

1. Act does not define registration; terminology of s. 25 referred to easements and right of way as "registered as a charge against the land"
2. Clearly, Act contemplates different kinds of registration

HELD:

Yes, Dukart's easement survives

RATIO

* Narrowest view: An easement contained in a trust document can continue to exist despite a tax sale; this would limit Dukart to its facts
* Widest view: If a document is on file at the LTO, anything included in that document is register
* Middle ground interpretation: interest in a trust document is considered registered

## 2. Indefeasibility? [rebuttable presumption of entitlement, registration not indefeasible or conclusive]

Land Title Act

Section 26 p 6-63–64:

1. A registered owner of a charge is **deemed to be entitled [rebuttable presumption of entitlement (***Crédit Foncier***)]** to the interest created by the instrument in respect of which the charge is registered subject to the exceptions of other registered charges or endorsements that appear on or are deemed to be incorporated in the register.
2. Registration of a charge **does not constitute** a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences **an estate or interest in the land** or that the charge is enforceable **[Charges not indefeasible or conclusive]**.

Section 27 – Notice Given of Registration by Charge:

1. 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**.

### CRÉDIT FONCIER FRANCO-CANADIEN v BENNET (1963): the registration of a charge creates only a rebuttable presumption of entitlement, forged transfer are void

FACTS:

The Bennets were the registered fee simple holders. One, Alan, **forged a mortgage** on their property, which he registered and then sold to a real estate agent, Stuart. Stuart knew Alan for five years but made no inquiries of the Bennets. Stuart then sold it on assignment to Credit Foncier Franco-Canadien. They asked their lawyer to check the title and saw the mortgage registered thereon. They sent the plaintiffs two letters demanding payment, and then filed for action against them and foreclosure.

The Bennets served notice of intention to sue Alan and the Attorney General. They didn’t end up suing Alan but got judgment against the Attorney General. They got paid out of the Assurance Fund. Attorney General appealed and said that although they deserve the money for the mortgage payments, the mortgage itself was a nullity obtained under fraud.

Credit Foncier argued that they were *bona fide* purchasers, and that even Stuart was a bona fide purchaser. They point to Section 51 (now 27) of LTA that says registered owners of charges “shall be deemed to be entitled” as creating an irrebutable presumption.

HELD:

Mortgage was a nullity. Even if it was valid the plaintiffs would not have succeeded because there was no amount owing. No loan had been made to the Bennets, and thererefore the mortgage secured nothing.

RATIO:

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 INVESTMENS LTD (1988): bona fide purchasers for value of charges are presumed to be entitled to their interests

FACTS:

Park Meadows, granted a mortgage in second position to Island Realty. Their solicitor, Cowan, then granted a third mortgage to the appellants “Almont” in third position under the understanding that the Island Realty mortgage would be discharged. They did not known that Cowan was a director of Park Meadow. Cowan forges the discharge and Almont move up to second position. Park Meadows forecloses. There is not enough money to pay off both Island Realty and Almont.

Trial judge restores the certificate of title so that Island Realty is back in second position. He reasoned following, *Crédit Foncier*, that the discharge was a forgery and therefore a nullity.   
  
ISSUE:

Who has priority? Almont or Island Realty?

HELD:

Almont has priority and gets paid out. Almont did not register their charge through fraud, and so get protection. Island Realty gets screwed because although they were fraudulently discharged, Almont did not take their position through fraud.

RATIO:

*Bona fide* purchasers for value of charges are presumed to be entitled to their interest.

**3. Priorities.**

Judgments against the registered owner jump ahead in priority to previous judgments against that owner. Chapter 5.

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

Land Title Act

Section 28: If 2 or more charges appear entered on the register affecting the same land, the charges have, as between themselves, but subject to a contrary intention appearing from the instruments creating the charges, 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 VII – FAILURE TO REGISTER

## The General Principle (in personam v in rem)

Lack of registration means the instrument does not create a **legal** interest in the property (*in rem* rights require registration). Section 20(1) makes a distinction between rights *in personam* and rights *in rem*. Rights *in personam* are enforceable despite lack of registration. Rights *in rem* (against the land) are only enforceable against third persons, when registered. Enforcement of rights *in personam* can indirectly create equitable interests in property.

An aspect of the “*in personam*” qualification to indefeasibility is that personal equities can be enforced as personal rights of action against the registered interests of those bound personally to perform obligations, but **not against innocent purchasers of the land**.

Short-term leases are exceptional:

1. they **do not have to be in writing**: Law and Equity Act, s. 54.
2. Regardless of whether they are written down in instruments, short-term leases do not require registration and cannot be registered: s. 23(2)(d). Section 20(3) gives the tenant in actual occupation under an unregistered short-term lease both in personam and in rem rights
3. A tenant in **actual occupation** under a lease of three years’ duration or less **including options for renewal** (s. 1) 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: s. 20(3).

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.

The Land Title Act

Section 20 provides that

* an unregistered instrument **does not pass estate**, except as **against the person making it**.
* Everyone benefitted by an unregistered instrument and every person claiming through or under that person, whether by descent purchase or otherwise has the right to
  + Apply for registration
  + Use the names of the parties in the instrument in auxiliary or incidental proceedings to registration
* Subsection (1) **does not apply to leases not exceeding 3 years** if there is actual occupation under the lease or agreement.

Section 180 provides that

* 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 [1920]: bona fide purchasers for value are protected upon registration from being subject to unregistered interests (unless notice+)

FACTS:

The plaintiff owned the fee simple to a parcel of land. He subdivided it into two lots. Lot 1 was on the exterior and Lot 2 was only accessible through Lot 1. The plaintiff sold Lot 1 to Mr. Roach, with the informal agreement that the plaintiff reserved an easement or private right-of-way through Lot 1 to get to Lot 2. This was unregistered. Mr. Roach, then transferred the property to the defendant, apparently without mentioning the unregistered interest.

The defendant registered her title, and denied access to the plaintiff. The plaintiff sued to get a declaration of the existence of the right of way. The defendant proved that she was bona fide and had no knowledge of the agreement between the plaintiff and Mr. Roach.

HELD:

The unregistered interest was extinguished.

RATIO:

*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 (s. 75), which should prevent a recurrence of this problem.

Land Title Act

Section 181:

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.
2. The applicant for registration of the fee simple s authorized to make, on behalf of the transferor, any application necessary to give effect to Subsection 1.

If the proper procedure is not followed, the **burden of the risk of loss is on the transferor**. Section 182 authorizes the registrar to endorse an easement existing on another’s property to the transferor’s property on the title of the transferor’s property.

## “EXCEPT AGAINST THE PERSON MAKING IT” – in personam obligations not enforceable against innocent third parties

The phrase, “**except against the person making it**,” in s. 20(1) 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 s. 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 s. 20(1).

Under the Torrens system, an obligation in an unregistered instrument would **not** be 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 usually critical under Torrens, because priorities of interests in land are determined by the chronological order of registration of instruments rather than by their order of creation. Unregistered interests are equitable, under Torrens.

## Judgements – judgments are “subject to the equities” [rank after prior unregistered interests], subject to *nemo dat*

Judgment creditors do not have the same status as purchasers, because on registration against the debtor’s land, they rank **after prior unregistered interests in the same land**. Personal equities in an unregistered instrument bind not only the initial maker of the instrument but also the judgment creditor of the maker, and the status of the judgment creditor is described as **“subject to the equities”** i.e., as being encumbered with the previous obligation. The registration and enforcement of money judgments is an example of taking “**subject to the equities**.”

The registration of a judgment does not create or divest any interest in the land to the creditor. It only serves as constructive notice to the world of the encumbrance of the judgment on the debtor’s interest. The registration of a judgment allows the creditor, following the filing of a CPL, to apply for a court ordered sale or other remedy. The **nemo dat principle**, which applies to all execution remedies, says the judgment creditor can only seize and sell the debtor’s interest in the assets, at the time of seizure and sale under the execution remedy.

**Subsequently created or registered interests rank after the registered judgment**, which gives effect to registration of the judgment, according to the Torrens system. Common law nemo dat applies to prevent registration of a money judgment from cutting off previously created but unregistered interests in the debtor’s land. Prior unregistered interests created against the debtor’s land are not extinguished by registration of the judgment, and rank ahead of it despite the possible application of s. 28, and as codified in the Court Order Enforcement Act s. 86(3), enacted in the 1970’s [p. 7-010].

The development of the law is traced in the decision of *Yeulet v Matthews* [p. 7-004].

### YEULET v MATTHEWS [1982]: judgment creditors are subject to the equities [prior unregistered interests]

FACTS:

Mrs. Matthews was the equitable mortgagee (by deposit of duplicate certificate of title) of her son’s property. Later, Yeulet got a monetary judgment against her son, which they registered.

ISSUE:

Who has priority? Does it matter that the equitable mortgage is unregistrable?

HELD:

Mrs. Matthews has priority

RATIO:

Judgment 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 interests is the date of execution.

## Court Order Enforcement Act – codification of Yeulet.

Section 86

1. From the time of its registration the judgment forms a lien and charge on the land of the judgment debtor specified in the application referred to in Section 88 in the same manner as if charged in writing by the judgment debtor under his or her signature and seal,
   1. **To the extent of his or her beneficial interest in the land**, [nemo dat]
   2. If an owner is registered as a personal representative or trustee, to the extent of the interest of a beneficiary who is a judgment debtor, and
   3. Subject to the rights of a purchaser who, **before the registration of the judgment**, 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 judgment.

In *Martin Commercial Fueling* *v Virtamen* the Court found that a transfer took priority over a registered judgment even though the transfer’s closing and its registration were subsequent to the registration of the judgment. The relevant time is the agreement of purchase and sale.

## Other Agreements – in personam rights can be given through contract.

Section 20(1) says that an unregistered instrument is ineffective to pass any estate or interest in land, either at law or in equity, until registered. Nevertheless, s. 20(1) also says obligations contained in an unregistered instrument are personally binding on the initial parties **(“except as against the person making it”**) despite lack of registration on title. If a registered owner enters into a contract containing personal obligations concerning the land, **the court can enforce the personal obligations**. Without violating the letter of s. 20(1), courts can compel the initial parties to a contract to abide by their bargains on a personal level, even though the obligations concern a party’s land and the instrument containing the contractual terms is not registered. Section 20(1) prohibits an unregistered instrument from directly affecting registered title, but allows personal enforcement against the registered fee simple holder, in their personal capacity as a party to the contract. **Personal enforcement can have the indirect consequence of affecting the land**.

If the initial party sells their unregistered contractual rights against the registered owner to a purchaser, the purchaser of the contractual rights, as assignee of the contract, can exercise the same personal right of enforcement against the other initial party, the registered owner, without violating the Torrens system.

### L & C LUMBER CO. LTD v LUNGDREN [1942] – unregistered interests are transferable to third parties to original agreement

FACTS:

The appellant sold timber rights (right to come and cut all the standing lumber)—*profit-a-pendre* to Mr. McDonald. He then sold that right to the respondent company, with notice to the appellant. Neither the earlier nor subsequent agreement were registered. When the respondent company tried to enter the appellant’s land they were refused entry.

The appellants try to rely on the Section 34 [now section 20] provision that unregistered interests do not create interests as except the person making it.

ISSUE:

Are the appellants subject to rights of L & C Lumber bargained for from a previous unregistered interest holder?

HELD:

Appeal dismissed.

RATIO:

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.

Like a lease, a *profit-à-prendre* comprises both personal (contractual) and property 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 1931:

FACTS:

Herrling, in 1908, granted all the timber, standing or fallen, on certain land to Kelliher, his heirs and assigns, with a right to enter on the lands and cut and take away timber at any time.

This grant was registered against the fee simple. Herrling then sold fee simple to Agassiz, and then in turn transferred to the appellant.

Kelliher died intestate and his heirs quit-claimed their interest to the respondent. The quitclaim was not registered. The respondent entered onto the land and commenced cutting timber.

The appellant sued, seeking an injunction, damages for trespass and an accounting. Failed at trial, got appealed.

ISSUE:

Does the quitclaim right constitute a transfer of chattels or an interest in land? If transfer in chattels, then it should not be registered, and is enforceable (due to contract law). If it is an interest in the land, that is unregistered, then it passes no estate or interest until registration and the *bona fide* purchaser appellant is protected, because of section 20.

HELD:

Appeal allowed

RATIO:

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.

The appellants were protected because they were bona fide purchasers and not party to the original contract.

## “Prohibited Transaction”

### INTERNATIONAL PAPER INDUSTRIES v TOP LINE INDUSTRIES INC 1996: incorrectly concludes that failure to subdivide was so contrary to public policy as to render a lease unenforceable *in personam* against the landlord

FACTS:

Top Line Industries owned vacant land on Vancouver Island. International Paper, which was in the business of recycling paper, wanted to lease a portion of the lot. International Paper wanted to move and install a modular building on the leased part of the lot, to store its paper. International Paper, as tenant, and Top Line, as landlord, entered into a written agreement to lease for a term of 51 months with options for renewal. The area of land comprised in the lease was part of an entire parcel, but the boundaries of the part were not surveyed and the leased portion was not subdivided from the rest of the parcel. The agreement to lease could not be registered on Top Line’s title, without first subdividing the portion to be leased from the rest of the lot (s. 73). International Paper moved the building to the area purportedly leased and installed it. For several years, the parties coexisted on the assumption that the unregistered agreement was valid and enforceable between them (in personam). As relations between the parties deteriorated, Top Line scrutinized the transaction for a way to rid itself of International Paper’s tenancy, and to keep the building. As an afterthought, Top Line decided to repudiate the lease on grounds of contractual illegality.

HELD:

International Paper could not enforce the lease against Top Line.

RATIO:

The Court concluded, correctly with respect, that lack of registration prevented the lease from creating “proprietary rights” (*in rem*). The Court erred, with the greatest respect, however, in concluding that failure to subdivide was so contrary to public policy as to render the lease unenforceable *in personam*, against the landlord.

#### Land Title Act Section 73.1 was enacted to reverse the decision in *Top Line*:

1. 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
   * The lease or agreement for lease does not comply with this Part, or
   * An application for the registration of the lease or agreement for lease may be refused or rejected.

This wording (“between the parties”) suggests that third-parties that buy the lease rights cannot enforce them against the party.

The BCCA interpreted s. 73.1 as having prospective effect only: *Idle-O* and so only applied to cases with leases commenced post 2007. For leases commenced prior to 2007, *Top Line* applies (if the lease is invalid due to impossibility of registration, it does not create *in personam* rights.

# CHAPTER VIII — APPLICATIONS TO REGISTER

Land Title Act

#### Priority of caveat or certificate of pending litigation: [ahead of registered interests filed after]

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 **entitled to claim priority for that person’s application for registration of title or charge so claimed over a title, charge or claim, which was applied to be registered after the date of the 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 judgment in the property

#### Effect of Caveat [freezes title]

288 (1) 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

(2) An instrument expressed to be subject to the claim of the caveator may be registered or deposited, 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**.

#### Registration of certificate of pending litigation in same manner as charge [rules regarding CPL]

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.

(1) – (4) Rules regarding CPL registration and modifying on page 8-2

(5) – procedure for restrictive covenant or building scheme

(6) – procedure for a *Family Law Act* claim page 8-3

(7) – procedure for *Wills Variation Act*

(8) – procedure for *Fraudulent Preference Act*

#### Effect of registered certificate of pending litigation [freezes title with exceptions]

216 (1) 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 canceled in accordance with this Act

(2) Exceptions to subsection (1):

1. an indefeasible title or a charge if the instrument supporting the application is **expressed to be subject to the final outcome of the proceeding**
2. an indefeasible title or a charge in respect of which the applicant in writing establishes that he is subject to the outcome of the CPL
3. priority or postponement agreement
4. an assignment of a charge registered before the CPL was registered
5. a sublease if the principal lease was registered before the CPL was registered
6. a builders lien or any other involuntary charge

(3) Registration under subsection (2) does not constitute a determination by the registrar that what was registered is not affected by the outcome of the CPL **and** is subject to that outcome if what was registered is affected by that outcome

#### Effect of CPL if prior application is pending

217 (1) The registrar may, despite section 216, 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

(2) Conditions on subsection (1)

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

### PECK v SUN LIFE ASSURANCE CO.: if a CPL is lodged after a BFPV registers his agreement (or agrees simpliciter) but before the completion of the transfer and the subsequent application to register, then that BFPV is protected but must pay the balance to the party who wins the claim disclosed in the CPL.

FACTS:

In 1894, Henry Elliot conveyed lands to his wife and from her by agreement dated 28th October 1896, and registered 7th March, 1897, the plaintiff contracted to purchase one parcel of this land. The agreement was that the purchase money, $3000, should be paid in installments; $500 at first, then the balance in monthly installments of $30 each. Money was paid in these terms until November, 1898. In that month, the plaintiff, having under a fresh arrangement paid a sufficient sum to reduce the unpaid balance of the purchase money to $1000, Mrs. Elliot then accepted his promissory note for that balance, and executed a deed conveying to him the parcel sold.

When the plaintiff applied to register he discovered that there were proceedings between his contract to purchase and registration date against Mrs. Elliot by the defendant company claiming that the original conveyance from her husband was fraudulent. There was a CPL lodged in September 1897. They won the case in 1901.

Plaintiff argued that *lis pendens* was improperly registered, and won at trial. Defendant appealed.

ISSUE:

Is Peck subject to the outcome of the trial?

If the CPL was not improperly lodged, then is the plaintiff subject to pay the outstanding balance he had already paid by promissory note to get the title?

HELD:

CPL was not improperly lodged, since the “fresh arrangement” constituted a new transaction, which occurred after the CPL and there was *subject to it*.

However, the plaintiff can still pay the outstanding balance of the first deal (registered in March, 1897) since he was *bona fide* without notice to get title. He must pay the money to the defendant and not Mrs. Eliot, because the transfer which granted her title was void due to fraud.

RATIO:

If a CPL is lodged after a *bona fide purchaser* registers his agreement (or agrees *simpliciter*) but before the completion of the transfer and the subsequent application to register, then that *bona fide purchaser* is protected but must pay the balance to the party in favour of who the claim is resolved.

### RUDLAND v ROMILLY the delays inevitable in a busy land registry office cannot effect the title of an honest buyer. In the absence of fraud a clear right to registration is the same as registration (4 conditions)

FACTS:

November 21: Romilly executed a deed conveying fee simple to Lindsay for consideration

December 14: Lindsay applied to register that deed

December 16: Lindsay executed a deed to Rudland as collateral for a loan due December 23rd

December 29: a certificate of title (proof of registration) was issued to Lindsay free of charges

December 29: an application to register the deed given from Lindsay to Rudland was lodged

After the application to register was made, but before the registration was effected, Romilly commenced proceedings against Lindsay on the ground of fraud

January 16: Romilly lodged a CPL on the land, still in Lindsay’s name.  
  
The registrar refused to issue a certificate of title to Rudland until CPL was disposed of.

Plaintiff commenced actions to get rid of lis pendens. Romily did not add Rudland as a defendant to that *lis*.

ISSUE:

Is Rudland’s *in rem* right subject to the outcome of the *lis pendens*?

HELD:

Romilly has no interest in the land. Plaintiff wins. Only the delays inevitable in the operation of the LTO stopped her getting a clear certificate of title on application on January 29, when Lindsay had clear title, making Rudland BPFV

RATIO:

The delays inevitable in a busy land registry office cannot effect the title of an honest buyer.

In the absence of fraud, a clear right to registration is the same as registration (*Re Saville Row*) where:

1. the person claiming such a right is a *bona fide* purchaser for valuable consideration
2. The right has been acquired and registration thereof 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.

In *Paramount Life*, a fraudulent conveyance led to an application registration and application of mortgage at the registry on the same day. Both were duly registered, which resulted in a registered charge of the mortgage on the certificate of title. Once the fraud was discovered, the title reverted to its rightful owner, but the Alberta Court of Appeal held that the original owner was subject to the mortgage. An applicant wishing to register a charge does not have to wait for the certificate of title to be produced, only that the application of the charge follows the application of the fee simple. The legislation in Alberta is different, it grants immediate indefeasibility to all *in rem* interests.

### CANADA PERMANENT MORTGAGE CORPORATION v BRITISH COLUMBIA (REGISTRAR OF TITLES): charge holder does not have to wait for certificate of title to be issued to R.O. to register charge (overturned by section 155, 198 LTA)

FACTS

Vorsteher transfer title to Vistica. Vistica applies to register, gives mortgage to CPM. CPM applies to register. Vorsteher then files a CPL, before either the title or the mortgage were registered but after they were pending registration. Registrar rejects mortgage registration. CPM commences action against Registrar. Registrar wins at trial. CPM appeals

HELD:

Mortgage should be registered.

RATIO:

Charge holder does not have to wait for certificate of title to be issued to R.O. to register charge.

Land Title Act

Section 155:

1. Charge holders must await the registration of a fee simple to be processed (**opposite of *CPM***)
2. If Charge rights date to Crown grant before June 1, 1921 then subsequent persons claiming under that right can just register
3. You can apply a charge but it has to be approved by the director and “suited to the circumstances”

Section 198:

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**. (**opposite of *CPM***)

### BRESKVAR v WALL where the equities are equal, first in time prevails, a caveat only grants a caveator an equitable interest in property (in personam against party involved in dispute)

FACTS:

Breskvars were joint tenants and registered owners of the fee simple. They signed a transfer in blank (later proven to be a mortgage and not a fee simple transfer) to Mr. Petrie. They did not fill the name of the transferee. Mr. Petrie, acting as agent for Wall, put his grandson Wall’s name as transferee. This enabled him to register the title in Wall’s name, and later use that title to sell the land to one Alban.

Wall to Alban transaction transpired on October 31st.

Breskvars lodged a caveat on December 13.

Alban was bona fide for value without notice and he applied to register his title on January 8th.

Alban could not register his title because of Breskvar’s caveat (which was also filed not sufficiently promptly [after transfer to Alban was executed]).

Both had equitable interests against Wall but neither had legal title.

ISSUE:

Who should get title?

HELD:

Alban got the title to the land. Breskvar and Alban had equitable interests but they were not equal in equity because Breskvar were careless in giving blank transfer, and did not provide the LTO with any information of retaining interest so this defeats their claim of chronological priority as against Alban.

RATIO:

Where the equities are equal, first in time prevails. (here equities were not equal)

A caveat only grants a caveator an equitable interest in property (*in personam against party involved in dispute*)

# CHAPTER IX: THE FEE SIMPLE

## CREATION

## Common Law – presumed life estate, needed “to B and his heirs”

At common law, in order to create a fee simple by an *inter vivos* transfer it was necessary to use the precise words “To B and his heirs”.

“To B” – Words of Purchase.

“and his heirs” – Words of limitation.

Every other configuration of words in an *inter vivos* transfer was presumed to pass a life estate, and not a fee simple.

In the case of a will, if words of limitation were used, the courts generally gave effect to them. In the absence of words of limitation they were sometimes prepared to construe the document as conferring the fee simple on a beneficiary if that was clearly the testator’s intention.

Equity dealt with cases when the words “To B and his heirs” were not used, and looked at intention for both inter vivos and wills.

## Statute: presumes fee simple/highest estate possessed [PLA 19.1, 19.2, LTA 186. 4-8, WESA 41(3)]

Property Law Act

Words of transfer

19. (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

Implied covenants

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

#### Wills, Estate and Succession Act (WESA) – In Force March 31, 2014

41 (3) A gift in a will

1. Takes effect according to its terms, and
2. Subject to the terms of the gift, **gives to the recipient of the gift every legal or equitable interest in the property that the will-maker had the legal capacity to give**

### TOTTRUP v OTTEWELL ESTATE – will is an ambulatory document, equity will not allow the gift to fail

FACTS:

Frank Ottewell left his entire estate to his twin Fred: “to Fred *and* his heirs”. Fred died before Frank. Frank’s testators

proceeded with dividing up the estate as if he died intestate. Fred’s only daughter (his heir apparent) sued Frank’s estate.

She argued that the words “and his heirs” signified a substitution clause – a clause that directed a testator’s executor to an

alternate disbursement of the estate should the will “lapse”.

A will is said to lapse when the gift cannot be completed. I.e, A leaves house to B in will but before A dies he sells the house, or if the beneficiary pre-deceases the testator.

HELD:

Frank’s estate passes pursuant to rules of intestacy, the words “to Fred and his heirs” are words of limitation, not words of substitution/residuary clause.

The phrase that confused everyone is “to Fred, to hold unto him, his heirs, executors, and administrators absolutely and forever.” There’s a comma between “to Fred” and “to his heirs” and it’s whether that comma is standing for an “and” or an “or”.

SCC ruled the phrase is read as conjunctive, not disjunctive. it passed by lapse to Frank’s next of kin or the people entitled to Frank’s estate. Because Fred used word “heirs, executors, and administrators,” use of all those words, unnecessarily, implied that the intention was for it to be conjunctive, not disjunctive.

RATIO:

A will is an ambulatory document, it has no effect, traction and attaches to nothing until the testator dies. Circumstances can change such that a will lapses and the Court must give a construction to the will before they look at the circumstances.

Circumstances should only be looked at when the will’s wording is ambiguous.

Had Frank said “to Fred *or* his heirs” the estate would have passed to Fred’s daughter.

Equity will not allow the gift to fail.

WILLS, ESTATES AND SUCCESSION ACT (WESA)

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

41 (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]

## Problems of Interpretation – Repugnancy [3 possibilities *Re: Walker*]

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 [*Re Walker*]:

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]

### RE WALKER: each will should be constructed on its own terms, and should not be compared to previously decided wills, if the language of the will conflicts then the will must be constructed by the court, equity will complete a gift.

FACTS:

John Walker left his wife “all my real and personal property” with exceptions of his watch and jewellery, which he gave to his nephews but which is not relevant.

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 . . .”

The widow survived until 1922. Her estate had been valued at $38 000.

Those claiming under the husband’s will seek to have some portion of the wife’s estate declared “undisposed of”, while those claiming under the wife’s will argue that John Walker’s will gave his estate *absolutely* to his widow.

Trial judge decided for those claiming under husband’s will, it was appealed.

HELD:

Appeal allowed. The words “undisposed of” in John’s will means during widow’s lifetime and not testamentary disposition. There is an attempt to deal with what is undisposed in a manner that is repugnant of the gift to her. Her gift must prevail and the attempted gift over must be repugnant and void.

RATIO:

Each will should be constructed on its own terms, and should not be compared to previously decided wills.

If the language of the will conflicts, then the will must be constructed by the court.

Equity will complete a gift. Nephews got their legal costs paid out of the estate. The costs of all the parties comes out of the estate in litigation over these matters. This is one of the incentives about estate litigation which is why people pursue it

### RE SHAMAS – rules of construction should give way to an attempt to construe each will according to the circumstances of that particular will, will should be looked at as a whole and in context the meaning of which should be determined by construction of the willmaker’s intention.

FACTS

Will was whack, and not created under any legal advice. Can be found on p- 9013.

HELD:

The will created a life estate in 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.

RATIO

Case stands for 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 connexion with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that constructed intention.

Basic idea is that to go to testator’s armchair and look at will in light of testator’s circumstances and not get caught up in rules of construction, shouldn’t use those rules to defeat the testator’s intention. In this case, dead husband left his wife a life estate, but that would not be enough for her to support their young children, so court interpreted intention of supporting family to mean life estate with right of encroachment.

### CIELEIN v TRESSIDER: testators use words that carry meaning to legal profession, but not to testator, so you have to look at these expressions from the testator’s armchair.

FACTS:

Mr. Van Essen died in 1985, he and Mrs. Rich had lived together since 1973. The appellant, Mrs. Rich’s son lived with them. Van Essen had 5 children from a former marriage.

He left a will, using a stationer’s form on which some standard clauses were already printed. In his own hand wiring Van Essen inserted provisions that Mrs. Rich was to have the realty and all other assets. There then followed as part of the printed form a line reading “all the rest and residue of my estate I devise and bequeath to …..” which he added Mrs. Rich to.

He then left five lines also in the testator’s handwriting: “however, upon the sale or disposal of the real estate as described above the proceeds shall be divided equally between her son …. And my children ….”

Chambers judge decided Mrs. Rich got life estate in the realty and on her death the property was to be sold and the proceeds “divided equally between among the five children of the testator and Mrs. Rich. Mrs. Rich appealed.

HELD:

Appeal allowed. 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.

RATIO:

Testators use words that may carry meaning to legal profession, but not to testator making the will, so you have to look at these expressions from the testator’s armchair

## WORDS FORMERLY CREATING A FEE TAIL

1. **Technical words of limitation**

Common law required technical words of limitation when creating a fee tail: “to B and his heirs of his/her body” for inter

vivos transfers. Fee tails were abolished by Property Law Act section 10. It is presumed that the testator passes the highest

estate he can (PLA S 19 (2)).

1. **Informal words of limitation**

Wills and equitable interests would see the courts giving effect to technical words of limitation if they were used, but did

not insist on these words. They would look to testator’s intention. Words such as “to A and her issue”, “to A and his

seed” and “to A and her offspring” were used.

## 3. The Rule in *Wild’s Case* [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)).

**Testamentary Spouses**

1. *Estate Administration Act:* if a spouse dies intestate, property passes to surviving spouse and children of the deceased. shared equally, (wife and two kids, each get 1/3).
2. Spouse gets all the household furnishings, all the chattels and life estate in the spousal home
3. Spouses don’t have to be lawfully married, just at least 2 years of cohabitation in a marriage-like relationship, including same gender.

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# CHAPTER X – THE LIFE ESTATE

## CREATION

## 1. By Act of the Parties [requires express words]

A life estate may last for the life of the holder of the estate, or it may last for the life of some other person. In the latter

case it is known as an estate *pur autre vie*.

If a life estate is to be created, it should be done expressly. (“To A for Life”, “to A for the life of B”)

If not expressly stated, then *S 19(2)* of Property Law Act assumes greatest estate possible is passed in *inter vivos* transfer, and *WESA* *s 41 (3)(b)* assumes the same for wills.

## 2. By Statute [WESA changes to Spouse succession, Family Law Act, Land (Spouse) Protection Act]

**Wills Estates and Succession Act**

*WESA* changed the surviving spouse beneficial life estate in the spousal home.

Instead, *WESA* 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.

The spouse retains the “household furnishing” any chattel related with the house.

**Family Law Act**

On the breakdown of a spousal relationship, the spouses must decide if they will continue to live under the same roof temporarily, or if one will move out and the other will remain in the home. To obtain a court order resolving the issue of which spouse should move out of the family home, a spouse may apply to the Supreme Court of BC for an order of temporary, exclusive right of occupying the spousal home, which would compel the other spouse to leave.

The order does not create any interest in the home in favour of the applicant and is merely a temporary measure, pending division of family assets. The temporary order does not amount to granting of a life estate in the family home.

***Land (Spouse) Protection Act*:**

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 of the owning spouse designating the property as a “homestead,” meaning 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 of the homestead** in favour of the surviving spouse.

**Supercedes any testamentary intention, the homestead takes precedence over the will and can’t be touched until the life tenant dies**.

WESA s 4 (2) states that a personal representative holds the homestead in trust for an estate for the life of the surviving spouse, despite any will, rule of law but subject to the liability of the land comprising the homestead for foreclosure or the payments of debts.

## RIGHTS OF A LIFE TENANT

## Occupation, Use and Profits [LE = operating expenses, R = capital outlays]

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 but “may well” not be responsible for insurance premiums: see *Re Verdonk*.

Life tenant is responsible for “operating expenses”: property taxes, mortgage interest payments, minor upkeep and repairs

Remainderman is responsible for “capital outlays”: major repairs – repairs for damage to corpus.

## Transfer Inter Vivos [A LE may be transferred IV.]

A life estate may be transferred *inter vivos*.

## Devolution on Death [LT disposable through will WESA ss1 [estate] and 41]

The ordinary life tenancy (e.g., to A for life) 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**: WESA ss1 “estate” and 41.

## OBLIGATIONS OF A LIFE TENANT TO THOSE ENTITLED IN REVERSION OR REMAINDER [R entitled “substantially the same form”]

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 s**ubstantially the same from** as it was when received by the life tenant.

## Waste [Permissive, Voluntary (2 conceptions), Equitable]

There are three kinds of waste: permissive, voluntary and equitable.

1. Permissive waste

This is **passive conduct** which permits decay – e.g. allowing buildings to detriorate. The **life tenant is not**

**responsible** for this waste unless expressly provided for in the instrument creating the estate.

1. Voluntary waste

Two conceptions:

* + - 1. any act of the life tenant which causes permanent damage to the land
      2. any act of the life tenant which changes the nature of the land, whether for better or worse (including ameliorating waste)

The second conception will usually always reduce to the first because in claiming waste plaintiff must proof damages, and

so damages will not be granted for improvement of the land, and an injunction will be unlikely.

Burn classifies waste in four categories p (10-6):

* Timber
* Mines and minerals
* Demolishing or altering buildings
* Changing the use to which the land is put (from residential to commercial)

## 3. Equitable waste – Unconscionable use of apparent legal right to commit waste at will[equity might restraint life tenant with right of encroachment, LEA 11 – presumption against permission of equitable waste]

The creator of a life estate may expressly permit the life tenant to commit voluntary waste. Where there is such a provision the life tenant is said ot be “**unimpeachable for waste**”. However, Equity might still restrain the life tenant from making an **unconscionable use of the apparent legal right to commit waste at will**.

This rule now appears in statutory form:

Law and Equity Act

Equitable Waste

11. 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**.

### VANE v LORD BARNARD (1716): Don’t commit equitable waste

FACTS:

Defendant created a life estate in Rudy Castle for himself with the remainder passing to his eldest son. After taking “some displeasure” in his son he got two hundred workmen together and stripped the castle of all the lead, iron, glass-doors and boards completely wrecking the place.

HELD:

Court ordered an injunction to stop the waste, and also an injunction to repair the castle.

RATIO:

Don’t commit equitable waste.

1. Liability for Taxes, Insurance, etc.

### MAYO v LEITOVSKI – equity looks on that as done which ought to have been done, equity imputes an intention to fulfil a legal obligation, LT must pay taxes on land and cannot use tax sale to extinguish remainder’s rights

FACTS:

Leitovski left 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 subsequently transferred his title, subject to his parents life estate, to Mayo.

His parents did not and could not pay taxes, so the house was foreclosed and put up in a tax-sale. The widow Leitovski’s daughter Mrs. Faust 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.

HELD:

The remainderman’s future interest is restored, and the title will pass to him upon the defendant’s death.

RATIO:

The life tenant can do nothing during the continuance of his estate to impair the estate in remainder, and on the other hand the remainderman can not do any act which will affect the life estate.

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 purchasing the property in a tax-sale or being benefitted by such a purchase.

Equity looks on that as done which ought to have been done.

Equity imputes an intention to fulfil an obligation.

A mortgagee can be a tax sale purchaser, but must not use his position as mortgagee to acquire tax title to mortgaged lands.

# CHAPTER XI: CO-OWNERSHIP – CONCURRENT ESTATES

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.

There are two kinds of co-ownerships remaining:

## 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.

## JOINT TENANCY

Two essential elements:

1. Right of survivorship (*jus accrescendi*)

The right of survivorship provides that upon death of one joint tenant the other joint tenant takes 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**.

1. The Three Unities
2. Unity of Title

Co-owners must derive their titles from the same instrument (transfer or will).

1. Unity of Interest

The interests of the joint tenants in the property must be the same (split equally).

1. Unity of Time

The interests of the joint tenants must vest simultaneously.

Exception: transfer to uses, gift by will.

## PRESUMPTION OF TENANCY IN COMMON

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