**Class 1 – Assurance Fund and the Limits of It (Bucholtz)**

Assurance Fund

* Current owner has an indefeasible interest which means previous owners who are victims of fraud or mistake who have lost the title to this current owner must bear the consequences of the loss. Idea is that they should be allowed to turn to the province to reimburse or compensate them for their loss because their loss has occurred due to indefeasibility
* Indemnity plan: compensating for losses but not giving profits to people, would only recover for the interest in property that they lost and no more than that.
* Registered titles are “assured.” Once a title is registered, it cannot be overturned so long as the owner acquired his or her interest in good faith and for valuable consideration.
* Mortgage fraud: mortgagees have no protection under indefeasibility and no protection from the assurance fund.

Gill/Bucholtz

* A fraudster and a collaborator impersonated Gill and talked Bucholtz into lending money as a private mortgage transaction on Gill’s property. Bucholtz argued they had a valid mortgage and it was registered in LTO and Gill is the registered owner of property
* CoA held that the mortgage was invalid as indefeasibility and registry only worked for fee simple holder, not a charge holder like a mortgagee. So nemo dat, fraudster had no title to give the charge to the Bucholtz, so the charge, the mortgage, was not valid and it was discharged.
* Bucholtz wanted assurance fund, they relied on the register and the fact that Gill was on the certificate. But they were ruled to have relied on word of the fraudster and the fact that they were Gill, not just on the register. So their mortgage was lost due to nemo dat, not register.
* Banks now insist that mortgagees pay the premium for private insurance on the property.

Limits/Problems of the Assurance Fund

* Premium is sum paid by everyone who registers a document in the LTO
* Assurance only covers the fee simple, not charges
* Very hard to actually get the Fund to pay out and the result is that by charging a portion out of every registry fee as a premium, they take in a LOT more money than they pay-out. Excess goes into the Contingency Reserve Fund. It’s not actually used for anything.
* Assurance Fund is remedy of last resort. Can only turn to it after you’ve already attacked and gotten as much as you could from the wrongdoer, like the fraudster or even the Law Society.
* Bucholtz case shows it only applies to fee simple despite saying “any estate or interest in land.”
* Only insures those who acquired the fee simple by way of purchase. Fee simple gotten by gift are not covered.
* Charge-holders are not covered, volunteers are not covered, and fraudsters are not covered, only innocent parties can make a claim under the assurance fund.
* Have to have been DEPRIVED of an interest in land (must have lost the fee simple).

**Class 2 – Claiming against the Fund and Limits to it (McCaig, Royal Bank)**

Further Problems with the Assurance Fund

* Must have lost your title because of the Torrens system. Person who’s claiming to recover from the fund has to have lost their interest in the property because of the concept of indefeasibility of registered ownership. Have to be a person who would’ve been successful and recovered the property under the common law, but due to institution of indefeasibility, they can’t.
* A person who’s a successful claimant has to have been “deprived of any estate or interest in land.” Bucholtz case made it so only a registered fee simple holder deprived of their title

McCaig and Reys

* McCaig buys this property, then is going to sell the property to Reys. Wants an option .
* Reys buys the property and says he understands the option and he will honor it. McCaig finds he cannot register the option because there must be a subdivision of the property and a new boundary line. Registry staff will not register interests in undefined areas of property. Unregistered interest = equitable interest capable of specific performance.
* Reys sells the property to the Rutland Agricultural Society. Reys told Jerome, Rutland’s agent, about this outstanding option in favour of McCaig and asked Jerome if they would purchase property and honour the option and Jerome agrees
* Land passed from Reys to Rutland, the agreement however made no reference to the unregistered option, but earlier negotiations and earlier drafts of the agreement, the option had been mentioned and Jerome had told Reys that it would be honoured
* Rutland sold to Jabim and never mentioned the existence of the option (presumably to get a better price). Jerome thus committed Torrens fraud. Jabim buys property and got themselves registered as the owner of the property in fee simple. Jabim says he never knew about McCaig and denies the option.

McCaig and Reys Ruling

* Reys was found to be in breach and Rutland had also acted in fraud to McCaig by surpressing knowledge of option and passing it on to Jabim meant option could no longer be exercised, as McCaig has no rights against Jabim
* CoA: “if the Torrens system had not come into existence, the claimant would be entitled to recover the land from the present owner,” not just mere operation of the Torrens system. You have to compare McCaig’s position under the Torrens system to what it would be under previous Deed recording system. Would he have lost under that system as well?
* CoA says the outcome would’ve been exactly the same under deed recording system, he’d’ve lost, albeit on a different basis.
* Jerome had deliberately suppressed notice of the option to Jabim, who was completely innocent. Title of Jabim is therefore unassailable, both before and after Torrens. Now it’s unassailable because of indefeasibility because he’s on the register, but before that, he’s a bona fide purchaser for value without notice, unassailable in equity.
* While legal is first in time, first in right, in equity: where the equities are equal, the law prevails. Where two innocent people are both victims of fraud, it’s the holder of legal title that prevails. Jabim has the legal title, so he prevails over McCaig’s equitable interest.
* Obligation is on the claimant to go after people. McCaig must FIRST sue Rutland and Jerome for every penny he can get before turning to the Assurance Fund.
* Very a short time period for bringing these claims, three years upon discovery of the fraud to bring his claim against the fund.
* At time of signing interim agreement, Jabim had no knowledge of the interest. If subsequently, McCaig found out and told Jabim, the notice is too late, conscience is clear. Notice cannot come after the interim agreement.
* Fraud by a lawyer or a real estate agent is called imputed fraud, it’s imputed to the principal, fraud of agent is counted as fraud of the principal.

Royal Bank v. British Columbia

* Other way of claiming against the fund (beyond fraud): an error by the land registry staff, some fault of the staff. A person sustaining loss or damages caused as a result of omission by state or malfeasance by registrar has claim against the fund.
* Walsh is registered owner of fee simple and he removed the duplicate certificate of title form the LTO. He deposited it with Royal Bank as security for a loan. LTO Staff screwed up and wrote down that the duplicate can’t be found, not that it was out. Walsh granted a mortgage to Bank of Nova Scotia, who got themselves, which gave them first charge on the property, with Royal Bank coming after with their unregistered interest.
* Royal Bank claimed against the Fund, saying victims of error on part of staff. The judge said it was Royal Bank’s fault more than the staff’s for taking a short-cut. Royal Bank is “ludicrous” for thinking they can get money from Assurance Fund when they bypassed registration by going with equitable mortgage, and hence skipping the registration fee that pays into the Fund. They want compensation from the Fund, despite not paying anything into it.
* If the registrar can point to anyone else as having made a mistake, they are off the hook. To recover under the assurance fund, if claiming error on registrar, that must be the ONLY cause of the loss. Here, Royal Bank was partially responsible for the error due to their taking a shortcut.

**Class 3 – Abo title, sui generis, Calder, Delga**

Basis of abo claims

* their prior use and occupation before European settlement, asserted by descedents of the occupants in possession of the property at time of Brit sovereignty’s first being asserted.

Calder

* SCC rules Nisga did hold title to their land before BC was created. Thus, they recognized the existence of Abo title and abo rights to land
* split evenly about whether they still had this title or if it had been overtaken and extinguished by Brit sovereignty.
* Fed govn’t starts land claim negotiations with the Nisga’a, but BC declines to participate. BC then begins negotiations, which followed introduction of s.35 into our constitution. \
* Province of BC then changes its stance, BC will negotiate land claims, but will not acknowledge pre-existing title, thus say they will negotiate but will not recognize abo title
* Force that compelled these negotiations was s.35, which does not create abo title or any abo rights whatsoever, but recognizes, protects and affirms rights that are established, either through litigation or by treaty
* Province cannot extinguish or unilaterally take it away abo title once it is established; only way it can be extinguished is if a band surrenders their title to the fed govn’t. Fed can’t unilaterally take it away either, must be surrendered.

Aboriginal Title and Aboriginal rights, Extinguishment and Infringement.

* Aboriginal title: rights of use and exclusive occupation of land.
* Aboriginal rights: rights to follow aboriginal customs, practices, and traditions; rights to hunt and fish and to follow traditions.
* Title is more extensive occupation and exclusive use of the land. Confers more than the right to engage in site-specific activities that are aspects of the distinctive culture. Site-specific activities can be made out without title, but title is a common law right to property, a right to the land itself, whereas the lesser abo rights are more like easements, not claiming exclusive use.
* Aboriginals: Indians (First Nations), Metis (mixed First Nations and European ancestry), and Inuit (First Nations living above the tree line)
* Federal govn’t under royal proclamation from Britain has to reserve lands and protect abo interests. Abo cannot give away the land and can only be surrendered by treaty.
* 1846 – the year British sovereignty is established in BC
* Feds have jurisdiction over Indians and Indian lands while province has ownership of financial resources (debts, assets, taxation, mines, minerals, royalties, etc).
* Abo title is a right of property, not right of individuals, it is based on occupation of this territory in 1846.
* Feds can extinguish title with treaty and a surrendering of the land by the abo.
* Prov and fed can infringe on the abo title if it justified. The abo title does not give abo a veto. The fed and prov can infringe if they can justify it to the courts.

Delgamuukw

* basic decision is that trial judge erred in failing to give weight to abo evidence of title.
* At end of the case, bottom line is that we should be negotiating this rather than litigating it.
* Prior to this case, the presentation of claims of abo title to court had been through expert evidence (anthropologists, sociologists, archaeologists), always failing. In Delgamuukw, the bands presented case in their own way, involving evidence of performances in the court room of native dances and ceremonies and reference to aboriginal dress and carvings and totem poles. Oral history. The trial judge said this was all hearsay, reputation in the community, and is inadmissible as evidence in court or if it is admissible, of very little weight
* SCC said this was incorrect. Shouldn’t be bound by traditional definitions of evidence
* Difficulty of pleading: the court says that abo title was actually proven over part of the area claimed but because the claim was pleaded as a claim of ownership of the entire area court has to reject the claim entirely..

Nemo dat functioning in Abo title (Delga)

* if abo title is proven, a claim of ownership of property, and that claim of ownership precedes Brit sovereignty in 1846, then that claim runs with the land so that it would extend to private ownership, because the Crown would take its title to the property subject to the prior occupation of this land by the First Nations
* If abo title is established, then it attaches to the land and runs with it from the Crown, which is burdened by it, and on to the people that acquire the land through Crown grant and every successive purchaser of that land, even though that land is now in the Torrens system
* Aboriginal title is a LEGAL title, arises from the common law. Thus, not defeated by bona fide purchaser for value without notice, which only defeats equitable claims. Aboriginal title is a legal claim, common law. Nemo dat applies, Crown cannot give a better title than it has and so the title that passes is subject to abo title.

Sui Generis

* bands cannot file any claims through the Torrens system
* Abo title is sui generis. This means it’s unique, a special kind of ownership. It’s recognized in law, but it is not common law fee simple as we know it. There are certain aspects of this ownership that relate to hunter gathering values of First Nations.
* The land cannot be sold, it is inalienable. Fee simple, meanwhile, must be alienable. Abo title can only be surrendered to the Fed by treaty.
* It arises from prior occupation before assertion of British sovereignty. The ownership thus doesn’t arise from the crown, it precedes the Crown.
* Aboriginal title is owned communally, owned by the group, not by any individual. There’s no concept of individual ownership, which is at the heart of the fee simple system. Abo title is “communal stewardship.” Decisions with respect to that land are made by that community

**Class 4**

Duty to Consult (Delgamuukw)

* If gov wishes to develop land on which abo claim title, they have a duty to consult with them and to accommodate their concerns as much as possible.
* , negotiation, and reconciliation between European society and aboriginals through treaty negotiation rather than by litigation.

Nature of Aboriginal Title

* Aboriginal title is a right in land, which is more than a right to engage in specific activities which may themselves be aboriginal rights. Rather, it confers the right to use land for a variety of activities. Abo title is an equivalent to the fee simple concept of ownership of a property.
* There’s a spectrum of rights in land. Can have rights in passage across land, rights of seasonal occupation, they could have various rights of hunting/fishing, all the way up to aboriginal title. Difficulties of proof rises.
* If aboriginal title is established, it is “upstream,” or chronologically precedes Crown claims of ownership in 1846. Abo title would precede crown ownership and in Canada, the Delga case says it passes to private owners. People who take title from the Crown would thus be subject
* Sui generis: inalienable to third persons, can only be surrended to the Federal Crown by treaty
* Communal stewardship. Survival depends on communal ownership of assets and band members do not compete with each other the way individuals in Euro society do. Ownership is not for their personal benefit, but also for the benefit of future generations.

SCC in Delgamuukw – things that must be established to prove abo title

* Prior occupation before Crown asserted sovereignty. Chilkotin case says 1846
* Continuity. Current band members are claiming based on prior occupation of their ancestors. The continuity can be interrupted, so long as there is substantial maintenance of the connection. Movements of members of the band must be traced from 1846 to present to show that same people who were in that area are still there.
* Exclusivity – The band must establish that they have the ability to exclude others from their areas. They don’t have to have excluded others, but must have had the ability to do so.

Delgamuukw Evidence Rules

* Proof of abo title by oral history: spoken words. Normally hearsay is inadmissible at common law. There are statutory and common law exceptions where, if the hearsay is reliable, can be admissible. This was applied to bands’ evidence. SCC said they cannot satisfy the test as they do not have written records that could be admissible under these frequent exceptions.
* Oral history is given significance (band has no written records), though that significance can only be understood orally. Symbols are related to history. dances and songs were performed in courtroom.

Infringement

* Aboriginal title is not absolute, bands cannot prevent development of their lands, govn’ts can authorize infringement of abo title if they can justify it.
* As part of process of justification, they must consult with the band to find out what the band’s concerns are with respect to the development that interferes with their claimed title. Must accommodate or alter the proposed development to meet the concerns as far as possible.
* Bands do not have a veto, cannot demand accommodation with veto. Govn’t can override bands’ concerns if the accommodation demanded is impractical.
* Duties to consult/accommodate apply to any lands within abo claims, even if those claims have not been established by litigation or treaty.
* Accommodation: changing the plans, scaling back the development, but can also be a payment of money. Payment of fair compensation by governments to the bands for infringing upon their claims of aboriginal title. Duty of consultation and accommodation is on the governments, fed and prov, but it does NOT extend to the private developer.

Mitchell Case (proving abo title)

* Mohawk claimed right to bring goods bought in US into Canada without paying customs duties. Say they were buying goods in an area over which they were claiming abo title. Goods are within the territory and brought in for use by the band and should be duty free
* Admissibility of oral evidence: , the SCC clarified Delga, saying there were three requirement **1)** Useful (relevant to an issue in the case) **2)** Reasonably reliable (truthful, accurate, does the witness know what they’re talking about) **3)** May be excluded by judicial discretion. (for instance, if prejudicial)
* Weight: use “general principles of common sense” in weighing the evidence and give “equal and due treatment” to the bands’ evidence and the government’s evidence. Balance of probabilities operates for proof of aboriginal claims.
* Crown sovereignty: court rules it was infringed by this claim; Canada has right to establish and protect its boundaries

Mitchell (things that must be proven)

* Ancestral practice, tradition, or custom when Crown asserted sovereignty. Can you show that that practice existed all the way back to before 1846?
* Practice had to have been integral, unique, or distinctive to the culture, a central attribute of the cultural identity of the band, of special cultural importance to the band. (Mitchell failed this).
* Reasonable continuity
* Burden is on the claimant

Marshall/Bernard

* Taking logs from Crown land without permission, foresting. They said don’t need permission and provincial forestry regulations don’t apply to them, as these lands were taken from them when they were making claims of abo title.
* Did M’ikmaq have AT to Crown lands? Claim has not been proven. Their claim of ownership of this land and the trees on it was not proven, so they are subject to provincial regulation
* This case adds more things that must be proven. Must show pre-sovereignty aboriginal practice. However, must also translate that practice into a modern legal right. How does modern clear-cutting translate to a pre 1846 practice. Trace this practice from pre-1846 to today. Marshall failed test: can you translate this practice prior to sovereignty into what you are doing today. Were you cutting the trees and selling the logs pre-sovereignty?

**Class 5 (Haida Nation (Duty to Consult), Rio Tinto, Squatters)**

Haida Nation

* Govn’t is required to consult, once you know about a claim or have reasonable basis to suspect a claim will arise, the duty to consult will arise for the province
* SCC criticized use of interlocutory injunctions. SCC was trying to divert these AT claims away from courts and into negotiation process. Interlocutory injunction is an all-or-nothing solution. Prefer consultation/accommodation/negotiation process.
* Consultation must be “meaningful,” with meaningfulness being relative to the strength of the claim and the extent of the infringement that the government wants to take.
* There is no duty to reach agreement. The band does not have veto power over development of lands that are subject to their claims. It is duty to consult and accommodate, but not an obligation that the province has to meet the band’s requirements, just an attempt to do so.
* The private developer/third party does not have a duty to consult and accommodate, it is the prov and fed govn’ts who owe the duty to consult and accommodate. Not involved directly in the negotiation, though can be involved indirectly by providing info to the Crown. However, the court leaves open the possibility that they could be held liable in damages to the band for exceeding the scope of the arrangements made between the band and the Crown.
* Duty to negotiate arises out of the “honour of the Crown” and fiduciary duty to look out for the interests of aboriginal peoples. Idea is to get away from litigation and court remedies. It’s not just a moral duty, it is a LEGAL DUTY, and it is enforced by the courts.
* New field of litigation: band can argue under admin law principles that Crown has not engaged in MEANINGFUL negotiation with the band, not a good faith effort, only perfunctory or vague.
* Crown cannot delegate the duty to negotiate/consult to third parties. The Crown may however delegate procedural aspects of consultation.

Tsilhquot’in Nation Case

* band went to court to say govn’t had duty to consult/negotiate/accommodate. Basic problem came down to pleading. Ratio of the case was a pleading defect, the claimed whole area was under AT, but only certain parts of what they put in their plea fell under AT

Rio Tinto Alcan case

* agreements between Alcan and BC Hydro had been in effect for years, but was up for renewal in 2007. The Commission took the position that they did not have a duty to consult with the bands because this was simply a renewal of a pre-existing set of agreements. Sekina nation said province is proposing to approve something that affects us, and we should be consulted.
* The SCC said there was no duty to consult in this case.
* Consultation only occurs where you have the govn’t approving or giving approval to a future development or change having an “adverse affect” on abo title or abo lands. This was not such a situation. This was just one in a series of ongoing contracts and this was just a renewal of pre-existing agreements with no additional adverse effects, it was just more of the same, continuation of prior infringement, nothing new, and so no duty to consult.
* Past wrongs, including previous breaches to consult, do not suffice. It has to be prospective/future and it must have an adverse effect on the claim of aboriginal title. Sekina did not have either of those qualities, it was not a future wrong, but a continuous one, and there was no new adverse effect beyond what had been recognized for years.

Squatters (Adverse Possession)

* Adverse Possession: incompatible with the Torrens system to have land owned by people who are not on the register.
* Common law: if someone owns land at common law and someone else is living on the land and making good use of it, then that person can acquire title to that land if they lived on it for 20 years. Because that’s making more efficient use of the land.
* BC: you must be a registered owner to have ownership of the land. A squatter who lives on Crown land cannot gain title against the Crown. Once the grantee gets on the title as the registered owner, they are protected, their title is protected and no one can acquire a title by possession against a registered owner.
* In the time between the Crown Grant and registration into private ownership, if someone is adversely in possession of this land, though they can’t get a title against the Crown nor a title against the grantee once they get on the register, if they’re in occupation of land at the time the Crown grant is acquired by the grantee, they can assert their title as against the grantee.
* If you have lived on the land for a undetermined period of time, you can have title against the grantee if they haven’t gotten on the register yet.

**Class 6 – Exceptions to Indefeasibility**

Effects of Indefeasibility

* Indefeasible title, as long as in force and uncancelled (registrar has the power to correct defects in registration), is conclusive, irrebuttable evidence, against the Crown and all other persons (excepting Aboriginal title), that the person named in the title as the registered owner has indefeasible title to an estate in fee simple.
* If the prospective purchaser searches the title, they see on the title registered charges, they are subject to charges on the register prior to purchase.
* Unregistered charges will not affect the purchaser.

Exceptions to Indefeasibility

Unregistered Interests and Exceptions/Reservations

* Unregistered charges that WILL affect the registered owner: some are listed in the LTA, but others are not (like Agricultural Land Reserves). Considered practical necessities, “overriding interests”.
* There are often where the registry is incomplete: zoning restrictions of local government (not on the title, it will be in the Zoning Authority department’s office, here in City Hall) (development potential is restrained by this), public utilities easements (again in City Hall, plan that locates all the easements), and pre-1973 Agricultural Land Reserves. The purchaser would be affected by these exceptions even though they are unregistered at time of purchaser’s acquisition and registration. They override indefeasibility.
* Exceptions and reservations of the Crown Grant. If you buy land, there is a heading at top of certification saying “subjecting to subsisting conditions,” LTO staff keep the original grants and onit are undersurface minerals, oil and gas, all reserved, as well the Crown’s right of resumption.
* The statutory right of resumption – right to take property without compensation is part of original Crown Grant and carries to subsequent purchasers. That said, before Crown can take it for resumption, it has to be undeveloped land, no buildings on it. Can only be up to 1/20th of the land that can be taken for resumption without compensation.

Taxes

* Tax liabilities: Under federal income tax act, someone might get a property for less than fair market value and the vendor or registered owner or donor might owe taxes on this transfer, property might owe federal or provincial income tax or property taxes. These provincial and federal taxes, even though not on the register, can attach to the title and pass to the person who acquires that title and they’re usually cut off if you’re a purchaser for value without notice and got on the register, but if you’re a volunteer (a donee), you can be subject to a lien.
* Property taxes – local government tax debt. If the vendor has not paid his property taxes and has them in arrears, or there is some local improvement charge for a local improvement that is made (paving the lane, curbs, etc), those charges are binding on the purchaser and they are not on the title. Standard practice is to ask for the tax situation if the vendor is up to date.

Short-term Leases

* a lease, which is for a term of less than 3 years, and the tenant must be in actual occupation, visible to the purchaser if the purchaser had physically inspected the property. If there is actual occupation and there is an option or covenant for renewal, have to include all the options in determining the duration of the lease. Even if purchaser doesn’t physically inspect, he is presumed to have knowledge, still bound by the lease
* You also can’t register a lease of less than 3 years. It does, however, create a binding interest on the purchaser, who has to honour the lease and allow the tenant live there for the term, with or without actual knowledge (with or without inspection)
* For longer lease, if the purchaser has notice or knowledge of it, then we have question of fraud. Issue is when they got notice. Can be fraudulent to disregard an unregistered interest in property when you have knowledge of it when you buy it.
* Turns into fraud if it is clear that the owner did know about the lease at time of purchase. Must be actual knowledge, negligence/failing to inspect is not fraud. Negligence may mean the tenant has to go, fraud means tenant stays.

Public Easement/public right of way

* highway or public right of way watercourse.
* Easements under the ground for public utilities like oil and gas. Water pipes or sewage. Not on the title or the plan, have to go to city hall. Public right of way wouldn’t be on the title.

Right of Expropriation

* Government right to expropriate prevails over indefeasibility.
* Unlike resumption, they must pay compensation. If they give notice of expropriation, they have to give fair market value for the property. They can take it for public purposes, compulsory acquisition.

Escheat

* Property without an owner goes back to the Crown by escheat, who can then resell the property or hold onto it. Obviously, there’s no one to give compensation to by expropriation. This often happens if someone dies intestate without heir.

Liens

* A charge registered before or after registration of purchaser’s title: builder’s lien. Can act as an intervening charge that takes precedence over purchaser’s registration and retroactively rank ahead of them even though it wasn’t registered anywhere at the time of purchase.
* If payments aren’t reaching the workers on a project, they have right to file builder’s lien, provided they do it within 45 days.
* the purchaser could acquire title, get registered as owner, then one of these unpaid equipment providers or workers could then come in and file a builder’s lien. It’s filed on the title, but can be filed after the date of purchase and registration and it would be binding on the purchaser. Gets priority over the purchaser even if the lien is filed after the purchase and registration.
* The purchaser gets a cause of action against the vendor, though he could be insolvent

Wrong Boundaries

* If there’s an error in surveying and the property is not as big as the purchaser thought due to error in the plan, then the purchaser cannot look to anyone to recoup that loss. There’s no guarantee under Torrens system. Could mean the purchaser paid too much for the property – thought it was bigger than it was, gets shrunk. Can’t get compensation from the vendor (private title insurance is the only source of compensation).

Fraud

* A title may also be defeasible if a fraudster obtains by forging innocent registered owner’s signature on transfer documents and gets themselves registered as new owner of the property, victim of fraud is deprived of land and fraudster claims indefeasibility.
* The statute is not to protect fraudsters. Their title is deemed defective and hence defeasible. They got on title as owner by forgery/fraud. The person deprived of land can get their title back.
* It has to be personal fraud by the registered owner, the guy who got himself on the register, or by his agen
* if fraudster gets title by fraud or forgery then passes the title to a third person, who was innocent in good faith. The land title system doesn’t say one way or another.McCaig, it was ruled that the innocent purchaser keeps the title. If they relied on the register, Torrens is to protect the register and keep it reliable. The original owner is gets nothing, may have claim against assurance fund and against the fraudster as well.

Squatters (see class 5)

In personam claim

* The registered owner of the property has indefeasible title, they can make a contractual obligation or make themselves trustee of the property for someone else.
* Indefeasibility protects one against prior transactions, but there’s nothing stopping a registered owner from binding themselves by personal obligation regarding their property. The Torrens system says if a registered owner makes a deal and intend to renege on it, the other person can sue, usually for specific performance that can affect title, even though not on the register. Indefeasibility is NOT prospective, it looks backwards. Future transactions by owner are binding, called in personam claims. Rather than affect title directly, it’s a claim on owner.
* A volunteer is not protected by indefeasibility. If volunteer gets a gift of land and they get registered on title as owner of the property, in their status, they are not protected, as they are not purchasers. As such, prior defects in their title can be pointed out and affect their interest.

**Class 7**

Agricultural Land Commission Act

* Province imposed a system of zoning to preserve and protect agricultural lands from creeping urban sprawl. Stop Agricultural lands were being developed for residential real estate.
* Agricultural Land Commission is tribunal determining uses of agricultural land. Affected titles that had no registration of this scheme, originally. People bought this land subject to this even though it wasn’t on the title.
* Agricultural land as it existed in 1973 is designated by the Commission as an Agricultural land Reserve, a province wide scheme of zoning to preserve agricultural land from development.
* Farm use/occupation= agricultural use. Can apply to Commission for exclusion of land from agricultural land reserve to use it for purposes other than farm use/occupation, so not absolute.
* Can apply to the commission to subdivide agricultural land.
* Can find out what lands are designated as agricultural land by going to the local government. The designation usually won’t be on the title.
* Approval to develop the land will only be granted to things that will still keep the land open, like golf courses for instance. Not agricultural use, but keeps land open.
* Since the system was introduced, as the lands were transferred, the reserve designations began appearing on the title. But the peril still exists for lands that have not been transferred since 1973, as it still won’t be on the title. Could buy it for development and get caught.

Creelman v Hudson Bay

* could not buy the property as an investment, only as their own property to develop. Rule is that you can’t buy land to speculate on it. Hudson had boughtland contrary to the statute under which they bought it. Creelman thus says they can’t buy property and he refused to complete, says can’t sell me this property because they can’t own it.
* Privy Council ruled that Creelman was attempting to go against the LTA, looking behind the title would be defeat the very purpose and object of registration. Creelman is reverting to nemo dat, says yes Hudson is on register, but there is a defect in the title of the Hudson’s Bay, so their title is void. Privy Council says you can’t make that argument, title is conclusive.
* HB was not supposed to have the capacity to buy it (the vendor not selling it for the use HB was going to put it to), but HB got the title anyway, and so their title is clear, no defects, for purposes of purchase by Creelman. Registration removes the possibility of nemo dat as a way for the purchaser, even in good faith, to get out of purchase.
* Purchase is always protected regardless of how the vendor got the title, as long as vendor has good title and is registered owner.

Proprietary estoppels as unregistered interest

* You can create an interest in property through the conduct of the owner, even if this interest isn’t on the register. The encouragement must come from the registered owner. Whatever’s necessary to do equity to the parties, may result in easement or equitable title.

Encroachments

* Property law act says the court has a much broader discretion to allow encroachments. It provides that if issue concerns encroachment by a building or a fence built over the property line, then the SC has the authority to do what is necessary to do what is justice between parties regardless of encouragement. This is separate from proprietary estoppels.
* Their options are to declare an easement with compensation, the court can also move the property line to accommodate the encroachment, or require the removal of the encroachment. It has to be a building or a fence for the court to make these rulings.
* So in encroachment, if not estoppel, court will move boundary line or provide easement but the encroacher will have to pay compensation.

Carr v Rayward (builder’s lien)

* Rayward did not pay Carr for the work on property. Rayward then sold the property to Bell. Bell got registered as the registered owner. Carr then filed a builder’s lien on the title, so Bell no longer had clear title.
* Bell argued Torrens removed nemo dat, he bought with clear title, and here are events that occurred before Bell’s purchase of the property coming back to haunt him.
* However, this is permissible for builder’s lien. Carr can claim lien on property despite indefeasibility, which is expressly provided for in the LTA. If Bell wants a clear title, will have to pay additional money beyond the purchase price to Rayward to get Carr’s lien off the title.
* Claim of lien must be within 45 days of them failing to pay you/completion of the work.

**Class 8 - Liens, Torrens Fraud (Carr, Winrob, Assets Co, Gibbs, Gill)**

Carr v Rayward cont’d

* If there’s new construction or renovation of a property, these actions can amount to improvements under Builder’s Lien Act and a claimant can file a lien claim against the purchaser of the property even after the purchaser has acquired indefeasible title. True exception to indefeasible title in that the purchaser is the registered owner and the lien is filed after that person becomes registered.
* As soon as the contractor starts work, they’re entitled to file a lien, that right continues until 45 days after the project is completed. Rayward, in that period, sold the property to Bell, the deal completed, and Bell got registered as owner of the property. Then Carr, who hadn’t been paid, filed a lien on the title.
* Carr has one year to start a lien action in BCSC. “Construction litigation” and at end of that process, Carr established that he’d done the work and hadn’t been paid, and that he was owed money by Rayward. Got personal judgment against Rayward as result of the lien action, but he also got a lien on Bell’s title. Two people to collect from, either from Rayward or from Bell, whoever had the money.
* Bell has to pay twice: pay the fair market purchase price to Rayward and pay Carr for the work.
* 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.
* Builder’s lien act goes beyond privity of contract; unjust enrichment theory that the owner has benefited from the work.

Winrob v. Street

* the Torrens system does not guarantee boundaries. The statute provides that the holder of an indefeasible title is subject to the possibility that someone will come along to show that all or a portion of a property is improperly included on the title by error or whatever.
* Winrob’s title was fine, but the boundaries of his property were smaller than what he’d be told by the vendor. He’d paid too much for the property. City demanded rent, he was on their property and have to pay rent for use of it.
* Winrob went after his conveyancer Street, for not checking everything out. Street said not his problem, as a lawyer, he searched the title and verified the title, verifying the boundaries is for surveying, not lawyer.
* Ruling: Prospective purchaser should have the property surveyed. Purchaser should verify the lot lines. It is not the conveyancer’s responsibility.

Fraud: Torrens fraud. Two situations where fraud can arise.

1. Fraud against the registered owner. Fraudster impersonates registered owner and forges their signature to documents that cause a transfer of the title or a mortgage to be placed on the property. Then the fraudster absconds with the proceeds
2. Where there’s an unregistered interest on the property and the fraudster, knowing of the existence of this unregistered interest, then takes some action to defeat the unregistered interest through registration of a new interest in the property.

Assets Company vs. Mere Roihi.

* Privy Council in this case 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.
* 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.
* Agent must be acting in the scope of authority of the principal for it to be attributable
* The fraud has to start before the purchaser buys the property and becomes registered owner.

Fraud

* Critical date is the date at which the purchaser signs the binding agreement of purchase and sale. That’s the point where, if the person knows of fraud or knows there’s a problem and goes ahead and signs the interim agreement with that knowledge with the intention of carrying through the transaction and registering as owner of the property, then that is fraud. You’re using the statute and bending it to the purpose of fraud, as you’re trying to get indefeasible title to defeat these other interests.
* To go through with closing and get registered, if your conscience is clear at that time, you are not affected by subsequent knowledge. Knowledge after this point does not lead to fraud. What you find out about unregistered interests don’t bind you after you sign the interim agreement, because you have already commited to buying the property

Fraud and Indefeasibility (Assets Co case continue’d)

* The fraud does not give fraudster an indefeasible title. Indefeasible title is conferred to the registered owner, but subject to the right of a person deprived of land to show fraud, including forgery to which the registered owner has participated to any degree.
* Fraudster got on title but participated in fraud by forging sig or agent forging sig, so original resgistered owner has been deprived of land. Fraud on original owner and on land registry and so the property is actually returnable to the registered owner #1. That person can show fraud on part of owner #2 and get the property back. Cannot benefit from your own fraud.

Gibbs and Messer

* Deferred indefeasibility: courts were sympathetic to registered owner #1 (Gibbs) and allowed him to get the property back from registered owner #2, even though #2 was an innocent purchaser and was not a participant with registered owner/fraudster B in the fraud.
* In this situation, court says that it is fair to give the title back to original owner. We have two innocent people here, but argument was that #1 was completely unaware of the whole thing. LTO does not give any notice that something has happened to your title (assume you know), he’s totally innocent. #2 however, was involved with the fraudster, he dealt directly with the fraudster, which #1 did not. #2 had the opportunity to investigate the bad title and didn’t avail himself of it, so maybe not totally clean in not looking behind claims of the fraudster.
* #2 says he relied on the title, court says this is true, but it’s so hard to take #1’s home away. #2 can either get their money back from the fraudster or the Assurance Fund.
* Indefeasibility is deferred until the fraudster sells to the innocent purchaser and that person sells to another innocent purchaser. While the fraudster is on the title and before the sale, the title is vulnerable and can be taken back. But once it passes from the fraudster to innocent purchaser, then that title is still vulnerable and can still be recovered and taken back.
* #2 is vulnerable because he dealt with the fraudster, but by #3, we have an innocent person dealing with another innocent person, and now we have indefeasibility.

Gill and Bucholtz

* Changed law from Gibbs. A transferee named in the instrument and in good faith for valuable consideration is deemed to acquire that estate on registration of that instrument. As soon as #2 gets on the register for bonified value without notice, they get immediate indefeasibility, #1 is SOL and can’t get property back, can only go for claim on fraudster and the Assurance Fund.
* Immediate indefeasibility in BC. Fraudster does not have indefeasibility, but innocent purchaser gets it for dealing with the register, offers more faith in the register. Now, if fraudster sells property, the first innocent purchaser gets immediate indefeasibility. This decision is retrospective to affect those who got property pre-2005 as well.
* a person who purports to acquire land by registration of a void instrument does not acquire any estate or interest in land on registration of that instrument. If #2 is a mortgagee and the fraudster has by forgery obtained title and puts a mortgage on the property, the mortgage is void. There’s thus a gulf between fee simple purchaser and mortgagee or any other interest holder. Immediate indefeasibility does not affect mortgagee.

**Class 9 – fraud, Notice, Equitable Interests (Vancouver City Savings, Gill)**

Effect or Registration

* Purchaser gets immediate indefeasibility on registration.
* Charge-holder gets nothing, on registration, all they get is a rebuttable presumption of validity. Land title staff vet these charges when the charge-holders apply for registration and if they look ok, get on the title, but that is not a provincial guarantee that the charge is valid.
* Implication according to CoA is that in determining the voidness of the charge, nemo dat (any prior defect) applies.
* Anyone after 2005 buying a fee simple and getting on the register gets immediate indefeasibiliy without any deferral, no opportunity for the original owner to claim fraud and recover title from the fraudster. A person deprived of a land only has a right to show fraud or forgery to which the registered owner has participated in any degree.

Gill/Bucholtz

* Bucholtz, mortgagees, searched title, found Gurjeet on the title (by forgery) and the Bucholtz advanced money to them. Then another registered company filed a second mortgage after the Bucholtz’s, did not register their mortgage, also defrauded.
* argued that Mr. Gill should get his title back due to the fraud, but with the mortgages attached to it. The Bucholtz’s also applied to the assurance fund for recovery, but got nothing, declared their mortgage void and only fee simple holders can get anything from the Assurance Fund.
* CoA decided in favour of Assurance Fund – because they have a charge they are subject to nemo dat. Gurjeet’s title is void due to fraud, so they have charge on nothing (nemo dat), so Bucholtz’s could not recover from Assurance Fund and Mr. Gill got title back.
* You don’t get, by registration, conclusive evidence/indefeasibility of title to the mortgage, all you get is rebuttable presumption, an assumption in the absence of further knowledge that the charge is valid – but this is rebuttable by showing fraud or forgery, then back to nemo dat.
* Mortgagee is expected to deal directly with the mortgagor, reduces fraud.

Volunteers

* someone who’s just GIVEN fee simple/property does not get protection. They do not get indefeasibility. Volunteers are not within the system. They do not get immediate indefeasibility, their title is defeasible.
* That said, there must be a basis for attacking their title, if no one can show a defect in their title, it’s just fine. Defeasible just mean that the title can be attacked if there’s a prior defect or problem. So if a volunteer got the title from a valid fee simple holder and they get on the title, there really won’t be a basis for attacking the title.
* If an innocent purchaser gets property from a fraudster then gives their property to a volunteer, that volunteer may have their title attacked by nemo dat, as they don’t have indefeasible title.

Equitable Interests/When Notice Trumps Indefeasibility

* What happens when you have McCaig, who has an interest he cannot register, and then the property is transferred? The new fee simple holder tries to dump the unregistered interest and claim indefeasibility, while McCaig will say that the new owner had notification
* Bona fide Unregistered interest holder has equitable interest in the property.
* Statute originally said notice was abolished and any unregistered interest was behind the curtain and could thus be ignored. Fraud is an exception: they know about the interest (McCaig), they promise to abide by and respect the interest, the vendor sells the property with that understanding, then the purchaser goes back on word and turns around and ignores the interest and claims indefeasibility.
* Court says can’t allow a fraudulent purchaser to get away with that kind of reneging on promise.
* a purchaser is not affected with knowledge of an unregistered interest unless their behaviour or their conduct amounts to fraud.
* The purchaser who is found to be a fraudster does not have the benefit of defence, cannot claim indefeasibility so as to defeat unregistered interest. Statute cannot be used for fraud.
* It is Fraud to buy property knowing of interest, and then after purchase, trying to hide behind indefeasibility.
* If the purchaser signs on the dotted line before the vendor mentions the unregistered interest, then he is entitled to ignore the unregistered interest as they’ve already committed themselves to buying the property. Question is when in the sequence did the purchaser find out about the unregistered interest. Onus of proving lack of notice is on the purchaser. If succeed, all that interest-holder can do is seek financial compensation from the vendor.

Vancouver City Savings

* important time for assessing what the petitioner knew is when the mortgages were granted or, at latest, when they were registered on the title.
* Notice of an unregistered interest before closing; if the purchaser acquires knowledge of the unregistered interest before closing, but after signing of interim agreement, this judge felt that it was fraud for the fee simple holder to try to defeat the interest by indefeasibility
* Earlier cases: signing the interim agreement, that is the effective time, if they have notice at that time, they are bound. If they don’t acquire knowledge until after signing the interim agreement, they are not(Woodwes). So one judge says knowledge before closing is enough to bind, other judge says only before interim agreement.
* Vancouver city Savings: notice isn’t good enough, there must also be actual fraud. The purchaser must have a dishonest intention.
* So, when’s the proper time, and is it only a matter of time or is a dishonest mind required? Different cases say different things

**Class 10 – Fraud, Effective Notice (Kearns, Vancity)**

Kearns

* court of equity does not set aside the statute that abolishes notice, it is merely acting in equity and good conscience to enjoin a person from perpetrating a fraud through using the statute aimed at preventing fraud
* Court says notice has generally been abolished, but in exceptional case where person has acquired title by fraud, then we back off and we say that that fraudster should not get the benefit of the concept of registration and indefeasibility.
* Must be “actual fraud,” with the idea being one of dishonesty. There must be a fraudulent intent, more than just mere notice of the unregistered interest, there must be some dishonesty somehow associated with this notice. The “malice animus” must be proven with clear evidence, direct proof of the criminal character of fraud, must be real dishonesty. Must also be actual knowledge of the unregistered interest
* If purchaser’s behaviour falls sort of this, then the purchaser is not subject to the unregistered interest, notice or not. If a purchaser does not have notice of the unregistered interest: bona fide purchaser for value without notice, not subject to interest
* With notice: subject to equitable interest; dishonest to have notice of the interest, and then buy the property and hide behind indefeasibility in effort to abolish the interest.
* Can be “express notice,” actual knowledge/transferee’s knowledge. Statute tries to abolish implied notice. Equity does try to say however that knowledge of the agent is imputed to the principal. (Gravelin)
* Constructive notice: suspicious circumstances where the ordinary purchaser would be suspicious and investigate. In constructive notice, the transferee knows facts that would put the reasonable person “on inquiry.”
* We’re now just down to actual knowledge.

Vancity

* BCSC judge saying that if you’re put upon inquiry by suspicious circumstances, that is sufficient to be bound by unregistered interest.
* But the CA in the Hudson’s Bay/Kearns case, and is binding and a higher court, talked about actual knowledge. Not just a tiny bit of knowledge that puts you upon inquiry, the CoA says it has to be actual knowledge, you have to actually know about the details of the unregistered interest and buy the property anyway. So there’s a contradiction here.

Notice to Agent and Fraud in Action (McCaig and Graveling)

* McCaig can’t get title back because Jabin is innocent purchaser. While Rutland owned the property, he could’ve gotten it back, because they were fraudsters. But he still has personal rights against Jerome for fraud and against Reys for breach of contract.
* The knowledge of Jerome the agent, is imputed to Rutland, the principal, and the knowledge applies to Rutland because the agent had notice of it.
* Graveling: because the conveyancing lawyer knew, the purchaser is taken as knowing.
* Jerome explicitly told Reys that he would honor the option, hence why he got the property for the lower price. After that, Jerome decided he can get better price if he ignores option, so suppress all knowledge of it. Dishonesty element

Mere Notice

* Mere notice does not amount to fraud. If I bought the property, got notice of the interest, and then quickly sold it, it’s not fraud. Apparently, I didn’t do enough to suppress knowledge of the interest. It’s dishonourable, but not enough to be fraud.
* If the interest-holder doesn’t come forward or anything, you’re not obliged to tell them when you transfer the property.   
  If the transferee doesn’t ask, you don’t have tell about the unregistered interest. Not dishonest.

Hudson’s Bay/Kearns

* Kearns gives Hudson’s bay the duplicate certificate of title. Land title staff is supposed to note that the duplicate certificate is out of the title office, but they messed up and did not. LTA provides that the Hudson’s Bay cannot register an equitable mortgage. Kearns then turns around and starts negotiating to sell the property to Rowling.
* Rowling got property for half of its fair-market value, says he’ll pay purchase price in two instalments. He did not find out about the duplicate certificate being out until after he made the first payment, at which point he asked about it, and Kearns gave evasive answer. At that point, he paid the second instalment and got on the title as registered owner
* HBC argued that equity would not allow a statute to be an instrument of fraud. Rowling’s conduct amounted fraud and that Rowling should take and be bound by the Bay’s equitable mortgage.
* need “actual notice/knowledge” and some conduct equivalent to fraud. Must be some sort of act done for the direct purpose of facilitating the fraud. Idea of some dishonest conduct in deliberately extinguishing an unregistered interest by getting on the register. Dishonest purpose for direct purpose for extinguishing the unregistered interest.
* Rowling does not fit the bill. At the time he signed the agreement to purchase the property, he was dealing in good faith. While committing himself to purchase, Rowling had no suspicion that this was an irregular deal as there was nothing on title to indicate a problem. It was only later he had suspicion about duplicate certificate and asks her...and he accepts her evasive answer.
* Rowling got notice, if anything, of the problem only after signing the agreement and paying first instalment, then he MAY have gotten constructive notice. Too late and besides, constructive notice is NOT actual knowledge.
* Dissenting judge says that Rowling was just incredibly careless. The majority says this is correct, he was careless, but even so, he was not dishonest. Worst you could say about him was that he was negligent and reckless and stupid, but he lacked the element of dishonesty

**Class 11 – Fraud (Agency, Actual Knowledge, Belief in Defect – Vancity, Saville Row, Graveling)**

Knowledge = fraud?

* Knowledge of an unregistered interest is not in itself fraud, there must be dishonesty. Full knowledge BEFORE agreeing to purchase the property plus either subsequent deception or deliberately carrying out the purchaser is fraud.
* Having full knowledge, not just a suspicion, of the unregistered interest, knowing exactly what it says. It is combined either with subsequent deception or deliberately carrying out the purchase and then attempting to extinguish the interest.
* Fraud under Torrens system is that it must be actual fraud, NOT equitable fraud.

Vancity

* unregistered tenant lease for 5 years. Building is foreclosed, Cancity has mortgage on the building. When they issue mortgage, they take cash flow of this motel/building into account. Determining this cash flow takes these tenants/occupants into account
* Vancity finds another possible purchaser for this foreclosed property, but this purchaser wants it free of the tenants. Vancity applies to the court for foreclosure for vacant possession. Tenants say this is fraud, Vancity is turning around, after recognizing their existence from the outset and awareness of the rent, to deny our existence by asking for foreclosure with vacant possession.
* There was no dishonesty on Vancity’s part in explicitly suppressing knowledge of the existence of these occupants, but there’s still fraud in that they had full knowledge from the outset of the terms of these agreements, then for them to turn around and say they never knew these people, that is fraud according to McCaig and Kearns
* Judge in Vancity, however, says it isn’t fraud because Vancity did not have a dishonest intent at the time they advanced the money. When they put up the mortgage money, they didn’t have an ulterior motive to kick out the tenants, had no dishonest intent. Vancity formed the intent to remove these tenants after they registered their mortgage.

Graveling and Graveling

* fraud on the part of Mrs. Graveling. She sold the property once to her husband, then sold it again to Blackburn. Selling the same property twice is fraud, can only have one owner. Sold it to Blackburn, who did not know, personally, about the previous sale. H
* However, Mrs. Graveling’s lawyer, who knew about the previous transaction and had actually done the documentation for it, was also Mrs. Graveling’s lawyer in the divorce, and was also the lawyer acting for Blackburn in this purchase. So the lawyer for Blackburn knew of the transfer
* Majority held that Mr. Graveling had a personal claim against Mrs. Graveling for fraud but he did not have a registered interest and his unregistered interest did not bind Blackburn, so Blackburn got clear, indefeasible title and Blackburn extinguished Mr. Graveling’s interest
* Graveling by agency law: idea that knowledge to an agent, if the agent of the purchaser in the transaction knows of someone else’s fraud, that knowledge is imputed or implied to the principle and the principle is deemed to know what the agent knows. If Mr. Blackburn, with that knowledge, buys that property, it’s fraud on his part, as the knowledge comes before the agreement for purchase and sale.
* If the lawyer is also a fraudster and/or is in league with the fraudster to defraud Blackburn, then knowledge would not be imputed.
* In this case, lawyer didn’t think the transfer to Mr. Graveling was enforceable, thought there was defect in the transfer so thought he could sell to Blackburn. If you have a good reason for thinking the unregistered interest is defective, you are entitled to disregard it, you do not have a dishonest intent in ignoring it and going ahead with the purchase.
* Knowledge of a fraud on somebody else can be fraud on the part of the purchaser even though they didn’t take any part in that fraud on that third party, it is fraud by purchaser to buy property knowing from the outset that the vendor has committed a fraud on somebody else (Graveling ratio)

Re Saville Row

* Saville buys the property from Eldred, sees all this stuff on the title about an option that was rejected. They buy the property but before they can get on the register, Frew files certificate of pending litigation on the title which freezes the title and stops Saville from getting on title as fee simple owner.
* Court: you are only deemed to have knowledge of what you can know. Saville Row were entitled to think, because of what they saw on the title, that Frew’s entitlement to this option was in doubt because the registry staff had rejected it and had refused to put it on the title.
* If you know of the existence of the unregistered interest but have a good reason for thinking it’s defective, you’re entitled to ignore it and proceed to purchase and be free of the option.
* Equity: why didn’t frew just correct his application? If the fault is on anyone, it’s on him.

In Personam claims

* often treated as exceptions to indefeasibility, as it relates to conduct after registration.
* Indefeasibility just protects against prior defects, but leaves the registered owner open to behave stupidly and create claims against themselves which CAN affect their title, bound the the consequences of your own actions, can’t hide behind indefeasibility after making promises.
* It’s not just a personal right, it also has proprietary application, affects the title. It’s directly in personam in that it’s against the owner, but it has in rem implications in that it affects the title

**Class 12 Personam Claims, Right of Redemption, Registration of Instruments (Pacific Savings, McRae)**

Rectification

* The registrar can correct the register, even if the error was made after the owner becomes registered. Indefeasibility thus does not apply to conduct/mistakes after registration.

Pacific Savings v. Can-Corp

* Can Corp is registered owner in default of mortage, pacific savings is the registered mortgagee. PS became the registered owner of this property as a result of the foreclosure procedure. Can-Corp suddenly found some money and after this foreclosure had occurred, Can-Corp said they wanted to redeem the property from PS and get the title back by paying off the mortgage. Filed a CPL on the title
* PS had gotten offer to purchase from another purchaser. CPL had been filed at 9:15am but the offer to purchase was accepted at 4:58, so technically the CPL was on the title when the offer was accepted, which meant the purchaser was in effect buying the property with constructive notice of this CPL regarding redemption.
* The mortgagor, in equity, can have a second opportunity to redeem the property, in the discretion of the court. As long as a third party’s interest have not intervened (bona fide purchaser for value without notice) in the meantime, if that mortgagor can make their claim known prior to any purchaser coming on the scene, then the mortgagee has to listen to the mortgagor and give that mortgagor a further chance to redeem.
* PS argues that they are registered owners, indefeasible, can sell property, but court tells PS it’s all their own conduct through which got them into this position. Mortgage carries fact that borrower can take steps to redeem the property and so CC ranks ahead of purchaser.

McRae

* FF #1 purchased 3 lots. Dies, but left a will that says that his surviving spouse Harriet would receive the properties on trust, she would have life estate in the property for herself with remainder to their three children (J, C, FF Jr.). Harriet was registered as fee simple holder with an “on trust” notation on the title.
* She passes on the title to FF Jr. For $1, nominal consideration, a gift. But when he got the title, there was this notation “on trust.” He gets registered as owner and the LTO staff allowed FF Jr. To get registered as owner...but without any reference to the trust. The staff thus screwed up and in breach of the act, allowed the notation to be removed from his title.
* FF Jr dies and will inserted his spouse as a beneficiary (his brother and sister, remember, were already beneficiaries). This was a breach of trust. Through his position as a fee simple holder with clear title, he’d 1/3 ownership to his wife.
* Judge rules that FF Jr had tried to commit fraud. He claimed to be full owner and entitled to sell the property if he wanted.
* FF Jr was on the title as the registered owner with no qualification on the title and so his counsel argued he was indefeasible. Court said that these beneficiaries (J and C) have in personam claims against him. He claims to be registered owner, but it was due to inequitable conduct by FF Jr, he’d deliberately tried to exclude J and C from property and take sole title.
* Virtue of registration of the trust is point of this case. When FF Jr took title, there was notation that property was in trust, therefore he had constructive notice of it and had to abide by it
* Someone who claims to be an indefeasible title holder, by their own inequitable conduct, can make themselves liable to in personam claims from other people

Registration of Instruments

* When you register a trust, you are registering the instrument of creating the trust. What is being registered is a notation “on trust” and a reference to a document, but the actual thing that is registered is the instrument.
* What the title says is whatever the LTO staff choose to put on the title.
* There might be other things/rights in that instrument than actually appear on the register. The title says “on trust,” might lead someone to conclude it’s a trust but what is actually in that instrument could be something quite different from standard trust, the term “on trust” is just the term the staff chose to put on registry, but may be other interests in there that are also registered by the reference to that document.
* What interests are registered through the registration of the instruments are not on the register, you have to go look at the instruments themselves, those that are referenced.
* Registration is acceptance by the LTO staff. Administrative determination of the validity of the instrument, but not a legal one
* Registration doesn’t guarantee validity, just acceptance as apparently valid, but can be disputed.

**Class 13**

Dukart v. Surrey

* Developer set up a trust and said that strip/walkway would be held in trust for the beneficiaries who would be the owners of those properties/houses shoreside of these areas.
* The property taxes were not paid on that strip/walkway and the govn’t that is owed has power of selling the property, and it ended up in a tax sale and since no one else bought it, it was purchased by Surrey. On a tax sale, by statute, all charges on the title are wiped off. So land was acquired by Surrey and saw the trust on the title, but said to LTO staff that it should be purged from the title, and the staff complied. Inside the trust, was this easement across that property that allowed the Dukarts to access the beach
* Court held that the easement was registered in the LTO even though it was not specifically referred to on the title. Easement survives the removal of trust as the LTO erred in removing the easement, they should’ve removed “on trust” and added the easement to the title. By statute, all charges except easements are wiped out in a tax sales.
* “On trust” in this case refers to the easements as well, as they are contained in the trust documents referred to by reference number.
* The registry is a registry of instruments, the document is the instrument and what’s in that instrument are the rights created

Credit Foncier v. Bennett

* Bennetts were the registered owners of the property and by a forgery, Allen of Todd Investments forged a mortgage and put it on their property. There was no money advanced on the Mortgage. Allen’s plan was to get money by selling this forged mortgage.
* The Bennetts, for nothing, got the mortgage on their property by Allen, Allen then sold the mortgage to Stuart who flipped the mortgage to Credit Foncier. To designate who is to receive payments on the loan, the person who holds the mortgage have to let the mortgagee know whose to be paid. Thus, CF gave notice of the assignment so the Bennetts, who ignored the letter from CF. No payments, CF start foreclosing
* Registration of fee simple is conclusive evidence, can’t be rebutted, rule of law that if you get on title as a fee simple holder, you’re protected. However, charges is just an evidentiary assumption, registered holder of the charge is presumed to be entitled to a charge and the person against whom the charge is being enforced can show that it is not valid by introducing evidence to the contrary.
* No assurance claim can be made by a chargeholder. No recovery unless they had title insurance, though there can of course be civil action.
* Mortgage is only security for the amount actually owing. So if CF paid $6000 for this mortgage, but nothing had been borrowed on it by the Bennetts, it was worthless. You can’t rely on face amount of the mortgage, as it says on the title, it’s not security for that amount but for the amount actually advanced under the mortgage, onus is on the assignee (CF) to check the amount that’s actually been advanced on it. Here, nothing had been borrowed on it, so nothing was owing.

Novation

* Contractual obligation can be assigned, contract between first and second party and second party assigns his obligation to third party. Novation allows the second party to bow out; requires the consent of first party to discharge and release second party from the obligations under the contract. If the third party doesn’t perform, first party has no rights against second party. The contract is now between first and third party with third party substituting for second party.

Canadian Commercial Bank v. Island Realty

* Park Meadow owns a piece of property and it had a first mortgage on it in favour of Imperial Life. PM granted a second mortgage to Island Realty to secure a loan of 240,000.
* S.28 of LTA says that charges rank in the order of their registration, not in the order of their creation. This means that if you have a property with a first mortgage on it, if there’s a default and the mortgagor can’t pay, then the person with the best claim is the first mortgagee.
* IF PM defaults on these two mortgages, IL could enforce their mortgage and they get the claim against the highest equity, the full property. Island Realty with the second mortgage would rank iafter Imperial Life. If IL sells the property, they’d sell it to purchaser with clear title, IL would get paid first and any remaining money would go to IR as second mortgagee. Foreclose down
* PM wants to get a third borrower. Fraudster said he would arrange a novation, get a discharge of the second mortgage to IR and insert Almont as second mortgagee. Cowan forged IR agreement to discharge mortgage and removed it and put Almont in their place
* PM then defaulted and IL, being the first mortgage, were ok and paid off, but not enough equity in this property cover the remaining two mortgages.
* Trial judge held Almont was third, that the mortgage discharge was forged and a forged document is a nullity and so discharge had no effect.
* CA reversed, saying forged discharge was effective to discharge from title the IR reality and Almont was second mortgagee and they got paid. Bad law: gives effect to forged discharge (which CF says is a nullity)
* Made ruling because if he made it anullity, it would remove protection provided by LTA for mortgagees, but Gill establishes that there isn’t any such protection for mortgagees.
* CoA distinguished Credit Foncier from this case because said this was a novation instead of an assignment, which is what Foncier case dealt with, novation should be treated differently.

**Class 14 – Novation, Ranking of Mortgages, Failure to Register, Bona Fide Purchaser**

Defaults can be shown to attack a charge, even if it’s registered.

Novation vs. Assignment, Novation in Mortgages

* CCR still has standing: Distinction between an assignment and a novation. Assignment is where a person transfers a contractual obligation to someone else, sells it to someone else. Assignor remains liable on the contract, even though he’s transferred a contractual obligation.
* Novation: instead of two party deal between assignor and assignee, novation involves original party to the contract, current party to the contract, and the person who’s going to be substituted for the current party in the contract. Novation requires permission from both parties. Can be done with a mortgage.
* Novation is a substitution for a new lender/mortgagee for the original mortgagee. That original mortgagee has to be removed from the title in order for the new one to stand in its place. Requires the permission of the original mortgagee (which fraudster in CCR didn’t have)

Ranking of Mortgages (Foreclose down, redeem up)

* rank in the order in which they are registered.
* Mortgages can have subordination clause, mortgagees can thus change the ranking (subordination clause allows a first mortgage or second mortgage to rank lower amongst the mortgages).
* Priority according to date and time of the respective application for registration of the charges as received by the registrar, not the date of execution.
* LTO has six day window, that is the ideal lapse of time between application and registration. In those six days, they vet the applications and see if they’re ok.
* If mortgages default, they can wipe out any mortgages below them. Also, mortgages are redeemed/paid in order of precedence, so you get less and less.
* “Foreclose down,” people below the first mortgage are vulnerable, as they can get wiped off the title if there’s a foreclosure, even if there’s no money to pay them off
* “Redeem up,” if you want to pay off your mortgage, you pay off the most recent one first and go up. You pay off the third mortgage first and the first mortgage last. Same goes for Mortgagees themselves. Third mortgagee can buy the second mortgage to move up, but they can’t just buy the first mortgage to leapfrog to the top.

Failure to register

* Apart from original acquisition of Crown grant, it’s entirely optional.
* General principle: unregistered interests in torrens land are unenforceable against innocent third persons , if the interest created is an interest in land, it will be defeated by a sale to a bona fide purchaser for value without notice.
* Bona fid purchaser for value without notice: notice means actual knowledge, must have express, actual knowledge of the interest in the property, fact that purchaser comes onto the land and sees a garden there doesn’t mean he sees that garden as an interest in the property. Purchaser doesn’t have to take notice of it and is entitled to ignore it because it has not been expressly brought to their attention relating to what the terms of that interest are.
* Exception is “as against the person making it.” The unregistered interest holder can enforce their unregistered interest against the person who made them. In personam enforcement
* Failure to register does not defeat these in personam claims, but there may be other policy grounds that will render the in personam claim unenforceable.

Top Line case

* unregistered lease of a part of a vacant property and the BC court of appeal held that to grant an unregistered leasehold interest of a part of a vacant parcel was contrary to public policy and illegal. It wasn’t the absence of registration that rendered the tenant’s lease invalid, it was this public policy argument that the unregistered lease was invalid as doing a bypass around the requirement of registration and zoning.
* There may htus be other grounds of invalidity that would render an in personam claim unenforceable, apart from the failure to register, which would not defeat it.
* Another example: If it’s oral understanding, not in writing as required by Law and Equity Act. If the in personam claim is an oral one and it relates to an interest in property, it must be in writing. An oral claim would not be enforceable.

Sorenson v. Young

* Sorenson owned piece of property and subdivided into lot 1 and lot 2. Sold lot 2 to Roach. They had oral understanding of an easement across lot 2 to get to the road. Roach sold lot 2 to Young. He saw some ruts in the land (the easement) but that is not constructive notice (remember the garden). Young put a barrier up that prevented people crossing his property.
* Court said Young was correct and could ignore this oral understanding that existed between Sorenson and Roach. The easement was not binding: it was oral (should have been in writing) and should have been registered (not registered, so Young was bona fide). He had in personam arrangement with Roach, but no such arrangement with Young. There was no fraud on Young’s part as he did not have actual notice of the terms of the interest.

**Class 15 – Unregistrable Interests, Creditor’s Remedies, Fraudulent Conveyancing, Execution**

Interests that Can’t Be Registered

* claims of aboriginal title.
* Equitable mortgage is another example. (no instrument in writing to register)
* A short-term lease with actual occupation does not have to be registered to confer interest. Oral understandings work, as long as they are in actual occupation, they have a legal interest
* Even though it’s not registered, equity will step in and enforce it against the person who made it. If a person who is the registered owner creates an interest in property in law or in equity in favour of another person, equity will enforce it against the person. Failure to register does not affect enforceability between the initial parties
* Illegality, like failure to get it in writing, can make it unenforceable.

Sorenson

* fundamental concept of Torrens system is to abolish equitable notice. A purchaser does not take any notice express, implied, or constructed when they buy property.
* Notice only still pertains to fraud; people can’t use the statute to commit fraud.
* Young seeing tire tracks is the kind of equitable notice that is abolished, not expected for himt o take notice, investigate, etc.

Creditor’s remedies

* secured credtiors like mortgagees who have security interest in the property and have a right to go after it in rem in the event they are unpaid. Other creditors who do not have that right are unsecured creditors.
* Unsecured creditors must begin a legal proceeding against the person in debt, get a judgment against the person.
* A money judgment is not tied to any specific assets of the debtor, so have to research land title system to find out where the debtor has an interest, registered or unregistered, in property. Creditor can have hearings before a judge or court reporter to inquire into the assets of the debtor. Amount owing is established and debtor is supposed to pay it immediately, but if he doesn’t, move to execution of the judgment. If debtor has real estate, we can register the judgment on the title.
* Once we’re on the register as holder of this judgment, we’re protecting ourselves and if debtor makes agreement to sell the property, then the judgment would rank ahead of the purchaser, or if debtor puts a mortgage on the property, it would rank after the judgment.
* Anyone who buys a property with a judgment on it and register the property would be liable to pay it if they wanted clear title. It thus effectively ties up the property; a person won’t buy it
* the judgment isn’t registered on the title, it’s not effective against the purchaser.

Fraudulent conveyance

* conveyance by a person who anticipates a judgment being registered against their property; they pass the title so they won’t be the owner by the time the judgment is registered.
* If it’s not fraudulent, the person gets good title that the money judgment can’t be attached to and the creditor can’t go after that property – has to attack the debtor directly
* Even if debtor doesn’t have a specific creditor in mind, if the general tenor is business is going under or there are financial problems ahead, that’s sufficient, it’s an attempt defeat future creditors, even if creditors aren’t known at the time. It’s an action by the creditor on the debtor
* If agreement is valid and not a fraudulent conveyance, then nemo dat applies, the claim is subject to the principle that the debtor doesn’t own the property and the purchaser, though not registered, ranks ahead of the creditor.
* If the purchaser is complicit in it, we have all the makings of a fraudulent conveyance action. It has to be for less than market value for it to be a fraudulent conveyance.

Execution Sale

* The creditor is not a bona fide, they don’t get an interest in the property, and the purchaser at an execution of sale is not bona fide either, they are buying in this execution procedure and it is understood that their title is vulnerable to claims of creditors. Unregistered purchaser can come forward as against the creditor and say you can only sell the interest of the debtor, the creditor will thus get the proceeds of sale that would otherwise go to the debtor.
* Purchaser is first, they get the title. Next would come the creditor, after discharge of the mortgage (which is paid by the purchaser), in the execution sale, paying proceeds of sale would go to the creditor instead of the debtor.
* The debtor is able to pass a good title to a purchaser in the ordinary course of business, but if it’s an execution situation, a creditor enforcing on the debtor, then the whole situation is under the collections concept of nemo dat. The creditor can have no greater interest in the debtor’s property than the debtor has themselves at the time of registering the judgment and time of sale; if the creditor had previously agreed to enter sale with bona fide purchaser, that ranks ahead. Also, this means a court-ordered sale may have unregistered interests on it and would not be worth fair market value due to risk of these coming forward

**Class 16**

Selling with a Registered Judgment

* If the debtor agrees to sell to purchaser after this registration and doesn’t tell purchaser, the purchaser is deemed to have notice, so the execution creditor would rank before the purchaser or mortgagee in question.
* Means the execution creditor, if they wanted to, could apply to the court for order of sale for the property and the principle of foreclose down would apply: the creditor would sell the interest of the debtor and the subsequent purchaser would be wiped off of the title.

Agreement to Sale Prior to Registration of Judgment

* The execution creditor gets no greater interest in the debtor’s property than the debtor had at common law. Failure of purchaser in this situation to register does not affect their position relative to the judgment creditor, as they rank even after unregistered interests that were created prior to registration of the judgment.

Registration of Judgment

* You have in effect a link between the money judgment and the debtor’s land by registration. Creditor, unlike mortgagee, has no legal interest in the debtors property. Registration in judgment just gives them authority to apply to the court for sale of the property, but they have no interest in debtor’s proper
* judgment attaches to and forms a charge. The debtor has an interest in the property and the creditor can sell that interest to a purchaser. In trusts, you can go after the debtor’s interest as a beneficiary.

Prior Unregistered Interests

* Nemo dat: failure to register interest does not affect your ranking with respect to a subsequent registered money judgment.
* The judgment creditor ranks no higher than the judgment debtor and is in his shoes. If the judgment debtor has made a transaction affecting the property, that transaction is enforceable between the unregistered interest holder and the debtor, but the creditor is subject to it too

Martin Commercial Fueling

* The complication was that the transaction was just going through completion at the time that the judgment was registered and the purchaser did not search the title just prior to completion to make sure everything was okay, so did not see Martin had registered a judgment between closing and completion of the deal.
* Martin declared themselves to be entitled to the entire proceeds of sale
* BCCA held that nemo dat applied and Martin was too late. The agreement had been made between vendor and purchaser and the transaction went through and Martin didn’t intercept the proceeds, which instead went to discharge a mortgage on the property first, and then very little left afterwards going to Martin.
* All the judgment debtor can get is any interest the debtor has in the property after the prior purchase/interest.

Profit a prendre

* a type of easement, it is a right of taking. It gives the holder of that interest a right to enter the property of the owner and to take something off of the land
* An easement must be associated with another, neighboring property, but a profit a prendre need not be tied to another property and can be entirely independent.

L&C Lumber

* McDonald pays for profit a prendre from Lungdren but did not register it or use it. Resell to L&C Lumber who also did not register it. When L&C came to cut timber, Lungdren wouldn’t allow
* Court says this unregistered profit a prendre was enforceable against the person making it. She made the instrument, granted the profit a prendre, and therefore it ended up in hands of assignee, L&C, by a valid assignment (sale) and therefore L&C could enforce it against her.
* In personam enforcement against Lungdren, but an in rem consequence in that it creates a right in the property.
* Ratio: not only can an unregistered interest be enforced against the initial party that made the interest, but it can be enforced by an assignee.
* Unregistered interests can only be enforced against the person who made it, not against the innocent purchaser.

International Paper v Topline

* the parties prepared their own lease using a draft form provided by the tenants, IP. They just drew a little sketch, showing the boundaries and such which was never registered. IP then moved a modular building onto the site to house their recycling facility. This was never registered. Topline got fed up with IP and wanted to kick them out.
* s.73 of the LTA says that a lease of part of bare land of more than 3 yrs must be registered and it must be preceded by a subdivision. S.73 thus gives Topline good argument for getting out of lease, as lack of compliance with s.73 meant this lease was illegal.
* argument prevailed in CoA and Topline was able to forfeit or terminate the lease and Topline kept the building and threw IP off the property.
* Problem: this type of transaction is done all the time in interior BC. It’s all done informally
* This was a lease of 51 months, which is more than 3 years, and it’s bare land, which made such a transaction done informally illegal and hence unenforceable. Illegal = unenforceable.
* if they’d leased the whole property, no problem would’ve arisen, can have informal agreement. Issue was that it was only part of the lot (need formal subdivision). Also would’ve been fine if it’d been part of the land, but less than 3 years.
* added to s.73.1 due to reaction to this case, to reverse Topline: says a lease or agreement for lease of part of land can be enforced where it would contravene s.73.
* Idle-O v. Charlyn: this amendment will not be given retroactive effect, will not affect leases given prior to 2007.

Application to Register/Caveat

* Date and time of application is noted when the application is received. A document is registered is effectively registered prior to its actual registration, it is deemed effective at the time and date of its application. Pending application is notice to everyone .
* Somebody who can’t get on the register or who is not on the register but fears a change in the title may effect them or the interest they have has the mechanism of a caveat to protect them.
* Caveat is a warning to people dealing with this title that someone has a claim on the title that they are trying to get registered but at this particular point, they can’t get on the register, so wish to protect themselves by giving notice to the world of their claim or dispute of the title.
* Caveat expires after 60 days unless the Caveat is followed up by a CPL. Person claiming this property interest has started litigation and wishes to give notice.
* Application to register is not the same thing as registration as an application can be bounced by the LTO staff.

Legal Status of Applicant to Registration before Actual Registration

* Rudland: holder of an application to register prior to registration has the status of bona fide purchaser for value. If they have no notice of any other interest, they are in the situation of a purchaser for value without notice and thus have a common law legal interest in the property
* Bretfar (better) the holder during that pending period only has an equitable interest in the property, no legal interest, only way to have a legal interest is to get registered
* It’s basically treated as a higher equitable interest. It ranks after legal interests but before other equitable interest.
* the person who is closest to the bona fide purchaser for value will prevail, where equitable interests conflict.

**Class 17**

Wall

* Once you get on the register, you’ve got immediate indefeasibility. While application is pending, they merely have an equitable interest.
* Torrens system says until you get on the register, you have nothing. But Wall, and other cases, say that despite the language of that provision of the LTA, a purchaser for value, before registration of the transfer of the land of to him, in that intermediate phase, an equitable estate in the land which will be recognized and in appropriate cases be given priority over a prior equitable interest.

Caveats

* A caveat says a person is claiming an interest in the property, but putting a caveat on the title does not create an interest, it’s only notice of a claim. These are not established claims yet, there has to be litigation with an admission by the registered owner that the claim made by the caveator or person filing CPL is valid.
* When that interest is established by judgment, court order, or admission by registered owner, that “relates back,” we go back in time, the caveat or CPL has in effect made a place for this claimant in the ranking of charges back to the point of caveat’s date of application. Anyone who tries to register a charge or buy a property takes subject to t hat caveat its ultimate outcome.
* Registration of a caveat freezes the title, or is an injunction to the registrar not to register intervening interests between the time of the caveat and the 60 days and then if CPL is filed, then that freezing will continue on until CPL is discharged. That said, someone can file a caveat after that, but it will be subject to the first caveat.

Breskar v. Wall

* use equitable principles of ranking in ranking unregistered interests.
* Caveator only has equitable interest in property
* Equitable interest arose at the time of their filing of the caveat, not at the time of the actual fraud committed. Alban was not bona fide because Alban does not have a legal interest in property – in equity, bona fide is someone who purchases a legal title.
* But Alban’s interest can arise when he paid balance of purchase price, the time of completion. So on the register, Breskvar is ahead (caveat was filed before application to register), but if you go off the register, Alban ranks ahead due to the completion date.
* Equitable ranking: chronological order of creation of equitable interest. Where the equities are equal, the first in time prevails.
* First assess the relative equitable position of the two parties and ask yourself whether they are equally valid claims. For instance, if one of them behaved negligently, that would be weighed against them. A person partly responsible for the whole screw-up (like the person who didn’t register properly), doesn’t have as high degree of equity. But when the equities are equal, the first in time prevails.
* First in time were the Breskvars, they were victims of fraud and filed a caveat and CPL before the transfer to the Alvins was registered. But looking at the equities, their conduct set up the fraud (gave blank transfer form) so the equities favoured the Albin. Look at their relative ethical positions. They also failed to file their caveat properly
* The longer the time between a fraud and the filing of a caveat, the party realizing and taking an action, the more likely it is for an innocent third party to get involved, and the weaker the court is likely to find that party’s equitable position.
* Other equitable principle is to honor the bona fide purchaser for value without notice. Where bona fide is the holder of the legal title, he should prevail, because equity follows the law and where the equities are equal, the person the common law legal title prevails.
* Where equities are equal this principle prevails over first in time first in right (rudland)

Canada Permanent Mortgage vs. Registrar

* this same principle applied to a mortgagee, who was made equivalent to a purchaser. The results are the same. .
* Chronology is important in these cases, follow sequence of when interests are created; because we’re in equity, the equitable concept of notice applies.

Fee simple vs. Equitable interests

* fee simple: indefeasibility subject to the possibility of fraud on their part which would deprive them of title but if they are the innocent purchaser, innocent of any fraud, and get on the register, they have indefeasibility.
* Person making application to register a fee or mortgage: they are below the registered interest holder, they do not have indefeasibility, they have an equitable interest

Rudland v. Romily

* Judge says that Romily’s filing of a CPL does not create any interest in his favour. A CPL is only a form of notice.
* Hierarchy of strength of claims: registered fee simple holder, then applicant to register, and at the bottom of the heap is the caveator or CPL, because filing caveat or CPL gives no interest in the property in itself.
* Romilly is the first victim, Lindsay is the fraudster, and Rudland is the second victim. Romilly was the original fee simple holder and Rudland had application to register fee simple
* Chronology: The date of the first victim’s equitable interest arises from the point of time at which they start their litigation against the fraudster and file their CPL and caveat in the land office, not from the date of the wrongdoing. Usually, filing of caveat and the commencement of litigation/CPL are done nearly simultaneously with the filing of caveat. Where they are not, go with the filing of the CPL/start of litigation
* Rudland proved they were bona fide, so the equities were equal. However, the statute says freeze the title and the judge says register the title in favour of the purchaser. Registrar says no can do. But the court and the legislature are telling them to do opposite things.
* s.217 was enacted in the LTA: effect of a CPL if a prior application is pending -The registrar may, despite the freezing of the title, make an entry in the registry to complete the registration of an indefeasible title or charge that was applied before an application a CPL was received by the registrar.
* Registrar only has to determine if the person, Rudland, is the party to the original litigation. If they are a party to it and know about the claim, that’s kind of a substitute for notice. If they are not a party to the original litigation, they are assumed to not know and are the bona fide purchaser

**Class 18**

Value of a CPL

* if you have an application to register filed first and there’s a claim by a victim of fraud, their claim has no standing until he/she files a lis pendens or caveat and gets on the register
* If you have an applicant to register followed by a subsequent claim, it’s first in time, first in right. Pending application would get priority over the subsequent lis pendens.
* Same principle applies to mortgages.

Canada Permanent Mortgage

* Vorsteher is the first victim. Vistica is the alleged fraudster. Vistica put a mortgage on the property in favour of CPM. Vorsteher filed a CPL, the CPL was filed after the application to register the mortgage.
* Court said Vorsteher’s claim did not create an equitable interest in his favour until after he filed he’s CPL. CPM’s interest arose earlier, when they filed application to register the mortgage, first in time first in right, it ranks ahead of Vorsteher.
* Problem: Vorsteher was the registered owner and the mortgagee was Vistica. Court is ordering a mortgagor on the title of someone who is NOT the borrower. If you’re going to put a charge/mortgage on a property, you have to own that property.
* It was all based on anticipation that eventually Vistica would own the property. But that’s often what leads to fraud, people rushing about to get on the title, etc.
* Also, equities aren’t equal, CPM dealt with and should’ve detected the fraudster. Gave money to someone who is just saying he’s going to get title. CPM was actually facilitating fraudGill and

Words of limitation

* define the duration of the estate, so “to B and her heirs,” does not confer anything to the heirs, only person taking the property is B. While B lives, they are “heirs apparent.” If B dies before A, the fee simple holder, the gift lapses/fails, because B is the intended recipient.
* Common law demanded “to B and her heirs” be used, anything else would be read as giving a life estate
* Statutory amendment. The modern presumption is now in favour of a fee simple. Property Law Act says in an inter vivos transfer, it is sufficient to use the words “in fee simple” without the words “and his heirs.” Whatever words you use, the highest estate that the transferor has passes to the recipient unless the transfer is expressly qualified.

Qualifications:

* Reservations. Risk that if they don’t maintain the reservation, that their interest will terminate and the property will revert to the Crown. They use the words “during, while, until”.
* Conditions: less than a fee simple in that it is determinable, it will end if something happens that is expressly provided for.

Tottrup v. Ottewell

* “To A” are the words of purchase and “and his heirs” are the words of limitation.
* “to Fred and his heirs” which confers on Fred a fee simple. If Fred dies before the testator, his heirs get nothing. You can say “to Fred or his heirs,” which creates a disjunctive and makes the words “his heirs” words of purchase, conveys the meaning that the estate goes to Fred if alive, but if he dies before gift takes effect, then it goes to his heirs.

**Class 19**

Tottrup v. Ottewell (lapse)

* A will is only an ambulatory document, it has no traction and attaches to nothing and doesn’t take effect until the testator dies. Circumstahnces can change and since the will’s drafting but it does not incorporate those changes unless the testator updates the will.
* Exception: a divorce where if it happens, it changes the will by law and revokes all gifts to the ex-spouse as that is presumed to be testator’s intent
* Lapse: when the gift has nothing left to attach to, like if he leaves a house for someone but in the interim between making the will and his death, he sold it and no longer owns it. In such a case, the intended recipient gets nothing. Executor’s job is to apply the will as best they can to the circumstances of the testator at the time of death.
* Another case of lapse is where the recipient pre-deceases the testator. Cannot receive gift as he’s not around at the time will speaks. His heirs get nothing.
* The most recent will is the one that takes effect on death.
* Testator makes a specific gift to the church in his will. If the church was closed down before the will takes effect, it’d be lapse. Often in charities, where lapse occurs, the court will find a similar, substitute charity, equity will not allow the gift to fail.

Residuary Clauses and Substitutional Clauses

* Lapsed gifts pass on intestacy unless the testator has clause in the will to deal with this situation, a residuary clause, covers off possibility of lapse.
* Residuary clause: if any specific gifts fail because of lapse, they will fall into the residue and go to anyone who is listed as being the recipient of this residue under this residual clause.
* Lapse of residual beneficiary dying before the testator? In this case, the property, the residue, passing to that person would pass intestacy.
* To avoid these problems of lapse to death, people have substitutional clauses.
* Substitional clause: “to B, but if she predececeases me, I leave the house/residue to her daughter, X” or “to B, but if he predeceases me, I leave the house/residue to his personal representative” (personal representative takes as a trustee, not as beneficiary). Can also be “to B, but if she should predecease me or die within thirty days of my death, the cottage is to go to X”

Ottewelle

* “and” is a conjunctive – if intended recipient dies, gift goes into lapse. “Or” is disjunctive and indications possible substitution in the event of pre-decease
* Testator left the residue of his estate to his brother Fred but Fred had predeceased him and 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.
* Had the testator had put in the word “or” that would have been read disjunctively. Doesn’t matter where the “or” is, could be “to fred, his heirs, his executors, or his administrators”
* If it’s conjunctive, it’s a fee simple.

Repugnancy

* legal impossibility, testator trying to do something that cannot be done.
* if you put phrase in will “to B,” it gives B a fee simple, confers all the rights of ownership that can be conferred, so if you say “to B and on B’s death to C,” it’s repugnant
* To give the highest ownership, fee simple, is inclusive of use of the property, sale/gift during their lifetime, and disposal on death either by will or on intestacy and to give someone a property in fee simple but to attempt to take away one of those attributes/legal qualities of a fee simple creates a repugnancy.
* Absolute and remainder gifts conundrum: testator expresses gift in absolute terms and adds words that apparently give a remainder estate to someone else, which is possible. Fee simple gives the right to sell the property or to pass it on to whomever the holder wishes upon death.

Court’s Remedies to Repugnancy

* try to get as close as possible to the testator’s clear intention as is possible under the law.
* First option: life estate to B, remainder to C,” the second gift thus predominates
* Second option: the first gift predominates – the testator intends to give B as much as possible so B gets the fee simple and the gift to C is invalid.
* third possibility: B gets the life estate with the right to access the capital (power to encroach) meaning that B can sell out the remainder interest if necessary. C only gets the possibility that B won’t sell out the asset.
* First option is rare, as courts usually expect the spouse to favoured over the kids. Second option is the preferred one.

Re Walker

* testator trying to do the impossible, an absolute gift to the wife and then the testator gave remainder to nephews. Repugnancy, two contradictory gifts, one will have to yield to others.
* He’s saying she can sell it if she wants, but if she doesn’t, it doesn’t belong to her on her death, and that’s contradictory
* Court says the third option is only available where it involves a trustee who would scrutinize any attempt to sell the property, based on whether they really needed the money. Fairness concern
* This situation of a trust is usually done through a spousal trust (basically this option, but within a trust), not through a gift, which is why the court doesn’t like it. With the trustee as an objective third person, there are bound to be issues between the life tenant and the remainderman.
* Court goes with the second option, preferring the first named. Wife is closer than nephews.
* 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.

**Class 20**

Problems with Giving a Life Estate

* You can’t devise the life estate, there’s nothing to leave in the will, nothing passes on intestacy, when B dies, the estate is gone.
* B is liable to C (remainderman) for waste, if C doesn’t get the property in largely the same condition that B got it in, due to fiduciary relationship to pass property on in roughly the same condition , B is liable to C.
* While B is alive, C has no right to possession, must watch B to ensure he maintains the property in reasonable condition.
* Life tenant is entited to the income that is earned off the property, but has no access to the capital (unless enhanced by power of encroachment, which entitles them to take away from the remainderman and sell the property or part of it as they need the money

Rule of Construction

* on an intervivos gift or transfer, the first beneficiary, the first-named person prevails.
* On a will the common law idea was that we should favour the last words of the testator and therefore the preferred person under this rule of construction is the last named person.
* These rules have been moved a way from: in every case, court should try to ascertain the intent of the testator from the words of the provision in the context as a whole. You may still look at rules of construction but this is where the emphasis currently is.

Re Shamas (the testator’s armchair)

* 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.
* don’t follow precedents in interpreting wills, you look to interpreting the words in context of rest of the will
* Also go to testator’s armchair and look at situation he/she was in when making the will. Look at dispute in light of the will and in light of circumstances in which will was made.
* Court says that in construing the will, you’re supposed to look at the will and put yourself in the position of the testator in the time he or she made the will, mentally recreate the circumstances he or she was in and make up a construction that suits that situation.
* Court, however, has to follow wording of the will, can’t make a new will on testator’s behalf
* 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.

Salim

* Testator left everything to girlfriend and disinherited his children from previous marriage, says he’s giving everything to her, but if she sells it, proceeds are to be divided between her children and my children, equally.
* CA held that Mrs. Rich got absolute ownership. Testator had purported to take away one of the essential attributes of the fee simple. Can’t give someone a fee simple, which carries right of alienation, and then take away the right to the proceeds. It’s a repugnancy.
* Testator’s 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

Life Estate

* Unlike before, the presumption is in favour of fee simple.
* Creation is by the act of the parties, through explicit words like “to A for life,” or “to A for the life of B” which is an estate pur autre vie with B as the “measuring life.
* A life estate can also arise by statute.

Testamentary Spouses

* State 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).
* Spouse gets all the household furnishings, all the chattels and life estate in the spousal home
* Spouses you don’t have to be lawfully married, just at least 2 years of cohabitation in a marriage-like relationship, including same gender.
* 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.
* If there is a mortgage that falls into arrears, it can be foreclosed despite the surviving spouse’s interest. The mortgagee can sell the property over the life estate. Also a judgment creditor can proceed to execution and sell the property despite homestead designation

Rights of a Life Tenant

* possession of the property (right to occupy it), right to use it, right to earn income from it (like can rent it out, or farm it), right to occupy it personally.
* Can keep the profits from the use to the exclusion of the remainderman.
* Can transfer it, but nemo dat, can only transfer their life estate which creates an estate pur autre vie, A gives to B, B’s estate ends on A’s death.
* On death: the estate vanishes. However, in estate pur auture vie, the holder can pass that on after death provided the measuring life, still lives. When that person dies, it vanishes.

**Class 21**

Devolutionn on death of life tenancy

* the life tenancy vanishes on death. In the case of estate pur autre vie, it is the measuring life
* Right of reversion: if life tenant dies possession goes back to the grantor or if grantor is dead, it will pass as part of grantor’s estate to whoever is entitled to it.
* Grantor/testator can also say “to A for life and then to B,” B is a remainderman and the property will pass on A’s death into possession of B.
* all that changes is possession: when a life tenant dies, possession either goes backwards, reverting to the original grantor, or go forwards to the remainder interest
* Fee simple always has to be held by someone. B dies, reversion to A in fee simple if A is alive, if not goes as part of A’s estate. This is called a reversion..

Law of waste

* controls exploitation by the present owner injuring the future interest holder.
* those entitled to reversion and remainder have right to receive the property in substantially the same condition as the life tenant received it
* Permissive waste: normal wear and tear: the life tenant is not responsible for this to the remainder or reversion, unless it is expressly provided. Also not responsible for Acts of God.
* Voluntary waste: this is where the life tenant does something to the property, for which he is liable – waste that results from the activity of the life tenant. Life tenant or co-owner is liable for their own actions on the property, but NOT to the actions of third parties. May be restrained from committing these acts of waste by injunction or may be required to pay damages
* Donors can exempt life tenants from this type of waste by making them “unimpeachable for waste,” which means they are expressly permitting them to change or damage the property.
* Ameliorating Waste: a waste that changes the property for the better, improves the value of the property, life tenant will not be held liable for the improvement of the property.
* At common law, if someone has life tenant and unimpeachable waste, there is no legal remedy. But equity can stop them from trashing the place, mandatory injunction to require the life tenant to fix the place up or prohibitory injunction to stop them from trashing the place.
* equitable waste: can’t trash the place or equity will step in

Vane:

* son applied to get a prohibitory injunction to stop the old man from going berserk and a mandatory injunction to rebuild the place.
* Lord Bernard was without impeachment for waste and the remainder was given to the plaintiff
* If one wants to, you can be explicit, you can say unimpeachable for legal and EQUITABLE waste, but normally just saying unimpeachable for waste doesn’t include equitable waste

New Westminster v Kennedy

* if the owner doesn’t pay property tax, there’s a lien on the property in favour of municipality and can get order for sale of the property.
* sale and no one wanted to buy it, so the City took the title in its own name.
* Kennedy had one year following the tax sale to redeem the property
* Kennedy started removing everything from the house that could be sold and selling it.
* Like Vane: the City got injunction against him with a mandatory injunction to repair the property and restore it to its original condition.
* Court says the one in possession will be stopped from using his legal power in a manner that is unconscionable or destructive in creating waste.

Life Tenant’s Liability for Taxes, Insurance, etc.

* life tenant is supposed to pay for the minor upkeep and ordinary repairs, supposed to pay the property taxes and to meet the mortgage interest payments.
* fiduciary duty to remainderman to pay these interests
* Vague whether something is a major or minor repair: but wear and tear, like a roof taking wear and tear and ultimately needing replacement could be considered permissive waste
* Life tenant is paying the carrying charges, just the interest payments on the mortgage, while the remainder and reversionary interest will be paying the principal amount
* Fire insurance and such are not responsibility, only occupier’s insurance or on own goods.
* responsible for property taxes.
* Remaindermen are responsible for fire insurance nd insurance for the protection of the structures on the property.
* Life tenant has no obligation to pay major repairs or upgrades or property insurance premiums.

Mayo v Leitovski

* Leitovski, through her daughter buying through tax sale, moved up from life tenant to fee simple holder and Mayo got his interest wiped out (all interests wiped off after tax/execution sale).
* Mayo sues Leitovski: committed a breach of your responsibilities by not paying the property taxes and as result of your own breach which you are equitably obliged to pay, you’ve got fee simple. Profited from your own wrongdoing.
* Convinced the court to say Leitovski has the legal title in fee simple but hold it in trust, a trust obligation to Mayo. You have a fee simple, an equitable life estate given to you by your daughter with the remainder to Mayo. Remainder interest now held in trust till her death.
* fiduciary relationship, like a trust relationship, between the life tenant and the remainder or reversionary interest, fiduciary obligation to meet payments/taxes and if they breach those obligations, a trust arises to the benefit of the other person, the reversion or remainderman.
* Court of equity looks at the situation not as it is, but what it would have been had everyone done what they were supposed to. Leitovski ought to have paid the taxes and kept the property in good state and had she done this, she would’ve kept the life estate and Mayo would’ve kept remainder. Equity tries to bring it about so that this would be the state again.
* being the life tenant, owed a fiduciary duty to keep the property taxes of and was in breach of her equitable duty; idea is that the person who had granted the life estate expected her to fulfill those obligations and equity will require her to do so. Cannot benefit from her own wrongdoing

Trust as a Preferable Alternative to Legal Life Estate

* Trustee can be given the power to encroach, which is the preferred solution to the life estate: to create a trust and not a life estate, in other words, an equitable life estate.
* Common for someone wanting to reduce taxes on gifts to leave all the property to the spouse or to a trust in which the spouse has a life estate and remainder to a children; spousal trust.

Trust and Settlement Variation Act:

* allows BCSC to vary or revoke a trust or settlement on behalf of infants, unborn, mentally disordered, unascertained.
* The court, if they’re satisfied that this variation is for the benefit of the children, they are underage, but the court can approve it on their behalf
* statute permits court to give consent for children or people with disabilities. Cann’t give consent on their own so court gives it for them if it thinks it’s for their benefit to make this change. Gives them power to revoke or vary a life estate or remainder for people who can’t consent themselves. Can also transfer their remainder interest to the life tenant if they wish.

Co-ownership:

Tenancy in Common

* when two or more people have equal and full rights to possession and occupation of the entire property. Unity of possession. Tendency of court is to treat them in same way as single owners.
* Pass on interest after death. No right of survivorship.
* treated as separate owners but with one thing in common – both have rights of possession and occupation of the entire property.
* TiC can also give his interest to someone or sell his interest
* If you don’t say explicitly “as joint tenants” the presumption is in favour of tenancy in common.

Joint tenancy

* right of survivorship. Cannot dispose of their interest by will. On death, their interest vanishes and passes to surviving joint tenant, who could just take certificate of death to the LTO
* need for existence for three unities in addition to unity in possession. Unity of interest (like both hold life estate, or both hold fee simple), unity of title (have to acquire by same instrument), and unity of time (have to get their interests at the same time.) Everything equal

**Class 22**

Flexibility of Tenancy in Common

* can hold different proportional interests in the property whereas unity of interests means that joint tenants must hold equal proportions.
* Considered separate owners
* one co-owner can sell their interest to another co-owner, which would bring tenancy to an end, or can sell their interest in the property to a third person, creating co-ownership between the third person and the co-owner.
* co-tenant dies, their interest passes under their will or in intestacy
* If the tenants in common pay the purchase prince in unequal amounts, TiC proportionate interest would reflect this. Also reflected in unequal share of the proceeds of sale
* identical rights of possession, regardless of proportion of ownership. One TiC cannot exclude another. If one tenant does exclude the other, the excluded guy has right of compensation
* other unities do not have to be present. Can end up as TiCs through separate instruments. For instance, a parent gives one child the property in his lifetime but on his death, give it to that child and a sibling in TiC. So one got interest inter vivos and the other after death.
* don’t have to have unity of interest, one of the TiC could have life estate while the other could have a term of years, but they’d be TiC for their period of co-ownership.
* You don’t need unity of time – TiCs can arise at different times

Finances Between TiC (Partition)

* If one of the TiCs has the property to exclusion of the others, that’s where co-tenant is supposed to pay rent to the other TiCs for the right of exclusive possession of the property
* could agree to have separate parcels for each of the properties, put a partition between their proportions, that results in the end of a tenancy in common, results in each being the sole owner of their share. Termination of the unity of possession.,
* Partition of Property Act: apply to get a court order of partition if they can’t agree. Court can order partition of the property or sale of the property in lieu of the partition. If they have one hold-out Tic who doesn’t agree with division of the property, the others can apply to court and get an order of partition or ask for a sale; properties would be sold and the proceeds divided among the tics according to the proportions of their shares.
* If they rent the property out, if the property produces common, the TiCs would take the income in proportion to their respective shares.
* Carrying costs, like mortgage payments and property taxes, of the property are borne by the TiCs in proportion to their shares of the property.

Joint tenancy advantages

* right of survivorship precedes will, wills don’t change the outcome. Death ends the JT.
* unity of possession: entitled to identical rights to possession of the entire property and cannot exclude the other joint tenant, or are liable for damages.
* Unity of title: to have a joint tenancy, you use the words “as joint tenants” and they must take their interests under the same instrument – if it’s an inter vivos transfer, parent would give it to the property to A and B in the same transfer/same document.
* Unity of time: most be vested in the JTs at the same moment in time
* Unity of interest: JTs must have the same interests as one another (eg: all fee simple holders)
* regardless of the relative shares of money they put into the purchaser of the property, they each own equal proportions in the property

Severance

* creating, instead of a joint tenancy, a TiC with respect to the severed interest.
* If a joint tenant transfers his interest to a third party, that third party has a tenant in common while the other joint tenants remain joint tenants. Proportions between them all will be equal.
* The remaining joint tenants have right of survivorship between each other, but the new tenant in common passes his interest under the will.
* Joint tenant cannot alienate like this without consent if it’s a homestead.
* Co-ownership applies to both realty and personalty.

**Class 23**

Partnership Act

* equity presumes partners were tenancy in common rather than joint tenancy. C
* Commercial partners with shares in a partnership; personaltyheld by partners in a partnership as tenants in common under the proportional shares in the partnership agreement.

Robb v Robb

* s.11 of the Property Law Act presumes a tenancy in common for land transfers of the fee simple into co-ownership unless there is a contrary intention expressed in the instrument.
* Property has to be devised in fee simple. Here the court held that “in fee simple” should be given literal interpretation, in Robb and Robb there was a leasehold in co-tenancy and there was a share in a co-op housing corporation.
* Court held s.11 only applies literally to the fee simple transfer. A Leasehold is not a fee simple and so Robb/Robb are on the lease as co-tenants, went back to common law presumption that when Mr. Robb died, the entitlement to the leasehold passed to Mrs. Robb by right of survivorship. Similar with the shares in housing co-op was also not subject to s.11 presumption, also subject to common law presumption of joint tenancy.
* Equity only applies where the legal result is inadequate, would have to argue for exceptional treatment, otherwise common law applies. Here, court felt usual idea of husband and wife should be survivorship, so equitable presumption was not needed
* Equity regards right of survivorship as incompatible with partnerships.
* Common law presumption ofj oint tenancy does however apply to personalty, like shares in a housing co-op, personal property.
* Land, as opposed to a share in a company, is transferred or devised in fee simple (a leasehold is just a charge), the presumption is for tenancy in common

Presumption for trustees

* To A and B and both are trustees, and I don’t say more, they are joint tenants. Trust obligations will pass by right of survivorship to surviving trustee, then when survivng trustee dies, the administration of the trust passes to whoever’s responsible for his estate. Equity will not allow a trust to fail for want of a trustee

Transferring Property to Oneself

* It was not common law to transfer property to oneself
* Property Law Act, however, does enable a person who owns property or an interest in property to contract with themselves validly. A person can create out of their own property an interest in that property for themselves. For examples, under s.18(1), if an individual wishes to sever their interest in a joint tenancy, they can, by transferring their joint tenancy to themselves, which affects a severance of their interest in it.
* Can transfer their share to themselves in secret to sever the jointure, they then become a tenant in common. Removes right of survivorship for the other joint tenant.
* This also applies to easements; Property Act: it is possible for a person to create an easement in favour of themselves in property. As the owner of one lot, they can create an easement in the favour of themselves as the owner of the other lot.
* Under s.18 buyer and seller can also be the same person – you can subdivide your property and transfer the other lot to yourself

Remedies Against Co-Owners Failing to Live Up to Obligations/share of the expenses/profits

* Common Law provides no remedy for ongoing obligations of these co-owners.
* Only way to resolve these disputes is to get an order for partition and sale of the property.
* the proceeds of sale will be divided according to court’s discretion to adjust the distribution according to these disparities in revenue receiving and any failures to pay expenses – doc the recalcitrant co-tenant by reducing any proceeds of his sale, this is the only remedy.
* avoid all this is to have a co-owner’s agreement – here the co-owners can spell out among themselves who is paying what and how the proceeds of rental will be distributed, how the expenses will be borne, as otherwise your left to discretion of court