

LAW 540
LAND TITLES
Ziff

LAND TITLES:

Hypothetical Fact Pattern #1

- reoccurs in almost every case in the course
- you ask to borrow a X from A, then sell it to B then run away with the money.
- Who should prevail A or B?
 - o The issue is who gets the property (i.e. the mud) and who gets the money?
 - o A gets the property and B gets the right to take action against the rogue.

Hypothetical Fact Pattern #2

- A sells Blackacre to B, reserving mines and minerals
- B registers the transfer and error is made in her favour
 - o Assume that the mm's are wrongfully added to B's title
 - o B sells to C

What are the basic values that inform a land titles system?

- remember that ownership is a divisible concept

Factors to consider in establishing a system of compensation for A and C

- Property often is not fungible
- Personhood values – i.e. sentimental value
- relationship between – *nemo dat* (can't sell what you don't own) & *caveat emptor* (buyer beware)

5 Approaches to Risk Management Here (there are many variations on these)

1. Sue the lawyer
2. Common Law (including equity)
3. Deeds Systems
4. Title systems
5. Title insurance

Common Law (including equity)

- basically *nemo dat*
- most of the risk is on the purchaser
- so you want the vendor to give some proof of ownership – show the chain of title – note doesn't give you any real protection – but this would factor out adverse possession
- Equity took a different position – often it would favour the bona fide purchaser

Deeds Systems

- system dictates that all the deeds be noted in one form or another in a government registry. Documents themselves would be deposited at that office.
- Made it easier to create a good root of title – but showing the chain of title is still necessary.
- Registration is a good tool for providing notice to the world – protects equitable interests. However, it does not in anyway authenticate the deed or validate the legal title if the title is otherwise defective.
- Risk is still very much on the purchaser
- Still exists in eastern and parts of central Canada

Title Systems (Torrens System)

- substantially reduces purchasers risk in theory
- partakes a little bit of a deeds system – all docs go to the land titles office.
- No transaction is operative until it is registered (some flexibility here)
- Once registered the gov issues the title – by virtue of transfer documents by giving a certificate of title. Government is claiming to certify the title.
- If you don't register you may lose priority
- 1. Curtain principle
 - o don't have to worry about past dealings – in theory can count on the top title as it is certified by the gov – theoretically no historical search is necessary.
 - o Favours the bona fide purchaser over the true owner that comes out of the woodwork.
 - o Negates *nemo dat*
- 2. Mirror (or photo) Principle – if you don't have the record you are not in it.
- the land titles system has an assurance fund – to deal with mistakes when true owner loses their title.
- 3. Net Principle
 - o true owner gets paid out

4 Common Law Conveyancing Contests:

- legal v. legal
- legal v. equitable
- equitable v. legal
- equitable v. equitable

1. LEGAL v. LEGAL

- first in time is first in right
- so buyer beware!

2. LEGAL v. EQUITABLE

Where does an equitable right come from?

Common Law Mortgage

-core concepts:

- X wishes to borrow (mortgagor) and Y lends (mortgagee)
- X conveys Blackacre's title to Y for the loan
- what does the mortgagor retain?
 - legal title goes to Y
 - X retains an equitable interest
 - called the equity of redemption
 - residual interest in the land
- subsequent mortgages are also equitable b/c there is no more legal title to give
- can also get an equitable interest when you only have one and you grant a mortgage of it, b/c you only ever had equity that is all you can give

NOTE: AB mortgages operate differently

- regulation under the LTA does NOT involve the transfer of title for security
- instead, a “charge” is added NOT a conveyance of title
- practically speaking this distinction doesn’t matter for most purposes, we still speak of foreclosure
- BUT in AB 1st, 2nd, 3rd, etc charges are ALL legal (in CL they are equitable)
- sometimes vendor holds legal title under purchase price paid in full
- purchasers int will remain as equitable even before the txn is completed

NOTE – the effect of the foreclosure is to whip out the equity of redemption – it whips out all lower interests i.e. second mortgage and so on

You foreclose down subordinate interests and you redeem up.

****the 1st SI does not have a choice about being paid off**

-must accept it so the 2nd, 3rd, etc interests can remain alive

North Counties v. Whipp (Eng 1884)

Facts: Manager of HC Crabtree transferred a legal mortgage to the company HC and also handed over the deeds. Manager then transferred another legal mortgage to the company and transferred deed documents which were put in a safe. Crabtree then executed the same mortgage to Whipp with those deeds. Whipp had no idea that the land was earlier incumbered. Crabtree went bankrupt and then in 1880 the liquidator brought action for foreclosure against Whipp and the trustee in bankruptcy.

A → NC which has a legal mortgage

B → Crabtree

C → Whipp is the bona fide purchaser – equitable mortgage.

Issue: Which interest A or C has priority? What conduct is sufficient to postpone a legal mortgage in favour of a subsequent equitable mortgage?

Decision: A

Ratio: normally first in time is usually first in right – however there are exceptions, can postpone if owner of legal estate assisted in the fraud, can postpone if mortgagor has constituted his agent to raise money, in 2nd carelessness is not enough, Whipp is saying the company was very sloppy by giving Crabtree the key,

Ratio: postponement requires fraud – mere carelessness is not enough.

NOTE – but there is authority today that gross negligence on the part of the company can be grounds for postponements

3. EQUITABLE v. LEGAL

EX: Property is to sold by B to A through an agreement (equitable interest)

C offers B a better deal and the property is sold by the granting of legal title to C

-generally equity prevails

- legal prevails if BFPV w/o notice of prior equitable interest (clean hands)
- value cannot be nominal consideration
 - must be more than that to support a simple K
- cannot have notice of prior interest, any will deprive legal of priority
 - actual
 - constructive (should have known if acted reasonably/prudently)
 - imputed notice (agent imputes knowledge to principle)

Glenelg Homestead v. Wile (2005 NSCA)

Facts: property misdescribed, ends up being sold/mortgaged to 3 diff pl, L made mistake and didn't mean to convey property twice, L agreed to sell lands to G, G paid 1800, deed not recorded until 1998, later L conveyed lots to his son K, gift but K paid \$1, deeds recorded 1996, K mortgaged to R who registered before G, K didn't know of misdescription,
 Issue: Priorities between K and G?

Decision: K wins

Ratio: payment of \$1 was not valuable consideration, difference b/t consid for parties to a K vs. that required for ousting of title

4. EQUITABLE v. EQUITABLE

Rice v. Rice (Eng 1853)

Facts: A (George, Moore, etc) B (Mike Rice) C (Ede & Knight)

- B gets legal interest of a leasehold, takes an assignment
- A sold/assigned but was not paid in full so A had equitable interest as a vendor's lien
- A's document said it had been paid in full when it really wasn't
- C had equitable interest as mortgagee
- perfected by deposit of title deeds

Issue: Who has priority b/t competing equitable interests?

Decision: C b/c A was sloppy

Ratio: look at entire transaction to see if either should be favoured

- generally b/t two competing equities first in time is first in right unless something tells you there should be a postponement
- here equities unequal b/c A said paid in full when they weren't, this leads C to think there is no prior interest (also gave deeds to B)
- must look at the nature and manner of their interests, circumstances and manner of their acquisition, whole conduct of each party

Ratio: between two competing equities first in time is first in right unless there is something which tells us there should be a postponement

NOTE – there are equities and there are equities. “mere equities” get less protection – i.e. if you have right to rectify a deed because it is imperfect, you don't have a right to the deed, but do have a right to have the deed rectified.

- mere equity not practically speaking the same as an equity you otherwise have

Australian Guarantee Corp v. CFC (1995 NZCA)

Facts: AGC loans 100K and gets SI over land

- CFC loans \$ on the same lands, didn't think there was a previous loan

- CFC does search, no caveat turns up
- A/C didn't know of each other, eventually A regs and sends a letter to C
- A first in time and first to record
- C eventually registers

Issue: Who gets priority? Are there grounds for postponement?

Decision: C gets priority, A is postponed if C pays \$ to A

Ratio: this is an equity v. equity case b/c registered through caveat

-A didn't act quickly enough to file caveat b/c quick reg would have resulted in no problem, not determinative always, but look at causative effect,

-A gave B access to title which was pedaled to C, consider the actions of a prudent lender

-C is BFPV, this is not determinative in their favour, but it wasn't a BFPV then would end the inquiry

Ratio: affirms Rice

Result:

-C can sit on the property and hope it increases in value

-A gets paid what it is owed b/c C redeems up, but A's exposure is that they stand to lose any additional \$ increase from the property

-so even though they are paid out, they are penalized to an extent

CHAPTER 3: DEEDS REGISTRY SYSTEMS

3 Main Forms: (derived from American model)

1. race (to register)
2. notice
3. race-notice

1. RACE TO REGISTER

-transfer ineffective until registered

-priority created by date of registration NOT date of interest creation

BUT registration does not validate an otherwise invalid deed

-forgery is still a forgery

-risk remains on purchasers to find a good root to title

BUT if int not on title you can get priority over it and not bound by it

-so it doesn't matter if you know about the interest, if its not on the register it doesn't matter

-can be problematic b/c if the statute doesn't expressly say no notice then it can be read in as a notice gloss (statute doesn't eliminate the CL unless express!)

-irrelevant if interest is created 1st or 2nd or legal or equitable as long as registered 1st

2. NOTICE

-registry will provide an effective means of giving notice

-if register document then notice to world is given

-works for legal and equitable interests

-key to gaining priority is to obtain an interest with no actual or constructive notice of a prior interest (regardless of priority)

-so if the document is in the system then notice is presumed

-purchaser bears the onus to make relevant inquiries as to the proper state of title (Quassa)

Caribou Investment v. Fortis (NLCA)

-adds a notice gloss to a system that appears to be a race system

-this and the ON Registry Act show that notice gloss is VERY prevalent

NOTE: AB Torrens has resisted the notice gloss through s. 195(2)(b) LPA

3. RACE-NOTICE (most common)

-if acquire and pay for property unaware of pre-existing interest AND win race to register you get priority

-need to be:

-purchaser of interest

-without notice

-register before pre-existing interest

CIBC v. Quassa (1996 NWTSC)

Facts: A = bank B = Quassas who had a leasehold from gov C = Logothetis who bought the leasehold, leasehold noted in the deeds registry not LTO, lease sold to L but still in name of Q, both have equitable interests

Issue: What are the priorities b/t a mortgagee and subsequent purchaser who claims to be a BFPV w/o notice?

Decision: mortgagee has priority b/c notice system and C didn't check system

Ratio: conceded that A holds equitable mortgage (odd...but this is what court decided)

-C has an equitable interest b/c there is no formal assignment

-so equity v. equity which means first in time is first in right unless unequal equities

-is gross negligence required?

-C is a BFPV which is relevant but not controlling

-must show they are or it is a serious strike against them

-Bank reg in an ad hoc registry system

-C didn't search registry so grossly negligent

Ratio: in a notice system the purchaser bears the onus to make reasonable inquiries as to the state of title, if put docs in registry everyone is assumed to be on notice

Rockway Holdings (1996 ONGD)

Facts: B grants A a rt to remove gravel (profit a prendre)

-B grants to C a SI over the same land

-A didn't register license until 1.5 years after C registered SI

Issue: Who is to prevail? A or C? Did C have actual notice as req'd under s. 71?

Decision: C has actual notice so A will prevail

Ratio: C is 2nd in time but 1st to register

-A is 1st in time but 2nd to register

-A's grant is void unless C had actual notice

-C knew there was some agreement but didn't know the details thereof

-actual notice means actual notice (not constructive)

-know enough that should have followed up, don't need to know all the details just that some agreement exists

Ratio: actual notice means you don't need to know the exact juridical right, test is whether the registered instrument holder is in receipt of such information as would cause a reasonable person to make inquiries as to the terms and legal implications of the prior instrument

Mayer v. Bruning (NSSC) –Ziff thinks this case doesn't make sense

Facts: L sells to M and same day L mortgages to B to secure unpaid \$, B reg on title but out of the chain of title and before M, L transfers to P who registers, L registers mortgage to B, P transfers to M, M did not search title to property

Issue: Is M bound by the mortgage to B?

Decision: no

Ratio: 2 possible ways to explain this outcome

1. P would take priority over B
 - problematic b/c P holding in trust
 - also only gave \$1 so no valuable consideration

2. no duty to search registry and B registered out of order which would make searching problematic
 - so reg would be a game of chance
 - even if no BFPV has come along cant use the system b/c of transfer
 - so B needs to hope for Ms actual notice
 - s. 18 gives M priority unless M had actual notice

DEEDS REGISTRY—PART 2—CROWN LANDS

- amendment/improvement of CL
- minimized chance of docs going missing
- altered priority rules (risk of postponement w/o gov registration)
- still important b/c
 - Crown grants are deeds systems
 - caveats are part of Torrens
 - record rts, different from proper registration

Crown Grants and Deeds Registry

- “patented land” way of gov devolving land to private, gives a fee simple
 - when land is patented it is registered in the Land Titles Registry
 - when land is NOT patented we register in Public Lands Registry
 - ex for grazing leases
 - for a mineral lease we register in Mines and Minerals Act Registry
- “notification” is functional equivalent of patented

Exceptions to Fee Simple

- normally get everything to centre of the earth to the sky when get land
- Mines and Minerals
 - s. 35 Public Lands Act exempts mines and minerals
 - even if mines and minerals are expressly allowed gold and silver will ALWAYS be reserved for the Crown (s. 10)
 - NOTE: clay, marl etc not M&Ms they are surface minerals (see defns)

-s. 7 LPA in PRIVATE txns the mines and minerals are included even if not mentioned in the agreement

-Water

-Public Lands Act s. 3

-Crown beds and shores to not pass, this is rebuttable with express provision

Public Lands Act

-s.113- onwards

-s. 115 creates a pure race system

Mines and Minerals Act

-s. 91(5) is the keystone section saying it is a pure race system

-only two types of instruments capable of registration: transfers and security notices

-everything else unregistrable so depends on the common law and equity rules

Banks:

→the question of effectiveness and priority of unregistrable interests depends on the rules of common law or equity for the Mines and Minerals Act

-only transfers and security notices are registrable

-transfer must be approved by Department based on the requirements below

-s. 136 sets out the requirements of registration

(1)(a) must be the whole of the agreement

(b) a specified undivided interest; or

(c) a part of the location in the agreement

(2) Minister has discretion to refuse to register if:

(a) not executed in a manner accompanied by proof satisfactory

(b) undivided interest conveys less than 1% undivided interest in the agree

(c) fee not paid

(d) address for service not submitted with filing

EX: A registered holder of 50% undivided interest transfers to B profit a prendre

-A alleges he has lost docs and gets another copy from Department

-executes same interest to C

-A registers transfer to C on C's insistence

-Crown not bound to inquire further than the face of the lease

-even if knew of B, Crown is only required to deal with the registered lessee A

-matters b/t A, B, C to be decided by the courts

-question is about the priorities b/t B and C, 2 competing views about what should happen

1. orthodox view:

-later transfer registered first prevails over a prior interest

-registration essential to pass legal title

-makes the register the valid root to title

-perfects ones title and protects against prior unregistered interests

-Crown is not bound by unregistered transfers

2. non-orthodox view

-registration not required to pass legal title

-makes the registry of little value

- doesn't protect owner of legal interest b/c he doesn't require protection
- doesn't protect equitable int b/c they are not registerable
- doesn't protect purchaser b/c reg not compulsory so would take subject to unregistered legal int which he had no notice of as well as legal interest
- reg only good for lessee who transferred int and wants his obligations to the Crown to shift to transferee

Ziff: it is never clear to what extent a statute replaces the common law

- but it doesn't matter if the interest is legal or equitable when the statute says who wins
- thinks Bankes wants to add a notice gloss to the M&M system

Hawker v. Hawker (SK 1960s)

Facts: mine and mineral rts in Ws name (legal title), presumption of an advancement from H to W which is rebuttable, W tries to sell and puts ad in paper, L buys them, L is also the Ws new boyfriend

Issue Who has priority? Is L a BFV w/o notice?

Decision: L b/c BFPV

Ratio: L has legal title, H has equitable

-court finds L is BFPV and takes free and clear of H

NOTE: L did not check registry, and even if he had he would not have altered his perception b/c the title was in the Ws name

*assume the result would be the same in AB b/c of the notice gloss

CHAPTER 4—TORRENS SYSTEM

3 Cardinal Elements of Torrens

1. mirror (photo)

- what you see is what you get, all int registered on title
- comprehensive record
- EXCEPT short term leases and other things such as overriding interests

2. curtain

- gov issues certificate of title which certifies it
- title only passes by a certification NOW by private txns

3. net (insurance)

- if system causes loss then can make a claim under the safety net

Advantages of Torrens:

- 99% txns have no hitch
- insurance there incase problems
- other systems have may sunken costs

Registration of Certificate vs. Caveat

-caveat = notice

- not certified itself

- fails/succeeds on its own merits
- registration will not perfect it
- used in the interim before a closing
- we 'lodge' or 'record' a caveat but we 'register' title

Important Sections:

15

16—record of names

- find out property owned by someone by searching their name

17

47—registration of trusts

- notice of T may not be made on title
- B protects themselves by registering a caveat

53-54—short term leases/SIs

- instruments take effect on registration and not before
- Church*: only concerned with 3rd parties rights not inter partes
- file a caveat concerning the purchase and sale agreement
- equitable interests are not excluded from the system

58—changes privity in a mortgage situation

59—make 2 promises

1. to existing mortgagee
 2. to guy you're dealing with
- *must indemnify vendor if bank goes after him

103—mortgage and security

- mortgage is a charge upon the mortgagor's title
- so we can have multiple mortgages b/c no title transfers as in old system

60—**keystone provision**

- if you acquire an interest in land AND register it then you hold free and clear from everything else

61—implied conditions

- land in certificate of title subject to:
 - overriding interests
 - basically governmental interests
 - leases less than 3 years

62—certificate as evidence of title (same as 60)

130—keystone provision for filing caveats

- gives wide berth for noting on title

168—assurance fund

- tells what losses are compensable

183—remedies

- deals with situations of who can deject another party

203—limit idea of notice outside the register

- knowledge of an unregistered interest shall not be imputed as fraud (by itself)
- designed to abolish equitable concepts of notice
- notice by registration is the only one that counts

Fraud:

What is fraud?

- B forging transfer in Bs name and registering it
- B forging transfer in Cs name with C aware of the forgery
- C suspecting of a fraud but doesn't inquire

What is not fraud?

- C should have realized it was a forgery but was not suspicious

Acquiree's/Purchasers/Recipient's Fraud:

- doesn't matter if it is a lease for example
- as long as you are the recipient then this applies
- this is the area that we are concerned with

PROBLEM: What if C is aware of an unregistered interest?

- s. 60 creates a race system
- SCC said in ON there was a notice gloss applied so that actual notice works as fraud
- in AB we do the IKEA test (read the statute)
 - s. 203(3) says knowledge alone is not fraud
 - BUT we have cases that muddy the water

Hackworth v. Baker (1936 SKCA)

Facts: H gives land to daughter but it is registered in Hs name

- B wants to buy from daughter who refuses
- B discovers the records and approaches H who sells it to him
- B registers the deed

Issue: Does knowledge of unregistered interest count as fraud?

Decision: no

Ratio: distinction b/t mere knowledge of unregistered interest which might not be hurt by txn and one where we know that the interest will be destroyed

- so mere knowledge of interest is not enough, need conduct that is dishonest
- knowing you will defeat another interest is fraud

NOTE: this would have been fraud at CL

Holt Renfrew v. Henry Singer (1982 ABCA)

F: P represents that lease wont be a problem, later runs and registers a caveat

I: Does knowledge of an unregistered interest count as fraud under s. 203?

D: knowledge is not fraud, but P later loses b/c caveat improperly registered

R: need something more than mere knowledge

- when looking at what counts as fraud look to K law
- there is a duty to correct a statement once true
- must also be reliance on that incorrect statement
- when he said here is the title that we are relying upon it was not properly read
- there was a chance to become aware that the lease was unregistered
- K was made on the understanding that they were relying on the title

R: prior knowledge of the interest and knowing that it will be defeated by registration is not enough to satisfy fraud requirement

Alta v. McCulloch (1991 ABCA)

Facts: M gets land grant for residential and pulp mill

-rt for gov to reacquire property

-gov's interest was fully discharged even though mill site right wasn't supposed to be

-M tells gov who says they look into it, but M transfers property to his company before the gov can register

-M registers his interest

Issue: Is this fraud?

Decision: yes

Ratio: purchasers fraud is what matters

-parties dealt at arms length, transferor controlled transferee

-parties shared intent and had far more than mere knowledge (no other purpose for txn)

Ratio: absence of another reason for registering the interest is more than mere knowledge and constitutes fraud

NOTE: this case doesn't discuss Holt Renfrew (misses the boat)

-Ziff thinks this case muddies the waters even in consideration of "no other reason"

SUMMARY ON FRAUD—Ziff's Conceptualization

Ruthenian: selling land as a Tee is a breach of a fiduciary duty

Holt Renfrew: H has only sold the land, says it has a tenant, HS didn't induce a breach

Hackworth: the new owner was at fault for not registering the transfer

McCullough: company tells of way to frustrate K and induces the breach

SO...as long as we make arguing that inducement of a breach of K or Tee obligations we can reconcile these cases

→in reality the court just doesn't want to let go of equity

Agency Issues:

-deals with idea of imputed knowledge/notice

-Di Castri

-principal not liable for fraud outside of the scope of agent's employment

-or if the fraud is done against the principal

-what if acting w/l the scope of agency and fraud is committed against a non-principal?

Dollars & Sense Finance Ltd v. Nathan (2007 NZCA)

Facts: R agent of Dollars forged mom's name on docs, used to mortgage to get loan, loan not repaid

-Mom discovers, D argues and says that they asked for a signature not a forgery of it

-trying to argue he was not w/l scope of agency

Issue: she an agent? Within the scope of his duty?

Decision: yes

Ratio: company benefited from the acts, his agency was authorized to get the signature, was acting within the ballpark of what he was supposed to do, contrary position in law would make it too difficult to impute principals

Ratio: principals can be imputed with the knowledge of the fraudulent activities of their agents when the act is done w/l the scope of the agents duty and in furtherance of principals goals

Immediate Indefeasibility vs. Deferred—When Does the Curtain Fall:

EX: B sells to C, B is a rogue, A real owner has signature forged, C not fraudulent

1. Deferred

-C loses, no indefeasible title b/c it doesn't occur until C transfers to D

-Gibbs v Messer

- forges name of fictitious person C
- B represents self as C and transfers to D
- *C remains defeasible and indefeasibility deferred to 2nd BFPV
- must deal with registered owner/agent who had authority
- protection limited to those transacting with persons whose name is on register
- LTA can't guarantee signature, only who is actually on the register
- A/C both innocent so reverts to A who most likely has a personal connection

2. Immediate

- C prevails, curtain falls to protect C and indefeasibility said to be immediate
- there is an in personam exception that exists to allow A to sue C

Frazer v. Walker

- distinguishes Gibbs on the facts b/c the fraudster is real

What is the rule in Alberta?

- Ziff thinks the act gives mixed signals and acts like a fad

Hermanson v Martin (1987 SKCA)

F: H/W held land, divorced, no division of property, needs W signature, H wants to sell and gets someone to pretend to be W, gets two mortgages, H back on title, H dies, C is 1st mortgagee and is ok, real problem is the other mortgagee of M

I: Immediate or deferred indefeasibility?

D: immediate, M is free and clear

R: M is BFPV if court had applied deferred rule M would be taken off title and would not be able to go to assurance fund, b/c insurance only there when 'system error' not to protect against fraudsters

R: SK takes the immediate position

NOTE: this does not preclude A from bringing an 'in personam' claim against C b/c in the world of immediate indefeasibility there is an in personam exception

Paramount Life Insurance Co. v. Hill (1987 ABCA)

F: H/W own property, H wants mortgage and gets L to get mortgage and H will make payments, forges Ws name

-no one pays, foreclosure by P w/o payment

-P wants to kick out w to collect

I: Immediate or deferred?

D: mortgage stays on title, neutral

R: if immediate then P remains (same as if deferred)

-transfer to L then to P was almost instantaneous

-deferred means rely on the faith of the register, L was quick owner and wouldn't have shown on the register, court says that if order correct then this is enough evidence of reliance on register

NOTE: this case doesn't answer the question of immediate or deferred indefeasibility, L transferred property back to H b/c didn't want anything to do

-Mrs H can go to the assurance fund

Beneficial Realty v. Sun Bae (1996 AB Master)

F: mortgage fraud, ptf's reg mortgage and caveat, owners signature forged

-def's served, ignored b/c thought it was a mistake

I: Immediate or deferred?

D: deferred, Bank loses

R: Bank can't succeed if Gibbs stands b/c they dealt with the rogue

-Hermanson and Hill distinguished b/c both dealt with bona fide owner

-here the Bank dealt with the perpetrator

-court says it thinks mortgage invalid b/c believe it is deferred

NOTE: Ziff doesn't think the above distinctions matter b/c both are BFPV

-authority is *Frazer v. Walker*

-txn immediate was a mortgage and doesn't buy into judge's faulty distinction

NOTE: this case has no procedural value but shows that Gibbs can still be argued, this case never went to trial on the merits but rather for costs

NOTE: immediate is probably the law in AB according to the AB Law Reform Commission but based on the case law we cannot be too definitive

-s. 5.6 allows for a 'qualified deferred' system which gives land back to original owner

AND allows certain circ of giving the innocent owner indefeasible title

-also if land given back they are compensated

-this approach is used in Metis land disputes

Thomas v. Wright (2007 ONCA)

F: imposter gives lawyer forged docs under the terms the property is sold to another imposter

Thomas Wright, a loan is given and a mortgage granted to Maple Trust

I: Immediate or deferred?

D: deferred, Maple Trust loses

R: -relied on Gibbs

-this was a case of identity theft, had all the docs to make pl believe his name was Thomas Wright

-this is important b/c under a conventional deferred system Maple should have won not lost

NOTE: what about the distinction b/t a 'figment' and an 'alias'

-Ziff thinks that it was an alias and not a figment so Maple Leaf should have won b/c it was a real person, however this case was really concerned with innocent Mrs. L

-In ON s. 57(13) allows for changing names on title and compensating the property owner (this section is very similar to AB reform propositions)

-Ziff thinks this is a very, very horribly decided case

De Lichtbuer v. Dupmeier (1941 SKKB)

-prior to the case of Frazer v. Walker

F: land transferred by forgery to a real person, then he got a mortgage

I: Is mortgage still valid?

D: yes

R: -applies Gibbs

-b/c the forgery transferred to a real person then the title is indefeasible

R: forgery by a person from whom he claims does not affect a transferee or mortgagee unless knowledge of the fraud is brought home to him or his agents

NOTE: in this system (deferred) to be a good fraudster you need to get a forged transfer and register it in your name (doesn't work in Ontario)

-likely BFPV will prevail in deferred, ON is hyper-deferred

What is guaranteed as certified when the curtain falls?

Credit Foncier v. Bennett

F: B owns land, A forges mortgage to T for 7400

-no \$ ever advanced

-mortgage transferred to S for 5500, S assigned to CF

I: Correct state of title?

D: CF got actual interest held by assignor which was a nullity

R: no money is advanced, mortgage only for \$ given

-if you buy a mortgage the title will say what the original mortgage was, it will not say the balance, need to inquire about what is outstanding

-LTA is supposed to facilitate transfers and txns but title might not always tell full story

NOTE: here there was a 'fresh' mortgage so probably assumed it was close to full owing

Perpetual Trustees Victoria v. Tsai (not a Canadian case)

F: forged mortgage, indefeasible title to Bank

I: Indefeasible as to what?

D:

R: Bank wants to take possession on default, if there is no loan to original owner he cannot be in default, so bank not entitled to possession

-no action against land if not signed (this extends Hill)

NOTE: essentially this is saying that indefeasible title to a mortgage is worthless

-court says it is not that broad, here there was a drafting error

-also statute wording changes

-so it is NOT invariable that a forged mortgage protects nothing

Personal Remedies

-most likely to arise in the immediate setting

-possibly A can sue C

-“in personam” is a misnomer b/c remedy can be proprietary (so call it inter se)

-arises outside the scope of Torrens as a broader part of the law

Examples (Peter Butt 'Land Law'):

1. purchaser under K enforces K against vendor who is registered proprietor
2. B enforces T despite Tees status as registered proprietor
3. registered proprietor conduct rendered transfer void/voidable even though not guilty of Torrens fraud (ex. mineral rts messed up)
4. additional factors indicating agreement to recognize and be bound by unregistered interest (ex. maybe asked for lower price b/c of interest)
 - impose constructive trust wrt interest

Chamber's Thesis: (regarding Dollars and Sense)

Q: to what extent will an indefeasible title acquired by registration of an interest in land bar a claim for restitution of unjust enrichment?

-question unanswered b/c many inconsistencies among the cases

In personam exception:

- most Torrens statutes prohibit the registration of equitable interests in land
 - does AB?
 - but can still exist and arise as unregistered interest
 - Torrens shouldn't protect a purchaser from a subsequently arising equitable int
- 'in personam' doesn't mean that 'in rem' should be excluded
 - means that it involved the current registered owner in some way
- calling it an exception is unhelpful
 - indefeasibility doesn't prevent creation of new unregistered interests by purchaser
- fraud exception will be able to cope with most cases
- volunteer exception can work in some cases
 - if knew or ought to have known about wrong doing it may work
 - knew = Torrens fraud so no issue
 - ought to have known = ?
- new equitable right in original and innocent owner is created when Bank accepts a fraudulent transfer
 - PROBLEM: this would diminish indefeasible title b/c could transfer back outside of Torrens rules
 - this thesis is expressly adopted in Dollars and Sense

3 situations that can cause confusions when land transferred from ptf to def which lead to a right of restitution: (must avoid all if in personam exception to be applied)

- a. new restitutionary unreg interest is mistaken for a pre-existing unreg interest
- b. 2 party situation mistaken for a 3 party situation
 - ex. when defs name registered by fraud or forgery
 - fraudulent registration causes land to pass from ptf to def (not to the fraudster themselves so it looks like 3 pl involved but there aren't)
 - real q. is if the def had notice of facts which will entitle ptf to restitution
 - two-party cases fall w/i in personam exception
- c. vitiation of ptf's intent to benefit the def (mistake or undue influence) overlooked and misapplied in the mistaken belief that in personam exception requires some conduct by the def
 - conduct of the holder of the legal title creates an equitable interest
 - but also in no action/ no fault of legal holder and w/o knowledge

- ex. creation of an express trust
- don't need wrongdoing beyond mere receipt of enrichment
- falls w/I in personam exception

Possible Solutions:

1. ptf cant get restitution unless def fraudulent or actively involved in rt of restitution

- would exclude UE and create barriers
 - place intolerable pressure on fraud exception
 - would need to expand def'n of fraud in Torrens
 - would dilute protection afforded by registration
 - would dilute UE b/c ptf would need to show dishonesty
- would create a gulf b/t cases involving int in Torrens and those outside
- RT and guarantee cases would be affected

2. limit restitution to cases where def had notice of the unjust enrichment

- def who had notice of UE will see restitution against them
- def who had enrichment for value and in good faith has SI against ptf
- system requires that int in good faith and w/o notice are protected
 - but shouldn't be protected from all claims
- must be w/o notice of the facts that give rise to ptf's claim for restitution
 - if knows of bad facts then not protected

→ inclusion of in personam exception does not conflict with the objective of avoiding expense, difficulty, delay of investigating title

Dollars & Sense v. Nathan (2007 NZCA)

F: son forges mom's signature

I: Does mom have an in personam claim against Dollars & Sense?

D: yes

R: 3 elements must be proven: (1) not inconsistent with objectives of Torrens system (2) unconscionable conduct on the part of the current registered proprietor (3) recognized cause of action; unconscionable decided by fact and degree, exs include undue influence, alterations of material terms of financing agreements, no reason not to extend principles of undue influence to more serious conduct such as forgery, D was willfully blind b/c did not try direct contact with Mom, cause of action is a claim for unjust enrichment, the claim arises when the title is unlawfully transferred, not before

Farah Construction v. Soy-Dee (2007 HC Aus)

F: party on title w/o fraud

-deprived party advances in personam claim

I: Can this claim succeed?

D: no in personam claim here

R: in personam claims must be based on a pre-existing cause of action

-here they base it on breach of a fiduciary duty (knowing receipt of trust property)

-means you are tarred with same brush as wrong doer

-here knowing means circumstances in which you ought to have known

NOTE: Ziff thinks this contrasts with NZ decision, not prepared to take in personam exception this far, we only penalize parties who knew/ought to have known of fraud

*only cases accepted in Aus is as the primary wrong doer

NOTE: Ziff thinks an in personam exception operates between the requirements that you knew of an unregistered interest and had intent to kill it and the other prong that all you did was know of the unregistered

Example: if fraudster B transfers to C is there an in personam right of A against C?

- Chambers says yes → resulting trust
- Farah says no
- Ziff thinks it depends on actual knowledge of the recipient
 - if actually knew then guilty of Torrens fraud
 - if didn't know then no guilty of Torrens fraud
 - so person who ought to have known but didn't is left as indefeasible
 - remember we don't find this as fraud in Torrens

CPR v. Turta (1954 SCC)

F: CPR owned land including mines and minerals, 1908 transfers to P reserving only coal, 1910 CPR certificate cancelled b/c it is a mess and is replaced, P sells ½ to S and ½ to T, S transfers remaining piece to T, 1943 registrar corrects to add petroleum to reservation, 1944 T transfers to N and M reserving coal and petroleum to CPR, oil discovered later

I: Who owns the mineral estate?

D: T wins in theory, but in practice made very little \$ b/c bad deals made

R: can't reserve an interest to a 3rd party so T can't convey the interest to them, registrar makes 2 mistakes, by initially giving the mines and minerals and then by later giving it back to CPR, 1st mistake unfixable b/c T is a BFPV, could only be fixed before the sale, 2nd mistake there were caveats on the title so IO wasn't a BFPV, IO purchased a leasehold in a nullity, registrars actions not void even though wrong

R: the power to correct for misdescription does not include correction of M&Ms that have been left out of title

Adverse Possession

- still has value in a Torrens system when dealing with misdescription
 - if you misdescribe your own land then you are technically an AP of another's
 - if occupy for 10 years then get your own land back
- possession must be:
 - open
 - continuous
 - adverse

REMEMBER: as soon as AP on the land there is a possessory rt against 3rd parties can protect int with a caveat but not usually done b/c LTO sends notice to title holder

Before 10 years expires:

- tacking is permitted when transfers from AP to AP2
- tacking not permitted if TO sells to TO2 (the clock resets and 10 years starts a new)
 - if it was permitted then APs interest wouldn't need to be on mirror to be recognized
 - if TO2 knew of squatter it doesn't matter b/c don't need to take notice of things outside of the system (Holt Renfrew)

After 10 years expires:

- T02 gets all the land unless AP has registered the interest via caveat
- so T02 is BFPV WITH notice if caveated filed, then AP keeps interest

Volunteers:

- obtain title as a gift
- curtain of indefeasibility will not fall on a transfer by way of a gift b/c if it did a donee would acquire a greater interest than that of the donor
 - supported by Kaup in obiter
 - donee doesn't rely on register

Darnley v. Tennant (2006 AB) (in obiter)

- indefeasibility and donees not found in the statute
- factual mistake to assume pl don't rely on register
- distinguishes b/t BFPV and donee
- discusses s. 183(1)(d) related to a transferee in a fraudulent transaction
 - does not get indefeasibility if get property from a rogue

NOTE: there is no statutory justification for a different law for volunteers

-s. 3(8) of the Limitations Act

- curtain of indefeasibility does not fall for a donee
- if given land subject to a squatter then acquire land as given
- this tells us that the drafters assume Kaup applies

Limitations Act

- s. 3 10 years for land claims
- s. 7 acknowledge that they are on the land to get a fresh 10 years, or move the fence, or sue the neighbours

NOTE: the extinguishment provision is removed from the new Act, so we do not know what happens when the 10 years expires b/c nothing in the statute says the title is extinguished

- CL rule was you could no longer sue but if you could peaceably re-enter you could get your entitlement (don't worry about what peaceably means)
- ALRI s. 3(6) suggests no re-entry or right to sue after 10 years
 - so if AP has it for 10 years the boundaries can be redrawn
- s. 3(8) says if received by gift then the clock keeps ticking
- gifts do not restart the clock b/c not a BFPV

Misdescription as an Exception to Indefeasibility

- dealt with summarily in this course, left with a lot of questions
- if it is a "real" misdescription then it is not affected by any BFPVs
- key sections:

- 60
- 62
- 168 (b)(iii) insurance fund

-so if misdescription is an exception to indefeasibility then how can the

- system deprive you of land for \$
- 183(1)(e) can only bring action for recovery of land if misdescription
- suggests not an exception to indefeasibility

CONCLUSION: the system is a mess

- some forms of misdescription result in a deprivation of title while others do not
- Turta: misdescription as an exception to indefeasibility doesn't include the giving of mineral rts not supposed to have
- BUT wrongful boundaries are included
- only case addressing boundaries is Edwards

Edwards v. Duborg (1982 ABQB)

F: peninsula juttred into a part of the land, 1951 mistake of boundaries by registrar giving extra property to E, D family has used and occupied land for years,

-registrar tries to correct in 1966 after a BFPV had intervened, tries to take away property from Es title and add it onto Ds title

-1980s E discovers he has no title b/c of corrections but carries out activities, D unhappy

I: Can the title be corrected or is this an exception to indefeasibility?

D: D wins, exception to indefeasibility

R: mistake of boundaries by the registrar, when E bought land did not anticipate getting the extra part, can view the action as them trying to become registered owners again or as one to recover land b/c of adverse possession, that is the correct view, D was an AP even D would win b/c used the property for years

R: misdescription wrt to boundaries or land is an exception to indefeasibility

NOTE: both AP and misdescription as an exception to indefeasibility line up b/c both support the same outcome

NOTE: misdescription as an exception means that the stated boundary in title cannot be relied upon, however, AP guarantees you your boundaries

Ambiguous Legal Description:

- to have a misdescription we need a correct description to compare it with
- this order helps us decide what to do if there is an internal ambiguity in a legal description

Presumptive Rules of Pecking Order:

1. natural monuments
2. artificial monuments
3. abutting boundaries
4. courses/distances (due north 35 degrees or footages)
5. statements of acreage

NOTE: these are based on the least likely to be mistaken

Kristiansen v. Silversen (1929 SKCA)

F: HBC sold NW ¼ section to def and NE ¼ to ptf, NW ¼ had 142 acres and NE had 178, both were supposed to have 160, monument was incorrectly placed by surveyor

I: Can the title be corrected to give both 160?

D: ptf wins, keeps windfall

R: where monument put is what matters, not where it was supposed to be put, there is a conflict b/t acreage and an artificial monument, above hierarchy shows that monument trumps an acreage amount

R: reinforces above hierarchy, if an incorrect survey it is the placement on the ground that matters

Burden v. Alberta (1913 ABSC)

F: sale to ptf of NW ¼ south of river containing 27 acres, actually contained 17.9, ref to 27 acres contained in the patent and certificate of title, certificate of title in error

I: Can ptf recover from assurance fund?

D: no

R: property was correctly described physically, referred to natural and artificial monument, acreage was incorrect but that's the lowest hierarchy, registrar does not certify acreage or description

R: ptf's will not be compensated for mistakes that are exceptions to indefeasibility

NOTE: In this case the ptf was able to sue for an acreage shortage but this is not always a guarantee

Prior Certificates of Title:

-s. 60 and 62

-how to calculate 'priorness'

-to have a 'true' prior certificate of title case we need to have a title that is still alive

ex. if title issued and prior one was not cancelled

ex. if allocates land that has already been allocated

-Ziff says he doesn't know of a single 'real' PCT case

-s. 62 says we can go back through previously cancelled certificates to see what is prior

-normally sys works on top title but we cant if there are 2! b/c they compete

-this is why we must look at later rather than privileging the prior

Writs of Enforcement:

-s. 65(1)(e) used to maintain that "land was subject to..."

-the LTO was a general registry searchable only by the property itself

-today we search by name

-s. 122

-s. 123

-s. 124

Martin Commercial Fueling (1997 BCCA)

F: Oct 10 land sold to G, not noted on title, Oct 25 judgment obtained/registered by M against the land (debtor is V), Nov sale of land to G is closed, title issues, agreement for sale is first in time but registered 2nd in time

I: Priority b/t agreement for sale and the writ?

D: agreement gets priority

R: generally first to register wins, per Jellett but writ can only attach to that which debtor has, so when writ registered the partial owner only had land subject to the agreement for sale, could only get interest in the proceeds of sale

Ziff: think of the writ holder as a volunteer to understand that they can only acquire what the debtor had at the time

NOTE: we do not know if the assignment of a writ allows for the collection of only what the writ is worth (like in an assignment of mortgage)

Registrar's Corrective Powers

-s. 194

-s, 198

-s. 187 allows changes so long as rts conferred for value not affected

-doesn't specify BFPV

-so money can come from someone else other than one who gets name on title

-s. 151 allows registrar to file a caveat when land relates to Crown or person of disability

-can also apply to anyone in cases of fraud or improper dealing

-*Krautt v. Paine*

***Heller v. Registrar* (SCC 1963)**

F: transfer for \$1 on death bed, H trying to argue that W is a donee b/c not valuable consideration, W regs transfer, mistake by registrar, didn't get duplicate title before reg, Hs lawyer asked registrar to cancel certificate in Ws name, registrar refused

I: Does the registrar have the power to correct?

D: no

R: registrar not to adjudicate upon contested rts of parties if it is necessary for him to hear evidence, can only act on material w/l records, here nothing in records to indicate a problem

NOTE: Ziff thinks that even something like a major signature difference would not be able to be decided by the registrar b/c it would require a judgment call

-this would create a s. 96 problem

NOTE: if a lease is registered so long as a condition must be met (ex. 10 years so long as holds shares in company) then registration will not correct an imperfect document

-leases must be for a definitive term and this condition means its not

Things the certificate of title doesn't do:

1. misdescription
2. fraud
3. when the curtain falls
4. \$ owing on mortgage
5. substantive validity of documents
6. overriding interests
7. Aboriginal issues

OVERRIDING INTERESTS

-s. 61 lists the implied conditions

-(1)(a) subsisting reservations or exceptions incl royalties contained in original grant from Crown

-includes things like M&Ms reserved from Mines and Minerals Act

NOTE: until 1961 language said unless the contrary is expressly declared" so if A was granted M&Ms expressly a sale to BFPV could not allow for a correction

-(1)(b) unpaid taxes

-includes irrigation charges and drainage district rates

-another occasion where purchaser cant rely on top title

-(1)(c) public highway or other public easement

-(1)(d) short term leases of 3 years or less if actual occupation of land

-(1)(f) any right of expropriation vested in any person...including easements acquired under any act of law

-(1)(g) any right of way or any easement

-there are also some arising from CL

-rt of support from neighboring land

-easements

-Aboriginal title

**these exceptions are construed narrowly b/c they are a derogation from Torrens

Manitoba (Reg of Portage La Prairie) v. Can. Superior Oil (1954 SCC)

F: certificate of title read "land is deemed to be subject to any subsisting reservation contained in the original grant of land from the Crown" unless contrary declared

I: Did the conveyance of land carry with it petroleum rights to subsequent BFPVs?

D: no

R: s. 21 withdraws all mineral rights from the operation of grants in any form unless they are mentioned in express language, read all statutes together, original title didn't pass from the Crown so it cant pass to BFPVs

First National v. Oddson (1919 MBQB)

-lease for 5 years not registered

-when registered there was less than 3 years remaining

-court would not allow them to register

R: we look at what the 'term' is, not what is remaining

NOTE: options to renew a lease are extensions and are not registerable

Trotzok v. Zilka (1946 SKCA)

-lease tenant used land as a farmer but was not living on it

-lease not registered

-farming = constructive occupation

-we require actual occupation

-no habitable buildings on the land

-the purchaser knowing of the lease is immaterial

NOTE: to find what constitutes “actual occupation” we should look to AP law and what we require of a squatter

- unknown how this would play out for leased vacation homes
- living on the land should not be required in all cases b/c some land is not meant to be lived on

Easements:

- non-possessory but site specific
- incorporeal hereditaments
- rt to use someone else’s land
- types:
 - rt of way, internet, pipelines
- dominant tenement = land that benefits
- servient tenement = land burdened
- s. 67 allows for the memorandum of easements on title
 - can also file a caveat

4 Requirements of a Valid Easement:

- dominant and servient tenement
- accommodate dominant
 - NOTE: s. 69 says that a utility rt of way does not need to benefit the DT
 - if this is so is it really an easement?
- 2 diff pl involved
- capable of forming the subject matter of a grant
 - too wide or too vague?
 - inconsistent w/ proprietorship or possession of servient
 - mere rt of recreation w/o utility or benefit

NOTE: if all the requirements are not met, yet it is registered, you can challenge for substantive invalidity

Shelf Holdings v. Husky Oil (1989 ABCA)

F: registrar did not put pipeline easement on title until S became owner, was previously reg and recorded in another system that dealt with unpatented lands, owner of easement says its an overriding interest, S argues its not an easement b/c either doesn’t accommodate DT or can be subject matter of a grant

I: Is this an easement?

D: yes, s. 65(1)(g) does not require registration/caveated

R: test is substantial interference with the servient lands, here the degree of occupation was minimal, high degree of possession and control with a low level of interference from the DT, degree of possession is determined by the document conceding the grant

NOTE: key here is that it was a pipeline easement which was supported by statute

Creation of an Easement:

1. K giving express grant/express reservation
2. implied grants/reservations
 - a. necessity

- old easement passes to new owner
- b. intended easements
 - without them the agreement doesn't make sense
- c. Wheeldon v. Barrows (we just got the name in class no explanation)
- 3. statute
- 4. law of prescription (abolished in AB)
- 5. estoppel

Petro-Canada v. Shaganappi (1991 ABCA)

F: original easement granted, gas station with mall around it, original owner sells to PC and mall owner sells to new owner, construction fencing blocking rt of way, S says doesn't know of easement, not on title, PC argue s. 61(1)(f) doesn't require it to be on title

I: Is this easement enforceable by PC?

D: no

R: it is an easement, but s. 61(1)(f) is not broad enough to incorporate 'this type' of easement, deals only w/ Act or law in AB, excludes private easements from the ambit, no policy reason to justify the continuation of private easements, constrict the meaning of law in AB to common law and statute and NOT the law of K

R: the method of coming into being is what is important when assessing easements, not the pre-existing type of category

- K validity doesn't fall into s. 61(1)(f) b/c it is erected as express and implied/estoppel

-s. 65(1)(g) does not exempt registration of an express K for a private easement w/o reference to any statutory power to impose an easement

NOTE: law of construction that when something is express it overrides the necessary so we K for the necessity then the K part is determinative so it MUST be registered as between private parties

NOTE: Petro-Canada differs from Shelf b/c in Shelf there was a statutory provision for pipelines

NOTE: we only need to register express easements and not implied ones or one by estoppel, this creates a problem b/c where do we look to find these types?

Foothills v. Stockwell (1985 ABCA)

F: road allowance every mile, impeding gully, road diversion built 70ft into farmer's land

I: Has there been creation of a public highway by dedication?

D: yes

R: dedication requires:

- intent to dedicate (actual intent)
- open to public
- public acceptance (actual acceptance)

-these can be deduced by surrounding relevant circumstances such as here with long uninterrupted public use, fact that road not heavily used didn't detract from the fact that it was used by the public at large

R: creation of a public highway is recognition of an unregistered interest in Torrens

Aboriginal Issues:

-common theme is that they lose

***Paulette* (1977)**

- tried to file a caveat against unpatented land
- Court said no provision for caveat against unpatented land in statute
 - so was possible in AB at time, later amended
- s. 134(2) if no certificate of title then cannot register caveat

Why Can't Aboriginals File a Caveat?

- cant get benefit of a system w/o taking the burdens
- purpose of the system is to promote marketability and Ab land is in alienable
- CLPs are ok though

Soldier Settlement Lands:

- s. 51 maintains that the grant is the same and full effect as if it was previously ungranted land
- s. 57 reserves mines and minerals even if conveyance doesn't expressly reserve
- s. 13 the board may register in the LTA but its not necessary to preserve boards rts
- 1930 Natural Resources Transfer Act
 - transfers ownership of federal crown land to the provincial crown

***Re Director of Soldier Settlement* (1960 AB)**

- this case was decided in 1960 but was based on facts pre-NRTA
- F: soldier land grants contained express statutory reservation of minerals, fed gov got land from unpatented sources as well as some private sources, in many cases original errors carried through to administrative errors, W received previous private land, title didn't contain broad reservation it was supposed to, W transferred to N, N transfers again
- I: Who wins?
- D: for gov
- R: fed gov entitled to use POGG to override the registry, cannot deprive fed gov of its property, s. 61(1)(a) says that Crown reservations are overriding, can be deemed by statute as it was here and in Portage La Prairie

***Canada v. Snider Estate* (1991 SCC)**

- F: property acquired by SSB contained a coal reservation only, sold prop to L, loaned \$, L paid off gov, coal reservation on title granted by SSB to veteran, land sold to S
- I: Who owns the minerals? Did minerals pass to AB under the Act?
- D: S wins, BFPV
- R: Article 13 says feds keep rts/control over the soldier lands, so feds keep M&Ms and provincial legislation cannot affect, but judge says this doesn't apply b/c the mortgage is not an 'advance' w/l meaning of the act, Article 18, has general language and is overridden by specifics of Art 13, so NRTA doesn't keep land with feds, AB crown bound by its own statute, BFPV means they lose

Why the conflicting decisions?

1. POGG

-considering Snider the interjurisdictional immunity Q doesn't matter b/c of 1930 Act
2. S. 61(1)(a)

- Crown reservations are overriding interests
- N. Bankes and says that court is not given guidance by section
- land in case was originally granted in 1901 to CPR, the txn given to soldier is a subsequent txn
- but SSB says deemed original grant to back within ambit of the section
- main problem is that we shouldn't use federal legislation to interpret a provincial statute
- NOTE: this shows that we should interpret the overriding interests narrowly!
- NOTE: this problem wasn't explicitly stated by the court, Bankes just assumes we shouldn't use fed legislation, but this is not in the decision

Unpaid Taxes: (based on an unknown case not in the casebook)

- court would not allow a municipality to collect utility arrears from a new owner
- construed tax very narrowly so as not to include unpaid bills
- NOTE: after this case Municipal Government Act was amended to include unpaid utility bills as a tax (s. 553/553.1 deems payments as taxes)
- s.430/431 deals with acquisition of minerals
- background taxes often levied against property and the mineral estates but it is a mistake to sell the mineral estate for unpaid taxes
- regardless of the certificate of title, the municipality only gets what they are entitled to get
- assume mistake gives BFPV for title
- (4) says BFPV is ok if they buy from municipality
 - but if txn after 1948 then (4) doesn't apply
 - even BFPVs may not be safe
 - so prior to 1948 we live with our mistakes

CHAPTER 8: CAVEATS

- registration of a caveat is not the exact same thing as registration on certificate of title, but many of the same protections apply to both
- has the same effect for priority (s. 147/135)
 - deals with priority only and not existence validity (William Hurlburt)
 - doesn't validate an interest which stands or fails on its own merits (Tom Mapp)
- caveats represent a race system b/c deal with priority only
- you can only caveat an interest in land
- caveats are basically a deeds record system

Imperial Oil v. Conroy (1954 ABSC)

F: B and C own land and agree to trade properties, B didn't know C reserved M&Ms for self, C gives lease to IO who regs caveat, after lease registered B sues C and gets judgment that C not entitled to M&Ms, ultimate dispute b/t B and IO

I: Is B bound by the lease?

D: yes, IO wins

R: distinction b/t caveat and reg wrt to forgery, caveat wont protect a forgery, but registration in an immediate system will, here it was C's M&Ms at the relevant time he was on title so reliance on sys, IO then caveated an interest which they had acquired

NOTE: at CL/equity B has 'mere equity', C has legal title and IO has partial legal title, prior equitable vs. subs legal, first in time is first in rt unless BFPV w/o notice

1244034 Alberta v. Walton Intl (2007 ABCA)

- this case talks heavily about an SCC Case Semelhago v. Paramadevan
 - agree for p&s gives rise to equitable interest in land in equity if there is a remedy that will bind the land
 - usually means specific performance
 - this case held that to get specific performance must show:
 - a. land is unique
 - b. damages are not an adequate remedy
 - so now theoretically harder to get it for a failed land deal
- NOTE: Ziff thinks this is problematic b/c uniqueness standard not often easily met and we will have no way of knowing if we are getting specific performance, so cannot file a caveat
- **in 124 the court struck the caveat b/c they said there was no way that he would get specific performance
 - said it is a subjective/objective test
 - here he was going to flip the properties
- Slatter J. (dissent) but this is way too early to tell at a summary trial!
 - caveat need only claim an interest in land
 - striking it is problem b/c doesn't have a caveatable interest b/c not entitled to specific performance and not entitled to specific performance if caveat struck

Farm Credit Canada v. Mainline (2006 SKCA)

F: mortgage on leasehold, postponement in favour of leaseholder who eventually became a fee simple owner, 1st mortgage to RM reg before the 2nd, 2nd to FCC, agree gives FCC priority over RM so no contest b/t RM and FCC

I: Can the postponement agreement alter the priorities?

D: yes

R: registration is conclusive on issues of priority and notice but it cannot alter the nature of the legal interest granted by the instrument registered, grant instrument set out the parties intentions, cannot create a greater interest by registering

READ ss. 130-152 for exam!

-s. 131 IKEA rule

- caveat must contain
 - name and addition
 - signed
 - address
 - nature of interest/grounds

-NOTE if s. 131 not complied with then it is not technically on register so notice is vacated, but some things (like addition are not fatal)

-cases will show that once caveat is accepted by registrar court cant refute it

-s. 135/137 effect of caveat when on title (priorities)

-s. 136 assignment of caveat

-if lease assigned the caveat will be assigned if this section complied with

-s. 138 lapsing a caveat

- s. 141 application for discharge
 - ex. when protects a mortgage but the mortgage has been paid in full
- s. 142 allows stand alone lis pendens
 - ex. when you want court to order constructive trust
 - you don't yet have that interest so cant caveat but the interest may be created
- s. 148 lis pendens
- s. 151 registrars power

What is the correct way to state the interest claimed?

1. "leasehold for 10 years, right to renew for further 10 years, under lease dated X"
2. "all rts contained in attached lease [full lease attached]"
3. (questionable)
 - "int in land under agree dated X"
 - McKillop says there is reasonable certainty
 - ALRI says claim under agree in broad terms will protect whatever int agree confirms
 - CAV-1 (policy manual) says as long as fees can be determined its ok
 - only fee difference for unregistered mortgages
 - so basically just tell them its not a mortgage interest and should be ok

Ruptash v. Zawick (1956 SCC)

F: brothers own land in 213 & 119/332 ratio, bldg needs repairs, W cant pay so agree with D to repair, agree said could sell w/o each others consent (rt of first refusal), later changed to consent/veto, caveat filed on previous agreement, "inter alia" and rt of first refusal, W sells land, D wants to be reimbursed and doesn't care about the sale

I: Did D have a properly protected lien under caveat?

D: no

R: just b/c supposed to get \$ back doesn't mean it's a lien, caveat lang inadequate, rt of first refusal explicitly stated, expression of one right excludes the others, implied not seeking protection of other rts if one is specified over others

NOTE: in the 1950s a rt of first refusal couldn't have been enforced b/c wasn't a recognized interest in land until LPA s. 63 recognized it

-also, that rt was replaced in a subsequent agreement anyway

Calford Properties v. Zeller's (1972 ABCA)

F: term of lease 30 years w/ option to renew for 10 years, Alta files caveat in 1948, 1953 lease assigned to West, 1955 West files caveat, 1970 fee simple sold to C

I: Is option to renew enforceable?

D: yes, but by the 1955 caveat not by the 1948 caveat

R: 1st caveat had 'claims in land under lease for X terms and cond set forth..' 2nd caveat said "term of 30 years" so express mention of 30 years means that option to renew precluded b/c not mentioned

NOTE: it is silly to rely on a previous person's caveat b/c if there are proceedings to lapse then you won't receive the notice, so its best to assign it!

NOTE: leases may or may not contain an option to renew, once we see a lease on title then we read the terms to see if its there

NOTE: a provision to purchase is not protected (Powers v. Walker)

NOTE: Rule in Spencer's case tells what kinds of covenants will pass on a lease

-must touch and concern the land

Holt Renfrew

- fatal flaw was lawyer put in his name
- agent may sign but the owners name must be included

Darnley v. Tenant (2006 AB)

F: 3 mistakes in caveat:

- “Reggie” not “Regina”
- claimed M&Ms but shouldn’t have
- Registrar didn’t sign it

I: Do these mistakes make the caveat fail?

D: no

R: procedures manual has no legal force, may be used for interpretative forces when legislation unclear, caveat tendered by Registrar, court will not look behind any titles or registrations

R: once registration accepted by the Registrar then it is assumed valid (for technicalities not for interests in land)

NOTE: prof draws attention to s.5 of the Cav-1 Unacceptable Interest for Caveats

- Asks what if you wanted to caveat a license?
 - o What is a license?
 - Permission to do what would otherwise be a trespass.
 - o Is a license an interest in land?
 - Denning (*Errington*) once expressed the view that it was an equitable interest in land but that was subsequently overturned
 - o So if you go to register, is the clerk entitled to punt the caveat? (i.e. not register it)
 - Clerk hasn’t read the SCC decisions that could have been decided that day
 - In punting the caveat, the clerk can only make its decision based on what’s in its possession.
 - Think of the Heller decision – what gives the clerk the right to qualify. – you have the right to defend and show that your caveat is valid

Prof argues the clerk cannot likely do that

White Resource Management v. Durish (1995 SCC)

F: C owns prop including MMs in fee simple in the 1960s, Jan 1969 C leases M&Ms minerals to P, caveat filed, Nov 1969 C sold the freehold to V and filed a caveat, nowhere in the facts does Vold take legal title – likely a result of an installment scenario, C dies in March 70, Nov 1971 C’s estate grants 2nd mineral lease to P, caveat filed in Dec 1971 * note the property was already sold to V – final step in sale to V had not occurred

1972 – separate titles established in LTO (separate certs for mms relative to surface rights), Vold sale of surface rights to H in 1972 (not an issue)

March 73: P2 assigned to B, caveat filed May 1973, August 1976 B assigns to H, caveated Oct 1976, Nov 1977 B caveat discharged

Oct 1976 C estate grants lease to N, caveat filed – not inconsistent with sale to Vold and the pawnee#2 lease, N assigns to W, caveat filed March 1977, Nov 1977 W grants option to D, unexercised,

W challenges P, V, H caveats Dec 1977, Dec 1977 H files lis pendens, Mar 1978 V and P caveats extinguished; H's remained in surface rights, April 1979 V sells reversionary rights to D, caveated June 1979, May 1979 H assigns P2 to D, caveated July 1979, Aug 1979 H lis pendens discharged, H assigns caveat to D

May 1978 V gives mineral lease to W, caveated June 1978, Oct 1978 W to D a 50% option in W's minerals, whatever source, (essentially merges W's claims) caveated Feb 1981, assigned to L, 1981 L assigns to WRM, 1981 RBC SI over WRM and W's interests

Oil discovered May 1979, wells produce in 1982

I: Who is entitled to priority White or Durish?

D: Durish wins

R: Three arguments at the SCC

1. Durish had notice of the White interest acquired from Vold:

- When Durish acquired its interest it was or ought to have been aware of the earlier transaction – particularly the fact that Vold was entitled to freehold and the minerals and that Vold was the person if anyone who should have been granting leases.
- Essentially everyone in the first chain of title from pawnee#2 forward is regarding as having notice of Vold's interest by notice.
- Problem in that Vold's interest was not on the register (only an equitable interest)
 - o NOTE trial judge's rationale (see slides) Trial judge is applying the ike rule, i.e. in determining priority between two caveats you apply the act and s.203 says that constructive notice does not apply – race to register. However, s.203 as it read at this time did not apply to this case. This is because (s.195) now s.203 said notice outside the register was not applicable to that section.
 - o The concern was the notice of someone with a caveated interest by someone who is acquiring a caveated interest – i.e. the trial judge went back to the common law – thus subject to the rules of equity about notice. As such Tj ruled in White's favour.
 - o CA – ruled in favour of White – but said that this needed to be addressed by the ALRI – so the statute was amended to apply to caveats and also had retroactive effect.

2. White Caveat was in place when Durish bought Haida's lease

- rejected by the SCC – allowed a backwards leapfrog

note

Haida (first in time)

White (second in time)

Durish (third in time)

But Durish acquired the prior interest of Haida (note *Calford Properties* situations)

3. Lapse of Vold caveat did not affect priority. As such White was then relying on Vold's place in the line

[Vold] (first in time)

Haida 2nd

White

Durish

But this backward leapfrog was not permitted because the Vold interest was no longer – there was no extant interest for White to grab onto as such it was rejected.

Building on Point #3:

- White shot himself in the foot because if the Vold caveat still existed then White could have leapfrogged but White had all those caveats vacated.
- McLachlin J at 313 – “Vold himself could not have regained priority by re-caveating his interest”
- Herlberg has a problem with case.
 - o Note – we are not talking about a BFPV
 - o McLachlin says no you cannot reassert your interest.
 - Fact pattern:
 - B owns blackacre, having purchased from A; registered
 - C has a mortgage granted when A was the owner and it is caveated
 - D has a lease (granted by A); caveated
 - Assume C's caveat lapses under s.137 [now 138]

What happens?

- according to McLachlin:
 - o C loses priority over D, even if C re-registers the very next day.
 - o What about B?
 - Can B say that he no longer has to pay the mortgage? i.e. can B's freehold title come first if C re-registers
 - McLachlin says no – priority against B is not otherwise affected
 - Lapse of a caveat does not effect priority as against the registered owner.
 - Herlberg doesn't see the distinction – he thinks that where there is no BFPV involved
 - Ziff – doesn't agree with Herlberg

BUT

- what happens if you are B and you acquire property subject to a mortgage?
 - o S.58 – says you are deemed to have made a new contract with the mortgagee. As such even if McLachlin is wrong there is this new contract that makes B contractually liable to pay out the mortgage.
 - o Renders the priority issue moot.
- What if B acquires the property and there is a lease on title, but it lapses? Is B bound?

- Yes – because you become liable under privity of estate based on the *Spencer's* case.

Where would McLachlin's statement matter?

What if C had an easement?

- B acquires property subject to the easement
- Caveat for the easement lapses
- There is no other doctrine that would make B bound by that easement

Herlberg says:

- if a caveat lapses and is immediately re-registered you should not lose your priority, that way it would be same situation for B – the holder of the certificate of title assuming there is no BFPVs have entered the waters.
 - But this would look strange on the register because the mortgage or second caveat would be at a later date and the register is not going to back date the re-register. i.e. it is not registered first – even if it was signed first in time.

Durish won the battle.....

But who won the war?

- there were several other elements to this dispute after the priority of the interests were determined by the SCC. The matter went back to trial in Sept 1998 – Mason J heard (original TJ)
- Durish lost and really lost.

SUMMARY of *White v. Durish*

1. s. 195 protects a purchaser of a caveat from interests not caveated at the time of purchase
 - abolishes rule of equity of BFPV w/o notice
2. purchaser of a caveat entitled to priority of the seller's caveat
 - assignee unaffected by notice of an uncaveated interest
3. lapse deprives priority of a caveat against an encumbrancer
 - caveats deal with priority only, not validity
4. lapse does not deprive a caveator against an owner
 - dispute b/t a caveator and a registered owner in fee simple is not one of 'priority'
 - good reason to maintain a distinction b/t reg owner vs. encumbrancers and encumbrancer vs. encumbrancers
 - value of the caveated interest depends on its priority relative to others

CHAPTER 9—THE ASSURANCE FUND

- pay to reg caveats etc and this \$ goes to assurance fund to compensate for losses
- difficult to get a payable claim as the cases show
- sections 164-182 important
- s. 168 keystone provision
 - claimant must have lost and loss must be caused by the system
 - through rogues or administrative error

- s. 171-2 assurance fund the last resort, so must sue rogue and assurance fund
- s. 172 cannot have judgment entered against registrar unless try to collect against rogue
- s. 175/179 monetary limits
 - errors in M&Ms compensable by a formula
- s. 181 list of exclusions
 - legal owners breach of a trust (equitable int not on title)
- s. 178 time limitation of 6 years from deprivation to get compensation
- s. 174 says 3 months notice req'd so really shortens about to 5 years 9 months
- s. 173, 177, 182 recovery by the registrar
 - subrogation of rts to recover from the rogue

Barty v. Kerr (1975 ABQB)

F: old woman sweet talked by K, invests \$ for years, K says will lose it all if she doesn't help again, K convinces her to sign transfer of her house saying she got consider (but didn't), K sells land to BFPV, possible non est factum defence, B eventually gets land back b/c BFPV sell it fo her for 51K, K guilty of fraud and liable but judgment proof

I: Was assurance fund required to compensate her?

D: no

R: for recovery against registrar ptf needs CL rt of action that would deprive a BFPV of title, non est factum would mean docs were void ab initio so BFPV would lose at CL so system should protect her, LTA allows BFPV exception so the sys would have caused her loss, non est factum was not made out on the facts, court found she knew that she was signing a transfer of her land, it was the purpose that she did not know, non est factum doesn't require knowing the contents of the doc, it requires not knowing the type of doc, doc had the transfer of land printed on the top, it did not seem to matter to her what she was signing as long as it would help K recover
 NOTE: fraudulent misrepresentation makes a doc voidable, but non est factum make it void
 R: for the assurance fund to compensate must show that the system caused the loss, this means the system disallows a rt of action at CL

NOTE: fraudulent discharge of an equitable caveat likely compensable b/c no CL equivalent and loss clearly caused by a system error

Youssef v. Ontario (2003 ONSC)

R: just compensation includes only the amounts of the ptf's actual loss directly related to the harm contemplated, legal costs included, non-pecuniary losses excluded, aggravated damage claims and similar things excluded

McWorter v. Reg North Alta Land Registration (1989 ABCA)

F: 1943 M wrongfully deprived of M&Ms due to municipal tax sale of rts, 1944 sell to K who takes M&M title, 1946 reg makes a wrongful correction of title to M, 1973 reg files a caveat b/c realizes there may be a mistake, 1978 K challenges correction, 1981 K wins rts to minerals, M sues registrar

I: Does the registrar have to compensate M?

D: no

R: time limit clock began to run when K originally got the title (in 1944) and not when the subsequent declaration of title made

Paramount v. Hill (1991 ABQB)

F: recall the facts from earlier course, H gets fraudulent mortgage and W gets booted, mortgage on title 1977, law suit not brought until 1988

I: Has the limitation period expired? When did the deprivation occur?

D: expired, deprivation in 1977 when P got indefeasible mortgage

R: discoverability wouldn't have mattered here b/c either way she discovered it more than 6 years before bringing the suit, mortgage registered in 1977 this is when the deprivation occurred, deprivation occurs when the fatal blow is struck, a temporary restoration of title is irrelevant, must look to original event b/c can only lose ownership once, court didn't find that P guilty of fraud until 1986, rendering judgment is not a triggering event

R: initial deprivation by registration of an interest starts the clock running for limitation period, issue of discoverability still remains open

NOTE: Ziff thinks the problem occurs b/c she has 2 law suits going (one against P and then one against Registrar), logical thing is to join the actions "if and only if we lose then will the 2nd action against the registrar be addressed"

CHAPTER 10: REFORM

Title Insurance:

-originated in US, not popular in some states such as Iowa

-brought to Canada in ON by Americans

-1914 original company discovered

-1950s became more widespread

-lawyers worried it would affect their real estate practice

-1956/1957 insurance regulation introduced requiring independent legal advice

3 Differences B/t Title Insurance and Regular Insurance:

1. One time payment for an indefinite term
2. Risks are predominantly retrospective
3. Premised on risk elimination

2 Similarities:

1. Body of legislative regulation
2. Ks interpreted strictly against insurer

Policies:

1. Covered Risk

-designed for risks that have already happened

-today will protect for some future calamities

- a. interests held by others
- b. pre-existing documentary defects
- c. marketability of title problems

-ex. survey, zoning,

d. pre-existing contraventions

-ex. money owing for public services, subdivision violations

- e. prospective risks
 - ex. forgery
- f. residual risks
 - no pedestrian or vehicular access to the land
 - adverse circumstances affecting the land
- 2. Limits (financial)
- 3. Exclusions
 - a. "Government Power" and any violation of law, regs, etc
 - b. building code violations
 - c. rights of expropriation
 - d. risks known to the policy holder
 - e. losses occasioned by the failure to pay for the title
 - f. losses resulting from a lack of right outside the relevant parcel
- 4. Conditions
- 5. Schedules/Endorsements
 - added or excluded from coverage
 - these are special things

Ex. Schedule B (sample for rural land, the urban land one is blank)

- excludes reservations in original Crown grant
- excludes easements or rts of way
- excludes mortgages, work order, etc
- Why buy it?

2 Primary Reasons for Buying Title Insurance

1. time gap in title
 - when doing a purchase and sale and there is a delay in putting the interest on title at the LTO
 - AB has dealt with this via the Western Torrens Protocol
 - LTO transfers registered the same day
 - lawyers omission insurance covers losses so no need for title insurance, this is a service provided by the legal profession for clients
2. boundaries at issue
 - b/c Torrens will not certify boundaries as correct
 - remember in AB we have AP to iron out the wrinkles
3. Bank financing
 - instead of surveying the land etc just get title insurance
 - surveyors think this just papers over the problems and doesn't correct them
4. unpaid taxes
 - although debts are readily obtained by gov office

NOTE: title insurance companies only pay out 16-33% for claims whereas other insurance companies pay out close to 90%

- Ziff thinks this is because the system is working, there is little opportunity to pay out

Reform:

-Land Recording and Registration Act

- s. 1.1(w) value defined as that to support a simple K
 - potential reversion to CL peppercorn approach
- s. 1.2(4) for fraud, the test is actual knowledge that A has not authorized O to grant a conflicting interest to B, proceeding with that knowledge is fraud, but proceeding w/o actual knowledge to the contrary B can assume that its legit
- s. 4.2(1) require the document upon which an interest is based OR a summary of the txn upon which the txn is based to record an interest
 - risk of summarizing the txn b/c s. 4.4(4) talks about prior interest only effective if expressly described
 - seems to codify Ruptash about merely referencing the document
- s. 4.3 allows a derivative interest to record their interest even if the interest it was derived from is not recorded, dominant interest can also use this priority
- s. 4.4(1) if neither interest is recorded then we look to the laws of CL and equity
- s. 4.4(2)(b) priority to a subsequently obtained interest if for value and w/o fraud
- s. 4.4(2)(b)(iii) the cancellation of a recording does not affect priority
 - NOTE: differs from Durish, doesn't overrule b/c written before
 - NOTE: if there is fraud and an unrecorded interest then the laws of CL and equity will determine priority
- s. 4.4(3) a successor should be entitled to the benefits of an assignor's recording
- s. 4.4(4) if interest not expressly described then recording not effective
 - if describes less than the whole then will not be effective for the remainder
- s. 4.4(5) donees/fraudsters of subsequent interest do not get the benefit of recorded priority, but if it is then given to someone with value and w/o fraud then that person gets the priority
- s. 4.5 if a prior interest cancelled on an invalid request for cancellation, B's int is also registered (not merely recorded), B had no knowledge of A's cancellation was invalid, and B had detrimentally altered his position then B's interest is enforceable for priority
- s. 4.6 mortgage secures additional obligations up to the max of the initial SI
 - ex. if 40K mortgage, 20K paid back but 20K advanced again its good for 40K
- s. 4.8 can assign the right to have an interest cancelled
- s. 4.9 recording does not prove the interest exists
 - 3 exceptions:
 - a. registered interest
 - b. registrar's recording
 - c. recording under another statute
- s. 4.9(4) challenger of a recording liable if sends a notice by registered mail
 - a. obtained a court order permitting that type of service
 - b. claimant actually receives the notice w/l the prescribed period
 - c. reasonable effort to effect service by this form of service
- s. 5.2(1) conditions of registration
 - a. interest is qualified for registration
 - even if interest void the priority will be maintained
 - b. person has legal capacity to own the interest
 - if not then Crown will be legal owner on trust for owner
 - c. interest based upon a valid txn
- s. 5.4-5.6 create a qualified deferred system
 - deferred is the general rule
 - best to return to the original owner when fraud or forgery
 - now if this happens the court obliged to compensate the innocent purchaser

- also authority to compensate the owner and leave innocent in the house
- new system swings both ways
- so deferred is the standard rule but immediate can be ordered
 - Ziff thinks this flexibility is so un-Torrens
- s.6 all easements are eliminated from the overriding interest unless they can fit w/l (d) of the original LTA
 - eliminates Municipal Gov Act tax sales unless can fit w/l (f)
 - most likely Aboriginal and Soldier Settlement are outside this act b/c ultra vires
- s. 7.3 establishes a limitation period with a discoverability regime