

Subject Outline

LLB 270/306

Property and Trusts B

Spring Session

2007

UOW

Faculty of Law

University of Wollongong



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Contents

Introduction.....	1
Goals and General Description	1
Learning Objectives.....	1
Tertiary Literacies.....	2
Administration.....	2
Getting Help	2
Learning Resources	3
Classes	5
Assessment.....	6
(inc Acknowledgement, Referencing and Academic Misconduct	9, 11-12)
Additional Information.....	12
Teaching Programme.....	15
Lesson Plan 1.....	16
Lesson Plan 2.....	21
Lesson Plan 3.....	26
Lesson Plan 4.....	31
Lesson Plan 5.....	35
Assignment Coversheet	

LLB 270/306 Property and Trusts B

Introduction

This is an 8 credit point compulsory subject to be completed by students undertaking a bachelor of laws program. Section 3 (21) of the University's *General Course Rules* states that each credit point allocated to a subject has an implied workload (including class attendance) of approximately 28 hours over the duration of the subject

Goals and General Description

This subject builds directly on the real and personal property concepts introduced in *LLB 220/305 Property and Trusts A* and, in addition, provided an analysis of the modern law of express trusts. As with *Property and Trusts A*, policy analysis will remain important and a critical evaluation of the law will continue to form an important component of the material covered.

The subject is divided into 5 topics, or "lesson plans". The titles of these lesson plans and the approximate time allocation for each are:

Lesson Plan #1

- **An Introduction to Mortgages and Securities (Weeks 1 and 2)**

Lesson Plan #2

- **Old System and Torrens Title (Weeks 3, 4, 5 and 6)**

Lesson Plan #3

- **Co-ownership of Property (Week 7)**

Lesson Plan #4

- **Gifts and Sales (Weeks 8 and 9)**

Lesson Plan #5

- **Issues in the Law of Express Trusts (Weeks 10, 11, 12 and 13).**

Learning Objectives

At the conclusion of this subject, students should be able to:

- demonstrate knowledge of the legal doctrine applicable to legal and equitable interests in real and personal property;
- apply these doctrinal elements to solve problems concerning conflicting property claims and the acquisition of property rights (including rights under express trusts);
- critically evaluate the legal doctrine applicable to Australian property law and identify potential areas for legal reform; and
- demonstrate awareness of the responsibilities of the lawyer involved with matters concerning property and trusts law.

Tertiary Literacies

This subject will contribute to the development of the following tertiary literacies:

1. A commitment to continued and independent learning, intellectual development, critical analysis and creativity;
2. Coherent and extensive knowledge in a discipline, appropriate ethical standards and, where appropriate, defined professional skills;
3. Self-confidence combined with oral and written communication skills of a high level;
4. An ability to logically analyse issues, evaluate different options and viewpoints and implement decisions;
5. A desire to continually seek improved solutions and to initiate, and participate in, organisational, social and cultural change.

Administration

SUBJECT CO-ORDINATOR AND LECTURER

Scott Grattan

Office: 67.237

Phone: 4221 4423

E-mail: scott_grattan@uow.edu.au

LECTURER

Jakkrit Kuanpoth

Office: 67.220

Phone: 4221 4302

E-mail: jakkrit_kuanpoth@uow.edu.au

ENQUIRIES

Students should feel free to seek assistance with the subject. Your lecturer's consultation times are _____. You may make an appointment if you prefer.

If you are unable to contact your lecturer and/or the subject co-ordinator, please contact the Faculty of Law Administration Office, Room 67.239, Phone (02) 4221 3456.

Getting Help

If you believe that your studies are not progressing satisfactorily, or if you feel that you are struggling with the workload or content, it is essential that you immediately seek the advice of your lecturer, the Subject Coordinator or appropriate University support services. (These University services include the Learning Development Centre, Counselling Service and Disabilities Office.) You should be aware that if the issue is

one of workload, the advice you receive might be to reduce either your University workload or other commitments.

You might find it useful to form and participate in a study group with other students undertaking this subject in order to discuss the weekly readings or seminar questions. However, participation in such a study group is not a substitute for thoroughly preparing for seminars yourself. Additionally, it is imperative that study groups do not discuss how an assignment or take-home examination should be answered. See the statements on Acknowledgement, Referencing and Plagiarism below.

Learning Resources

In a pedagogical system that stresses student-centred learning, the primary responsibility for learning lies with the student. The instructor provides guidance, assistance and support. To assist in the process the following learning resources have been assigned:

(I) LESSON PLANS

Lesson plans for each topic are included with this subject outline. These are designed to (i) provide an agenda for the classes; (ii) indicate the manner in which the readings will be integrated into the classes; (iii) describe the learning objectives of each lesson; (iv) identify the areas of the topic which will be emphasised; and (v) identify the questions to be pursued in class. The plans often reveal the inter-connections between topics covered in the subject. They may also be of some value for revision and study purposes. The plans serve as a general guide and will not be followed slavishly. Nor should they be viewed as foreclosing the possibility of treating additional issues of interest to the class.

(II) PRESCRIBED MATERIALS

The prescribed materials for this subject are:

- (a) *LLB 270/306 Property and Trusts B Cases and Materials* (rev ed 2007), referred to throughout the Lesson Plans as 'Casebook';
- (b) P Butt., *Land Law* (5th ed, 2006), referred to throughout the Lesson Plans as 'Butt', and
- (c) G Dal Pont and T Cockburn, *Equity and Trusts in Principle* (2005) referred to throughout the Lesson Plans as 'Dal Pont & Cockburn'.

(III) STATUTES

You will need to consult the following New South Wales statutes from time to time:

- *Conveyancing Act 1919*;
- *Real Property Act 1900*;
- *Trustee Act 1925*.

The materials listed in paragraphs (I), (II) and (III) attempt to serve the needs of student-centred learning by, among other things, indicating clearly the learning objectives for each topic, the required work which must be undertaken and the basic tools to do that job.

As with the *Casebook* prepared for *Property and Trusts A*, the following guidelines have been used in the preparation of materials. These are: (i) the quality and quantity of the readings have been carefully monitored; (ii) where possible, the textbook will provide basic readings for most topics and should reduce the need to dwell on basic doctrine; (iii) since the coverage of the subject differs from that of the text, there will be areas where the general readings must be found elsewhere; this is clearly indicated in the lesson plans which accompany this outline; (iv) materials have been drawn from a number of different sources and jurisdictions.

(IV) GENERAL REFERENCE BOOKS

We hope that students in the subject will pursue areas of difficulty and/or interest by exploring and drawing on the various learning resources available in the library. The following readings should all be available in the collection. In consulting these texts, the reader must be sure that the material is current and germane.

Land Law

J Gray, B Edgeworth, N Foster & S Grattan, *Property Law in New South Wales* (2nd ed, 2007)

AJ Bradbrook, SV MacCallum and AP Moore, *Australian Real Property Law* (4th ed, 2007)

R Price and L Griggs, *Property Law in Principle* (2005)

A Bradbrook, *et al*, *Australian Property Law: Cases and Materials* (3rd ed, 2007)

M.A. Neave, *et al*, *Property Law: Cases and Materials* (7th ed, 2004)

S Hepburn, *Principles of Property Law* (3rd ed 2006)

E.I. Sykes and S. Walker, *The Law of Securities* (5th ed. 1993)

Personal Property

M Bridge, *Personal Property Law* (3rd ed, 2003)

A Bell, *The Modern Law of Personal Property: England & Ireland* (1990)

S Worthington, *Personal Property Law: text cases and materials* (2000)

Trusts and Equity

GE Dal Pont and DRC Chalmers, *Equity and Trusts in Australia* (4th ed, 2007)

G Dal Pont, *et al*, *Equity and Trusts, Commentary and Materials* (4th ed, 2007)

R Douglas and J Knowler, *Trusts in Principle*, (2006)

P Radan, C Stewart and A Lynch, *Equity and Trusts* (2nd ed, 2005)

DSK Ong, *Trusts Law in Australia* (2nd ed, 2003)

D. Heydon and M.J. Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006)

RP Meagher, JD Heydon, MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed. 2002)

J Heydon and P Loughlan, *Cases and Materials on Equity and Trusts* (6th ed, 2002)

S Hepburn, *Principles of Equity and Trusts* (3rd ed, 2006)

(V) LEGAL DATABASES

The intelligent use of electronic databases is an important aspect of legal research. You will find it helpful from time to time to utilise the databases to which the University has a subscription. Those most relevant to law can be accessed online through the following link:

<www-library.uow.edu.au/eresources/databases/dbfaculty/dblaw.html>

Classes

The subject involves a two-hour seminar and a one-hour lecture each week. The seminar is the primary teaching vehicle for the subject. The lecture will be used to consider material relating to the topic covered in the seminar in the previous week.

In most weeks, the lecture will be conducted as a problem-solving class: students will work through the discussion questions in the Lesson Plans. Occasionally, by necessity, the lecture will be used to consider material unable to be covered in the seminar because of time constraints. After your seminar each week, the Subject Coordinator will advise you of what will be done in the lecture in the following week.

At the time of preparation of this *Subject Outline*, the timetable for this subject is:

Class	Day	Start	Finish	Room
Lecture	Monday	10:30	11:30	20.1
Seminar Group 1	Monday	16:30	18:30	67.102
Seminar Group 2	Tuesday	13:30	15:30	67.102
Seminar Group 3	Tuesday	13:30	15:30	22.G22
Seminar Group 4	Tuesday	16:30	18:30	67.303
Seminar Group 5	Wednesday	15:30	17:30	19.G100
Seminar Group 6	Wednesday	17:30	19:30	67.203

LAW FACULTY SEMINAR ALLOCATION POLICY

The University of Wollongong timetable allocation system is generated centrally, and does not automatically reconcile each Faculty timetable with each other Faculty timetable. Consequently, double degree students and students in subjects taught outside their home Faculty will generally have to compromise on their preferred timetable.

After seminars are allocated, students may seek to change from their allocated seminar to another. In some cases, there will be vacancies available in the desired seminar. If, however, the seminar enrolment has already been closed, a student must provide adequate documentation of their reasons.

Acceptable reasons for seeking to change to another seminar group include:

- safety concerns
- child-care
- timetable clashes with other compulsory Law subjects within a common year.

Acceptable reasons do not include:

- work commitments
- seeking to consolidate classes into fewer days.

Not all students will be satisfied with their seminar allocation. This is unavoidable.

ATTENDANCE

Students must attend the seminar group to which they have been allocated. If you are unable to attend your seminar group in a given week due to circumstances beyond your control, on two occasions only during the subject you may attend an alternative group, provided that you inform the lecturer of this at the beginning of the relevant seminar.

A roll will be marked at each seminar.

LEARNING METHODS

This University adopts a student centred learning approach. The classes will promote an atmosphere in which students can learn by active participation.

The Faculty considers that an active participation in learning will be most effective and, accordingly, expects that all students will participate in those classes designed for involvement. You will be expected to prepare for each seminar, by reading designated sections of the reading materials, being willing to engage in discussion about, and answer questions arising from, those readings.

A number of different teaching techniques will be employed including question and answer and problem solving sessions. Other learning exercises (eg. role playing, buzz grouping, brain-storming) will be used from time to time. All of these methods are designed to promote active learning; conventional lecturing (a form of passive learning) will be kept to a minimum.

Consistent with the selection of prescribed materials, discussed above, you will find that little attention and time will be spent in class to determining or discussing the facts of a given case or the details of statutory wording. Classes will proceed on the assumption that the materials have been read, and the discussion in class will build on the foundation provided by the readings. In each lesson plan you will find a series of questions. Some of these will be considered in each class; some will not, and you should pursue these on your own.

Students are sometimes baffled and annoyed when readings that are assigned are only briefly discussed in class. Some readings will be assigned to obviate the need to raise and discuss matters during the limited time available in class. Therefore, it is a mistake to assume that the cursory treatment given to the assigned readings in class is a signal that this material is of minimal importance.

Assessment

Given the student enrolment information available at the time of the preparation of this *Subject Outline*, the assessment regime for this subject will be as follows:

Class participation	10% of the final mark for the subject.
Assignment (no more than 10 pages of text)	40% of the final mark for the subject.
Examination	50% of the final mark for the subject.

If the number of students enrolled in this subject is such that class participation cannot be appropriately assessed, an alternate assessment regime will be announced in Week 1.

Further details of the assessment tasks are set out below.

(I) CLASS PARTICIPATION

Marks are awarded for valuable contribution in the seminars. You are expected to prepare in advance, to actively participate and to exhibit analytical skills in dealing with the material.

In assessing your class participation, your lecturer will have regard to the extent to which you have: (A) contributed to the learning of the class as a whole; (B) participated in a process of active learning; (C) demonstrated knowledge and understanding of the subject matter; (D) demonstrated the ability to develop ideas and think critically; (E) demonstrated oral communication skills.

You should refer to the Faculty Policy on Class Participation on the Faculty web site for further information.

You will be given the opportunity to complete a class participation self-assessment form during the session, following which your lecturer will give you an indicative class participation mark. However, because of the total number of students for which each lecturer must assess class participation, your interim mark will be communicated to you by SOLS, and in the first instance no written comments will be made on your self-assessment form. If you believe that your interim class participation mark does not reflect your performance, you may request that your lecturer return your self-assessment form with written comments.

(II) ASSIGNMENT

Due Date/Time

The assignment question will be distributed at some time during the week commencing Monday, 20 August and is **due at 5 p.m. on Monday, 17 September.**

Page Limits

The page limit for your assignment, excluding the cover sheet, endnotes and the bibliography, is **10 pages**. If you exceed the page limit the marker will deduct 1 mark for every 5 lines or part thereof in excess of the page limit.

(III) EXAMINATION

A 3-hour open book, problem-based, examination.

Unless otherwise indicated in an examination question, in assessing your answer, the marker will have regard to the extent to which you have:

- (i) correctly identified the legal issues that arise from the given facts (noting any areas of factual uncertainty);
- (ii) correctly identified the legal rules that are relevant to those issues (noting any areas of legal uncertainty);
- (iii) correctly applied the relevant rules to the issues so as to reach appropriate conclusions;
- (iv) developed your arguments in a logical manner; and
- (v) employed a succinct and grammatically correct writing style.

Assessment Policies

1. Submission of Written Work

Students are advised that **only student numbers**, not names, must be written on assignments so that work is anonymous for the purpose of marking. Assignments must be placed in the box outside the Faculty Administration Office on the day that they are due and on or before the due time. Work is not to be placed under the door of an academic's office. Students submitting assignments after the due date, whether or not they have been granted an extension, must still place their assignments in the faculty assignment box. Assignments should be attached to a Law Faculty coversheet, copies are provided at the back of this subject outline, and outside the Faculty of Law administration office.

Once the assignment has been placed in the box, the Faculty of Law Administration staff will collect it and date-stamp it. An assignment lodged after 5.00 pm on any day will be collected on the next working day. The office will maintain a register of submitted assignments which will be published on the web.

It is the responsibility of each student to check the register to ensure that the office has received your assignment by consulting the register at the following link:

<http://www.uow.edu.au/law/assignmentsreceived/assignments.html>

Where an assignment has been received, the student number will appear in **BOLD** print. If your student number is not in **BOLD** print, then this means that the office has not received your assignment and you need to consult with your subject coordinator immediately.

ASSIGNMENTS MAY NOT BE SUBMITTED BY FACSIMILE OR EMAIL

Lodgment of Assignments by Post

Assignments posted to the Faculty must be received by the due date and an official Australia Post receipt, evidence of posting, must be kept by the student. Assignments should be mailed to:

LLB 270/306 Assignment
Faculty of Law
University of Wollongong
WOLLONGONG NSW 2522.

2. Collection of Marked Assignments

Assignments that have been marked by the lecturer are to be handed back to students in their seminars or tutorials. Students who are absent when assignments are returned in class may then retrieve their paper at the Law Faculty administration office.

3. Format of Work

Assignments must be in the following format:

- The front page must consist of a completed Law Faculty cover sheet.
- All pages should be in black type, on white A4 paper, printed on one side only with 3 cm margins on all sides (left, right, top, bottom).
- The font size must be 12 point font using the 'Times' font and line spacing should be 'double spaced'.
- Pages, other than the coversheet, must be numbered.

- Quotations exceeding 20 words must be indented and in block format.
- Referencing must be by way of endnotes. You must not include substantive material in your endnotes.
- Assignments must conform to adequate reference and citation practice. Marks will be lost for failing to undertake this procedure.
- You must staple your assignment. Do not use folders, binders or covers.

Always keep a photocopy of your work.

4. Acknowledgement and Referencing

You must acknowledge all sources of information. You should ensure that you are familiar with the rules on referencing and acknowledgement. You should consult the University Policy on Acknowledgment Practice <http://www.uow.edu.au/handbook/courserules/plagiarism.html> and the Faculty of Law Policy on Plagiarism www.uow.edu.au/law or Studying Law 2007 handbook. Plagiarism will not be tolerated and you will be penalised if you commit plagiarism (see Academic Misconduct below)

It is important to use a standard system of citation and referencing. The Faculty of Law's official citation guide is the *Australian Guide to Legal Citation* (Melbourne University Law Review Association Inc., Melbourne, second edition 2002). The Guide may be borrowed from the University library, purchased from the Unicentre Bookstore or accessed online at <http://mulr.law.unimelb.edu.au/aglcdl.asp>

5. Special Consideration, Extensions, Late Submission of Written Work and Penalties

To apply for Special Consideration, students must log onto SOLS and select the Special Consideration link. A personalised application form will then appear for electronic completion and submission. Once you have completed and submitted the application, you must forward all relevant medical certificates and documentation to ARD (Academic Registrars Division) within 3 days so that they can be verified and accepted. Once verified and accepted, the subject coordinator for your subject will receive your application via SMP (Student Management Package) and you will be advised of the outcome.

It is the policy of the University of Wollongong and the Faculty of Law that extensions of time for submission of assessable work are only granted in exceptional circumstances, such as serious illness or unforeseen circumstances beyond your control.

Extension applications must be made in accordance with the University's Special Consideration Policy <http://www.uow.edu.au/handbook/courserules/specialconsideration.html>

Assessment tasks must be submitted by 5 pm (or other designated time), on the due date. An assessment task that is submitted late will receive a penalty of 5% of the total available mark for each 24-hour period, or part thereof that it is late. Penalties accrue on each day that the assessment task is late, including Saturdays, Sundays and public holidays. You should also note that an assessment task that is submitted after 5 pm on any day will be deemed to have been submitted on the next working day.

No work will be accepted later than 7 days after the due date. After that time a student will be deemed to have failed to meet the subject requirements and will therefore receive a fail grade.

6. Supplementary Examinations

To apply for a supplementary examination, students must log onto SOLS (Student Online Services) and select the special consideration link. A personalised application form will then appear for electronic completion and submission. You must ensure that you select the appropriate button to request a supplementary examination. Once you have completed and submitted the application, you must forward all relevant medical certificates and documentation to ARD (Academic Registrars Division) within 3 days so that they can be verified and accepted.

Once verified and accepted, the subject coordinator for your subject will receive your application via SMP (Student Management Package) and you will be advised that the application will be considered by the Faculty of Law Assessment Committee.

All applications for supplementary exams are determined by the Faculty of Law Assessment Committee on the advice of the relevant subject coordinator. The Associate Dean determines all applications for supplementary exams, which are lodged after the Faculty Assessment Committee meeting. The Faculty will then forward details of your supplementary examination to ARD. ARD will then notify you via SOLS as to the time and date of the supplementary examination.

Please note:

That the Faculty Examination Committee may, in appropriate circumstances, approve a special consideration application for a supplementary examination for students who provide adequate documentation of medical or other circumstances beyond their control. The Faculty will not grant additional opportunities for supplementary exams. Students who still fail to achieve a Pass grade (or PC grade) in a subject after being granted a supplementary exam will either receive a Fail grade (or PR grade where relevant) or, in appropriate circumstances, be allowed to withdraw from the subject without academic penalty.

For further information regarding eligibility for supplementary examinations, please refer to the University's Special Consideration Policy, which can be found at: www.uow.edu.au/handbook/courserules/specialconsideration.html and also refer to SOLS at <http://www.uow.edu.au/student/> for more special supplementary examination information.

IMPORTANT:

The University's Special Consideration Policy requires that where a student supports an application for a supplementary exam with a medical certificate or a counsellor's letter, that documentation must specifically state that as a result of the medical complaint, treatment or other problem described in the documentation, the student was unfit to complete the examination on the relevant date. It is **not** sufficient that the supporting documentation merely state that the student was ill, or that her or his performance or preparation was adversely affected. Documentation to that effect would support only an application to have an appropriate adjustment of the examination mark.

Re-Marking of Assignments and Examinations

Students are advised to consult the University rules on Reassessment of Grades in the Undergraduate Calendar <http://www.uow.edu.au/handbook/>

7. Student Academic Grievance Policy

The University and the Faculty of Law have formal Student Academic Grievance Policies. These policies are to be used only when informal approaches have been made to the marker or the Subject Coordinator.

"Academic grievance" means a complaint by a student concerning a decision, act or omission of a member of UOW staff or committee, which affects the student's academic experience. Examples of the types of complaints that may be covered by this definition follow:

- a. failure to assess work in accordance with specified criteria;
- b. bias by marker;
- c. technical marking or collating error;
- d. failure to manage requests for special consideration in accordance with the Special Consideration Policy;
- e. failure of a research project supervisor to fulfill their responsibilities as defined in the Code of Practice - Honours;
- f. failure to adhere to the requirements of the General Course Rules, including the rules governing the award of grades of performance, granting of awards "with Distinction", minimum rate of progress, advanced standing, amendments to academic records;
- g. failure to adhere to the requirements of the Award Rules;
- h. failure to adhere to mandatory requirements of a relevant Code of Practice (e.g. Teaching and Assessment, Honours, Practical Placements), including assessment or examination requirements;
- i. failure to adhere to Faculty assessment or examination requirements;
- j. failure to follow due process in handling student requests or complaints.

You can obtain a copy of the policy and the *Appeal against decision or action affecting academic experience* form from the Faculty office or on the Faculty website at www.uow.edu.au/law

Please note that there are strict guidelines and timeframes.

A full copy of the University Student Academic Grievance Policy can be found at: www.uow.edu.au/handbook/courserules/studacgrievpol.html

8. Academic Misconduct

The University regards academic misconduct as a very serious matter. Students found guilty of academic misconduct may be excluded from the University for a specified period of time or permanently. Paragraph 4.1 of the rules of student conduct and discipline defines academic misconduct as:

"4.1 **Academic misconduct** – including plagiarism and other forms of cheating by students in breach of the General Course Rules or any relevant policy or code, for example, Codes of Practice – Teaching and Assessment, Students, Honours, Supervision and Research.

Examples:

bringing unauthorised material into an examination room
plagiarism: using the ideas of another person without giving them credit “

The rules can be found at the following website;

<http://www.uow.edu.au/handbook/generalrules/rulesforstudentconductdiscipline.pdf>

You should note, academic misconduct is relevant to your admission as a lawyer. The Legal Profession Admission Board's current application for Admission as a Lawyer requires applicants to make a number of declarations relating to fame and character including the following:

- 5.9 I am not and have never been the subject of disciplinary action in a tertiary education institution in Australia or in a foreign country that involved an adverse finding.

Applicants must disclose details of any relevant incidents if they cannot make the above declaration.

ADDITIONAL INFORMATION

Email and Faculty Notice Boards

SOLS Mail, Email and the Faculty's electronic Notice Board are used on a regular basis by Faculty Staff to contact students and to send out essential information to the Faculty of Law student body. Consequently, it is essential that you check your University email account and the Faculty's electronic Notice Board on a regular basis (every 2-3 days minimum).

1. It is each student's responsibility to ensure that they have an active University email account.
2. If a student wishes to forward email from their University account to another account, it is the student's responsibility to ensure that this has been successfully done. For information on how to forward your University email account to your preferred email address refer to:
<http://www.uow.edu.au/its/userguides/students.html>
3. Students are not permitted to submit assignments by email.
4. The Faculty's electronic Notice Board will be used to provide electronic copies of documents to students as the group email facility does not allow academics or the Faculty to send enclosures to students.

The Faculty's Notice Board can be found at: <http://www.uow.edu.au/law>

Late Withdrawal

The last date for withdrawal from a single session (Spring Session) 2007 subject **without financial penalty** (HECS refunded/International Student Fees credited) if withdrawn by is: 31 August 2007.

Last day to withdraw from single session subjects (Spring Session) **without academic penalty** - subject deleted from record. (Fail grade recorded if subject withdrawn after this date) is: 23 September 2007.

Disability

If a student with a disability requires reasonable accommodation in this subject, they are strongly advised to discuss the issues early in the session with one of the following people: The Faculty of Law Student Equity and Diversity Liaison Officer, the Faculty Disability officer and/or the subject coordinator.

Student Equity and Diversity Liaison Officer is:

Viv Mclroy

Location: 67.207 (Monday, Tuesday) and 19.1075 (Wednesday – Friday)
Phone: 42215017 (Monday, Tuesday) and 4221 3635 (Wednesday – Friday)
Email: vmcilroy@uow.edu.au

The Faculty Disability Officer for the Faculty of Law is:

Scott Grattan (Sub-Dean)

Room: 67.237
Phone: 4221 4423
Email: sgrattan@uow.edu.au

Appointments with the Sub-Dean can be made by contacting the Law Faculty Administration Office on (02) 4221 3456 or via email: law@uow.edu.au

Grades of Performance for 100, 200, 300 and 400 level subjects.

The approved grades of performance and associated ranges of marks for 100, 200, 300 and 400 level subjects (except for subjects referred to in Rule 8.5.2 or subjects constituting an Honours program applying Method 1 in Rule 8.5.6 to determine the Honours grade) are as follows:

Satisfactory completion:

High Distinction 85-100%

Distinction 75-84%

Credit 65-74%

Pass 50-64%

Pass Restricted (for 100 & 200 level subjects only) or Pass Conceded 45-49%**

Fail 0-44%

Subjects satisfactorily completed at a Pass Conceded or Pass Restricted grade may comprise no more than one sixth of the minimum credit point value of a course (see Rule 8.5.4 of the General Course Rules - Assessment)

The award of the grade Pass Restricted in a subject will prohibit a student progressing to the next subject in a sequence for which the subject in which the pass restricted is awarded is a pre-requisite. However, students are not prevented from repeating a subject for which, a Restricted Pass has been awarded.

Scaling of Marks

The Faculty reserves the right to scale marks in any subject. Please refer to:
<http://www.uow.edu.au/about/teaching/scaling.html#guidelines>

University Policies

Students should make themselves aware of the following University of Wollongong policies which are to be found on the University website in the current Undergraduate Calendar:

Code of practice – Teaching and Assessment

www.uow.edu.au/handbook/codesofprac/teaching_code.html

Code of Practice – Honours

<http://www.uow.edu.au/handbook/honourcode.html>

Code of Practice – Students

www.uow.edu.au/handbook/codesofprac/cop_students.html

Code of Practice – Practical Placements

http://www.uow.edu.au/handbook/codesofprac/cop_pracplace.html

Acknowledgment Practice – Plagiarism

<http://www.uow.edu.au/handbook/generalrules/rulesforstudentconductdiscipline.pdf>

Special Consideration

www.uow.edu.au/handbook/courserules/specialconsideration.html

Non-Discriminatory Language Practice and Presentation Policy

<http://staff.uow.edu.au/eeo/nondiscrimlanguage.html>

Occupational Health and Safety

<http://staff.uow.edu.au/ohs/commitment/index.html>

Intellectual Property Policy

<http://www.uow.edu.au/research/researchmanagement/1998IP.html>

Student Academic Grievance Policy

www.uow.edu.au/handbook/courserules/studacgrievpol.html

Supplementary Examinations and Assessment and Examination Rules and Re-Assessment of Grades

www.uow.edu.au/handbook/codesofprac/teaching_code.html

For Faculty of Law policies, students must refer to the Faculty of Law Handbook for 2006 or the Faculty of Law website at www.uow.edu.au/law

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Teaching Programme Spring Session 2007

The first day of Spring session is Monday, 23 July 2007

WEEK	DATE COMMENCING	LESSON PLAN #
1	23 July	1
2	30 July	1 (continued)
3	6 August	2
4	13 August	2 (continued)
5	20 August	2 (continued)
Assignment question distributed this week.		
6	27 August	2 (continued)
7	3 September	3
8	10 September	4
9	17 September	4 (continued)
Assignment due Monday, 17 September at 5 pm		
MIID SESSION RECESS: 24 September to 30 September		
10	1 October (1/10 is a public holiday)	5
11	8 October	5 (continued)
12	15 October	5 (continued)
13	22 October	5 (continued)
STUDY RECESS: 29 October to 2 November		
EXAMINATIONS: 3 November to 16 November		

Lesson Plan #1

Topic: "An Introduction to Mortgages and Securities"

Time Allocation: Weeks 1 and 2

Prescribed Readings:

Week 1 (Topics 1, 2 and 3)

Butt, paras [1801] - [18.70]; and
Casebook, pp 1 - 35.

Week 2 (Topic 4)

Butt, paras [18.81] - [18.179]; and
Casebook, pp 36 - 67.

Learning Objectives and General Description:

This lesson is designed to introduce fundamental principles concerning the mortgage and other forms of security interests in property.

A thorough-going and practical treatment of this area is rendered difficult by several variables which affect the relevant governing regime. To be more precise, the principles which govern a mortgagor-mortgagee relationship will vary depending on whether the mortgage is: (i) legal or equitable; (ii) formally perfect or informal; or (iii) under Torrens or old system title. Given this state of affairs, some permutations must receive limited coverage. In this lesson, the primary focus will be on the formally correct legal mortgage, involving old system or Torrens land.

Mortgage law is often concerned with determining the relative rights of creditors. This concept was introduced in relation to fixtures in Lesson Plan #2 of *Property and Trusts A*. This issue will be dealt with again in the lesson plan on Torrens and deeds registration (Lesson Plan #2). You will also see that some of the material in this lesson plan draws back to general contract law principles, or forward to protections in favour of consumers (in their capacity as 'borrowers'). These matters are important and should be reviewed in the assigned text readings, but will not be central to the class discussion.

The law of mortgages will only be introduced here. The Faculty of Law offers the subject *LLB 321 Finance and Security*, in which a more detailed treatment of the law of mortgages is provided and where the issues broached here are considered in greater detail.

With the above in mind, at the end of this lesson students should be able to:

- (a) understand the fundamental nature of a mortgage and the basic policies which inform the law of mortgages;
- (b) understand the basic rights of both mortgagor and mortgagee;
- (c) solve basic problems relating to mortgages; and

- (d) understand the array of security interests over chattels.

1. Introduction

- (a) early forms of mortgages
- (b) the elements of an old system mortgage
 - (i) the mortgagee and his interest
 - (ii) the mortgagor and the equity of redemption
 - (iii) the equitable right to redeem
- (c) the nature of a Torrens mortgage (*Real Property Act ("RPA")*, s. 57(1))
- (d) formal requirements (*Conveyancing Act ("CA")*, ss. 23B, 23C, 54A; *RPA*, s 56)
- (e) legal v. equitable mortgages
- (f) disguised mortgages
- (f) charges, liens and pledges

2. Rights and Obligations

- (a) sources
- (b) obligation to pay the amount owing
- (c) the right to redeem
 - (i) generally - legal and equitable rights
 - (ii) the equity of redemption as an interest in land
 - (iii) early redemption (*CA*, s 93)
 - (iv) late redemption - the "six month rule"
- (d) lease by mortgagor
 - (i) common law rule
 - (ii) under statute (*CA*, s. 106; *RPA* s 53(4))
- (e) other issues

3. Protections for the Mortgagor (*Jones v Morgan*)

- (a) equity to the rescue: generally
- (b) the doctrine of penalties
- (c) clogs on the equity of redemption
- (d) unconscionability
- (e) consumer credit legislation: generally

4. Remedies of the Mortgagee

- (a) source
 - (i) express
 - (ii) implied (*CA*, s 109)
 - (iii) inherent
- (b) action on the covenant (*CA*, s 111(5); *RPA*, s 57(5))
- (c) possession
- (d) appointment of a receiver (*CA*, ss 115, 115A)
- (e) sale
 - (i) requirement of notice (*CA*, s 111; *RPA*, ss 57, 58, 58A; *Wongala v Munglebar*)
 - (ii) obligation to mortgagor (*Carver v Westpac*)
- (f) foreclosure (*Conveyancing Act*, s 103)

(g) restrictions on exercise - accepting interest (CA, s 92)

* * *

Questions

- (1) Examine the mortgage available for old system land which is contained in the materials. In particular, examine the first two paragraphs of the indenture. How would you characterize the *property interests* of the mortgagor and mortgagee under that document?
- (2) What is meant by the 'legal right to redeem', the 'equitable right to redeem' and the 'equity of redemption'?
- (3) What are the practical differences between an old systems mortgage and a Torrens mortgage today?
- (4) What is meant by the phrase 'once a mortgage always a mortgage'?
- (5) On 1 January 2000 Julius purchased the fee simple in Old System title land in New South Wales known as "Roma", on which the business of a retail flower shop is conducted. Julius financed the purchase of Roma with \$100,000 borrowed from Cleo. On settlement of the purchase, Julius granted to Cleo a mortgage of the fee simple in Roma. The mortgage secures the repayment of the amount borrowed, with interest, by equal monthly instalments, the last of which is due on 1 January 2020. The mortgage is by deed and contains the following clauses:

"Clause 1

"In consideration of \$100,000 advanced by the Mortgagee to the Mortgagor, the Mortgagor conveys the fee simple in Roma to the Mortgagee. On payment of all of the moneys secured by this mortgage, the Mortgagee will convey the fee simple in Roma to the Mortgagor.

* * *

"Clause 19

"The Mortgagor must not sell any flowers in the course of the Mortgagor's business conducted from Roma, other than flowers supplied to the Mortgagor by the Mortgagee, until 5 years after this mortgage has been redeemed.

"Clause 20

"The Mortgagor may not redeem this mortgage prior to 1 January 2020."

- (a) Having regard to Clause 1, what were the respective interests in Roma of Julius and Cleo on the granting of the mortgage?
 - (b) Is Clause 19 enforceable?
 - (c) Having regard to Clause 20, can Julius redeem the mortgage prior to 1 January 2020?
-
- (6) Joe Bloggs was an impoverished artist struggling to keep body and soul together until that happy day, which he knew would inevitably arrive, when his genius would be recognised and his paintings begin to sell for their true value rather than the pittance that he was now getting for them. Of course, Joe thought, the revelation of his genius would occur that much sooner were he able to buy a

proper studio in which to work. Joe thus entered into an agreement with Vince Drinkwater whereby Vince loaned Joe \$200,000 to purchase a studio at 52 Regent Street (which was under old system title) and Joe granted Vince a mortgage in fee simple of 52 Regent Street to secure repayment of the amount borrowed, plus interest.

Unfortunately, the purchase of the studio did not hasten the recognition of Joe's genius, and he soon fell behind in his repayments. In a bid to get more money, Joe got in a tenant, Justin Case, to rent the lower floor of the studio. But despite his efforts to shore things up, Joe is still unable to meet his repayments to Vince. Vince has finally lost patience and has begun to make loud noises about "doing something to clean up this mess."

- (i) What remedies are available to Vince and what factors should Vince take into account in determining which remedy/remedies to pursue?
 - (ii) What is the position of Justin with regard to his lease?
 - (iii) Assume that Joe's genius is recognised at this point and he acquires an enormous amount of money. Is he entitled to redeem his mortgage to Vince if Vince insists on "exercising his legal rights against the property"?
- (7) Abraham was the registered proprietor of Torrens title land in New South Wales. Abraham granted Brigid a mortgage over the land that Brigid registered. The mortgage provided that if Abraham defaulted in the performance of any of his obligations under the mortgage, Brigid was entitled to serve a notice on Abraham requiring him to rectify the default within 21 days. If Abraham did not rectify the default within this time, Brigid was entitled to exercise her power of sale over the land.

The mortgage set out a number of obligations that Abraham had to perform. These included the payment of interest at monthly intervals on the principal amount owing under the mortgage. Each payment was due on the last day of each month. Interest on the principal amount accrued at a rate of 8% per annum where payment was made on or before the due date, or at 12% per annum if payment was made after the due date. The mortgage also required Abraham to keep the land (including his house) in good repair.

Abraham did not make the payment of interest that was due on 30 June. When Brigid went to ask Abraham why the payment had not been made, she saw that the house and land were in a severe state of disrepair. Without bothering to talk to Abraham, Brigid went to meet with her solicitor. The solicitor prepared a document addressed to Abraham stating that he was in default under the mortgage and that if he did not rectify the default within 21 days Brigid would exercise her power of sale. Brigid served the notice on Abraham but he did not make the overdue interest payment or make the repairs.

After the 21 days referred to in the notice had elapsed, Brigid appointed real estate agents to advertise the property for sale by auction. The agents told Brigid they would advertise in the local newspaper that the land was to be sold at auction the following week. However, the agents forgot to place the advertisement, and the attendance at the auction was poor. The highest bid received at the auction was \$90 000. Brigid directed the auctioneer to accept this, even though the amount which Abraham owed under the mortgage (using the 12% per annum rate for the missed June interest payment) was \$100 000.

- (i) What rights does Abraham have to with respect to the land: (a) on the fall of the hammer at the auction; (b) on Brigid and the purchaser signing the contract for sale; (c) completion of the sale?

- (ii) Assume that the sale of the land is completed. Brigid demands that Abraham pay her the \$10 000 'gap' between the sale price and the amount owing under the mortgage. Abraham refuses, claiming that the land was worth at least \$120 000 and that on this basis Brigid owed him money. What rights do Abraham and Brigid have against each other?

Lesson Plan #2

Topic: "Old System and Torrens Title"

Time Allocation: Weeks 3, 4, 5 and 6

Readings:

Week 3 (Topics 1 and 2)

Butt, paras [1901] - [1911], [1943] - [19112], [18189] - [18207] (Chapter 18 is the Mortgages chapter).

Week 4 (Topic 3)

Butt, paras [2001] - [2022];

Casebook, pp 74 - 100;

Butt, paras [20123] - [20135];

Casebook, pp 101 - 112; and

Butt, paras [20137] - [20154] - read for overview only.

Week 5 (Topic 4)

Butt, paras [2067] - [20119]; and

Casebook, pp 113 - 162.

Week 6 (Topics 5 and 6)

Butt, paras [2023] - [2045];

Casebook, pp 163 - 171;

Butt, paras [2046] - [2066]; and

Casebook, pp 172 - 193.

In addition, in this Lesson Plan you will be required to read various parts of the recent High Court decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22.

Description and Learning Objectives:

This lesson is concerned with the means of ordering and recording property interests. Of principal concern will be the rules that govern the registration of interests in land. It will already be appreciated that a given tract of land may be the subject of a variety of recognisable property interests. The method of recording these interests will occupy most of the present discussion.

Two systems of land registration exist in Australia - (i) the so-called old system of deeds registration; and (ii) the Torrens registration. Both systems continue to exist in New South Wales, although the vast majority of freehold land is held under Torrens title. Eventually all land will be brought under the Torrens system title and the method for doing so will be explained briefly. As a preliminary matter, an outline of the general common law and equitable rules governing priorities, which emerged in the absence of land registries, will be presented. It will be seen that, in certain contexts, these priority rules retain significance.

To some, the study of land registration rules may appear to draw down to the absolute nadir of legal analysis; the study of registration may seem drier than the land itself. That need not be the case and in the analysis undertaken here, an eye will be

consistently kept on the policies that have dictated the fixing of the rules which have emerged. Pay special attention to these.

With the study of mortgages in the preceding lesson plan, the main substantive rights with which Torrens is concerned have now been presented. The manner in which these are subject to, or affected by, registration can now be considered.

At the conclusion of this lesson, students should be able to:

- (a) understand and explain the policies underlying:
 - (i) common law and equitable priority rules;
 - (ii) old system registration; and
 - (iii) Torrens title; and
- (b) apply these rules to solve problems concerning registration of land, and identify continuing uncertainty in the law.

NOTE: Unless otherwise stated, the sections referred to in this lesson are from the Real Property Act, the Torrens statute in New South Wales.

* * *

1. Introduction

- (a) the meaning of priorities
- (b) contests in the absence of a registration system
 - (i) legal v. other legal interests
 - (ii) legal v. equitable interests
 - (iii) equitable v. equitable interests
- (c) priorities between successive mortgagees
 - (i) tabula in naufragio
 - (ii) further advances

2. Old System Title

- (a) the law before registration
- (b) the impetus for reform of the common law - the Statute of Uses
- (c) the nature of registry systems
- (d) the position in New South Wales

3. The Torrens System: Introduction

- (a) the origins of Torrens
- (b) the paradigm
- (c) the policy underpinnings
- (d) the doctrine of indefeasibility (s 42; *Frazer v Walker*; *Karacominakis v Big Country Developments*)
- (e) indefeasibility and notice (*Real Property Act, 1900*, s 43)
- (f) deferred or immediate indefeasibility? (*Frazer v Walker*, s. 135)
- (g) the inter-relationship between Torrens and the general law (*Conveyancing Act*, s. 6)
- (h) uniformity throughout Australia
- (i) the Assurance Fund (*Diemasters v Meadowcorp* and *Jain v R-G*)

- (i) grounds for compensation
- (ii) qualifications
- (j) bringing land under the Torrens system
 - (i) the current state of affairs
 - (ii) requirements
 - (iii) qualified title/limited title
 - (iv) compulsory and/or state initiated acquisition

4 . Exceptions to Indefeasibility

- (a) overview
- (b) express exceptions (s. 42)
 - (i) interests noted on title
 - (ii) fraud (*Davis v Williams; Snowlong Pty Ltd v Choe*)
 - (iii) prior certificate or folio
 - (iv) erroneous description
 - (v) easements
 - (vi) leases
- (c) invisible clouds
 - (i) overriding statutory rights (Radan)
 - (ii) reservations in the grant
 - (iii) natural rights/ others?
- (d) volunteers
- (e) rights *in personam*
- (f) alterations by the Registrar-General (ss. 12, 136)

5. Caveats

- (a) general nature and function (*Leros Pty Ltd v Terara Pty Ltd*)
- (b) interests capable of caveat
- (c) removal and termination

6. Unregistered Interests

- (a) equitable interests
- (b) others
- (c) priorities: generally (*J & H Just Holdings Pty Ltd. v. Bank of New South Wales; Person-to-Person Financial Services v. Sharari;*)
- (d) the period between settlement and registration (s. 43A; *Finlay v Rl Bank of WA; Diemasters v Meadowcorp* and *Jain v R-G*)

Questions

- (1) X is seised of old system land in fee simple. X signs a written document transferring the land to A in return for \$5000. X subsequently purports to convey the land to B by deed in return for \$1000. A discovers the purported conveyance to B.
What should A do?
- (2) Is there any reason why a donee of old system land should register the instrument of gift?

- (3) "Many practitioners tend to over-state the importance of Torrens title in the overall scheme of property law. It is, after all, no more than a thin veneer which covers the substantive rights which the law of property confers."

Do you agree with this statement?

- (4) Does and should the Torrens system protect a volunteer?
- (5) What justifications exist for the recognition of overriding interests?
- (6) What is postponing conduct? How would you reconcile *J & H Holdings* with the *Person-to Person* case in light of your definition?
- (7) Is the High Court decision in *Leros Pty Ltd v Terara Pty Ltd* relevant to the New South Wales Torrens regime?
- (8) A was the registered proprietor of Torrens title land in NSW. A granted B a lease of the land for a term of 5 years. The lease was not registered.

C offered to purchase the land from A. A agreed, but on the basis that C would indemnify A against any liability which A incurred to B following the sale of the land to C. C agreed, and the contract for sale of the land contained a term to this effect.

Following the settlement of the sale, C became the registered proprietor of the land, and served a notice to quit on B. **What rights, if any, does B have against C?**

- (9) Adam was the registered proprietor of land held under the *Real Property Act* 1900 (NSW). In order to finance his university education, Adam entered into a written agreement with his sister, Beatrice, under which he transferred the land to Beatrice for the sum of \$200,000. Under the agreement, Beatrice agreed to transfer the land back to him if he repaid the \$200,000 within three years.

Beatrice duly became the registered proprietor of the land, which was unencumbered at the time of registration and was valued at \$200,000. Shortly after Beatrice became the registered proprietor she developed an intense fascination with greyhound racing. She began to spend most of her time at the Dapto race track placing unsuccessful bets on a dog called Jack's Revenge. In due course Beatrice ran out of ready cash, and approached the Friendly Banking Corporation ("FBC") for a loan. Beatrice told FBC about the agreement she had made with Adam. FBC searched the title to the land and lent Beatrice \$100,000 secured by a mortgage over the land. FBC registered the mortgage given by Beatrice and retained the certificate of title.

Beatrice spent the money lent by FBC very quickly. In desperation, she discussed her financial difficulties with Harold, a man she had met at the races. Harold offered Beatrice \$80,000 for the land. Beatrice told Harold about her agreement with Adam and said that she would only sell to Harold if he promised to sell the land back to Adam for \$200,000 if Adam wished to buy back the land within the next three years. Harold promised Beatrice he would do so, and on the basis of this promise Beatrice entered into a contract with Harold for the sale of the land. The contract made no reference to the agreement between Adam and Beatrice, or to the undertaking given by Harold. The sale was made subject to Harold taking

over the mortgage to FBC. Harold instructed his solicitor to ensure that the transfer was lodged for registration as soon as possible after settlement. FBC produced the certificate of title to allow registration of Harold's transfer. The transfer was registered one week later. The certificate of title was returned to FBC.

One day later Harold entered into a mortgage with Greynurse Finance Company ("GFC"). The mortgage, which was over the same land, was security for a loan of \$40,000. Although FBC was prepared to make the certificate of title available to allow GFC to register the mortgage, GFC did not register the mortgage and did not lodge a caveat.

The week after Harold's transfer was registered, Adam went to see Beatrice to tell her that he was ready to pay her the \$200,000 and that he wanted the land transferred back to him as soon as possible. Beatrice confessed that she had sold the land, but told him of Harold's undertaking. Adam went to see Harold, who refused to discuss transferring the land back to Adam. Harold had just had the land re-valued and had discovered that he had purchased it very cheaply and could sell it for much more than \$200,000. In fact the next day Harold entered into a contract of sale with his friend, Irene. The sale was made subject to Irene taking over the FBC mortgage. After the sale was settled, but before the transfer to Irene had been lodged for registration, Adam lodged a caveat claiming an interest in the land on the basis of the agreement he had made with Beatrice.

Adam seeks your advice. He wants to know who is entitled to become the registered proprietor of the land, and what interests, if any, to which that title will be subject.

Lesson Plan #3

Topic: "Co-ownership of Property"

Time Allocation: Week 7

Readings:

Butt, Chapter 14; and
Casebook, Chapter 3.

Description and Learning Objectives:

This lesson addresses the principles which govern shared ownership in conventional co-ownership situations. In other words, the relationship of persons who are *contemporaneously* entitled to possession will be studied. Forms of communal ownership found in other legal systems will also be considered and some comparative analysis will be undertaken at that point.

The idea that more than one person can possess an interest in the same tract of land has already been seen in topics considered in *Property and Trusts A*. Co-ownership rights recognised in equity have also been considered previously (Lesson Plan #5, *Property and Trusts A*). It may be useful to review the readings there, particularly in relation to item 4(b) below. In this lesson we return to questions concerning the balancing of the rights and obligations of such persons. The law of co-ownership has relevance to the rights of spouses, both married and *de facto*, given that (i) concurrent ownership is frequently found in familial relationships; and (ii) the law governing division of property on marriage breakdown forms a modern statutory variant of co-ownership rights. The inter-relationship between the general law of co-ownership and these statutory regimes will be considered.

At common law four distinct forms of co-ownership regimes were recognised. In modern Australian law only two of these traditional forms, the joint tenancy and the tenancy in common, have significance and so these will be of principal concern in the first part of the lesson. The two other forms, co-parcenary and tenancy by the entirety, will be mentioned in passing, primarily by reference to their respective philosophical and juridical underpinnings.

Note: the *Costin v Costin* case, which considers the High Court decision in *Corin v. Patton*, is important with regard to the law of joint tenancies and the law of gifts. It will be studied in Lesson Plan #4.

By the end of this lesson, students should be able to:

- (a) construe and analyse transactions purporting to create conventional co-ownership arrangements;
- (b) determine the state of title of the legal and equitable interests in co-owned property, including rights after putative or actual severance of a joint tenancy;
- (b) analyse the rights and obligations of co-owners *inter se* during the currency of co-ownership;

- (c) understand the role of equity, in affecting co-ownership entitlements in conventional co-ownership arrangements and in relation to non-marital cohabitants; and
- (d) compare and contrast common law notions of co-ownership with forms of communal property

1. Introduction

(a) traditional forms of co-ownership

- (i) joint tenancy
- (ii) tenancy in common
- (iii) tenancy by the entirety
- (iv) co-parcenary

(b) broader perspectives on shared ownership: leases, easements, commons.

2. Joint Tenancies

(a) conceptualization: *totum tenet et nihil tenet*

(b) creation of a joint tenancy

(c) the four unities

- (i) possession
- (ii) interest
- (iii) title
- (iv) time
 - A. general rule
 - B. exceptions

(d) the element of intention

- (i) the presumption at common law
- (ii) equity's attitude
- (iii) statutory intervention (*Conveyancing Act, 1919, s. 26*)
- (iv) trustees
- (v) personalty
- (vi) conveyance to 'joint proprietors'

(e) the position of corporations

(f) the vital feature of the joint tenancy: *jus accrescendi*

(g) determining the order of death (*Conveyancing Act, 1919, s. 35*)

3. Tenancy in Common

- (a) requirements and general nature
- (b) express creation: words of severance
- (c) statutory presumption
- (d) by operation of law
- (e) 'failed' joint tenancy
- (f) 'severed' joint tenancy
- (g) devolution on death

4. The Impact of Equity on Co-Ownership Arrangements

- (a) the potential for different forms of ownership at law and in equity
 - (i) on creation
 - (ii) after severance
- (b) a brief re-consideration of resulting and constructive trusts
- (c) mortgages
- (d) partnerships

5. Rights and Responsibilities of Co-Owners

- (a) possession
- (b) improvements and waste
- (c) rents and profits
- (d) occupation rent (*Biviano v Natoli*)

6. Transformation of a Joint Tenancy into a Tenancy in Common: Acts of Severance

- (a) policies affecting the law of severance
- (b) the starting point: the statement in *Williams v Hensman*
- (c) severance by unilateral act (*Costin v Costin*) — see LP#5
 - (i) transfer to a non-joint tenant
 - (ii) transfer to a joint tenant
 - (iii) acquisition of a further joint interest
 - (iv) transfer to oneself (*Conveyancing Act, s. 24, Real Property Act, s 97*)
 - (v) granting of a lease or life estate
 - (vi) mortgage or charge
 - (vii) declaration of trust
 - (viii) the position prior to Torrens registration
- (d) two or more joint tenants
 - (i) agreement or course of conduct (*Sprott v Harper; Re Allingham*)
 - (ii) mutual or joint wills
 - (iii) others
- (e) severance by operation of law
 - (i) murder
 - (ii) bankruptcy
- (f) 'contracting out' of the right of severance

7. Termination of Traditional Co-ownership Arrangements

- (a) partition and sale
 - (i) land (*Conveyancing Act, ss. 66G - 66I*)
 - (ii) chattels (*Conveyancing Act, s 36A*)
- (b) accounting principles on termination (*Foregard v Shanahan*)
- (c) the inter-relationship between co-ownership and marital property disputes

(d) release

8. Common Property

- (a) tragedy of the commons - reprise
- (b) common property systems
- (c) a comparison

Questions

- (1) Why does the law require four unities to create a joint tenancy? Which of the unities is essential to a tenancy in common?
- (2) Butt suggests that in view of s. 44(2) of the Conveyancing Act, the requirement of the unity of time no longer exists in New South Wales. What is the basis of this assertion? Do you agree?
- (3) Do 'words of severance' have any contemporary relevance?
- (4) What factors would influence the taking of title in the form of a joint tenancy or as a joint tenant?
- (5) What factors have influenced the attitude of courts as to whether sufficient acts of severance have occurred?
- (6) Assume that A and B were joint tenants in law, but tenants in common in equity, and that A has died. Who is entitled to possession of the property?
- (7) Is the *Pfeiffle* case (considered in the *Textbook*) consistent with *Re Allingham*?
- (8) Compare and contrast common property with concurrent ownership (in the form of tenancies in common or joint tenancies).
- (9) Ursula was seised in fee simple of Old System title land in New South Wales known as "Olympus". On 1 January, Ursula, by deed, transferred the fee simple in Olympus to "Alan and Brigid on trust for Calvin and Doris". The deed did not specify how Alan and Brigid, or Calvin and Doris, held their respective interests.

On 1 June, Alan transferred his interest in Olympus to Eric by deed. The deed provided that Eric was to take his interest subject to the trust declared in Ursula's deed of 1 January.

On 2 June, Doris transferred her interest in Olympus to Flora by a written document signed by Doris.

On 3 June, Eric and Flora died.

What was the state of the legal and equitable title to Olympus on the death of Eric and Flora? You must give reasons for your answer and refer to the relevant statutory provisions governing the creation and disposition of interests in land.

- (10) Recently Ian MacGregor, Owen Jones and Wojciech Czarnecki, three young academics at the University of Wollongong, together purchased 54 Regent Street. The property was under old system title. It was conveyed to MacGregor, Jones and Czarnecki in fee simple as "joint co-owners". The purchase price was

\$200,000, of which MacGregor contributed \$100,000 and Jones and Czarnecki each furnished \$50,000.

Immediately after the purchase, MacGregor, Jones and Czarnecki went out to dinner to celebrate their new investment. Unfortunately, they fell into a terrible argument over the relative literary merits of Dravidian poetry, iambic pentameter and Michael Jackson, and parted with bitter words on all sides. That night all three wondered how they would ever be able to sit next to their colleagues the next day during the thirty hour flight to New York where they were each presenting a paper at a literary conference.

MacGregor, deathly afraid of flying and extremely angry at his colleagues, suddenly decided there and then to see a solicitor. He made a will whereby he left all his property, including his "entire interest in any co-owned property", to "my dear wife Janet". For his part, Jones, likewise smarting from the heated argument and as sorry as MacGregor that he had ever entered into a relationship of co-ownership, took out a piece of paper and wrote on it, "I no longer wish to be in a relationship of co-ownership with either Messrs. MacGregor and Czarnecki." This he produced in duplicate and mailed to MacGregor and Czarnecki. Czarnecki, meanwhile, regretting the things he had said to his two colleagues, but still convinced that he was right and they were wrong, also wrote a short letter to MacGregor and Jones. It read as follows: "I think as literary scholars you are both idiots, but I can live with that. I certainly don't want to upset our lucrative business arrangements over iambic pentameters."

Two days later, the Illawarra Mercury issued a special edition, which opened with a screaming, two-inch black letter headline: "Literary Scholars Lost in Fiery Plane Crash!" The article underneath detailed how three of Australia's foremost academics had been cut off in their prime and at the height of their powers. Ian MacGregor, the article noted, was only 41 years old, Owen Jones only 37 years old, and Wojciech Czarnecki only 35 years old when they met their untimely deaths. The newspaper added that the three academics had been good friends and had collaborated closely with each other both in their academic endeavours and in their business affairs.

What happens to 54 Regent Street?

Lesson Plan #4

Topic: "Gifts and Sales"

Time Allocation: Weeks 8 and 9

Readings:

WEEK 8

Assignment of Legal Property at Law

Casebook, pp 221 - 258;

Dal Pont & Cockburn, paras [3.05] - [3.15].

The Concept of an Equitable Assignment

Dal Pont & Cockburn, paras [3.20] - [3.45].

Equitable Assignments of Legal Property Assignable at Law

Dal Pont & Cockburn, paras [17.50] - [17.60] and

Casebook, pp 259 - 268.

Note that the *Milroy v Lord* principle applies to assignments of legal property where the recipient is intended to take beneficially or as a trustee.

Equitable Assignments of Legal Property Not Assignable at Law

A part of (as opposed to the whole of) a legal chose in action can be assigned in equity without formality; an intention to immediately transfer is all that is required: see *Shepherd v FCT* (1965) 113 CLR 385 at 390-391 per Barwick CJ, at 396-397 per Kitto J.. Review *Dal Pont & Cockburn*, para [3.15] (the first dot point) and paras [3.25] - [3.30].

Equitable Assignments of Equitable Property

Dal Pont & Cockburn, paras [17.05] and [17.20]: note s 23C(1)(c) of the *Conveyancing Act 1919* (NSW).

WEEK 9

Exceptions to the Rule that Equity Will Not Assist a Volunteer

Dal Pont & Cockburn, para [17.70]; and

Casebook, pp 269 - 276.

Transfer of Future Property

Dal Pont & Cockburn, para [3.60].

Factors which can Vitate Gifts

Casebook, pp 277 - 287.

Description and Learning Objectives:

This lesson returns to issues discussed in *Property and Trusts A*, namely, possession and the modes of transfer of title. Here further detail will be provided as to the governing principles where property is transferred voluntarily, or for valuable consideration. The position in law and equity will be examined, as will the basic rules

concerning real and personal property.

As you review these materials, you should see how these early topics of possession and transfer relate to the present discussion. Further, you should note the obvious connection between the principles of succession discussed in the previous lesson and the gift *donatio mortis causa*, which lies on the cusp between *inter vivos* and testamentary transfers.

This lesson will also deal with the law of sale, which brings together aspects of the law of contract and the law of property. Our discussion concerning the passing of title of personal property should tie into the course *LLB 320 Commercial and Consumer Contracts*. Finally, the lesson will also consider the basic elements in the settlement of the sale of land. This will be done only by a brief overview, with the sale of land being considered in more depth in practical legal training courses.

When this lesson is concluded, you should be able to:

- (a) understand the policies and rules governing gifts and sales of real and personal property;
- (b) determine whether a valid transfer, for value or otherwise has been completed;
- (c) solve complex problems concerning the validity of gifts and basic problems concerning sales; and
- (d) understand the elements of the settlement of a sale of land.

* * *

1. Gifts: Introduction

- (a) basic definition
- (b) the social role of gifts
- (c) types of gifts
 - (i) *inter vivos*
 - (ii) testamentary
 - (iii) *donatio mortis causa*
 - (iv) trust-based

2. Gifts Inter Vivos

- (a) gifts effective at law (*Nolan v Nolan*)
- (b) gifts effective in equity
 - (A) legal interest not assignable at law
 - (B) legal interest assignable at law - *Milroy v. Lord (Costin v Costin)*
 - (C) equitable interest (*Conveyancing Act*, s 23C(1)(c))
- (c) types of property
 - (i) chattels - delivery or deed (*Nolan v Nolan*)
 - (ii) old system land (*Conveyancing Act*, ss 23B, 23C)
 - (iii) Torrens title land (*Costin v Costin*)
 - (vi) choses in action (s 12, *Conveyancing Act*)
- (d) intention and capacity

- (i) generally
- (ii) reprise of presumptions of advancement and resulting trust
- (iii) capacity (*Re Beaney*)

(e) acceptance

- (f) alternatives to inter vivos gift
 - (i) declaration of trust
 - (ii) the rule in *Strong v. Bird*
 - (iii) *donatio mortis causa* (see below)

3. Donatio Mortis Causa ("DMC")

- (a) basic definition
- (b) historical development
- (c) doctrinal elements

- (i) contemplation of death
- (ii) delivery
- (iii) must the apprehension of death be reasonable?
- (iv) delivery
- (v) revocation

(d) DMC and land

(e) DMC and intangibles (*Public Trustee v Bussell*)

4. Vitiating of Gifts

(a) undue influence

- (i) *inter vivos* gifts (*Louth v Diprose*)
- (ii) DMC

(b) other issues

5. Transfer By Sale

(a) the passing of title of personal property for consideration

- (i) goods
- (ii) intangibles
- (iii) "future" property

(b) sales of land

- (i) contract
- (ii) settlement
- (iii) statutory regulation

(c) auctions

Questions

- (1) Distinguish between constructive and symbolic delivery.
- (2) What is the function of delivery in the law of gifts?

- (3) Should the doctrine of *donatio mortis causa* apply to property other than chattels?
- (4) How can one reconcile the rule that equity will not perfect an imperfect gift with the notion of a declaration of trust by the settlor?
- (5) Jane and her younger sister Kate shared a rented house in Austinmer, N.S.W. Kate's very valuable collection of antique furniture was kept in the house and used by both sisters. Kate was an alcoholic and a poor money manager. She relied heavily on Jane to manage her life, including her finances. Six months ago Kate read the works of Kafka at one sitting, became deeply depressed, and disappeared. There is a rumour circulating among Kate's friends to the effect that she has joined an ashram in India, renounced all her worldly possessions and never intends to return to Australia. All attempts to locate Kate have failed. Jane maintains that just before she left, Kate said to her: "You can have all my furniture, you deserve it for looking after me for so long". Jane claims that Kate also told her that if she wanted to go and pick it up it, Jane could have a valuable painting Kate had lent to a friend, Boris. Jane collected the painting from Boris, and plans to sell some of the antique furniture.

Jane's claim to the antique furniture and the painting is disputed by Kate's only child, Michael. Advise Michael whether Jane has a good claim to the furniture and the painting. If more information would assist you to advise Michael, specify in your answer the information you need, and explain why you need it.

- You have received a telephone call from Adesuwa. She tells you that she is due to go in to hospital later today for heart surgery and that she wishes to make unconditional gifts to Zebedee of the following:
 - a life-size marble statue of John Selden, which is currently stored in Sydney in a locked shed for which Adesuwa has the only key;
 - her beneficial interest in shares in XYZ Ltd, which are held on trust for Adesuwa by ABC Nominees Pty Ltd;
 - any property which she may receive under the will of her brother (who is still alive);
 - \$5000 of the \$10 000 owed to her by her sister;
 - the fee simple in Torrens title land of which she is the registered proprietor.

Additionally, Adesuwa wishes to gift her shares in Blue Chip Ltd to Zebedee, but on the condition that she does not survive the operation.

Adesuwa tells you that Zebedee is currently with her. She wants to know what she needs to do in order to make these gifts immediately effective. She adds that for deeply held religious convictions, she is unable to make the gifts by deed or by declaration of trust.

Citing relevant statutory and common law authority, explain what advice you would give Adesuwa.

Lesson Plan #5

Topic: "Issues in the Law of Express Trusts"

Time Allocation: Weeks 10, 11, 12 and 13

Readings:

Week 10 (Topics 1-2)

Dal Pont & Cockburn, paras [15.05] - [15.30], [15.45], [25.55], [25.80] - [25..100], [15.80] - [15.95], [16.05] - [16.50], [19.35] - [19.60], [16.55] - [16.70], [17.05] - [17,15]; and *Casebook*, pp 290 - 307.

Week 11 (Topic 3)

Dal Pont & Cockburn, Chapter 20; and *Casebook*: pp 308 - 360.

Week 12 (Topic 4)

Dal Pont & Cockburn, Chapters 22 and 23; and *Casebook*, pp 361 - 370.

Week 13 (Topic 5)

Dal Pont & Cockburn, Chapter 27;
Dal Pont & Cockburn, paras [36.05], [36.25] - [36.30];
Casebook, pp 371 - 377;
Dal Pont & Cockburn, paras [36.35] - [36.45];
Casebook, pp 378 - 387;
Dal Pont & Cockburn, Chapter 37; and
Casebook, p 388.

In addition, in this Lesson Plan you will be required to read various parts of the recent High Court decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22.

Description and Learning Objectives:

This lesson builds on the general principles presented in Lesson Plan #5 of *Property and Trusts A*, which provided a general introduction to the idea of equitable interests in land. The historical development of both the use and the trust were explained in that Lesson Plan and express, resulting and constructive trusts were presented, with emphasis on the latter two. You should review the grounds for illegality and public policy considered in Lesson Plan #6 of *Property and Trusts A*.

This topic picks up where that introduction finished off. Much more detail will be provided in this Lesson Plan, for example, as to the varieties of trusts now recognised and the rights and responsibilities of trustees. In this discussion the express trust will be the main (but not sole) focus of the inquiry. As not all of the topics can be covered in complete detail, some areas have been selected for comprehensive treatment while others will be covered only by a general overview. This designation has been made on the basis of the conceptual difficulty of the item and its contemporary importance.

At the end of this topic, you should be in a position to:

- (a) distinguish between trusts and trust-like relationships (especially powers) and

- understand the importance of such distinctions;
- (b) apply the rules governing the creation of various types of express trusts (including charitable trusts);
- (c) understand and apply the *basic* rules concerning trustee duties, powers and rights;
- (d) apply the myriad tests concerning invalidity of trusts (of all sorts);
- (e) apply the rules governing variation and termination of trusts and the remedies associated with breach of trust;
- (f) understand the practical utility of modern express trusts; and
- (g) evaluate the cogency of the doctrinal rules studied in this lesson.

* * *

1. Nature of Trusts

- (a) Introduction
 - (i) terminology
 - (ii) origin
 - (iii) modern context and functions
- (b) Trusts v other institutions
 - (i) miscellaneous
 - (ii) trusts v powers (*Re Baden*)

2. Creation of Express Trusts

- (a) the three certainties
 - (i) intention
 - (ii) subject-matter
 - (iii) object (*Re Baden, Strathalbyn Show Jumping Club v Mayes* extract 1)
 - (A) unincorporated associations
 - (B) purpose trusts
- (b) voluntary trusts
 - (i) substance
 - (ii) form
- (c) trusts of common intention

3. Charitable Trusts

- (a) special treatment
- (b) legal concept of charity (*Statute of Charitable Uses, 1601*)
 - (i) requirement of public benefit
 - (A) general rule (*Re Hilditch*)

(B) trusts for the relief of poverty

(ii) the four heads :

(A) relief of poverty (*Downing v. F.C.T.*)

(B) advancement of education

(C) advancement of religion

(D) purposes beneficial to the community

(*A-G Caymen Islands v Wahr-Hansen, Queensland Law Reporting case, Strathalbyn Show Jumping Club extract 2;*)

(c) mixed (charitable and non-charitable) gifts (*Charitable Trusts Act s 23*)

(d) enforcement and effectuation

(e) cy pres doctrine (*Permanent Trustee v A-G. NSW*)

(f) failure and lapse

(g) statutory reform

4. The Trustee

(a) appointment and removal

(b) vesting of property

(c) duties

(i) preservation

(ii) loyalty

(iii) keep accounts

(iv) act personally

(v) consider

(vi) apportionment

(vii) capital and income

(d) powers

(i) sale

(ii) management

(iii) maintenance and advancement

(e) rights

(i) reimbursement and indemnity

(A) beneficiary

(B) trust property

(ii) contribution

(iii) impound beneficiaries interest

(iv) court direction

(f) liability

(i) bases (*Holder v. Holder, A-G for Hong Kong v Reid*)

(ii) relief

(iii) release and acquiescence

5. The Beneficiary

(a) rights

- (i) fixed trusts
- (ii) discretionary trusts

(b) termination of trusts

(c) remedies

- (i) personal action against trustee
- (ii) the imposition of a constructive trust
 - (A) proprietary against trustee (*A-G Hong Kong v Reid*)
 - (B) personal remedy against third parties (*K & S Corporation Ltd v Sportingbet Australia*)
- (iii) proprietary remedy - tracing
 - (A) common law and equity
 - (B) mixing of assets of trustee and beneficiary
 - (C) mixing of assets of two or more beneficiaries
 - (D) mixing of assets and beneficiary and Innocent volunteer (Note on Tracing and the Innocent Volunteer)

Questions:

- (1) Describe the change in the law introduced by *McPhail v. Doulton*.
- (2) *Re Denley* has not yet been applied in Australia. In your view, is it good law?
- (3) What social values are inherent in the law governing charitable trusts?
- (4) Is a general charitable intention always required for the operation of the cy-pres doctrine?
- (5) Is the decision in *Holder v. Holder* inconsistent with the very idea of trusteeship?
- (6) Distinguish between a conflict of 'duty and interest' and a conflict of 'duty and duty'.
- (7) Explain the nature of the following dispositions:
 - (a) "I give \$1 million to A in the sincere hope that she will use it for the benefit of B."
 - (b) "I give an amount of property to T to hold on trust for my children as is adequate of their purposes."
 - (c) "I give all my property to my trustee, T, to distribute it to whomever T wishes, other than my husband."
 - (d) "I give \$100 000 to Lola to hold on trust for such graduates of the

University of Wollongong as she may appoint, and in default of such appointment, on trust for my husband."

- (e) "I give \$100 000 to Lola on trust for my children Peter, Paul and Mary in equal shares."
- (f) "I give \$100 000 to Lola to hold on trust for such graduates of the University of Wollongong as she appoints and, in order to remove any doubt, I hereby confirm that Lola is obliged to exercise this power of appointment."
- (g) "I give one third of my estate to the Wollongong Chess Club" (an unincorporated association).
- (h) "I give \$5000 for each of the following purposes:
- the promotion of world peace;
 - the maintenance of my tomb;
 - the care of my cat, Rex."
- (8). Would the following dispositions constitute valid charitable trusts?
- (a). For the education of the employees of the XYZ Co.
- (b). To establish an institution to teach lawyers to sing.
- (c). For the distribution of my textbook on industrial relations.
- (d). To publicly promote the need for the legislative adoption of the ideas expressed in my textbook.
- (e). For the beautification of Wollongong.
- (f). To my priest for parish work.
- (g). For the purposes of The Church of the Zodiac (a body that believes that all conduct should be governed by astrology).
- (9) Explain the extent to which the following clause valid:
"I give \$1 000 000 to my trustees for the amelioration of the condition, and the religious instruction, of former lecturers in the Faculty of Law at the University of Wollongong."
- (10). The following provision appears in a will:
"I give \$100 000 to the orphanage at Bulli, which I believe to be a fine example of such wonderful institutions."

What effect, if any, should be given to the provision if the orphanage at Bulli closed prior to the testator's death?

Explain whether your answer would differ if the clause read:
"I give \$100 000 to the orphanage at Bulli where I was raised and cared for."

(11) X conducted a business of selling boats on consignment. When X sold a boat, she would deposit the proceeds into an account at her bank called "X's Client Account." At the end of each month X would draw a cheque on this account in favour of each the owners of the boats that X had sold during that month in an amount equal to the sale price of the boat, less a 5% commission. At the end of each month X would transfer the commissions she had earned to her personal account at the same bank.

In the middle of October, X instructed her bank to transfer the balance of X's Client Account to X's personal account. The bank did this.

What rights, if any do the boat owners who have not been paid by X have against the bank if:

(i) the bank appropriated the funds transferred from X's Client Account to repay the amount by which X's personal account was overdrawn?

(ii) the bank did not appropriate the funds, but X withdrew them from her personal account and fled Australia?

(12) Terry held certain property on trust for Belinda. Under the terms of the trust, Terry was authorised to invest some or all of the trust property, including by way of purchasing shares. Terry was approached by his friend Xu, who offered Terry \$10 000 if Terry would use his powers as trustee to purchase \$500 000 worth of shares in Xu's company on behalf of the trust. Terry agreed and Xu paid him \$10 000.

Terry used the \$10 000 he received from Xu, \$30 000 of trust property which he misappropriated and \$10 000 of his own money to purchase a parcel of land for \$50 000. The land is now valued at \$100 000.

Advise Belinda of her rights in respect of the land.

(13) T held monies on trust for B1 and B2 under separate trusts.

T's bank account had a credit balance of \$4000.

T deposited into her account \$2000 which she held on trust for B1 and, on the next day, \$4000 which she held on trust for B2.

T withdrew \$7000 from the account and purchased property X

T then withdrew \$3000 from the account and purchased property Y

Property X is now worth \$3500 and property Y is worth \$6000.

Advise the parties.



Student Number _____

Faculty of Law

ASSIGNMENT COVER SHEET

Declaration:

By submitting this assignment I am certifying that this is entirely my own work, except where I have given fully documented references to the work of others, and that the material contained in this assignment has not previously been submitted for assessment in any formal course of study.

Subject

LLB 270 Property and Trusts B

LLB 306 Property and Trusts B

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Assignment Topic

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