

CASE INDEX: Cases covered in syllabus

1. *Creelman v. Hudson Bay Insurance*

- a. Facts - Hudson Bay had registered title for the land under the *Land Title Act*, which effectively corrects any defect.
- b. *Title indefeasible once registered* - title becomes good once registered, and other parties could not recover title even if there had been a past defect.

2. *Carr v. Rayward*

- a. Facts - plaintiff undertook plumbing work for original owner, unpaid, lien, then land sold to the defendant.
- b. *Liens can defeat registered titles* - registered title subject to liens put in place even *after* title has been registered, so long as the lien itself is filed within time specified by Builder's lien act.

3. *Gibbs v. Messer* (overruled) (2)

- a. Facts - solicitor made up fraudulent person, transferred client's land to that person for purposes of obtaining mortgage.
- b. *Deferred indefeasibility* - errors outside of the register, such as the acquisition of a title through forgery, do not give indefeasible title. They give the *root* of an indefeasible title. Therefore, if such a title is passed to a bona fide purchaser for value, that party acquires indefeasible title.
- c. *Bona fide purchaser for value* - to be a *bona fide* purchaser for value, one must take care in the transaction to ensure that it is not tainted by fraud. In this case, the subsequent mortgagee of the fraudulent title did not confirm the identity of the party with which they were dealing, and so undermined their status as *BFPV*.

4. *Frazer v. Walker*

- a. Facts - wife takes out mortgage on property jointly owned with husband, forges husband's signature.
- b. *Immediate indefeasibility* - overrules Gibbs. Indefeasibility applies the moment that an instrument is registered in a Torrens system, regardless of whether it was a void instrument. To do otherwise would be to undermine curtain/mirror principle, as BFPVs would have to search behind the registry. Therefore, only fraud on the part of the registered owner can defeat title.

5. *Pacific Savings v. Can-Corp*

- a. Facts - mortgagees win judgment re: ownership of land, mortgagors file motion to reopen this order and obtain *lis pendens* to this effect (certificate showing pending legal dispute). Subsequent purchasers of property cannot register ownership due to *lis pendens*, s.23(2).
- b. *Indefeasible title subject to legal claims* - court orders concerning a title following a legal dispute (eg. where a court issues a certificate of indefeasible title to one party in such a dispute) are subject to appeal and review. During this process, parties can obtain *lis pendens* certificate, and register this against title of property under dispute, according with s.23(2) (g). If this interest is registered before property is sold to a BFPV, then the title received by the BFPV is defeasible subject to the registered interest.

6. *Hermanson v. Martin*

- a. *Rule in Canada* - immediate indefeasibility applies in Torrens jurisdictions in Canada.

7. *Canadian Commercial Bank v. Island Realty*

- a. *Contradictory section limited to insurance* - while s.297(2) of the *Land Title Act* suggests that a person taking a void instrument is not a purchaser, and therefore cannot acquire interest through registration, this provision is limited to the insurance portion of the Act.

8. *Central Station v. Shangri-La*

- a. Facts - purchaser only became aware of unregistered lease *after* agreement completed, but before agreement was executed.
- b. *s.29(2) protections concern knowledge at time of transaction* - so, if a BFPV did not have actual or constructive notice of an unregistered interest *at the time of the transaction* (at the moment that the BFPV became contractually bound to purchase the land), then s.29(2) protections apply. Notice received after this, even if prior to Torrens registration / issuance of certificate does not affect s.29(2) protections.

9. *Me-N-Ed's Pizza v. Franterra*

- a. Facts - tenant has 20 year unregistered lease with owner; subsequent owner acknowledges this lease, adjusting purchase price of property to reflect lease income.
- b. *s.29(2) does not protect against acknowledged, though unregistered interests* - interests which are acknowledged and acted upon by a BFPV will be protected, and will defeat the Torrens title against which they are held. By acting upon and benefiting from the lease, the lease was effectively "assigned" in equity - ergo titleholder estopped.

10. *Nicholson v. Riach* (2)

- a. Facts - son pressures mother to register 50% interest in her house in his name. Son later becomes subject to civil judgment, leading to potential sale of property.
- b. *s.29(2) does not protect if there is actual knowledge of fraud* - for participation in fraud to vitiate s.29(2) protections, it must be shown that the purchaser knew that the vendor did not have title.
- c. *s.29(2) does not protect if there is constructive knowledge of fraud* - if there was an arousal of suspicion and attendant lack of prudent enquiry on the part of the purchaser, this amounts to wilful blindness. Suspicion is key - without it, no duty to make enquiries. Must occur in concert with dishonesty.

11. *Re Airey*

- a. Facts - deed of transfer contains no words of limitation, nor does it say in "fee simple".
- b. *No words of limitation, no contrary intent, greatest estate possible passes* - provided that there is nothing to the contrary (for instance, the deed is a conveyance and not a "lease" or "demise") then with no words of limitation fee simple is transferred.

12. *Re Otterwell* (4)

- a. Facts - brothers each devise property to each other. One brother dies, other brother does not change will. Daughter of brother that died first sues for father's property.
- b. *Absent ambiguity, surrounding facts not relevant to will* - surrounding facts to will only relevant if ambiguous, and distinguish words of limitation from words of purchase.
- c. *Where words of limitation used, must be given meaning* - while these words are not *necessary* for realty (and have no meaning concerning personalty, which is owned allodially), where they are used, they must be given meaning - must be presumed to convey intent. Therefore, should take care to use words that are not required.
- d. *Presume that every word used has a meaning.*
- e. *Presumption against intestacy* - where will capable of supporting two meanings, the one which negatives intestacy is preferred.

13. *Re Walker* (2)

- a. Facts - husband's will attempts to divide property left to wife following the expiry of life estate granted to her.

- b. *Repugnancy* - cannot give something absolutely, such as a fee simple, but to then attempt to control the destiny of the gift thereafter through a *gift-over*. The central contention in repugnancy claims is whether the giver is attempting to control an absolute gift, or rather, whether only a partial gift was in fact given; based on intention of the giver of the gift.
- c. *Three possible outcomes in a repugnancy claim* - first, that the gift is dominant, and the gift-over is repugnant. Alternatively, the gift-over is dominant, and so the original receiver of the gift only gets a life estate (eg. a partial interest). Finally, there is a middle ground, where only a life estate is given, but it may be encroached upon during the lifetime of the life tenant - the remains are a gift-over.

14. *Re Richer*

- a. Facts - wife given “free use” of property, with “unspent balance” going to children. Wife wants fee simple via repugnancy.
- b. *Intention and expectation trumps plain meaning* - while words such as “free use” or “could imply fee simple, there is in intent / expectation in the will that a *balance* will remain on her death to go to the children. This is the case in spite of the fact that the balance is not *required* by the will, as modified by the words “balance, if any”.
- c. *Land cannot be spent* - while the use of the word “unspent” with regard to an estate would allow the receiver of a gift to spend monies, use chattels, the word is not applicable to land. Land cannot be spent, and therefore applying the word “unspent” to an estate applies only to consumable items. However, this view may not be entirely accurate, as does not contemplate the profits which can be taken from land (eg. cutting timber).

15. *Re Shamas*

- a. Facts - will gives all property to wife, until all children reach 21. Wants to encroach on capital until children turn 21.
- b. *Holism trumps formalism* - Walker approach seen as too formal. Testator’s intention should be determined from whole will and, if ambiguous circumstances when will was made. Should just interpret the document as a whole to give effect to the intention of the testator, and should “sit in the testators armchair”.

16. *Re Tremblay and Township of Tay*

- a. Facts - to avoid registration and planning requirements, attempts to transfer lots to all in granting clause, and then to each of five owners in habendum. Conflicts.
- b. *Unlike interpreting wills, interpreting deeds is a formal process* - for instance, in deeds, granting clauses take priority over *habendum* (eg. “to have and to hold”) clauses, even where there is a clear intention to follow the *habendum* clauses. This is different than in interpreting wills, where the intention of the testator in context of whole will is the guiding

principle, not formality.

17. *Hiltz v. Langille*

- a. Facts - Mother transfers life estate to herself with remainder to daughter, then allows son to cut down trees.
- b. *Life tenant cannot cause permanent injury to property* - the life tenant cannot cause material prejudice or permanent injury to property which diminishes its value. However, can take some value from the land; otherwise life estate could be *less than useless*, due to a lack of income from the land sufficient even to cover property taxes.

18. *Vane v. Lord Barnard*

- a. Facts - father gives self life estate in castle remainder to his son. After falling out, father begins to demolish castle.
- b. *Unconscionable waste* - even where instrument permits voluntary waste (eg. it includes the words *unimpeachable for waste*), equity might grant injunction to reversioner where this waste is unconscionable or flagrant. This is the case where the waste is extreme, beyond what would be contemplated in normal activities.

19. *City of New Westminster v. Kennedy*

- a. Facts - defendants have possession of house pending sale one year in the future due to unpaid taxes. Defendants strip house of everything valuable.
- b. *Disallowance* - applies to other relationships where one party has possession but another has a simultaneous interest, such as tenants in common, joint tenants, mortgagor/mortgagee, tenants in fee simple subject to an executory devise over, partners, *purchaser by contract awaiting to perfect title in registry*, etc. There is no *Hiltz* right to commit voluntary waste, and so this rule disallows both normal and flagrant waste.

Mayo v. Leitovski

- c. Facts - defendant could not pay taxes on land; seized and sold by municipality. Daughter buys land at auction. Intends life estate for defendant, who attempts to register fee simple.
- d. *Life tenant under obligation to prevent forfeiture of property* - this means an obligation to pay taxes, among other things, where nonpayment would lead to forfeiture of the property. Further, life tenant is under obligation not to sell property against the wishes of the remainderman/reversioner.

20. *Morris v. Howe*

- a. Facts - life tenant wishes to sell land against wishes of remainderman.
- b. *Cannot order partition or sale under Partition Act if future interest reasonably objects* - while partition and/or sale can be ordered in the case of co-ownership, this is not applicable in the case of consecutive interests. However, question of whether unreasonable objection by future interest would be enforced by the Courts against such an order.

21. *M. v. H.*

- a. Definition of spouse, which was limited to heterosexual for spousal support on marriage breakdown in the *Ontario Family Law Act* was struck down as unconstitutional

22. *Walsh v. Bona*

- a. *Exclusion of unmarried couples from marital property regime is constitutional* - to do otherwise would be to undermine the choice of some couples to choose whether to marry, and thus engage the legal consequences of marriage.

23. *Tataryn v. Tataryn Estate* (3)

- a. *Strict needs/maintenance test* - approach to interpretation started in the 1920s - courts interpreted the *Act* as only requiring provision for basic needs and maintenance to avoid surviving spouse and children becoming a public charge upon the country. Effectively, authorized the courts to vary wills where the alternative would be to require surviving spouse and children to rely on welfare.
- b. *Broad marital and parental moral duty test* - began in the Depression, courts extended their interpretation beyond mere necessities. Applied a more generous rubric, one which roughly accords with the preservation of standard of living. By taking into account moral considerations, this approach gave an equitable share even in the *absence* of need.
- c. *Legal and moral obligations* - wills variation is guided by legal obligations, such as the duty to support one's wife and children, and to avoid unjust enrichment by ensuring that spouse's contributions are recognized by testator. Further, there are also moral obligations, such as to make provisions for dependents as the estate permits.

24. *Howard v. Howard Estate*

- a. Facts - will variation rejected. Economically independent spouses marry late in life, prenuptial agreement re: existing estates for children from previous marriages. Wife applies for variation, as will disentitles her to any inheritance.
- b. *Must be economic dependence to support variation* - spouses who are independent, marry late, do not become an economic unit, present a prenuptial agreement concerning wills, do not

have expectations of reliance on each other's estates.

25. *Picketts v. Hall (Estate)*

- a. Facts - \$18m estate where deceased and common law spouse lived frugally with one another for 21 years. Courts award escalating amounts to widow.
- b. "*Dovetailing*" between the *Estate Administration Act* and the *Wills Variation Act* - the former applies only if there is an intestacy; if there had been an intestacy in this case, the spouse, by legislation (whether married or marriage like), would have received approximately one third.

26. *Austin v. Goerz (4)*

- a. Facts - Plf.'s husband separate; he then lived with D. until his death six years later. Plf. seeks action for relief, including that D. is not her deceased husband's spouse, common law or otherwise.
- b. *Driedger approach to statutory interpretation is relevant* - read holistically, give large liberal construction so as to give statute effect.
- c. *For marriage-like relationships, don't need to have capacity to marry* - both parties must have capacity to marry to enter common law marriage - but nothing in statute re: marriage-like arrangements. So, married persons can enter into marriage-like relationships.
- d. *Financial dependence is not necessary for marriage like relationships* - the manner in which financial affairs are arranged is but one factor to be considered.
- e. *Intention to enter marriage like relationship is necessary* - such an intention can be found in spite of a lack of financial codependency.

27. *Re Bancroft Eastern Trust (2)*

- a. Facts - grant *per stirpes*, by branch of family tree; when one recipient dies, who gets that share?
- b. *TIC created by slightest intention in grant* - Anything which in the slightest degree indicates an intention to divide the property, e.g. "equal shares", will create a TIC. However, where there are multiple gifts, must ensure that one considers any such words within the context of the relevant gift.
- c. *Meaning of "issue"* - was not defined by statute or within this grant. In this case, would have made the difference between JT (if meaning children) or TIC (if meaning lineal descendants). Word is now statutorily defined as lineal descendants, despite its common meaning.

28. *Winchester v. McCullough* (2)

- a. Facts - whether the words “to be theirs jointly in equal shares” create a JT or TIC. Also included stipulation, should beneficiaries predecease, the residue to their successors.
- b. *Residue to “successors”, rather than “survivors”, implies TIC* - if this were a joint tenancy, one would expect that the latter term would be used.
- c. *Use of “equal shares” creates presumptive TIC, not determinative* - while these words normally denote a TIC, they must not be read in isolation, and could be modified (eg. “to be theirs absolutely”, which implies JT).

29. *Robb v. Robb*

- a. Facts - husband’s children from a previous marriage intended to challenge will, so wife seeks declaration that property held as joint tenancy.
- b. *Leasehold and personal property give presumptive JT not TIC* - where leasehold or personal property is granted to two or more persons with no words of severance, the persons are JTs. The exceptions to that rule recognized by equity are: where purchase is in unequal shares (implies TIC), where property is a mortgage and co-owners are mortgagees, and business partners.

30. *Bull v. Bull*

- a. Facts - son and mother purchase homes, former pays greater portion of price and is sole owner on deed. After dispute, son asks mother to lease.
- b. *Equitable tenants in common* - where two people are in possession of a property to which they have both *substantially* contributed, and there is a clear *intention that both should have possession*, even though only one name appears on the deed they are *equitable tenants in common*. Neither one can oust the other as they are entitled to concurrent possession, use, and enjoyment of the land. When land sold, each will be reimbursed according to their contribution.

31. *Spelman v. Spelman* (4)

- a. Facts - wife leaves joint tenancy property, returns and demands account of rents and profits. Intends to sue for occupational rents.
- b. *No obligation to pay rent for occupation due to unity of possession* - where one co-tenant is exclusive occupier, but there is no agreement / ouster, that tenant does not have to pay occupation rent to others, as they have a right to be there in accordance with unity of possession.

- c. *No obligation to share profits from own labour and capital* - where one tenant is receiving a return for his own labour and capital he is not receiving more than his just share, and his co-tenant has no right to it (only fair since consider the reverse situation where a tenant makes couldn't ask co-tenant to pay a share of a loss).
- d. *No obligation to account for profits* - in the absence of a contract (i.e. between tenants to share profits) or ouster, there is no obligation to account for profits.
- e. *Probable obligation to share pure rent* - where profit obtained through rental suite jointly owned, need to share profits; pure rents divided equally between JTs, or according to proportionate shares of TICs.

32. *Leigh v. Dickeson* (4)

- a. Facts - claim of occupation rents from tenancy in common.
- b. *All owners must pay for expenses w/ common obligation* - all co-owners must pay, so there can be immediately recovery of such an expense - now written into statute in s.13 and s.14 of *Property Law Act*.
- c. *Expenses made without common obligation at request* - if made by one co-owner at request of the other co-owner, can be recovered immediately based on notions of implied agency, promise, or from business practices.
- d. *Expenses made without common obligation, no request* - if not made at request of other co-owner, this is a voluntary expenditure. If an option was given to the other co-owner to *adopt*, and adoption occurs, then can be recovered immediately. If option given to adopt, but this is *rejected*, then no contribution can be recovered. If no option given to adopt, then no recovery.
- e. *Expense without common obligation which increase value* - by equity on partition, if expenses increased the value of the property then at equity a contribution can be recovered since would be unjust for the other party to benefit from the increase in price without having contributed to those expenses.

33. *Bernard v. Bernard*

- a. Facts - husband and wife settling accounts re: JT, where husband claims constructive ouster.
- b. *Procedural, not substantive* - sections 13 & 14 of the *Property Law Act* are merely procedural, and they do not create any new obligations beyond the common law.

34. *Stonehouse v. Attorney General (British Columbia) (2)*

- a. Facts - wife conveys JT interest to property inter vivos, in secret. Husband believes he has title through survivorship, but daughter registers her title.
- b. *Can sever unilaterally, in secret.*
- c. *Severance takes effect once severer is bound* - although estate does not pass to the transferee until transfer deed is registered, severance of the JT occurs on execution/delivery of the unregistered deed - unity of title was destroyed at that time by the different instrument.

35. *Lyons v. Lyons (2)*

- a. Facts - husband granted a mortgage of all his estate and interest in JT land. After he died, the mortgage was registered.
- b. *Under Torrens, mortgages are charges* - under Torrens, mortgages do not convey title to the mortgagee, but rather the mortgage acts as a charge on the title to secure payment. Legal title remains with the mortgagor. Since only a charge on the JT's interest, the mortgage dies with the mortgagor - so the mortgagee loses out in this circumstance. However, if the non-mortgagor JT had died first, the other JT would have gained full interest through survivorship, and mortgage would then be secured against the entire property.
- c. *Consequentialist approach* - concerning destruction of unities in view of severance, we are not concerned with intention of parties, but only the result/consequences of the transaction are relevant - whether or not a unity is in fact destroyed.

36. *North Vancouver v. Carlisle*

- a. *Land Registry Act refers to a mortgage as a charge* - and so a mortgage does not work a severance, following Lyons. The unreported case Bank of Montreal is a weak authority for this approach, and this approach is more likely than the other approach espoused in this case, eg. that mortgages remain common law transfers of legal title.

37. *Public Trustee v. Mee (2)*

- a. Facts - JT declares trust for infant son, with self as trustee. Trust never registered, title not able to be taken by son until 21.
- b. *Valid, perfect trusts will be enforced, even if unregistered* - valid declaration of a trust that is completely constituted, in that it complies with trust law's three certainties (intent, beneficiary and what property is being conveyed), cannot be revoked except in the case of fraud, fundamental mistake, or duress, or if power of revocation is included.
- c. *Transfer of ownership to trust, even to oneself, is incompatible with JT* - therefore, even if unregistered, and transfer is to oneself for benefit of another, is incompatible with JT (although does not violate unity of title). Equity will not enforce an incomplete or

imperfect gift, however.

38. *Foort v. Chapman* (2)

- a. Facts - mother conveys fee simple interest to self and sister as JT. Mother then agrees to sell her interest to her son; son never pays, but mother releases him from obligations to this end. Title was not registered before her death - son tries to do this after death, registrar refuses.
- b. *Agreement for sale and purchase not conveyance, but charge* - does not affect the unity of title, and so does not sever the JT until it is executed.
- c. *Equity tends to only come to the aid of those bona fide and for value* - equity does not aid those who are mere volunteers, receivers of gifts, or who do not make full consideration for their promises.

39. *Re Sorenson* (4)

- a. Facts - divorced couple JT on three properties; mother wants to sever to provide estate for disabled son. Attempts multiple means of doing so.
- b. *Onus of proof re severance* - the onus to prove that there was a severance is on the party that asserts it.
- c. *Actions are relevant to determining partition* - for instance, execution of divorce settlement may not amount to partition if one acts as if the property is not parted - for instance, by subsequently filing for partition.
- d. *Unilateral declaration on its own not sufficient* - unilateral declaration by one party of an intention to sever that falls short of destroying one of the 3 additional unities, without any other act, and without acceptance by the other joint tenants, does not sever. Evidence of intention alone, which can yet be abandoned.
- e. *Granting of a lease doesn't create a severance unless precludes survivorship* - lease only for life, so survivorship returns ownership to JT. This is problematic, however - could argue this lease was really a contractual license, since it is of uncertain duration whereas a lease should be certain since it is a non-freehold estate.

40. *Flannigan v. Witherspoon*

- a. Facts - brothers are JT, enter into agreement to sell to third party, with proceeds equally divided, deposited into separate bank accounts for each. On death of one brother, do proceeds go to his heirs, or to other brother via survivorship?
- b. *Course of dealings indicating TIC severs JT* - dealings, which indicate a mutual agreement to sever, will do so. It is sufficient for the parties to act as though the interest was a tenancy in

common i.e. that they had separate shares (they do not need to know the law).

41. *Walker v. Dubord*

- a. Facts - wife transfers JT land to self. Separately attempts to sever JT in personalty through unilateral declaration. Wife was close to death, so wanted to ensure estate.
- b. *Rules for joint tenancy concerning realty also apply to personalty.*

42. *Morrow v. Eakin*

- a. Facts - creditor receives judgment against one JT owner - lien. Attempts to bring action for partition and sale on this basis to satisfy debt.
- b. *Only those who have a right to possess can make an action for partition* - TICs and JTs can make such actions, but creditors are not so entitled to maintain a partition action - nor is a remainderman or other holder of future interest. It is not clear how court would treat partition claim by holder of life interest.

43. *Rayner v. Rayner*

- a. Facts - spouses own cottage as JT. Husband possesses cottage for seven years, collecting rents. Wife thereafter occupies cottage. Husband wants to cause wife hardship, seeking partition and sale.
- b. *Those who come to equity must have clean hands* - as partition based in discretion of the courts at equity, one who seeks partition claim must not have exhibited unworthy behaviour.

44. *Bradwell v. Scott*

- a. Facts - bad blood between TIC concerning a parcel of land. One party seeks order for partition and sale as a result.
- b. *Clean hands are not "required" under Partition Act* - court does have the power to refuse order for partition for equitable reasons, but, claimant does not have to demonstrate entitlement to equitable relief. Onus must be on party claiming *mala fides* conduct.
- c. *Partition required if "good reason to contrary"* - this is not a hard and fast definition, but rather flexible, meets the needs of each given case.

45. *Brown v. Moody (2)*

- a. Facts - income left to son during his life, 1/2 to grand daughter and 1/6 to each of six great granddaughters thereafter.

- b. *Preceding life interest never stops the vesting of an interest in the remainderman* - if no condition precedent, there is immediate vesting in the *remainderman* on testator's death. Therefore, remaindermen have an interest which one could leave in will, etc., even though the life interest remains alive.
- c. *Must take account the purpose of the instrument* - if vesting will not alter the purpose of the document (eg. to provide income for life interest to one party, then to other parties thereafter), then the court should interpret the document in light of this.

46. *Re Squire*

- a. Facts - testator left properties to trustees to hold for grandsons until 30 years, then conveyed absolutely. Income to be added to inheritance, unless to be used for higher education.
- b. *Rule from Saunders applies only to absolute gifts* - if the gift is contingent, defeasible, if there is a gift over, or if any other person may have an interest in the trust, then this principle does not apply. Read with entire document (eg. does it use language like "if you should attain", does it separate property from estate?).

47. *Re Carlson* (2)

- a. Facts - income and capital to be used for youngest son until he reaches 21; residue thereafter to be divided differently. Divestment of vested estate.
- b. *Interest cannot vest until certain* - when the whole of a gift, income and capital may be used for the benefit of one person until a stated age, divided thereafter, the residue is not vested in the other until the first person reaches the stated age. This is because when the first person has the power to encroach, exact amount of residue cannot be determined.
- c. *Will must be read in context* - cannot say that certain words always create a condition precedent and other always create a condition subsequent, since must look at the provisions of a will in context. But, words like "upon", "when", "if", "as", "as soon as", "provided" all are more likely to imply conditions precedent, *whereas* "but if" is more likely to imply condition subsequent.

48. *Phipps v. Ackers*

- a. Facts - land conveyed to trustees to convey to godson at age 21; if doesn't reach 21, no issue, then divests, becomes part of estate residue which goes to testator's wife. Wife claims income of estate between death of testator and godson reaching 21.
- b. *Existence of gift over implies immediate interest* - consider a gift to a devisee upon attaining a certain age (eg. to A upon reaching 21), with a gift over to some other ascertained person if the devisee dies before reaching that stated age (eg. to B if A does not reach 21). The very existence of the gift over shows that the first devisee (A) is to take an immediate interest -

B gets the gift because A does not. Therefore, A is entitled to income from estate from execution until stipulated age.

49. *Re Barton Estate*

- a. Facts - sum of money left to grandson when he "shall attain 25", but allowed the income to be used for his maintenance and education prior to his attaining 25.
- b. *Phipps rule applies to personalty as well as realty.*

50. *Festing v. Allen*

- a. Facts - land left to granddaughter for life, and upon her death, to her children who shall attain 21, and if no such issue the land was to go into other trusts specified in the will.
- b. *Rule of destruction of contingent remainders* - if a remainder was still contingent at the time when the prior particular estate ends, this would result in an unacceptable gap in seisin. Therefore, on passing of the prior particular estate, all unmet contingencies are destroyed.

51. *Re Tilbury West Public School Board and Hastie* (3)

- a. Facts - land conveyed to school board in trust "for so long as it is used for school purposes." School board eventually uses land for storage instead.
- b. *Distinction between a possibility of reverter and a right of entry - determining event* (from possibility of reverter) states the limit for the estate first granted in the granting clause. In right of entry, complete grant given, then cut short unnaturally through *condition subsequent*.
- c. *Rule against perpetuities does not apply to possibility of reverter* - an intercession by a determining event is seen as a naturally occurring termination of the estate, and therefore the rule against perpetuities does not apply. It does apply to the right of entry, which gives a complete gift and then revokes it.
- d. *Earlier direction governs in case of ambiguity* - if there is any inconsistency in the deed the earlier direction governs; generally, this would be the granting clause.

52. *Westsea Construction Ltd. v. British Columbia*

- a. Facts - appellants are mortgagees of determinable fee simple interest (condo building); seek to secure this mortgage against possibility of reverter on units in building.
- b. *Possibility of reverter is not a charge, but limitation on grant* - therefore, mortgage cannot be secured against possibility of reverter.

53. *Re McKellar* (2)

- a. Facts - land was granted to the C.N.R. "only so long as they continued to use the land for railway purposes". C.N.R. proposed to abandon the railway line
- b. Does the clause set a limit on the estate first granted (determining event), or does the clause operate to defeat the estate first granted (condition subsequent)?
 - i. *Determining event* - part of words of limitation and marks natural boundary of the estate rather than operating to defeat it. Grants only limited estate, which could possibly endure forever - subject to "until x" or "for as long as x" - must clearly mean that duration of the estate depends upon the future event.
 - ii. *Condition subsequent* - independent clause added to a fee simple absolute which operates to defeat it prematurely, defeats title already granted before that title reached natural boundary. Re-entry must be exercised by grantor or estate to destroy the fee simple. Normally created by use of words including "but if", "until", etc.

54. *Blackburn and Cox v. McCallum*

- a. Facts - land devised to sons with condition that it could not be disposed of or encumbered until 25 years after death. One son takes out mortgage, creditors attempt to claim security on default.
- b. *General restrictions on alienation are not allowable* - restrictions on alienation are valid only if they apply to or exclude a particular class of persons. Total restraints are not allowable.
- c. *Acceptability of partial restraints increased if time limited* - the lesser the restraint, the more likely it is that the court will enforce it; limiting partial restraints by time makes them more acceptable. However, this cannot make a total restraint more acceptable.

55. *Re Brown*

- a. Facts - land left to sons with restriction: can only alienate to their brothers, otherwise their interest would be held in trust for the grandchildren who shall attain 21.
- b. *Can restrict from selling to a particular individual or class of persons* - for instance, can restrict from selling to A, or from selling to the sons of A.
- c. *Key question is whether condition is substantially a total restraint* - question of substance, not mere form.
- d. *If alienation only allowed to a class which is diminishing, it is invalid* - over time, alienation limited to diminishing class will amount to a general prohibition on alienation. This is not the case with a stationary or expanding class, however.

56. *Re Porter*

- a. Facts - the testator provided that the son was not to mortgage or sell the lands provided to him.
- b. *Can restrict from a certain type of alienation so long as other means available* - for instance, can prohibit the sale or mortgage of lands in grant, because this would still allow for the grantee to dispose of the lands through transfer, will, or lease. This does not amount to a substantive prohibition on alienation.

57. *Re Leach*

- a. Facts - land devised to nephew "until" nephew assigned or charged it, or became bankrupt.
- b. *Not a restriction if estate is determinable* - can have significant or perhaps absolute restriction on alienation on determinable estate, because with such estates, less than a complete gift has been given. Such estates end naturally, unlike with re-entry (where provision may have been invalid).

58. *Re Tuck*

- a. Facts - land devised w/ condition subsequent, "but if she married outside the Jewish faith." How can the court determine what "outside the Jewish faith" means?
- b. *Religious provisions can be valid where there is a means to render them certain* - for instance, the Court can refer to the head of a religion in order to determine who would fit definitions of membership as they are found in wills or other grants.

59. *Re Messinger Estate*

- a. Facts - widow left life interest in a Vancouver home "while she resides in the home" - divests should she leave the home in her lifetime. Widow does not live in Vancouver.
- b. *Courts prefer interpretation of conditions subsequent, not precedent regarding uncertainty* - so as not to invalidate gift, courts will try to interpret these conditions as conditions subsequent, not conditions precedent - therefore the invalidity can be flicked off, absolute gift remains.

60. *Phipps v. Pears* (2)

- a. Facts - new house built close to old house; old house pulled down, wall of new house exposed to weather causing damages. Owner of new house sues owner of old house, claiming easement through prescription.
- b. *Four categories which are not suitable for negative easements* - obstruction of view, reception of wind in *undefined* channel, sun/shade, protection from weather. such restrictions on land use would amount to far too great a restriction on the servient tenement.

- c. *Positive easements allow novelty, negative easements do not* - as negative easements restrict titles and can bind owners without notice, courts have been hesitant to expand allowable subject matter. Restrictive covenants, with notice requirements and lack of prescription are apt to cover this subject matter.

61. *Re Ellenborough Park* (5)

- a. Facts - conveyances for subdivision in fee simple, with easements for use of neighbouring park. Park taken for war purposes during WW2, compensation paid: who should receive?
- b. *Easements require both dominant and servient tenement* - this is what differentiates easements from public rights, as the benefit drawn from the servient tenement is for the benefit only of the dominant tenement, and not for the public at large.
- c. *Objective benefit to the dominant tenement required* - right granted must inherently benefit the dominant tenement, be connected with the normal enjoyment of and proximate to that tenement. An increase in value of the land is persuasive, but not determinative to this end.
- d. *Dominant and servient tenement owners can be the same person* - while at common law, the opposite was true, according to s.18 of the *Property Law Act* these owners can now be the same person.
- e. *Must be subject matter appropriate for easement* - must be sufficiently defined and certain, not vague. Must not be inconsistent with servient owner's possession (eg. cannot occupy land, or take things from land). If the easement amounts to occupation, inapt. Can be for mere recreation.
- f. *Intentionality required to run with land* - must be more than arrangement between the parties, must have been made with intention for benefit to run with the land; must be intention for successive title.

62. *Dukart v. Surrey* (2)

- a. Facts - building would interfere with view of neighbouring owner; the latter's title holds that foreshore reserves to be held to give access to foreshore for neighbouring lots.
- b. *Where requirements are met, easement is established* - if requirements for easement are met, then right to move upon the land of another can be considered an easement which runs with the land.
- c. *Easements can grant hybrid public and private rights* - giving access rights to the grantee *and* to others as well (eg. both a public and private right) can still pass muster as an easement. Solely public rights not allowable.

63. *Smith and Snipes Hall Farm v. River Douglas Catchment Board*

- a. Facts - owners of land subject to flooding contract with covenantor to take steps to prevent flooding in exchange for contribution to costs of work. Subsequent covenantees attempt to enforce burden against covenantor.
- b. *Benefits, not burdens, run with the land* - restrictive covenants / burdens do not run with the land; only benefits, which touch and concern dominant tenement and intent to run with the land are said to run with the land. *No servient tenement is required.*

64. *Austerberry v. Oldham Corporation*

- a. Facts - landowners agree to build roads; one successor in title refuses to pay maintenance charges for road, but sues trustee corporation to force it to repair road.
- b. *Burden of a covenant does not run with freehold land* - successors in title not bound re: burdens. Only the benefits can pass. An obligation to pay maintenance is a burden so cannot pass to successors.

65. *Halsall v. Brizell*

- a. Facts - landowner agrees to pay costs for upkeep of sewers. Subsequent owner obtains property. Corporation undertaking upkeep attempts to increase charges.
- b. *Unenforceable covenant can be enforced if burdened party avails* - if a party owning land subject to an unenforceable covenant (eg. payment for upkeep of road) wants to avail itself of the benefits of that covenant (eg. maintained road), then must live up to covenant.

66. *Parkinson v. Reid*

- a. Facts - agreement under seal; staircase on one lot can be used to access second floor of other lot. Covenantees given right of way, covenantors agree to repair / replace staircase.
- b. *Taking a benefit in the past not binding* - just because a party has availed itself re: unenforceable covenant at one time does not bind it permanently; the burden no longer has to be paid once the availing party no longer wants the benefit.

67. *Tulk v. Moxhay* (2)

- a. Facts - covenant that purchaser would maintain garden as a pleasure ground, not build on it. In return, tenants can purchase key for privilege of admission. Purchaser wants to build.
- b. *Covenants are binding at equity with notice* - would be unconscionable to allow owners to ignore covenants which they were aware of when they purchased the land (price also reflects burdens on land).

- c. *No further inquiry required, beyond notice* - enforced independent of whether the covenant runs with the land at common law, or whether it was a positive or negative covenant - third party buyer is treated the same as the vendor.

68. *London County Council (LCC) v. Allen* (4)

- a. Facts - defendant receives permission to lay out streets in exchange for covenant not to build on other properties that he owned. Successor to defendant's title builds.
- b. *Dominant tenement is required* - reformulation of restrictive covenants to require both dominant and servient tenements, more similar to negative easement. However, subject matter of covenants more expansive, easements restricted due to possibility of prescription.
- c. *Common intention that burden runs with both lands is required.*
- d. *Negative, not positive burdens will be enforceable.*
- e. *Notice is required.*

69. *Canada Safeway v. Thompson*

- a. *Benefit should be for use and occupation of the land, not for financial interests.*

70. *Hounslow London Borough Council v. Twickenham Garden Dev.* (7)

- a. Facts - building contract; plaintiff can terminate contract, but defendant insists on continuing work. Plaintiff seeks injunction to stop further trespass.
- b. *Bare licences* - revocable at any time, although reasonable time given to depart land must be given. Do not bind successors (or at all, due to revocability). If licence arises out of contract, then revocation gives rise to action re: breach of contract. No longer binding.
- c. *Licences coupled with interest in land* - consider profits a prendre, permission to take something from land coupled with ability to enter land in order to do so. Irrevocable for the term of the interest, and binds third party successors as well. Tortures the word *interest*, as in interest in land, thus giving rise to licence coupled with contract.
- d. *Licences coupled with contract* - if the contract is irrevocable, a licence subsequent to that contract is irrevocable as well, and enforceable through equity.
- e. *Licensor threatening to revoke / revocation declared but not executed* - if licensor is threatening to revoke, or has declared revocation but has not yet carried this out, equity grants injunction to prevent revocation.
- f. *Revocation already carried out* - court silent on whether order of specific performance would be made in order to return rights to the licensee. Equity more comfortable enjoining a

priori than ordering positive action ex post facto.

- g. *Licensor asking court to remove licence* - if licensor asks court for help in removing licence, the court will not aid if the contract is irrevocable - equity won't aid a party in breaching its agreements.
- h. *Applicability* - nothing is said in this case concerning the applicability of its provisions to third parties; deals only with relations between licensor and licensee.

71. *Errington v. Errington & Woods* (3)

- a. Facts - father lets daughter and son-in-law live in house until mortgage paid. Mother claims house is hers, wants daughter-in-law out after marriage breaks down.
- b. *Licences can provide exclusive possession* - while exclusive possession is prima facie a tenancy, if this takes the form of personal privilege then it is a licence.
- c. *Performance renders unilateral contracts irrevocable* - if licence arises out of unilateral contract where acceptance is performance of some act (eg. payment of the mortgage), the licence cannot be revoked once performance has begun. It is revocable only if the act is unperformed.
- d. *Licences coupled with contracts bind successors* - neither the licensor nor anyone who claims through the licence can disregard the contract and licence. The only exception is a bona fide purchaser for value without notice.

72. *Grafstein v. Holme and Freeman* (3)

- a. Facts - employee finds lockbox in basement of store. Informs owner. Left for one year. Later discovered to hold \$38k. Employee and owner dispute ownership of funds.
- b. *Possession required to be a finder* - one must have taken de facto control over property to have possession; this means the power to use, the power to exclude others from using.
- c. *Presumption that items found attached to land are controlled by landowner* - if item is found attached to or under land, this presumption is stronger, regardless of whether landowner knew that the items were there.
- d. *Knowledge relevant to obligation to true owner* - if landowner aware of contents / nature / presence of item, there is an obligation to locate and notify the true owner.

73. *Cranbrook v. Brown*

- a. Facts - money found in a couch which had been sold to the D. Seller and D. both claim to money, former as owner of couch, latter as finder of money. Was practice of seller's former

common law partner to stash money places.

- b. *Superior title can be found through circumstances* – as title to the property in which a bag of money was found had been vested in the seller of the couch, she is entitled to ownership.

74. *Kowal v. Ellis* (2)

- a. Facts – finder of pump, unattached on property owner's land. Dispute over who gets proceeds from sale of pump.
- b. *Finder becomes bailee on taking possession* – no rights or obligations arise from finding unless the finder actually takes possession. At that point, obligated to find true owner.
- c. *Attached objects presumptively belong to landowner* – but unattached objects do not. Obligation is key to ownership – landowner does not have any obligations towards true owner until item is found on property, therefore cannot be a prior bailee absent knowledge of item's presence.

75. *Parker v. British Airways Board* (6)

- a. Facts – man finds gold bracelet in airport lounge, leaves with defendant – if they can't find owner, man wants them to send bracelet to him. Defendant instead sells bracelet.
- b. *Rights of finder require that item lost and taken into possession* – finders only get rights if item is abandoned, or lost (w/ attendant obligation to find true owner), and taken into possession by finder.
- c. *Finder has no rights if acting dishonestly or illegally* – cannot be acting with dishonest intent (eg. to convert) or have been trespassing on land.
- d. *True owner and prior bailees have rights over finder* – the right of possession acquired by the finder acts against all but the true owner, representatives of the true owner, or others who can assert prior right that pre-existed the finding.
- e. *Finder has no rights if acting in course of employment.*
- f. *Presumption in favour of landowner over finder* – if object is in, under, or attached to the land or building, there is a strong presumption in favour of the occupier over the finder. This presumption is weakened with the level of attachment of the object.
- g. *Landowner's presumption based on intention* – did the landowner manifest an intention to control the building, and to control items found within (eg. do they have a lost and found)? If so, there is an obligation to ensure that lost chattels are returned to true owners. Once discharged, landowner has rights.

76. *Lesson v. Jones*

- a. Facts - Plf. contracts with defendant to pay \$5 per month to store car; assurance that car would be safe, but was damaged. D. did not have key to car, and Plf. could freely access.
- b. *Possession necessary for bailment* - cannot say that one has bailment without *control and custody*; consider storing a car, but without the key or access to the car itself (so cannot use or access interior). This does not constitute a bailment - particularly where the bailor still has access to the item (undermines exclusivity of bailee's possession).

77. *Newman v. Bourne and Hollingsworth* (2)

- a. Facts - Plf. goes shopping, removes coat, diamond brooch, places on glass case. Discovers brooch missing after some time. Had been discovered by shopwalker, who placed it on his desk. However, again went missing from shopwalker's desk.
- b. *Gross negligence in view of bailment* - the absence of ordinary care which a prudent person would have taken; but also something more, as this is effectively ordinary negligence.
- c. *Possession of the employee is not the possession of the employer* - and therefore, mere possession by an employee of an article lost in a place of business does not necessarily give rise to obligations on the part of the employer.

78. *Morris v. C.W. Martin* (6)

- a. Facts - gave fur to bailee to clean; bailee, with owner's knowledge, sends to sub-bailee; stolen by employee of sub-bailee. Sub-bailee has exclusion clause with bailee.
- b. *Intent to take possession* - to determine whether there has been a bailment, must determine whether the item was taken with intent to possess it.
- c. *Obligations of bailee* - these obligations are in tort, to take reasonable *care* of the goods, to not *convert* the goods, and to return the goods - *detinue*. Burden of proof is on bailee to show that apt level of care was taken. Risk can be allocated / exemption gained through contract.
- d. *If bailment only benefits bailor* - if bailment undertaken with no benefit to bailee - no consideration, unable to make use of the goods, etc., then the bailee is only liable for gross negligence.
- e. *If bailment only benefits bailee* - if bailment undertaken with no benefit to bailor (eg. loaning expensive / utile goods), then there is a high standard of care on the bailee. Liable for the least neglect, and goods must only be used for purpose that they were lent.
- f. *If bailment is mutually beneficial* - ordinary standard of care applies.

g. *Sub-bailees who are aware of distant owners have obligations to those owners* - not required that sub-bailee be aware of owner's identity, but rather mere existence (eg. that item of bailment belongs to distant owner sufficient). Relationship is based on voluntariness of sub-bailee. This is constructive bailment between distant owner and sub-bailee.

i. Denning limits this relationship, however, by saying that that distant owner only has right to *sue* if they have right to immediate possession.

79. *Martin v. Town n' Country Delicatessen (2)*

- a. Facts - parking provided for benefit of customers of the D. restaurant. This is a mutually beneficial relationship, helps both restaurant and parking businesses.
- b. *Bailment is delivery of chattels* - can be in trust, in contract, express or implied; must be returned in same form, unless specified, at appointed time.
- c. *Owners possession must be excluded* - for custody to be present, required for bailment, the bailee must have exclusive access to the item for the period of the bailment.

80. *Crawford v. Kingston*

- a. Facts - possession of cows. Obligation to return the same number of cows, although didn't have to be the exact same cows.
- b. *Bailment requires non-fungible return* - concerned with taking possession of an object and then returning that very same object. If one can replace with different (but same) object, then cannot be a bailment. This is what differentiates bailment from transfer.

81. *Appleton v. Ritchie Taxi*

- a. Facts - D. operates parking lot in Toronto. Plf. left car in D.'s possession (w/ keys). Later discovered stripped of tire, radio, other items. Claim ticket contained limitation of liability.
- b. *If bailee wishes to limit liability, must draw attention of Plf. to this fact* - mere limitation of liability clause in small print / standard form is not sufficient; these seem to be designed in fact to conceal such limitations.

82. *Palmer v. Toronto Medical Arts Building*

- a. Facts - damages claimed from theft of car, where it had been parked, keys in control of parking attendant; voluntary and gratuitous service offered by parking attendant.
- b. *Licensor-licensee rather than bailor-bailee in gratuitous service / mere courtesy* - while performing gratuitous service on owner's behalf (outside of usual operation of business), this is temporary de facto possession; but person performing service not a bailee, but rather possession is same as the owner's possession.

83. *Bata v. City Parking Canada Ltd.*

- a. Facts - D. owned parking lot; attendant requested that Plf. park car, leave keys inside; would park later on Plf.'s behalf (due to congestion). Same fact base as Palmer - does this constitute licence or bailment?
- b. Due to presence of limitation of liability clause, notice that charges were only for use of parking space and not care/bailment, this relationship is a licensee agreement, as in Palmer.

84. *Heffron v. Imperial Parking (2)*

- a. Facts - owner parked car, left keys with attendant. There was an exclusion clause on the ticket stating not responsible for car and contents. The car went missing.
- b. *On detinue, onus on bailee* - once bailor proves non-delivery, the bailee then must then prove that reasonable care was taken. This is not subject to exclusion clauses, as failure to return bailed item amounts to detinue, a fundamental breach of bailment.
- c. *Heffron factors* - relate to control, possession, and custody. Includes active control over item (eg. car keys), supervisory role over item (eg. presence of attend), system concerning item (eg. key retrieval). Can one be bailee of keys, but not car?

85. *MacTague v. Inland Lines Ltd.*

- a. *Lending or entering into bailment a defective chattel is actionable* - if a lender is aware of any defect in the chattel which renders it unfit for the purpose for which it is lent, fails to communicate this to the borrower, this leads to a cause of action - even if gratuitous bailment.

86. *Coggs v. Bernard (2)*

- a. Facts - D. despoils some of Plf.'s bailed goods due to negligence.
- b. Six types of bailment:
 - i. *Depositum* - stored for the use of the *bailor*; a naked bailment.
 - ii. *Commodatum* - stored with a friend for that friend's use - must be restored *in specie*.
 - iii. *Locatio et conductio* - goods left with bailee to be used by him for hire.
 - iv. *Vadium* - pawn or pledge of goods to secure loan.
 - v. *Gratis Delivery* - goods are delivered to be carried, no charge.

vi. *Delivery for consideration* - goods are delivered to be carried, with charge.

- c. *Level of negligence / standard of care shifts with the type of bailment undertaken* - gross negligence required without some benefit to the bailee. Light negligence required without some benefit to bailor. Regular negligence required if both benefit.

87. *Macdonald v. Whittaker Textiles Ltd.* (3)

- a. Facts - tool box left within caged area, subsequently stolen. Merely placing tool box within caged area sufficient to establish bailment, ergo possession? Only keys to access area were in possession of company.
- b. *Bailment for reward does not require monetary relationship* - sufficient to establish that there be indirect consideration or benefit. A bailment within the context of an employer-employee relationship is sufficient to establish bailment for reward.
- c. *Standard of care in bailment for mutual benefit is normal negligence* - that care which a prudent man would exercise in protection of his own chattels.
- d. *Exculpation from liability for bailment construed strictly* - will be interpreted narrowly, will only exempt bailee from responsibility for losses due to own negligence if in clear words adequate for purpose - clause which tells employees not to bring valuables to work does not apply to tools needed to perform work.

88. *Townsend Air Services v. Hansen*

- a. Facts - D. pilot crash landed plane owned by D., causing its complete destruction.
- b. *Onus re: negligence is on the bailee* - If a bailment has been established, and the item was either not returned, or returned in a condition other than that specified by the bailment, then the onus is on the defendant to prove that every reasonable care was taken in order to ensure the return of the item in the required condition.

89. *Punch v. Savoy*

- a. Facts - owner gave jewellery to D. to clean, who gave to third party to carry out cleaning. Owner did not know that this would be done. Ring went missing.
- b. *Limitation of liability only relied upon if distant owner assents* - for exemption of liability between distant owner and sub-bailee to apply, the distant owner must assent to this through implication or express intent.

90. *Cochrane v. Moore*

- a. *Gift and acceptance must be contemporaneous* - one cannot give something without delivering it, and one cannot accept a gift without receiving it. Therefore, without actual, *factual*

delivery, there is no gift; it is revocable by either party.

91. *Hardy v. Atkinson*

- a. Facts - Plf. was told "you can have the horse" - did not take ownership for winter, and owner sold horse to someone else.
- b. *Intention to give must be accompanied with delivery* - otherwise there is no gift, but rather only a revocable, non-binding intention.

92. *Re Cole* (3)

- a. *Facts* - husband bankrupt. Touched furnishings, says "all of this is yours." However, goods still insured under husband's name, trustee claims that gift not made to wife.
- b. *Proximity to and handling of chattels is not delivery* - Merely bringing someone near to chattels and letting them handle them is not sufficient to constitute delivery. Would be sufficient if the donor had then left, leaving the chattels with the donee - clear change of control.
- c. *Contract for sale necessary in spousal situation or common establishment* - deed or contract of sale (even for nominal consideration) is necessary - mere words alone are not enough because there is no clear change in possession.
- d. *Evidence of retention of possession by the donor can negative gift* - for instance, by retaining insurance in one's own name over property claimed to have been given to the donee, donor may have undermined the claim that the gift ever occurred; shows importance of going beyond mere words in common establishment.

93. *Thompson v. Meham* (5)

- a. Facts - woman afraid of air travel offers extensive personal property to another as *donatio mortis causa*.
- b. *Inter vivos transfers* - one can avoid application of the *Wills Variation Act* by disposition of property *inter vivos*. This is difficult to challenge under the *Fraudulent Conveyances Act*. However, there is an argument relating to the possibility of there being a legal obligation not to engage in such transfers where this would create a legal need - eg. cause dependent spouse / children to require support from welfare.
- c. *Application of Wills Variation Act cannot be contracted out of* - agreement between spouses concerning separation of assets can not oust the jurisdiction of the courts concerning the application of the *Wills Variation Act*. This would be taken into account when dividing assets under that act, however.

- d. *Death must occur from peril contemplated.*
- e. *Must not be ordinary risk of living.*
- f. *Needs to be an extreme pressing danger which will not allow the time to make a will.*

94. *Chauvel v. Adams Estate*

- a. Facts - injunction against D. from selling property; claim that deceased gave them fishing vessel, gear, tools, and licence in donatio mortis causa. Gave keys to fishing vessel to Plf. (and another person). Plf. did not make any claim to property known until after death; intestacy.
- b. *Three requirements for donatio mortis causa* - gift made in contemplation (or expectation) of death, delivery to the donee of subject matter of gift, and, gift conditional because would revert if the donor recovered.
- c. *Three requirements for delivery in donatio mortis causa* - parting with dominion of subject matter, to donee or donee's agent, a delivery of the subject matter or a means of access to it.

CASE INDEX: Cases not in syllabus, but covered in Keith's notes

1. *Nova Scotia (Attorney General) v. Walsh*

- a. Facts - co-habiting spouse attempts to get child and spousal support.
- b. *Family Relations Act covers only formal marriage re: property* - Act does include marriage-like relationships for maintenance / alimony / custody / etc, but not for property, which is limited to formal marriage (but can *opt in* if in a marriage-like relationship and want to follow the *Family Relations Act*).
- c. *s.15(1) challenge to Family Relations Act re: property fails* - the Court indicated that the parties had chosen to avoid the institution of marriage and the consequences attendant of that institution. As a result, it would be unjust not to respect the choice of the parties in this regard. It is in society's interest to afford greater recognition to formal marriage than to other types of relationships, and s.15 could not be used to equate formal marriage with marriage-like relationships.

2. *Murdoch v. Murdoch*

- a. Facts - wife has money from previous work, from mother, and claims interest in husband's ranch on marriage breakdown.
- b. *Trust requires intention* - in dissent, Laskin held that the SCC should recognize a *constructive trust* which does not require intention; based on equity instead. While majority did not agree, the constructive trust has since become an acceptable legal construct in

Canadian jurisprudence, due to statutory provisions to that effect.

3. *Pettkus v. Becker*

- a. *Constructive trusts are applicable* - if the facts show that there has been an enrichment, a corresponding deprivation, and absence of a juristic reason for the enrichment, then it is equitable for the court to apply a constructive trust.

4. *Sorochan v. Sorochan*

- a. *Relationship* - while previously applied only in marital circumstances, constructive trust also expanded to include long-term, non-marital relationships.

5. *Peter v. Beblow*

- a. Facts - twelve year cohabitation with extensive domestic services; how to value on breakdown of relationship?
- b. *Domestic services* - further extension of constructive trusts to include conventional domestic services in the circumstances of long-term cohabitation involving domestic work.

6. *Clarke v. Clarke*

- a. Facts - farm and chattels left to brothers, with clause that debts would be paid in joint and equal shares.
- b. *TIC created by slightest intention in grant* - Anything which in the slightest degree indicates an intention to divide the property, e.g. "equal shares", will create a TIC. For instance, clause in grant which says that brothers should pay all debts shows an intention to sever the property, creating a tenancy-in-common. Found through joint conduct of parties.

7. *Mastron v. Cotton*

- a. *On partition and claim for expenses* - one tenant may be awarded an allowance for paying more than his proportion of the repairs - *providing they increased the capital value* - and the maintenance of the property. Other tenant cannot take advantage of the increased price without submitting to an allowance for them. Where one tenant has paid more than his share of the encumbrances he is entitled to an allowance for such surplus. If you are claiming repairs and expenses, then you may also have to pay occupation rent.

8. *Ginn v. Armstrong*

- a. Facts - spouses were JT in matrimonial home, agree to sever through correspondence during divorce proceedings.

- b. *Mutual intention to sell JT property and split profits severs* - intention by JTs to sell property and split the profits, is totally inconsistent with JT ownership. This is evidence of severance, and therefore no survivorship. Requires mutual intent, however.

9. *Munroe v. Carlson*

- a. Facts - JT husband attempts to sell matrimonial home without consulting wife. Wife initiates divorce proceedings and property partition, which is dropped after husband's death - wife now claims survivorship.
- b. *Unilateral declaration insufficient to sever* - a unilateral declaration to sever, such as the commencement of a partition action, which has not been heard and so can be abandoned (as occurred here), does not sever because it doesn't destroy any of the unities.

10. *Harmeling v. Harmeling* (4)

- a. Facts - JT own house built for old age; both names to ensure for their care. Both contribute to financing the house. Wife leaves husband for another man, applies for partition.
- b. *Prima facie right to partition* - Co-owners (eg. those with a 50% or greater stake in the property) have prima facie right to partition - this is reflected in s.6 of the *Partition of Property Act*. Courts have discretion under s.2, purpose is to protect equity / fairness.
- c. *Motivation and faith are not relevant to exercise of property rights* - the court does not have to refuse an order simply because an applicant does not have "clean hands" - questions of motive or bad faith are not really relevant to property division.
- d. *Relative hardship not sufficient to deny partition, must be serious* - in order to deny partition, the extent of the hardship and unfairness suffered by allowing the claim must be serious.
- e. *Courts give more consideration to spouses than to siblings* - partition is far more likely to be denied where between spouses than between siblings or other JTs / TICs. This is often because siblings not responsible for each others children, unlike spouses. See s.55(2) if the *Family Relations Act*, where partition and sale can be refused or varied on marriage breakdown.

11. *Saunders*

- a. *Absolute gift held in trust can be taken over upon age of majority* - If absolute gift given, but trustees directed to remain in possession for period of time, during which they accumulate income from capital, the beneficiary can immediately bring the trust to end upon gaining age of majority.

12. *Purefoy v. Rogers*

- a. *Destruction of unmet contingent remainders not always avoided at equity* - interests which comply with the four common law remainder rules are treated as remainders, and so run the risk of destruction. This presumably still applies.

13. *Re Robson*

- a. Facts - property left to children that attain 21, TIC in equal shares if more than one. Daughter died leaving four children, two over and two under 21.
- b. *Everything in a will is equitable* - freehold estate is vested in the executors, not the life tenant, and the executors held the land as trustees for those who were entitled to equitable estates on the death of the testator. Therefore, rules of destruction, remainder rules, etc. do not apply. However, must still consider common law position, as Robson is uncertain.

14. *Re Crow*

- a. Facts - remainder given to children, or if no children then to nieces and nephews. No children born at time of testator's death - but some subsequently born.
- b. *Purefoy, not Robson, applies to wills* - unmet contingencies are destroyed, because wills are not treated as equitable.

15. *National Provincial Bank v. Ainsworth*

- a. Facts - A deserted wife lives in a house owned by her husband.
- b. *Bare licence revocable on reasonable notice* - notice by licensor or by subsequent purchasers. This case is doubted, however - not followed in Canada.

QUESTIONS

1. What is indefeasibility of title?

- a. Refers to land titles in fee simple. In accordance with s.23(2) of the *Land Title Act*, such titles are incapable of being defeated or altered once registered under a Torrens system. In other jurisdictions, mortgages / other titles may be indefeasible, but *only* fee simple in BC.

2. What is the "curtain and mirror"? What are the implications of this system?

- a. Refers to an integral component of Torrens system of land title. Once a title is registered in the system, with a certificate of title issued, it is indefeasible. This is because the curtain is drawn on any previous errors or defects in title, and therefore the mirror (certificate) accurately reflects the current state of affairs.

- b. This means that where there is a registered title, any claim based on a past defect in title will fail, according to s.23(2) of the *Land Title Act*. However, such a claimant may still be eligible for compensation under Crown insurance fund. {Creelman}

3. Describe four exceptions to indefeasibility from the *Land Title Act*

- a. *Lease* - s.23(2)(d) - title defeasible if property subject to a lease for a term not exceeding 3 years with actual occupation. Leases *without* occupation cannot defeat title, and leases exceeding three years must be registered to defeat title.
- b. *Legal claims* - s.23(2)(g) - title defeasible by particular legal claims, including builder's lien to secure priority of payment for services rendered, or pending court proceeding concerning contested property. {Carr} {Pacific Savings}
- c. *Fraud* - s.23(2)(i) - title defeasible if it was obtained by fraud or forgery in which the registered owner participated in any degree. However, if this title is passed to a bona fide purchaser for value, the title cannot be defeated by fraud. Passed to mala fides purchaser, or acquirer by means other than for value (eg. will), title is defeasible if fraudulent.
- d. *Interests* - s.29(2) - title defeasible by registered interests, or alternatively, by unregistered interests, such as leases s.23(2)(d) or interests pending registration s.23(2)(c).

4. Define fraud, constructive fraud, and forgery within the contemplation of the *Land Title Act*

- a. *Fraud* - something which is said, done, or omitted, with the design of perpetuating what that person must know to be false. Based on intentionality (ie. one intended to deceive).
- b. *Constructive fraud* - based on the concept of recklessness. This occurs where one could have found out the truth but turned a blind eye.
- c. *Forgery* - act fraudulently by making false documents.

5. Differentiate between two types of indefeasibility relating to fraudulent title

- a. *Deferred indefeasibility* - errors outside of the register, such as the acquisition of a title through forgery, do not give indefeasible title. They give the *root* of an indefeasible title. Therefore, if such a title is passed to a bona fide purchaser for value, that party acquires indefeasible title, in accordance with the curtain/mirror principle. {Gibbs}
- b. *Immediate indefeasibility* - overrules Gibbs. Indefeasibility applies the moment that an instrument is registered in a Torrens system, regardless of whether it was a void instrument. To do otherwise would be to undermine curtain/mirror principle, as BFPVs would have to search behind the registry. Therefore, only fraud on the part of the registered owner can defeat title.

6. What is a bona fide purchaser for value (BFPV)?
 - a. Party which purchases land in a Torrens system of title, providing consideration and acting in good faith.
7. Describe the equity doctrine of notice and its relevance to Torrens title
 - a. The doctrine held that those other than BFPVs, or BFPVs that have actual *or* constructive notice of an interest in land (a lease, for instance) *must* honour those interests.
8. Describe the significance of s.29(2) of the *Land Title Act*
 - a. Effectively undermines the equity doctrine of notice. Notice of unregistered interests no longer affects BFPVs, except for where the interests concerned are: leases with actual occupation of less than three years, or interests which are pending registration.
9. Describe 3 exceptions to *Land Title Act* protection against unregistered interests
 - a. *s.29(2) does not protect against acknowledged, though unregistered interests* - interests which are acknowledged and acted upon by a BFPV will be protected, and will defeat the Torrens title against which they are held. By acting upon and benefiting from the lease, the lease was effectively “assigned” in equity - ergo titleholder estopped. {Me-N-Ed’s Pizza}
 - b. *s.29(2) does not protect if there is actual knowledge of fraud* - for participation in fraud to vitiate s.29(2) protections, it must be shown that the purchaser knew that the vendor did not have title. {Nicholson}
 - c. *s.29(2) does not protect if there is constructive knowledge of fraud* - if there was an arousal of suspicion and attendant lack of prudent enquiry on the part of the purchaser, this amounts to wilful blindness. Suspicion is key - without it, no duty to make enquiries. Must occur in concert with dishonesty. {Nicholson}
10. When must notice be received in order to elude s.29(2) protections?
 - a. *s.29(2) protections concern knowledge at time of transaction* - so, if a BFPV did not have actual or constructive notice of an unregistered interest at the time of the transaction (at the moment that the BFPV became contractually bound to purchase the land), then s.29(2) protections apply. Notice gained after this, even if prior to land registration, does not affect s.29(2) protections. {Central Station}
11. What is required to create an estate in fee simple?
 - a. *Words of purchase*: “who” words, describes the entity that will acquire the property.
 - b. *Words of limitation*: “what” words, describes the property that will be acquired.

12. Describe historical treatment of fee simple estates within three modes of property acquisition

- a. *Inter vivos transfer* - strict, historically. Had to use “and his heirs”. If no words of limitation or incorrect words of limitation used, would instead create a life estate. Even “to A in fee simple” not adequate, “and his heirs” absolutely required historically. These strict rules often created life estates despite intentions of original owner - statute to the rescue.
- b. *Inter vivos trust* - flexible, historically. Absent “magic” words of limitation, able to form fee simple if there is clear intent to do so.
- c. *Will transfer* - flexible, historically. Absent “magic” words of limitation, able to form fee simple if there is clear intent to do so.

13. Describe modern treatment of fee simple estates within two modes of property acquisition

- a. *Inter vivos transfers* - governed by the *Property Law Act*. Can say “in fee simple” rather than “and his heirs” according to s.19(1). Further, s.19(2) holds that, absent words of limitation, the *greatest possible estate* is granted. For instance, if transferor has fee simple, then fee simple transferred. If transferor has life estate, then *pur autre vie* estate is transferred. {Airey}
- b. *Will transfers* - governed by the *Wills Act*. According to s.24, if there are no words of limitation and no contrary intention in the will, fee simple or greatest estate possible would be transferred.

14. Describe eight factors in the interpretation of wills

- a. *Absent ambiguity, surrounding facts not relevant to will* - surrounding facts to will only relevant if ambiguous, and distinguish words of limitation from words of purchase. {Ottewell}
- b. *Where words of limitation used, must be given meaning* - while these words are not *necessary* for realty (and have no meaning concerning personalty, which is owned allodially), where they are used, they must be given meaning - must be presumed to convey intent. Therefore, should take care to use words that are not required. {Ottewell}
- c. *Presume that every word used has a meaning.* {Ottewell}
- d. *Presumption against intestacy* - where will capable of supporting two meanings, the one which negatives intestacy is preferred. {Ottewell}
- e. *Repugnancy* - cannot give something absolutely, such as a fee simple, but to then attempt to control the destiny of the gift thereafter through a *gift-over*. The central contention in repugnancy claims is in determining whether the giver is attempting to control an absolute gift, or rather, whether only a partial gift was in fact given; based on intention of the giver

of the gift. {Walker}

- f. *Intention and expectation trumps plain meaning* - while words such as “free use” could imply fee simple, there is in intent / expectation in the will that a *balance* will remain on her death to go to the children. This is the case in spite of the fact that the balance is not *required* by the will, as modified by the words “balance, if any”. {Richer}
- g. *Land cannot be spent* - while the use of the word “unspent” with regard to an estate would allow the receiver of a gift to spend monies, use chattels, the word is not applicable to land. Land cannot be spent, and therefore applying the word “unspent” to an estate applies only to consumable items. However, this view may not be entirely accurate, as does not contemplate the profits which can be taken from land (eg. cutting timber). {Richer}
- b. *Holism trumps formalism* - Walker approach seen as too formal. Testator’s intention should be determined from whole will and, if ambiguous circumstances when will was made. Should just interpret the document as a whole to give effect to the intention of the testator, and should “sit in the testators armchair”. {Shamas}

15. Differentiate between the interpretation of wills and the interpretation of deeds

- a. *Unlike interpreting wills, interpreting deeds is a formal process* - for instance, in deeds, granting clauses take priority over *habendum* (eg. “to have and to hold”) clauses, even where there is a clear intention to follow the *habendum* clauses. This is different than in interpreting wills, where the intention of the testator in context of whole will is the guiding principle, not formality. {Tremblay}

16. Describe three possible outcomes in a repugnancy claim

- a. *Gift dominant* - that the gift is dominant, and the gift-over is repugnant. Receiver gets fee simple, giver has no control over destiny. {Walker}
- b. *Gift-over dominant* - that the gift-over is dominant, and so the original receiver of the gift only gets a life estate (eg. a partial interest). {Walker}
- c. *Middle ground* - where only a partial interest (eg. life estate) is given, but it may be encroached upon during the lifetime of the life tenant - remains are a gift-over. {Walker}

17. How are life estates and *pur autre vie* estates created?

- a. Life estates are created through a grant such as “To A for life”, while *pur autre vie* estates are created through grants such as “To A for the life of B”. Express words are required, otherwise the greatest possible estate will be granted (eg. fee simple, if that is what is owned by the grantor).

18. What is a homestead?

- a. Under *Land (Spouse Protection) Act*, a homestead is a land interest registered by one spouse against land registered in the name of the other spouse, on which there is a dwelling which has been occupied by the spouses as their residence within one previous year.

19. Describe the impact of homestead interests concerning deeds and wills

- a. *Inter vivos* - Homestead interest prevents the owning spouse from disposing of the relevant land without consent of the other spouse in writing.
- b. *Upon owning spouse's death* - regardless of whether owning spouse dies testate or intestate, under s.4 of the *Land (Spouse Protection) Act*, the other spouse is entitled to a life interest. However, this is subject to the interests of creditors.

20. Identify six factors concerning the applicability of homestead interests

- a. *Not avoided through contract* - cannot contract out of the implications of a registered homestead interest; spouses cannot agree that the *Act* will not apply.
- b. *Avoided if marriage no longer intact* - the *Act* is not applicable in case of divorce, nullity, or after separation for a defined period of time.
- c. *Marriage must be registered* - Act requires registered, official marriage within the meaning of the *Fed Marriage Act. Family Law Act* will eventually recognize "marriage like" relationships within the meaning of the Spouse Protection act; however, these are not yet in effect.
- d. *Exclusion of unmarried couples from marital property regimes is constitutional* - to do otherwise would be to undermine the choice of some couples to choose whether to marry, and thus engage the legal consequences of marriage. {Bona}
- e. *Same-sex marriage recognized* - in accordance with *Family Law Act*, same sex marriages which are registered are subject to *Land (Spouse Protection) Act*, and ergo homestead interests apply to these unions. {M. v. H.}

21. Describe two changes brought about by *Definition of Spouse Amendment Act*

- a. Amends spouse to include:
 - i. *Common law spouses* - cohabited for at least 2 years, in marriage like relationship, including same sex. Must have legal capacity to marry (eg. age of majority, not already married). Must make agreement to marry, so although not formally married, recognized as valid marriage.
 - ii. *Marriage like relationships* - cohabitation for two years immediately preceding spouse's death. Is cohabitation really a valid factor, since formally married spouses are not required to live with one another?

22. What is required for a marriage like relationship to be enforced at law?

- a. *For marriage-like relationships, don't need to have capacity to marry* - both parties must have capacity to marry to enter common law marriage - but nothing in statute re: marriage-like arrangements. So, married persons can enter into marriage-like relationships. {Austin}
- b. *Financial dependence is not necessary for marriage like relationships* - the manner in which financial affairs are arranged is but one factor to be considered. {Austin}
- c. *Intention to enter marriage like relationship is necessary* - such an intention can be found in spite of a lack of financial codependency. {Austin}

23. Describe the applicability of the *Estate Administration Act*

- a. This act only applies where a person dies intestate; applies regardless of whether the marriage is registered, so does apply to "marriage-like" relationships - includes common law spouses, same sex-spouses.

24. How is the estate apportioned when a spouse dies intestate?

- a. *Surviving spouse* - receives estate (s.83) subject to entitlement to children (s.85). Includes all chattels associated with the enjoyment of the matrimonial home, and life interest in matrimonial home (s.96(2)(a)). This life interest can be rented out or abandoned.
- b. *Surviving children* - receive legal title to matrimonial home, although possession (cestui que use) given to spouse until death; also receive title to all other property.

25. How will the apportionment of intestate spousal estates be altered when the *Will States and Succession Act* comes into effect?

- a. Life estate in matrimonial home will be replaced by monetary sum; this is due to the fact that the life estate is seen as an onerous gift.

26. Differentiate between general and special occupants

- a. *General occupants* are holders of *pur autre vie* estates, whose grants end if they predecease the *autre vie* ("To B for the life of A"). *Special occupants* are holders of *pur autre vie* estates, whose grants are passed to their heirs if they predecease the *autre vie* ("To B and his heirs for the life of A"). In the case of general occupants, estate is held by B until A or B dies, while in the case of special occupants, estate is held by B and his heirs until A dies.

27. What is devolution on death?

- a. The differentiation between general and special occupants was abolished by the Statute of Frauds in 1677, and subsequently by s.2(a) of the *Wills Act*. Therefore, concerning *pur autre vie* estates, so long as the *autre vie* remains living, the estate may be disposed of like any other realty held by the *cestui que use*.

28. How are family assets divided between spouses on marriage breakdown?

- a. In accordance with the *Family Relations Act*, 50% interest in family assets, including those acquired previous to marriage, to each spouse on marriage breakdown. Court can vary the proportion for fairness Re: length of relationship, extent to which property acquired by one spouse by gift/inheritance/etc.

29. Describe the applicability of the *Family Relations Act*, and the SCC's reasoning to this end

- a. *Family Relations Act* covers only formal marriage re: property - Act does include marriage-like relationships for maintenance / alimony / custody / etc, but not for property, which is limited to formal marriage (but can *opt in* if in a marriage-like relationship and want to follow the *Family Relations Act*). Provision is *gender neutral*. {Walsh}
- b. *s.15(1) challenge to Family Relations Act re: property fails* - the Court indicated that the parties had *chosen* to avoid the institution of marriage and the consequences attendant of that institution. It would be unjust not to respect the choice of the parties. It is in society's interest to afford greater recognition to formal marriage than to other types of relationships, and s.15 could not be used to equate formal marriage with marriage-like relationships. {Walsh}

30. How will the *Family Law Act* change the division of assets on marriage breakdown?

- a. Only applies to property acquired after the marriage; has no effect on assets acquired prior to the marriage. This is a deviation from the *Family Relations Act*, in which there was no limitation on the property to which the law could apply.

31. How will the *Wills Estates and Succession Amendment Act* change wills in BC?

- a. Brings into the *Wills Estates and Succession Act* certain features of the Nis'gaa treaty. For instance, Fed *Indian Act* does not have any further power over Nis'gaa wills, ergo fell under PG jurisdiction; this amendment coordinates necessary changes to accommodate.

32. Describe the nature of the *Wills Variation Act*

- a. Grants broad discretion where deceased spouse's will does not adequately provide for "the proper maintenance and support" of the surviving spouse and children. Effectively, the court can limit the autonomy of the testator, thereby varying the will as it "thinks adequate, just and equitable in the circumstances."

33. Describe the applicability of the *Wills Variation Act*

- a. Stepchildren cannot make claims under this act. Applies to those living / cohabiting / in marriage / marriage like relationship, have been so doing (living and co-habiting) for at least two years. Going forward, definition will remove “living and co-habiting” requirement, once *Wills Estates and Succession Amendment Act* passes. Encompasses all property, regardless of when it was acquired (rather than only property acquired after the marriage).

34. Describe two approaches to the application of the *Wills Variation Act*

- a. *Strict needs/maintenance test* - approach to interpretation started in the 1920s - courts interpreted the *Act* as only requiring provision for basic needs and maintenance to avoid surviving spouse and children becoming a public charge upon the country. Effectively, authorized the courts to vary wills where the alternative would be to require surviving spouse and children to rely on welfare. {Tataryn}
- b. *Broad marital and parental moral duty test* - began in the Depression, courts extended their interpretation beyond mere necessities. Applied a more generous rubric, one which roughly accords with the *preservation of standard of living*. By taking into account moral considerations, this approach gave an equitable share even in the *absence* of need. The preferable approach according to the SCC. {Tataryn}

35. Identify three factors which guide the application of the moral duty test re: *Wills Variation Act*

- a. *Legal obligations* - wills variation is guided by legal obligations, such as the duty to support one’s wife and children, and to avoid unjust enrichment by ensuring that spouse’s contributions are recognized by testator. {Tataryn}
- b. *Moral obligations* - further, there are also moral obligations, such as to make provisions for dependents as the estate permits. Allows for claims by non-dependent children and spouses, thereby exceeding legal duty, extending into *moral* duty. {Tataryn}
- c. *Testator autonomy* - *Wills Variation Act* recognizes the significant right of the testator to determine the ultimate fate of the estate. Any adjustments which are to be made, could not take away, entirely, the testamentary autonomy of the testatrix. {Tataryn}

36. Describe the theory underlying preservation of the standard of living in the *Wills Variation Act*

- a. “*Dovetailing*” between the *Estate Administration Act* and the *Wills Variation Act* - the former applies only if there is an intestacy; if there had been an intestacy in this case, the spouse, by legislation (whether married or marriage like), would have received approximately one third. {Picketts}

37. Identify how one can elude application of the *Wills Variation Act*

- a. *Inter vivos transfers* - one can avoid application of the *Wills Variation Act* by disposition of property *inter vivos*. This is difficult to challenge under the *Fraudulent Conveyances Act*. However, there is an argument relating to the possibility of there being a legal obligation not to engage in such transfers where this would create a legal need - eg. cause dependent spouse / children to require support from welfare. {Mechan}

38. Identify how one cannot elude application of the *Wills Variation Act*

- a. *Application of Wills Variation Act cannot be contracted out of* - agreement between spouses concerning separation of assets can not oust the jurisdiction of the courts concerning the application of the *Wills Variation Act*. This would be taken into account when dividing assets under that act, however. Different from prenuptial agreements, which will be respected on marriage breakdown - *Wills Variation* deals not with marriage breakdown, but rather with testacy. {Mechan}

39. When will a claim under the *Wills Variation Act* fail?

- a. *Must be economic dependence to support variation* - spouses who are independent, marry late, do not become an economic unit, present a prenuptial agreement concerning wills, do not have expectations of reliance on each other's estates. {Howard}

40. What are resulting trusts?

- a. Resulting trusts work on the theory of the intention by the parties. For example, if one party gives a donation to cover someone's medical bill, but then government steps in and pays it, then the donation money will be held under a resulting trust to be returned to donors. {Murdoch}

41. What are constructive trusts?

- a. Trusts imposed by equity to deal with unjust enrichment - do not require intention of the parties, unlike resulting trusts. For example, in response to unconscionable conduct, such as person profiting from a crime. Consider, a house which has been sold is held in constructive trust by the vendor until the closing of the transaction. Can intervene in the disposition of property under any circumstance, including inter vivos transfers, testacy, intestacy, divorce, etc. {Pettkus}

42. Describe three requirements for constructive trusts

- a. *No intentionality needed* - such trusts do not require intention on the part of the parties; such a requirement would bring this concept into the realm of the resultant trust. {Pettkus}
- b. *Enrichment and deprivation without juristic reason* - if the facts show that there has been an enrichment, a corresponding deprivation, and absence of a juristic reason for the enrichment (eg. no obligation to the contrary), then it is equitable for the court to apply a

constructive trust. {Pettkus}

- c. *Relationships, marital, marriage like, domestic services* - while previously applied only in marital circumstances, constructive trust also expanded to include long-term, non-marital relationships. {Sorochan} Further extension of constructive trusts to include conventional domestic services in the circumstances of long-term cohabitation involving domestic work. {Peter}

43. What is the purpose of the law of waste in property?

- a. In life and *pur autre vie* estates there is a danger that the life tenant will despoil or reduce the value of property for successive takers - the remaindermen or reversioners. There are conflicting rights at place, those of the *cestui que use* (exclusive possession, profits), and those of the future interest (receive land in substantially, if not completely same form granted to *cestui que use*). This conflict is managed by the law of waste.

44. Describe three types of legal waste

- a. *Permissive waste (passive)* - damage resulting from a failure to preserve or repair property. Life tenant generally not liable unless the grant put an obligation on life tenant to make such repairs.
- b. *Voluntary waste (active)* - positive action that changes or diminishes value of land, such as the cutting of timber. Generally, *cestui que use* is liable to reversioner / remainderman unless grant of life estate contains exemption expressly permitting life tenant to commit voluntary waste (eg. *unimpeachable for waste*).
- c. *Ameliorating waste (active)* - positive acts that enhance the value of land. Can be actionable due to negative side effects such as increased property taxes or a significant transformation of the property.

45. Identify an exception to the law of waste

- a. *Life tenant cannot cause permanent injury to property* - the life tenant cannot cause material prejudice or permanent injury to property which diminishes its value. However, *can take some value* from the land; otherwise life estate could be less than useless, due to a lack of income from the land sufficient even to cover property taxes. {Hiltz}

46. Identify statutory provisions relevant to equitable waste

- a. Under s.11 of the *Law and Equity Act*, there is a presumption against equitable waste in life estates. There must be an express intention to the contrary. Such contrary intentions, however, could have the effect of transforming the gift from a life estate into a fee simple.

47. Describe two types of equitable waste

- a. *Unconscionable waste* - even where instrument permits voluntary waste (eg. it includes the words *unimpeachable for waste*), equity might grant injunction to reversioner where this waste is unconscionable or flagrant. This is the case where the waste is extreme, beyond what would be contemplated in normal activities. {Vane}
- b. *Disallowance* - applies to other relationships where one party has possession but another has a simultaneous interest, such as tenants in common, joint tenants, mortgagor/mortgagee, tenants in fee simple subject to an executory devise over, partners, purchaser by contract awaiting to perfect title in registry, etc. There is no *Hiltz* right to commit voluntary waste, and so this rule disallows both normal and flagrant waste. {Kennedy}

48. Describe two restrictions imposed by unconscionable waste

- a. *Life tenant under obligation to prevent forfeiture of property* - this means an obligation to pay taxes, among other things, where nonpayment would lead to forfeiture of the property. Further, life tenant is under obligation not to sell property against the wishes of the remainderman/reversioner. {Mayo}
- b. *Cannot order partition or sale under Partition Act if future interest reasonably objects* - while partition and/or sale can be ordered in the case of co-ownership, this is not applicable in the case of consecutive interests. However, question of whether unreasonable objection by future interest would be enforced by the Courts against such an order. {Morris}

49. Describe criticism of equitable waste

- a. Can create a virtual prison sentence through testacy / gift; one might be stuck with land which is incapable of producing income, yet nevertheless saddles the estate holder with property taxes. Often better to use a trust rather than a life estate in such circumstances, so that the trustee can ensure that the estate is arranged so as to best benefit parties in accordance with testator's intention.

50. Describe the power of the courts to alter trusts

- a. *Trusts varied or revoked for parties unable to speak for themselves - Trust and Settlement Variation Act* allows a court to vary or revoke a trust or settlement when there are parties involved who cannot speak for themselves - infants, the unborn, etc.

51. Identify four unanswered questions concerning the return of Aboriginal cultural artifacts

- a. *Rightful claimant* - museum may be unsure who is rightful claimant and fear of suit if give to wrong party e.g. claims from multiple aboriginal groups;
- b. *Restrictions* - museum may have contract with donor to keep artefacts, statutory mandate to preserve and display, did donor have legal right to give/sell artefact to museum

- c. *Preservation* - Preservation may be an issue – if returned, will the artefact be preserved (e.g. if all artefacts returned to Greece, could they house them)
- d. *Ownership* - should ownership of chattels be inalienable but to the Crown, as in land? What of fixtures, which are viewed as *attached to land* by aboriginal groups? Or, should they be seen as connected with aboriginal activities, ergo under culture / heritage rights?

52. Describe five ways in which the law of intellectual property is relevant to aboriginal artifacts

- a. *Trademark* - names, logos, and other symbols are used to sell products. Could not these be protected as trademarks, reflecting aboriginal origins? Answer is yes - can be registered under s.9 of the *Trademarks Act*, and do not expire like other trademarks.
- b. *Copyright* - artistic, musical, literary works. However, copyright is difficult for aboriginal use for three reasons:
 - i. *Time* - only protects for life of author plus fifty years;
 - ii. *Ownership* - based on individual or joint ownership, not communal ownership (although communal trust might overcome this issue);
 - iii. *Fixation* - must be written down or recorded, although relaxed evidence requirements from Delgamuukw may be helpful to this end.
- c. *Patent* - pharmaceutical interests are developing drugs based on aboriginal knowledge; currently, no way for aboriginal groups to get profits, although WIPO seeks to change this through royalty system.
- d. *Confidentiality information* - certain elements of aboriginal culture are secret, even from other aboriginals. For instance, some knowledge only available to healers.
- e. *Novel branch* - might create new branch of intellectual property for cultural interests. Difficulties include identifying who this would apply to - the Greeks, Iraqis? Or only indigenous peoples? If the latter, how are these to be identified. WIPO attempting to tackle these issues.

53. What is co-ownership?

- a. As opposed to individual ownership - *severalty*, co-ownership occurs where multiple interests or entities possess property. Two forms recognized at law, *joint tenancy* and *tenancy-in-common*. Applies to realty and personalty where two or more people own the same interest (can have co-ownership of future as well as present interests. Recognized by deed and by grant, at both common law and equity.

54. Differentiate between common law and equity positions concerning co-ownership

- a. *Common law* - interpretation at common law prefers the joint tenancy, present unity of possession and the three additional unities. This would preserve a *unity in tenure* so that the provision of services as part of tenure would be unified. When tenure was no longer important, the tenancy-in-common became preferable. This led to some surprises, however, as survivorship overrode provisions in wills.
- b. *Equity* - prefers the tenancy in common. Looks for words of severance, or shares (eg. equal moieties, or shares), words of division; these indicated a TIC, as these would undermine that each owned "the whole with his fellows". Could follow interpretation (eg. looking for indication for intent to create TIC), or substantive equitable remedy role (eg. where purchasing parties did not contribute equally to purchase price, therefore should not have equal shares). This approach is now dominant.

55. Describe three elements re: equitable interpretation of co-ownership documents

- a. *Absence of additional unities* - one of the 3 additional unities was absent
- b. *Express intent* - with express terms, for example: "To A and B in fee simple as TIC" or by using words of severance that imply in any way a division of the property into shares which is antithetical to the imagery of JT. *TIC created by slightest intention in grant* - Anything which in the slightest degree indicates an intention to divide the property, e.g. "equal shares", will create a TIC. However, where there are multiple gifts, must ensure that one considers any such words within the context of the relevant gift.
 - i. For example:
 1. "To A and B in fee simple in equal shares" {Bancroft}
 2. "To A and B in fee simple" and then in later provision "with equal responsibility for payment of debts" {Clarke}
- c. *Implied intent* - intention to benefit the extended family of one of co-owners such that it implies that survivorship would not apply.

56. Describe five statutory rules re: interpretation interpretation of co-ownership documents

- a. *TICs are to be presumed by statute for land transfers* – *Property Law Act*, s.11, with the exception of transfers to trustees and personal representatives, TIC is the presumptive disposition absent contrary intention (eg. a reference to survivorship).
- b. *TIC presumption does not apply to lease or personalty* - leases and personalty still go by rules of common law and equity. {Robb}

- c. *Unstated interests are presumed equal* - according to *Property Law Act* s.11(3), where the interests of the tenants are *not* stated they are presumed to be equal.
- d. *Residue to "successors", rather than "survivors", implies TIC* - if this were a joint tenancy, one would expect that the latter term would be used. {Winchester}
- e. *Use of "equal shares" creates presumptive TIC, not determinative* - while these words normally denote a TIC, they must not be read in isolation, and could be modified (eg. "to be theirs absolutely", which implies JT). {Winchester}

57. What is unity of possession?

- a. Requirement of co-ownership, holds that every co-owner has the right to *possess* the whole (not own the whole). Unity of possession is a present interest which can be dissolved either by mutual agreement or by partition - dissolution of unity of possession leads to severalty ownership.

58. What is tenancy-in-common?

- a. *Possession* - unity of possession, entitled to possess the whole of the property.
- b. *Ownership* - each owner possesses a share in the property; the shares do not have to be equal.
- c. *Disposition* - each can dispose of their share *inter vivos* without the consent of the other owners.

59. What is joint tenancy?

- a. *Possession* - unity of possession, entitled to possess the whole of the property.
- b. *Ownership* - each owner owns "nothing" by self, but the whole with the other owners.
- c. *Disposition* - absent *inter vivos* severance (which converts to tenancy-in-common), the right of survivorship prevails. If survivorship is impossible / precluded, then there can be no joint tenancy. Note that while JT interest can be transferred *inter vivos* (severance), cannot be disposed of by will, since survivorship has already spoken for that interest. To be a joint tenancy, there had to be the possibility of severance at the time of creation.

60. Describe survivorship

- a. Also called *jus accrescendi* - when one co-owner dies then the number of owners simply decreases. While technically, the portion of each surviving owner increases, effectively there is no change since all surviving joint tenants still all own the whole, although they don't have to share it with as many others.

61. What occurs when one joint tenant is criminally responsible for the death of another?

- a. In such circumstances, the joint tenant responsible for the death cannot benefit. The interest in land will be held in trust by the joint tenants for the heirs of the deceased person.

62. What occurs when there is only one joint tenant remaining?

- a. When the *penultimate* JT dies, the final co-owner becomes the absolute fee simple owner. If the last two tenants die simultaneously, s.2 of the *Survivorship Act* holds that eldest is deemed to have died first. Therefore, the property will pass to the estate of the younger. This will change with future legislation, will automatically change to TIC; no more presumption of death, or court constructed fictions concerning order of death.

63. Differentiate between partition and severance

- a. *Partition* - destroys unity of possession; alternatively, occurs if unity of possession is destroyed. Applicable to both types of co-ownership, converts to severalty.
- b. *Severance* - converts joint tenancy to tenancy-in-common. Can be carried out secretly, without the knowledge of the other joint tenants (unless in Saskatchewan).

64. Describe two types of historical co-ownership

- a. *Tenancy by entireties* - when land was transferred to a husband and wife in circumstances where, if they had not been married, they would have taken as joint tenants, then took as "tenants by the entireties" - title was regarded as single and indivisible, with the survivor taking their property absolutely (i.e. survivorship indestructible with no right to partition). This has been abolished by s.12 of the B.C. *Property Law Act*.
- b. *Coparcenary* - on intestacy the real property went to the heir of the deceased, usually the eldest son by primogeniture. In the absence of a son the property descended to all the daughters, and if there were more than one the daughters would take the estate jointly as coparceners. Each daughter had the right to possession. This has also been abolished now by the *Estate Administration Act*.

65. Describe three additional unities required for joint tenancy

- a. *Unity of title* - co-owners must derive their titles from the same instrument, be it a transfer or a will.
- b. *Unity of interest* - the interests of the joint tenants in the property must be the same in each of the following ways:
 - i. *Quantum* - each co-owner's portion must be equal.

ii. Duration – each co-owner must hold for the same duration e.g. can't have one holding for 10 years and the other for 20 years.

iii. Nature/Kind – each co-owner must hold the same kind of estate - can't have one with a leasehold and the other with a freehold. Consider “to A & B for lives as JT, then remainder to B in fee simple.” Once B acquires the remainder this effects a severance due to lack of unity in interest; This is because the doctrine of merger would then apply to add B's smaller interest into their bigger one, so that A and B no longer hold the same interest.

c. Unity of time – applies only to the common law, not equity. When dealing with interests flowing from the use/trust, unity of time doesn't apply. Interests of the co-owners must vest at the same time. For example, consider: “to A for life, remainder in fee simple to heirs of B & C upon their turning 21”. If B & C turn 21 on the same day (e.g. have same birthdays or are twins) then this is allowable. Otherwise there is no JT. The existence of unity of time does not apply in a transfer to uses or in a gift by will (a joint tenancy will exist as long as the other unities exist)

66. Identify three ways in which a joint tenancy can be severed

a. Mutual action

b. Destruction of additional unities

c. Creation of trust where JT is trustee

67. Describe severance through mutual action

a. Mutual, not unilateral action - by agreement of the JTs, or through a course of dealings where conduct of parties acting as if TIC. For instance, having proceeds paid to separate bank accounts, indicating proceeds go to separate estates. {Flannigan} Could also include silence by JT on matters of other JTs indicating TIC (eg. will to heirs, undermining survivorship. {Flannigan} Intention by JTs to sell property and split the profits, is totally inconsistent with JT ownership. This is evidence of severance, and therefore no survivorship. Requires mutual intent, however. {Ginn}

b. Mere intention declared by one JT not sufficient - severance occurs on the making of binding mutual agreement, even if one of the parties dies before the agreement is given effect - indicates intention. However, agreement by all tenants to sell to *third* party does not sever. {Munroe} *But*, declaration of intent to sever, without act or acceptance of others to evidence mutuality of severance is not sufficient. This is merely evidence of intention, and intention is not binding, can be abandoned. {Munroe} {Walker} {Sorenson}

68. Describe severance through the destruction of additional unities

- a. *Destruction of additional unities* - by breaking one of the three additional unities. It can happen *unilaterally* and in secret without giving the other co-owners notice (unless in Saskatchewan). {Stonehouse} Can also sever by creation of trust where JT is trustee. Charges do not destroy unity of title, although can lead to severance (eg. where mortgage charge leads to foreclosure). Wills and divorces do not destroy unity of title. Leases probably do not destroy unity of title, unless they cause survivorship to be lost. {Sorenson}
- b. *But not destruction of unity of possession* - recall that if unity of possession is destroyed then do not have severance but rather have partition - lose co-ownership altogether and get severalty.

69. Describe severance through the creation of a trust

- a. *Creation of trust where JT is trustee* - transfer of ownership to trust, even to oneself, is incompatible with JT. Therefore, even if unregistered, and transfer is to oneself for benefit of another, is incompatible with JT (although does not violate unity of title). Equity will not enforce an incomplete or imperfect gift, however. {Mee}
- b. *Valid, perfect trusts will be enforced, even if unregistered* - valid declaration of a trust that is completely constituted, in that it complies with trust law's three certainties (intent, beneficiary and what property is being conveyed), cannot be revoked except in the case of fraud, fundamental mistake, or duress, or if power of revocation is included. Operates regardless of registration, so another means for unilateral severance {Mee}

70. What occurs when unity of title has been broken through *inter vivos* transfer? Provide an example.

- a. The joint tenancy continues to bind the tenants who have not severed. The severed tenants are bound to the joint tenants via a tenancy-in-common. If there are no tenants who have not severed (eg. there were only two tenants in the joint tenancy, and one of them severed), then they will thereafter be bound by a tenancy in common.
- b. For instance, if there are three joint tenants A, B, C created under one instrument, then C sells/transfers their interest to D (i.e. under a different instrument). There will then be a joint tenancy between the original A and B, and together they form a tenancy in common with D. Hence, A and B are joint tenants each with 1/3, and together they form a tenancy in common with D (where A+B hold 2/3 and D holds 1/3)

71. What are four ways that a gift can be made?

- a. By transfer, conveyance or delivery of the property to the donee
- b. By transferring, conveying or delivering the property to a 3rd party as trustee for the donee
- c. By the donor declaring themselves a trustee of the property for the donee

d. By will

72. What effect does an agreement for sale have on unity of title?

a. *Agreement for sale and purchase not conveyance, but charge* - does not affect the unity of title, and so does not sever the JT until it is executed. {Foort}

73. What is required for equity to intervene concerning a joint tenancy?

a. *Equity tends to only come to the aid of those bona fide and for value* - equity does not aid those who are mere volunteers, receivers of gifts, or who do not make full consideration for their promises. {Foort}

74. When is severance deemed to have taken place?

a. *Severance takes effect once severer is bound* - although estate does not pass to the transferee until transfer deed is registered, severance of the JT occurs on execution/delivery of the unregistered deed - unity of title was destroyed at that time by the different instrument. {Stonehouse}

75. Differentiate between the historical and modern effect of mortgages on joint tenancy

- a. *Historically* - a mortgage would have transferred the legal title of property it is secured against to the mortgagee (leaving possession / use in the hands of the mortgagor). This would have severed joint tenancy, as constitutes an *inter vivos* transfer. {Lyons}
- b. *Modern* - mortgages no longer sever, as they are merely registered as charges in Torrens systems. This is a consequentialist approach - we are not concerned with *intention*, but only the result/consequences of the transaction are relevant - whether or not a unity is in fact destroyed. {Lyons}

76. What occurs when a JT mortgagor dies?

a. *Dies with mortgagor* - since only a charge on the JT's interest, the mortgage dies with the mortgagor - so the mortgagee loses out in this circumstance. However, if the non-mortgagor JT had died first, the other JT would have gained full interest through survivorship, and mortgage would then be secured against the entire property.

77. Describe the effect of foreclosure of mortgage on joint tenancy

a. *Absent conversion legislation, title must be considered transferred* - while the *Land Registry Act* refers to a mortgage as a "charge", there is no legislation that allows for this charge to be converted on foreclosure and the property sold. Therefore, when considering foreclosure, must continue to think of mortgages as having transferred title according to the old common law. This would effect a severance upon foreclosure. {Carlisle}

78. Describe the capacity of corporate entities to participate in joint tenancies

- a. In accordance with *Company Act* s.32, a corporation can be a joint tenant. This came to be with the rise of trustee companies. Trustees always hold as JT's so that survivorship applies. Through s.32(2), where a corporation is joint tenant of property, on its dissolution the property devolves on the other joint tenant, (so that other at least has some chance of survivorship).

79. Describe the treatment of personal and leasehold property in co-ownership

- a. *Leasehold and personal property give presumptive JT not TIC* - where leasehold or personal property is granted to two or more persons with no words of severance, the persons are JT's. The exceptions to that rule recognized by equity are: where purchase is in unequal shares (implies TIC), where property is a mortgage and co-owners are mortgagees, and business partners. {Robb}
- b. *Rules for joint tenancy concerning realty also apply to personalty.* {Dubord}

80. What is meant by the word "issue"?

- a. Statutorily defined as lineal descendants, despite its common meaning ("children").

81. Which party has to prove severance?

- a. *Onus of proof re severance* - the onus to prove that there was a severance is on the party that asserts it. {Sorenson}

82. How is partnership dealt with in view of co-ownership?

- a. *Partnership Act* s.25 recognizing that Equity regarded survivorship as incompatible with partnership, partnership land is viewed as a tenancy in common: Where land or any other heritable interest has become partnership property, it shall, unless a contrary intention appears, be treated between partners as personal property and not as a real or heritable estate.

83. What are equitable tenants in common?

- a. *Equitable tenants in common* - where two people are in possession of a property to which they have both *substantially* contributed, and there is a clear *intention that both should have possession*, even though only one name appears on the deed they are *equitable tenants in common*. Neither one can oust the other as they are entitled to concurrent possession, use, and enjoyment of the land. When land sold, each will be reimbursed according to their contribution.

84. Describe five statutory rules for transfer of a joint tenancy interest to oneself

- a. *Common law vs. statute* - not possible to transfer an interest to oneself at common law; however, now allowable in BC via s.18 of the *Property Law Act*.
- b. *Applicable to JT* - s.18(1) - a person may transfer land to himself in the same manner as to another person, and a JT may transfer his interest in land to himself
- c. *Applicable to trustees and representatives* - s.18(2) - a trustee or personal representative may transfer land to himself in his personal capacity
- d. *Self-transfer by JT owner severs JT interest* - s.18(3) - a transfer by a JT to himself of his interest in land, whether in fee simple or by a charge, has and shall be deemed always to have had the same effect of severing the joint tenancy as a transfer to a stranger.
- e. *Self-transfer can be done jointly* - s.18(4) - a registered owner may make a transfer directly to himself jointly with another (e.g. A transfers to A and B as JT's or TIC's) and registered owners may make a direct transfer to one or more of their number either alone or jointly with another.

85. Describe three provisions under the *Land Titles Act* relevant to co-ownership

- a. *Property does not transfer until registration has occurred* - s.20 - property does not transfer until registration has occurred; except as against the person making the document. So, this provision applies only to third parties. Third party could be a purchaser of the property, or a lender to Stonehouse, for instance. The daughter would surely not have been a third party; has an unregistered registered interest, and would be vulnerable to those who registered their interests.
- b. *Registration of fee simple with insistence* - s.173 - several persons interested in registration: The registrar may effect registration of the fee simple at the insistence of one or more co-owners of a JT or TIC
- c. *Registration of multiple JT owners* - s.177 - registration of Joint tenants: Where, on the registration of the title to land under an instrument or document, two or more persons are JT's, the registrar shall enter in the register following the names, addresses and occupation of those persons, the words "joint tenants".

86. Describe five guidelines concerning division of profits between co-owners

- a. *No obligation to pay rent for occupation due to unity of possession* - where one co-tenant is exclusive occupier, but there is no agreement / ouster, that tenant does not have to pay occupation rent to others, as they have a right to be there in accordance with unity of possession. {Spelman}
- b. *No obligation to share profits from own labour and capital* - where one tenant is receiving a return for his own labour and capital he is not receiving more than his just share, and his co-tenant has no right to it (only fair since consider the reverse situation where a tenant

makes couldn't ask co-tenant to pay a share of a loss). {Spelman}

- c. *No obligation to account for profits* - in the absence of a contract (i.e. between tenants to share profits) or ouster, there is no obligation to account for profits, except for in the case of pure rents. {Spelman}
- d. *Cannot ouster other tenants* - cannot preclude access to property for other tenants, directly or indirectly (latter case, by making situation so awful so that tenants cannot enjoy) - this leads to a cause of action. {Spelman}
- e. *Probable obligation to share pure rent* - where profit obtained through rental suite jointly owned, need to share profits; pure rents divided equally between JTs, or according to proportionate shares of TICs - *Estate Administration Act*, s.71. {Spelman}

87.How are expenses divided between co-owners?

- a. At common law, owners could not compel other co-owners to pay cost of repairs or recover voluntary expenses. Under s.13 of the *Property Law Act*, when a co-owner has to pay more than his proportionate share of mortgage, money, rent, interest, taxes, insurance, repairs because of default of another registered owner, he can apply for relief under s.14 - remedies include lien and/or sale.

88.Describe five guidelines concerning distribution of expenses on partition or sale of JT

- a. *Awarded allowance* - tenant may be awarded an allowance for paying more than his proportion of the repairs - providing they increased the capital value - and the maintenance of the property. Other tenant cannot take advantage of the increased price without submitting to an allowance for them. Where one tenant has paid more than his share of the encumbrances he is entitled to an allowance for such surplus. If you are claiming repairs and expenses, then you may also have to pay occupation rent. {Mastron}
- b. *All owners must pay for expenses w/ common obligation* - all co-owners must pay, so there can be immediately recovery of such an expense - now written into statute in s.13 and s.14 of *Property Law Act*. {Leigh} *Procedural, not substantive* - sections 13 & 14 of the *Property Law Act* are merely procedural, and they do not create any new obligations beyond the common law.{Bernard}
- c. *Expenses made without common obligation at request* - if made by one co-owner at request of the other co-owner, can be recovered immediately based on notions of implied agency, promise, or from business practices. {Leigh}
- d. *Expenses made without common obligation, no request* - if not made at request of other co-owner, this is a voluntary expenditure. If an option was given to the other co-owner to *adopt*, and adoption occurs, then can be recovered immediately. If option given to adopt, but this is *rejected*, then no contribution can be recovered. If no option given to adopt, then

no recovery. {Leigh}

- e. *Expense without common obligation which increase value* - by equity on partition, if expenses increased the value of the property then at equity a contribution can be recovered since would be unjust for the other party to benefit from the increase in price without having contributed to those expenses. {Leigh}

89. How can partition be effected?

- a. Where one co-owner wants to sever but other(s) do not, so must go to court to break co-ownership. No more power at common law, so can only be effected through equity (personalty) under the *Partition of Property Act* (realty).

90. What tenancies does partition apply to?

- a. According to s.2 of the *Partition of Property Act*, both joint tenancy and tenancy in common are subject to partition, which destroys the unity of possession. Applies regardless of whether the property is subject to liens from mortgagees, creditors, or other parties.

91. What is the outcome of partition at equity?

- a. Because equity deals with the partition of personalty, not realty, and personalty cannot be split (eg. cannot cut a horse in half), the outcome of a partition application at equity is the sale of the property at issue.

92. What factors influence the outcome of a claim for partition at equity?

- a. *Partition cannot be ordered if "good reason to contrary"* - this is not a hard and fast definition, but rather flexible, meets the needs of each given case. {Bradwell}
 - i. *Those who come to equity must have clean hands* - as partition based in discretion of the courts at equity, one who seeks partition claim must not have exhibited unworthy behaviour. {Rayner}
 - ii. *Clean hands are not "required" under Partition Act* - court does have the power to refuse order for partition for equitable reasons, but, claimant does not have to demonstrate entitlement to equitable relief. Onus must be on party claiming *mala fides* conduct. {Bradwell}

93. What is the outcome of statutory partition?

- a. According to s.3, can include sale with distribution of the proceeds, or alternately the division of realty between the parties. If the claimant owns more than 50% of the property and requests sale, the court must order the sale absent a good reason not to do so (s.6). If the claimant owns less than 50%, the court has discretion concerning whether to order the

sale of the property (s.7). Finally, if the court sees fit, parties can be bought out by other tenants (s.8).

94. What four factors influence the outcome of a statutory claim for partition?

- a. *Prima facie right to partition* - Co-owners (eg. those with a 50% or greater stake in the property) have prima facie right to partition - this is reflected in s.6 of the *Partition of Property Act*. Courts have discretion under s.2, purpose is to protect equity / fairness. {Harmeling}
- b. *Motivation and faith are not relevant to exercise of property rights* - the court does not have to refuse an order simply because an applicant does not have "clean hands" - questions of motive or bad faith are not really relevant to property division. {Harmeling}
- c. *Relative hardship not sufficient to deny partition, must be serious* - in order to deny partition, the extent of the hardship and unfairness suffered by allowing the claim must be serious. {Harmeling}
- d. *Courts give more consideration to spouses than to siblings* - partition is far more likely to be denied where between spouses than between siblings or other JTs / TICs. This is often because siblings not responsible for each others children, unlike spouses. See s.55(2) if the *Family Relations Act*, where partition and sale can be refused or varied on marriage breakdown. {Harmeling}

95. Who can seek an order of partition?

- a. *Only those who have a right to possess can make an action for partition* - TICs and JTs can make such actions, but creditors are not so entitled to maintain a partition action - nor is a remainderman or other holder of future interest. It is not clear how court would treat partition claim by holder of life interest. See s.4 of the *Partition of Property Act*. {Morrow}

96. Describe the way that wills are treated post *Robson*

- a. *Everything in a will is equitable* - freehold estate is vested in the executors, not the life tenant, and the executors held the land as trustees for those who were entitled to equitable estates on the death of the testator. Therefore, rules of destruction, remainder rules, etc. do not apply. However, must still consider common law position, as *Robson* is uncertain. {Robson}

97. What is a gift over?

- a. Transfer of property to take effect after the termination of an intermediate estate such as a life estate.

98. What is a present interest?

- a. An estate in possession. It is “vested in interest” meaning that one has the interest now, and additionally is also “vested in possession” meaning can take immediate possession. If “vested in possession” then will also be “vested in interest” automatically.

99. What is required for an interest to vest?

- a. Party receiving must be identified, and must be *in existence*. If one has said “to my first born son” this is not a vested right if the son has not yet been born - this would be contingent on the son being born.

100. Differentiate between vested and contingent interests

- a. Any condition other than the passing of the *prior particular estate* itself means that the interest is merely contingent (may pass to donee). Absent such conditions, the estate is vested in interest, certain (will pass to donee). If there are no conditions precedent and no conditions subsequent, the property is *absolutely vested*.

101. Differentiate between conditions precedent and conditions subsequent

- a. Conditions subsequent do not prevent vesting. They *can* divest, and so are referred to as *defeasible conditions*. An estate with a condition subsequent is vested, but subject to a contingent right of entry, which is a condition precedent for the *right of re-entry*.
- b. Conditions precedent can prevent vesting.

102. What is an estate in expectancy?

- a. A future interest - one currently owns a present right for future possession, which may or will be obtained (depending on whether there are conditions precedent).

103. What are the requirements for a contingent gift to become certain?

- a. *Identity of the devisee* - the identity of the grantee / devisee is established / ascertained and the grantee / devisee is in existence. Consider an unborn child - the identity is known, but the gift doesn't vest until the child is born.
- b. *Exact shares determined* - in the case of a class gift, then the interest is contingent until the class becomes closed - no more can join the group.

104. Describe three components to dealing with ambiguity in contingent interests

- a. *Preference for early vesting* - where there is an ambiguity in a document between a vested interest and a non-vested interest, the courts have a preference for early vesting to avoid

the problems of contingencies, and choose construction which will lead towards vesting.

- b. *Must take account the purpose of the instrument* - if vesting will not alter the purpose of the document (eg. to provide income for life interest to one party, then to other parties thereafter), then the court should interpret the document in light of this. {Moody}
- c. *Will must be read in context, although there are magic words* - cannot say that certain words always create a condition precedent and other always create a condition subsequent, since must look at the provisions of a will in context. But, words like “upon”, “when”, “if”, “as”, “as soon as”, “provided” all are more likely to imply conditions precedent, *whereas* “but if” is more likely to imply condition subsequent. {Carlson}

105. What is the rule from *Saunders* concerning absolute gifts?

- a. *Absolute gift held in trust can be taken over upon age of majority* - If absolute gift given, but trustees directed to remain in possession for period of time, during which they accumulate income from capital, the beneficiary can immediately bring the trust to end upon gaining age of majority. {Saunders}

106. What is the applicability of the rule from *Saunders*?

- a. *Rule from Saunders applies only to absolute gifts* - if the gift is contingent, defeasible, if there is a gift over, or if any other person may have an interest in the trust, then this principle does not apply. Read with entire document (eg. does it use language like “if you should attain”, does it separate property from estate?). {Squire}

107. What effect do intervening life interests, without conditions, have on contingent interests?

- a. *Preceding life interest never stops the vesting of an interest in the remainderman* - if no condition precedent, there is immediate vesting in the *remainderman* on testator's death. Therefore, remaindermen have an interest which one could leave in will, etc., even though the life interest remains alive. {Moody}

108. When the whole of a gift may be used of a certain age, does this affect vesting?

- a. *Interest cannot vest until certain* - when the whole of a gift, income and capital may be used for the benefit of one person until a stated age, divided thereafter, the residue is not vested in the other until the first person reaches the stated age. This is because when the first person has the power to encroach, exact amount of residue cannot be determined. {Carlson}

109. Does the presence of a condition subsequent disentitle one to income until that condition is affirmed?

- a. *Existence of gift over implies immediate interest* - consider a gift to a devisee upon attaining a certain age (eg. to A upon reaching 21), with a gift over to some other ascertained person if

the devisee dies before reaching that stated age (eg. to B if A does not reach 21). The very existence of the gift over shows that the first devisee (A) is to take an immediate interest - B gets the gift because A does not. Therefore, A is entitled to income from estate from execution until stipulated age. {Phipps} *Phipps rule applies to personalty as well as realty.* {Barton}

110. What is the rule of destruction of contingent remainders?

- a. If a remainder was still contingent at the time when the prior particular estate ends, this would result in an unacceptable gap in seisin. Therefore, on passing of the prior particular estate, all unmet contingencies are destroyed - they can no longer be met. So, in such circumstances, property becomes subject to gift over. {Festing}
- b. Destruction of contingent remainders does not usually apply to legal executory interests. {Pells}

111. Identify three types of future interest

- a. *Common law future interests* - applies to legal interests.
- b. *Legal Executory Interests* - applies to legal interests created by the *Statute of Uses* executing the use (not the double use).
- c. *Equitable future interests* - applies to the equitable interest created by the double use - trusts.

112. Identify four types of common law future interest

- a. *Remainder* - only type which can go to someone *other* than the grantor. Occurs where possession is postponed until after the expiration of some prior particular estate. Springing / shifting interests are considered *only* in the context of remainders. Can be vested in interest, or contingent.
- b. *Reversions* - always vested in interest, as they *must*, not *may* return. Portion which remains with a grantor who has not exhausted the whole of the interest by the transfer. This portion is always called a reversion, regardless of whether it is subsequently transferred by will or other grant.
- c. *Right of entry / re-entry* - defeasible grant with a condition subsequent that can occur after vesting and if so grantor has right to re-enter by bringing action within six years, via *Property Law Act* s.8(3). A complete gift is given, but the condition subsequent operates so as to terminate the estate - a permissible exception to repugnancy.
- d. *Possibility of reverter* - arises when a grantor creates a determinable gift in fee simple or life estate which is to last until the occurrence of some future determining event, and the event may or may not happen. Not giving completely and taking back, as in right of entry, rather

it is giving something less. Possibility of reverter itself is vested - determining event is a "natural" termination as opposed to a condition subsequent which cuts short an otherwise completely given estate.

113. What are two differences between a right of reentry and a possibility of reverter?

- a. *Determining event* (from possibility of reverter) states the limit for the estate first granted in the granting clause. In right of entry, complete grant given, then cut short unnaturally through *condition subsequent*. {Tilbury}
- b. *Rule against perpetuities does not apply to possibility of reverter* - an intercession by a determining event is seen as a naturally occurring termination of the estate, and therefore the rule against perpetuities does not apply. It does apply to the right of entry, which gives a complete gift and then revokes it. {Tilbury}

114. How do the courts determine which type of future interest is present in a given document?

- a. *Earlier direction governs in case of ambiguity* - if there is any inconsistency in the deed the earlier direction governs; generally, this would be the granting clause. {Tilbury}

115. How can one identify whether there is a possibility of reverter versus a right of reentry?

- a. Does the clause set a limit on the estate first granted (determining event), or does the clause operate to defeat the estate first granted (condition subsequent)?
 - i. *Determining event* - part of words of limitation and marks natural boundary of the estate rather than operating to defeat it. Grants only limited estate, which could possibly endure forever - subject to "until x" or "for as long as x" - must clearly mean that duration of the estate depends upon the future event. {McKellar}
 - ii. *Condition subsequent* - independent clause added to a fee simple absolute which operates to defeat it prematurely, defeats title already granted before that title reached natural boundary. Re-entry must be exercised by grantor or estate to destroy the fee simple. Normally created by use of words including "but if", "until", etc. {McKellar}

116. How is the possibility of reverter treated by Torrens registries?

- a. *Possibility of reverter is not a charge, but limitation on grant* - therefore, mortgage cannot be secured against possibility of reverter. {Westsea}

117. Describe four rules restricting remainders re: common law future interests. Provide examples.

- a. *Freehold support by same instrument* - remainder must be supported by a prior estate of freehold created by the same instrument as the remainder. Attempts to avoid springing

interests, those which *pop up* after a gap in seisin.

- i. Consider a gift from A to B, if B reaches 21. If A dies before B reaches 21, there is no freehold estate to support the remainder. B's interest invalidly "springs up" at age 21, so B gets nothing.
 - ii. Consider a gift from A to B for two years, then to C in fee simple. The gift to C has no freehold support, as gift to B was leasehold, due to certainty in time. C gets nothing.
- b. *Must vest before or at termination of prior particular estate* - remainder must be limited so as to be capable of vesting, if it vests at all, before or at the moment of termination of the prior freehold estate. Attempts to avoid gaps in seisin.
- i. Consider a gift from A to B, then to the first son of B to reach 21. B could die *before* his first son reaches 21 - potential gap in seisin. Will wait and see. If no son of B reaches 21 in B's lifetime, the estate reverts to A.
 - ii. Consider a gift from A to B for life, and then to B's son one year after B's death. This is void, because it would always create a gap in seisin.
- c. *Condition subsequent can only benefit transferor* - remainder is void *ab initio* if it takes effect in possession by prematurely defeating the prior estate of freehold / the prior particular estate. Can have conditions subsequent for right to re-enter, but not to benefit third parties. Avoids shifting interests. Note that determining events do not unnaturally end estates, and so are exempt from this rule - can benefit third parties.
- i. Consider a gift from A to B, but if X occurs, then to C. This would prematurely and unnaturally end B's interest in favour of C. However, if this had been constructed as a determinable interest (eg. "until" instead of "but if"), would have been valid.
- d. *Remainder after fee simple is void* - cannot pass remainder after entire fee simple; applies to a transfer of a fee simple with conditions subsequent or determinable interests.
- i. Consider a gift from A to B, but if X occurs, then to C. This creates an interest after a fee simple has been given.
 - ii. Consider a gift from A to B, until X occurs, then to C. This is allowable, since a lesser estate (a fee simple subject to a determining event) was given.

118. What are legal executory interests?

- a. Occurs where the *Statute of Uses* executes equitable interests, passing legal title to the *cestui que use*. However, common law remainder rules do not apply to these interests. Therefore, can have springing and shifting interests in legal executory interests. Also called executory limitations where they arise *inter vivos*. Destruction of contingent remainders does not

usually apply to legal executory interests. {Pells}

119. Describe the application of the destruction of contingent remainders rule to legal executory interests.

- a. *Destruction of unmet contingent remainders not always avoided at equity* - interests which comply with the four common law remainder rules are treated as remainders, and so run the risk of destruction. So if “waiting and seeing” under rule 2 with an interest that was otherwise valid by the 4 rules, if it turned out the condition precedent on the contingent remainder was not satisfied, could not then save the remainder by calling it a legal executory interest. This presumably still applies. {Purefoy}

120. What is a springing use? Provide examples.

- a. Occurs where a legal executory interest is granted where the gift otherwise would have been invalid due to a gap in seisin (this is because it achieves immed. transfer to the party, thus avoiding the gap).
 - i. Consider a gift from A to B for the use of C when C reaches 21. The grant is executed, so that B receives nothing, and C receives legal title and use.
 - ii. Consider a gift from A to the use of B for life, and to C one year after B's death. C receives legal title and use, which “springs” into being one year after B's death.

121. What is a shifting use? Provide examples.

- a. Occurs where a legal executory interest is granted where the title shifts to a third party on the occurrence of some event.
 - i. Consider a gift from A to B for the use of C, but if X occurs, then to the use of D. This is acceptable; no need to consider whether conditions subsequent (which can only revert to grantor) or determinable interest.

122. Describe equitable future interests

- a. Done through double use / in trust for (where three certainties satisfied). Such interests are not subject to the 4 common law remainder rule or destruction of contingent remainders. No gap in seisin applicable, because gap would apply only to gap in benefit, not in ownership. These interests are only subject to rule against perpetuities.

123. Describe the application of the destruction of contingent remainders rule to legal executory interest

- a. Rules of destruction do not apply to an equitable contingent remainder that has been turned into a legal contingent remainder through the *Statute of Uses*. No longer applicable

in England, certainly. {Robson}

b. *Purefoy, not Robson, applies to wills* - unmet contingencies are destroyed, because wills are not treated as equitable. {Crow}

124. Identify three step process for dealing with springing and shifting interest on an exam

- a. *Equitable* - check first to see if it is an equitable future interest i.e. a trust (i.e. a double use) - if so, no problem
- b. *Legal executory interest* - single "use" / testamentary - if so, no problem unless it meets the 4 common law remainder rules in which case will be treated as a remainder and so still runs the risk of destruction after a wait and see period via *Purefoy*.
- c. *Inter vivos or will* - if in a will, discuss applicability of *Robson*, then the common law position in the alternative.

125. Describe inter vivos transfer or disposition by will concerning future interests

- a. *Inter vivos* - a contingent, executory or future interest in land, and a right of entry on land, immediate or future, vested or contingent may be disposed of - *Property Law Act*, s.8(1)
- b. *Will* - one may dispose of all property to which he is entitled in law or in equity, of estates pour autre vie, contingent, executory, or other future interests in property, and rights of entry - *Wills Act*, s.2

126. How are future interests dealt with in view of registration?

- a. Such interests are registered as *charges* against property. The title of the trustee, but not the details of the trust are registered, under s.172 and s.176 of the *Land Title Act*. Under s.10 of the *Property Law Act*, possibility of reversion or right of reentry may be registered as a charge.

127. Identify x circumstances under which a gift can be held to be invalid?

- a. Invalid condition precedent
- b. Invalid determining event
- c. Illegality
- d. Restraint on marriage

e. Restraint on alienation

128. What occurs when a determining event or condition subsequent is invalid?

- a. Invalid determining events make the entire gift void, because these events are part of the grant - part of the words of limitation in fact. {Tilbury} Courts will sometimes try to interpret this as a condition subsequent so that the gift can remain, however; conditions subsequent do not invalidate the gift itself.

129. What occurs when a condition precedent is invalid?

- a. Condition precedent (contingent interest): invalid condition precedent makes it impossible to satisfy, so generally invalidates the gift.

130. Describe six rules concerning the allowability of restrictions on alienation

- a. *General restrictions on alienation are not allowable* - restrictions on alienation are valid only if they apply to or exclude a particular class of persons. Total restraints are not allowable. {Blackburn} Key question is whether condition is substantially a total restraint - question of substance, not mere form. {Brown}
- b. *Acceptability of partial restraints increased if time limited* - the lesser the restraint, the more likely it is that the court will enforce it; limiting partial restraints by time makes them more acceptable. However, this cannot make a total restraint more acceptable. {Blackburn}
- c. *Can restrict from selling to a particular individual or class of persons* - for instance, can restrict from selling to A, or from selling to the sons of A. {Brown}
- d. *If alienation only allowed to a class which is diminishing, it is invalid* - over time, alienation limited to diminishing class will amount to a general prohibition on alienation. This is not the case with a stationary or expanding class, however. {Brown}
- e. *Can restrict from a certain type of alienation so long as other means available* - for instance, can prohibit the sale or mortgage of lands in grant, because this would still allow for the grantee to dispose of the lands through transfer, will, or lease. This does not amount to a substantive prohibition on alienation. {Porter}
- f. *Not a restriction if estate is determinable* - can have significant or perhaps even an absolute restriction on alienation on determinable estate, because with such estates, less than a complete gift has been given. Such estates end naturally, unlike with re-entry (where provision may have been invalid). {Leach}

131. Describe the significance of uncertainty

- a. Courts historically used uncertainty to get rid of racial/religious conditions. This was done for pragmatic purposes, as a means to achieve policy objectives concerning the

undesirability of enforcing these clauses.

132. Describe the use of deference by the courts to avoid uncertainty

- a. *Religious provisions can be valid where there is a means to render them certain* - for instance, the Court can refer to the head of a religion in order to determine who would fit definitions of membership as they are found in wills or other grants. {Tuck}

133. Differentiate between the treatment of uncertainty with conditions subsequent and precedent

- a. *Subsequent* - these conditions can continue to have importance for duration of the estate, so it is important that the donee be able to understand, with certainty and from the outset what actions/conditions will lead to loss of the interest. So, uncertainty renders conditions subsequent void (absolute gift remains)
- b. *Precedent* - these conditions are only applied once at the beginning of the interest, so the bar is lower with a view to uncertainty. Grants which would be uncertain and therefore void as conditions precedent may be enforced as conditions subsequent. Less clarity of understanding is required.

134. How do the courts carry out interpretation concerning uncertainty in conditions?

- a. *Courts prefer interpretation of conditions subsequent, not precedent regarding uncertainty* - so as not to invalidate gift, courts will try to interpret these conditions as conditions subsequent, not conditions precedent - therefore the invalidity can be flicked off, absolute gift remains. {Messinger}

135. Describe the applicability of the rule against perpetuities

- a. This rule applies across the board, to contingent interests whether legal or equitable, to legal executory interests (rights of entry), to equitable executory interests (springing and shifting interests), to personalty and realty, to wills, deeds, and contracts; to any gift with a condition precedent (contingent).

136. What is the rule against perpetuities?

- a. The grantor / deviser of a gift can only exert control over what has been gifted for three generations, including one's own - and only 21 years into the lives of the third generation. Not interested in whether an interest will vest, but rather with *when it may vest, if at all*. The mere possibility of vesting outside of the perpetuity period makes it void at common law.

137. Differentiate between the old and modern rules against perpetuities

- a. *Old rule* - from *Whitby v. Mitchell* - if an interest in realty is given to an unborn person, any remainder to his issue is void, together with all subsequent limitations.
- b. *Modern rule* - from *Duke of Norfolk* - an interest is only valid if remote vesting is possible, meaning that the interest can vest *within* the perpetuity period.

138. How is the perpetuity period calculated?

- a. The lives in being at the date the instrument takes effect plus 21 years; the effective date for a will is on the death of the testator, while for a transfer it is the date that the transfer is executed. If a deed is revocable through a special clause, then it starts when the power of revocation is lost - eg. usually on the death of the settlor.

139. Describe lives in being

- a. These must be human lives, not animals or corporations. May be expressed or impliedly involved in the gift, and need not be the beneficiaries - so technically, anyone alive could be used. However, this is without utility, as to be effective must have some bearing on the gift.

140. What occurs if there are no lives in being?

- a. If no life in being is possible either expressly or implied, the perpetuities period is 21 years only.

141. What are two requirements if the lives in being are a class of persons?

- a. *Closed class* - must be alive at the date of the creation of the interest, must be a closed class. For instance, "all my children", if one is still alive, is an open class, because one could have more children (until death at common law, or until one reaches a defined age according to *Perpetuities Act*). All my children would be fine in a will, however (testator can't have more children, because testator is dead on execution).
- b. *Ascertainment of death* - can use any number of measuring lives, so long as it is possible to ascertain when the last one dies. If too many lives are chosen, the disposition may fail for uncertainty.

142. Can the unborn be used as lives in being or beneficiaries?

- a. Unborn children can be used as lives in being if they have been conceived, *en ventre sa mere*, and can benefit from a gift if they have been conceived by the end of the perpetuity period.

143. Describe four requirements of the rule against perpetuities at common law

- a. *Beneficiaries* - the person or persons entitled to the interest must be ascertained.
- b. *Conditions* - any conditions precedent which are attached to the interest must have been satisfied
- c. *Share* - with class gifts, share to be taken by each member of the class must be certain - the class must be closed by the end of the perpetuity period, and the possibility that this will not occur renders the gift invalid. However, if the intention of the grantor was to *close the class* after a period of time, the court can do this to make the gift valid. {Andrews}
- d. *Wait and see* - no wait and see period, so absolute certainty of vesting must be present at the time when the perpetuity period starts to run.

144. What is the remedy at common law for violations of the rule against perpetuities?

- a. *Struck out of instrument* - when an interest is invalid for infringing the perpetuity rule it is struck out of the instrument that contains it. All interests which are ulterior to and dependant upon the invalid interest must also fail. However, an interest is not invalid merely because it is followed by an interest that is invalid.

145. What is the effect of the *Perpetuity Act*?

- a. Except as provided by this act, the rule of law known as the modern rule against perpetuities continues to have full effect. If a gift passes the common law rule, then it is valid. However, if not, then one must look to the remedial sections if the *Perpetuity Act* to determine what must be done.

146. Describe the procedure for determining the validity of a gift under the *Perpetuity Act*

- a. *Applicability* - s.2 - applies to instruments taking effect after December 31, 1978. Otherwise, have to consider validity through common law.
- b. *Division* - divide the gift into its component parts (interests); determine whether each interest is vested (no problems) or *contingent* (potentially problematic re: perpetuities).
- c. *Determination* - for each contingent interest, determine:
 - i. *Beginning* - when does the perpetuity period start? If a will, on death of testator, for instance.
 - ii. *Lives in being* - who are the *effective* lives in being? For lives in being to be effective, the duration of lives must have some influence on vesting of gift.
 - iii. *Ending* - when does the perpetuity period end? This will be 21 years after the death of the last life in being.

iv. Requirements - what are the contingencies which must be satisfied? Can these happen after the perpetuity period, or *must they happen within perpetuity period*?

147. Describe the remedial procedure for an invalid gift under the *Perpetuity Act*

- a. *80-year period* - s.7 - interest is valid if it must vest, by express terms or necessary implication, within 80 years of its creation.
 - i. Cannot move backward, only forward, so this rule cannot apply if s.9 (wait and see) has been considered.
- b. *Capacity to have children* - s.14 - according to this act, only males over the age of fourteen are capable of having children; only females between the ages of 12 and 55 are capable of having children. Evidence of infertility can also be considered. Children acquired through adoption or legitimation are not considered. This section can be used to close / ascertain classes.
 - i. Cannot move backward, only forward, so this rule cannot apply if s.9 (wait and see) has been considered.
- c. *Wait and see* - s.9 - contingent interests are not invalid until actual events show that they are incapable of vesting within the perpetuity period. s.10 provides lives in being applicable to wait and see period.
- d. *Age reduction* - s.11 - if interest contingent upon attainment of years greater than 21 and thus violates rule against perpetuities, the age required will be reduced to the nearest age to avoid the violate. Reduces by the minimum amount necessary.
- e. *Class splitting* - s.12 - if members or potential members of a class prevents s.11 from saving the gift those persons should be excluded. If there are still too many members in class making it void, then those should be excluded as well.
- f. *Cy pres* - s.13 - discretion of the court to vary a disposition as it sees fit, to make a gift valid if this can be done within the testator's intentions.

148. What are incorporeal interests?

- a. Interests in relation to land, but not in land itself, as they do not give a right to possession.

149. What are incorporeal hereditaments?

- a. Interests in relation to land which can bind third parties/future owners, in spite of a lack of privity of contract.

150. Identify the four main types of incorporeal interest

- a. *Easements* - can bind third parties; positive and negative forms.
- b. *Profit a prendre* - right to enter land, take something from it (eg. a benefit).
- c. *Covenants* - may bind with notice; allow for more leeway than easements; equitable only.
- d. *Licences* - right to do something on land which would otherwise be trespass. Does not bind third parties generally.

151. Identify two types of easement

- a. *Positive easements* - gives the owner of the land benefited, the *dominant tenement*, the right to enter the land burdened, the *servient tenement*, for some purpose (eg. a right of way). Do not confer possession, nor does this allow taking anything away (would then be profit a prendre).
- b. *Negative easements* - restrict the owner of the servient tenement in his/her use of it in a way which benefits the dominant tenement (eg. refrain from building structures which would block light). Legal and equitable.

152. Describe the subject matter of negative easements

- a. Limited to matters which can be the subject matter of a grant.

153. How can easements be made binding?

- a. Unlike covenants, easements can bind without notice. However, this is not the case in Torrens jurisdictions, where they must be registered as a charge on servient land, and noted on dominant land. Mere registration does not mean that they are enforceable, however - this is left to the purview of the courts.

154. How are negative easements created?

- a. Negative easements can be created by mutual agreement. However, can also be created through prescription (eg. period of open, notorious, uninterrupted use), unlike restrictive covenants. Prescription no longer applicable in land title (Torrens) jurisdictions.

155. Differentiate between easements and rights

- a. Easements are not the same as natural rights (eg. riparian rights), which are part of the land itself, ergo corporeal (not incorporeal) hereditaments. Easements are not the same as public rights, as they extend rights only to the dominant tenant, and not to any third party.

156. Identify six requirements for valid negative easements

- a. *Where requirements are met, easement is established* - if requirements for easement are met, then right to move upon the land of another can be considered an easement which runs with the land. {Dukart}
 - i. *Easements require both dominant and servient tenement* - this is what differentiates easements from public rights, as the benefit drawn from the servient tenement is for the benefit only of the dominant tenement, and not for the public at large. {Ellenborough}
 - 1. Not required for statutory right of way under s.218(1) of the *Land Title Act*, where necessary for operation and maintenance of undertaking by certain parties (Crown corporations, utilities, timber companies, etc.)
 - ii. *Easements can grant hybrid public and private rights* - giving access rights to the grantee and to others as well (eg. both a public and private right) can still pass muster as an easement. Solely public rights not allowable - still need dominant tenement. {Dukart}
 - iii. *Objective benefit to the dominant tenement required* - right granted must inherently benefit the dominant tenement, be connected with the normal enjoyment of and proximate to that tenement. An increase in value of the land is persuasive, but not determinative to this end. {Ellenborough}
 - iv. *Dominant and servient tenement owners can be the same person* - while at common law, the opposite was true, according to s.18 of the *Property Law Act* these owners can now be the same person. {Ellenborough}
 - v. *Must be subject matter appropriate for easement* - must be sufficiently defined and certain, not vague. Must not be inconsistent with servient owner's possession (eg. cannot occupy land, or take things from land). If the easement amounts to occupation, inapt. Can be for mere recreation. {Ellenborough}
 - vi. *Intentionality required to run with land* - must be more than arrangement between the parties, must have been made with intention for benefit to run with the land; must be intention for successive title. {Ellenborough}

157. What subject matter is not suitable for negative easements?

- a. *Four categories which are not suitable for negative easements* - obstruction of view, reception of wind in *undefined* channel, sun/shade, protection from weather. such restrictions on land use would amount to far too great a restriction on the servient tenement. {Phipps}

158. What is the reason for the limitation of the subject matter of negative easements?

- a. *Positive easements allow novelty, negative easements do not* - as negative easements restrict titles and can bind owners without notice, courts have been hesitant to expand allowable subject matter. Restrictive covenants, with notice requirements and lack of prescription are

apt to cover this subject mater. {Phipps}

159. What are the requirements for profits a prendre?

- a. *Profits* - must be a thing taken; this has to be part of the land and must be susceptible to ownership. Therefore, does not include water.
- b. *No dominant tenement* - can be granted in *gross*
- c. *Possession* - gives right to possession by severing and taking - but since the thing taken is converted to personalty, this is not a right to possession of the land itself.

160. What is included with profits a prendre?

- a. Right to remove designated items, right to enter and use surface for removal of profit.

161. What are covenants?

- a. Not true incorporeal hereditaments, as they do not generally run with the land. To this end, more akin to contracts. Covenantor promises not to do something with respect of the servient land. In this way, similar to negative easements.

162. Identify two types of privity relevant to covenants

- a. *Binding with privity of contract* - if the parties who originally made the covenant are involved, then the covenant is enforceable as a contract.
- b. *Binding with privity of estate* - if the parties involved have privity of estate, contract is enforceable so long as terms touch and concern the estate.

163. Identify four requirements for covenants to be binding at common law

- a. *Benefits, not burdens, run with the land* - restrictive covenants / burdens do not run with the land; only benefits, which touch and concern dominant tenement and intent to run with the land are said to run with the land. No servient tenement is required. {Snipes}
- b. *Burden of a covenant does not run with freehold land* - successors in title not bound re: burdens. Only the benefits can pass. An obligation to pay maintenance is a burden so cannot pass to successors. {Austerberry}
- c. *Unenforceable covenant can be enforced if burdened party avails* - if a party owning land subject to an unenforceable covenant (eg. payment for upkeep of road) wants to avail itself of the benefits of that covenant (eg. maintained road), then must live up to covenant. {Halsall}

- d. *Taking a benefit in the past not binding* - just because a party has availed itself re: unenforceable covenant at one time does not bind it permanently; the burden no longer has to be paid once the availing party no longer wants the benefit. {Parkinson}

164. What are two elements required for enforceable covenants at equity according to *Tulk*?

- a. *Covenants are binding at equity with notice* - would be unconscionable to allow owners to ignore covenants which they were aware of when they purchased the land (price also reflects burdens on land). {Tulk}
- b. *No further inquiry required, beyond notice* - enforced independent of whether the covenant runs with the land at common law, or whether it was a positive or negative covenant - third party buyer is treated the same as the vendor. {Tulk}

165. Identify five requirements for enforceable covenants at equity post-*Tulk*

- a. *Dominant tenement is required* - reformulation of restrictive covenants to require both dominant and servient tenements, more similar to negative easement. However, subject matter of covenants more expansive, easements restricted due to possibility of prescription. {Allen}
- b. *Common intention that burden runs with both lands is required.* {Allen}
- c. *Negative, not positive burdens will be enforceable.* {Allen}
- d. *Notice is required.* {Allen}
- e. *Benefit should be for use and occupation of the land, not for financial interests.* {Safeway}

166. Identify statutory requirements concerning the enforceability of covenants

- a. *Registration* - such covenants must be registered as a charge against land. However, this does not mean that it will necessarily be enforceable. Necessary, but not sufficient in accordance with s.29 of the *Land Title Act*.

167. What are licences?

- a. Permissions given by the licensor to the licensee to do something that would otherwise be unlawful (eg. trespass on land) . Purely personal right, does not pass interest, alter / transfer property. Can be granted gratuitously, and are revocable.

168. What is a lease?

- a. An exclusive right of occupation with a certain duration in time. Occupancy by lease is treated the same as *real property* - therefore, chattel real; started as personal property, came

to be treated as real property over time; can be the basis of a real action.

169. Differentiate between a licence and a lease

- a. A lodger in a boarding house is a licensee, while a tenant is a lessee. The difference is that the licensee does not enjoy *exclusive* occupation, while a lessee does. Lessee can therefore bring actions in trespass on the relevant property. Leases must be certain in term, while licences do not need to have a certainty of duration - revocable.

170. How do the courts determine whether a document grants a licence or a lease?

- a. Look for certainty in duration (necessary but not sufficient to establish a lease); then look to intention of parties, eg. whether they intended to grant an estate in land, or rather just allow someone to be there.

171. What is privity of estate in view of a lease?

- a. Where a lease is *assigned* down to a third party - the landlord has no privity of contract with that party, but yet can still enforce terms of lease through privity of estate. This would also apply if landlord assigned lease to third party. This does not apply to subleasing (where one retains own contract with landlord, and initiates new contract with sublessee). Only relates to those terms which touch the land, personal components of agreement do not transfer through privity of estate.

172. Identify three approaches to the treatment of licences at law

- a. *Bare licences* - revocable at any time, although reasonable time given to depart land must be given. Do not bind successors (or at all, due to revocability). If licence arises out of contract, then revocation gives rise to action re: breach of contract. No longer binding. {Hounslow} {Ainsworth}
- b. *Licences coupled with interest in land* - consider profits a prendre, permission to take something from land coupled with ability to enter land in order to do so. Irrevocable for the term of the interest, and binds third party successors as well. Tortures the word *interest*, as in interest in land, thus giving rise to licence coupled with contract. {Hounslow}
- c. *Licences coupled with contract* - if the contract is irrevocable, a licence subsequent to that contract is irrevocable as well, and enforceable through equity. {Hounslow}

173. Identify three circumstances at equity concerning remedies for revocation of licences

- a. *Licensor threatening to revoke / revocation declared but not executed* - if licensor is threatening to revoke, or has declared revocation but has not yet carried this out, equity grants injunction to prevent revocation. {Hounslow}

- b. *Revocation already carried out* - court silent on whether order of specific performance would be made in order to return rights to the licensee. Equity more comfortable enjoining a priori than ordering positive action ex post facto. {Hounslow}
- c. *Licensor asking court to remove licence* - if licensor asks court for help in removing licence, the court will not aid if the contract is irrevocable - equity won't aid a party in breaching its agreements. {Hounslow}

174. Do licences only bind the licensor / licensee, or do they bind third parties?

- a. *Applicability* - nothing is said in this case concerning the applicability of its provisions to third parties; deals only with relations between licensor and licensee. {Hounslow}
- b. *Licences coupled with contracts bind successors* - neither the licensor nor anyone who claims through the licence can disregard the contract and licence. The only exception is a bona fide purchaser for value without notice. {Errington}

175. What is the extent of rights provided by licenses to the licensee?

- a. *Licenses can provide exclusive possession* - while exclusive possession is prima facie a tenancy, if this takes the form of personal privilege then it is a licence. {Errington}

176. How does the law deal with licenses coupled with unilateral contracts?

- a. *Performance renders unilateral contracts irrevocable* - if licence arises out of unilateral contract where acceptance is performance of some act (eg. payment of the mortgage), the licence cannot be revoked once performance has begun. It is revocable only if the act is unperformed. {Errington}

177. Identify five ways in which one can give up possession of personal property

- a. *Sale* - exchange for consideration
- b. *Gift* - requires both intent to give and actual delivery
- c. *Loss* - possession and custody of an item are gone through involuntary accident or negligence and they can't be retrieved. Finders rights apply here.
- d. *Cache* - also, hidden/mislaid, where the owner deliberately put property in a cache and then forgotten where the cache is. The "treasure trove" principle applies here: if gold/silver then goes to king, otherwise goes to landowner.
- e. *Abandonment* - owner has intent to get rid of possession and has in fact got rid of possession without reference to passing it on to someone else. If a person finds an abandoned item they become the true owner.

178. Describe finder's rights

- a. Person who finds a lost item does not have to take possession, is not liable to true owner if they opt not to take possession. Finder who takes possession gets rights as a finder - however, this means that their ownership is subordinate to rights of true owner or prior bailee. *Rights of finder require that item lost and taken into possession* - finders only get rights if item is abandoned, or lost (w/ attendant obligation to find true owner), and taken into possession by finder. {Parker}

179. When has a finder taken possession?

- a. When bailment has been initiated - generally, if something has been taken away or used, this will constitute possession. Must exercise control, voluntarily.

180. When an item has been lost on someone's land, who owns it?

- a. *Attached* - if the item is found in, under, or attached to the land, the landowner has the superior claim.
- b. *Atop* - if the item is merely atop the land, then one must consider the obligations and rights approaches.

181. Describe the obligation/knowledge approach to found personalty

- a. *Knowledge based approach* - if landowner did not know that the item was there, there is no obligation to the true owner. If the landowner knew that the item was there, a duty is owed to locate and notify the true owner. If the owner cannot be located, then the person who owes the obligation should get the item; so, landowners have superior claim, but only if they were aware that the item was on their land. {Kowal}

182. Describe two elements of the obligation approach to found personalty

- a. *Finder becomes bailee on taking possession* - no rights or obligations arise from finding unless the finder actually takes possession. At that point, obligated to find true owner. {Kowal}
- b. *Attached objects presumptively belong to landowner* - but unattached objects do not. Obligation is key to ownership - landowner does not have any obligations towards true owner until item is found on property, therefore cannot be a prior bailee absent knowledge of item's presence. {Kowal}

183. Describe the rights/control approach to found personalty

- a. *Control based approach* - who ever intended to exert or in fact exerted the most control over the item should get it. Landowner intended to exert property rights over item, regardless of

whether they knew the item was there. This presumption increases in strength with the degree of attachment of the item to the land. Knowledge unimportant. {Grafstein}

184. Describe three elements of the rights approach to found personalty

- a. *Possession required to be a finder* - one must have taken de facto control over property to have possession; this means the power to use, the power to exclude others from using. {Grafstein}
- b. *Presumption that items found attached to land are controlled by landowner* - if item is found attached to or under land, this presumption is stronger, regardless of whether landowner knew that the items were there. {Grafstein}
- c. *Knowledge relevant to obligation to true owner* - if landowner aware of contents / nature / presence of item, there is an obligation to locate and notify the true owner. {Grafstein}

185. When do finders *not* have rights, even when possession of lost item has been taken?

- a. *Finder has no rights if acting dishonestly or illegally* - cannot be acting with dishonest intent (eg. to convert) or have been trespassing on land. *Finder has no rights if acting in course of employment.* {Parker}

186. What other rights take precedent over rights of finder?

- a. *True owner and prior bailees have rights over finder* - the right of possession acquired by the finder acts against all but the true owner, representatives of the true owner, or others who can assert prior right that pre-existed the finding. {Parker}
- b. *Presumption in favour of landowner over finder* - if object is in, under, or attached to the land or building, there is a strong presumption in favour of the occupier over the finder. This presumption is weakened with the level of attachment of the object. {Parker}
- c. *Superior title can be found through circumstances* - as title to the property in which a bag of money was found had been vested in the seller of the couch, she is entitled to ownership. {Cranbrook}

187. What is the basis for the presumption in favour of landowner's rights over finder?

- a. *Landowner's presumption based on intention* - did the landowner manifest an intention to control the building, and to control items found within (eg. do they have a lost and found)? If so, there is an obligation to ensure that lost chattels are returned to true owners. Once discharged, landowner has rights. {Parker}

188. Describe the relation between finders and bailees

- a. A finder is effectively a bailee under the obligation formulation of finders.

189. What is bailment?

- a. Temporary, voluntary taking into custody of chattels which are the property of another. Initiated by bailee taking possession of the bailor's property. The bailee gets property rights exercisable against everyone other than the owner or prior bailee. Not sale or gift, in that this amounts to possession but not *title* to property. Does not require contract.
- b. *Bailment is delivery of chattels* - can be in trust, in contract, express or implied; must be returned in same form, unless specified, at appointed time. {Martin}

190. How is a bailment analysis to be performed in an exam situation?

- a. Is there a bailment? Is there a sub-bailment?
- b. What is the appropriate standard of care in this situation? Has this been met?
- c. Where does the burden of proof lie?
- d. Is there a contract which modifies the bailment, eg. through a limitation of liability?

191. What five elements are necessary for bailment to have been initiated?

- a. *Intent to take possession* - to determine whether there has been a bailment, must determine whether the item was taken with *intent to possess* it. {Morris} Consider a customer of a car park leaving the keys with the owner. {Appleton}
- b. *Owner's possession must be excluded* - for custody to be present, required for bailment, the bailee must have exclusive access to the item for the period of the bailment. {Martin}
- c. *Possession necessary for bailment* - cannot say that one has bailment without *control and custody*; consider storing a car, but without the key or access to the car itself (so cannot use or access interior). This does not constitute a bailment - particularly where the bailor still has access to the item (undermines exclusivity of bailee's possession). {Lesson}
- i. *Heffron factors* - relate to control, possession, and custody. Includes active control over item (eg. car keys), supervisory role over item (eg. presence of attend), system concerning item (eg. key retrieval). Can one be bailee of keys, but not car? {Heffron}
- d. *Bailment requires non-fungible return* - concerned with taking possession of an object and then returning that very same object. If one can replace with different (but same) object, then cannot be a bailment. This is what differentiates bailment from transfer. {Crawford}

192. When will license rather than bailment be found?

- a. *If bailee wishes to limit liability, must draw attention of Plf. to this fact* - mere limitation of liability clause in small print / standard form is not sufficient; these seem to be designed in fact to conceal such limitations. {Appleton}
- b. *Licensor-licensee rather than bailor-bailee in gratuitous service / mere courtesy* - while performing gratuitous service on owner's behalf (outside of usual operation of business), this is temporary de facto possession; but person performing service not a bailee, but rather possession is same as the owner's possession. {Palmer}
- c. *Given notice of license, bailment is negated* - due to presence of limitation of liability clause, notice that charges were only for use of parking space and not care/bailment, this relationship is a licensee agreement, as in *Palmer*. {Bata}

193. Describe the obligations of the bailees to bailors

- a. *General obligations / onus* - these obligations are in tort, to take reasonable *care* of the goods, to not *convert* the goods, and to return the goods - *detinue*. Risk can be allocated / exemption gained through contract. {Morris}

194. What is the standard of care owed by bailees to bailors?

- a. *Level of negligence / standard of care shifts with the type of bailment undertaken* - gross negligence required without some benefit to the bailee. Light negligence required without some benefit to bailor. Regular negligence required if both benefit. {Coggs}
 - i. *If bailment only benefits bailor* - if bailment undertaken with no benefit to bailee - no consideration, unable to make use of the goods, etc., then the bailee is only liable for *gross negligence*. {Morris}
 - ii. *If bailment is mutually beneficial* - ordinary standard of care applies. {Morris} Standard of care in bailment for mutual benefit is normal negligence - that care which a *prudent man* would exercise in protection of his own chattels. {Macdonald}
 - iii. *If bailment only benefits bailee* - if bailment undertaken with no benefit to bailor (eg. loaning expensive / utile goods), then there is a high standard of care on the bailee. Liable for the *least neglect*, and goods must only be used for purpose that they were lent. {Morris}

195. Where lies the burden of proof in bailment?

- a. *Burden of proof is on bailee to show that apt level of care was taken*. {Townsend} {Hansen} {Heffron} This is reflective of the fact that the bailee has the knowledge, or at least is in the better position to know. However, if the bailee has himself vanished with the chattel, the

reverse onus does not exist - onus still with the plaintiff, as no more knowledge advantage.

196. What are the requirements for bailment for reward to be established?

- a. *Bailment for reward does not require monetary relationship* - sufficient to establish that there be indirect consideration or benefit. A bailment within the context of an employer-employee relationship is sufficient to establish bailment for reward. {Macdonald}

197. Describe the obligations of bailors to bailees

- a. *Lending or entering into bailment a defective chattel is actionable* - if a lender is aware of any defect in the chattel which renders it unfit for the purpose for which it is lent, fails to communicate this to the borrower, this leads to a cause of action - even if gratuitous bailment. {MacTague}

198. What is gross negligence in bailment?

- a. *Gross negligence in view of bailment* - the absence of ordinary care which a prudent person would have taken; but also something more, as this is effectively ordinary negligence. {Newman}

199. Describe the applicability of exclusion clauses to bailment and sub-bailment

- a. *Bailment - on detinue, no applicability* - once bailor proves non-delivery, the bailee then must then prove that reasonable care was taken. This is not subject to exclusion clauses, as failure to return bailed item amounts to detinue, a *fundamental breach* of bailment. {Heffron}
- b. *Sub-bailment - owner must assent* - limitation of liability can only be relied upon if distant owner assents - for exemption of liability between distant owner and sub-bailee to apply, the distant owner must assent to this through implication or express intent. {Punch}

200. What is required for an exclusion clause to be enforced in bailment?

- a. *Exculpation from liability for bailment construed strictly* - will be interpreted narrowly, will only exempt bailee from responsibility for losses due to own negligence if in clear words adequate for purpose - clause which tells employees not to bring valuables to work does not apply to tools needed to perform work. {MacDonald}

201. Describe the obligations of sub-bailees to distant owners

- a. *Sub-bailees who are aware of distant owners have obligations to those owners* - not required that sub-bailee be aware of owner's identity, but rather mere existence (eg. that item of bailment belongs to distant owner sufficient). Relationship is based on voluntariness of

sub-bailee. This is constructive bailment between distant owner and sub-bailee. {Morris}

- i. Denning limits this relationship, however, by saying that that distant owner only has right to *sue* if they have right to immediate possession. Diplock's view (expressed above) is the one which has carried forward - see *Punch*. {Morris}

202. Can possession by an employee give employer obligations re: bailment?

- a. *Possession of the employee is not the possession of the employer* - and therefore, mere possession by an employee of an article lost in a place of business does not necessarily give rise to obligations on the part of the employer. {Newman} Has to be something more than mere possession for an action to lie. Conversion or theft by the very employee whose duty it was to keep an item safe, for instance. {Morris}

203. What are two requirements for a gift to be valid at law?

- a. *Legal capacity to give* - one must have legal title in order to give legal title. Follows *nemo dat, one cannot give what one does not have*. Also involves mental capacity to give, as minors, the mentally incapacitated, corporations not following own regulations may not have the capacity to make gifts.
- b. *Legal capacity to receive* - certain relationships preclude gifts due to concern about abuses of confidence, undue influence, etc.

204. What are three ways that gifts can be made?

- a. *Inter vivos*
- b. *Donationes Mortis Causa*
- c. *By will*

205. What two steps are required for inter vivos gifts to be valid?

- a. *Intention* - there must be an intent to give, an intention of the owner to divest themselves of the property in possession *to the donee* (eg. that it is a divestment and not a bailment in the eyes of the original owner. Must be clear and unambiguous words to this end. If there is doubt, then the least possible transfer is given.
 - i. Consider whether intentionality is served if keys given as symbolic delivery, but there is more than one set in existence, with the donor retaining that set. Onus is on the person who claims that a gift was given to establish intention of divestment by owner.
- b. *Delivery or deed* - delivery of the item is required, unless the gift is by a deed which itself is signed, sealed, and delivered. Mere words are not enough. Must hand over the item itself, or something which constructively or symbolically transfers control of the item (eg. keys to

a car, contract, seal).

- c. *Proximity to and handling of chattels is not delivery* - Merely bringing someone near to chattels and letting them handle them is not sufficient to constitute delivery. Would be sufficient if the donor had then left, leaving the chattels with the donee - clear change of control. {Cole}

206. What is the role played by contemporaneity in gifts?

- a. *Gift and acceptance must be contemporaneous* - one cannot give something without delivering it, and one cannot accept a gift without receiving it. Therefore, without actual, factual delivery, there is no gift; it is revocable by either party. {Cochrane} *Intention to give must be accompanied with delivery* - otherwise there is no gift, but rather only a revocable, non-binding intention. {Hardy}

207. Describe the revocability of gifts

- a. Until both intent and delivery have occurred (they may occur at the same time, or either may come before the other) a person is free to change their mind, and intention alone to give a gift cannot be enforced. After that, however, gift cannot be revoked.

208. Identify two ways in which being in a common establishment affect *inter vivos* gifts?

- a. *Contract for sale necessary in spousal situation or common establishment* - deed or contract of sale (even for nominal consideration) is necessary - mere words alone are not enough because there is no clear change in possession. {Cole}
- b. *Evidence of retention of possession by the donor can negate gift* - for instance, by retaining insurance in one's own name over property claimed to have been given to the donee, donor may have undermined the claim that the gift ever occurred; shows importance of going beyond mere words in common establishment. {Cole}

209. What are donationes mortis causa?

- a. *Gifts made by a person apprehending own death* - delivering to another the possession of personal goods to keep as their own in case of the donor's death. If the donor dies the donee receives the gift absolutely, but if the donor lives the donee has to give it back. Until the person dies it is a bailment, and if they die the gift is completed. {Mecham}

210. Identify six requirements of donationes mortis causa

- a. *Death must occur from the very peril contemplated.* {Mecham}
- b. *Peril must not be ordinary risk of living.* {Mecham}

c. Needs to be a pressing danger which will not allow the time to make a will. {Mecham}

d. Gift was made in contemplation (or expectation) of death {Chauvel}

e. Subject matter of the gift was delivered to the donee {Chauvel}

f. Gift conditional because would revert if the donor recovered. {Chauvel}

211. Identify three requirements of delivery in donatio mortis causa

a. Three requirements for delivery in donatio mortis causa - parting with dominion of subject matter, to donee or donee's agent, a delivery of the subject matter or a means of access to it. {Chauvel}