

FE1 PROPERTY LAW NIGHT BEFORE NOTES

SUCCESSION

Requirements for a valid will

Section 77	Capacity	Aged 18 or more, if under 18 married Sound Disposing Mind – Banks –v- Goodfellow
Section 78	Formal Requirements	In writing Signed by testator / testatrix Attested/witnessed by 2 or more persons

Restrictions on testamentary freedom

Section 111	Legal Right Share	Spouse and no children Spouse and children	Spouse 50% Spouse 33.3%
Section 56	Right to Appropriate the Dwelling Home		
Section 117	Right of Child to bring application in relation to proper provision		

Section 90 – Extrinsic Evidence Julian / Rowe / Collins

The points you need to consider from the exam perspective are as follows:

1. the extent to which admissible when interpreting a will
2. Common law position only allowed in mistake, ambiguity or contradiction on face of will – that is solid and known as a certainty
3. These cases are where we seek to admit when none of the above are present , but we know that it is not the intention of the testator i.e. the terms of the will and the intention of the testator are different
4. Re Julian – court held common law position not allow even when we know the intention was different
5. Attempt in section 90 to broaden basis as to when extrinsic evidence will be admitted and test in Rowe –v- Law where the majority of the Supreme Court held that section 90 does not change common law and under section 90 evidence will have to satisfy a double requirement before it will be admitted:
 - (i) Evidence went to intention – relevance requirement
 - (ii) Ambiguity / contradiction on the face of the will

If discussing in detail you should be able to look at the difference in the reasoning of the majority. The majority said section 90 doesn't clearly expand the cases in which extrinsic evidence will be admitted so reading it in the context of the whole act we shouldn't expand basis either. There are five requirements for a valid will and if clear and unambiguous why do behind it?

The dissenting minority was the Chief Justice who said section 90 intended to operate in cases where there would be injustice even if the five formal requirements were complied with. This was a difference in interpretation:

Majority -give effect to intention as expressed in will

Minority-give effect to intention as we know that intention to have been

6. Collins and Crawford cases agreed with the majority in Rowe –v- Law and the 2 step test

ADVERSE POSSESSION

Statute of Limitations Act, 1957 – Section 13 sets out time limits.

Case Law:

Murphy –v- Murphy [1980] IR183

The question was did time run against the mother in adverse possession when she was not aware of her own land rights. It was held it did and the fact that the brother farming did not realise he was in adverse possession as he honestly believed he owned the entire was not to be relevant as he showed the necessary animus possidendi by excluding all others including the true owner.

Remember the progression of the case law in relation to future intended use:

Leigh –v- Jack

Cork Corporation –v- Lynch

Both the above stated that the future intended use of the land by the land owner was important as opposed to the squatters intention. This was reversed in

Durack Manufacturing –v- Considine [1987] IR 677

This case has been followed by

Feehan –v- Leamy

If answering a problem question on adverse possession advise how to stop time running by issuing proceedings or obtaining written acknowledgement from the person in possession or obtaining payment or part payment – Examiners have been critical in the past as candidates omit to give this advice.

FAMILY PROPERTY

The most important areas to revise are:

1. Family Home Protection Act, 1976
2. The Family Law Act 1995 and The Family Law (Divorce) Act 1996
3. Presumed resulting trusts
4. Legislative protection for spouses on death
5. Civil Partners and Certain Rights and Obligations of Cohabitates Act 2010

Family Home Protection Act, 1976

Key points

1. Section 2 scope of the application of the legislation – what is the definition of a family home – dwelling / married couple / ordinary residence
2. Section 3 – right to veto
3. Section 3 – consent not required
4. Section 4 – dispense with consent
5. Section 5 – protection from the behaviour of the spouse
6. Section 7 – protection against landlords and mortgagees

CO OWNERSHIP

Differences between joint tenancy and tenancy in common

Creation

Joint Tenancy

Presumption of joint tenancy
Right of survivorship
Four unities

Tenancy in Common

presumption does not operate – role of equity
no right of survivorship
unity of possession only
TIC can emerge from severance of JT

Operation

If 1 JT alienates interest then
JT severed and TIC created
If all alienate JT equally to share
Purchase / rent monies
On death other JT's take

if TIC alienates no effect on existence of TIC

if all alienate right to share entitles to right to
money in proportion to extent of share
can be disposed of by will / intestacy

How to sever a joint tenancy

In law

Alienation to a third party - effect is tic created between third party and remaining joint tenant. Note if more than one joint tenant remaining they hold as joint tenants with each other

Acquire additional interest effect is tic created between that individual and remaining joint tenants. Unity of interest destroyed. Again note if more than one joint tenant remaining they hold as joint tenants with each other.

Involuntarily when a third party exercises a statutory power eg judgment mortgage effect is if unregistered land tic created between that individual and remaining joint tenants therefore only the interest of the debtor is effected however if registered land as per Irwin –v- Deasy situation is not clear, if more than one remaining joint tenant, they remain as joint tenant with each other.

By Equity

To further the mutual intentions of the parties – Burgess –v- Rawnsley

Tempany –v- Hynes situation, an example of an individual tenant acting on his own share effect if where there has been part performance of the contract for sale, purchaser acquires an interest in property in proportion to the amount paid.

Course of dealing where parties evidence an intent to sever but it has not been completed / concluded / put into effect = effect is tic created

SYSTEMS OF LAND REGISTRATION

The Mirror Principle

This applies to registered land only and relates to the folio issued by the Property Registration Authority.

It is the philosophy behind the concept that the folio is conclusive evidence of title.

The Folio is said to be a mirror of all rights relating to that piece of land.

It is subject to exceptions.

Proof of the Mirror Principle – an example of this is Section 69 Burdens. These are third party rights which must be registered in order to bind purchasers for value. The purchaser for value is only bound by those rights on the folio. If you hold one of these rights you must register and the purchaser is only obliged to check the folio. There is an exception to this and it is in the case of squatters who gained their title through adverse possession and they are bound by all, even unregistered. They are not a purchaser for value.

Crack in the Mirror Principle – an example of this is Section 72 Burdens and here the purchaser for value will be bound whether registered or not – they are known as ‘overriding interests’ and override the register and overrides the mirror principle. In practice you will obtain a Declaration from the Vendors stating that there are no such burdens over the property.

LANDLORD AND TENANT

Lease / Licence Distinction Case Law

Gatien Motor Company –v- Continental Oil [1979] IR 406

The Court laid down the principle that they were entitled to disregard the label put on an agreement or relationship and look behind the label where the circumstances warrant it.

Irish Shell & BP Ltd. –v- Costello [1984] IR 511

This was a realistic analysis of how the land ownership is working not just what the document states by way of a label. It considers how the parties conduct themselves and how the relationship works on the ground.

Antoniades –v- Villiers [1990] AC 417

This case is authority for the proposition that the court is entitled to sever a condition of the lease if it is there for the pretext of avoiding landlord and tenant law.

Governors of the National Maternity Hospital –v- Mc Gouran [1994] 1 ILRM 521

The High Court focused on the terms of the agreement and said there was not exclusive possession due to the control retained by the hospital and therefore not a lease.

Kenny Homes Ltd –v- Leonard [1997] IEHC 230

The Court prioritised the contract over the realistic position.

The above two decisions drew criticism as the courts were leaving behind the decision in Costello. This was followed by

Smith –v- Irish Rail [2002] IEHC 103

In the High Court Peart J looked at the decision of Street –v- Mountford on exclusive possession and adopted it. The Court found exclusive possession on Smith's part.

This was again following the realistic position as opposed to the formalistic position.

This is important for the exam purposes the difference between the two approaches and how they work

EASEMENTS

Test for an easement

Ellensborough Park Case

4 positive tests

1. There must be a dominant and servient tenement
2. The easement must accommodate the dominant tenement
3. The ownership/possession of both tenements must be in different people
4. The right must be certain enough to be contained in a deed

Is there user as of right – is the right exercised as if entitled to do so without force, secrecy or permission:-

1. is it capable of existing as an easement –
2. open and continuous user as of right –
3. must be capable of being an ~Easement as in the Ellenborough Park Test
4. must be continuous

If in applying the law there is a potential difficulty with the above I would then move onto prescription

1. The Common Law – time immemorial – rebuttable
2. Lost Modern Grant – legal fiction
3. Statutory User – 20 or 40 years

ESTATES

Freehold Estates

Fee Simple –	largest estate Most freely alienable Can last forever
Conditional –v- Determinable	Two types of condition – precedent / subsequent Deal with effect of differences between conditions All conditional / determining events must comply with public policy
Life Estate	What is it? How long does it last? Effect of 2009 Act
Fee Tail Estate	What is it? How is it converted to a fee simple? Barring the entail the 4 stages in the procedure What is a base fee? What is a voidable base fee? Effect of 2009 Act

LICENCES /RIGHTS OF RESIDENCE

Estoppel Licences

As with other forms of licence the key points are

1. How do you define this type of licence? Candidates should ensure that they can clearly outline the basic principles of estoppel and in particular clearly apply these principles to property
2. Candidates should also be thoroughly familiar with the cases of Cullen –v- Cullen, Mc Mahon –v- Kerry County Council
3. Can this form of licence be transferred
4. Can this form of licence be revoked

Rights of residence

Candidates should ensure they are in a position to distinguish between:

- a. The different types of rights of residence
- b. The effect of the creation of same

The key to distinction is relation to b. is firstly, which type of right has been created and secondly, is the land subject to the right of residence unregistered or registered.

Exclusive rights of residence which were created over unregistered land create a life estate over the property – National Irish Bank –v- Keegan and Atkins –v- Atkins

General rights of residence which were created over unregistered property give rise to a charge that can be satisfied in monetary terms by a payment from the grantor of the right or their successor in title

Both exclusive and general over registered land are governed by Section 81 of the Registration of Title Act, 1964.

Candidates should also be clear on how the rights of residence can be enforced

Exclusive rights of residence over unregistered land – as per any other life estate

General rights of residence over unregistered land

All rights of residence over registered land. Both are enforceable in monetary terms. Note the difference in the approach taken by the Courts in Johnson –v- Horace and Bracken –v- Byrne and Another

TREASURE TROVE

It is said that a person has rights to the land below the surface and to the airspace over their land, but this is not absolute.

A landowner is entitled to what is below the surface with certain restrictions placed on minerals or treasure trove, as these belong to the State.

When considering items found beneath the surface of the land the person who owns the land is said to be the owner of items with a few exceptions. The first exception that must be considered is treasure trove, which is money or coin, gold, silver, plate or bullion discovered by accident which was concealed or hidden and whose owner is unknown. Treasure Trove belongs to the State.

Webb v Ireland [1988] IR 353

What if the item is found on the land as opposed to below it?

The finder has the second best title to the item, the owner of the item having the best title. Importantly it is not the person on whose land it is found that has best or second best title.

Armory –v- Delamirie (1722) KB, 1 Strange 505, 93 ER 664

Parker –v- British Airways Board [1982] 1 All ER 834

EQUITY AND NOTICE

1. the development of the law of equity
2. the general principles of the operation of common law and equitable principles in relation to each other, namely:
 - (a) equity follows the law, which means that while equity will not deny common law rights, it will not allow unfair advantage to be taken by the holder of the common law rights
 - (b) Supreme Court of Judicature (Ireland) Act, 1877, section 28, where common law and equity conflict, equity shall prevail
3. The concept of the use and its operation
 - (i) Candidates must ensure that they are entirely familiar with the terminology associated with the use, namely
Feoffee
Cestui qui use
 - (ii) Why did the use develop?
4. The Statute of Uses and its effect
5. The reaction to the effect of the Statute of Uses
6. A trust is born – very important in light of the 2009 Act which replaces the Settled Land Acts 1882 – 1890 by increasing the use of trusts to a considerable extent.

FREEHOLD COVENANTS

A covenant is a promise made in a deed.

If dealing with Covenant post December 2009 the new rules under the 2009 Act apply.

The running of the benefit at common law

1. The covenant must touch and concern the land of the covenantee
2. The original party and person now seeking to enforce must have or must have had a legal proprietary interest in the land that benefits
3. The party enforcing the covenant must have the same estate in law as the original party had
4. The covenant must be intended to benefit successors in title

The running of the burden at common law

Privity of contract applies and original parties remain liable unless contracted out

Running of the benefit in equity

Local Scheme of Development

Elliston v Reacher [1908] 2 Ch 374

Reid v Bickerstaff [1909] 2 Ch 305

Running of the burden in equity

Tulk v Moxhay (1848) 41 ER 1143

MORTGAGES

Creation over both registered and unregistered land

Powers and Rights of Mortgagee

Power to insure the property

Possession

Sale

Powers and Rights of Mortgagor

Redemption

Collateral Advantages

Judgment mortgages

Debt collection mechanism – technical defence if any flaw in the Affidavit in accordance with Section 6

Start Mortgages Ltd and ors v Gunn and Gunn and ors¹

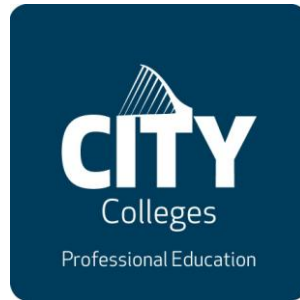
This judgment is intended to deal with the issue of a lender's right to apply for an order for possession pursuant to s.62 (7) of the Registration of Title Act 1964, notwithstanding its repeal by s.8 of the 2009 Act. Each of the defendants/borrowers argued that because the Land and Conveyancing Law Reform Act 2009 repealed s.62 (7) of the Registration of Title Act 1964, an order for possession could no longer be granted under that section, this was not accepted. Judge Dunne accepted the plaintiff's argument that where a relief has been repealed, s.27 of the Interpretation Act 2005 entitles a party to rely on such a relief, if the rights to the relief have accrued at the date of repeal of the law.

¹ *Start Mortgages Ltd and ors v Gunn and Gunn*, Judgment of Ms. Justice Dunne delivered the 25th day of July 2011

The Plaintiff/Bank therefore had to prove that their right to relief under section 62(7) of the Registration of Title Act 1964 had accrued in order to be granted an order for possession under that section. The Plaintiff/banks argued that the act which resulted in the right accruing was the registration of their charge on the land, i.e. the creation of the mortgage, and therefore they could seek an order for possession on any mortgage created before 1 December 2009.

The plaintiff argued the accruing act was the issuing a demand letter for repayment as that was when the money became 'due' as was required by section 67(2). After considering a number of authorities, Dunne J found the following:

- That section 62(7) conferred on a registered owner of a charge the 'right to apply' for an order for possession (and note a mere hope or expectation) for the purposes of a sale out of court. Dunne J cited *Bank of Ireland v Smyth*, *Birmingham Citizen Permanent Building Society v Caunt* and *Anglo Irish Bank plc v Fanning* as authority for the fact even though that there is a discretion conferred on a court by s.62 (7) as to whether they will grant the order or not, that this discretion is limited. The fact there may be a discretion does not alter the fact that the 'right to apply' to court for relief is such a right.
- Dunne J. found that if at the date of repeal of s.62(7), there was no right to make an application for possession, then no right had accrued within the meaning of section 27(1) (c) of the Interpretation Act 2005.
- Counsel for one of the defendants submitted, and it was accepted, that the registered owner of the charge only acquired the right to apply for an order (or the right only accrued to the registered owner to initiate proceedings) when the repayment of the principal monies became 'due'. Having regard to the provision of s. 62(7) the repayment of the principal monies secured did not become due until such time as demand for repayment of same was made. A right to apply for an order for possession did not arise on registration of the charge.
- Dunne J noted that there appears to be an unintended lacuna created by the new Act and that it may be that the repeal of s. 62(7) had unintended consequences. She interpreted the current position in law to be as follows:
 - If a right under section 62(7) has accrued before 1 December 2009 then an order for possession will be applied for under section 62(7).
 - If the mortgage is created after 1 December 2009 then any order for possession will be governed by the 2009 Act.
 - However the new powers under which orders for possession are granted only apply to mortgages created by deed after the 1st December 2009. Lenders who did not have an *entitlement* to apply for an order pursuant to s.62(7) on or by 1st December 2009, are not in a position to avail of the provision of the 2009 Act *or* the provisions of s.62(7).



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