

MERGER AND EXTINGUISHMENT OF INTERESTS IN LAND

INTRODUCTION

There are two common law doctrines governing the destruction of interests in land: merger and extinguishment.

The doctrine of merger applies where one person owns two or more estates in the same land. It developed in the context of common ownership of consecutive freehold estates, but was extended to apply where one person owns consecutive leasehold estates, or a freehold and a leasehold estate. In each case the estates merge or coalesce to form one estate.

The parallel doctrine of extinguishment relates to the situation where one person owns both an estate in land and a collateral right attached to that estate. Such collateral rights include mortgages, charges, easements, profits a prendre and restrictive covenants. Of these, only easements and restrictive covenants are inextricably linked to another estate in land. For this reason common ownership of dominant and servient tenements or of burdened and benefited land are often described as being the cause of extinguishment. However, in common with other collateral interests, it is common ownership of the right and the estate to which it relates or out of which it derives which works the extinguishment of the right.

The formulation of the rules and the consequences of application of the doctrines vary according to the nature of the interests held in common ownership. So too, does the extent to which they have been modified by equity. However, their common feature and the major consequence of their application is that the lesser estate or collateral interest ceases to exist.

It is this consequence which creates difficulties when the doctrines are sought to be applied to land registered under the Real Property Act 1886 (SA). In particular, the destruction of estates or interests in land potentially conflicts with the concepts of indefeasibility and conclusiveness of title which lie at the heart of the Torrens System.

Thus, the aims of this article are two-fold: firstly, to set out the general law rules which constitute these doctrines and to refer to the consequences of their application; and secondly, to examine to what extent they continue to apply to registered land.

Special reference is made to the consequences of the application of the doctrines, for it is only by virtue of the consequences of merger and extinguishment, both to the common owner and to third parties, that the question of their continued application to registered land assumes importance.

PART 1: MERGER AT GENERAL LAW

1 Merger of Estates

(a) *The common law rules*

Merger¹ means the coalescence of two estates in the same land so as to make one estate. For example, if A has a life interest in possession and B has the remainder in fee simple, merger will result from any event which unites ownership of life estate and the remainder in fee in one person. It is not important whether A's interest is conveyed to B, B's to A or both are conveyed to C.² Nor is the result affected by whether the union is the result of purchase, gift, devise or descent. In each case the life estate merges into the remainder.

Merger need not be between two or more freehold estates, but may also result from common ownership of two leasehold estates, or a freehold and a leasehold estate.³ However, the consequences of merger vary according to the nature of the interests merged.

At common law there are four requirements to be satisfied before merger will take place.⁴

(i) *One person must have two or more estates in the same land.*

This requirement seems obvious. However, it implies the limitations that there can be no merger where the reversion or remainder is only a contingent interest,⁵ nor where it may go over to another person, for example by virtue of an executory devise.⁶

(ii) *The estates must not be separated by an intervening estate.⁷*

For example, if there is a limitation to A for life, remainder to B for life, remainder to C in fee, and A takes a conveyance of C's fee, B's intervening life interest excludes the possibility of merger.

In this example B's intervening interest is a freehold estate. The existence of a lease will not be an intervening estate so as to prevent the merger of one freehold estate in another.⁸ However, "an intervening estate for years will prevent the merger of another estate for years in the freehold or inheritance".⁹

1 This article is concerned with the doctrine of merger in so far as it relates to interests in land. However, the doctrine is not restricted to land law, but applies also to debts, contracts, actions and other rights.

2 However, where the union of two estates in the same person is effected by the joint act of the respective owners with the intention that there shall be no merger so as to diminish the common owner's time of enjoyment, there will be no merger: *Wiscot's case*, *Giles v Wiscot* (1599) 2 Co Rep 60, 61b; 76 ER 555, citing as authority *Bredon's case* (1597) 1 Co 76b, 77a; 76 ER 172 and *Treport's case* (1594) 6 Co 14b; 77 ER 274. See also *Preston's Conveyancing* Vol 3 (1816) 51, 408 and 410. See for example the facts of *Stephens v Bridges* *infra* at n 18.

3 As regards the merger of two leasehold interests see 3 *Prest Conv* *ibid* at 73-77. With respect to the merger of a lease in the freehold see *Ingle v Vaughan Jenkins* [1900] 2 Ch 368, *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631, *Lea v Thursby* [1904] 2 Ch 57 and *Symons v Southern Railway Co* (1935) 153 LT 98.

4 For a complete statement of the common law rules see *Wiscot's case* *supra* n 2.

5 *Re Belville's Settlement Trusts*, *Westminster Bank Ltd v Belville* [1904] Ch 163.

6 *Ibid* at 171-172. See also *Re Chance's Settlement Trusts*, *Chance v Billing* (1918) 62 Sol Jo 349.

7 *Drinkwater v Combe* (1825) 2 Sim & St 340; 57 ER 376.

8 *Bates' case* (1696) 1 Salk 254; 91 ER 223. This consideration goes rather to the question of benefit. See discussion *infra* at n 53.

9 *Wiscot's case*, *supra* n 2, citing as authority *Bicknal v Tucker* (1611) 1 Brownl 181; 123 ER 741.

At common law the existence of a contingent estate was not such an intervening estate as to prevent merger. Take for example the limitation to A for life, remainder to B's eldest son for life, remainder to C in fee simple. If C and A's estates came into common ownership before B had a son they would in all but one case have merged at common law.¹⁰ If B afterwards had a son, that would not have affected the position; the contingent remainder to B's son was already destroyed, since it had not vested before the determination of the prior estate.¹¹ However, contingent remainders are now protected against the premature failure of a preceding estate by virtue of s 25 of the Law of Property Act 1936 (SA). Unlike some jurisdictions,¹² the South Australian legislation does not provide expressly that a contingent remainder lying between two estates vested in the same person shall prevent the merger of those estates. However, arguably the South Australian provision is sufficiently widely drafted to preserve the contingent remainder in this situation.¹³

(iii) *The estates must be held by the owner in the same right.*

Merger at common law is a legal incident of estates and so occurs quite irrespective of trusts on which the estates are held.¹⁴ However, an exception to merger exists where executors and administrators have an estate in their own right and another in the right of the testator or intestate.¹⁵

(iv) *The more remote estate must be at least as large as or larger than the preceding estate.*¹⁶

In many circumstances, application of this rule is relatively straightforward. Estates for life will merge in each other or in the fee simple. The same can be said of estates tail where there is no longer a possibility that the issue in tail can inherit,¹⁷ and of determinable fees, qualified fees and conditional fees. Further, it is clear that a leasehold

10 The exception was where the two estates came into the same person at the same time as the contingent remainder. For example, where they were limited by the same document. In this circumstance merger would take place, but only conditionally and would be cancelled if the contingency were satisfied.

11 See Adams, *Garrows Law of Real Property* (1961) 427. See also Sackville and Neave, *Property Law: Cases and Materials* (3rd edn 1981) para 4.83.

12 Conveyancing Act 1919 (NSW) s 16(2) and Property Law Act 1952 (NZ) s 20(2).

13 See Sackville and Neave, *supra* n 11, para 4.119.

14 See *Sir Ralph Bovy's case* (1672) 1 Vent 193,195; 86 ER 131, and Eastwood, *Williams and Eastwood on Real Property* (25th edn 1933) 133. And cf later discussion re merger in equity, *infra* at n 53.

15 *Wiscot's case* *supra* n 2. See also *Chambers v Kingham* (1878) 10 ChD 743,746. In the 16th century when the rules of merger were formulated, ideas of marriage and corporate personality differed greatly from those prevailing today and it was necessary to provide expressly that there could be no merger between husband and wife or between estates held by corporations with those owned by their "shareholders". Today these exceptions to merger would not be questioned.

One further exception to merger set out in *Wiscot's case* exists "between persons who have an instantaneous or temporary seisin to serve uses, to be raised out of the estate conveyed to them, and also an estate in their own right". It is not clear what this means. It may mean that where uses are executed under the Statute only the executed use may merge in other estate, or it may mean that merger is prevented in the situation where trustees take an active role in the running of a trust. However, the answer to this question is of limited significance today in light of the prevalence of equity's rules. See discussion *infra*.

16 Unless otherwise stated, authority for the following propositions may be found in *Wiscot's case*, *ibid*.

17 *Infra* at n 22.

estate is a lesser estate than a freehold (indeed the term "leasehold" is a contraction of the words "less than freehold"); thus, leasehold estates will merge in freehold estates, and a tenancy at will may also merge in a term of years.

However, in two situations this requirement has resulted in the development of technical rules: a term in reversion is regarded as greater than a term in possession, whatever their relative lengths. Thus in *Stephens v Bridges*¹⁸ it was held that a lease for 1000 years merged in a reversion for 500 years. Secondly, an estate pur autre vie is deemed to be a lesser estate than a life estate, and therefore the former will merge in the latter but not the reverse.¹⁹

Finally, implied in the formulation of these four requirements are several limitations on the circumstances in which merger will take place.²⁰ Some have been referred to already.²¹ One further exception relates to the fee tail where there is a possibility of issue in tail with a claim to inherit. In this situation the fee tail will not merge in the fee simple remainder or reversion. To allow merger in this situation would be to enable the tenant in tail in possession to bar the entail contrary to the Statute de Donis.²²

Provided the four requirements outlined above are satisfied, and none of the exceptions apply, the effect of common ownership of estates is automatically to annihilate the smaller estate, irrespective of the intention of the common owner.

(b) *The consequences of merger*

(i) *On encumbrances*

The effect of merger is to accelerate the possession of the more remote estate. Consequently, "charges and incumbrances to which the more remote estate was liable attach immediately to the possession whereas without merger such incumbrances [and the ability to prosecute those claims] would not have attached to the possession until the prior estate had determined".²³ An example is where A, the owner of an estate in fee simple, grants a lease to B and subsequently creates a rentcharge over the land. Since the rentcharge was granted after the creation of the term it cannot affect the term, but is binding only on the freehold subject to the term. However, if the lessee acquires the freehold, the rentcharge, not being an estate in the land, does not prevent the merger of the term in the freehold. Thus the charge attaches not only to the legal seisin but also to the possession of the land. The charge is said to be "accelerated" by the merger of the term.²⁴

Conversely, charges and encumbrances over the estate which is merged become charges on the fuller title of the owner.²⁵ This consequence of

18 (1821) 6 Madd 66; 56 ER 1015.

19 *Rosse's case* (1598) 5 Co Rep 13a; 77 ER 68.

20 For a detailed discussion of all the exceptions to merger, see 3 *Prest Conv* 51, supra n 2.

21 See supra nn 2, 10, and 11-13.

22 Statute de Donis Conditionalibus 1285; Statute of Westminster II.

23 3 *Prest Conv* 446-447, citing as authority: *Symonds v Cudmore* (1689) 4 *Mod* 1; 87 ER 226, *Shelbourne (Earl) v Biddulph* (1748) 6 Bro PC 356; 2 ER 1131 and *Erington v Erington* (1612) 2 Bulstr 42; 80 ER 944.

24 3 *Prest Conv* 360 and *Williams and Eastwood on Real Property* supra n 14 at 135.

25 3 *Prest Conv* 446-447.

merger may fetter dealings by the owner with the greater estate. In the case of *Lea v Thursby*,²⁶ Milward was the lessee of a property and had granted a mortgage over his lease. He subsequently acquired the freehold reversion. As to the effect of merger on Milward's ability to deal with the freehold, Swinfen Eady J stated:²⁷

"In my opinion it was for the benefit of Milward²⁸ that the term should not merge upon the conveyance of the freehold reversion. Such a merger would have fettered his own dealings with the property he had just bought. If there was no merger he could sell it, mortgage it, or otherwise deal with it as he pleased without paying off the mortgagee of the term and without his concurrence. Seeing that the timber and mines were reserved to the reversioners when the lease . . . was granted, he could have dealt with those items without the concurrence of the mortgagee of the term."

However, it seems that, with the exception of an easement of light,²⁹ where an easement is appurtenant to a leasehold estate it will be destroyed by the merger of the lease into the reversion. Otherwise merger would be causing the easement to become appurtenant to an entirely different estate.³⁰ Similarly, the right to enforce the benefit of a restrictive covenant which was annexed to a leasehold interest has been held to be lost when the lease is extinguished by merger.³¹

(ii) Upon joint ownership

The operation of the doctrine of merger may have the effect of severing a joint tenancy if only one of the estates is owned jointly.³² Where it is the lesser interest which is held jointly, severance will occur where one of the joint tenants acquires the greater estate or where a joint tenant grants his or her interest to the owner of the greater estate. Similarly, where the greater interest is owned jointly, the joint tenancy is severed if the owner of the lesser estate acquires a joint interest in the greater estate, or where one of the joint owners acquires the lesser estate. In each case the merger of one moiety severs the joint tenancy, so that the parties hold instead as tenants in common in possession.

This is so whether the second interest is acquired by purchase or devise.³³ However, an exception to this principle exists where both the lesser and the greater interests are limited or created by the same document.³⁴ In this situation even the common law bows to the intention of the person creating the interests, since it is clear that he or she contemplated that both interests should co-exist.³⁵

26 [1904] 2 Ch 57.

27 *Ibid* at 65.

28 See *infra* at nn 51 and 52. The question of benefit is relevant in considering whether merger takes place in equity.

29 A right to light is prescribed against all the world and therefore also against the owner of the reversion. See *Simper v Foley* (1862) 2 J & H 555, 564; 70 ER 1179, 1183. This exception is of limited importance today: see *infra* at n 120.

30 *Lord Dynevor v Tenant* (1888) 13 App Cas 279. See also Note in (1966) 30 Conv and Prop Law 92, 92-93.

31 *Golden Lion Hotel (Huanston) Ltd v Carter* [1965] 1 WLR 1189.

32 3 *Prest Conv* 481-482.

33 *Taylor and Wife v Sayer* (1599) Cro Eliz 743; 78 ER 975.

34 *Wiscot's case*, *supra* n 2. See also *Rogers v Downs* 9 Mod 293; 88 ER 460.

35 Cf n 10 *supra*.

Merger may also have the reverse effect, for "the right of enjoyment under a tenancy in common of the freehold to two, may, by merger of that freehold in the inheritance, as held by two persons jointly, be converted into a joint tenancy".³⁶

(iii) *Upon leases*

We have already referred to the undesirable consequence of the fact that in the eyes of the law a reversion is a greater estate than an interest in possession.³⁷ In addition there are two ramifications of merger which arise only in relation to the merger of leasehold interests in the freehold.

A leasehold interest is personal property whereas a freehold interest is real property. Thus, whether or not merger occurs determines whether the common owner's personal heirs inherit. It may also be important if the common owner is an infant.³⁸

The second issue concerns the effect on a sub-lease of the merger of a head-lease. At common law the merger of the head-lease destroyed with it the covenants contained in any sub-lease. As a consequence, the head-tenant could not sue for arrears of rent or other breaches of the lease arising after the merger unless privity of contract existed. Since the head-tenant had voluntarily terminated the head-lease, the sub-lessee was entitled to remain in possession even if he or she had notice of the merger despite the extinction of the reversion,³⁹ but could not enforce the sub-lessor's covenants against the head-lessor.⁴⁰

Section 53 of the Landlord and Tenant Act 1936 (SA)⁴¹ now provides that where the reversion on a lease is destroyed by merger, the next vested interest shall be deemed to be the reversion for the purpose of preserving the incidents and obligations of the defunct reversion. Thus the covenants are enforceable by and against the common owner and the sub-lessees respectively.⁴²

(c) *Merger in equity*

As we have observed, generally speaking merger takes place at common law irrespective of the intention of the common owner.⁴³ Two of the less desirable consequences of merger, namely the destruction of contingent remainders and sub-leases, have been overcome by statute. However, a rigid application of the common law doctrine of merger may still be a source of hardship to the common owner, particularly where either of the estates is subject to an encumbrance. In response to this the equitable rules of merger evolved.

36 3 *Prest Conv* 485.

37 *Stephens v Bridges* supra at n 18.

38 See discussion infra.

39 Macmillan, *Law of Leases* (1970) 189-190. See also *May v Bloom* (1949) 66 WN NSW 209, 211 per Herron J.

40 *Webb v Russell* (1789) 3 Term Rep 393; 100 ER 639.

41 In line with the Law of Property Act 1925 (UK) s 139 which in turn re-enacts s 9 of the Real Property Act 1845 ((UK). Though it may be that this section has no application where the lessor did not consent or approve the sub-lease of a periodic tenancy. Obiter per Herron J in *May v Bloom* supra n 39 at 211.

42 See Burn, *Cheshire and Burn's Modern Law of Real Property* (13th edn 1982) 852 and see Macmillan, supra n 39 at 190.

43 But cf at nn 2, 10 and 37.

In equity, whether estates merge is determined by the intention of the person in whom the estates are united.⁴⁴ Where an intention is expressed, as, for example, where it is stated in the instrument effecting the union⁴⁵ or in a subsequent disposition of the property, then,⁴⁶ in the absence of circumstances pointing conclusively to merger,⁴⁷ the expressed intention is determinative.

Similarly, if intention can be gleaned from the circumstances attending the transaction or from acts done either at the time of the union of the estates or subsequently during the owner's life⁴⁸ again, in the absence of contrary indications,⁴⁹ the intention to prevent merger will prevail⁵⁰. A common means of indicating such an intention was to assign one of the estates to a trustee to hold on trust for the common owner.

Further, "where no intention is expressed, or the party is incapable of expressing any . . . the Court considers what is most advantageous to him"⁵¹ and decides for or against merger accordingly. The result more beneficial to the owner of the interests is presumed to be the result he or she intended.⁵²

Many of the consequences of merger mentioned above provide examples of situations where it will not be to the common owner's advantage for there to be a merger. Alternatively, it may appear from the facts that it is more advantageous to the common owner that there is no merger. For example in *Ingle v Vaughan Jenkins*⁵³ X, the first tenant for life under a settlement, agreed to let three acres of the land for 99 years to Y, the second tenant for life, at an annual ground rent of nine pounds. In consideration, Y would erect thereon a house at a cost of 1,500 pounds. After the house had been erected, X died, with the result that at common law Y's term of years was merged in the life interest to which he had now become entitled.⁵⁴ On the death of Y, the remainderman contended that Y's executor was prevented by merger from claiming any further leasehold in the land. However, it was clearly to Y's advantage that the term of years be kept separate from the life interest, since the power of disposition of a tenant for years was greater than in

44 *Forbes v Moffatt, Moffatt v Hammond* (1811) 18 Ves Jun 384, 390; 34 ER 362 per Grant MR.

45 *Eg Re Gibbon* [1909] 1 Ch 367, 373.

46 *Bulkeley v Hope* (1855) K and J 482; 69 ER 549. But cf *Tyler v Lake* (1831) 4 Sim 351; 58 ER 131 and *Swinfen v Swinfen (No 3)* (1860) 29 Beav 199, 204; 54 ER 603 on the one hand and *Neame v Moorsom* (1866) LR 3 Eq 91 on the other hand as to the implication to be drawn from general words in a subsequent disposition.

47 *Supra* n 45.

48 *Hatch v Skelton* (1855) 20 Beav 453; 52 ER 678. See also *Lea v Thursby* [1904] 2 Ch 57.

49 *Astley v Milles* (1827) 1 Sim 298; 57 ER 589 and *Pitt v Pitt* (1856) 22 Beav 294; 52 ER 1121.

50 *Hood v Phillips* (1841) 3 Beav 513, 518; 49 ER 202 per Lord Langdale MR: conveyance to a trustee is not decisive. In that case it was not sufficient to rebut the presumption in favour of merger at common law.

51 *Forbes v Moffatt* *supra* n 44 at 390. Followed in *Earl of Clarendon v Barham* (1842) 1 Y & CCC 688; 62 ER 1073 by Knight Bruce VC, *Grice v Shaw* (1852) 10 Hare 76; 68 ER 845 by Turner VC, *Richards v Richards* (1860) Johns 754; 70 ER 623 by Sir W Page Wood VC and the Australian case of *Croaker v Bank of NSW* (1889) 10 LR (NSW) Eq 195 by Owen CJ in Equity.

52 See *Belville's case* *supra* n 5 at 173 per Wilberforce J.

53 [1900] 2 Ch 368.

54 This statement of the facts is taken from *Cheshire and Burns*, *supra* n 42 at 853.

the case of a tenant for life. The presumption was therefore applicable and it was held that no merger took place.⁵⁵

What then is the relationship between the common law and the equitable rules? Section 13 of the Law and Property Act 1936 (SA)⁵⁶ provides:

“There shall be no merger by operation of law only of an estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.”

Whilst it is clear that the prevalence of the rules of equity will have the negative effect of preventing merger in certain circumstances,⁵⁷ the terms in which the section is phrased suggest that the common law rules remain as a base requirement.

The continued application of the common law rules is, however, difficult to reconcile with a dictum of Sir William Grant MR in the leading case on the merger of charges: *Forbes v Moffatt*.⁵⁸ In that case Grant MR stated:

“Upon this subject a court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it where at law it would be merged.”

Although this was a decision on the merger of a charge, it is clear that the equitable principles governing merger are the same in both contexts.⁵⁹

One interpretation of this dictum is that intention is now the only relevant factor in determining whether merger takes place and the common law rules and exclusions need no longer be considered. However, it is submitted that this is not the case, and that the point Grant MR was making is that equity looks to beneficial rather than legal ownership. As a consequence, where one of the interests to be merged is held in trust for another, equity will regard them as being held in different rights,⁶⁰ with the result that they will not merge. Conversely, it is sufficient for merger to take place in equity if the beneficial ownership of both estates resides in one person, whether or not in either case it is accompanied by legal ownership.⁶¹

Thus, once it has been determined that the common law requirements are satisfied, and that there is no intention (actual or presumed) against merger, the lesser estate merges in the greater as before⁶² without any formal act by the common owner.

55 Macmillan, *supra* n 39 at 189.

56 Replacing s 25(4) of the Judicature Act. 1873.

57 See examples discussed above.

58 *Supra* n 44 at 390.

59 See cases cited *supra* at n 3. Further, *Forbes v Moffat* has been followed in numerous subsequent English decisions (*supra* n 44) and this dictum was expressly approved by Owen CJ in Eq in the Australian case of *Croaker v Bank of NSW* *supra* n 51.

60 Compare the position at common law, *supra* n 14.

61 *Re Radcliffe* [1892] 1 Ch 227 where merger was not possible because a father's life estate and son's reversion were held by the father in different rights.

62 *Re Atkins* [1913] 2 Ch 619.

2 Merger of charges⁶³

Strictly speaking, the term "merger" relates only to the coalescence of estates in land, and not to the destruction of collateral interests such as charges. Collateral interests are more correctly said to be "extinguished" by common ownership with the estate out of which they are derived.⁶⁴ However, it was in the context of the destruction of charges that the equitable principle that merger is dependent on intention was developed. And it was not until much later that these same rules were applied in the context of merger of estates. Because of this similarity in the governing principles, the destruction of charges will be dealt with under the heading of merger.

(a) *The general law rules*

At common law, provided a mortgage or charge and the estate out of which it derives are owned by the same person in the same right,⁶⁵ the mortgage or charge merges into the estate in the land. However, by virtue of the Judicature Act 1873 the equitable rules now prevail, so that whether a mortgage merges in the equity of redemption or a rent charge in the land depends upon the actual or presumed intention of the owner of the interests.⁶⁶

Clearly, in many cases it is of no benefit to the common owner to have a charge on his or her own estate "and, where that is the case, it will be held to sink unless something shall have been done by him to keep it on foot".⁶⁷ However, "where it would be more beneficial to the person entitled to the land and the charge to keep the charge on foot, there the court will raise an implication that he intended that the merger should not take effect and the charge should be raised".⁶⁸

(b) *The consequences of merger*

There are a number of circumstances where the consequences of merger are not in the interests of the common owner, and so presumptions against merger in equity arise. These presumptions can be discussed under three broad headings.

(i) *Where the distinction between real and personal property is important*

By virtue of the doctrine of conversion, the interest of the common law mortgagee is personal rather than real property. This distinction is

63 Under this heading, no distinction is made between the principles applicable to rentcharges as compared with mortgages. Generally speaking this is accurate. However, there is one point of divergence: "There is a complete extinguishment of a rentcharge if its owner purchase part of the land out of which it issues." *Halsbury's Laws of England* vol 39 (3rd edn) para 1345 (quoting from *Co Litt* 147b). Whereas a mortgage may merge with respect to part of the land owned yet remain alive as regards the other part.

64 See White, *Cruise's Digest of the Law of Real Property* vol VI (4th edn 1835) title 39.

65 It is unclear from the case law whether this requirement excludes the merger of a rentcharge in the land where the owner of the land out of which a rent issues grants that land to the owner of the rentcharge by way of mortgage. Compare *Freeman v Edwards* (1848) 2 Exch 732, 737; 154 ER 685 and *Swinfen v Swinfen (No 3)* (1860) 29 *Beav* 199, 206, 54 ER 603. The editors of *Halsbury's Laws of England* supra n 63 paras 1345 and 1347 prefer the view that merger is excluded.

66 See discussion of merger in estates in equity for examples of how intention may be gleaned. See also *Halsbury's Laws of England* vol 32 supra n 63 paras 970-974.

67 *Forbes v Moffatt* supra n 44 at 390 per Grant MR.

68 *Richards v Richards* supra n 51 per Page Wood VC, adopted in Australia in *Croaker v Bank of NSW* supra n 51 at 198.

important for two reasons.⁶⁹ Firstly it may determine who inherits under a deceased's estate. Thus, in *Forbes v Moffatt*⁷⁰ there was held to be no merger in equity on the basis that this was more advantageous to the common owner's personal representatives.

It may also be important if the common owner is an infant. In *Thomas v Kemish*⁷¹ it was held "that it was much more beneficial to the infant that [the charge] should continue personal property; because the infant has the use and disposition of that before twenty-one; but he could have no disposable interest in real estate till that age".⁷²

(ii) *Where the estate of the common owner is in some way limited or defeasible*

If the owner of a fee simple pays off a mortgage or charge, then in the absence of any intention to the contrary the charge will merge into the estate.⁷³ That is, the presumption is in favour of merger. Further, it is settled⁷⁴ that the position of a tenant in tail in possession who pays off a mortgage or charge is analogous to that of a tenant in fee "because the estate is considered his own, inasmuch as he may make it his own by suffering a recovery".⁷⁵

However, the presumption is against merger where the estate of the common owner is in some way limited or defeasible. It is presumed that the owner did not intend to benefit the inheritance. Thus, if a mortgage or charge on the estate is paid off by a tenant in tail in remainder whose estate may be altogether defeated by the birth or issue of another person⁷⁶ or by the tenant of an estate (even of the fee simple) which is defeasible by executory devise,⁷⁷ the presumption is that the charge was intended to be kept alive. This presumption applies a fortiori in the case of the payment off of a mortgage upon the inheritance by a tenant for life, whether in possession⁷⁸ or in remainder.⁷⁹

69 These consequences apply also to the merger of leaseholds. See *supra*.

70 *Supra* n 44.

71 (1696) 2 Vern 348; 23 ER 821.

72 *Lord Compton v Oxenden* (1793) 2 Ves Jun 261, 264; 30 ER 624.

73 Assuming, that is, that there is no other reason for a presumption against merger. If the owner is an infant, there is a presumption against merger in equity: *Ware v Polhill* (1805) 11 Ves Jun 257; 32 ER 1087.

74 See for example *Earl of Buckinghamshire v Hobart* (1818) 3 Swans 186; 36 ER 824 by Eldon LC.

75 *Wigsell v Wigsell* (1825) 2 Sim & St 364, 368; 57 ER 385, per Leach VC. Clearly this principle does not apply where the owner is forbidden by Statute to bar the entail: *Countess of Shrewsbury v Earl of Shrewsbury* (1790) 3 Bro CC 120; 29 ER 445 by Thurlow LC.

76 *Wigsell v Wigsell supra* n 75 at 369. Further, if the charge is paid off by the tenant in tail in remainder, rather than passively acquired as by becoming entitled under a will, this presumption continues even though his estate falls into possession. See also *Horton v Smith* (1858) 4 K & J at 624; 70 ER 259.

77 *Drinkwater v Combe supra* n 7.

78 Jessell MR stated this principle to be settled in *Adams v Angell* (1877) 5 CH D 634, and this statement was approved by the House of Lords in *Thorne v Cann* [1885] AC 11.

79 *Re Chesters, Wittingham v Chesters* [1935] 1 Ch 77 per Bennett J at 82. Similarly if the charge is secured by a term: *Chandos (Duke v Talbot* (1731) 2 P Wm 601; 24 ER 877.

The same rationale⁸⁰ was the basis for the decision in *Re Pride*.⁸¹ In that case the owner of five sixth shares of an estate was paying off a mortgage pending a suit to set aside the sale of one sixth. It was held that:

“The presumption . . . must be that the person paying off the charge intended to keep it alive as regards the one-sixth, because that is for his benefit; he cannot be presumed to have intended to benefit the person who is seeking to impeach his title.”⁸²

(iii) *Where the land is subject to charges subsequent to the one in common ownership*

It was laid down by Grant MR in the case of *Forbes v Moffatt*⁸³ that where the owner of a fee simple pays off a charge or the owner of an equity of redemption pays off a mortgage and there are subsequent encumbrances not created by the owner, which by reason of the payment would be advanced, the presumption is that the charge or mortgage should be kept alive. This is to the owner's advantage in that it prevents subsequent encumbrances gaining priority.⁸⁴ This principle, however, does not apply where the owner created the later mortgage. In this situation, not even an express intention can prevent merger. “A mortgagor cannot set up against his own incumbrancer any other incumbrance created by himself.”⁸⁵

Further, the concept of financial advantage to the owner in this context was qualified in the case of *Richards v Richards*.⁸⁶ No mention had been made in *Forbes v Moffatt* of the relative values of the estate and the charges which would have been let in by merger, and Sir W. Page Wood VC in *Richards*'⁸⁷ case decided that in general, such an enquiry is not necessary.

“In a case where the inheritance would be insufficient to cover all the charges the Court necessarily implies an intention that merger shall not take place; but I do not find it laid down in any of these cases that the Court, before implying such an intention, must be satisfied that the incumbrances which would otherwise acquire priority would exhaust the estate so far as wholly or partially to defeat the interest which had been merged.”⁸⁸

80 For other examples of the operation of this presumption see *Halsbury's Laws of England* vol 32 supra n 63 para 969.

81 *Re Pride, Shackell v Colnett* [1891] 2 Ch 135, 142 by Stirling J, relying on *Countess of Shrewsbury's* case supra n 75 and *Drinkwater's* case supra n 7.

82 *Ibid.*

83 *Supra* n 44. This rule was regarded as settled by the two members of the High Court who discussed it in the Australian case of *English, Scottish and Australian Bank Ltd v Phillips* (1936) 57 CLR 302 per Latham CJ at 309-311 and Starke J at 314. These two members of the Court dissented, but not on this issue.

84 See Francis, *Mortgages & Securities* (2nd edn 1975) 321.

85 *Otter v Lord Vaux* (1856) 6 De G M & G 638, 642; 43 ER 1381, where it was stated that this principle has never been controverted. For more detail on this question see *Halsbury's Laws of England* vol 32 supra n 63 at 439.

86 *Supra* n 51.

87 *Ibid* at 767-768.

88 *Ibid* at 766-767.

Page Wood VC nevertheless qualified this proposition:

“One can hardly conceive that the doctrine was meant to be stretched to this length, that an utterly insignificant incumbrance, as, for instance 20 pounds on an estate worth 20,000 pounds, will be sufficient to prevent a merger. What was intended probably [by the doctrine in *Forbes v Moffatt*] was that there must be at least some substantial competing charge.”⁸⁹

Some doubt exists as to whether the presumption in *Forbes v Moffatt* applies to keep alive a mortgage where the equity of redemption is purchased by a third party who has notice of the existence of subsequent encumbrances and who then pays off the first encumbrance. These were essentially the facts of *Toulmin v Steere*.⁹⁰ In that case the subsequent encumbrance had been created by the owner of the equity of redemption. Grant MR held that the assignee of the equity of redemption should be placed in no better position than the former owner would have been. He therefore found that the mortgage merged and the subsequent charge gained priority, stating:

“one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in against subsequent incumbrances of which he has notice.”⁹¹

This decision has been much questioned and criticised.⁹² However, it has never been necessary to decide upon its correctness, since in every case in which it has been discussed there has been an actual intention on the part of the purchaser of the equity of redemption that the first charge should be kept alive. Nevertheless, Hall VC in *Adams v Angell* stated that the remarks of Grant MR in *Toulmin v Steere*⁹³ with regard to the assignee of the equity of redemption were unnecessary for the decision, and in any case were intended to state a fall-back position applicable only in the absence of intention, either expressed or appearing from the circumstances. These remarks were endorsed by all members of the Court when that case went to the Court of Appeal⁹⁴ and have been approved in Australia by Owen CJ in Equity in the case of *Croaker v Bank of NSW*.⁹⁵

Arguably the very fact that evidence of an express or implied intention against merger will prevent it undermines Grant MR's reasoning. However, since it has never been formally overruled, it seems that *Toulmin v Steere*⁹⁶ still applies to prevent the application of the presumption in *Forbes v Moffatt* where the purchaser has notice of

89 Ibid at 767.

90 (1817) 3 Mer 210; 36 ER 81.

91 Ibid.

92 See for example *Watts v Symes* (1851) 1 De G M & G 240, 244; 42 ER 544 per Knight Bruce LJ, *Hayden v Kirkpatrick* (1865) 34 Beav 645, 649; 55 ER 784 per Sir John Romilly MR, and *Stevens v Mid-Hants Railway Co.* (1873) LR 8 Ch 1064 per James LC.

93 Supra n 90.

94 (1877) 5 Ch D 634.

95 Supra n 51.

96 Supra n 90.

subsequent encumbrance and there is no evidence of an intention against merger.⁹⁷

We have discussed the consequences of the merger of a charge and the equitable presumptions which have evolved to prevent them. It must be emphasized, however, that these presumptions are no more than prima facie rules of construction, and will be displaced by evidence of actual intention, express or implied.⁹⁸

However, as in the case of estates, once it has been determined that the common law requirements for the merger of a charge or mortgage are satisfied, and that there is no intention (actual or presumed) against merger, merger takes place without any formal act by the common owner.

PART 2: EXTINGUISHMENT AT GENERAL LAW

1 Extinguishment of easements and profits a prendre

(a) *The general law rules*

Although easements are sometimes said to be "merged" by unity of ownership,⁹⁹ since they are collateral interests rather than estates in land,¹⁰⁰ it is more appropriate to describe them as being extinguished.

It is generally accepted as a principle of law that where there is simultaneous unity of ownership and possession in one hand of dominant and servient tenements, then easements and profits¹⁰¹ are extinguished.¹⁰² Embodied in this formulation are certain pre-requisites for extinguishment.

(i) *There must be unity of seisin.*

Although it is sometimes loosely stated that unity of "possession" will extinguish an easement, it is clear from the cases that unity of possession without unity of seisin will only suspend an easement,¹⁰³ so that once the unity of possession ceases, the easement will revive. Mere unity of possession may arise where both tenements are leased to the same person, but the reversions are vested in different owners,¹⁰⁴ where one party is seised in fee of one tenement and is a lessee of the other.¹⁰⁵

97 For a more detailed discussion of the status of the rule in *Toulmin v Steer* see three anonymous articles entitled "The Merger of Charges" in (1888) 32 Sol Jo 418, 419, (1895) 39 Sol Jo 651 and (1898) 42 Sol Jo 712.

98 *Grice v Shaw* supra n 51. See merger of estates supra.

99 See eg *Thomson v Waterlow* (1868) LR 6 Eq 36,41 per Lord Romilly MR, *Cuvet v Davis* (1883) 9 VLR 390, 396 per Higinbotham J.

100 See supra at n 64.

101 In the following discussion, reference will be made only to the rules governing extinguishment of easements. However, it is clear that the same principles are equally applicable where a profit a prendre and the servient tenement come into common ownership. For cases relating specifically to profits, see: *Tyringham's case* (1584) 4 Co Rep 36b; 76 ER 973, *Wyat Wylde's case* (1609) 8 Co Rep 78b; 77 ER 593, *Bradshaw v Eyre* (1597) Cro Eliz 570; 78 ER 814, *Nelson's case* (1585) 3 Leon 128; 74 ER 584, *Hall v Byron* (1877) 4 Ch D 667 and *Kimpton and Ballamy's case* (1586) 1 Leon 43; 74 ER 40. See also *Halsbury's Laws of England* Vol 14 (3rd edn) 127.

102 Brooke-Taylor, "Perdurable Estates" (1977) 41 Conv and Prop Law 107, citing the leading case of *Sury v Pigot* (1626) Poph 166; 79 ER 1263. See also Hayton, *Megarry's Manual of the Law of Real Property* (6th edn 1982).

103 Infra n 105 at 40 per Lord Abinger CB and Alderson B (p 17 of ER).

104 See Jackson, *The Law of Easements and Profits* (1978) 204.

105 See *Thomas v Thomas* (1835) 2 CM & R 34; 150 ER 15.

(ii) *The seisin must be perdurable.*¹⁰⁶

This qualification emerges from the case of *R v Inhabitants of Hermitage*¹⁰⁷ where the court led by Holt CJ defined "perdurable" to mean "equal in duration, quality and other circumstances of right".¹⁰⁸ In that case the dominant and servient tenements became vested in King Henry VIII. The servient tenement was part of the Duchy of Cornwall and was determinable on the birth of a Duke of Cornwall. As such, it was only a base fee, whereas the dominant tenement was held by the King in fee simple. It was held that the unity of seisin did not work an extinguishment because the King "had not as perdurable estate in the one as he had in the other".¹⁰⁹ Thus, the easement was merely suspended during the period of unity of seisin.

Whilst it can be said therefore that it is a pre-requisite for extinguishment that the seisin be for the same estate, the question left open by this case is whether this proposition entails a further requirement that the common owner be seised in fee simple of both tenements.

It is stated in *Halsbury's Laws of England* on the basis of a dictum of Buckley LJ in the case of *Richardson v Graham*¹¹⁰ that this is indeed an additional requirement. Buckley LJ's actual words were:

"In *Simper v Foley*¹¹¹ it was held that a union of the ownership of dominant and servient tenements for different estates does not extinguish the easement . . . but merely suspends it so long as the ownership continues, and upon a severance of the ownership the easement revives. I cannot see how that case is authority for saying that where there is unity of ownership for the same estate there is an extinction of the easement."

Taken on its face, this dictum supports the interpretation sought to be given to it by the editors of *Halsbury's Laws of England*. However, the above quoted remark of Buckley LJ related to a discussion as to whether there was a reason to prevent extinguishment despite unity of seisin *in fee simple*.¹¹²

For this reason, it appears that there is, as yet, no judicial guidance as to whether seisin of both tenements in fee tail or for a life estate would work an extinguishment, or would merely suspend an easement. However, it is assumed by a number of commentators that only seisin in fee will extinguish.¹¹³

106 For a more detailed discussion of this question see Brooke-Taylor "Perdurable Estates" supra n 102.

107 (1703) Carth 239; 90 ER 743. For cases applying this qualification to profits see supra n 101.

108 Ibid at 241 (p 744 of ER).

109 Ibid.

110 [1908] 1 KB 39, 46.

111 (1862) 2 John and H 555; 70 ER 1179.

112 On the basis that it was not accompanied by unity of possession. See requirement (iv) infra.

113 See Maurice, *Gale on Easements* (14th edn 1972) 309 and Voumard, *The Law relating to the Sale of Land in Victoria* (2nd edn 1965) 457.

(iii) *There must be beneficial unity of seisin.*

At common law there was a requirement that the dominant and servient tenements be seised in the same right. Thus there was no extinguishment where one of the tenements was held in the capacity of executor, administrator or mortgagee.

This common law requirement was extended by the courts of Equity. The Chancery division of the Court of Appeal held in *Ecclesiastical Commissioners for England v Kino*¹¹⁴ that there will be no extinguishment unless there is beneficial unity of seisin. In that case the rector, in whom the freehold of the church was vested, had become the owner of the land formerly part of the glebe of the church. It was held that this was not such a unity of seisin as would destroy the easement of light which the church had over the glebe since the rector held the freehold of the church as "bare trustee" of the church.

(iv) *There will be no extinguishment where unity of seisin is not accompanied by unity of possession.*

This requirement has an uncertain history but now seems to be settled. In the case of *Buckby v Coles*¹¹⁵ the passage "The Court expressing a decided opinion that the prescriptive right of way was extinguished by the unity of seisin, without adverting to the unity of occupation" appears in the summary of the submissions of counsel for the defendant. Apart from this the report is silent on this issue and certainly no reasons for the court's reaching this decision are reported. The case as reported was an action for trespass and turned on whether a way of necessity could be implied. It can hardly even be regarded as a reliable authority on this question. The judgments are short and cryptic. The headnote bears little relation to them, and, indeed has been replaced in the Revised Reports.¹¹⁶ Nevertheless, on the basis of the above quoted passage it was stated in the 6th edition of *Goddard on Easements*¹¹⁷ that:

"Unity of seisin for estates in fee will in every case cause easements to be extinguished, and it matters not that there has been no unity of possession and enjoyment, as for instance, that one tenement has been in possession of a tenant during the whole period of unity, for, notwithstanding that, extinction will be effected."

A similar passage stated in slightly more cautious terms appears in the 7th edition of *Gale on Easements*.¹¹⁸

However, 94 years after *Buckby v Coles*,¹¹⁹ when the question came before the English Court of Appeal in *Richardson v Graham*,¹²⁰ this proposition was not applied. In the latter case a tenement in favour of which an easement of light had been acquired by prescription was leased to the plaintiff. Subsequently, and during the continuance of the term, the freeholder, E, conveyed the dominant tenement in fee to the freeholder of the servient tenement. The Court of Appeal held

114 (1880) 14 Ch D 213.

115 (1814) 5 Taunt 310; 128 ER 709.

116 15 RR 503.

117 (1904) p 555.

118 7th edn by Cave (1899) p 488.

119 Supra n 115.

120 [1908] 1 KB 39.

unanimously that the easement was not thereby extinguished. Two main lines of reasoning emerge from their judgments.

The first appears in the judgments of Lord Alverstone CJ and Kennedy LJ and was to the effect that whilst it may in many cases be possible to presume possession from evidence of seisin, this could not be applied where, as here, the landlord had actually granted a lease over the property, including the easement. To hold otherwise would be to work injustice. It would allow the landlord to give another a right which was not his or hers to give, because it had already been disposed of to someone else.

The second line of reasoning ran through the judgments of all the members of the Court,¹²¹ and is concisely stated in the judgment of Pickford J at first instance:

"If the common ownership does not prevent the acquisition of the right to light, I fail to see why the conveyance should extinguish that right . . . unless the conveyance brings with it not only the right of common ownership but also the right to possession which it does not do in this case."

This ground was based on the cases of *Frewen v Phillipps*,¹²² *Robson v Edwards*,¹²³ and *Fear v Morgan*.¹²⁴

Frewen v Phillipps and *Robson v Edwards* "are authorities to shew that the right of ancient light when once acquired exists against both the owner and the lessee of the servient tenement, even where the owner of the servient tenement is also the owner of the dominant tenement." The further proposition in *Robson v Edwards*, which was affirmed in *Fear v Morgan*, is that a right to light "ensures against all succeeding owners of the adjoining tenement".

The question then arises as to what extent this decision is applicable in South Australia and whether it can be supported in relation to other types of easement.

The second basis for decision must seemingly be attributed to the fact that an easement of ancient light need not be enjoyed "as of right" and hence may be prescribed for an interest other than a fee simple. The foundation of the Court of Appeal's decision appears to have been: If unity of seisin of the tenements would not have prevented the tenant acquiring an easement of light against his landlord by prescription for the term of the lease, why should an easement of light expressly granted for a term be extinguished merely by the bringing about of such a unity of seisin?

By virtue of s 22 of the Law of Property Act 1936 (SA) the only way in which a right to light may now be acquired in South Australia is by express or implied grant. Thus, the basis for the decision no longer has any direct application in this State.

121. It was a dual ground for the decision of Lord Alverstone CJ and Kennedy LJ, and the sole basis for decision of Buckley LJ. It was also the sole ground on which Pickford J decided the case at first instance.

122. (1861) 11 CB (NS) 449; 142 ER 871.

123. [1893] 2 Ch 146.

124. [1906] 2 Ch 406.

The question then arises whether this aspect of the decision can nevertheless be applied by analogy to other types of easement. This in turn raises the question whether other easements may be prescribed for a term of years. In answering this question it is necessary to distinguish between easements acquired by virtue of the Prescription Act 1832 (UK) and those created under the doctrine of lost modern grant.

In relation to the former, the answer appears to be that they cannot. The traditional limitation that the user must be by the holder of the fee simple estate in the dominant tenement against the fee simple estate in the servient tenement applies, so that a tenant may only prescribe in right of his or her landlord.¹²⁵

This rule has also been applied to easements sought to be created by lost modern grant.¹²⁶ However, doubt has been cast on the continued applicability of this maxim in this context by a statement of Channell J in *East Stonehouse UDC v Willoughby Bros Ltd*¹²⁷ that:

“[The doctrine] enables the court to avoid interfering with user and possession in cases not covered by the statutes of prescription and limitation, though within the mischief which these statutes were intended to remedy. In particular it can be applied between termors when there is a difficulty in applying the statutes owing to the freeholder not being bound.”

In relation to this question it is observed by Bradbrook and Neave¹²⁸:

“The issue has not arisen again directly in the context of lost modern grant. It is submitted that when the opportunity arises, *East Stonehouse UDC v Willoughby Bros Ltd* will probably be rejected as bad law. There is no logic to any distinction being drawn between the scope of easements claimed under lost modern grant and the Prescription Act 1832, and the decision of Channell J runs counter to the whole theory of prescription at common law, viz that a right claimed by prescription must be claimed ‘as appendant or appurtenant to land, and not as annexed to it for a term of years.’”

On this basis it may well be that the second ground for the Court of Appeal decision has no application in South Australia.

Whatever the status of the second ground, it is submitted that the first basis, namely that a landlord should not be able to act inconsistently with his or her grant is equally applicable whatever the nature of the easement granted. Thus, arguably, it can be stated as a general rule that where a dominant tenement is in possession of a lessee, unity of seisin of the dominant and servient tenements will not extinguish the easement during the continuance of the lease.

125 *Bright v Walker* (1834) : C M & R 211; 149 ER 1057 and *Kilgour v Gaddes* [1904] 1 KB 457.

126 *Wheaton v Maple & Co* (1893) 3 Ch 48.

127 [1902] 2 KB 318.

128 *Easements and Restrictive Covenants* (1981) 92-93, quoting from *Wheaton v Maple* at 63 per Lindley LJ.

(v) *Some easements by their nature will not be extinguished by unity of seisin.*

An exclusion was drawn in *Sury v Pigot*¹²⁹ in relation to easements which exist by the operation of nature. That case was an action for stopping a natural watercourse. Whitlock CJ found that the right to the flow of the water had not been extinguished by the unity of seisin, stating:¹³⁰

“A way or common shall be extinguished because they are part of the profits of the land, and the same law is of fishings also; but in our case, the watercourse doth not begin by the consent of parties nor by prescription, but *ex jure naturae*, and therefore shall not be extinguished by unity.”

This and several other authorities to the same effect are cited with approval, although without expressing a decided opinion, by the Court of Exchequer in *Wood v Wood*.¹³¹

An exception was also sought to be made in relation to easements of necessity. Alderson B stated in the course of argument in the case of *Pheysey v Vicary* that:¹³²

“In that case [referring to *Sury v Pigot*]¹³³ Dodderidge J puts the question of necessity on the same footing as a watercourse or gutter. Its principle seems to be, that nothing of absolute necessity to the tenement is extinguished by unity of ownership or possession.”

This is, however, to be compared with the later cases of *Worthington v Gimson*¹³⁴ and *Pearson v Spencer*¹³⁵ where it was held that a way of necessity, like every other easement, is extinguished by unity of seisin and will only revive if it is created “de novo” either by some indication in the grant or by implication.

Although this appears to be the position in England, the state of the law in Australia is less clear. The writer’s research has revealed only two Australian cases where the effect of unity of seisin on easements of necessity has been referred to, both single judge decisions of the Supreme Court of New South Wales. In the first, *Parish v Kelly*,¹³⁶ Rath J quoted the comments of Baron Alderson in *Pheysey v Vicary*¹³⁷ and appeared to accept them as correct. However, in *Margil P/L v Stegul Pastoral P/L*¹³⁸ Needham J expressed his hesitation at relying on the comments of Alderson B since they were merely remarks made during argument. Needham J expressly stated that he had neither considered nor been referred to any authorities on the question besides *Parish v Kelly*.¹³⁹

129 (1626) Popham’s Rep 166; 79 ER 1236.

130 Ibid at 170.

131 (1849) 3 Ex 748, 775; 154 ER 1047. And see Campbell, *English Ruling Cases* (1896) Vol X p 292 - notes to *James v Plant*.

132 (1847) 16 M & W 484; 153 ER 1280.

133 Supra n 129.

134 (1860) 2 El & El 618; 120 ER 232.

135 (1861) 1 B & S 571; 121 ER 827.

136 (1980) 1 BPR 9394, 9400.

137 Supra n 132.

138 [1984] 2 NSWLR 1, 9.

139 Supra n 136.

and stated his conclusion that an easement of necessity was not extinguished in these circumstances on the basis that he regarded certainty as "a desirable state in the law of conveyancing and property".¹⁴⁰

These New South Wales cases cannot be regarded as strong authorities, and it is suggested that the better view is that no special rule exists in relation to easements of necessity. This is fortified by the fact that if the circumstances in which the easement was initially implied are recreated by severance, the easement would presumably be implied afresh.

(b) The consequences of extinguishment.

Of the five requirements outlined above, the third and fourth clearly show the influence of the courts of equity. However, no delineation has been made in the cases between the common law and equitable requirements. By contrast with merger, provided all the requirements are complied with, an easement will be extinguished without reference to the intention of the common owner. The fact that equity has not intervened further can be understood when the consequences of extinguishment are considered.

While the two tenements remain in the hands of the common owner, the extinguishment of an easement has neither favourable nor adverse consequences either to the owner or to third parties. Indeed, the only situation where the fact of extinguishment assumes importance is in interpreting the effect of general words in conveyances and wills by virtue of which the tenements in common ownership are once more severed.¹⁴¹

Once an easement has been extinguished by unity of seisin, continued use of it by the owner is attributed to his or her ownership of the servient tenement rather than to the existence of an easement.¹⁴² As was stated by Fry LJ in *Roe v Siddons*:¹⁴³

"Where the owner of Whiteacre and Blackacre passes over the former to Blackacre he is not exercising a right of way in Blackacre, he is merely making use of his own land to get from one point of it to another."

Although a conveyance describing an easement as "appurtenant" to the land would be sufficient to convey an existing easement,¹⁴⁴ a subsequent assignment or devise¹⁴⁵ of the dominant tenement with "appurtenances" will not be sufficient to convey an easement which has been extinguished.¹⁴⁶ It appears from the judgment of Tindal CJ, delivering the judgment of the Court in the leading case of *James v Plant*,¹⁴⁷ that

140 Supra n 138 at 10.

141 Jackson, supra n 104, p 204.

142 *Whalley v Tompson* (1799) 1 Bos & P 371, 376; 126 ER 959 per Eyre CJ; *Thomson v Waterlow* (1868) LR 6 Eq 36, 43 per Romilly MR; and *Bright v Walker* (1834) 1 C M & R 211, 219; 149 ER 1057 per Barke B.

143 (1888) 22 QBD 224, 236. See also *Bolton v Bolton* (1879) 11 Ch D 968, 971 and *Bright v Walker* *ibid.* This proposition has been applied in Australia in the case of *Cuvet v Davis* (1883) 9 VLR 390.

144 By virtue of s 36(1) of the Law Property Act 1936 (SA).

145 Note, however, that it was held in *Morris v Edgington* (1810) 3 Taunt 24; 128 ER 10, that a right of way although not appurtenant in the strict sense, would pass with a demise of the land.

146 Infra n 147 at 761 (p 971 of ER).

147 (1836) 4 Ad & E 749; 111 ER 967. Also *Whalley v Tompson* supra n 142.

in order to pass an extinguished easement "the grantor must either employ words of express grant or must describe the way in question as one 'used and enjoyed with the land' which forms the subject matter of the conveyance". That is not, however, to say that words which would be sufficient to recreate an easement extinguished by unity of seisin will be sufficient to create an easement where the "tenements" are severed for the first time and were initially part of one property. In the case of *Thomson v Waterlow*¹⁴⁸ Lord Romilly MR discussed *James v Plant*¹⁴⁹ and stated:

"it is contended that this mode of access was a road which was used by thye vendor, and that being so used it passes with the words 'all ways now or heretofore occupied and enjoyed,' and for this purpose the Plaintiff relies on the case of *Plant v James* . . .

The words of the deed there are exactly the same as the words of the deed in the present case. The present case differs from it in this, that here no right of way existed prior to the occupation of the Messrs. *Fellowes*, but it was a road created by them during their enjoyment of the property.

There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to another, and which has become merged by the fact of the same person having become the owner of both properties . . . if these words were held to create a new right of way, they would give to the purchaser of the outlying field a right of going over the adjoining property of the Messrs. *Fellowes* in every direction in which they had been accustomed to go from or to the land in question, and that in a case where such access is not necessary for the convenient use and occupation of the piece of land so sold. This evidently could not be the intention of the vendors. The question depends upon the construction of the deed; and it is clear that these words have only a natural meaning belonging to the circumstances of the case, and not a technical meaning extending to every road which the owner may have made for his own temporary convenience."

In this sense therefore, it cannot be said that once extinguished it is as if the easement had never existed. However, this is not to detract from the general rule that if there are not special words in a subsequent conveyance the easement will not revive.

The fact that this is the only consequence of extinguishment, combined with the fact that even this result is tempered by the rules relating to the implication of easements on the grounds of necessity, or that they are continuous and apparent, provides an explanation for the fact that intention in the form of "benefit" to the owner plays no part in the rules of extinguishment of easements.

¹⁴⁸ (1868) LR 6 Eq 36, 42.

¹⁴⁹ *Supra* n 147.

2 Extinguishment of restrictive covenants¹⁵⁰

It is clear that when the burden and the benefit of a restrictive covenant reside in one person, the covenant is unenforceable by the common owner since one cannot bring an action against oneself. However, this does not answer the question whether unity of seisin extinguishes restrictive covenants or merely suspends them so that they revive on the passing of the benefit. In answering this question the cases have distinguished between restrictive covenants which are part of a building scheme and all other restrictive covenants.

(a) *The cases*

(i) *Restrictive covenants which form part of building schemes*¹⁵¹

There are no Australian cases discussing unity of seisin in this context. In the English cases and the decision of the Privy Council in *Texaco Antilles v Kernochan*¹⁵² it has been held that anything less than unity of seisin of all the land in the scheme will merely suspend a restrictive covenant. During the suspension, the lots are subject to and entitled to the benefit of the covenants as regards other owners, but, of course, cannot be enforced by the common owner. Upon a subsequent severance, the restrictive covenants revive unless either the parties expressly provide that the restrictions shall not apply as between themselves,¹⁵³ or there is evidence from the circumstances surrounding the severance that the parties intended that they should not do so.¹⁵⁴ As an example of this latter proposition Lord Cross states:¹⁵⁵

“Suppose for example, that the owner of two adjoining houses subject to a scheme of development which forbade user for professional purposes started to use one of the houses for professional purposes and shortly afterwards sold it to someone who to his knowledge proposed to continue such user. In such circumstances the purchaser would run the risk of actions by other owners but any claim by the vendor as owner of the adjoining house to enforce the covenant would be a derogation from his grant even though the conveyance contained no express release of the purchaser from the restrictions of the scheme so far as concerned the vendor as owner of the adjoining house.”

It is apparent that the decisions laying down the principle that restrictive covenants in building schemes are merely suspended unless the unity of seisin covers the entire scheme are indispensable to the proper working of schemes. “[O]therwise a permanent ‘island of immunity’ would be created

150 Note that the common law position has been modified by statute in Tasmania and New South Wales. For a discussion of those provisions see Bradbrook and Neave, *Easements and Restrictive Covenants in Australia* (1981) 376.

151 The extinguishment of easements which are part of a building scheme has not yet come before the courts. Brooke-Taylor, *supra* n 102, argues in favour of *Texaco's case* being applied also in this context.

152 [1973] AC 609, 626 (PC) (Bahamas). See quotation from this case and discussion *infra*. For a thorough discussion of the authorities on which *Texaco's case* is based see Brooke-Taylor, *supra* n 102 at 115-123.

153 Applying *Knight v Simmonds* [1896] 1 Ch 653, 660-661 and *Elliston v Reacher* [1908] 2 Ch 374, 393-395.

154 *Infra* n 157 at 1025.

155 For a discussion of this aspect of the Privy Council decision see Bradbrook and Neave, *supra* n 150 at 374-377.

as between those two plots, with the result that, although the obligations could be enforced by those owners against others within the scheme, and vice versa, yet as between themselves neither owner could enforce obligations, and neither could their successors in title.¹⁵⁶ As was stated by Megarry J in *Brunner v Greenslade*¹⁵⁷

“such immunities seem to me to be contrary to the whole basis of schemes of development, with their concept of a local law for the area of the scheme. If then, the result of putting the basis of schemes of development on a relentless application of the law governing covenants is to produce an unsatisfactory or unworkable result, some other basis must be sought . . . [namely] an equity created by the circumstances.”

(ii) *Restrictive covenants which are not part of a scheme of development*

The fate of covenants which are not part of such a scheme in the event of unity of seisin has been discussed in only three cases. The first was a decision of the Supreme Court of New South Wales in *Kerridge v Foley*.¹⁵⁸ The covenant was held to be unenforceable for reasons not relevant here. However, as an alternative ground for the decision, Jacobs J stated:¹⁵⁹

“I think that the fact that the plaintiffs' and the defendants' land after the making of the covenant came into the same ownership . . . prevents the enforceability of the restrictions by the owner for the time being of lot 52. In my view the benefit and the burden of a restrictive covenant does not survive such a unity of ownership.”

No authority was given for this proposition and it was clearly obiter. However, it appears to be supported by the more recent decision of the English High Court in *Re Tiltwood, Sussex, Barrett v Bond*.¹⁶⁰

The covenant in that case was to use the burdened land only for agricultural purposes and not to build thereon. Its purpose was to preserve the view from the manor on the benefited land. By a series of transactions effectively all the benefited land came to reside in S who was also the assignee of part of the burdened land. S sold part of the burdened land to the plaintiffs. Contained in the conveyance was an express restrictive covenant mentioning the restrictions to which the burdened land had been made subject and imposing a new covenant, namely not to use the building on the property conveyed except as a private residence or for agricultural or horticultural purposes, and not to do anything which might be or become a nuisance, annoyance or injury or which might tend to depreciate the value of any other part of the benefited land.

It was not altogether clear how the old and new covenants were to stand together and, as will be discussed later, this new covenant posed problems of interpretation of its own. There was no discussion as to

¹⁵⁶ Bates, “Extinguishment and Revival of Restrictive Covenants in Land” (1980) 54 ALJ 156.

¹⁵⁷ [1971] 1 Ch 993.

¹⁵⁸ (1964) 82 WN (Pt 1) (NSW) 293.

¹⁵⁹ *Ibid* at 297.

¹⁶⁰ [1978] 3 WLR 474.

whether the former covenant was revived by this provision. Presumably Foster J decided that it was not, for he based his declaration that the plaintiffs' land was no longer subject to the old covenant entirely upon his determination that it had been destroyed by the unity of seisin in S.

Foster J held that the restrictive covenant was destroyed as regards those parts of the burdened land which became vested in S when she was also owner of the benefited land. However, since a declaration was sought only in relation to the plaintiffs' land, his Honour made no mention of whether the covenant continued to exist in relation to the burdened land which had not come into common ownership. There were two main reasons for Foster J's decision.

The first was academic support for drawing an analogy between easements and restrictive covenants in this regard in both *Jolly on Restrictive Covenants Affecting Land*¹⁶¹ and *Preston and Newsom on Restrictive Covenants Affecting Freehold Land*.¹⁶² The relevant passage in the latter work states:

"Similarly, it is submitted that restrictive covenants are destroyed when the fee simple in the benefited and burdened land become vested in the same person. Then there ceases to be land to be protected; and as in the case of an easement, the fact the owner exercises certain forebearances on part of his land is merely the particular use which as owner he chooses to have. Upon the subsequent partition of the land, however, the covenant can scarcely be said to revive: it cannot be 'of necessity' like a way or 'continuous and apparent'. It is accordingly submitted, though there is no authority on the point, that such unity of seisin destroys the covenant, and does not merely suspend it."

Foster J then referred to the case of *Miles v Etteridge*¹⁶³ as one in a line of cases establishing that "a release of part of a right of common extinguishes the rights over the whole common".¹⁶⁴ It seems that Foster J regarded this same rule as applicable to easements and by implication also to restrictive covenants.¹⁶⁵

His Honour found added support for his conclusion that the covenant had been extinguished in "modern dicta" distinguishing in this regard between restrictive covenants in building schemes and those existing between two adjoining properties, as was the case on the facts before him. Foster J referred to a dictum of Megarry J (as he then was) in *Brunner v Greenslade*¹⁶⁶ which was affirmed by the Privy Council in *Texaco Antilles Ltd v Kernochan*.¹⁶⁷ Lord Cross delivered the judgment in the latter case and stated:

161 (2nd edn 1931) 52.

162 (1st edn 1939) 42.

163 (1892) 1 Show 349; 89 ER 618.

164 Supra n 160 at 482.

165 The question whether unity of seisin of dominant tenement and only part of the servient tenement extinguishes an easement has never come before the courts. Jackson (supra n 104 at 203-204) argues that there is no reason why it should.

166 Supra n 157 at 1005.

167 Supra n 152. For a more detailed discussion of this case and the authorities on which it is based see Gover, "Extinguishment of Restrictive Covenants" (1979) 1 NLJ 236 and Crane, who wrote a note to this case in (1979) 41 Conv and Prop Law 458.

"It is no doubt true that if the restrictions in question exist simply for the mutual benefit of two adjoining properties and both those properties are bought by one man the restrictions will automatically come to an end and will not revive on a subsequent severance unless the common owner then recreates them. But their Lordships cannot see that it follows from this that if a number of people agree that the area covered by all their properties shall be subject to a 'local law' the provisions of which shall be enforceable by any owner for the time being of any part against any other owner and the whole area has never at any time come into common ownership an action by one owner of a part against another owner of a part must fail if it can be shown that both parts were either at the inception of the scheme or at any time subsequently in common ownership."

No mention was made of *Kerridge v Foley*.¹⁶⁸ Indeed it was stated that there were no previous decisions directly in point.

It is not clear from the judgment of Foster J whether the analogy with easements incorporates all the qualifications which apply in that context. Here S was beneficially seised in fee simple and in the same right of all the land concerned and there were no leases existing over any of the lots. Thus there was no reason to discuss this point. However, it is submitted that the pre-requisites for the extinguishment of easements would be equally applicable in this context. This argument is made on the basis of the dicta in *Elliston v Reacher*,¹⁶⁹ *Lawrence v South County Freeholds*¹⁷⁰ and *Brunner v Greenslade*,¹⁷¹ which were referred to and approved by the Privy Council in *Texaco's case*¹⁷² to the effect that the basis of the law of restrictive covenants is to be found in equity.

*Re Tiltwood*¹⁷³ dealt with the case of unity of seisin of the benefited land with part of the burdened land. The converse situation, namely unity of seisin of the burdened land with part of the benefited land, arose in the case of *Re Victoria Recreation Ground's Application*.¹⁷⁴ In this case a Council covenanted not to use a recreation ground for certain purposes. Subsequently, several of the benefited lots came into the hands of the Council, but at the time of this case they had been resold by the Council. Applying *Re Tiltwood* it was held that such a partial unity of seisin was sufficient to extinguish the restrictive covenant in relation to the land which had been in common ownership.

In two respects this decision diverged significantly from *Tiltwood's case*.¹⁷⁵ In the first place, it was specifically held that the covenant was extinguished only in relation to the benefited land which had temporarily been owned by the Council. Further, the rule of extinguishment which was originally justified on the basis that it was appropriate to the situation of a restrictive covenant between two neighbouring land owners was here applied in the context of multiple land owners.

168 Supra n 158.

169 Supra n 153.

170 [1939] Ch 656.

171 Supra n 157.

172 Supra n 152.

173 Supra n 160.

174 (1981) 41 PCR 119 (Lands Tribunal, Eng) before V G Wellings Esq QC.

175 Supra n 160.

(b) Discussion

Dr Bates in his article "Extinguishment and Revival of Restrictive Covenants"¹⁷⁶ criticises the distinction made in the building scheme cases and taken up by Foster J in *Texaco's case*¹⁷⁷ between restrictive covenants which are part of building schemes and those which are not, and argues that all restrictive covenants should revive on a disunity of seisin.

A second line of argument advanced by Dr Bates in support of the same conclusion is that the analogy between restrictive covenants and easements in this context is false. He states:¹⁷⁸

"Whereas an easement is generally a right over or on land, a restrictive covenant by annexation becomes a right in land, part of the land itself . . .

[T]he argument that an easement cannot survive a unity because a common owner cannot exercise it against himself, is really only an expression of the fact that in such circumstances the easement has become merged in the much wider and superior rights obtained by ownership. This reasoning should not apply to restrictive covenants, since, if annexed, the purchaser is actually buying the covenant as part of the land. It is therefore not that a common owner cannot enforce the covenants against himself; simply that he is not likely to do so. The covenants, however, still bind the land, and should therefore continue to bind subsequent purchasers on a disunity of seisin until application is made to remove them".

It is submitted, in line with Dr Bates, that there is no reason in logic to confine equitable intervention to prevent extinguishment to restrictive covenants which form part of building schemes. That is not to say, however, that the most equitable solution is in all cases to find that a restrictive covenant has not been extinguished.

The basis on which it was held that restrictive covenants in building schemes are merely suspended by unity of seisin was that this more accurately reflects the common intention of the owners; they would not have intended that an "island of immunity" should be created by a temporary common ownership of several of the lots involved. Further, a thread running through all the case law on restrictive covenants is that the Courts will not enforce a restrictive covenant where there is no point in doing so.¹⁷⁹ The approach advocated by Dr Bates appears to ignore these two underlying equitable principles, and merely substitutes one rigid rule for another. Further it appears that the cases concerning extinguishment can be justified by reference to these two general principles.

Admittedly, an application of this analysis to the facts in *Re Tiltwood*¹⁸⁰ is difficult since it is virtually impossible to distil any clear intention from the face of the covenant included in the conveyance from

176 *Supra* n 156.

177 *Supra* n 152.

178 *Supra* n 156 at 157.

179 For example where the character of the neighbourhood has changed.

180 *Supra* n 160.

S to the Plaintiffs, either as to how the old and new covenants were intended to co-exist or as to what precisely was meant by the new covenant. As was remarked by Foster J:¹⁸¹ How can one simultaneously use land only for agricultural purposes and only for a private house?

However, assuming, as Foster J did, that S's intention was to impose only the new covenant on the plaintiffs, arguably the most equitable solution was to find the old covenant extinguished as to all the burdened land, for it would have been pointless to enforce the covenant in relation to the other part of the burdened land if the plaintiffs were permitted to build so as to obstruct S's view. The inference that Foster J regarded the covenant as extinguished in relation to all the burdened land can be drawn from his Honour's citation of the commons cases.¹⁸² On the basis, therefore, that the decision in *Re Tiltwood*¹⁸³ reflected the intention of the common owner, S, and that it reached the most "equitable" solution so far as the land which had not come into common ownership was concerned, it appears that this case was correctly decided.

This same analysis can be applied to *Re Victoria Racing Ground's Application*.¹⁸⁴ In that case it was held that restrictions on the use of the grounds by the council could still be enforced by the owners of the lots which had not come into common ownership. By contrast with *Re Tiltwood*,¹⁸⁵ there was no reason in equity why the enforceability of those covenants should be affected by the extinguishment of the others.

The building scheme cases, *Re Tiltwood*¹⁸⁶ and *Re Victoria Racing Ground's case*¹⁸⁷ are reconcilable and justifiable when they are considered in this way. Further, the emphasis placed on equitable principles in the above analysis can be justified by the fact that restrictive covenants are an equitable creation.

Thus, it can be stated as a general principle that, by analogy with easements and consistently with the law of covenant, there is a presumption of extinguishment where there is unity of seisin of burdened and benefited land. This presumption may however be rebutted by competing equitable considerations, leading to a finding that the covenant has merely been suspended, and will revive on a disunity of seisin.

A settled exception to the presumption in favour of extinguishment has developed in relation to building schemes (unless the unity of seisin covers the whole scheme). However, the intervention of equity is not confined to this situation, and a restrictive covenant will be found merely to have been suspended wherever that would more accurately reflect the intention of the common owner. Similarly it can be seen from *Tiltwood*¹⁸⁸ and *Victoria Racing Ground*¹⁸⁹ that equitable considerations will also determine whether a covenant continues to be ownership where the unity of seisin does not cover all of the burdened or benefited land.

181 *Ibid* at 480.

182 See also Preece, "The effect of Unity of Ownership of Benefited and Burdened Land on Easements and Restrictive Covenants; (1982) 56 ALJ 587, 590.

183 *Supra* n 160.

184 *Supra* n 174.

185 *Supra* n 160.

186 *Ibid*.

187 *Supra* n 174.

188 *Supra* n 160.

189 *Supra* n 174.

None of the cases on which these conclusions are based is Australian. Indeed, in *Kerridge v Foley*,¹⁹⁰ the only Australian case where the extinguishment of restrictive covenants has been adverted to, no consideration was given to the question whether there might in some circumstances be equitable reasons for a covenant not to be extinguished. Nevertheless, so far as it is possible to formulate general principles from the authority available, this is the direction in which the law in South Australia is likely to develop.

PART 3: MERGER AND EXTINGUISHMENT UNDER THE REAL PROPERTY ACT

The next question is whether the general law rules relating to merger and extinguishment apply to estates and interests in land registered under the Real Property Act 1886 (SA).

A common view, particularly in the earlier cases, was that the legislation enacting the system was intended primarily to simplify the process of conveyancing.¹⁹¹ "The Real Property Act . . . was not intended to interfere with contracts and equities between parties themselves. The object of the Act was solely to render dealings with properties under the Act simpler than under the old real property law, and to enable *third parties* to deal with the persons who appeared as proprietors, under the documents and entries of the Real Property Office as if they were really the proprietors".¹⁹² Thus, despite the absence of any provision in the Torrens statutes providing for the destruction of registered interests by merger or extinguishment, nevertheless we begin with the presumption that the general law rules of merger and extinguishment apply to registered land.

However, even in the early cases it is recognised that "such a radical alteration in the system of conveyancing as is effected by these Acts must . . . result in *some* alteration of the substantive law of property".¹⁹³ Thus, all the Torrens statutes include a provision along the lines of s 6 of the Real Property Act 1886 (SA) which states:

"No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act".

The question then arises whether the doctrines of merger and extinguishment are inconsistent¹⁹⁴ with the "provisions" of the Real Property Act, and in particular whether these doctrines can stand with the two sections which confer indefeasibility: s 69, which provides for the title of the registered proprietor to be absolute and indefeasible subject to encumbrances, liens, estates and interests notified on the title, and

¹⁹⁰ Supra n 158.

¹⁹¹ See for example *Lewis v Keene* (1936) 36 SR (NSW) 493 per Maughan A-J at 500 citing as authority *Baker's Creek Gold Mining Co v Hack* (1894) 15 NSWLR (Eq) 207, 221 per Owen CJ in Equity whose decision was affirmed by the Full Court consisting of Darley CJ, Innes and Manning JJ; *Fink v Robertson* (1907) 4 CLR 864, 871 per Griffith CJ delivering the joint judgment of himself, Barton and O'Connor JJ; Griffith CJ in the cases of *Perpetual Executors and Trustees Association v Hosken* (1912) 14 CLR 286, 289, and *Drake v Templeton* (1913) 16 CLR 153, 157; Isaacs J as he then was in *Barry v Heider* (1914) 19 CLR 197 at 213 and 216, and Lord Wright in *Abigail v Lapin* [1934] AC 491, 500.

¹⁹² *Baker's Creek GM Co v Hack* supra n 191 per Owen CJ in Equity.

¹⁹³ *Lewis v Keene* supra n 191 per Maughan A-J at 501.

¹⁹⁴ This principle is easier to state than to apply. See Francis, *The Law and Practice relating to Torrens Title in Australasia* Vol 1 (1972) 25ff.

s 80 which provides for the certificate of title to be conclusive evidence that a person named therein or in any entry thereon as seized or entitled to an estate or interests in the land is so seized or entitled.

The approach taken by the courts in answering this question has differed according to the interests to be merged or extinguished. Thus, it is proposed to discuss each instance separately.

7 Merger of Estates

(a) *The cases*

The applicability of the doctrine of merger to estates under a Torrens-style system of registration was considered in other jurisdictions before it came before the Australian courts. Of these, decisions of the Supreme Court of New Zealand were those which were sought to be applied here when this point first rose in Australia. Thus, it is appropriate to spend some time discussing the early New Zealand authorities.

The first such case was *Smith v Davy*.¹⁹⁵ The facts were complicated. C, the registered owner of the fee simple, executed three mortgages over the fee. After the execution of the first mortgage, he took a transfer of a registered leasehold interest in the same land, over which a mortgage also existed. The third mortgagee of the freehold sold the fee to S in exercise of his power of sale and executed a transfer to S which was not registered for some days. In the meantime, S paid off the mortgage over the lease and registered the release. The day after this registration and before the transfer of the fee to S was registered, C signed an agreement to assign the lease to B. B entered a caveat to protect his rights which gave rise to action. It was not clear from the facts as reported whether the lease formed part of the security for the second and third mortgages.

Richmond J's decision was that B had no title of any kind which he could set up against S. This was on the basis that B's equitable interest in the land, if any, was inferior to that of S. That is, the case was decided on the basis of priority of equitable interests. Not enough facts are given in the report to enable comment on the correctness of the decision on this ground. However, Richmond J's further finding in that case was that the lease merged absolutely in the fee both at law and equity when the release of the mortgage was registered. And it is for this proposition, namely that the doctrine of merger applies ipso facto to registered land, that this case is cited as authority in the later Australian decision of *Lewis v Keene*.¹⁹⁶

However, a closer analysis of the facts in *Smith's case*¹⁹⁷ leaves this alternative basis for the decision open to criticism. At common law, the lease would have merged in the freehold as soon as the two interests came into C's hands. The mortgage over the lease, not being such an intervening interest as to prevent merger, would have become a charge on C's fuller title.¹⁹⁸ But C's subsequent dealing with the lease as a separate interest should surely have been sufficient evidence of an

195 (1884) 2 NZLR 398 (SC).

196 *Supra* n 191 per Maughan A-J at 509. See discussion *infra*.

197 *Supra* n 195.

198 See Part 1, *supra* and cases there cited: *Symonds v Cudmore* (1689) 4 Mod 1; 87 ER 226, *Shelburne v Bidulph* (1748) 6 Bro Pc 356; 2 ER 226, *Errington v Errington* (1612) 2 Bulstr 42; 80 ER 944, *Lea v Thursby* [1904] 2 Ch 57.

intention that there should be no merger in equity.¹⁹⁹ When S paid off the mortgage over the lease, this further objection to merger in equity was removed. But at that stage, although C remained the registered owner of both interests, seemingly the equitable title to both the fee simple and the lease belonged to S. It would have been to S's benefit that they remain as separate interests, for to allow them to merge would be to give an uncovenanted advantage at least to the first mortgagee and possibly also to the second, and would have prevented S's dealing with the lease as a separate interest.²⁰⁰

Even if all these objections are put to one side and the case accepted for what it seems to stand for, namely an adoption of the common law²⁰¹ rules as to merger, the question of the consistency of this proposition with the principle of a conclusive register is still left unaddressed. In this case, B dealt with C who on the face of the register appeared to be the proprietor. Nevertheless, Richmond J found that C's interest in the lease had been extinguished. This is an issue which will be returned to.

The case of *Smith v Davy*²⁰² was not referred to when the question of merger of registered land next came before the New Zealand Supreme Court 22 years later in *Bevan v Dobson*.²⁰³

The headnote in *Bevan v Dobson*²⁰⁴ states that "the legal doctrine of merger does not apply to land held under the Land Transfer Act". However, Stout CJ's actual words were:²⁰⁵

"There is nothing in the Land Transfer Act declaring that a registered lease merges upon the lessee becoming the registered proprietor of the land previously leased to him. That is a rule of law, and the rule of equity . . . that the mortgage over the lease is not destroyed by its merger in law. Our rule is that equity prevails, and I see no reason for assuming that the rule of equity does not prevail in this transaction."

This passage demonstrates that Sout CJ regarded the general law position that the equitable rules govern whether or not merger takes place as applying to registered land. This is the proposition for which the case is cited in *Lewis v Keene*²⁰⁶ and by the majority of the commentators.²⁰⁷ However, Sout CJ's finding in that case that there was no merger of the lease and that the existence of the lease and the mortgage over it should be noted on the title to the fee simple is equally consistent with an outright rejection of the doctrine, and this was the interpretation given to it by Dr Kerr.²⁰⁸

199 See Part 1 at n 48 for discussion of intention and cases cited as authority for fact that intention may be inferred from subsequent actions of owner.

200 See *Lea v Thursby* supra n 198 and passage quoted at n 27.

201 Here "common law" is used in its narrowest sense, ie as distinguished from equity.

202 Supra n 195.

203 (1906) 26 NZLR 69.

204 Ibid.

205 Ibid at 72-73.

206 Supra n 191 at 505.

207 See eg Beckenham and Harris, *The Real Property Act (NSW) (1929)*, Adams, *Garrows Law of Real Property* (1961) and Francis, *Torrens Title in Australasia* Vol 1 (1972) 291.

208 Kerr, *The Principles of the Australian Land Titles (Torrens) System* (1927) 251.

Even taken at its lowest, *Bevan v Dobson*²⁰⁹ stands for the proposition that there is no automatic merger when registered interests relating to the same land come into common hands, which seemingly is a complete turn around from *Smith v Davy*.²¹⁰ Arguably, Sout CJ also decided that the equitable doctrine applies to registered land, but in the absence of any discussion in his judgment as to the consistency or otherwise of either the legal or equitable rules of merger with the provisions of the Land Transfer Act 1952 (NZ), it cannot be regarded as a strong authority for that proposition.

The first Australian case concerning the applicability of the general law rules of merger of estates to land under the Torrens System and the first case containing any real discussion of the issues involved was *Lewis v Keene*.²¹¹ This case was complicated by the fact that although the lease had been registered, the fee simple was under the "old system title". Nevertheless, Maughan A-J addressed himself to the question of the consistency or otherwise of the doctrine of merger with the "provisions" of the Real Property Act 1900 (NSW) and, in particular, with the then s 40 of that Act which provided that "every certificate of title shall be conclusive evidence that the person named in such certificate of title, or in any entry thereon, as taking an estate or interest in the land therein described, is seised or possessed or entitled to such land for the estate or interest therein specified".²¹² Maughan A-J said in this regard:²¹³

"the true function of s 40 where the subject matter of a certificate of title is a leasehold interest, is to operate in favour of the person named therein as against all the world *except the lessor*".

He rationalized this on the basis that were the ambit of the section pushed further,²¹⁴

"a lessor could never eject a lessee for breach of covenants in the lease, if the lessee had a certificate of title, inasmuch as the certificate of title would be conclusive evidence that the lessee had the interest he claimed and therefore could not be contradicted".

Thus, his Honour decided that the general law of merger²¹⁵ applied to the land in this case, that is, that subject to any intention to the contrary (express or implied) the registered lease would merge in the freehold, and upon the production of evidence that she owned both interests, the owner would be entitled to insist upon the Registrar General's noting on the certificate of title that a merger had taken place.²¹⁶

209 Supra n 203.

210 Supra n 195.

211 Supra n 191.

212 Ibid at 503. The RPA (SA) s 80 contains an equivalent provision.

213 Ibid.

214 Ibid.

215 As to which he adopted the statement of the law by Cozens-Hardy LJ in *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631, 652.

216 Supra n 191 at 506-507. He asserted that the Registrar-General had an inherent power to note the word "merged" on the title, or in the alternative that this would be possible under s 32(3) which gives the Registrar-General power to cancel a certificate which has "ceased to affect the land".

Although Maughan A-J confined his judgment to the facts before him, his Honour regarded this reasoning as applicable where both the freehold and the leasehold are registered. In support of the view that the English general law as to merger applies to land under the provisions of the Torrens system, his Honour cited the New Zealand decisions of *Smith v Davy*,²¹⁷ *Bevan v Dobson*²¹⁸ and an Australian case on the merger of charges, *Fink v Robertson*.²¹⁹ This last case will be discussed in more detail under that sub-heading.

The next case to consider this question, and the only occasion where it has come directly before the High Court, was *Cooper v FCT*.²²⁰ The facts of this case were complicated. The relevant aspect is that it related to the owner of the fee simple (registered under the Transfer of Land Act 1892 (WA)) who took a transfer of a one-sixth undivided share of a registered lease existing over the property. There was no indication of any intention inconsistent with merger, nor could any such intention be inferred from the facts. On this basis, and relying without any independent discussion on the authority of *Lewis v Keene*²²¹ and several general law cases, Kitto J sitting as a single judge²²² held that the effect of the transfer of the undivided share to the registered proprietor in fee simple was to merge it in his estate. On appeal, Dixon CJ, Fullagar and Taylor JJ in a joint judgment assumed in favour of the taxpayer that there was no such merger. They based this assumption on the case of *English, Scottish & Australian Bank Ltd v Phillips*²²³ where a majority of the High Court held that there was no merger where a registered mortgagor took a transfer of the mortgage. This case will be discussed in greater detail later. However, suffice it to say at this stage that, as pointed out by the majority of the High Court in *Phillips case*²²⁴ itself, the basis for their decision does not necessarily transpose to the lease situation. The majority of the High Court in that case expressly left open the possibility of the merger of registered leases.

No mention was made by the majority of the High Court in *Cooper's case*²²⁵ of either *Lewis v Keene*²²⁶ or the earlier New Zealand decisions. Instead they referred to certain passages in Kerr's *Australian Land Titles (Torrens) System*²²⁷ as supporting the view that

"such a registered leasehold interest does not merge at law as long as it remains registered as a separate estate or interest".²²⁸

However, as already discussed²²⁹ Kerr based his opinion on an erroneous view of the decision in *Bevan v Dobson*²³⁰ and indeed, this

217 Supra n 195.

218 Supra n 203.

219 (1907) 4 CLR 864.

220 (1958) 32 ALJR 270.

221 Supra n 191.

222 (1957) 97 CLR 397, 407.

223 (1937) 57 CLR 302, 320-325.

224 Ibid.

225 Supra n 220.

226 Supra n 191.

227 Supra n 208 pp 29 and 251.

228 Supra n 220 at 273.

229 See discussion supra at n 208.

230 Supra n 203.

was pointed out by Maughan AJ in *Lewis v Keene*.²³¹ Dixon CJ, Fullagar and McTiernan JJ concluded their discussion on this question with the assertion, without more, that Kerr's view "appears to conform better with the Torrens system".²³²

In any case, the High Court itself did not purport actually to determine the question of whether there can be merger of registered interests as at general law. They merely assumed that there could not as a matter in favour of the taxpayer in a decision which eventually went against him.

As such, the most that can be said of *Cooper's case*²³³ is that it throws doubt upon the applicability of *Lewis v Keene*²³⁴ and the New Zealand cases where both the greater and the lesser estates are registered.

Finally, we turn to the most recent case, a decision of the New South Wales Court of Appeal: *Shell v Zanelli*.²³⁵ In this case, Z, the registered proprietor of land on which a service station was erected, leased the land to Shell Co who underleased the premises back to Z. A clause of the underlease provided for automatic determination of Z's underlease if for any reason Shell's tenure determined or was surrendered. The mortgagee of Z's interest in the fee simple exercised the power of sale and Shell purchased the reversion becoming both head lessor and head lessee. At Shell's request the Registrar-General entered a notification of the merger of the lease on the certificate of title of the fee simple. The Court of Appeal accepted that the Registrar-General had power to do this under s 32(3) and that there was a merger once the Registrar-General had in fact noted one on the title. However, there was some discussion obiter as to whether there would have been a merger irrespective of Shell's request to the Registrar-General. Jacobs P, with whom both Hardie and Reynolds JJA agreed, thought that there would not have been. Jacobs P disapproved of *Lewis v Keene*²³⁶ and the approach taken by Maughan A-J to the conclusiveness of the register, but pointed out that in any case it was not directly in point since here both freehold and the leasehold estates were registered under the RPA(NSW). His Honour saw no reason to distinguish in this regard the case before him of a transfer to the lessee of the fee simple from a transfer of a lease to the registered proprietor in fee (ie the facts of *Cooper's case*)²³⁷ or common ownership of a mortgage and the estate out of which it derives (*Phillips' case*).²³⁸ He also drew a comparison with the other methods of termination of a lease: surrender and forfeiture by re-entry, where in each case by virtue of ss 54(3) and 55 respectively of the RPA(NSW)²³⁹ the estate of the lessee does not revert in the lessor until the surrender or forfeiture has been noted in the Register Book.²⁴⁰

231 Supra n 191.

232 Cf discussion at n 208.

233 Supra n 220.

234 Supra n 191.

235 *Shell Co of Australia Ltd v Zanelli* [1973] 1 NSWLR 216.

236 Supra n 191.

237 Supra n 220.

238 Supra n 223.

239 Sections 122 and 126 of the Real Property Act 1886 (SA) are in substantially the same terms as these NSW provisions.

240 For a discussion of the relevance of the other methods by which leases may be determined, see infra under heading (b) *Conclusions from the cases*.

Jacobs P saw only two alternatives: for there to be automatic merger on the registration of the lessee as proprietor in fee simple, or to give full weight to the register. He rejected the former as inconsistent with the equitable position, and as leading to undesirable results,²⁴¹ and concluded:²⁴²

“It seems to me that so long as the lease remains on the title apparently as a distinct interest, it must be regarded as a separate estate or interest under the Real Property Act.”

(b) Conclusions from the cases

It is not appropriate to attempt to draw some conclusions as to the current state of the law. Despite *Smith v Davy*²⁴³ it is clearly established by the more recent cases that the common law doctrine of merger does not apply to registered land, so that as a matter of law²⁴⁴ there is no merger merely by virtue of registration of one person as owner of two estates capable of merger.

The issue which is less certain is whether estates may merge without a merger actually being registered. It is submitted that the answer can be found by a closer examination of the analogy between merger and the other methods by which a registered lease may determine.

It was held in the case of *Baker's Creek Consolidated Gold Mining Co v Hack*²⁴⁵ that as between a lessor and a lessee, a re-entry made under a power in the lease was effective although no notification had been made on the register. Owen CJ in Equity stated that while the lease remained on the register the lessee could confer a good title on an assignee or mortgagee²⁴⁶ but as between the parties themselves, the lease was determined by the re-entry. This decision was reached despite the express provision of s 55 of the RPA(NSW) that the estate of the lessee does not revert in the lessor until registration.

This decision was applied by analogy in the context of merger by Maughan A-J in *Lewis v Keene*.²⁴⁷ Consequently, the proposition which emerges from that case is that as at general law, merger is a matter of intention. The only way in which this intention may be manifested so as to affect third parties is for the merger to appear on the register, and in this sense, the general law rules are subjugated to the principle of conclusiveness of the register embodied in s 80. But so far as the owner is concerned, any registration is a matter merely of notation. The same principle²⁴⁸ is embodied in the comments of the High Court in *Phillips' case*²⁴⁹ where it was stated:

“A term of years is an interest existing apart from the provision of the Statute and its qualities are defined by the general law, subject however to Statute. The system does not make determination of the term dependent in all cases

241 See discussion infra.

242 Supra n 235 at 221.

243 Supra n 195.

244 Cf later discussion as to the position in practice, infra.

245 Supra n 191.

246 As long as the assignee or mortgagee gave value and there was no evidence of fraud.

247 Supra n 191.

248 This statement is the product of a conference with the Examiner of Titles (Old System), Mr R. White.

249 Supra n 223.

on registration and it is possible that its determination by merger remains allowable."

However, in the more recent case of *Shell v Zanelli*²⁵⁰ a quite different conclusion was reached in reliance on the same analogy. In that case *Lewis v Keene*²⁵¹ was criticized as not giving full weight to the register, and it was held that the lease continued to exist as a separate interest for so long as it remained on the register, not just so far as third parties were concerned, but also for the owner of the interests. The provisions in the RPA that the estate did not re-vest in the lessor until the determination of the lease was registered meant precisely what it said.

Ironically, Jacobs P cited *Phillips' case*²⁵² as authority for this proposition. However, despite the fact that *Phillips' case* does not support the decision in *Zanelli's case*²⁵³ and despite the status of *Phillips' case* as a decision of the High Court, and as the only merger decision relating to the Real Property Act of South Australia, when the question next arises in a South Australian Court, Jacobs P's conclusions as to the conclusiveness of the register are likely to be adopted. There is no reason to confine these conclusions to the merger of leasehold estates. They are equally applicable where two freehold estates are in common ownership.

These statements can be understood when the context in which the decisions were made is examined. *Lewis v Keene*²⁵⁴ and *Phillips' case*²⁵⁵ were decided in 1936, *Shell v Zanelli*²⁵⁶ in 1973. Between these two dates, in 1967, came the landmark decision in *Frazer v Walker*,²⁵⁷ where the doctrine of deferred indefeasibility, which had previously been applied to Torrens System land, was rejected in favour of immediate indefeasibility. Under immediate indefeasibility, the paramountcy and conclusiveness of title provided for in ss 69 and 80 apply not only to third parties, but also to the present owner of the interests. Thus, it may be concluded that in order for an estate to be merged in any sense, the intention that the interests should merge must be manifested on the register. This is not merely a matter of notation, but rather registration is the act which effects the merger.

(c) *The consequences of registering a merger*

The undesirable consequences which flowed from the operation of the common law doctrine are now of diminished significance in relation to registered land, since they will not occur unless the owner takes the positive step of registering the merger. However, the system of registration introduces consequences of its own.

The facts of *Smith v Davy*²⁵⁸ raise the question: what is the position of A, a person who has entered into a contract for the assignment of an interest where a merger of the interest²⁵⁹ is registered before A registers the assignment?

250 Supra n 235.

251 Supra n 191.

252 Supra n 223.

253 Supra n 235.

254 Supra n 191.

255 Supra n 223.

256 Supra n 235.

257 [1967] 1 AC 569.

258 Supra n 195.

259 Or its equivalent, see discussion *infra*.

A comparable situation could never have arisen at general law, since the very fact that the common owner had assigned the interest would have been evidence of an intention against merger in equity. Nor should such a situation be able to arise in relation to registered land, for two reasons. Firstly, in every case since *Smith v Davy*²⁶⁰ it has been expressly stated that the common law rules whereby merger occurs irrespective of intention do not apply to registered land. Further, s 71 IV preserves the rights of a person with whom the registered proprietor has made a contract in relation to land and s 249 preserves equities and contractual rights arising from unregistered transactions. What, however, would be the position of A where the owner applies for a merger to be registered and does not disclose his or her dealings with the interest to the Registrar-General? It was assumed by Jacobs P in *Shell v Zanelli*²⁶¹ that if a merger of the interest were registered, it would be impossible for an assignee such as A ever to become registered. Certainly A could not simply present his or her transfer for registration, since the assignor would no longer be the registered proprietor. But this does not mean that A's only remedy would be an action for compensation against the owner under s 203 on the basis that A is a person deprived of land in consequence of fraud.

Assuming no bona fide purchaser were involved, arguably, A could become registered by virtue of the exception to indefeasibility in s 69 I. This section concerns fraud and provides that any person defrauded shall have all rights and remedies he would have had if the land were not under the provisions of the Act. Strictly speaking no remedy exists, since this situation could never have arisen if the land were not under the provisions of the Act. However, it seems from the case of *Loke Yew v Port Swettenham Rubber Co Ltd*²⁶² that the equitable remedy of rectification would be available here to enable A to become registered. For it was stated by Lord Moulton delivering the judgment of the Privy Council in that case:²⁶³

"So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against a man who has suffered the wrong. Indeed the duty of the court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register cannot be rectified."

A similar situation could formerly have arisen as a result of the practice of the Registrar-General. Although this practice has now changed,²⁶⁴ it was for many years the practice of the Registrar-General of South Australia to regard a lease as merging on the acquisition by the lessee of the fee simple.²⁶⁵ If prior to the registration of the acquisition of the fee simple the lessee had assigned his or her interest to A, again the undesirable consequence would have followed that A would not have been able to become registered simply by presenting his or her transfer.

260 Supra n 195.

261 Supra n 235.

262 [1913] AC 491.

263 For a more detailed discussion of this remedy see Sackville and Neave, *Property Law: Cases and Materials* (3rd edn 1981) 391 para 7.98.

264 Maher, *Jessup's Forms and Practice of the Lands Titles Office of South Australia* (6th edn 1982).

265 Kerr, supra n 208, 29.

Clearly A would have had an action for compensation against the Registrar-General under s 203 on the basis that A had been deprived of land in consequence of an error in an entry in the Register Book. Presumably A would also have been able to apply to the Registrar-General to exercise his power to correct errors under s 220 (4) and so become the registered proprietor of the interest.

2 Merger of Charges

(a) *The cases*

There are only two Australian cases where the merger of a registered mortgage has been discussed. Neither of them considered the merger of rentcharges. But since the similarity between a rentcharge and a mortgage over Torrens System land is, if anything, greater than at general law, it is submitted that the conclusions advanced in relation to the merger of mortgages as charges are equally applicable to rentcharges.

Any discussion of the merger of mortgages is, however, complicated by the fact that when a mortgage and the land mortgaged come into the same hands there are two quite separate things to be merged. Firstly there is the personal covenant to pay the mortgage debt. At common law, when the benefit and the burden of a debt reside in one person the debt is extinguished on the basis that a man cannot be his debtor.²⁶⁶ But the mortgage also exists as a charge over the land. At common law this would merge in the event of common ownership for the reason that there is generally no advantage in having a charge over one's own land. However, in equity, merger of the charge is dependent on intention, actual or presumed.

It has long been settled,²⁶⁷ and is still the case under the Torrens System, that the personal covenant to pay the debt and the charge over the land which provides security for the debt are capable of existing independently of each other. Thus, "it seems clear that an action could be brought on the covenants for payment, when these are expressed in the instrument itself, although the mortgage was not registered".²⁶⁸ Further, the registration of the discharge does not ipso facto put an end to the mortgagor's covenants in the mortgage. Thus, in the absence of an acknowledgement that money was paid in full satisfaction and discharge of the obligation, it is possible to sue on the covenant even after the mortgage has been discharged.²⁶⁹ Conversely, "a mortgage as a security over and a charge upon land . . . can quite well exist without any covenant to pay".²⁷⁰ Our primary interest is with the merger of the

266 *Ford v Beech* (1847) 11 QB 852, 867 & 870; 116 ER 693, 698-699: "Where the party to pay and receive have become identical there is no debt."

267 *The Earl of Halsbury, The Laws of England* vol 21 (1st edn 1912) 171.

268 Hogg, *Registration of Title to Land Throughout the Empire* (1920) 200-221. Hogg cites as authorities *Mathieson v Mercantile Finance Co* (1891) 17 VLR 271, *Seabrook v McMullan* (1908) 10 WAR 47 and *Mercantile Building v Murphy* (1888) 4 WN (NSW) 105.

269 See *Bell v Rowe* (1900) 26 VLR 511, 523 per Madden CJ, *Groongal Pastoral Co Ltd v Falkiner* (1924) 35 CLR 157, *IAC v Tarulli* [1974] WAR 125 per Wallace J, and for a recent case: *Grundy v Ley* [1984] 2 NSWLR 467 (SC) per Kearny J. See also Sykes, *The Law of Securities* (3rd edn 1978) and Hogg, *The Australian Torrens System* (1905) 961 and 967.

270 Latham CJ in *Phillips' case*, supra n 223 at 309, citing as authority Griffith CJ delivering the joint majority judgment of the High Court in *Fink v Robertson* supra n 219 at 871-872. See also *Halsbury's Laws of England* and *Groongal's case* supra n 269.

charge. However, it is in the cases on the extinguishment of the covenant to pay the mortgage debt that we find the only judicial references to the merger of registered charges. Thus, it falls now to consider these cases in more detail than would perhaps otherwise have been the case.

The first such case is *Fink v Robertson*.²⁷¹ This case involved the transfer of the mortgaged land to the mortgagee under the foreclosure provisions of the Victorian Transfer of Land Act 1890. The question before the court was whether the mortgagee continued to have a right to sue on the covenant to pay the mortgage debt or whether it was thereby extinguished. Griffith CJ, delivering the judgment of the majority of the High Court, referred to the common law rule that the assignee of an equity of redemption is, in the absence of agreement to the contrary, bound to indemnify the mortgagor against the mortgage debt.²⁷² His Honour examined the provisions of the Transfer of Land Act to see whether there was any inconsistency between them and the general law doctrine. Section 130 of the Act provided for the mortgagee in a foreclosure action to be a "deemed transferee" of the land and s 95 stated that on the transfer of any land subject to a charge, the transferee would indemnify and keep harmless the transferor from and against the principal sum security by the mortgage and all liability in respect of any of the covenants therein contained or implied by the Act. On the basis that these sections embodied the common law doctrine of indemnity, Griffith CJ found that the mortgage debt was extinguished. His Honour however then went on to say:²⁷³

"The further rule that when property and the benefit of the charge on it are vested in the same person the charge is extinguished unless a contrary intention is shown, which may be called a rule of commonsense, would also itself dispose of the question."

And, in an earlier passage:²⁷⁴

"The mortgagee would, of course, in such a case be entitled to a certificate of title subject only to incumbrances created by the mortgagor in favour of other persons."

It was these passages which Maughan A-J cited in *Lewis v Keene*²⁷⁵ as "an express recognition of the application of the English law as to merger to lands under the provisions of the Torrens system". It is beyond the scope of this article to discuss the correctness of the majority decision that the debt was extinguished.²⁷⁶ However, the merger or non-merger of the charge must be regarded as an independent question and irrelevant to any finding in relation to the debt.

271 Supra n 219. For a discussion of this case as an authority on the extinguishment of the personal covenant see Francis, *Torrens Title in Australasia* (1972) 22 & 25, Sykes, *The Law of Securities* (3rd edn 1978) 239-240 and Robinson, "Merger and Systems of Title to Land by Registration" (1973) 37 Conv and Prop Law 342.

272 His Honour cited as authorities the cases of *Waring v Ward* (1802) 7 Ves 332, 337; 32 ER 136 and *Dodson v Downey* [1901] 2 Ch 620.

273 Supra n 219 at 879. Griffith CJ was delivering the judgment of himself, Barton and O'Connor JJ.

274 Ibid at 877.

275 (1936) 36 SR(NSW) 493, 505.

276 As to the applicability of this discussion to States such as SA where there is no equivalent of s 130 see Francis supra n 271 at 140. The ration has now been put beyond doubt in SA by the enactment of s 55b(3) of the LPA (SA).

There is no discussion in Griffith CJ's judgment as to the consistency of the doctrine of merger with the provisions of the Transfer of Land Act. His Honour merely asserted, without more, that it was consistent with the provisions of the Torrens legislation since, in his opinion, its application to the facts gave the same result. As such, Griffith CJ's comments with regard to the merger of charges are open to criticism. In any case, they are clearly no more than obiter dicta. Nevertheless, the tenor of his judgment does seem to support the interpretation put on it by Maughan A-J in *Lewis v Keene*,²⁷⁷ namely that the English law of merger applies to registered land.

It was not until 29 years later in *The English Scottish & Australian Bank Ltd v Phillips*²⁷⁸ that the question again received judicial consideration. The facts were that Phillips had mortgaged his land and later sold the fee simple interest. He subsequently took a transfer of the mortgage, and in turn transferred it to the plaintiff bank. The question before the High Court was whether the vesting of the mortgage in the original mortgagor destroyed the covenant to pay the debt as against subsequent transferees of the mortgage. The High Court split (3:2), overturning the decision of Angas Parsons A-CJ. The minority of Latham CJ and Starke J decided in line with the majority of the High Court in *Fink v Robertson*²⁷⁹ that the debt was extinguished when both benefit and burden resided in Phillips and could never subsequently revive. By contrast, the majority consisting of Dixon, Evatt and McTiernann JJ did not think that the application of this general law doctrine was consistent with the plan of the legislation.²⁸⁰ They held that the personal covenant was temporarily suspended during the coincidence of ownership of the benefit and burden and that it revived once Phillips transferred the mortgage to the bank.²⁸¹

The question of the merger of the mortgage as a charge was one stage more removed from the issue before the court than in *Fink's case*,²⁸² since at the time Phillips took a transfer of the mortgage, he had already transferred the land. Thus, as was pointed out by Starke J²⁸³ in that case, no question of merger could arise. Nevertheless, some comments were made obiter by Latham CJ and in the joint majority judgment.

Latham CJ reviewed²⁸⁴ the general law authorities as to when a mortgage would be regarded as still subsisting so as to maintain the priority of subsequent encumbrances. In line with *Fink's case*,²⁸⁵ he clearly regarded these principles as applicable to registered land. As in *Fink's case*,²⁸⁶ there was no discussion of any inconsistency between the general law rules and the provisions of the RPA.

277 Supra n 275.

278 Supra n 223.

279 Supra n 219.

280 See discussion at p 324 of the report to the effect that this is a consequence of the plan of legislation to treat mortgage obligations as distinct property interests and capable of the same ready transfer as other such interests.

281 It has been held subsequently that as regards the extinguishment of the covenant, the cases of *Fink v Phillips* are not necessarily inconsistent. See Matthews J in *Finance Corporation of Australia Ltd v Commissioner of Stamp Duties* (1981) Qd R 493 at 507.

282 Supra n 219.

283 Supra n 223 at 316.

284 Ibid at 309-311.

285 Supra n 219.

286 Supra n 223 at 322-323.

This is to be compared with the comments of the majority judges, who stated:²⁸⁷

“For our part we are unable to find anything in the legislation to support the idea that when the proprietor of the estate in fee simple becomes registered proprietor of a mortgage or encumbrance subsisting over the land it is *ipso facto* sunk and merged in the estate in the land of which he is already registered proprietor. Machinery is provided for the discharge of mortgages (secs 143, 144). None is provided for showing on the register the destruction of the mortgage by merger. When a mortgage comes into the same proprietorship as the fee simple a discharge may be executed by the proprietor in his two capacities and registered. But otherwise the presence on the register of a mortgage is conclusive that the registered proprietor may transfer it free from all encumbrances or matters of defeasance, with certain well-known specified exceptions none of which includes the destruction of the interests by merger. A mortgage under the system is the creature of statute and its incidents depend upon the provisions of the statute and so much of the general law as is availed of by or under those provisions. Destruction by merger does not appear to us to be a part of the general law which the provision relating to registered mortgages should be understood as invoking.”

(b) *Conclusions from the cases*

Clearly the majority of the High Court in *Phillips' case*²⁸⁷ rejected the notion that there can be a merger of a mortgage merely by the fact of registration of one person as both mortgagee and owner of the land charged. That is, they rejected any transposition of the strict common law rules to registered interests. The question is whether they went any further than this. It can be argued that the majority of the High Court regarded the doctrine of merger as having no application whatsoever to Torrens System mortgages, that is that the only way of removing a mortgage from the register is by discharge. This accords with the Canadian position as stated by Scott²⁸⁸ to the effect that:

“The Registrar is justified in refusing to merge any mortgage in the title, even if requested to do so, as the doctrine of merger, in the opinion of the Master of Titles, does not fit in with the Torrens system.”

However, their Honours prefaced the above quoted passage with the statement that they were discussing “the question whether registered interests may *without any change in the register*²⁸⁹ be extinguished by merger”.²⁹⁰ On this basis it appears²⁹¹ that their Honours were not ruling out altogether the destruction of registered charges by merger, but that in

287 *Supra* n 223.

288 Scott, *Torrens System Mortgages* (1918) 70.

289 Author's emphasis.

290 *Supra* n 223 at 323.

291 See Nettle, *Bauman and Wells' Land Titles Office Practice* (4th edn looseleaf) 279, Whalan, *The Torrens System in Australia* (1982) 199 and Francis, *Mortgages and Securities* (2nd edn 1975) 323.

the case of mortgages, as in the case of leases, an intention that the interests should be merged²⁹² must be manifested on the register. It is not until then that it has any effect either as regards third parties, or the owner.

The majority of the High Court distinguished the merger of registered mortgages from that of registered estates on the basis that "a mortgage under the system is a creature of statute". Certainly a mortgage under the Torrens System is fundamentally different from a common law mortgage in that the mortgagor remains the owner of the land with a right of sale in default of payment. However, when one considers the equitable transformation of the general law mortgage, and the extent to which the rules relating to old title mortgages are reflected in the statutory provisions, the gap between the two is much lessened.²⁹³ Further, the equitable rules regarding clogs on the equity of redemption²⁹⁴ and the rule in *Otter v Lord Vaux*²⁹⁵ have been held to be equally applicable to registered mortgages. Why then should the fact that the Torrens System mortgage is a "creature of statute" be a reason to exclude the equitable rules of merger?

Whatever the validity of this argument, it is likely that the decision in *Phillips' case*,²⁹⁶ that an intention to merge a mortgage may be effected only by an application to the Registrar-General to record it on the register, will be followed when the question next arises in South Australia. This will be not merely because of the status of *Phillips' case*²⁹⁷ as the only High Court decision in relation to the South Australian Act, but also because this conclusion is more consistent with the doctrine of immediate indefeasibility which has since been applied with this result to the merger of estates.

3 Extinguishment of easements and profits

(a) *The cases*

The only case where the question whether an easement over the registered land will be extinguished by unity of seisin of the dominant and servient tenement²⁹⁸ has been considered is *Re Standard and the Conveyancing Act, 1919*.²⁹⁹ This case was an application under s 89(3) of the Conveyancing Act, 1919 (NSW) for an order that the servient tenement was not affected by the easement registered on the title, on the basis that it had been extinguished by virtue of an earlier unity of seisin of dominant and servient tenements. Owen CJ rejected the application, saying:

"I was referred to a great number of authorities in relation to the principal arguments presented and to subsidiary questions which arose out of them, but I do not think that it is necessary to refer to them or to discuss them. I have

292 See discussion *infra* as to how this may be effected in practice.

293 Sykes, *The Law of Securities* (2nd edn 1973) 176.

294 *Toohy v Gunther* (1928) 41 CLR 181, *Knightbridge Estates Trust v Byrne* [1939] 1 Ch 441.

295 See *R v Registrar of Titles; ex parte Watson* [1952] VLR 470.

296 *Supra* n 223.

297 *Ibid.*

298 In the case of easements in gross and profits a *prendre* the precise concern is with unity of seisin of the easement or profit and the servient tenement.

299 (1970) 92 WN (NSW) 953.

come to the conclusion that by virtue of the provisions of s 42 of the Real Property Act, 1900,³⁰⁰ the servient tenement is still subject to the burden of the easement in favour of the dominant tenement."

(b) Conclusions from the cases

In *Re Standard*,³⁰¹ the servient tenement had been conveyed to a third party. Thus, it was not necessary to consider whether the easement was extinguished by the unity of seisin so far as the common owner was concerned. However, by analogy with the recent cases on the merger of leases where the doctrine of immediate indefeasibility has been applied, there is no reason to limit McLelland CJ's judgment that the easement had not been extinguished to third parties. This receives added support from the case of *Australian Hi-Fi Publications Pty Ltd v Gehl*³⁰² where Mahoney A-J regarded *Standard's case*³⁰³ as deciding that by s 42 the land was held subject to interest noted on the certificate of title and the rules relating to extinguishment did not operate to the contrary.

As such, this case is likely to be followed when the question of extinguishment of registered easements arises in South Australia.

4 Extinguishment of restrictive covenants

The Torrens System in South Australia predates judicial recognition of restrictive covenants. Whilst in New South Wales, Victoria and Western Australia provision has been made for the notification of restrictive covenants on the register, and more elaborate provisions exist in Tasmania, there is no such specific provision in South Australia or Queensland.

Whether restrictive covenants are capable of binding land under the Torrens System in South Australia has been discussed in two cases.³⁰⁴ However, it remains far from clear what the effect is of notification of covenants on the register in the absence of direct legislative authorization. Nor is it certain whether the caveat system may be used to protect restrictive covenants.³⁰⁵ Further, even in the jurisdictions where it is possible to notify restrictive covenants on the register, the question of compatibility of schemes of development with the Torrens System remains unresolved,³⁰⁶ and even the effect of notification is uncertain.

Quite apart from the complications imposed by the system of registration, the general law rules relating to the extinguishment of covenants are also far from settled.³⁰⁷

In light of all these uncertainties, it is virtually impossible to postulate how the general law rules of extinguishment are affected by the Torrens System. The difficulty in arguing by analogy with the extinguishment of easements is that the notification of restrictive covenants on the register

300 The closest equivalent to this provision in the SA Act is the indefeasibility provision in s 69.

301 *Supra* n 299.

302 [1979] 2 NSWLR 618, 627.

303 *Supra* n 299.

304 *Blacks Ltd v Rix* [1962] SASR 161 and *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227.

305 For a discussion of these two issues see: Bradbrook and Neave, *Easements and Restrictive Covenants in Australia* (1981) 294-321.

306 *Ibid* p 307 ff.

307 See *supra*.

(even where it is expressly provided for) does not convert the restrictive covenant from an equitable interest in land to a legal interest.³⁰⁸

Thus, even in the jurisdictions where notification is allowed, the restrictive covenant is only excepted from the operation of the indefeasibility provisions if it complies with the usual equitable requirements.³⁰⁹ Presumably this would incorporate the rules relating to extinguishment. The position in New South Wales is stated by Woodman in the following terms:³¹⁰

“Where the land benefited and the land burdened are held under the Torrens System, the covenant should be removed from the Register upon unity of ownership. The position is not clear where the covenant still remains on the title of the burdened land and a third party buys. On the one hand, it may be argued that the Torrens system does not affect the general law, so that the covenant has been extinguished and is ineffective unless it is recreated on the transfer. On the other hand, it may be argued that the third party is bound by the covenant for either of two reasons; first, it is still recorded in the Register, and this would appear to be the attitude which would flow from the decision in *Re Standard and the Conveyancing Act* (1967) 92 WN (NSW) 953 (although that was a case involving an easement); secondly, it *may* be a right in personam which would be enforceable under the ratio of *Frazer v Walker* [1967] 1 AC 569.”

On the present state of the law, no more than this can be said.

5 The Law and current Lands Titles Office practice

It has been stated above that in order to effect the merger or extinguishment of an interest, the intention to do so must be manifested on the register.³¹¹ It has been assumed that this may be done either in the instrument by virtue of which the interest is acquired, or subsequently by a request to that effect.

It appears from *Baalman and Wells' Lands Titles Office Practice*³¹² that this assumption reflects the current practice in New South Wales. Further, it was sanctioned by the New South Wales Court of Appeal in the case of *Shell v Zanelli*.³¹³

However, by contrast with the New South Wales Act, no express statutory provision exists in South Australia either to record the extinguishment of any estate or interest by merger,³¹⁴ or to cancel an entry on a certificate which has ceased to affect the land.³¹⁵ Whalan argues that despite the lack of express power the Registrar is nevertheless able to deal with an application to record an intention to merge.³¹⁶

308 *Supra* n 305 at 306.

309 *Ibid* 307, citing *Re Martyn* (1961) SR (NSW) 387, 392 (FC) per Walsh J.

310 Woodman, *The Law of Real Property in New South Wales* (1980).

311 With the possible exception of restrictive covenants.

312 Nettle (4th edn looseleaf service).

313 [1973] 1 NSWLR 216.

314 Section 12(1)(i).

315 Section 32(3). This was the section which was used in *Shell v Zanelli*.

316 *The Torrens System in Australia* (1982) 199.

However, it appears that the Registrar-General currently exercises this power only in relation to the extinguishment of easements. Form T.2 in the current edition of *Jessup*³¹⁷ sets out that an easement will be extinguished by expressing an intention that it should in the transfer effecting unity of seisin of dominant and servient tenements. Further it may be that extinguishment could be effected at a later stage by express request.³¹⁸

However, it appears that this is the limit to which the doctrines of extinguishment and merger are recognized by Lands Titles Office practice. Effectively the same result may be achieved, but only by the adoption of full formal procedures.

Thus whilst a form exists³¹⁹ providing for the merger of leases and extinguishment of mortgages, titled "Transfer (to effect merger)", it is submitted that the overall situation produced does not differ in essence from a normal transfer. For, although an intention in favour of merger is clearly expressed in the transfer, the accompanying note states that in order for the lease or mortgage to be removed from the register, the transfer must be accompanied by a surrender or discharge. If merger or extinguishment is desired to be effected at a later stage than at the time of the transfer of the second estate or interest to the owner, there seems to be no other means by which this may be achieved than by registering a surrender or discharge. No mention is made as to the appropriate means for removing a rentcharge from the register. Arguably it would be treated in the same way as a mortgage.

The current practice in relation to the merger of leases is in one respect more advantageous to the common owner than the former practice³²⁰ of regarding leases as merging automatically upon the registration of one person as owner of both estates. Not only is it more in line with the equitable position, but it also makes reconveyance of the estate much simpler than if the lease had to be created afresh. However, the current practice of requiring not only an expression of intention, but also a surrender (or discharge in the case of a mortgage) means that the effectuation of a merger requires the execution of two documents rather than one. Apart from being cumbersome, this may be marginally disadvantageous to the owner so far as stamp duties are concerned.³²¹

Where one person is registered as owner of two freehold estates in the land, there appears to be no means for registering a merger other than by application for a fresh certificate of title.

Further, a merger may be effected by the Registrar-General without any express request by the common owner, and indeed, contrary to his or her intention, when as a matter of course he issues a fresh certificate of title, for example when a book is full. Whether the Registrar-General issues a fresh certificate in this situation is in his discretion, and

317 Maher, *Jessup's Forms and Practice of the Lands Titles Office of South Australia* (6th edn 1982).

318 This statement is based on a telephone conversation with the Chief Examiner of Titles.

319 *Ibid* form T.1.

320 See Kerr, *supra* n 208.

321 Where there is a surrender for no consideration, no stamp duty is attracted, so that the extra instrument would not be a financial burden to the common owner in this context. However the discharge of a mortgage does attract a nominal duty of \$4.00. See Stamp Duties Act 1923 (SA), 2nd Schedule.

although he would probably not exercise it if there were a reason for preventing merger, this practice may potentially lead to a situation where there is merger by registration where there would be none in equity.

Whilst admittedly the current state of the law cannot be regarded as settled, it is not suggested in any of the cases that the doctrines of merger and extinguishment should have no application to Torrens System land. Rather, it has been held that they must be modified to the extent to which they are inconsistent with the provisions of the Torrens statutes, and in particular with the indefeasibility provisions. The reconciliation which has been adopted is that the Registrar-General must receive an express request to give effect to a merger or extinguishment. With the exception of easements, it appears that the current practice of the Registrar-General is not in accordance with the law. As such the Registrar-General could be compelled to behave differently were the question ever to be litigated.

CONCLUSION

At general law, provided the common law requirements are satisfied and there is no reason in equity for merger or extinguishment not to take place, the lesser estate or collateral interest ceases to exist; that is it merges or is extinguished without any positive intention or formal act by the common owner.

The effect of the cases on merger and extinguishment under the Torrens System has been to reverse this presumption. Despite the variation in the routes by which this end result has been reached, it can now be stated as a general rule³²² that in order to effect the merger or extinguishment of a registered interest, the common owner must have a positive intention in favour of merger or extinguishment and must manifest it in the form of an application to the Registrar-General. It now falls to consider how far the current state of the law is consistent with the underlying bases of the doctrines which have been so modified.

There are as many justifications for the doctrines of merger and extinguishment as there are interests in land. For example, where one person owns two freehold estates it may be argued "that the time of one estate also comprises the time of the other estate; and that it would be absurd for the law to admit that the same person had two distinct estates, when the time of one of those estates was, in construction of law, equal to and involved in the time of the other of those estates."³²³ In the case of leasehold estates one may point to the impossibility of the lessor enforcing covenants against him or herself. As regards mortgages and charges the rationale is that one cannot be one's own debtor. In the case of an easement or profit one may argue that one of its essential characteristics is that it is a *jus in re aliena* — a right in the land of another — so that by definition, when both the right and the land to which it relates are owned by the same person, the right must be extinguished. And in relation to restrictive covenants, as with leases, the argument is raised that one cannot enforce a covenant against oneself.

All these rationales have been ignored by the courts of equity where a rigid adherence to them would have led to an unfair or unworkable

322 Leaving aside the unresolved question of the extinguishment of restrictive covenants under the Torrens System.

323 3 *Prest Conv* 18.

result. But the universal justification and arguably the reason for the continued existence of these doctrines in equity is that they simplify the title of the common owner.

The object of simplification is of less significance under a system of registration which provides for a single statement of the state of the title than at general law where this information can only be ascertained by investigating the chain of title. Nevertheless, it remains a desirable aim, in that it simplifies ongoing transactions.

What can be seen in the cases is a reconciliation of this object with one of the major goals of the introduction of the Torrens System, namely the provision of an accurate and complete register.

When the question arose as to whether these general law doctrines continued to apply to registered land, three options were open to the courts:

- (a) To reject outright the application of these doctrines to registered land;
- (b) To find that merger and extinguishment took place as at general law, so that notification on the register was merely evidential so far as the common owner was concerned;
- (c) To make merger and extinguishment dependent upon registration.

The first approach has never been contemplated by the courts. They regarded the general law as *prima facie* applicable to registered land, and modified it only to the extent that it was inconsistent with the provisions of the system. As such, the choice lay between the second and third approaches. The approach chosen depended upon the perception by the courts of the system as a whole; whether the concept of a conclusive register was intended to protect only third parties relying on it and becoming registered, or whether it also extended to the current registered proprietor; that is, whether the system was governed by deferred or immediate indefeasibility. The more recent cases favour the latter and consistently with this have adopted the third approach outlined above.

Within an immediate indefeasibility regime, the cases strike a happy balance between the two potentially conflicting aims of simplifying the title where appropriate and maintaining an accurate register. The title may still be simplified, but only by registration of the merger or extinguishment. Moreover, this has the result that, by contrast with the general law where intention was in many cases presumed for the common owner, merger or extinguishment of registered land may only be effected by manifesting a positive intention in their favour to the Registrar-General.