



HD APPROVED

LAND LAW

MLP325

COMPREHENSIVE NOTES

-UPDATED FOR 2026-

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1 INTERESTS IN LAND

“LAND”

- Land law deals with the acquisition, nature, transfer and priorities of rights and interests in land
- **Common law meaning** of land: some part of the earth
- Including physical **components**: soil, minerals, vegetation and fixtures
- Land is indestructible (?)
- *Cuius est solum* rule: ownership of land extends up to heaven and down to centre of the earth (fanciful phrase subject to limitations)
- Three-dimensional space: Surface, above the surface and below the surface. Butt: Open-ended inverted pyramid
- “Land” may be defined for purpose of a statute:

S 4(1) Transfer of Land Act 1958 (Vic): Land “includes any estate or interest in land: but does not include:

- (a) an interest in land arising under the Mineral Resources (Sustainable Development) Act, 1990 and
 - (b) a carbon sequestration right or soil carbon right granted in relation to Crown land under a Carbon Sequestration Agreement
- Two types of land: **General law land** and **Torrens title land**

GENERAL LAW LAND V TORRENS TITLE LAND

General law land

- Different systems of land registration applicable to:
 - Torrens title land
 - General law land
- General law land is land alienated or granted by the Crown from 1837 to the commencement of Torrens legislation in 1862 (Vic)
- Legal title could only have been transferred by a deed of conveyance
- Parcels of general law are diminishing due to conversions
- General law land is governed by Property Law Act 1958 (Vic)

Relevance: General law land (and PLA) remain relevant —

- Many of those titles have been converted over the intervening years but those that remain in the system are still valid proof of ownership
- A program to convert Victoria’s remaining General Law titles to the Torrens system continues
- When application for conversions is made to bring general law land within the operation of the Torrens system, priorities between the conflicting interests are judged according to the rules of the old system
- Even with converted land the provision of the Property Law Act may still affect priorities

Torrens title land

- Torrens title land includes:
 - Land alienated or granted by the Crown after commencement of Torrens legislation in a particular state (SA 1858; Vic 1862); and
 - Old title land converted to Torrens title land
- Transfer of Land Act 1958 (Vic) applies to Torrens title land
- **Title** to Torrens title land is evidenced by a Certificate of Title
- Interest is known as a **registered interest**

- **System** of title by registration:
 - validates a defective title; and
 - guarantees protection of title
- Distinction between registered & unregistered interest
- Lack of uniformity in Torrens legislation of the different states

General law (old title) and Torrens title land: What is the difference?

- General Law (Old Title) Land represents all land grants issued between 1838 and 1862 which have not been brought under the Torrens system.
- General Law is the original form of land ownership. When land was sold or otherwise allocated by the government, a Crown Grant would state that the land described had been given to the person named in the Grant. Each time the property was sold a new deed would be added to the Grant. These would grow into a chain of deeds. To prove ownership, a vendor would have to produce the complete and unbroken chain of titles. These days any general law land that is transferred must be converted to modern Torrens title
- In Victoria the Torrens system first introduced in 1862 pursuant to the Real Property Act (Vic) which is now set out in the Transfer of Land Act 1958 (Vic). Land issued *after* 1862 was Torrens land OR land converted to Torrens under the 'conversion process' is Torrens land

INTERESTS IN LAND

- A contract for the sale/ disposition of land/ any interest in land is unenforceable unless it is **in writing** and **signed** by the party or representative
- **Applies to legal and equitable interests**
- Not invalid but merely unenforceable
- Not enforceable in court, unless written agreement is produced
- Equitable interest can be created orally but to enforce interest it must be in writing

General law interests

- In Victoria today, most land is now Torrens title.
- Remaining old title land **must**, where transferred, be brought under the TLA so that eventually all land will be covered.
- General law land is evidenced by a 'chain of title'. Torrens title land is evidenced by a CT.
- Chain of title dates back to the original grant.

"Searching a Chain of Title"

- To verify general law title, **s44** PLA sets out only need to search back for the 'good root' of title. This amounts to documentary title apparent in the previous 30 years.
- Purchaser is not affected by any title existing beyond this 30 year period: PLA **s44(6)**
- Must be aware of titles existing within the 30 year period because will be affected by this.
- No guarantee of title with general law interests

Torrens Title interests

- The *Transfer of Land Act* provides for the Register to be in a variety of forms and on any medium, including parchment (old CT's) and a computer
- The computer title information forms part of the Register and can be updated by registering new dealings on the computer database without having to update any paper title.
- The folio is the original document in the titles office. The certificate of title is the duplicate of the folio (known as the duplicate certificate of title).
- For a computer title, the Certificate of Title is a computer printout

Computer titles may be created in two ways:

- (1) directly from newly registered plans of subdivision for lots, roads and reserves on those plans. In this situation there is no paper folio for the land, only the computer folio information
 - (2) through the registration of a dealing affecting a paper folio (title) for which there is computer "search" data available. The registration transforms the data to computer folio data, which can be subsequently updated instead of the paper title
- Computer titles do not contain the breadth of detail as the old paper titles.
 - They only contain current information (ie not old registered proprietors etc) and they do not contain any detailed diagrams of easements etc
 - Verified: Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) Appendix – Victorian Act – ss7(documents may be lodged electronically and s12(digital signatures)

1) REGISTERED AND UNREGISTERED INTEREST

- Both general and Torrens title land **may be unregistered**.
- General law interests cannot be registered under Torrens until they are converted.
- Torrens title interests may be unregistered because holders choose not to register as the system is not compulsory
- Unregistered interests do not gain the protection of indefeasibility that registered holders of Torrens title land acquire

History: System of deeds registration — categorise deeds according to lodgement

- **Title** was comprised of a series of deeds forming a chain of title representing the history of the land grant
- Vendor must prove title by searching each document in chain to ensure that link to original Crown grant is unbroken (Aus: 1788)
- Theory of relative dependent title: each owner of an estate could acquire only such title as his predecessor held
- Search of chain of title
 - Difficulties and costs
 - Statutory limitations of statutory search:
 - Need only to search title back for 30 years, provided good title can be found during that period: **s 44(1)** of the PLA
 - Purchaser not deemed to be affected by notice of interest prior to the 30 year period: **s 44(6)** of the PLA
- Although registration not compulsory registrations did take place
- Distinction between legal and equitable interests

- **Priority** is given to a registered interest over unregistered interest and interest registered at a later date, provided it was acquired:
 - bona fide
 - for valuable consideration
 - without actual or constructive knowledge: **s 6** PLA
- Registration does not validate a defective title and provides no guarantee of title
- Deeds, conveyances or other instrument may no longer be registered in the office of the Registrar-General: **s 6(2)** PLA
- All dealings relating to old title land must now be registered under the Torrens system necessitating a conversion from old title to Torrens title

2) LEGAL AND EQUITABLE INTERESTS

a) LEGAL INTERESTS IN LAND

- A **legal interest** in land is one which constitutes a recognisable common law estate/interest and which is created in accordance with the requisite formality requirements.
- All legal interests over land **must be in the form of a deed** otherwise not legal: **s52(1)** PLA
- Exceptions to this are set out in **s52(2)** (variety of orders) **AND s54(2)** PLA sets out that leases not required to be in writing such as oral leases for 3 years and under.
- Applies to all 'conveyances' of land — **s18** PLA defines conveyances broadly to include: 'mortgage, charge, lease, assent, declaration etc'
- Conveyance not restricted to formal deed or transfer

Formalities for legal interests

- Formalities for creation and conveyance of legal interests are set out in statutes of different states
- In Victoria, a legal interest in land is created or conveyed by state grant (**s 51(1)** PLA) or execution of a **deed (s 52(1))** or registration of an instrument
- If formalities are not met, an equitable interest may exist
- Creation of parol leases (taking effect for a term not exceeding three years) need not to be executed by deed to be valid: **s 54(2)** PLA

S 51 PLA: "All lands and all interests therein shall lie in grant and shall be incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale....."

- Land/interest in land shall lie in grant
- Incapable of conveyance by livery, or livery and seisin or by feoffment or by bargain and sale
- Possession is passed by conveyance of an interest

S 52(1): "All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed"

- Land/interest in land must be conveyed by deed
- Legal interest = recognisable common law estate
- If a deed is executed a legal interest is created enforceable in the common law
- If no deed is executed:
 - no legal interest is created

- an equitable interest may be created

S52(2) exceptions to conveyance by deed:

- Surrenders by operation of law (s 52(2)(c))
- Leases or tenancies not required by law to be made in writing (s 52(2)(d))
- Vesting orders by a court (s 52(2)(f))
- Conveyances taking place by operation of law (s 52(2)(g))

S 54(2)

- “Nothing in the foregoing provisions of this Division shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.”
- Formalities do not apply to oral leases for three years or less

A deed: s 52, s 73 PLA

- **Deed:** most solemn act a person can perform with respect to a particular property: *Manton*
- Other definitions —
 - At common law re *Manton v Parabolic* = Ritual/instrument to signify solemnity.
 - Early times: ‘Livery of seisin’: vendor removed his battle glove from which he had defended the land and ‘vested’ the purchaser with it. Vendor then dug up a sod and handed it to purchaser along with the knife.
 - A Memorandum of events subsequently prepared. This Memorandum came to be known as deed – replaced ancient rituals.
- **Usually applied to:** conveyances, transfers, mortgages, charges and leases of land.
- Common law requires a deed to be: **signed, sealed and delivered.**
 - ‘A deed must be intended by the party who does it to be the most solemn indication to the community that he really means what he is doing. The solemn indication is given by sealing a deed which witnesses to what has been done’: *Manton v Parabolic Pty Ltd*
- It must be **executed by the grantor in presence** of the prescribed number of witnesses, known as instrumentary witnesses.
- Originally, a **seal** had to be affixed to it. Most jurisdictions outdated seals, and now the grantor and witnesses signatures are primary.
- Deed for purposes of PLA: document signed by both parties with intention of operating as a deed and witnessed — No wax or wafer seal; **Printed indication** where the seal should be affixed

Statutory requirements —

- Person who executes a deed **must sign or place mark** on deed; sealing alone insufficient: **s73** of PLA;
- if deed expressed to be sealed shall have the same effect as if it has been: **s 73.**
- Attested by witness not a party to deed; **s 73** and
- Sealed: instrument which is expressed to be sealed shall operate as if sealed: **s73A**
- TLA **s40(2)** Every instrument – when registered – shall have the same effect as if it were a deed under seal. Electronic Conveyancing (Adoption of National Law Act) 2012 (NSW) Appendix **s 9(1)** gives electronically lodged registry instruments the same effect as paper documents

Execution of a deed

- Corporation executes a deed by affixing the common seal of corporation
- 'Conveyance' includes: Mortgage, charge, lease, assent, vesting declaration, disclaimer, release, extinguishment or assurance of property/interest by any instrument (except will)
- **Delivery** of title deed – changed from actual delivery to constructive delivery
- Once delivered, the delivering party cannot withdraw or resile from it
- Delivery can be unconditional or conditional ('escrow'; not effective until condition is fulfilled)
- Formality of execution of a deed required for:
 - *Inter vivos* transfer of an estate in general law land
 - Grant of a lesser interest such as:
 - Lease (subject to **s 54(2)** exception)
 - Mortgage
 - Easement
 - Registration of instrument in Torrens system has the same effect as deed: **s 40(2) TLA** (repealed in 2014)

b) EQUITABLE INTERESTS IN LAND

- An **equitable interest** is a "right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him".
- Legal Interest at Settlement **BUT** equitable interest enforceable when contract entered.
- Settlement period necessary to organise finance; investigate title
- Contract will generate equitable interest (constructive trust/equitable lien) if specifically enforceable
- Specific performance available if damages inadequate and parties ready and willing and the contract is valid
- Orthodox type of equitable interest: constructive trust: vendor qualified trustee and purchaser holds beneficial title. Vendors trusteeship qualified by vendors lien: *Lysaght v Edwards*
- Tanwar dicta revises this: suggests no constructive trust but purchaser holds equitable lien over deposit bc description of purchaser as constructive trustee conceals the contractual relationship and this analysis is 'bedevilled by circularity.'

Equitable interests in land: *Statute of Frauds*

- Contracts in land must be in writing/signed: **s126** Instruments Act / **s53** (to enforce any contract for sale of land or any interest in land)
- Exception to formality requirement: Oral contract which are specifically enforceable may be valid if satisfies doctrine of part performance: **s55(d)** PLA: 'Nothing in the last two preceding sections shall- ...(d) affect the operation of the law relating to part performance.'
- These provisions derived from Statute of Frauds which will render a non-compliant contract or interest in land unenforceable (note that unenforceable does not mean that the interest is extinguished).

Formalities for equitable interest

- As an interest in land, equitable interest must satisfy statutory requirements for (a) **creation** and (b) **enforceability**

- Provisions regarding **creation** of an equitable interest in land is **s 53** Property Law Act
- **Creation** or **disposition** of an equitable interest has to occur in **writing**
- Writing and signing are liberally interpreted
- Formalities are required to prevent **fraud** in creation and transfer of interests in land
- Need not to be created by deed
- **Contract of sale** – deposit and agreement that vendor will execute a conveyance of legal estate and purchaser pays rest of purchase price
- **Term** (express/implied) of contract for sale that vendor proves good title to land
- Constructive **trust** or **lien** may arise to protect interest of purchaser
- At completion of sale (settlement): balance of purchase price, executed transfer, documents of title and keys are handed over

S 53 PLA

(1) ...

- (a) An interest in land can only be created or disposed by writing signed by the person creating or conveying the same, or by will, or operation of law
- (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
- (c) a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing and signed by the person disposing of the same or by will

(2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

Types of trusts re s 53

For purposes of **s 53** the different trusts must be kept in mind. The following trusts are recognised:

- 1) Express trust — Grantor expressly intends to create a trust and transfer legal title to a third party (trustee) for benefit of a defined party (beneficiary)
- 2) Resulting trust — An intention to create a trust is inferred from the circumstances and an act of performance supports the intention
- 3) Constructive trust — It is imposed at the discretion of the court where it is concluded that justice and fairness require it

S 53(1) PLA

- **Section 53(1)** applies to the creation of all trusts and other **express equitable interest** but not to resulting trust or constructive trusts
- An express trust by **transfer** must be created in writing
- An express trust created by **declaration** rather than transfer needs only to be evidenced in writing, not created in writing
- A trust can be created **orally** and subsequently enforced by evidence in writing or the terms of the trust which have been signed by the settlor
- **S53(1)(a)** does not overlap with oral trusts coming within the application of **subs (b)**.
- If a trust over land is orally declared, subs (b) has independent operation.
- **Section 53(1)(c)** applies to transactions with pre-existing equitable interest
 - Disposition = transfer/assignment or direction
 - Disposition has to be in writing and signed by transferor or his agent

S 126 of Instruments Act 1958 (Vic)

- No action shall be brought upon any contract for the sale or other disposition of land or of any interest in land, unless an agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some person thereunto by him lawfully authorised.
- This provision relates to the **enforceability** of all contracts or dispositions relating to land
- Written agreement creating interest, note or memorandum of agreement

THE DOCTRINE OF PART PERFORMANCE

- Part Performance : The Australian position is the strict test as set out in *Maddison v Alderson*: must prove acts unequivocally referable to agreement was endorsed in *Millet v Regent*
- The doctrine of part performance requires that the plaintiff must be able to show that he or she has made a substantial commitment to the contract so that it would be unconscionable to allow the defence. Note that it must be the acts of the *plaintiff*. The doctrine is based on the idea of unconscionability generated by the plaintiff's reliance on the existence of a contract. Acts of the defendant which show that there is a contract therefore do not count.
- What acts of part performance will suffice: generally the taking of money alone is insufficient. However, it is not necessary for the entire contract to be performed and generally, taking possession of land will raise a part performance action.

Equitable interests arising from part performance

- Despite absence of writing/insufficient writing a contract may still be enforceable if there are sufficient acts of part performance by plaintiff
- Equitable interest may arise if a court is prepared to issue a decree for specific performance in circumstances where it would be inequitable not to do so
- Qualification of Statute of Frauds of 1677
- Preconditions for a decree for specific performance:
 - Valid contract
 - General requirements for contract of sale of land have been met
 - Absence of adequate remedy at law in damages
 - Party seeking enforcement must prove that he has performed or is ready and willing to perform the substance of his contract obligations
 - Contract must be unconditional
 - No bar to award of equitable remedy of specific performance. Relief is refused in case of undue influence, delay or acquiescence
 - Vendor must prove good title or the purchaser has accepted such title as vendor has
- Doctrine of part performance allows for **enforcement** of an oral contract of sale of an interest in land when the contract has been sufficiently acted upon
- **Basis**: If a contracting party is induced to alter position on faith of contract it would be fraud on such party to set up the defence of invalidity of contract

Approaches to part performance

Two perspectives as to what constitutes to part performance:

- 1) Stringent approach requiring:
 - acts relied upon must be **unequivocally**; and

- in their own referable to some agreement alleged **nature**: *Madison v Alderson* (HL) (non-payment of salary for years in return for grant of life estate; held insufficient evidence)

4) Liberal approach:

- an act constitute part performance if on the balance of probabilities they indicate that a contract of some kind existed: *Steadman v Steadman* (HL)

Australian position

- Test in *Madison* represents the Australian position
- *Steadman*, however, not rejected in *Regent v Millet* (was not necessary to consider Steadman because acts met stricter test).

Regent v Millet

- Agreement to transfer property to daughter and partner if they paid deposit and loan off. They took possession and made payments, sought an additional loan for renovations. Father refused to transfer title.
- Acts relied upon:
 - taking of possession;
 - repairs and renovations; and
 - making of mortgage payments
- Court found that doctrine of part performance applied
- The court applied stringent requirement test
- Court found that granting and taking of possession constitutes part performance
- Found it unnecessary to consider other acts

Types of acts constituting part performance:

- Payment of purchase price;
- Depositing of title deeds; and
- Giving and taking of possession
- Combination of these acts (and not act per se) constitutes part performance

Part performance is established by showing:

- that the acts of performance unequivocally relate to the agreement alleged; and
- that the act relied upon must:
 - have been done on the faith of the agreement; and
 - resulted in a change of position with respect to the subject matter of the contract such that the person would be unfairly prejudiced if the other party were to take advantage of the absence of any written evidence: *Madison v Alderson* (1883) (UK)
- **S 126** of the Instruments Act does not recognised part performance as an exception to the formality requirements
- **S 55(d)** of the PLA acknowledges part performance as an exception to formality requirements as set out in s 53 of the PLA.

BOUNDARIES OF LAND OWNERSHIP

- Land may have artificial or natural boundaries
- Common law meaning of land is a three-dimensional space
- *Cuius est solum eius est usque ad coelum et ad inferos* rule: Ownership of land extends upwards indefinitely and downwards to the centre of the earth in the shape of an open-ended inverted pyramid

- Ownership rights can only be exercised within the specific dimensions of the land
- Boundary of land title is defined according to **survey lines** in Victoria
- If survey lines have been moved, a fence/wall erected and requirements of adverse possession have been met the erected fence/wall will be the boundary
- Owner of land does not own **minerals** in soil
- Ownership of (unsevered) gold and silver vest in Crown by royal prerogative: *Cadia Holdings Pty Ltd v NSW*
- In Victoria ownership of other (unsevered) minerals is vested in Crown. Mineral (Resources Development) Act 1990 s 9: "The Crown owns all minerals", except when:
 - a mineral exemption is current; or
 - minerals are separated from land in accordance with a statutory authorisation (licence or right) by an authorised person: **s 11**

Re surface of land

- *Cuius est solum* rule
- Rights of owner above surface:
 - Trespass of air space?
 - Transient intrusion will not constitute trespass
 - Permanent intrusion constitutes trespass
 - Aviation laws
- Rights of owner to surface
 - Encroachments
- Rights of owner below the surface
 - Trespass
 - Excavations or tunnels
 - Statutes can limit ownership beyond a certain depth
 - In general, minerals belong to the Crown (in right of the State)

1) Water rights / boundaries

- If land does **not abut water**, its has **artificial boundaries which are fixed**
- If **land abuts water**, the **boundary is natural**
- A **natural boundary is not fixed** and may shift from time to time by natural forces
- Artificial boundaries are determined in accordance with reference to specific measurements in the certificate of title
- Physical Measurements: Boundary defined according to survey lines. If survey lines removed may establish boundary lines according to adverse possession (where proven)
- Own up to the heavens and down to hell: *cuius est solum maxim* **BUT** Crown reserves certain rights which include minerals and now – regulation of bore water.
 - Crown owns riverbed an access depends on legislation
 - Ownership of and entitlements to water is vested in the Crown
- Water rights are granted pursuant to licences
 - Range of factors to be taken into account when Minister grants a licence

- Unauthorised taking of water constitutes civil liability (Vic)
- Minister may suspend, revoke and cancel licences
- Water Act 2007 (*Cth*): regulates the management of water in the Murray-Darling Basin
- **If measurements incorrect:** General law land will result in defective title. Torrens title land no indefeasibility for registered holder of land 'wrongly described' unless can prove are a bona fide purchaser for value.
 - Error in description of land in old title which vendor and purchaser are unaware will result in acquisition of defective title
 - If vendor is aware of defective title purchaser may set aside contract
 - If Torrens title land the registered proprietor will not acquire indefeasible title if land is incorrectly described
 - If land has been included by wrong description the proprietor cannot claim it (bfpfw will be protected)
 - If error is due to incorrect survey the proprietor will acquire indefeasible title
 - Registrar may correct errors
 - Correction or entry of Registrar may not prejudice new rights

LAND ACT 1958 (V), s 385(1)

Crown property in bed and banks of certain watercourses

(1) If—

- (a) land is bounded in whole or in part by a watercourse; and
- (b) the land was alienated by the Crown before, or is so alienated on or after, the commencement of section 327 of the Water Act 1989 —

the bed and bank of the watercourse remain, and must be taken always to have remained, the property of the Crown despite the alienation of the land and despite the fact that the same person owned or owns, or holds or obtains a consolidated certificate of title for, the land adjacent to both banks (my underlining).

WATER ACT 1989 (V), s7(1)

Continuation of the Crown's rights to water

The Crown has the right to the use, flow and control of all water in a waterway and all groundwater

Natural boundaries

Specific rules have developed to determine the boundary line of natural boundaries:

(a) Tidal water (land abuts sea-shore)

- **Tidal Waters: High Water mark** is the boundary subject to public rights to fish and navigate.
- Boundary is the mean high water mark
 - Averaging out of annual tidal level reached by spring and neaps
- Unless the boundary is expressly set out upon grant
- Land beyond the high water mark (foreshore) belongs to the Crown:
 - Unless contrary intention was set out in certificate of title
 - Modification: WA straight line drawn as near as possible to the high water mark of all land fronting body of water: Land Act 1933 (WA) s 16(3)
- Territorial sea is regulated by state and territory laws
 - Subject to public's common law rights of navigation and fishing

- Giving an exhaustive list of common law rights of public to tidal waters and foreshore is not possible
- Rights of public may be abrogated/changed by legislation
- Native title may not abrogate a public law or international right of fishing or navigation
- If Native title is inconsistent with such right it becomes a non-recognition right which cannot be exercised (Akiba)
- Private grant in respect of the foreshore is possible
- If the median high water mark changes over time due to gradual and imperceptible change so does the boundary

(b) Non-tidal water: centre of water/river (*ad medium filum aquae* rule) (unless abrogated by statute):

- **Non-tidal Waters: Middle Line approach** – abrogated by statute in Vic to vest river bed in the Crown: Water Act 1989, s327(1). Riparian entitlements now also vested in the Crown
- Non-tidal river running through centre of adjoining land is presumed to be divided down the centre of river by adjoining landowners
- Presumption may be rebutted by proving Crown did not intend equal division
- Most Aus States have, however abrogated or modified rule:
 - Qld: rule completely abrogated: beds and banks of water courses and lakes are property of State (Qld Water Act 2000 s 21)
 - Vic: riverbed and bank of river remains property of Crown subject to the right of exercise of water rights by landowner.

Alluvio et avulsio

- It is possible for owner of land to acquire land through a gradual process of alluvion by action of the sea/river
- If the adding of land is rapid and perceptible (*avulsio*) land is not acquired: *Williams v Booth*
- Roman law definition of alluvio and avulsion:
- "That," says Gaius (Gaius, II.70,), "appears to be added to our land by alluvio, which a river adds to our land (*ager*) so gradually that we cannot estimate how much is added in each moment of time; or, as it is commonly expressed, it is that which is added so gradually as to escape observation. But if a river (at once) takes away a part of your land, and brings it to mine, this part still remains your property (*avulsio*)."

Accretion and erosion

- **Accretion/Avulsion:** Land with 'ambulatory borders' may acquire or lose land where there is erosion or accretion which is gradual and 'imperceptible' rather than sudden and dramatic: *Williams v Booth* CB 150
- *Alluvio et avulsio* take place in respect of tidal and non-tidal water
- Land can be acquired by *alluvio* but not *avulsio*
- Natural and imperceptible deposits by *alluvio* will pass in ownership to the adjoining owner
 - De minimis non curat lex
 - "Imperceptible" refers to slowness of additions to the soil (*Williams v Booth*)
 - Whether alluvio or avulsion has take place is a question of fact
- Not restricted to action of water: accretion by windblown sand is possible– *Southern Centre of Theosophy v South Australia* [1982] AC 706

- Rapid and perceptible accretion by *avulsio* or flood will not result in passing of ownership to adjoining owner
- Gradual and imperceptible loss of land by erosion to the sea will pass to the Crown; Rapid and swift loss of land to the sea will not result in passing of ownership to the Crown
- Even upon an assumption of permanent closure of the mouth of a lagoon cutting it off from the sea, accretion of body of water of the lagoon and soil covered by it does not take place because it amounts to sudden and considerable alluvion or dereliction (*Williams v Booth*)
- Application of the doctrine may be excluded or modified by grant

2) Fence boundaries

- Fence usually upon boundary of land
- Upon purchase of land one must ensure that physical boundaries corresponds with legal boundaries set out in title
- No common law duty on adjoining owners to keep fence in reasonable condition
- Common law exceptions: (roaming livestock)
- Maintenance may be imposed by contract, covenant or easement

Fences Act 1984 (Vic)

- Regulated by statute
- Adjoining landowners must construct or jointly contribute to construction of a fence which is sufficient for both occupiers
- In absence of agreement a court may determine liability
- If contribution is sought a notice in writing must be served upon neighbour setting out the relevant area and type of fencing necessary

3) Encroachment / Encroaching buildings upon land

- Property rights only extend to physical boundaries of land
- Any encroaching property which is affixed to the land will be owned by the adjoining land owner pursuant to doctrine of fixtures
- If encroachment not affixed, adjoining owner may claim damages for intrusion. Encroachment includes land and airspace.
- Encroachment of surface, airspace or underground possible
- Encroaching buildings upon the land of another will vest in ownership in the other owner in terms of the doctrine of fixture.
- No compensation is available to encroaching owner
- Other (aggrieved) owner may apply for:
 - Removal
 - Compensation
 - Land transfer
 - Lease

Legislation

- Qld (PLA, s 196) WA (PLA, s 123(1)) legislation entitles a person to apply for relief if he made a lasting improvement to another's land in genuine belief that the land belongs to him
- Court has power to:
 - issue an order conveying, transferring, leasing, and conferring any easement, right of privilege in any person over the whole or any part of the land which the improvement has been made
 - Issue an order requiring any person to remove the improvement from the land
 - Issue an order for the payment of compensation in respect of any land or any improvement
 - Issue an order that any person have or given possession of the land or improvement for such period and upon such terms and conditions as the court may specify
- Court has broad **discretion** and take following factors in account:
 - the extent and purpose of the encroachment
 - the knowledge of the encroaching owner
 - how the encroachment affects the value of the encroached land
 - loss and damage suffered; and
 - costs associated with the removal of the encroachment.
- Alternatively, an action may be brought by aggrieved owner (land encroached upon):
 - for trespass (impedes proprietary rights); or
 - nuisance (continuous, unlawful interference with use and enjoyment of land).

a) Encroachment of airspace

- Encroachment occurs via spatial interference (*cuius est solum* rule)
- Spatial interference may constitute an encroachment
- Legislation: Aviation laws
- Structural encroachment may constitute **trespass** entitling aggrieved owner to seek compensation (damage is not a necessary element of the tort)
- Continuing trespass
- Conduct of trespasser not selfish or unreasonable
- Injunction prohibiting further infringement
- Courts not empowered by statute to refuse injunction
- In public interest to prohibit infringements

GENERAL LAW PRIORITY RULES

Why do we need priority rules?

- Jurisdictional Fragmentation increases chance of conflict
- Must determine which interest is entitled to priority
- Priority dispute will arise where two or more interests in conflict, whether partial or direct, over one piece of land
- Priority only conferred to extent of conflict

Different sources of priority rules

- Land Interests exist under common law, equity and statute – so do priority rules
- General Law rules: common law and equity apply as base rules and TLA superimposed on this
- Torrens title priority rules are superimposed over general law rules where land interest is registered under Torrens system

Priority disputes over old title land are governed by two sets of **principles**:

(a) **Principles (priority rules)** have developed in **common law and equity** to resolve disputes between:

- Two legal interests (prior in tempore potior in iure)
- Prior legal interest and subsequent equitable interest (fraud principle)
- Earlier equitable interest and subsequent legal interest (bona fide purchaser for value without notice)
- Two equitable interests (merit and *prior in tempore*)
- A mere equity and an equitable interest (higher equitable interest will prevail over a mere equity)

(b) The **statutory scheme of registration** of the instruments that has led to creation of particular interests:

- Statutory scheme operates as a gloss on the former rules

1) Pure legal interests / Legal and legal interests

- Legal interest in land by deed or per exemption
- Torrens legal interest – registered s 40(2) TLA
- Old title legal interest – chain of title representing all transactions over that land since first issued by Crown
- Two non-identical interest may be created in land
 - (Example, an easement followed by mortgage: earlier legal easement has priority over a later legal mortgage)
 - (Example, a life estate and remainder interest is granted)
- Dispute between two legal interests is determined according to the priority of time by which they are created: ***prior in tempore potior in iure*** (*Moffet v Dillon*). Interests operate chronologically
- It is, however, not possible to confer two **identical legal estates** to persons over a single piece of land
- Once a legal estate has been issued another identical estate can not be granted: the grantor has no estate to give
- When a person attempts to convey a legal estate which he or she no longer has, the ***nemo dat quod not habet*** principle applies
- Literally, it means no person can give what he or she does not have
- As a result of the ***nemo dat quod not habet principle*** **priority** is given to the legal interest created first in time
- ***Nemo dat quod not habet*** is strictly speaking a principle of **invalidity** rather than priority

Nemo dat

Two basic aspect of ***nemo dat quod not habet*** principle:

1) A person cannot transfer title which they **do not / no longer have**; and

5) A person can only transfer title which they **actually have**, namely a vested title

- The ***nemo dat*** rule is **infringed** if a person transfer an estate they no longer have or where a person transfer a greater estate than which they have

- Transfer of an estate which is **encumbered** by easement when title is transferred remains subject to easement, unless easement is properly extinguished
- The *nemo dat* rule has been **changed** by Torrens legislation: title is created by registration rather than conveyance from one owner to another (person registered first has indefeasibility of title)

Examples of *nemo dat*

The *nemo dat* principle may arise in a number of ways:

- If A transfers to B her entire legal interest in land and it turns out that she does not own any land then clearly B cannot and does not obtain any legal estate.
 - A transfers to B her entire legal interest in land and then B transfers his legal interest to C. If A did not have any interest in land then neither B nor C can acquire a legal estate.
 - If A does hold a fee simple in land and effectively conveys this to B through a properly executed deed and then later conveys it to C also, C will receive no interest in land. A does not have any estate to pass because it has already been effectively conveyed to B.
 - If A holds a fee simple estate in land and purports to create a legal leasehold in favour of B for a period of five years, and subsequently purports to execute a deed of conveyance of the fee simple to C, the interests of B and C may co-exist
- Whilst the *nemo dat* principle would prevent C from receiving a fee simple with a current right of possession, the conveyance will be deemed to transfer the fee simple reversion, the title of which A is capable of passing to C

2) Legal and equitable interests

- **Priority disputes** between legal and equitable interests will arise where legal and equitable interests relate to the same piece of land and the rights conferred under these interests are inconsistent
- An **equitable interest** is a 'right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him' (DKLR Holdings)
- It is an *in personam* right enforceable against the owner of land
- An equitable interest in land may **arise** where expressly created, or where inferred or imposed by a court where fairness requires it
 - Right based character of equitable interest – allows for multiple creation of equitable interests against same land.
 - Nemo dat not applicable to equitable interests as title and possession not conferred
- **Numerous** identical equitable interests can arise over a single piece of land
- The equitable interest may either exist **subsequent** to the prior legal interest or **prior** to the subsequent legal interest
- Whether the legal interests arises prior, or is subsequent to an equitable interest, the basic priority rule is that a bona fide purchaser of the legal estate for value without notice will take priority over the interest of an equitable interest holder

2) Prior legal and subsequent equitable interest

RULE: Legal estate holder will always take priority if bona fide and have not contributed to the subsequent creation of equitable title: *Northern Counties Fire Insurance v Whipp*

RULE: A prior legal right will prevail against a later equitable interest

- Given the hierarchy of interests, the legal estate holder will always take priority unless the holder of the legal estate has **fraudulently** assisted in the creation of the subsequent created equitable interest
- Examples of fraudulent conduct:
 - A first mortgagee returns title deed to the mortgagor to enable him to raise money in a subsequent mortgage by depositing of title document with a new creditor (mortgagee)(equitable mortgage)
 - Holder of prior legal interest represents that he has no interest in property and another person acquires interest on faith of representation
- Prior legal estate will be **postponed** where the legal estate holder has assisted or connived in some scheme resulting in the creation of a subsequent equitable interest in favour of bona fide purchaser taking without notice of prior legal estate
- Rule has its origin in equity
- An equitable right is only enforceable against a legal right where it would be unfair of the legal estate holder to deny knowledge of existence because his **inequitable behaviour** has contributed to the creation of the equitable title
- Would arise if it can be proven that the prior legal estate holder has **contributed** to the creation of the subsequent equitable interest, without the subsequent interest holder being **aware** of the prior legal estate
- The legal interest will prevail unless there are **extenuating** circumstances
- A court has to decide whether sufficient reason exist to displace the **natural priority** enjoyed by the earlier legal interest and thereby accord priority to the later created equitable interest

The holder of the legal estate must be able to **prove** that he/she:

- is bona fide; and
- did not contribute to the subsequent creation of the equitable title

A grantee of a prior legal estate will have his interest **postponed** in the circumstances where the conduct of the legal estate holder cannot be described as *bona fide*.

Conduct fitting into this category would include circumstances where:

- (a) the legal estate holder is guilty of **fraud**;
- (f) the legal estate holder is guilty of **gross negligence**; or
- (g) the conduct of the legal estate holder effectively results in him being **estopped** for asserting his legal priority

Categories of priority of subsequent equitable holder over legal title holder

- Where the legal estate holder has himself created the subsequent equity by some assurance, declaration of trust or agreement
- Where the legal estate holder fraudulently connives at the creation of the subsequent equity
- Where the legal estate holder fraudulently (as apposed to carelessly) failed to get his title deeds from his vendor and thereby allows the vendor to hold himself out to a third party as the legal owner
- Where the legal owner has given authority to another to deal with a third party and such authority has been exceeded, estoppel may be raised.
- It would, however, not be sufficient to raise estoppel argument: Mere possession of title deeds by another; **or** Mere vesting of title in name of trustee

Northern Counties of England Fire Ins Co v Whipp

- NCFI Co provided a loan to its manager, Crabtree, in exchange for a legal mortgage over his fee simple estate. Crabtree provided the Co with title documents to his property, including the legal mortgage. The Co placed the title deeds in the office safe. Crabtree,

making use of his access to the safe by having duplicate keys, removed the title deeds, removed the mortgage bond from the chain of title and purported to create another mortgage in favour of Mrs Whipp. Mrs Whipp acquired an **equitable mortgage** as the **legal title** had already passed to NCFI Co. Whipp obtained the title deeds without knowledge of the legal interest of the company. Crabtree became bankrupt

- Issue: whether the **legal interest** of the company (mortgage) should be postponed to the **equitable interest** of Whipp (equitable mortgage) where their alleged **carelessness** led to the creation of the subsequent title
- In other words: What **conduct** on part of the holder of the legal interest is sufficient to **postpone** such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without the knowledge of the legal mortgagee

Held —

- Fry LJ: The prior legal interest holder **must have fraudulently contributed to the creation of the subsequent equity**.
- Mere carelessness or negligence not enough
- Negligence implies duty of safe custody over title documents and this does not exist
- Carelessness or want of prudence insufficient to postpone prior legal mortgage: CB 520
- Court found: great **carelessness** on the part of the NCFI Co through its directors. However, found no evidence of fraud:
 - They did not know Whipp was lending money to Crabtree; and
 - They did not connive with Crabtree to induce Whipp to lend money;
 - Their carelessness was likely to injure but not to benefit
- Held that the **conduct** of the company did not constitute fraud and did not warrant the postponement of the legal interest to that of the subsequent equitable interest.
- From possession of the duplicate key to the safe one cannot imply **authority** for Crabtree to act as the agent of the Company

Established in *Northern Counties Fire Ins Co v Whipp*:

- Court will **postpone** prior legal estate to subsequent equitable estate where:
 - (a) the holder of the legal estate (mortgagee) has **assisted** or **connived** in the **fraud** which had led to the creation of the subsequent equitable estate in favour of a holder (of equitable mortgage) without notice of the prior legal estate
 - (b) the mortgagee constituted the mortgagor as its **agent** to raise money and fraud was committed through representation by agent as being the first estate holder
- A subsequent equitable interest will succeed over a prior legal interest where the earlier interest holder has somehow assisted the **fraud**.
- To prove **fraud** on the part of legal mortgagee he must:
 - have **concurred** in some project to enable the mortgagor to defraud a subsequent mortgagee; or
 - have been a **party** or **privy** to some other fraud in fact
- Mere **carelessness** on the part of the legal estate holder will not warrant postponement
- **Gross negligence** or **want of prudence** on the part of the legal mortgagee is not a sufficient ground to postpone its mortgage
- No general **duty** on an owner of land to keep title secure (like fierce dogs or destructive elements)

Walker v Linom (Court of Chancery)

- Facts: Walker, the holder of a legal fee simple conveyed it to trustees who then held the legal interest in trust. In handing the title deeds to the trustees Walker retained the most recent deed that provided him with title. Using this document Walker held himself out to be the legal owner of the property and procured a loan from X on security of the deed. X sold the loan to Linom. The court treated the dispute as one between a **prior legal interest of the trustees** and a **subsequent equitable interest** in favour of Linom
- Issue: which interest has **priority**: the legal interest of the trustees or the equitable interest of Linom
- Any **conduct** of the legal estate holder that would make it **unequitable** for him to rely on the estate against an holder of an equitable interest without notice of legal estate is sufficient to postpone legal estate
- Held Trustees guilty of **gross negligence** in not obtaining the title deeds in the chain of title; Accordingly the legal interest was **postponed** to the subsequently created equitable interest

Other cases

- *Barry v Heider (AHC)*: arming someone with the power to represent that they hold good title can mean that legal title holder is estopped from denying the enforceability of the subsequent equitable title
- For example a legal mortgagee may place in the hands of the mortgagor a document which implies that the mortgage has been paid of
- Courts are reluctant to apply estoppel in priority disputes if the holder of the legal interest is unaware of the subsequent equitable interest

3) Prior equitable interest and subsequent legal interest

RULE: Where a legal estate is created subsequent to a pre-existing equitable interest, the holder of a legal estate has priority over a prior equitable estate

RULE: If subsequent legal interest holder is a bona fide purchaser for value without notice they will take priority: *Pilcher v Rawlins*

- The holder of the legal estate must, however, **prove** that:
 - (a) the legal title has been acquired by him/her **in good faith**;
 - (b) the legal title has been acquired for **value**; and
 - (c) the legal title has been acquired **without knowledge** of the existence of the prior equity
- **Polar star of equity**: a bona fide purchaser of the legal estate for value without notice of prior equitable interests takes free of the prior equitable interest
- Where **notice** of the prior equitable interest can be established, the priority of the legal estate holder will be **postponed**

Meaning: 'Good faith' & 'purchaser'

- **Good faith** is a broad equitable concept which is based upon the principle of fair and proper conduct
- Good faith, in the sense of not acting inequitably or unconscionably, is required
- It includes an assessment of the **conduct** of the purchaser both prior to and upon receiving the estate
- Investigates motive and state of mind of purchaser
- Where it can be proven that the transaction was a **sham, fraudulently induced** or **morally reprehensible**, the legal estate holder will generally be unable to establish his good faith
- **'Purchaser'** = grantee of legal estate (fee simple/mortgage/lease); any person who is named by the grantor of the estate as the purchaser and who will acquire a legal interest in the property or a mortgagee or lessee of the legal estate
- Purchaser also includes a person who acquires a **minor interest** like an easement

Meaning: 'Value' & 'notice'

- 'For value' means you cannot be a volunteer receiving it as a gift
- 'equity will not assist a volunteer' – take land with all burdens
- **'Value'** includes **good consideration** (money or moneys worth), although it does not need to be pecuniary in nature. Not love and affection.
- Value also includes **past consideration** (pre-existing debt)
- Value can be established where **money** or an equivalent **worth** for the transaction can be proven
- **Notice** can be:

- **Actual:** actual knowledge of relevant facts — Vague rumours are not enough
- **Constructive:** notice of matters which the purchaser would have become aware of if he made all the usual enquiries or inspections; **or**
- **Imputed:** i.e. notice acquired through an agent of the purchaser within scope of mandate such as conveyancer.
 - Actual or constructive notice of an agent is imputed to purchaser

Note:

- This type of priority dispute can often arise where a **trustee**, in breach of his duties as trustee, transfers the legal title to a bona fide purchaser who takes without any notice of the existence of the trust
- In such a case the legal interest of the third party will defeat the prior equitable interests of the beneficiaries under the earlier trust, unless the third party had notice of the trust

Pilcher v Rawlins

- Trustees advanced trust moneys pursuant to a mortgage. Mortgagor conveyed legal title to trustees. Trustees reconveyed title to mortgagor before full payment of the loan and appropriated money. Trustees connived with mortgagor to fraudulently convey title to new mortgagees. A beneficiary under a trust (equitable interest holder) challenged the fraudulent conveyance by the previous mortgagee to new mortgagees which fraudulent conveyance took place with assistance of trustees
- Dispute between prior **equitable beneficiaries** under trust who claimed title pursuant to original mortgage and the subsequent **legal mortgagees**

Held —

- Decided that the good faith purchaser for valuable consideration of a legal estate without notice of the equitable interest **overrides** earlier created equitable interest
- Legal mortgage was bona fide and no notice
- Prior trustees 'roguish' and subsequent trustee honest investment motivation.
- Beneficiaries lost out because **'If you trust your property to a man who turns out to be a rogue, it stands to reason that you may lose it.'**

Established in *Pilcher v Rawlins*:

- A court **will not take away** an estate from a bona fide purchaser who has bought it for valuable consideration without notice
- If a trustee in breach of trust conveys a legal estate which comes in the hands of a purchaser for valuable consideration and without notice the purchaser can hold the property against the trust beneficiaries who were **defrauded** by the conveyance of the trustee
- Prior equitable beneficiaries were **defeated** by subsequent legal mortgagees who were bona fide and took without notice of the equitable beneficiaries
- **Ratio:** 'If you trust your property to a man who turns out to be a rogue it stand to reason that you may lose it !'

'Bona fide purchaser for value without notice' rule: Elements

There are three elements to the bona fide purchaser for value without notice-rule (CB 537-538):

- 1) **Bona Fide:** Is the subsequent legal title holder **bona fide**? Examination of overall circumstances in which title was acquired and whether equitable fraud was involved
- 6) **Consideration:** Is the subsequent legal title holder a **purchaser**? Principle does not apply to volunteers. Legal estate holder must have given recognised and acceptable consideration
- 7) **Notice:** Has the subsequent legal title holder take title **without notice** of the existence of the prior equitable interest? Notice will encompass actual or constructive notice

Doctrine of notice

- In terms of the doctrine of notice a legal estate holder is bound to a prior equity which he knew or should have known about
- A legal estate will only **be set aside** where it can be proven that the legal estate holder took with **actual** or **constructive** notice of the prior equitable interest either before or at the time of acquiring the legal estate
 - **Actual notice** refers to the situation where a subsequent interest holder is **directly** and **positively aware** of the existence of the prior equitable interest
 - **Constructive notice** is where the purchaser is not actually aware of the existence of a prior equitable interest but **should have been aware** and would have discovered it if he or she made the **proper** enquiries about and **inspections** over the title.
 - Whether or not a subsequent interest holder is affected by constructive notice is a question of **fact** depending on the individual circumstances
 - **S199** PLA incorporates both actual and constructive notice: CB 526

Section 199 PLA

Notice includes **actual** and **constructive** notice (See s 199 of Property Law Act 1958 (Vic)); Scope of doctrine:

199 (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless-

- it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or
 - in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his legal practitioner or other agent, as such, or would have come to the knowledge of his legal practitioner or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the legal practitioner or other agent.
- **Imputed notice** is where purchaser engages an agent who is affected by actual or constructive notice while in the course of acting as an agent
 - Under the principle of imputed notice, the law regards the principal as having all the knowledge as that of his agent

Timing of notice

- Timing of notice is important
- Notice of previous equity must have been received by the legal title holder **prior** to **acquisition** of legal title and not afterwards
- If a legal title holder acquires a pre-emptive equitable title (sale) it must be shown that notice was acquired prior to the pre-emptive title
- If notice is acquired after the acquisition of the pre-emptive equitable title but before acquisition of the legal title the purchaser will not be affected by notice unless it can be established that acquisition of legal estate amounts to a breach of trust
- If an acquirer of a subsequent equitable title becomes aware of a previous equitable title and seeks to acquire a legal title to defeat the prior equitable title, it will defeat the prior equity provided it does not amount to a breach of trust (tabula in naufragio)
- If a purchaser is a **corporation**, notice to one director will effectively constitute notice to all members
- Once a purchaser is affected by actual or constructive notice, it cannot be extinguished even it is alleged to have been **forgotten**

- Notice will bind all **purchasers**, even where the purchaser is mistakenly led to believe that the interest has been extinguished
 - **Timing**: Did legal interest holder receive notice of prior equity before acquisition of interest or after. Will only be bound if it is before
 - **Timing**: In a sale context – must receive notice before entering into contract and acquiring antecedent equity: *Blackwood v London* CB 525
 - Will be taken to be aware of all interests reasonably apparent from inspection – does not include interests arising from oral conversation eg right to rectify not in document: *Smith v Jones* CB 525
 - **Effect of notice**: Once receive notice – cannot remove it: *Jared v Clements* [1902] (CB527)
 - Equitable interests arising from co-occupation may have ‘constructive notice’
 - *Kingsnorth* CB 528 – Not a reasonable inspection to ascertain whether any co-occupant lived in the property and held equitable rights: timing and failure to follow up

Exception to the doctrine of notice: *Wilkes v Spooner* [1911] CB 530

RULE: When a legal interest holder who has taken without notice of the existence of a pre-existing equitable title passes that legal title on to a bona fide purchaser who does have notice of the equitable interest, the latter will take good title.

Why? Should not restrict first legal title holders ability to sell.

Exceptions: trustees in breach of trust OR if subsequent acquisition due to fraud.

Obligations on purchaser

- The doctrine of notice **requires** a purchaser to be aware of all of the interests which he would **reasonable** likely to come across in the course of conducting all of the usual **searches** and **checks** of title
- Inquiries **reasonably** to be made are “those which a **prudent man** of business would make in the circumstances which obtain”
- **Obligations** of purchaser include:
 - Checking obligations and clauses of an **agreement**
 - Checking title documents; and
 - Physically **inspecting** property
 - **Possession** of land by person other than vendor is notice of interest as possessor (for instance a tenant)
 - A purchaser has constructive notice of the right of everyone in **possession** of the land (the precise scope of doctrine is still in doubt)
 - Not notice of **rights** which cannot be gleaned from lease: equity of rectification and payment of rent (*Smith v Jones*)
- Where a purchaser is purchasing old title land all the **documents** in a **chain of title** must be searched.
- A purchaser will have **constructive notice** of any equitable interest which he would have discovered from the search
- The purchaser should be searching back for a **good root of title** and checking the accuracy of the **abstract of titles**.
- In Victoria the search is limited to **30 years search** if a good root of title is found (s 44(1) of the PLA)

- If a possible problem is discovered, the purchaser can only be **exempted** from the notification of any interest which may arise from this problem in circumstances where the **vendor** provides a reasonable and satisfactory **explanation**
- In a conveyance of old title land, a **failure** to check the register will affect the purchaser with constructive notice of all **interests** which may have been lodged
- The obligation requires a **physical inspection of the land** to determine whether an equitable interest may arise based upon the *character* of the land or any **possessory occupation**
- A purchaser will have notification of **terms of document** which speaks for itself and not of **disputes** not immediately apparent from express terms of agreement (*Smith v Jones*)
- Purchaser not taken to have received notification of disputes not immediately **apparent** from, for instance, the express terms of a tenancy agreement
- If a purchaser takes with notice the **effect** of notice can not be **removed**
 - *Jared v Clements*: the mortgagees had notice of prior mortgage but due to fraud of solicitor they believed mortgage had been discharged: could not escape the consequences of notice; their legal interest was still postponed
- Cannot rely on assurance of solicitor

5) Priorities between competing equitable interests

RULE: The interest which is prior in time will take priority if both interests are equal in merit. 'Qui prior est tempore potior est jure': *Rice v Rice*

- '**Double sale**': both purchasers have equitable interests
- Prima facie it seems to take effect according to their **dates** of creation: *qui prior est tempore potior est jure*
- Equity has taken a **broader view** to determine priorities by searching for the **better equity**
- The interest with **most merit** will **prevail**
- It requires an **overall merit analysis** of each equitable title
- The interest which is prior in time will take priority if both interests are **equal in merit**
- Two approaches:
 - a) Traditional rule: Equity will first consider the facts of the case to determine which is the **better** equity. If entirely **equal**, priority in time applies; *Rice v Rice*
 - b) Whether prior equitable interest, as first in time, should be **postponed** to the latter equitable interest: *Heid v Reliance*

a) Traditional rule / Merit analysis approach: *Rice v Rice*

Traditional rule = Equity will first consider the facts of the case to determine which is the **better** equity. If entirely **equal**, priority in time applies: *Rice v Rice*

- Priority in **time** will only be decisive in circumstances where in all other respects the interests are **equal** in merit
- Merit analyses involves a **comprehensive examination** of a broad range of **factors**:
 - Whether the prior interest holder has armed the purchaser with **indicia of title** and thereby **contributed** to the creation of the subsequent equitable interest
 - Whether the prior equitable interest holder has sufficiently **protected** itself by retaining possession of title documents
 - Whether the prior equitable interest holders were **beneficiaries**

- Whether prior unregistered equitable interest holder has availed himself of **protection** under the **caveat** system and what impact, if any, a failure to seek such protection might have upon the overall merit analysis (Torrens title land)
- Whether the subsequent equitable interest holder took with **notice** of the existence of the prior equitable interest holder
- Determine which of interests is the **“better equity”** under the circumstances. If the merits of the claim are equal, priority in time of creation is considered to give the better equity

Rice v Rice

- **Summary:** Michael Rice purchased lease from George and Lydia Rice. Michael paid portion of price but balance outstanding. George and Lydia transferred full title indicating full purchase moneys paid. Michael then deposited transfer with Ede and Knight to secure a mortgage. Competition between prior equitable lien for unpaid purchase price and subsequent equitable mortgage.
- **More detail:** R and R, the holders of a legal estate, conveyed it to X by execution of a deed and passed the title deeds, but did not receive full purchase monies. X received title deeds. The deed of transfer recited that whole of the purchase price had been received. According to the receipt the purchase price had been paid in full. X deposited the transfer documents with E to secure an advance. X absconded without paying balance to R and R (vendors) or E (equitable mortgagee).
- Issue whether **equitable lien** of unpaid purchase price of R and R as vendors or the **equitable mortgage** of E should take priority
- The **rule:** “As between persons having only equitable interests, *qui prior est tempore potior est jure*” is **incorrect**
- **Rule** should be stated: “As between persons having only equitable interests, if their equities are in all respect equal, priority of time gives the better equity”
- In the context of persons having only equitable interests, if one has a **better equity** than the other, priority of time is immaterial
- **Priority of time** is the ground of preference last **resorted** if the equities are **equal**
- The significant **issue** to determine is whether the equities are **equal**

Held —

- Ad (a): A vendor’s lien and equitable mortgage arises out of **forbearance** by a party of money owed to him
- Vendor’s lien is created by special contract (not a sufficient ground for preference)
- Found that rights are equitable interests of **equal worth** in respect of their abstract **nature** and quality
- Ad (b): Are there special **circumstances** which gives one a better equity than the other?
 - Equitable mortgagee has the **possession** of title **deed**
 - **Possession** of deed gives a **better** equity
 - Possession of deeds will not in all instances give a better equity
- Ad (c) In a contest of equitable interest the **conduct** of the parties and all the **circumstances** must be taken into account
- Seems to **favour** equitable mortgagee:
 - **Vendors** left part of the purchase price **unpaid**
 - Nonetheless **executed** and **delivered a deed** and a **receipt** by which they declared that the whole of the purchase money had been paid
 - The vendors decided not to **hold** on to the title deeds as **security** for the balance of the unpaid purchase price, despite the fact they were in a position to require this
 - They voluntarily **armed** the purchaser with the means of dealing with the estate as **legal** and **equitable owner** free from any shadow of encumbrance or adverse equity
 - Mortgagee was not guilty of negligence
 - The equitable mortgagees gave good **consideration** for the mortgage
 - The equitable mortgagees obtained **bona fide** possession of the title without any wrong done to the vendors
- Court found on the basis of the **conduct** of the parties, circumstances and **bona fide acquisition** and **possession** of the deeds by mortgagee the equity of the mortgagee is **better** than the equity of vendor, and ought to prevail
- **Postponing conduct** found by the court: holder of first equitable interest **armed** a third party ‘to go into the world under false colours’
- Held that the subsequently created interest should have **priority**
- Approach to be followed: — ‘But if after a close examination of all these matters, there appears nothing to give to the one a better equity than the other, then and then only, must resort be had to the maxim *qui prior in tempore potior est jure*, and the priority of time then gives the better equity’

Conclusions on the facts of *Rice v Rice* – defendant has better equity as holder of title deeds

- Acquired the deeds because the vendors 'voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity'

Established in *Rice v Rice*:

Three matters are relevant:

- (a) **Nature** and **condition** of the respective equitable interests;
 - (h) **Circumstances** and **manner of acquisition** of equitable interests; and
 - (i) The whole **conduct** of each party with respect thereto
- In examining these points, a court must apply the same **broad principles** of right and justice which a Court of Equity applies universally to deciding upon contested rights
 - Approach to be followed:
 - 'But if after a close examination of all these matters, there appears nothing to give to the one a better equity than the other, then and then only, must resort be had to the maxim *qui prior in tempore potior est jure*, and the priority of time then gives the better equity'

Factors Relevant to Merit Analysis

- Arming purchaser with indicia of title
- Carelessness by prior equity AND generates an estoppel based reliance for subsequent holder
- Arming purchaser with 'false colors' of title = indirect representation and estoppel: *Heid v Reliance*

Factors Relevant to Merit Assessment

- Not protecting prior equity with any means available
- Merit assessment based upon broad and flexible assessment – not rigid principles
- No one factor should be prioritised over another
- Notice can be relevant but not determinative in a merit assessment

b) Postponement approach: *Heid v Reliance*

- Consider whether the prior equitable interest, as first in time, should be **postponed** to the later equitable interest.
- The earlier interest will be postponed to the later interest (despite its priority in time) where the **conduct** of the earlier interest holder has been such that it has **induced** that subsequent interest holder to **believe** that no prior interest exists
- Whichever approach is taken, the important point is to conduct a **merits analysis** to determine if the interests are equal

c) Estoppel: *Rimmer v Webster*

- The foundation for setting aside the priority of a prior equitable estate is said to be **estoppel**.
- 'If the owner of property clothes a third person with apparent ownership ... he is estopped from asserting his title as against a person to whom such third party has disposed of the property, and who took it in good faith and for value'
- Thus, the owner is **estopped** from claiming **priority**

- If a prior equitable interest holder does not retain possession of title documents and **allows** a third party to represent to the world that they are full unencumbered legal title holders, a subsequent equitable interest will take **priority**
- **Detriment** caused to subsequent interest holder is the **foundation** of estoppel
- Estoppel approach **rejected** in *Cappel v Winter*; “better equity” approach preferred
- Cases which do not constitute estoppel
- **Difficult/impossible** to accommodate all the cases of postponement under the umbrella of estoppel: *Heid v Reliance Finance Corp*

Which to use?

- Estoppel analysis may be **inappropriate** to such priority disputes:
 - Estoppel by representation requires proof of a clear and **positive representation**
 - In many instances it is difficult to **infer** representation from the behaviour of a prior interest holder
 - It is often the thrd party (for instance X) who receives the unencumbered estate who fraudulently **pretends** that he holds an absolute legal title to an unsuspecting third party, who is responsible for the direct representation, not the **prior estate holder** (for instance Rice and Rice)
 - The merit analysis incorporates a **broad range** of factors under its umbrella and should not be **limited** to estoppel argument
 - Inappropriate to **prioritise** just one factor
- Merit analysis (and the doctrine of notice) is **preferred** in the case of competing equitable interests
 - The **possibility** of introduction of a **narrower test**, focusing more upon the issue of notice of subsequent equitable interest holder has been **raised** a number of times by earlier courts
 - The majority of the court in *Moffett v Dillon* concluded that the existence of **notice** in a subsequent interest holder automatically **negates** any further priority analysis
 - Reasoned that subsequent equitable interest cannot prevail over an earlier interest if the holder of the latter interest had **notice** of the earlier interest
 - A person who acquires an interest in property with notice of an earlier interest, is **bound** by the earlier interest
 - The court found that notice of an earlier equitable mortgage by a later mortgagee **guaranteed priority** of the first mortgage
 - Ormiston JA, however preferred the traditional view that notice was **one** of the matters to be considered
- Majority approach is **attractive** in its simplicity for the ease of application
- Criticism:
 - This conclusion severely undermines the apparent breadth of the equitable merit analysis test
 - What constitutes notice is sometimes difficult to determine

6) Prior mere equity and subsequent equitable interest

RULE: Mere equity **defeated** by a bona fide purchaser for value without notice: *Latec v Terrigal* CB 539

- A **mere equity** gives the holder of a personal right the right to bring an **action** to obtain equitable remedies against the defendant, with that right having **proprietary** consequences

Examples:

- Right to have a contract/conveyance **set aside** for:
 - Mistake;