

1. Approaches to Competing Interests - Old System Land

Transfer Land at Law – legal interest.

General Principle

- No conveyance of land under old system title is valid to pass an interest at law **unless made by deed**: s 23(B)(1), CA.

Exceptions to 'deed'

- A lease or tenancy or other assurance not required by law to be made in writing: s 23B(2)(d), CA.
 - Thus, short-term lease no more than three years, market payment rent and immediate possession: s 23D(2), CA
- Not apply to Torrens title land: s 23B(3), CA.

Deed

- ♦ "Deed" is a written document on paper [formerly vellum or parchment], which is signed, sealed and delivered, whereby an interest or right passes, an obligation is created or there is an affirmation of some act where an interest or right has passed.
- ♦ A deed is the most solemn act that can be done in respect to property: *Manton v Parabolic* (1985).
- ♦ A deed has 'binding effect' – once a deed is delivered, the party delivering it generally cannot withdraw or resile from it: *Beesly v Hallwood Estates* (1961).
- ♦ Whether an instrument is deed depends on whether the parties intended it to be a deed- examination of the subjective intention of the parties, extrinsic evidence and any self-description of the instrument as a 'deed'

Date of deeds:

- ♦ Where the deed has a date, it is presumed to operate from that date: *Styles v Wardle* (1825).
- ♦ Where the deed has no date or the date it bears would defeat the parties' evident intentions, it is presumed to operate from the date of delivery: *Glebe Administration Board v Tifan* (1968).

Elements of a deed

- ♦ The elements of a deed consist of a mixture of common law and statutory requirements.
 - ✓ Must be made in writing on paper (or vellum or parchment).
 - ✓ Must be delivered.
 - ✓ Must be signed, sealed and attested by one witness not a party: s 38(1), CA.
 - ✓ Sealed if signed and attested: s 38(3), CA.
 - ✓ Indenting is not necessary: s 38(2), CA.

Delivery of a deed

- ♦ A deed takes effect when it is delivered: *Styles v Wardle* (1825).
- ♦ Delivery is any act or words showing that the party executing the deed regards it as "presently binding": Blackburn J in *Xenos v Wickham* (1867).
- ♦ Delivery can be actual, where the deed is physically handed over, or constructive, where the deed does not leave the executing party's possession: *Xenos v Wickham* (1867).

Transfer Land in Equity – equitable interest

General Rule

- Conveyances must be in writing: s 23C(1), CA, but not necessarily by deed.

¹ Conveyancing Act 1919 (NSW).

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Exceptions to writing requirement

- **No writing requirement** for resulting, implied, or constructive trusts: s 23C(2), CA; and
- Subject to the law of part performance: s 23E(d), CA.

♦ Interests in land created by parol take effect both at law and in equity as interests at will only: s 23D(1), CA.

General Rule for Competing Interest

♦ It must be noted that interests may not necessarily be competing.

Competing Legal Interests

- ♦ Examples of legal interests:
- The holder or owner of a fee simple or the conveyance;
 - The first mortgagee in Old System title land;
 - A mortgage in the form of a deed;
 - A profit à prendre in the form of a deed;
 - Any other interest in the form of a deed: s 23B, CA.

General Rule

- Where two or more legal interests in the one parcel of land are inconsistent with each other, priority depends on the date of creation of the interests. – “**nemo dat quod non habet**”.
- Since most legal interests are created by deeds, for practical purposes priority depends on the dates on which the deeds creating **the interests come into operation**.
 - A deed cannot come into operation until it is “delivered”.
 - Speaking differently, where the competing legal interests have been created by deeds, priority will depend on the date on which the deeds were signed, sealed and delivered, as provided by s 38, CA.

Examples:

- Where the owner delivers a deed of mortgage to the mortgagee, then delivers a deed of conveyance to the purchaser, the earlier legal interest of the mortgagee will prevail due to the nemo dat rule, as the owner does not have the legal interest [only the ‘equity of redemption’] so cannot convey the legal interest to the purchaser at all.

Competing Equitable Interests

Equitable Interests

- ♦ An equitable interest is one that will be enforced by a court exercising equitable jurisdiction – all major courts in the Australian legal system recognise, characterise and enforce equitable interests.
- ♦ Examples of equitable interests
- The right of a beneficiary under a trust;
 - The right of a purchaser under a valid agreement for sale of land (equity orders specific performance of the contract, where there is a valid contract in writing, as provided by s 54A of the Conveyancing Act 1919 (NSW), or there are sufficient acts of part performance, as provided by s 23E(d), the purchaser is ready and willing to pay the purchase price, damages are an inadequate remedy and there are no equitable bars to the award of specific performance)
 - The right of a mortgagee or lessee under a valid agreement [not in deed form] to grant the mortgage or lease;
 - The right of a mortgagor in the mortgaged Old System title land- known as the ‘equity of redemption’;
 - The right of a second or subsequent mortgagee in Old System title land (the right of a first mortgagee in Old System title land is a legal interest);
 - The right of a mortgagee under a mortgage by deposit of title deeds, according to the equitable doctrine of part performance;
 - The grantee of an option to purchase land for valuable consideration;

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- An unpaid vendor's lien (where not all the money is paid to the vendor at settlement, so has an equitable interest to ensure that the remainder is paid);
- A purchase price resulting trust, arising where two people contribute to the purchase price but the land is only conveyed to one person- there is a purchase price resulting trust imposed on that person to hold the land not just for themselves, but also for the other person who contributed to the purchase price;
- A profit à prendre which is in writing but not in the form of a deed;
- Any other interest in writing but not in a deed, as provided by s 23C, CA.

Best Equity

- ♦ Although an earlier-created equitable interest normally takes priority over a later-created one, a court of equity regards itself free to determine priority by seeking the "best equity".
- ♦ Thus, in [Heid v Reliance Finance Corporation \(1983\)](#), Mason and Deane JJ held that a 'better equity' should be ascertained through "an examination of the relevant circumstances" which includes the nature of the competing interests, the manner of their acquisition and the conduct of the parties'.

General Rule

- Where competing equitable interests exist in the same parcel of land, an earlier interest generally has a stronger claim than a later – because 'equity follows the law', but only where the equities (or the merits) are equal.
- The starting point in a priority contest between two equitable interests is the equitable maxim, *qui prior est tempore potior est jure*, that is to say, 'if the merits are equal, priority in time of creation is considered to give the better equity': [Heid v Reliance Finance Corporation \(1983\)](#)
- So the prior equitable interest has priority over the subsequent equitable interest, unless some other factor causes the prior equitable interest to be postponed to the subsequent equitable interest – in such a case, the merits are 'unequal'.

Condition for a claim, not a defence

- The holder of the later right is a 'bona fide' purchaser.
 - Good faith – proved by without notice;
 - For value
 - Without notice.

Elements of postponement: [Breskvar v Wall \(1971\)](#)

- The later right was acquired for value in the belief that the old right did not exist, and
- The holder of the old right contributed to that belief in some way, either by representation or by negligence: [Heid v Reliance Finance Corporation Pty Ltd \(1983\)](#).
 - Postponement occurs only where the earlier holder's act or neglect contributed in some way to the later holder acquiring its interest without notice of the earlier interest: [Lapin v Abigail \(1930\)](#), or
 - Where it was "reasonably foreseeable" that, as a consequence of the acts or omissions of the earlier owner, a later equitable interest might be created and that the owner of that later interest would assume the non-existence of the earlier: [Heid v Reliance Finance Corporation Pty Ltd \(1983\)](#).

- ♦ Noteworthy, equity is a court of conscience, and does not apply its principle in the same inflexible fashion as the courts of common law – thus, need to query whether there is reason sufficient to justify the earlier holder of the interest retaining priority over a later-created equitable interest.

Reasons that a prior equitable interest will never be postponed: (Defence)

- When the newer right is acquired with notice of the old right: [Courtenay v Austin \(1961\)](#), or
- When the new right is acquired as a gift.

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Other Considerations – exceptions for the consideration of the general rule.

Single transactions – previous equitable interest will be postponed.

- ◆ Single transaction occurs in the commercial context when the financing arrangement for purchasing the land requires the same land to be mortgaged to the lender after it is purchased.
- ◆ In such a case, the equitable interest of the lender, prevails over the previous equitable interest granted by the borrower to other persons (if any).

Interests arising simultaneously – previous interest may not be postponed.

- ◆ For example, the grant of a right of pre-emption. Assume that the landowner (O) grants a right of pre-emption to A, and then later contracts to sell the land to B.
- ◆ The right of pre-emption transmutes to an equitable interest on the happening of the triggering event that gives A the right to demand the property.
- ◆ If that triggering event is O's act in entering into a contract with B, then it is conceivable that the interest of A and B arise at the same time.
- ◆ In such a case, it has been held that A can be expected to have the stronger equity, because, by its nature, the pre-emptive right was intended to stand first in line should the landowner decide to sell the land: *Sterns Trading Pty Ltd v Shteinman (1998)*.

Notice defeats claim to priority – previous interest defeated by notice only.

- ◆ Although the existence of notice is not merely a factor in the search for the better equity, but a distinct and fundamental ground for disqualification: *Platzer v Commonwealth Bank of Australia [1997]*.
- ◆ Where the holder of the earlier interest by agreement or conduct waived the right to prevail: *Commonwealth Bank of Australia v Platzer [1997]*, in such a case, a later equitable interest may prevail even the holder of the interest had notice of the existence of the previous equitable interest.

Beneficiaries under trusts – beneficiary's rights may be postponed.

- ◆ Generally, a beneficiary's equitable interest under a trust is not postponed to a later equitable interest created by the trustees in breach of trust: *Shropshire Union Railways and Canal Co v The Queen (1875)*.
- ◆ This is because a beneficiary is entitled to assume, in the absence of reason to think otherwise, that trustees will not abuse their position to create interests inconsistent with that of the beneficiary.
- ◆ However, this assumption is justified only where the trustees have possession of the title deeds. – thus, if the trustees neglect to obtain the title deeds and their neglect allows equitable interests to be created in favour of a third party, the beneficiary's rights under the trust are no better than those of the trustees.
- ◆ Also, the beneficiary's interest will be postponed where a trustee with a power of sale purportedly exercise that power to create an equitable interest in favour of a purchaser in circumstances where the purchaser can invoke statutory provisions conferring protection against the interests of beneficiaries under a trust – for example, provisions enabling a purchaser to rely on a trustee's receipt for the purchase price. (s 40, CA)
- ◆ Further, the beneficiary's interest will be postponed where the beneficiary personally engages in conduct allowing a later interest to be acquired in the belief that the beneficiary's interest did not exist: *Shropshire Union Railways and Canal Co v The Queen (1875)* – following the general rule.

● **Tabular in Naufragio** – “plank in a shipwreck”

● Under the tabular doctrine, if the later equitable interest was acquired for value and without notice (actual, constructive or imputed) of the earlier, and if the holder of the later interest subsequently acquires the legal estate in the land, then that holder can “squeeze out” the earlier equitable interest by “tacking” the later equitable interest onto the legal estate.

- ◆ The requirement of purchaser “without notice” must be satisfied **at the time the later equitable holder acquires that equitable interest.**
- ◆ But it is not a bar to the doctrine's application that the later equitable holder has notice of the earlier equitable interest by the time of acquiring the legal estate.
- ◆ So there is application of the tabular doctrine where the owner holds the legal fee simple, grants a legal mortgage to X, grants an equitable mortgage to Y and then contracts to sell the land to Z

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- ◆ Therefore, the holder of the later equitable interest, Z, without notice of the earlier equitable interest held by Y at the time of acquiring its equitable interest, can 'squeeze out' that earlier equitable interest by acquiring the legal interest from X, even though at the time of acquiring the legal interest, Z knew of Y's earlier equitable interest

Exceptions to the tabular rule

- The tabula doctrine does not apply where the later equitable interest holder knows that the transaction by which he or she acquires the legal estate constitutes a breach of trust by the holder of the legal estate: *Saunders v Dehew (1692)*.
- The tabula doctrine also does not apply where the person from whom the legal estate is acquired has created the very equitable interest which it is sought to defeat by acquiring the legal estate: Perter Butt, Land Law, p 723.

Mere Equities

- ◆ A mere equity is "a claim to have an equitable interest which can only be enforced by succeeding in some claim to a court of equitable relief": *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd (1996)*.
- ◆ Examples of mere equity include:
 - A claim to **rectify** a deed for a mistake: *Smith v Jones (1954)*, – so where the deed does not accurately record the true agreement between the parties, then either of the parties has a 'mere equity' and can go to a court to have the actual deed rectified.
 - A claim to **set aside a transfer** on the basis of fraud: *Latec Investments Ltd v Hotel Terrigal Pty Ltd (1965)* – so where one party is the owner of the land and transferred the land to the other party due to the transferee's fraudulent misrepresentation or conduct, then the transferor has a 'mere equity' and can go to a court for an order that his execution of the transfer be set aside due to fraud.
 - A claim to **enforce a contract** based on part performance: *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd (1996)*. – but the orthodox position is that where there is a part performance and equity would decree specific performance, then the applicant will have an equitable interest before a court order.

Prior equitable Interest v. Mere Equities

- ◆ In a competition between an earlier equitable interest and a later "mere equity", conduct that would normally postpone the earlier equitable interest to a later equitable interest does not postpone the earlier interest to the later mere equity: *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd (1996)*.
- ◆ This is so even where the older of the mere equity had no notice of the earlier equitable interest: *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd (1996)*.

Mere Equities v. Later Equitable/Legal Interest

- The general rule is that a later equitable interest has priority over an earlier mere equity only if the later equitable interest was taken bona fide, for value and without notice of the earlier mere equity: *Latec Investments Ltd v Hotel Terrigal Pty Ltd (1965)*.
- Similarly, a later legal interest has priority over an earlier mere equity if the later equitable interest was taken bona fide, for value and without notice of the earlier mere equity: *Smith v Jones (1954)*.

Prior Equitable Interests versus Subsequent Legal Interests

General Rule

- In a competition between an earlier equitable interest and a later legal interest, the legal interest prevails if it has been acquired by a "purchaser": *Pilcher v Rawlins (1872)*.
 - for value, and
 - in good faith (bona fide); and
 - without notice of the earlier equitable interest.
- The onus of proving all the elements lies on the person claiming priority for the legal estate: *Re Nisbet and Potts' Contract [1906]*

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By "Purchaser"

- ✦ By "purchaser" for the purposes of this principle is meant anyone who acquires for value an interest in land.
- ✦ It refers to the acquisition of legal title other than by inheritance. Therefore two points to check:
 - Must acquire legal title – someone who acquires an equitable property right cannot claim the defence.
 - No by way of inheritance.
- ✦ Purchaser extends to any person who provides value in return for an interest in the property, including mortgagees and lessees: *Goodright d Humphreys v Moses (1774)*.

For Value

- ✦ 'For value' means that the purchaser gave valuable consideration 'in money or money's worth', in exchange for the purchased property right.
- ✦ It is not necessary that the purchasers paid full market value for the property, but it must be more than merely nominal: *Bassett v Nosworthy (1673)*.
- ✦ But if the valuable consideration is extremely low, this may suggest that the purchaser had notice of the conflicting equitable property right and therefore were not bona fide.
- ✦ Further, a settlement of property in consideration of marriage is made for value consideration: *Floyer v Bankes (1863)*.

Bona Fide

- ✦ Bona fide means 'good faith', i.e., without fraud.
- ✦ The general rule is that the purchasers must prove an absence of notice so that the bona fide requirement can be satisfied.
- ✦ But according to *Blackwood v London Chartered Bank of Australia (1874)*, there is an exception – "If the purchasers acquired an equitable property right in good faith, for value and without notice of the inconsistent right, then they can later replace it with the equivalent legal property right and use the defence of bona fide purchase". – although they acquired notice of the inconsistent right before getting the legal right.
 - The exception only works if the purchasers can get the legal title without taking part in a new breach of trust.
 - Therefore, they cannot obtain the legal estate from the trustee.
 - But they can obtain the legal estate by other means, such as the registration of documents in their possession or by obtaining it from a third person: *Mumford v Stohwasser (1874)*.
- ✦ In addition, a purchase is not bona fide if he is a part of a criminal or other illegal enterprise. And this is even so if the purchasers paid value and knew nothing of the existing equitable property rights: *Midland Bank Trust Co Ltd v Green (1981)*.

Without Notice

- ✦ There are three types of notice:
 - Actual notice;
 - Constructive notice;
 - Imputed notice.

Actual Notice

- ✦ According to s 164(1)(a) of the CA, a person has actual notice of something if the existence of the prior equitable interest is "within the purchaser's own knowledge".
- ✦ A person has actual notice of something if it has been brought to his attention at some point, even if he "may not in fact have read it; or he may have read it some time ago and have forgotten its content": *Eagle Trust plc v SBC Securities Ltd [1993]*.
- ✦ However, a purchaser is not put on actual notice by rumours or statements from person with no interest in the property: *Barnhart v Greenshields (1853)*.

Constructive Notice

- ✦ According to s 164(1)(a) of the CA, a person has constructive notice of something if the existence of the prior equitable interest "would have come to the purchaser's knowledge", if such searches as to instruments registered or deposited under any Act of Parliament, inquiries, and inspections had been made as ought reasonably to have been made by the purchaser.

1. In this case, a purchaser (using that term in the general sense of anyone who acquires for value an interest in the property, including a mortgagee) who knows that a tenant is in possession of the property, is on notice (constructive) of the tenant's proprietary rights and takes subject to them.

2. This includes taking subject even to the tenant's right under a contract with the landlord to purchase the property.

Hunt v Luck [1902] 1 Ch 428

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- Thus, the rule is 'a purchaser who knows that any person is occupying or using the property - whether or not a tenant, and whether or not the vendor also occupies the property - is on notice (constructive) of the occupant's or user's proprietary rights, including rights to an equitable interest in the property.'

Test for constructive notice

- The test is "if the person would have discovered things if they had performed the searches that a reasonable person would have performed in the circumstances".
- What is reasonable depends on: (this means they should have performed the search)
 - The nature of the transaction – searches, inquiries and inspections that ought reasonably to have been made by purchasers includes:
 - For both systems of land, an inspection of the land to ascertain who is in possession or who is using it: *Hunt v Luck (1902)*
 - For Old System title land, a search of title deeds back to a 'good root of title' that is at least 30 years old: s 53(1) of the CA.
 - For Torrens title land, a search of the title deeds on the register.
 - The facts discovered during that transaction.
 - If buyers receive information that would cause a reasonable person to conduct additional searches, they have constructive notice of any rights that would be discovered by those searches: *Jared v Clements (1902)*.
- However, omission to search in any register or list kept by, or filed with, the Australian Securities and Investments Commission, shall not of itself affect a purchaser of land with notice of any mortgage or charge: s 164(1A) of the CA.

Imputed Notice

- According to s 164(1)(a) of the CA, a person has constructive notice of something if the existence of the prior equitable interest "has come to the knowledge of the purchaser's counsel as such, or of the purchaser's solicitor or other agent as such, or would have come to the knowledge of the purchaser's solicitor or other agent as such, if such searches, inquiries, and inspections had been made as ought reasonably to have been made by the solicitor or other agent."
- Therefore, a person is bound by notice, actual or constructive, received by his or her agent.

Exception to Notice Requirement -- the rule in *Wikes v Spooner*

- The rule in *Wikes v Spooner [1911] 2 KB 473* means the priority enjoyed by a bona fide purchaser of the legal estate for value without notice extends also to persons claiming through that purchaser, even person who take with notice of the earlier equitable interest or are mere volunteers.
- **Exceptions** – the rule does not apply:
 - where the purchaser seeking the "shelter" is a trustee re-acquiring property which he or she has disposed of in breach of trust to a purchaser without notice of the trust; or
 - where the purchaser seeking the "shelter" is a person otherwise endeavouring to take advantage of his or her own fraud by re-acquiring the property from someone to whom he or she sold it for value and without notice: *Re Stapleford Colliery Co (1880)*.

1. The defendant, Isaac Spooner, was the lessee of premises at 137 High Street, East Ham, carrying on the business of a pork butcher, in which the lease contained a covenant not to carry any noisy or offensive trade other than that of a pork butcher.
2. The defendant was also the lessee of premises at 170 High Street, East Ham, as a general butcher under a different landlord.
3. The defendant then sold and assigned the business at the 170 High Street to the plaintiff, his apprentice, as well as granting a restrictive covenant for the premises at 137 High Street, East Ham, limiting it to use as a pork butchery.
4. Then the defendant negotiated with the landlord over 137 High Street, East Ham, to surrender his lease and grant a new lease to his son, George Spooner, allowing him to use it as a general (not just as a port butchery).

Held, damages awarded against the defendant for breach of the restrictive covenant, but injunction not awarded against the business of the son.

Wikes v Spooner [1911] 2 KB 473

- A 'restrictive covenant' is a provision in a deed limiting the use of the property and prohibiting certain uses.
- The rule in the present case is that the successive holders of the legal interest will prevail if they took from a bona fide purchaser for value without notice of a previous equitable interest, even if those successive holders had notice of the equitable claim defeated by that bona fide purchaser.
- In other words, the present case provided that the protection afforded to a bona fide purchaser for value without notice of an earlier equitable interest can also be claimed by someone taking a legal interest from such bona fide purchaser (as a 'shelter'), even if that successive person had notice of the earlier equitable interest or was a volunteer.
- The explanation of this was provided by Farwell LJ
 - ★ In justice to the owner of the land who had no notice when he acquired the land, it would not be right to hamper his power of dealing with his own land, because certain persons, who possibly would be his only customers for the land likely to pay the best price, have such notice

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- There are restrictions, however, according to Vaughan Williams LJ at [483] – [484], such protection cannot be claimed by:
 - ★ a trustee repurchasing property sold in breach of trust;
 - ★ a fraudulent party repurchasing property acquired by fraud and then sold to a bona fide purchaser.

Applying the facts

- The landlord was a bona fide purchaser of the lease for value, when the lease was surrendered to him by the defendant, without notice of the plaintiff's equitable interest (the benefit of the restrictive covenant) – the son could thus 'shelter' behind the protection of the landlord when he purchased the legal interest, even though he did have notice of the plaintiff's equitable interest.

Prior Legal Interests versus Subsequent Equitable Interests

General Rule

- Where the equities (the merits of the case) are equal, the law prevails.

Postponing factors

- Where the legal owner has expressly created the equitable interest.
- Where the legal interest holder was party to **fraud** that led to the equitable interest being created: *Northern Counties of England Fire Insurance v Whipp (1884)*; or
 - It is irrelevant that the fraudulent purpose achieved was different from that intended, or that the person defrauded was not the person intended to be defrauded: *Northern Counties of England Fire Insurance v Whipp (1884)*.
- Where the legal interest holder, although not fraudulent, was **"grossly" negligent** in failing to inquire after, obtain, or retain possession of the title deeds to the land, thereby allowing another person to pose as the legal owner and create later equitable interest.
 - Mere carelessness is not sufficient to postpone, the negligence must be "gross": *Evans v Bicknell (1801)*.
 - The difference between negligence and "gross" negligence is a question of degree: *Armitage v Nurse [1998]*
 - So the legal interest is not postponed where its holder has made a genuine inquiry as to the whereabouts of the title deeds and has been given a plausible explanation for their non-availability, as held in *Hewitt v Loosemore (1851)*
 - Further, the legal interest is not postponed where its holder has obtained some of the title deeds and has reasonable grounds for believing that they were the only title deeds in existence, as held in *Hunt v Elmes (1860)*
- Where the legal owner is **estopped** from asserting their legal title against the holder of the equitable interest, due to their acts or omissions.
 - Where the legal interest holder entrusted the title deeds (or other indicia of title) to an agent with limited authority to raise money by giving a security intended to bind the legal interest, and the agent exceeded this authority by creating a security for a larger sum in favour of a person who had no notice of the limitation, the prior legal interest is postponed: *Perry-Herrick v Attwood (1857)*.
 - Where the legal interest holder, although not parting with the title deeds (or other indicia of title), handed another person a document appearing to give that other a beneficial interest in the land or the right to acquire the legal interest, and that other, so armed, then purported to create an equitable interest in favour of a third person, who took on the faith of the document, the prior legal interest is postponed: *Barry v Heider (1914)*.

Priority by Registration

CONVEYANCING ACT 1919 (NSW)

PART 23 - REGISTRATION

s 184G Instruments affecting land to take effect according to priority of registration

- (1) All **instruments** (wills excepted) affecting, or intended to affect, any lands in New South Wales which are executed or made **bona fide**, and for valuable consideration, and are duly registered...shall have and take priority not according to their respective dates but **according to the priority of the registration**.