Finding the better equity?: the maxim qui prior est tempore potior est jure and the modern law relating to equitable priorities

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1. Introduction

Sir George Jessel MR once observed that equity, unlike the common law, was not supposed to have been established since time immemorial.[1] That few now, other than the most ostrich-like common lawyers, would consider the common law to be anything other than judge made does not lessen the importance of acknowledged judicial creativity in equity. Such importance is apparent both in the past and in the present. An example of this process of creativity may be found in the area of equitable priorities. This article examines the maxim *qui prior est tempore potior est jure* ('the maxim') in relation to equitable priorities. In turn are discussed the origins of the maxim, its reasons, its restatement by the High Court in *Heid*,[2] the exceptions to the maxim, equitable priorities in Torrens land and matters of personalty, relative priorities and likely future developments.

2. The origins of the maxim

The older cases most frequently cited as authorities for the maxim are *Phillips v. Phillips*[3] and *Rice v. Rice*.[4] In the former of these two (decided in 1861) Lord Westbury LC described the maxim as embodying 'elementary rules'[5] which had

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1 *In re Hallet's Estate; Knatchbull v. Hallett* (1879) 13 Ch D 696 at 710.

2 *Heid v. Reliance Finance Corp Pty Ltd & Anor* (1983) 154 CLR 326 (*Heid*).

3 (1861) 4 De FG & J 208; 45 ER 1164 (*Phillips*).

4 (1853) 2 Drewry 73; 61 ER 646 (*Rice*). It has been suggested that *Cave v. Cave* (1880) 15 Ch D 639 (*Cave*) is the English authority most cited. Oakley, A.J., 'Judicial Discretion in Priorities of Equitable Interests' (1996) 112 *LQR* 215 at 215. Maitland is one who took *Cave* as the leading case: Maitland, F.W., 1920, *Equity: The Forms of Action at Common Law*, Cambridge University Press, Cambridge, 131. It is not an important point as both *Rice* and *Cave* approach the maxim in the same manner.

5 *Phillips*, fn. 3 at 217; 1167.

been recognised in the case of *Brace v. Duchess of Marlborough*,[6] decided in 1728. Those rules were that the 'first grantee ... has a better and superior - because a prior - equity.'[7] In the case of *Rice*, Kindersley V-C stated the maxim in slightly, but significantly, different terms: '[a]s between persons having only equitable interests, if their equities are in *all other respects* equal, priority of time gives the better equity.'[8] He continued with a further significant comment: 'in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to.'[9] Therefore, whilst *Phillips* placed time and thus the maxim first, *Rice* placed them last. The question of whether the maxim is one of first or last resort is a fundamental one running through the individual cases as well as through broader statements of the law relating to equitable priorities.

3. The reason for the maxim

Equity and her maxims are creatures of conscience.[10] As such her courts exercise (or perhaps exercised) a degree of flexibility unknown in common law courts.[11] That flexibility, being of the length of the Chancellor's foot, is both an easy target for criticism by common lawyers as well as being the factor that marks out equity as different from the common law (even after fusion by the

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6 (1728) 2 P Wms 491; 24 ER 829.

7 *Phillips*, fn. 3 at 1166.

8 *Rice*, fn. 4 at 78; 648 (emphasis in original). It is to be noted that the precedent employed by Kindersley V-C was substantially weaker than that in *Phillips*: a text book and assumed dicta from a case which had decided to the contrary (at 82; 649).

9 Ibid. Wright has observed that '[t]he court in Rice took extreme care to emphasise that time should be the last criterion resorted to and that a careful examination of each of the party's merits is the primary basis for determining priorities': Wright, D., 'The Continued Relevance of Divisions in Equitable Interests to Real Property' (1995) 3 *APLJ* 163 at 177.

10 St Germain in *Doctor and Student* stated that 'Equytye is a ryghtwysenes that consideryth all the pertyculer cyrcumstaunces of the dede the whiche also is temperyd with the swetnes of mercye', cited in Guy, J.A. 1985, *Christopher St Germain on Chancery and Statute*, Selden Society, London, p. 72. This concept of equity followed the theory of Jean Gerson (1363 - 1429): 'est ... aequitas justitia pensatis omnibus circumstantiis particularibus, dulcore misericordiae temperata' (at 72, n. 50) (i.e., equity is justice which considers all the particular circumstances moderated by sweet mercy).

11 Butt, P. 1988, *Land Law*, LBC, Sydney, 462. Cf Rossiter, C.J. & Stone, M., 'The Chancellor's New Shoe' (1988) 11 *UNSWLJ* 11 who suggest that 'many of equity's principles' had become 'ossified' as long ago as Lord Eldon's chancellorship (1801-6, 1807-27), at 16.

Judicature Acts). However, equity's rules in their long development have arguably lost sight of their purpose - society has changed yet the maxims are largely unchanging.[12] The result has been, as predicted by Lord Denning MR, the clash of social justice and moneyed might.[13] The search for victory of social justice in the matter of equitable priorities has been the cause of the development of a mass of exceptions to the maxim. Such a development has led to a process of categorisation[14] which, in turn, has run the risk of unchanging inflexibility. The modern argument that legal creativity should arise from legislative not judicial sources[15] (even in matters of equity) stunts a fulfilment of social justice goals, given the general lack of enthusiasm of legislatures for substantial reform. Indeed, Lord Denning has responded by commenting that 'equity is not past the age of childbearing.'[16] The problem with such

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12 It has been suggested that 'the priority rules ... give the judges room for the restrained exercise of discretion in the ordering of priorities ... The [maxim in *Rice*] has the attraction of never requiring the updating of its formulation. It is timeless in its language but malleable in its application': Wallace, J. & Grbich, Y., 'A Judge's Guide to Legal Change in Property' (1979) 3 *UNSWLJ* 175 at 184. Yet the same authors go on to acknowledge that '[t]he precedent doctrine works to minimise ad hoc decision-making and balances certainty and change in ways that have long been misunderstood' (at 202). They suggest society 'can no longer afford to place a disproportionate theoretical emphasis on certainty' (at 202).

13 *Williams & Glyn's Bank Ltd v. Boland* [1979] 1 Ch 312 at 333.

14 The categorisation is both between equities and equitable interests and also in determining what acts fall within the categories which will render the priorities unequal. On the matter of divisions within equitable interests Wright has commented that '[a]n important aspect of the judgement of Menzies J [in *Latec Investments Ltd v. Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265 (*Latec*)] was that it indicated that equitable rights may be classified in different ways for different purposes. This has the result that it is impossible to classify all equitable rights as mere equities or equitable interests for all intents and purposes': Wright, fn. 9 at 168. He has further stated at 171 that '[t]hese divisions are dangerous because the division of equitable interests is not a once and for all time process. ... It is possible to contend that too much attention has been placed upon the labelling of the equitable interest rather than on the essential question of what are the attributes of that interest.'

15 Martin, J.E., 1993, *Hanbury & Martin: Modern Equity*, 14th edn, Sweet & Maxwell, London, p. 43.

16 *Eves v. Eves* [1975] 1 WLR 1338 at 1341 although contrast *Allen v. Snyder* [1977] 2 NSWLR 685 per Samuels JA at 701 where, in the context of constructive trusts, it was suggested that 'further breeding should be discouraged.' Samuels JA further stated that 'the right solution involves questions of social policy which are for legislators to determine.' More recently, the case of *W v. G* [1996] 20 Fam LR 49

inventiveness, however, as identified long ago by Sugden, is that there can be no end to the difficulties which must arise out of judicial departure from the plain rule that the prior equity is to be favoured except in the case of fraud.[17] Yet the choice between judicial creativity and narrow reliance upon precedent is also a choice between social justice and narrow formalism. It is a choice which fundamentally was at the heart of the High Court's recent re-evaluation of the maxim.[18]

4. A re-working of the maxim in *Heid*?

In *Heid*[19] the High Court provided a restatement of the maxim. The joint judgment of Mason and Deane JJ (as the former then was) in that case has been held both to be the clearest statement of the maxim[20] and the established law in Australia in relation to equitable priorities.[21] Unfortunately, it is not necessarily so simple given that there was a five member bench which also comprised Gibbs CJ (with whom Wilson J agreed) and Murphy J. Murphy J in his short judgement deftly avoided the question of priorities.[22] Gibbs CJ approvingly cited Kitto J's statement from *Latec*[23] that '[i]f the merits are equal, priority in time of creation is considered to give the better equity. This is the true meaning of the maxim.'[24] Clearly then, the task of courts of equity would be to determine equality and inequality which, it would be supposed, requires a process of categorisation.

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has been discussed from a childbearing perspective: Bailey-Harris, R., 'Equity still childbearing in Australia?' (1997) 113 *LQR* 227.

17 Cited in Firth, E.C.C., 'The Rule in *Dearle v. Hall*' (1895) 11 *LQR* 337 at 340.

18 This is in line with Rossiter and Stone's perception of a turning away from precedent towards a renewed eclecticism (fn. 11 at 16). They suggest that the revitalisation of equity 'is a sign of a healthy progress to a more just society' (at 46).

19 Fn. 2.

20 Oakley, fn. 4 at 215.

21 *Reynolds v. Arthur* (Unrept, NSWSC Eq, Bryson J, 3/12/1990) at 5.

22 He did refer to priority obliquely. He looked at cases such as *Rice* and borrowed from *Lickabarow v. Mason* (1787) 2 TR 63 at 70 where it was said that 'wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it': *Heid*, fn. 2 at 346-7.

23 *Latec*, fn. 14.

24 Id at 276 per Kitto J. Gibbs CJ said in *Heid*, fn. 2 at 333: '... where the merits are unequal as for instance where conduct on the part of the owner of the earlier interest has led others to acquire his interest on the supposition that the earlier did not exist, the maxim may be displaced and priority accorded to the later interest.'

Mason and Deane JJ took a somewhat different approach. Criticising earlier authorities,[25] they considered that it was 'difficult, if not impossible, to accommodate all the cases of postponement of an equity under the umbrella of estoppel.'[26] After an examination of various cases they concluded that

> '[f]or our part we consider it preferable to avoid the contortions and convolutions associated with basing the postponement of the first to the second equity exclusively on the doctrine of estoppel and to accept a more general and flexible principle that preference should be given to what is the better equity in an examination of the relevant circumstances.'[27]

Their primary source for this restatement was Sykes' *Law of Securities*.[28] It is tempting to interpret this as indicating an absence of precedent. This approach to the merits of the better equity has generally been approved as avoiding precise categorisation[29] although it is not without criticism. Lewis, whilst acknowledging that the 'problem with custom ... is that it enshrines the past and is not malleable enough to keep up with avant garde trends',[30] has questioned whether a tort based notion of negligence is indeed preferable to custom.[31] It has also been observed that merits, by their flexible nature, produce uncertainty which in turn requires litigation to be clarified.[32] However, it is hard to see how this need be so in an era of increasing emphasis on dispute resolution and (supposed) improved corporate ethical understanding.[33]

For the purposes of this paper, however, perhaps the single most interesting aspect of *Heid* is the absence of discussion on the *Phillips* version of the

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25 *Rimmer v. Webster* [1902] 2 Ch 163; *Tsang Chuen v. Li Po Kwai* [1932] AC 715.

26 *Heid*, fn. 2 at 340.

27 Id at 341.

28 Sykes, E.I., 1986, *The Law of Securities*, 4th edn, Law Book Company, Sydney. See *Heid*, fn. 2 at 341 per Mason and Deane JJ referring to *Latec*, fn. 14 at 276.

29 *Cranston v. CBFC Ltd* (Unrept, NSWSC Eq, Bryson J, 11/06/1993) at 30 (*Cranston*).

30 Lewis, E.C., 'Competing equitable interests in Torrens Title Land: A reconsideration of *Heid v Reliance Finance Corp Pty Limited*' [1988] *ACL* 36,061 at 36,063.

31 Ibid.

32 Castle, T.D., 'Caveats and priorities: the "mere failure to caveat"' (1994) 68 *ALJ* 143 at 146.

33 It is hoped that corporate entities have learnt something from the sad (but ultimately vindicated) experiences of, for example, Herbert Bundy and Mr and Mrs Amadio.

maxim. For a discussion of that version it is necessary to examine the Privy Council's advice in *Abigail v. Lapin*[34] or *Latec* where Menzies J, in particular, made comment.[35] Menzies J distinguished *Phillips* and instead cited, approvingly, *Cave*. The differences between Kitto and Taylor JJ may largely be seen as relating to the categorisation of equitable interests rather than priorities. More significantly, however, in the NSW Court of Appeal's decision in *Reliance Finance Corp Pty Ltd v. Heid*[36] (the decision from which *Heid* was appealed) Hope JA, who gave the sole judgement, approvingly cited Kitto J in *Latec* that the maxim was of last resort.[37] It is clear then that although the maxim is alive and well in Australian law it is as the *Rice*, not *Phillips*, version. It is, therefore as a matter of last, not first, resort although more recent developments have taken the 'better equity' line.

Since *Heid* a number of cases have considered issues of equitable priorities. The Mason and Deane JJ formulation of the 'circumstances' was followed by McLelland J in *Person-to-Person*.[38] Similar approving remarks were made in *Cash Resources v. BT*,[39] *Jacobs v. Platt Nominees*,[40] *Avco v. Fishman*,[41] *Green v. Melzer*[42] and *Green v. CBA (No 2)*.[43] It was also followed by Bryson J in *Cranston v. CBFC*,[44] although earlier, in *Reynolds v. Arthur*,[45] he had emphasised that priority was only to be considered after evaluation of the

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34 [1934] AC 491 per Lord Wright at 504. The notion of 'taking away' equitable title is very much in keeping with a *Phillips* notion of equitable priorities. This idea of 'taking away' a title has been strongly criticised: Wallace and Grbich, fn. 12 at 184-5.

35 *Latec*, fn. 14 at 288-289.

36 [1982] 1 NSWLR 466 (*Reliance*).

37 Id at 480. *Reliance* was followed by *Composite Buyers Ltd v. State Bank of NSW* (1990) 3 ACSR 196 at 199, but as a maxim of *first* resort.

38 *Person-to-Person Financial Services Pty Ltd v. Sharari* [1984] 1 NSWLR 745 at 746-7.

39 *Cash Resources Australia Pty Ltd v. BT Securities Ltd* [1990] VR 576 per Brooking J at 586: '[q]uestions of priority as between competing equities must be determined by applying, not technical rules, but broad principle of right and justice ... There are no rigid principles.'

40 *Jacobs v. Platt Nominees Pty Ltd* [1990] VR 146 at 151-2.

41 *Avco Financial Services Ltd v. Fishman* [1993] 1 VR 90 at 93.

42 (1993) 6 NZCLC 68,393 per Casey J at 68,396 and Thomas J at 68,409.

43 *Green v. Cth Bank of Australia (No 2)* (Unrept, NSWSC Eq, Young J, 9/12/1994) at 14.

44 *Cranston*, fn. 29 at 30.

45 *Reynolds v. Arthur* (Unrept, NSWSC Ez, Bryson J, 3/12/1990).

merits was complete.[46] In New Zealand the Court of Appeal recently took the restatement of the maxim to a point further still from the maxim in *Phillips* and even *Rice* by requiring the holder of a later equitable interest accorded priority to himself do equity.[47] It has been suggested that in so doing the possibility has been raised that 'every single rule governing the priorities of equitable interests is now subject to a judicial discretion to apportion losses between the holders of the interests in question.'[48] It remains to be seen how Australian courts will respond to this development and whether the High Court will take the opportunity, when offered, to make a clearer statement about the maxim and its impact. Notwithstanding the retirement of Mason CJ and Deane J, the presence of Gummow J on the bench should make some further exploration likely.[49]

5. The exceptions to the maxim

Given that the judgement of Mason and Deane JJ in *Heid* is not yet established by the High Court,[50] that even if it were so it does not abolish equitable categorisation,[51] and that the impact of *AGC* is still quite uncertain, the issue

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46 Id at 6.

47 *AGC (NZ) Ltd v. CFC Commercial Finance* [1995] 1 NZLR 129 (*AGC*) per Tompkins J at 137: '[I]f the Court is to determine the issue by deciding whose is the better equity, bearing in mind the conduct of both parties and all other relevant circumstances, it is difficult to see why the conduct of the holder of the later interest should not be taken into account.' This built on Brooking J's comment in *Cash Resources v. BT* at 586: 'the overriding question is whose is the better equity, bearing in mind the conduct of both parties.'

48 Oakley, fn. 4 at 219.

49 Writing extrajudicially Gummow has been at the forefront of academic debate over equitable priorities: Meagher, R.P., Gummow, W.M.C, & Lehane, J.R.F. 1992, *Equity: Doctrines and Remedies*, 3rd edn, Butterworths, Sydney, para. 811.

50 Note the approach in some Supreme Court decisions: in *Daniell v. Paradiso* (1991) 55 SASR 359, in which *Heid* was distinguished, the notion of priorities was very much that of 'taking away' the earlier interest (at 365). A similar approach was taken in the recent case of *Corindi Blueberry Growers Pty Ltd (Receiver and Manager Appointed) v. Shephard* (Unrept, NSWSC CA, Handley, Sheller and Powell JJA, 15/5/1995) per Handley JA at 2. In *FAI Insurances Ltd v. Pioneer Concrete Services Ltd* (1987) 15 NSWLR 552 Young J, although generally upholding Mason and Deane JJ's judgement, warned that 'there must be some foreseeable relevant causal connection between the act complained of and the acquisition of the interest being attacked' (at 555).

51 Wright has pointedly commented that 'the realization that the classification of a given right as an equitable estate, mere equity or personal equity is a description

of the ten exceptions to the maxim remains a live one. It is all very well for the NSW Court of Appeal to ignore the 'distracting' list of exceptions,[52] but this does not remove them from either text book or case law if the Mason and Deane JJ approach is not settled. Of course, Court of Appeal decisions such as *Silovi* help to further the acceptance of the restatement. However ignoring both a maxim of first resort, with its concurrent exceptions, or one of last resort does not serve to over-rule them. As it is, the exceptions remain important for those with equitable interests in property. A point by point examination of these ten exceptions would be, in itself, of limited value in determining the applicability of the maxim. The exceptions and the cases on which they have been based have been summarised in clear and concise form elsewhere.[53]

Whilst the learned authors of the *Laws of Australia* may comment that the exceptions 'cannot be reduced to a single, organising principle'[54] the restatement of Mason and Deane JJ has not been without effect on them. Even if they are in error in pursuing the better equity, rather than the priority as a maxim of first resort, their adoption of the approach outlined by Sykes[55] should have an impact on the evaluation of the exceptions. The broad approach to the concept of the better equity allows (indeed requires) a broad approach to the maxim and its exceptions. Mason and Deane JJ's balancing act is one means by which policy issues are not totally lost by a desire to fit cases within narrow classifications. Although this sort of comment has been made about the division between equity and equitable interests,[56] rather than exceptions to the maxim, there is no reason for it not to do so.[57] Any form of strict orders of priorities serves to act counter to the courts' ability to do justice to the individual

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largely of a result, rather than providing in itself the reason for that result is most distressing': fn. 9 at 174.

52 *Silovi Pty Ltd v. Barbaro* (1988) 13 NSWLR 466 at 475 (*Silovi*). See also Wright, fn. 9 at 178.

53 For example, Evans, M. 1993, *Outline of Equity and Trusts*, 2nd edn, Butterworths, Sydney, paras 231-240.

54 LBC, Sydney, 15.1 at para. 42.

55 Sykes, fn. 28 at 403.

56 Neave, M., & Weinberg, M., 'The nature and function of equities (Part II)' (1978-80) 6 *U Tas LR* 115 at 135.

57 A more general approach has been hinted at by Stubbs, P., 'Equitable Priorities and the Failure to Caveat' (1989) 6 *Auck LR* 199 at 204-5.

circumstances of each case.[58] Because of the need to categorise interests in terms of equality and priority, which is inherent in either the *Phillips* or *Rice* forms of the maxim, a broad approach which is necessarily part of a searching for the better equity should render both equitable divisions and the exceptions somewhat redundant.

6. Equitable Priorities in Torrens Land

It is widely held that Sir Robert Torrens had a deep and abiding loathing for lawyers.[59] It is certainly true that the legal profession expressed little enthusiasm at his efforts at land regulation.[60] He was also highly critical of the interference of Chancery with common law titles.[61] Nevertheless, Torrens never advocated the abolition of equitable interests in land.[62] This certainly has been the position taken by the High Court.[63] The reason for this is fairly simple: it could not possibly be the intention of the Torrens system to allow proprietors to escape liability for illegal, unethical or unconscionable acts simply because their title is registered.[64] Put another way, the conclusive nature of the register is not a means for the registered proprietor to avoid contracts which have been entered into.[65] The most important roles of equity regarding Torrens land are

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58 Lindenmayer, T.E., 'A Question of Priorities: Wives or Unsecured Creditors?' (1992) 6 *AJ Fam Law* 239 at 245.

59 Whalan, D.J., 'The Origins of the Torrens System and its Introduction into New Zealand' in Hinde, G.W. (ed), 1971, *The New Zealand Torrens System Centennial Essays*, Butterworths, Wellington, pp. 1-32 at 22.

60 Ibid.

61 McCrimmon, L.A. 'Protection of Equitable Interests Under the Torrens System: Polishing the Mirror of Title' (1994) 20 *Mon LR* 300 at 301.

62 Ibid.

63 *Butler v. Fairclough* (1917) 23 CLR 78. That this case is authority for the proposition that the courts will recognise equitable interests in Torrens land has been described as 'trite': *Grimes Holdings Pty Ltd v. Sceghi* (Unrept, WASC, White J, 20/08/1993) at 19.

64 Skapinker, D., 'Equitable interests, mere equities, "personal" equities and "personal equities" - distinctions with a difference' (1994) 68 *ALJ* 593 at 599. The quote actually refers to an exception of 'personal equities' suggested as a judicial reform to perceived flaws in the Torrens system and which Skapinker suggests would not undermine the certainty of registered titles.

65 Robinson, S. 'Claims in Personam in the Torrens System: Some General Principles' (1993) 67 *ALJ* 355 at 355.

to do with the position of purchasers pending registration[66] and the lodging of (or failing to lodge) caveats. The latter has been described as 'an anomalous and hybrid creature, the child of statute but sustained by equity.'[67] This delightful creature brings in much that is of interest in considerations of equitable priorities.

Regarding equitable priorities, Torrens land provides some interesting decisions. Neither the priority first approach of *Phillips* nor the priority last approach of *Rice* were totally accepted by Mason CJ and Deane J in *Heid* in their search for the better equity in all the relevant circumstances. Yet with registered title the *Phillips* approach has had much more vitality. There is a perception that in such cases the better equity may be better found through the employment of the maxim and that a just decision will arise from it. This has come to the fore in cases where the acquirer of the earlier interest has failed to lodge a caveat. Whilst there are cases to the contrary,[68] the weight of authority is that failure to lodge a caveat will not necessarily lead to postponement.[69] Here again the maxim raises its head. It has been suggested that a reliance upon the maxim has led to an impeding of the development of the law in this area.[70] A further impeding of the development of the law is that of inconsistent decisions in the High Court and subsequent erratic ones in state courts.[71] A clear application of a merit-based approach at least would be a positive step out of the mire of conflicting precedent.

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66 He may be in a worse position than a purchaser of old system land: Whalan, D.J. 'The Position of Purchasers Pending Registration' in Hinde, fn. 59, 120-37 at 123, 137.

67 Palmer, K.A., 'Caveats and their effect on Equitable Priorities' in Hinde, fn. 59, 79-119 at 119.

68 For example *Osmanoski v. Rose* [1974] VR 523. The Victorian Law Reform Commission has recommended that the failure to lodge a caveat should postpone the interest: Law Reform Commission of Victoria, *Report No 22: Priorities*, April 1989, p. 12.

69 Neave, M. 'Towards a Unified Torrens System: Principles and Pragmatism' (1993) 1 *APLJ* 114 at 128.

70 Stubbs, fn. 57 at 199.

71 Castle, fn. 32 at 144.

7. The 'distinct' Rule in *Dearle v. Hall*

The maxim was modified in *Dearle v. Hall*[72] in that priority in matters of personalty[73] is accorded to the claimant who first gave notice to the trustees. Known as the Rule in *Dearle v. Hall*, it has been described as being 'perilously near legislation.'[74] It was treated as settled law in *Ward and Pemberton v. Duncombe*.[75] However, this is not a broad redrafting of the priority maxim - for the rule to apply the assignee who first gives notice must have taken the interest for value and without notice of any earlier assignment. The courts have been restrictive in their approaches to the extension of the doctrine.[76] Indeed, that one writer has described the rule as *applying* the maxim[77] seems an appropriate comment on its flexibility. Nevertheless, the settled state of this law may be soon unsettled: it has been suggested that the recent New Zealand case of *AGC (NZ) v. CFC*[78] 'will deprive the operation of the Rule in *Dearle v. Hall* of all certainty and every case involving that Rule will also need to be litigated ... [as] the Court of Appeal of New Zealand has at least raised the possibility that every single rule governing the priorities of equitable interests is now subject to a judicial discretion.'[79] The *Phillips* maxim seems further than ever from the state of the law.

8. Priority between a prior legal and later equitable interest

The maxim as first resort applies between prior legal and later equitable interests, although it seems strange that it should do so on the basis of equality of interest (and thus priority to the first in time)[80] rather than the nature of a legal interest. The strength of an equitable interest, however, brings the discussion unpleasantly close to the neurotic division between equities and equitable interests. Nevertheless there are the usual exceptions to the maxim.

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72 (1828) 3 Russ 1; 38 ER 475.

73 Since 1925 the Rule has also applied to equitable interests in land in England. Such a provision has not been adopted in Australia: Sykes, fn. 28 at 405. For a discussion of the application of the Rule in England after 1925 see Crane, F.R., 'Equitable interests in land: some problems of priority' (1956) 20 *Conv (NS)* 444 at 447-9.

74 Lord Macnaghten cited in Firth, fn. 17 at 339.

75 [1893] AC 369.

76 *BS Lyle Ltd v. Rosher* [1958] 3 All ER 597 at 602; *Consul Developments Pty Ltd v. DPC Estates Pty Ltd* (1975) 132 CLR 373 at 378.

77 Elphinstone, L.H. 'The Mischief of Secret Trusts' (1961) 77 *LQR* 69 at 71.

78 Fn. 47.

79 Oakley, fn. 4 at 219.

80 Butt, fn. 11 at para. 1931.

Essentially there are four situations which may indicate the conduct of the holder of the legal interest should see it postponed to the holder of the equitable. They are in cases of fraud,[81] gross negligence regarding possession of the title deeds,[82] where the title deeds are entrusted to an agent who exceeds his authority[83] and where the holder of the legal interest gives documents to another which appear to confer a legal interest.[84] It has been suggested that the basis of postponement in all these cases is estoppel.[85] If this is so then it would be logical to argue for the extension of these four exceptions as estoppel itself expands[86] - in turn this would further undermine the applicability of the maxim. The nature of estoppel is one which is hardly restricted to decisions based simply on priority of time. Of course, if estoppel were to be seen as part of the 'all other respects' then instead it would render the exceptions superfluous.

9. Priority between a prior equitable and later legal interest

Between a prior equitable and a later legal interest, held as equal, the maxim applies with one clear exception. That exception is when the legal interest has been purchased for value, in good faith and without notice of the prior equitable interest vis a vis by the bona fide purchaser for value without notice.[87] Maitland wrote, perhaps over-optimistically, that if this rule is remembered 'the cases will become intelligible.'[88] In the circumstances cases have revolved, naturally enough, around questions of definitions of value, good faith, and notice. Notice has been held to be relatively broad and has a threefold categorisation: actual, imputed, or constructive. As always there are exceptions to the exceptions such as, for example, the purchaser of the legal interest prevailing if he purchased from a bona fide purchaser, even though the second purchaser had notice of the equitable interest.[89] There are also the exceptions that equity will not assist a volunteer and although consideration

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81 *Northern Counties of England Fire Insurance Co v. Whipp* (1884) 26 Ch D 482 at 490, 494.

82 *Evans v. Bicknell* (1801) 6 Ves 174; 31 ER 998 at 998, 1005-6.

83 *Perry-Herrick v. Attwood* (1857) 2 De G & J 21; 44 ER 895.

84 *Barry v. Heider* (1914) 19 CLR 197.

85 Sykes, fn. 28 at 401.

86 *Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 CLR 387.

87 The classic formulation is in *Basset v. Nosworthy* (1673) Rep Temp Finch 102; 23 ER 55 per Finch LK at 103; 56.

88 Maitland, fn. 4 at 131.

89 *Wilkes v. Spooner* [1911] 2 KB 473.

need not be adequate it cannot be nominal.[90] Nevertheless, in this situation the maxim is still of clear authority and the Mason and Deane JJ reworking has made little headway.

10. The future of equitable priorities

Whilst there has been some statutory modification of the state of the law regarding equitable priorities[91] and there will undoubtedly be more tinkering around the edges, a broad legislative rewriting seems unlikely.[92] However, despite Lord Denning's denials, equity is menopausal[93] and change is likely to occur at the heart of the maxim rather than in its exceptions. The judgement of Mason and Deane JJ in *Heid* has provided such a lead. Despite its vagueness, it seems inevitable that a search for the 'better equity' eventually will become established law.

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90 There is a certain logic to these two maxims in the circumstances given that it is a purchaser *for value*.

91 See, for example, *Corporations Law* (Cth), ss. 279-282 and *Conveyancing Act* 1919 (NSW) ss. 153-4, 165.

92 If only because the field is too complicated for the legislature to broadly comprehend, one may surmise that any such attempt would be so inept as to be largely require a large amount of judicial re-interpretation.

93 Menopause may indeed be the start of new vibrancy; see for example Rossiter and Stone, fn. 11.