

Priority of Interests

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The question of priority of interest comes up when there are two or more competing interests over property and especially when these interests cannot be satisfied out of the total value of the property that is subject of the interests.

These interest may be encumbrances. An encumbrance is a limiting factor on the land. It is a charge on the property created in favour of a third party.

Of course, the only two categories of interests that may be acquired over land are equitable and legal interests, the former proceeding from the latter. Equitable interests would necessarily be the result of informal, incomplete or imperfect acquisitions while the legal interest would necessarily have complied with all formalities.

There are two basic rules that have been developed for the resolution of these conflicts. The first is the Order of Creation rule while the second is the Order of Notice rule.

Order of Creation/The Temporal Order Rule

This rule ranks the interests in order of creation. Thus, the first in time takes priority. It is encapsulated in the maxim: *Qui prior est tempore, potior est jure* "He who is first in time is stronger in law."

The rule is however subject to notice. As such, whoever takes an interest in the property even after notice of an earlier interest than his would have his interest postponed as against that of the other interest. It must also be noted that the rule would only apply in case of real property.

As between competing legal interests, the rule finds clear application although its application is a bit fanciful as it would be quite difficult to create two competing legal estates in one property. This is because a legal estate is one that must have passed all formalities of the law.

It is a bit difficult to pass through all the formalities and still not have notice of an earlier interest. For the rule to apply of course, both estates must have passed the test of legality with flying colours.

As between competing equitable interests, the rule would also apply. There can be several equitable interests on the same property as they are all incomplete and fall short of the law in some respect. For an interest to have priority however, the owner of the interest must not have had notice of any earlier encumbrance otherwise his interest would be postponed.

Two maxims modify the Order of Creation rule materially. First, the maxim: [Where there is equal equity, the law prevails](#), operates to modify the rule in two ways. First, in case of conflict between adverse claimants, one equitable and the other legal, the legal interest supersedes. Hence the maxim: Equity follows the law.

Second, the equality here is not in terms of concurrent time of creation, rather it is in respect of the equity of the two cases especially as regards their attitude, clean hands, notice of earlier interest etc.

Thus, in effect, the Order of Creation rule is the last resort when there is equal equity and by the operation of this maxim, the conflict would be resolved in favour of the legal estate.

The second maxim: As between equal equities, the first in time shall prevail, also operates to modify the rule in two ways. The first is that the equities must be equal, not in time, but in merit. The second is that where the interests in conflict are equitable and have been found to be equally meritorious, the first to be created takes priority as a last resort.

There are however exceptions to the Order of Creation rule, instances where an interest, even after being first in time, would still be postponed in favour of latter interests, maybe even the last one. These exceptions include:

- Purchase of a legal estate for value without notice
- Fraud, estoppel, gross negligence
- Registration

Bonafide Purchaser of a Legal Estate for Value Without Notice

This is one instance in which it can be said that legal interests are exceeding stronger than equitable interests. In the case of this purchaser, no matter how equitable or meritorious a competing interest is, his interest would always supersede and take priority over the others.

This interest is so strong that it was described by James L.J as "an absolute, unqualified, unanswerable defence and an unanswerable plea to the jurisdiction of the court." All that can be done is to interrogate the plea and question whether it attains the standard set by the law. Once it is found to attain that standard, it cannot be rebutted.

The standard is strict however. The purchaser's successors in title would also get a good title even if they knew about the previous encumbrances on the property. This would not apply to persons already bound by the property though.

Bona fide

This means good faith. It embodies the whole equitable idea of conscience. There must not be any *bad vibes* around him. He must be completely blameless in Equity. Once he is blameless, he has priority over others notwithstanding the poor moral character of the vendor.

Purchaser for Value

He must have given good consideration for the property. Consideration in this instance may be monetary. It may also be in the form of a detriment i.e. the promise not to pursue a debt. Marriage has also been held to constitute valuable consideration.

Legal Estate

The interest obtained must be a legal estate otherwise, he would take subject to the prior equitable interest holders. The estate may be acquired outright or by a previous owner of an equitable estate in the property subject to the caveat that he must not have had notice of the prior encumbrance.

Notice

Notice refers to knowledge of existing facts and it may be actual, constructive or implied. It is actual when the purchaser, at the time of the purchase or any period prior to, was aware of prior encumbrances on the property.

It thus connotes personal knowledge, and it is irrelevant how it came to the purchaser's notice whether direct or indirect. The purchaser is not however bound by knowledge which a reasonable and prudent businessman would not act on or would consider as unreliable.

Constructive notice covers facts that are not actually in the personal knowledge of the purchaser or that cannot be proved to be in his personal knowledge. It is enough if it can be proved that the purchaser would have had notice had he made reasonable inquiry.

Thus, if there are sufficient facts calling for inquiry which were not inquired into by the purchaser, he may be deemed to have had constructive notice of those facts. To discharge this burden, the purchaser must call for and investigate the title of his vendor.

According to **S. 70(1) Property and Conveyancing Law 1959**, he must investigate the title for the past 30 years. Failure to do this would postpone his interest. If he deliberately abstains from investigating or is negligent in his investigation, his interest would be postponed.

Occupation of the property in question constitutes constructive notice to the purchaser and if he fails to investigate, his interest would be postponed.

Imputed notice is notice to the appointed agent of the purchaser. It is imputed to the purchaser through the actual or constructive notice of his agent. The agent must however be the bonafide agent of the purchaser, appointed by him.

Where the agent is a lawyer, information acquired by him in another transaction will not bind his principal in the instant transaction. It has to be in the same transaction.

Fraud, Estoppel, Gross Negligence

Fraud will operate to postpone interest in the property. Where the owner of a prior legal estate assists in or fraudulently engineers a subsequent equitable estate in the same property, which estate was purchased without notice of any prior legal interest, the owner of the legal interest will have his interest postponed in favour of the equitable interest.

Gross negligence is more than just carelessness or want of prudence on the part of the legal owner. In ***Akingbade vs Elemosho (1964) 1 All Nlr 154*** the purchaser was in a position to find out about the prior equitable interest. He was however negligent and failed to find out. The court held that his interest would be postponed in favour of the equitable interest.

Where the owner of a prior estate has acted in such a way as to make the purchaser of a subsequent estate believe that he has no right over the property, he will have his interest postponed in favour of the subsequent interest.

Registration

The Land Registration Act provides in its **S. 16** that non-registration of any instrument affecting land would result in loss of priority of that interest. Thus, the Act affects the Temporal Order rule such that what is material now is not the date of creation but the date that the instrument was registered.

As between legal interests and even in competition with equitable interests, it would mean that non-registration postpones the unregistered interest.

In ***Amankra vs Zankley (1963) 1 All NLR 304***, the same vendor conveyed the same property to the plaintiff and defendant. The plaintiff claimed that the land was conveyed to him in August 1957 and he registered the deed in September 1957. The defendant claimed that the land was conveyed to him in May 1957 but he registered in March 1960. The court held that even though the defendant was earlier in time, he loses priority because he registered it later.

Order of Notice

The rule as to order of notice applies solely to pure personalty i.e. choses in action. It was laid down in *DEARLE v HALL* (1823) 3 Russ. 1 where the court held that:

“Where there are successive assignments whether to purchasers or chargees, of an existing equitable chose in action, the priority of those assignments is to be determined by the order in which the respective assignees gave notice of their assignments to the person who is to discharge the liability arising from the assignment.”

Thus, as far as interest in pure personalty is concerned, the applicable rule is the order in which notice of interest was given to the trustee of the assignment. In the case of a debt, the trustee would be the debtor.

So, for instance, if A borrows B some money, and then gives C the right to collect the debt, he has to give notice to B. If A also gives D the right to collect the debt, and D notifies the debtor (B) first, then D would have a priority in the debt compared to C.

The notice, according to **S. 152 Property and Conveyancing Law**, must be written.

The rule is also subject to notice of prior encumbrances. Thus, a subsequent encumbrancer who had notice of an earlier interest would not obtain priority by giving notice first.