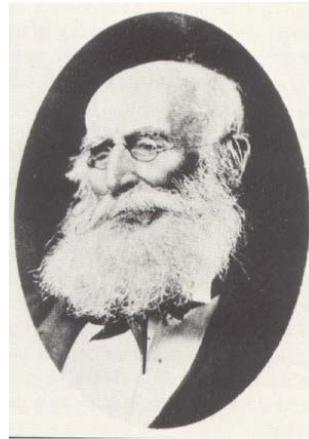
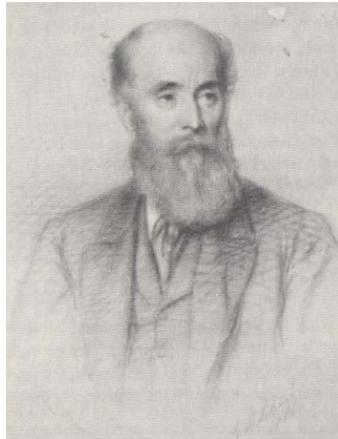




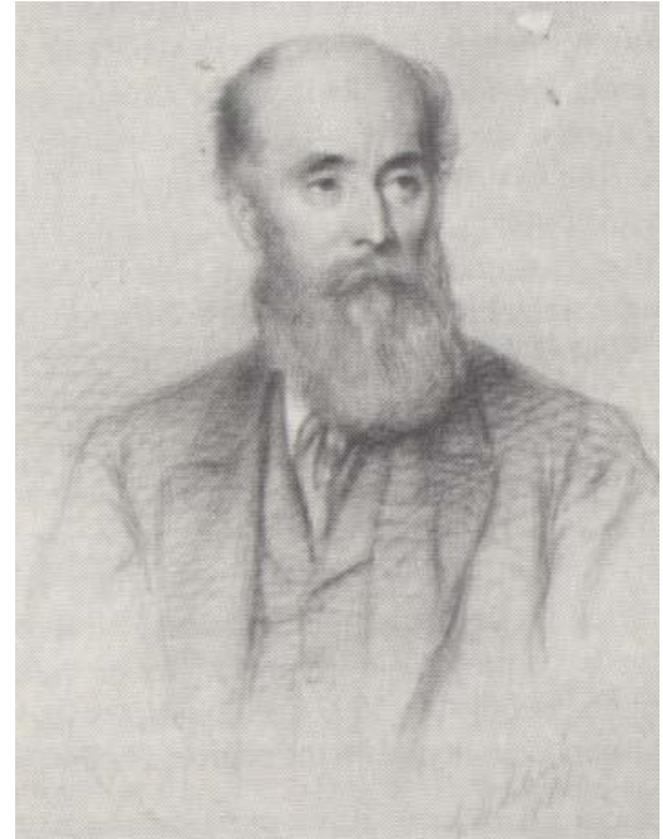
# The Torrens System



# Introduction

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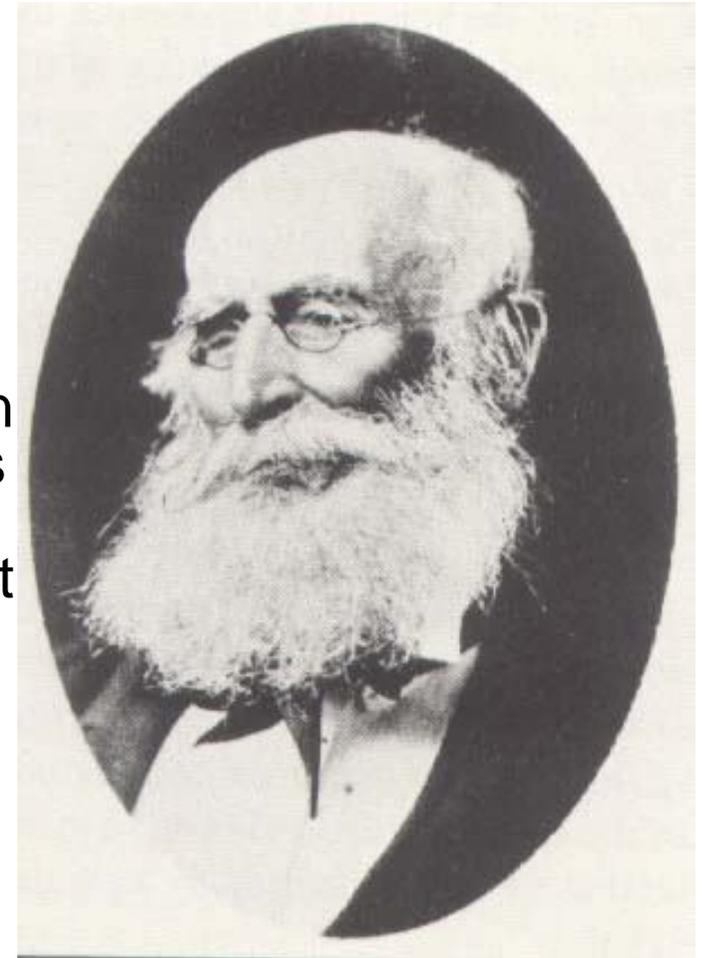
- The Torrens system is a system of 'land registration'
- Operates in every state and territory in Australia and other Common Law countries such as Canada and New Zealand
- Sir Robert Torrens (3<sup>rd</sup> Premier of SA) is credited with the creation of the of this simplified system of transferring land
- In December 1857 he passed the *Real Property Act* 1858 for the transfer of real property under the system which became known as Torrens title.



Sir Robert Torrens

# ... Dr juris Ulrich Hübbe?

- German Lawyer who had conducted real property transactions in Germany
- Part of a group who assisted Torrens in formulating the new title system
- Torrens never acknowledged Hübbe's assistance
- He referred to the success of the system in Merchant shipping and the many centuries of success of land title registration in Germany without referring to Hübbe or that the system was modelled on it
- It is not in doubt that Torrens fought it through parliament
- Torrens later visited Victoria and assisted in bringing in the new system in that colony.



Ulrich Hübbe

# General Law – Old Law

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- Under the traditional system of transferring land, the history of the property must be examined to ensure that the seller can convey good title to the purchaser
- When property is sold, a deed is filed and recorded with the land office
- The deed contains:
  - the names of the seller and the buyer
  - the ownership relationship of the sellers and buyers, if more than one seller or one buyer is involved (for example, joint tenants or tenants in common)
  - the legal description of the property being transferred.
- This information is summarised from each deed and recorded in a document called an abstract of title

# General Law – Chain of Title

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- Any prospective purchaser required to undertake a title search (30 years in Victoria) of past transactions to establish a **good root of title**.
- For true certainty of ownership every deed in the chain from the Crown Grant (when land was first converted to freehold) would need to be discovered
- However deeds over a long period of time can be separated from the title
- An lawyer or a real estate title examiner inspects *each entry* to determine that good title has been passed with *each transaction*.
- Every transaction in relation to the land – every mortgage, every conveyance etc needed to be identified
- This information collectively is **a chain of title**

# General Law - Uncertainty

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- Required high degree of diligence – *a purchaser is bound by a legal interest created by a deed **even if it has been left out of the chain of title***
- If any problems exist with the title, they must be remedied before the purchaser may obtain good title
- Onus is on the purchaser to discover if an interest in land is missing – purchaser is often the least equipped to discover the truth
- Under old system title, the interest of the true owner was never transparent
- When the Torrens system was proposed, there was violent opposition from the legal profession?!
- The Torrens system addresses the problem: When the owner sells the property, the **certificate alone is evidence of good title** - eliminating the need for a new examination of title.

# Simplicity of the Torrens System

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- Torrens' speech to SA Parliament 1857 articulated the basic principles of the system:
  - Each transfer of the fee simple was to be as a fresh grant from the Crown
  - Registration alone would give validity to land transactions
  - The Titles Office would provide simple forms

# The Torrens System

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- Property is transferred **by registration** of title instead of by deeds
- A purchaser is merely required to undertake a search of one record - the title as registered
- The Torrens system did away with the complexity of the old English land law which was based on medieval concepts and made conveyancing cumbersome, time consuming and expensive
- No document (eg a transfer or a mortgage) or other interest in property (eg caveat) is effective unless and until it is recorded at the centralised registry
- Once the purchaser's name is recorded on the title register the purchaser becomes owner of the property **to the exclusion of all others**, by the very fact of registration
- Purchaser obtains 'title by registration'

# Unchallengeable

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- The owner of a property cannot have their title challenged or overturned
- This concept is known as ‘indefeasibility’ of title. There are exceptions:
  - if a dealing is registered fraudulently – this is a very complex area of law
  - if any existing easement has been wrongly left off the title or misdescribed by the Land Titles Office
  - wrong boundary descriptions
  - leases for less than 3 years do not have to be registered. - so, if “A” transfers to “B” and no lease is shown on the title, “B” will take subject to any tenancy, even though not shown, if it is for a term of less than 3 years
- Purchaser can bring a claim against the Land Titles Office (compensation) if they suffer a loss as a consequence of fraud or the omission of some legal interest relating to the title

# Residual influence from the English System

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- Courts have applied the English system rules to the Torrens system
- Common law and equity principles relating to property still apply
- Problematic juxtaposition:
  - Torrens system originated in Germany, a Civil law country and was meant to operate in that system
  - Australia is a Common Law country which inherited a system of feudal tenures
  - Mismatch ...
- In Victoria, English general law rules apply as far as the Transfer of Land Act 1958 does not otherwise provide
- In practice, even where the Transfer of Land Act *is* explicit, interpretation of the Act by the Court has been to 'read down' sections not directly compatible with the old rules.

# Registered Title

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- 'Registered Title' refers to land held under the Torrens system administrated under the *Transfer of Land Act 1958*.
- Each parcel of land has its own Certificate of Title numbered by Volume and Folio
- The Certificates of Title (original) are stored in the Register Book which is maintained by the Registrar of Titles



# Electronic Title

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- The Register Book is in the process of being computerised and automated.
- Every property transaction in Victoria now involves conversion of paper title (original held by the Registrar of Titles at the Land Titles Office) to 'electronic' title
- Purchasers get to keep the paper title as a souvenir
- Indefeasibility of title with guarantee from the State (compensation payable) is a key aspect of the Torrens system
- Fraud: Does electronic registration allow those committing fraud to offend on a wider scale - question the security and stability of the register?
- Accuracy needs to be ensured
- Provision needs to be made for the failings of technology
- Already there are problems. The process of conversion will inevitably create some errors. I have had personal experience of this!

# Estates and Interests in Land



Introduction to Part 5

# What is an estate or interest in land?

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- Section 4(1) of the *Transfer of Land Act* 1958 defines *land* as:
  - ...any estate or interest in land but does not include an interest in land arising under the *Mineral Resources Development Act* 1990.
- An *estate or interest* in land is a legal *right* with respect to that land.
- An estate or interest (right) to land can be registered on the Certificate of Title
- The estate or interest to land need not be an *actual* right. A person who simply *claims* an estate or interest can lodge a **caveat** to protect that claimed right
- The caveat will then appear on the Certificate of Title
- It is extremely easy to lodge a caveat. Just contact Land Titles office and pay \$120 fee

# Chattels – when goods become a part of the land

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- Chattels are fixtures – moveable property that are annexed to the land
- So how can you infer whether the intention was to annex a fixture to land? What is the test for chattels?
- Generally, the test for chattels is the degree of annexation and placement to justify an inference that they are to be treated as part of the land
- In the judgment of Jordon CJ in *APA v Coroneo* (1938), he says:

"The test of whether a chattel which has been to some extent fixed to land is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period, or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose.

In the former case it is a fixture, whether it has been fixed for the better enjoyment of the land or building, or fixed merely to steady the thing itself, for the better use or enjoyment of the thing fixed. If it is proved to have been fixed merely for a temporary purpose it is not a fixture."

# Test for Chattels

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- Kearney J in *Palumberi v Palumberi* (1986) NSW Conv R 55-287 said that:

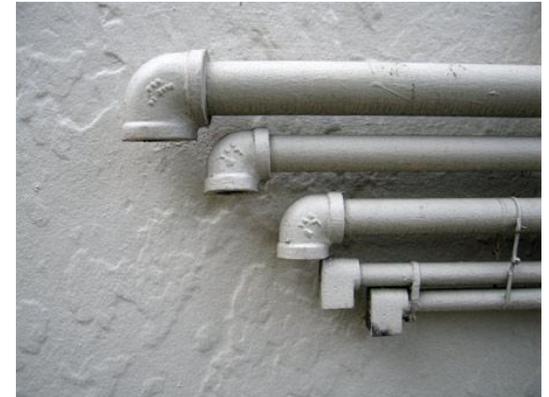
"It would seem from perusal of these and other authorities in the field that there has been a perceptible decline in the comparative importance of the degree or mode of annexation, with a tendency to greater emphasis being placed upon the purpose or object of annexation, or, putting it another way, the intention with which the item is placed upon land. This shift has involved a greater reliance upon the individual surrounding circumstances of the case in question as distinct from any attempt to seek to apply some simple rule or some automatic solution.

Bearing in mind the principles to be derived from the above references, and seeking to apply them to the facts of the present case, it might be noted that whilst some guidance may be obtained from other decisions in similar circumstances or concerning similar items, no standard solution is to be derived from such cases which upon ultimate analysis, are found to turn upon their individual facts."

# Chattels – practical examples

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- Where the test for a chattel is satisfied, that object is owned by the owner of the land and cannot be claimed by its original owner. A purchaser of land acquires chattels as of right
- In practice, when a property is sold, the vendor may wish to list other items as 'chattels' in the contract, which are not annexed to the land
- An example is the installation of pipes in a building
- The pipes are the property of a plumber until they are installed and they become part of the building and thus part of the land
- If the landowner does not pay the plumber, the plumber cannot remove the pipes ... but can sue for the price of their installation



# Chattels – practical examples

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- It is important to be very careful that the boundaries of a parcel of land are accurately identified
- Consider a builder who builds on the wrong parcel of land by mistake
- If the owner of the land knows that the mistake has been made, but does nothing, the builder will be treated (in equity) as a trustee of the improvements on the property
- If the owner of the land was unaware of the situation, they have no duty to correct the situation.
- The owner can assert their rights to retain the building, which becomes a fixture.
- The owner can sue the builder for trespass, or order its demolition

# Physical extent of the land

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- The heart of Common law conception of property  
*Cujus est solum, ejus est usque ad coelum et ad inferos*
- Which means that ownership of a parcel of land goes down to the centre of the Earth and up to heaven.
- Today, for practical reasons, airspace ownership extends only as far as necessary for ordinary use and enjoyment of the land (you can't exclude planes from flying over your property!)
- The ownership of airspace can be subdivided horizontally – this is necessary for multi-story apartments, offices etc

# Stratum title

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- The owner of a stratum title actually owns a pocket of airspace above the land defined in relation to a datum point
- The Strata Titles Act 1964 (Vic) introduced the strata title which is defined in relation to the building itself
- Now, the Subdivision Act 1988 (Vic) provides for both horizontal and vertical subdivision



# Minerals and Petroleum

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- In Victoria, all minerals and petroleum are vested in the Crown
- Usually this is reserved in the Crown Grant
- Land is usually only granted to a depth of 50 feet
- See:
  - Mineral Resources Development Act 1990
  - Petroleum Act 1958
- However, stone still belongs to the landowner (see Extractive Industries Development Act 1995)