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IN THE SUPREME COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE

IN EQUITY

SUIT NO. E.94/1967

BETWEEN BARCLAYS BANK D.C.O. PLAINTIFF

AND ADMINISTRATOR GENERAL
Administrator of the Estate of
Gifford Astor Reid (deceased)

AND

RANSFORD HAMILTON DEFENDANTS

Ramon Alberga Q.C. and Ronald Williams for the Plaintiff
David Muirhead for the first defendant
Leacroft Robinson Q.C. and Carl Rattray Q.C. for the second defendant.

January 12,13,14,15,16,22,23, 1970.

Cur adv. vult

On 24th. June, 1970 Judgment read.

PARNELL J. On the 5th day of February, 1960, Gifford Astor Reid, then a Land's Officer, executed an equitable mortgage by way of a charge in favour of the Bank charging as security, "All that parcel of land part of Barry and Lloyds in the parish of Saint Catherine being lot numbered one hundred and eighty on the plan of Barry and Lloyds and being part of the land comprised in Certificate of Title registered in Volume 312 Folio 127."

Lot 180 was registered on the 2nd April, 1958 in the names of Felix and Elizabeth Richards but on the 4th November, 1958, the said lands were transferred and registered in the name of the said Gifford Astor Reid who died intestate on the 21st July, 1961. Lot 180 is registered at Volume 864 Folio 98 of the Register Book of Titles. The charge on the property of the deceased was evidenced in writing.

> "for advances made to me or for my use or at my request or for any moneys whatsoever which I may be liable to pay you together with interest at the rate of Seven and one half per cent per annum payable quarterly or at such other rate and at such other times as the Bank may from time to time charge."

On the 8th February, 1960, the Bank lodged a caveat against the certificate of title in protection of the charge. The last two paragraphs of the charge read as follows:-

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"I undertake whenever called upon to do so, to have prepared at my expense and to execute a legal mortgage to the satisfaction of your Solicitors. This property is not encumbered in any way and I undertake not to execute any encumbrance so long as this charge to Barclays Bank D.C.O. remains in force.

This charge shall be impressed in the first instance with stamp duty to cover ~~any~~ my indebtedness of EIGHT HUNDRED Pounds but you shall be at liberty and you are hereby empowered at any time or times hereafter (without any further licence or consent on my part and whether before or after the sale of the said security or any part thereof)to impress additional stamp duty hereon to cover any sum or sums by which my indebtedness to you may exceed EIGHT HUNDRED Pounds it being the intent hereof that his charge shall cover all sums to any aggregate in which I may be indebted to you at any time."

When Gifford Astor Reid (hereinafter referred to as the deceased) died on the 21st July, 1961 aged 31, he was indebted to the Bank.

At the trial, the statement of claim was amended to show an indebtedness of $4862.09 to the Bank including outstanding loan and interest said to be still accruing at the rate of 9½% per centum.

The first defendant was granted Letters of Administration of all the estate of the deceased on the 19th November, 1964. On the 6th August, 1965, the first defendant, by transmission, was registered as proprietor of lot 180. On the 29th November, 1958 the deceased entered into an agreement with the second defendant for the sale of lots 172,175 and 180.

Prior to the 29th November, 1958, the second defendant paid the deceased a total sum of £310 in respect of the sale of the three lots above mentioned. When the deceased demanded more money on the sale, the second defendant requested that the agreement for sale be put in writing and this was done on the 29th November, 1958. Between the 23rd June, ~~1959~~ 1957 and the 5th August, 1960 the second defendant paid the deceased further sums totalling £900 and having been put into possession of these lands, the second defendant spent a lot of money to improve the lots which, from the diagram which was put in by consent, indicate a contiguous run of land from a planned land settlement scheme. Lots 176,177,179 and part of lot 178 are also owned by the second defendant. The second defendant, at no time, lodged a caveat against the registered title of the owner of

.../lots

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lots 172,175 and 180. His reasons for his action will be referred to in due course.

After prolonged correspondence between the parties, a writ was filed in July 1967, in which the Bank claims in substance:

(1) A declaration that it is the equitable mortgagee of Lot 180 registered at Volume 864 Folio 98 in the Register Book of Tiltes;

(2) That the said land i.e. lot 180 is charged with the payment of all monies owing from the deceased to the Bank;

(3) That the Bank's equitable mortgage ranks in priority to whatever right the second defendant may have in or over the said land;

(4) Payment of all the moneys due to the Bank under the equitable mortgage with interest accruing and continuing to accrue at the rate of 9½% from the 15th June, 1967.

The deceased died insolvent. He left a vast amount of debt behind him together with a widow and two young children. The evidence of the Assistant Administrator General, Mr. Sibthorpe Beckett is that calculated as at June 1967, the assets of the deceased were put at roughly £766 while the liabilities (including adminstrative expenses) were about £3,700 with a further claim of £368 from a Jamaican living in England. This claim is still being examined.

The first defendant in his defence has admitted that the deceased did execute an equitable charge on lot 180 in favour of the Bank and that at the date of the death of the deceased the sum claimed was due and owing. But the first defendant has taken his stand. I shall therefore quote paragraphs 4,5 and 6 of his defence.

4. "The First-Named Defendant states that lot 180 did and does form part of the Estate of GIFFORD ASTOR REID but this Lot is the subject of Legal Proceedings as to the competing Claims between the second-Named Defendant and the First-Named Defendant.

5. The First-Named Defendant will accordingly submit to the decision of the Court as to the ownership and/or disposition of Lot 180.

6. The First-Named Defendant states that there are not sufficient assets of the Estate of the late

.../GIFFORD

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GIFFORD ASTOR REID in his hands to answer the Plaintiff's or the Second-Named Defendant's claim if established."

The second defendant has repudiated the claim of the Bank, he claims that in law he is the equitable owner of lot 180 by virtue of the agreement for sale dated the 29th November, 1958 to which I have already referred. He counter-claims for a declaration that:

(1) Lot 180 is his property he being the equitable owner thereof;

(2) That his equitable right is prior in time to any right which the Bank may have acquired subsequent to the 29th November, 1958.

When the whole picture is examined therefore, the position seems to be that there is a contest over priorities between two competing equities; that is between the Bank and the second defendant touching lot 180 which was registered in the name of the deceased Gifford Reid: The equities arose when -

(a) On the 29th November, 1958 he entered into an agreement for the sale of three lots 172,175 & 180 to the second defendant for valuable consideration.

(b) On the 5th February, 1960, when the deceased executed a charge in favour of the Bank without his disclosing to Mr. Garsia the Bank's Branch manager at May Pen that lot 180 was encumbered in any way whatever.

The first defendant has been brought into the fray. He is prepared to submit - as it would be his duty - to the decision of the Court as to the ownership or disposition of lot 180.

Having given a brief outline of the pleadings and the issues involved, I shall examine in more detail the facts and arguments that were put before me during the hearing lasting for seven days.

In January, 1960 one Chresten Garsia was the manager of the Bank's branch at May Pen. A customer of the Bank, Mr. R.J. Simms introduced the deceased Reid to Mr. Garsia. The deceased who was then a Land's Officer in the government service was stationed in Clarendon. According to Mr. Garsia, "Mr. Reid applied for facilities, that is a loan of £800. I asked if he had a security to offer and he said he owned three registered/ lots. One was at Barry and Lloyds, St. Catherine."

Mr. Garsia arranged with the deceased to visit the land at Barry and Lloyds. This was about the end of January, He Garsia paid

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one visit to a lot of land shown to him by the deceased. The visit was made about 5:30 p.m. when the deceased pointed out:

"A house and about 3 acres of land."

The place which was shown to Mr. Garsia satisfied him with its setting, risk involved and panoramic view. To the Court, Mr. Garsia said:

"I would have bought this place myself because of its scenic view."

On the 5th February, 1960, the deceased returned to the Bank with a duplicate certificate of title showing that he was then the registered owner, by transfer, of lot 180.

"On the Plan of Barry and Lloyds aforesaid and deposited in the office of Titles on the 2nd December, 1944."

The agreement between the deceased and Mr. Garsia on behalf of the Bank was this: he Reid was to open an account with £10 and granted overdraft "facilities" up to £800 but until the security was in order, the overdraft was not to exceed £200. Mr. Garsia was anxious to assist land owners to develop their farms. He was told by the deceased that the credit facilities would be used to establish a chicken farm and that the sum of £150 was to be paid every two months from the sale of "broilers, land and pigs." There was one stipulation which Mr. Garsia made. The deceased was to effect an insurance on the house which he saw on the lot over which the charge was made in the sum of £1,000 and that the Bank's interest should be noted on the policy. The policy with its renewal receipts is in evidence as Exhibit 6. To this I shall return later.

Mr. Garsia was carefully cross-examined by Mr. Robinson concerning the one visit he made to Barry & Lloyds, the observations he made of what was shown to him and his examination of the insurance policy which the deceased produced to the Bank, a condition of his obtaining the credit facilities. I will quote parts of the evidence under cross-examination.

"He showed me a house on a rising; he took me up a Parochial Road - dirt road. It was not on the main road."

Q: What sort of house you saw?

A: "I do not remember the place well."

Further on in the cross-examination he continued:

Q: Did you come to any concludion about the value of the place?

A; "I valued the place at about £100 per acre and the house

.../was

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was presumably worth abcut £1,100. I asked him to have the house insured."

When the policy (Exhibit 6) was produced it was pointed out to Mr. Garsia that what was insured was not lot 180 but

> "main building the property of the Insured situate at Lot No. 182 part of Barry and Lloyds, Gunaboa Vale in the parish of St. Catherine constructed of concrete blocks with roof of zinc and having doors and windows of timber with glass occupied solely as a Private Dwelling in the sum of Nine Hundred Pounds."

An outbuilding is also insured in the sum of £100.

There is an endorsement on the policy referred to as "memo 2" which reads as follows:

> "Barclays Bank D.C.O., May Pen are interested in the within Insurance as mortgagees to whom loss if any under this Policy shall be payable in accordance with the standard mortgage clause attached."

Mr. Garsia at first said that he discovered the typographical error in the number of the lot and he had the matter adjusted. He did not remember when it was corrected. This stand of Mr. Garsia was later withdrawn. The final portion of his evidence in cross-examination by Mr. Robinson is as follows::

> "I now say I did not discover any error in the policy. I relied entirely on what Reid told me that the place he took me was in fact Barry & Lloyds."
>
> Q: Did you see any signs of activity on the land he showed you at Barry & Lloyds?
>
> A: "I do not remember."

The Policy is dated the 10th February, 1960 but was effective from the 5th February, 1960 to four o'clock in the afternoon of the 5th February, 1961.

On the 10th March, 1961, the policy was renewed for 12 months iring on the 5th February, 1962. The renewal receipt shows lot 182 as the "covering property."

What seems to be clear beyond any argument is that the deceased Reid either by artifice or by sheer negligence effected an insurance on lot 182 with house thereon although he was offering Lot 180 as the security for the facilities to be granted. And owing to an oversight - I will put it on this plane - Mr. Garsia accepted the policy without discovering this undoubted

.../error

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error although he Mr. Garsia was careful enough to cause a caveat to be lodged against the title of the owner of Lot 180. And this state of affairs continued throughout the period that the deceased was alive. While this transaction was being executed between Mr. Garsia and the deceased, lot 180 was in the notorious possession of the second defendant.

A play had been enacted with the deceased as one of the actors. e discussion between Verges, Leonato and Dogberry in Shakespeare (Much Ado about Nothing) comes to mind.

"Verg. Yes. I thank God I am as honest as any man living that is an old man and no honester than I.

Dogb. Comparisons are odorus: palabras, neighbour Verges.

Leon. Neighbours you are tedious.

Dogb. A good old man sir; he will be talking; as they say, when the age is in the wit is out--------
and two men ride of a horse one must ride behind."

Act 3, Scene 5.

And as Chitty J. said in Lavery v. Pursell (1888) 39 Ch.D. 508 at p.517.

"Courts of justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, 'this is a horses's tail' at some time."

In this matter of competing equitable interests, one question which I will have to consider is this: if lot 180 is to be regarded as a horse with Mr. Garsia for the Bank and the second defendant as the riders, who was the first in the saddle? If there is a clear answer to this question, the next one will be this: has this rider been displaced from his original position by the other?

Before I examine the evidence of the second defendant, a piece of evidence from a witness called by the Bank must be referred to.

Mr. Harold Ramsay the present mananger of the May Pen branch of the Bank has about 20 years service in banking and he has held managerial position for about 10 years. Under cross-examination by Mr. Robinson, Mr. Ramsay said that the purpose of a visit to premises (on which a charge is to be made for the purposes of a loan) is solely for valuation and for no other reason.

The question and answer should be mentioned.

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Q: During all your experience with Barclays Bank is it to your knowledge that the purpose of visiting premises of persons seeking a loan from the Bank is solely for valuation?

A: "That is right."

The second defendant Hamilton is a builder and land owner. He is Justice of the Peace for St. Andrew and is a Roman Catholic. He left school in the 6th standard with a flair for wood-work in every phase of it. In 1957, the deceased took him to Barry & Lloyds and showed him three lots i.e. Nos. 172,175 and 180. The deceased claimed to be the owner of these lots and offered to sell all three to Hamilton. Between the 8th February, 1958 and the 9th August, 1958, Hamilton paid the deceased the sum of £310 as part payment towards the purchase price of lots 172,175 and 180. The three receipts are in evidence as Exhibit 11. According to the second defendant on the 29th November, 1958, the deceased came to him and asked for a big amount of money.

> "Apparently he was in some difficulty. I told him that he would have to draw up a contract for that amount of money."

The agreement (Exhibit 9) was duly drawn up in the handwriting of the deceased and signed by both of them.

Barry & Lloyds land settlement scheme in St. Catherine is a government project to assist farmers. The deceased, as a Land's Officer working on the scheme, was not permitted to purchase a lot in his own name but he could accept a transfer from an allottee or the assignee of an allottee. On the 29th November, 1958, the deceased gave the second defendant the transfer forms relating to the lots to be signed. With regard to lot 180, the deceased told the second defendant that one Richards would be transferring title to him Reid.

In truth, lot 180 was formerly registered in the names of Felix Richards and Elizabeth Richards his wife but, as I have already mentioned, the transfer to the deceased Reid was effected on the 4th November, 1958. I shall return to the Agreement for Sale. It is legibly written and shows signs of intelligence. Even the craft of the draughtsman is not lacking. The following particulars, inter alia, are recited:

(1) That the vendor owns lot 180,172 and 175;

(2) That the purchaser agrees to buy the said lands,

.../comprising

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comprising 26½ acres more or less for the sum of One thousand, six hundred and eighty pounds (£1,680);

(3) That the vendor acknowledges receipt of Six Hundred and ten pounds (£610) as part payment on account.

(4) That the titles for the said land are to be presented on the payment of the last instalment.

(5) Date of possession 29/11/58 and taxes to be adjusted to date of possession.

Under the agreement, the balance of the purchase price of £1070 was to be paid at the rate of Fifty pounds per month. Hamilton, the purchaser therefore had roughly 21 months calculated from November 29, 1958 to complete his payment and to obtain his title.

After Hamilton was put in possession of the three lots, he exercised rights of ownership by doing the following in relation to lot 180:

(1) He applied to St. Catherine Parish Council for water. Pipes were laid to connect the premises with water from the public supply in the area;

(2) A site was cleared for building a house and in January, 1959, the construction began. By April, 1959, a dwelling house, a maid's room and a store-room - three separate buildings - were completed at a cost of nearly £3,000. The cost for erecting the house was about £2,200 excluding the cost of the builder's time. The second defendant built the house himself;

(3) A pig farm and a chicken coop were established;

(4) Two water tanks were erected;

(5) A branch of the Jamaica Agricultural Society called the"Barry and Lloyds JAS Branch" was established. Meetings of the Society were held in the dwelling house. The second defendant was elected president of the branch;

(6) A Roman Catholic Mission was established at the dwelling house. About once per month, Fr. Charles Eberle conducted mass;

(7) Distribution of free food for the poor of the district was conducted from the premises (lot 180) and an annual Christmas treat for children was begun at the expense of the second defendant;

(8) A caretaker for the premises was appointed.

.../Alphanso

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> Alphanso Richards otherwise called "son son" was the first caretaker. Richards started to live on the premises after the buildings were erected in April 1959. He occupied the maid's room.

When the Branch of the Jamaica Agricultural Society was established or resuscitated - as claimed by Mr. Cecil Morrison a witness called by the second defendant - there was a well attended meeting which was addressed by Mr. Willie Henry who was then Vice-President of the Jamaica Agricultural Society. This function was held in the middle of 1959.

Several visits were paid to the pig and chicken farms by Mr. Cecil Morrison who was then the Chief Agricultural Officer for the southern division of the Ministry of Agriculture and Lands. The dwelling of Hamilton was used by Mr. Morrison and St. Catherine Parish Agricultural Officers as a training ground for farmers in the area. Through the advice of Mr. Morrison, the second defendant secured a subsidy under the farm development scheme. Mr. Cecil Morrison who is now the co-ordinator for Rural Land Authorities has given some indication of the common knowledge in and around Barry & Lloyds that the place of the second defendant was used as a kind of forum for agricultural activities. In answer to the Court he said:

> "JAS meetings at Mr. Hamilton's place were summoned for late evenings coming on to night fall, occasionally I would drop in a number of them. The average attendance at these meetings was about 30 to 45 people."

The unchallenged evidence, therefore, which I accept is that the second defendant having entered into possession of lot 180 in November, 1958 openly and to the knowledge of a wide circle of people exercised powers of ownership in and over the said lot. While he personally did not live permanently in the dwelling house which he had constructed, his acts of benevolence, religous persuasion and his farm development which he practised on that very lot were notorious.

According to Plutarch it was a law of Solon that man must not speak ill of the dead. This law is clothed in the latin adage "de mortuis nil nisi bonum." In this case, however, it is difficult for one to stick to the letter of the maxim. The deceased Reid appeared to have practised a fraud on the Bank. When on the 5th February, 1960, he gave the Bank an equitable charge over lot 180 behind the back of the second defendant, he

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was purporting to offer as a security that which in equity and in good conscience he knew was not his. And for the purpose of securing the overdraft or "the facilities" as the bank calls it, the deceased "insured" lot 182 with house thereon. The extent of the activities of the deceased may be gathered from a piece of evidence which the first defendant gave. Mr. Beckett has said that a claim against the estate of the deceased has been made by the Registrar of Titles. If I am permitted to quote in the former currency of Jamaica as I have already done, the Registrar of Titles is claiming the sum of £1,430.8.8. in respect of

> "a fraudulent transfer of land to the deceased on his application followed by a mortgage thereon to one Charles Duckie."

This fraudulent transfer was effected on the 13th October, 1960. As a result Mr. Duckie was compensated from the Assurance Fund established pursuant to the Registration of Titles Law, Cap.340.

Before I proceed to examine certain submissions which Mr. Alberga made on behalf of the Bank, I shall mention a part of the evidence of the second defendant under the cross-examination of Mr. Alberga.

Q: Did you know about registered lands?

A: "I know a little about it. I got to know it from Reid and from one or two other land officers."

Dealing with the question of title for lot 180, the cross-examination continued:

Q: If you had known that lot 180 was the subject of a registered title in November 1958 what would you have done?

A: "I would ask for the title. If I did not get it, I would inquire about it."

Q: What else would you have done?

A: "I would not do anything else beside waiting. I did not see any danger in waiting. I had a properly stamped contract for the three lots."

The evidence shows that whereas the Bank took steps to enter a caveat against the title of the owner of lot 180, the second defendant did nothing in this regard to protect the contract of sale concerning the three lots including lot 180. As to the knowledge of the second defendant concerning the entering of a caveat, he said this under cross-examination:

.../recently

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"recently I heard about caveat. I heard that caveat gives protection to title but I did not know of this in 1958 or 1959."

Under further cross-examination:

Q: Did you know of 'caveat' in any sense in 1959?

A: "I cannot be able to say how much I knew about it in 1959. In 1959, I thought I was quite secure."

The ordinary man in Jamaica - and I speak particularly of the age group thirty five and over - was trained from youth to observe certain precepts. He was taught among other things to rely on, and put his confidence in, the assurance, words, and practice of the village parson, the teacher and the public officer in the form of a government officer.

The word of any of these gentlemen uttered on an occasion which called for the display of honesty and seriousness would be accepted and relied on by the ordinary citizen of the land without any suspicion or doubt whatsoever.

It could be - it is not necessary for me to attempt any finding - that that confidence in public officers which was common among the people about 25 years ago, may not be so pronounced today.

I accept the evidence of the defendant Hamilton that in 1958 and 1959 he did not know the purpose of a caveat in relation to the title of land and that he thought he was secure in his transaction with the deceased Reid. It is no secret that there are many thousands of our people who know nothing about the use of a caveat. To many, that word sounds like a foreign word or phrase. Perhaps, as the society gets more sophisticated even without a corresponding advance in liberal education, matters pertaining to the transfer of land, registered or unregistered, the incidents of transfer, and agreements for sale of land will become more accepted and appreciated.

Mr. Alberga has argued that this is a "test case" to determine this question: How good is an equitable mortgage in Jamaica by deposit of title deeds? In his closing address, he states that there are certain questions which the Court must determine: Briefly summarised they are as follows:

(a) Is the agreement between Reid (deceased) and Hamilton (second defendant) dated 29/11/58, valid and enforceable in its entirety?

.../(b)

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(b) If yes, then does the provision of Sec.70 of Cap.340 (Registration of Titles Law) apply to the facts of this case? To put it in another form, is the Bank deemed to have had notice of the second defendant's equity it being first in time.

(c) Is the fact of the second defendant's actual possession equivalent to the lodging of a caveat or does the principle enunciated in the Australian case of Butler v. Fairclough (1917) 23 C.L.R. 78 apply to the case?

(d) Even if the second defendant was in possession between the 29th November, 1958 and the 4th February, 1960 (the day before the Bank obtained the equitable charge) does the fact that he was dealing with registered land cause his equity to be postponed because of his failure to lodge a caveat against the title of the registered owner?

Mr. Rattray for the second defendant made certain submissions which I may summarise as follows:

(1) That the Bank and Hamilton each had an equitable interest in and over lot 180 and that since the lodging of a caveat is not equivalent to registration, there is a competition between unregistered and unregistrable interests.

(2) That Section 70 of Cap. 340 only refers to an interest which can be registered and which was not. But in any event, that section only protects a person obtaining registration.

(3) That if the Bank took its interest with notice actual or constructive of Hamilton's interest, then the Bank despite any caveat lodged or search made would not be promoted over the interest of the former which was first in time.

The burden of Mr. Alberga's argument, as I understand it, is that since the second defendant did not lodge a caveat to protect his interest then his prior interest is postponed to that of the Bank which protected its own interest by lodging a caveat on the 8th February, 1960. The second defendant is therefore to be penalised for his failure to warn the Bank on the 8th February by means of his caveat, that there was in existence an interest in lot 180 vested in him.

There are certain countries in which specific legislation may be relied on in arguing that if a "minor interest" which would include

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an equitable interest in and over registered land is not protected by some entry on the register, then priority will be postponed to a later equitable interest which is lodged for entry even if the assignee of the later interest knows of the existence of the former. See for example the English Land Registration Act, 1925, sections 3 and 102. Counsel's industry has not discovered any statute in Jamaica and I am not aware of any which has any provision similar to the English provision.

There is no evidence before me that it is the settled practice in Jamaica for an owner of equitable interest in registered land to lodge a caveat. It has been proved that as far as the Bank is concerned it is the practice to visit the premises of persons seeking a loan solely for the purpose of valuation and thereafter to lodge a caveat with the Registrar of Titles after a search has been made for any prior encumbrance. But the practice of the Bank does not convert it to a regular and established practice between an ordinary registered ~~and~~ owner and an ordinary interested purchaser. Caveats under the Registration of Titles Law, Cap. 340 may be divided under three heads, namely;

(a) Caveat against registration of land (Sec.42)

(b) Caveat by the Trustee in Bankruptcy where the proprietor of any land, lease or charge is adjudged a bankrupt (Sec. 132)

(c) Caveat by any beneficiary or other person claiming an interest in the land (Sec. 133)

But the owner of an equitable interest protected by the lodging of a caveat does not enjoy a better priority than he otherwise would have enjoyed merely because he lodges a caveat. The scheme under the Registration of Titles Law does not seek to postpone the interest of a person who fails to lodge a caveat except in the instance mentioned in section 132 of the Law. It is this: where the registered proprietor of land becomes a bankrupt, the Trustee in Bankruptcy may forward to the Registrar of Titles an office copy of the provisional or absolute order made against the proprietor. The Registrar of Titles is now put on his guard against registering any instrument touching the bankrupt's property unless he informs the Trustee in Bankruptcy in writing. The relevant portion of the section states:

.../If

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> "If the trustee shall omit or neglect to make application aforesaid, or to lodge a caveat under the general provision relating to caveats hereinafter contained, within seven days after the Registrar shall have notified him, by a letter delivered or registered, that application has been made for the registration of an instrument concerning property (to be in such notice described) standing in the Register Book in the name of the bankrupt, such instrument may be registered, and thereupon shall not be affected by the order of adjudication either at law or in equity."

In developing his argument that the second defendant's prior interest is postponed to that of the Bank, Mr. Alberga has relied heavily on certain statutory provisions and decided cases under the Torrens System of land registration in Australia. He has argued for example that section 70 of Cap. 340 is similar to section 43 of the Transfer of Land Act, 1954 of the State of Victoria. And in particular on the question of priorities, if any, conferred by the lodging of a caveat, he has relied on Butler v. Fairclough (1917) 23 C.L.R. 78 (a decision of the Supreme Court of Victoria).

It is merely out of admiration for his attractive argument why I shall spend a little time in examining some of the points he has raised from an examination of the Australian authorities. I must confess, however, that like Lord Jenkins in Chisholm v. Hall (P.C.) (1959) 7,J.L.R. 164, I get little or no assistance from the Torrens System. When Robert Torrens in 1853 was appointed Registrar General of Deeds in South Australia, he found the position dealing with the title to land "complex, uncertain and ruinously extravagant." There were no natural or artificial boundaries of land and where the settlement itself was of vast extent - as it usually was - a squatter would move his flocks and himself according to the season and the state of the feed. Every root of title was deemed to be in the Crown and the statute of Limitations was not applicable in proving title.

In Chisholm v. Hall, the correct interpretation of Sections 67 and 69 of the Registration of Titles Law, Cap. 340 and how these sections may be reconciled if there is a conflict, came up for consideration before the Judicial Committee of the Privy Council. Lord Jenkins (delivering the judgment) said this (see p. 169 of 7 J.L.R.)

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> "The plaintiff's contention on this part of the case demands reference at some length to the provisions of the Registration of Titles Law. This Law is one of many enactments for the registration of titles in force in this country and in various parts of the Commonwealth and Empire. But these enactments are by no means uniform in their terms, and it was agreed in the course of the argument that no useful purpose would be served by comparing other enactments with the Jamaican law, or citing cases decided on other enactments as aids to the construction of the Jamaican law."

In my view the Registration of Titles Law, Cap. 340 is by no means uniform in all its terms, purpose and sociology with its Australian counterpart. An Australian decision on any given provision which is said be similar to the Jamaican statute cannot bodily be accepted here as an authority without careful examination.

Section 70 of the Registration of Titles Law, states:

> "Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

Mr. Alberga has argued that by virtue of Section 70, the Bank is ot affected by any notice actual or constructive of the second defendant's interest. Further, he argues that the Bank may still claim the benefit of the section although it is not claiming as a registered proprietor. It seems to me that section 70 cannot be examined in isolation. It must be construed in its own setting, that is to say as a relevant provision in understanding Section 69 which goes before it:

Section 69 says in part:

.../Notwithstanding

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> "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Law might me held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Law shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."

An indefeasible title, subject to certain qualifications, is obtained by a registered proprietor unless fraud can be alleged and proved against him. This is what section 69 has provided. In order to remove any doubt as to what may be regarded as "fraud," section 70 gives a list of what

> "shall not of itself be imputed as fraud."

It seems to me that section 70 is subordinate to, and explanatory of, section 69. A person who is not a registered proprietor of a registrable interest cannot claim the benefit of section 70. He must first be registered without any taint of fraud before he can claim protection from what shall not of itself be imputed as fraud.

The majority of the Australiam authorities under section 43 of the Land Transfer Act, 1954 (Victoria) which I am told is similar in terms to section 70 supra, support the view that only a person who has become registered may gain immunity from that section. For example, the text book on the Transfer of Land Act 1954 (Victoria) by Mr. P. Moerlin Fox LL.B., Lecturer in Conveyancing at the University of Melbourne says this at p. 43 and with reference to section 43.

> "The section itself says nothing about registration, but if it is regarded as in the main declaratory of the effect of the preceding section it follows that it applies only to a person who has become registered."

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Mr. Alberga has referred to the decision of Clark, C.J. in Re Hope & Co's Petition (1903), 2 Stephens Report p. 1975. This is a local decision based on section 56 of the Registration of Titles Law of 1888. That section is now section 70 of Cap. 340. I need not examine the particular facts of that case. But I will quote what I will regard as an obiter dictum of the learned Chief Justice at p. 1976.

> "I think that, at any rate, where a purchaser has obtained a transfer in the prescribed ~~from~~ form, and has paid his money before receiving any notice either actual or constructive, of a prior unregistered equitable charge, the section protects him in his purchase."

If this means that where a person for valuable consideration becomes registered as a transferee of an interest in land before he receives any notice (actual or constructive) of an earlier and unregistered equitable interest, he is protected by the section, then I am in complete agreement with the learned judge. Any other view would cause me to doubt the correctness of the construction placed on the then 56th section.

I hold that the Bank cannot claim the protection which the 70th section of the Registration of Titles Law confers for the simple reason that when on the 8th February it lodged a caveat pursuant to section 133, this fact did not thereby make the Bank a registered proprietor of its equitable charge. Under the Law, a mortgagee may only be registered as proprietor if he proposes to exercise his power of sale, if any, which the mortgage instrument may contain or if the original charge was made in accordance with section 98 of the Registration of Titles Law.

But if I am wrong in so holding, it seems to me that there is a statutory provision under the Conveyancing Law, Cap. 73, which the Bank has failed to surmount. That every man is presumed to be honest until the contrary is proved is not - even if it is a presumption known in banking transactions - recognized either at law or in equity.

Mr. Harold Ramsay, a witness called by the Bank said in answer to the Court:

> "The Bank does not employ private dectives because we normally deal with reliable people."

The purchaser for value who obtains a legal estate without notice of a prior equitable interest takes his interest free of the equity which may

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be claimed. In such a case equity follows the law because the purchaser's conscience is in no way affected by the equitable interest. But a purchaser of an equitable interest is affected by notice actual or constructive.

The Conveyancing Law (Cap. 73) puts this rule in a statutory form. Section 5 (1) of the Law states:

> "A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing, unless -
>
> (a) it is within his own knowledge or would have come to his knowledge if such inquiries and inspection had been made as ought reasonably to have been made by him."

"Purchaser" in this provision would include a mortgagee and "mortgage" would include any charge on property for securing money or money's worth. Under section 70 of the Registration of Titles Law, a proprietor which would include a mortgagee

> "shall be affected by notice, actual or constructive of any trust or unregistered interest"

unless he can claim the immunity which that section confers.

When Mr. Garsia was taken to the settlement by the deceased Reid the lot pointed out to him was either the said lot 180 intended to be charged or it was not. If it was lot 180, then Mr. Garsia would have seen signs of an elaborate development including the establishment of a piggery and a poultry farm, the very purpose for which the "facilities" were required. Mr. Garsia would then be put on his inquiry and it would have been his duty to probe a little further than what he actually did.

If it was not lot 180 that he had inspected, he failed in my judgment to make any reasonable inquiries as to where or what had been shown to him.

A simple question to any ordinary person in the area would have brought the answer that the second defendant was and is the owner and occupier of lot 180 and that it was a meeting place for several activities to which I have already referred. And even if Mr. Garsia was astutely led astray by the deceased when this alleged "inspection" was made, he lost a clear opportunity to discover what I will euphemistically call an "error" by his not detecting in time the fact that lot 182 was insured as the security and not lot 180 as he had requested. The deceased was successful in practising his hocus pocus on the Bank and could have been detected in

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time, if to use the language of the Conveyancing Law,

> "such inquiries and inspections had been made as ought reasonably to have been made."

The open and well established possession and occupation of lot 180 by the second defendant gave the Bank constructive notice of his rights and interest.

Before I refer to the argument of Mr. Alberga concerning the priorities of equitable interests, I shall refer briefly to one of the questions which he posed for my consideration. It is contended that the agreement of the 29th November, 1958 cannot be relied on unless it can be shown that specific performance would be decreed in respect of lots 172, 175 and 180 mentioned in the said agreement. Some evidence was tendered to show that the deceased Reid had no interest, and never had any, in lots 172 and 175. Assuming that this is so, would it affect the equitable interest of the second defendant in and over lot 180? Only one answer, in my judgment could be given and that is "no."

A man cannot give away what he has not got. He cannot sell what is not his or what is not in his power to dispose of. But if in attempting to dispose of what is not his, he includes in the sale what is his property, there can be no valid reason in law or in equity why he cannot be held to his agreement in so far as the sale touches what belongs to him. Ingenious as the argument of Mr. Alberga is on this point, I must reject it as being unsound and fallacious.

In examining Butler v. Fairclough to which I have already referred, Mr. Alberga submitted that in case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But there must be an equality and the first who is first in time may lose his priority by any act or omission which had or might have had, the effect of inducing a claimant later in time to act to his prejudice. One will quarrel with this proposition. In fact it is another way of stating the well known maxim of equity "qui prior est tempore, potior est jure." That is: where the equities are equal, the first in time shall prevail.

Certain facts were proved in Butler v. Fairclough one of them being that the Registrar of Titles did not give notice to the plaintiff that the defendant had lodged for registration a transfer which the defendant had previously withdrawn. The Registrar had taken the view that

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a caveat which the plaintiff had lodged was no longer in force and as a result the defendant's interest was registered. The plaintiff had a charge over property and the defendant became the assignee of a lease subject to a mortgage but the defendant, having searched the register of titles, did not see any other incumbrance endorsed against the title. In other words, he was not aware of the plaintiff's charge. Judgment was given for the defendant and on appeal, by a majority, the judgment was affirmed. I am unable to extract any particular principle from this case. Apart from the fact that certain specific provisions under the Torrens System were reviewed, it seems to me that the decision of the lower court and the Court of Appeal can be supported on the simple ground that without any fraud, the defendant was registered as a proprietor and therefore he could take his interest subject to any prior interest which was noted on the register and free from any which had not been entered or protected.

The case of Abigail v. Lapin, (1934) All E.R. Rep. 720 (an appeal to the Privy Council from the High Court of Australia) was discussed at some length by Mr, Alberga. I have read the report of the case. It is not out of disrespect if I say that I can get no help whatsoever from Abigail and Lapin moreso in view of the particular facts in the one before me and the findings which I have already made. I need not examine the facts in the Australian case. Mr. Robinson who seems to have made a detailed examination of the Australian authorities cited by Mr. Alberga contends that they all refer to actions in which the parties had a registrable interest. Mr. Robinson's view may be correct. It is untenable for one to argue that whereas registration has the effect of destroying an equity and a caveat has the effect of protecting the equity by delaying or postponing registration, nevertheless a caveat also defeats or postpones a prior equity although the interest protected can only defeat or destroy when it is registered.

The other authorities to which Mr. Alberga referred have been considered by me. In my judgment they offer me no assistance as a safe guide. But he referred to a proposition, presumably a reference in an Australian study in Adams on Land Transfer Act 1958, p. 365. The proposition is: that where there are two innocent parties to a fraud, the one who by his negligence made it possible for the fraud to be committed should be the sufferer. I detect this proposition as a variant of the famous dictum of Ashhurst J. in Lickbarrow v. Mason (1787) 2 T.R. 63, 70 when he said:

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> "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."

This dictum has not escaped criticism. Sometimes it is accepted as it is and other times it is varied or explained.

Lord Halsbury, for instance, in Henderson & Co. v. Williams (1895) Q.B. 521 p.529 adopted the language of an American judge and said:

> "When one of two innocent persons must suffer, for the fraud of a third, he shall suffer, who, by his indescretion, has enabled such third person to commit the fraud."

And Lord Lindley in Farquharson Bros. & Co. v. King (1900-3) All E.R. Rep. 120 at p. 126D said:

> "This dictum has never, to my knowledge, been applied where nothing has been done by one of the innocent parties which has, in fact, misled the other."

It seems to me that what Lord Lindley is saying is this: some positive act or omission must be traced to one of the innocent parties in the transaction and the fault of that party must have been the proximate cause for the other to be led astray or into some error which he would not have made but for the act or omission in question.

The Bank in my view is unable to point to any act or omission on the part of the second defendant which was the proximate cause for its granting the facilities to the deceased Reid. And even if it is assumed that the second defendant was required to lodge a caveat on or shortly after the 29th November, 1958, on the facts, it is clear that the May Pen Bank manager (Mr. Garsia) did not do enough to ascertain the true state of affairs. The claim of the Bank, therefore, against the second defendant must fail.

Mr. Muirhead on behalf of the first defendant was critical of the attitude which the Bank has displayed; he has argued that the interest charged looks excessive and it is really interest on interest which has been computed. He contends that the Bank was informed before proceedings were brought that the estate was insolvent.

On the question of costs, Mr. Muirhead has argued that in any event, the Bank should pay the first defendant's costs. He submits that since the Bank had been informed that the estate was insolvent and in view

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of the fact that the first defendant has admitted the debt which the deceased owed, there was no necessity for bringing in the Administrator General or persisting in the claim against him.

I have examined the Bundle of Correspondence (Exhibit 1) with a view to ascertaining whether there is any good ground for any of the criticisms which Mr. Muirhead has made. I shall summarise the result of my examination as follows:

(1) At least from the 14th March, 1962, the Bank knew that the deceased died on the 21st July, 1961 (page 1 of bundle). The amount then owing was "one thousand one hundred pounds, thirteen shillings and nine pence (£1100.13.9) together with interest accruing thereon to date of payment." The interest originally charged was "at the rate of seven and one half per cent payable quarterly or at such other rate and at such other times as the Bank may from time to time charge."

(2) On the 17th April, 1964, the Solicitors of the Bank advised the first defendant that it was the duty of the latter to administer the estate pursuant to section 12 of the Administrator General's Law (Chap. 1). A claim is made on behalf of the Bank for the sum of £1,311.1.5 "together with interest at 8½ per annum from the 5th November 1963."

Notwithstanding that the Bank knew from March 1962 that the deceased was dead and that therefore the personal obligation on his part could no longer be performed by him, the rate of interest is increased. No final balance is struck in the books of of the Bank as a result of the death of the customer (Reid). The sum owing continues to increase at quarterly rests.

(3) On the 15th June, 1964, the first defendant advised the Bank's Solicitors inter alia that he intended to apply for Letters of Administration; that the land at Barry & Lloyd's registered at Volume 864 folio 93 that is, lot 180, was in dispute "as his widow claims that this land was sold by the deceased, prior to his death, to one Mr. Hamilton" (page 7).

(4) On the 23rd June, 1964, the Solicitors acknowledged receipt of the first defendant's letter and threatened to institute proceedings (on instructions)

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"for an Order for Sale of the deceased's property at Barry and Lloyds and to have you made representative ad litem etc. (page 8).

(5) On the 4th September, 1964, the first defendant advised the Bank's Solicitors that he had taken steps to file an application for Letters of Administration. He further asked for a postponement of any further proceedings in connection with the assets of the deceased and that after Letters of Administration have been obtained "consideration will be given to the claims of your clients under the letter of charge held by them" (page 9)

(6) On the 5th January, 1965 (page 11), the Solicitors agreed to a suggestion of the first defendant that the property (lot 180) be sold and that he (first defendant) be registered on transmission. But they informed the first defendant that the debt was then £1,481.17.11 including interest up to 15th December 1964. There is this interesting information:

> "Interest continues to accrue on that amount at 9½% per annum from 16th December, 1964."

The first defendant obtained Letters of Administration on the 19th November, 1964.

(7) On the 17th September, 1965 (page 17), the first defendant advised the Bank's Solicitors that he had been registered on transmission in respect of Lot 180, Barry & Lloyds. He continued:

> "I must, therefore, advise that the property will be advertised for sale in the Daily Gleaner on the 29th September and 2nd October, 1965."

(8) On the 18th November, 1965 the first defendant was advised by the Solicitors for the second defendant (Hamilton) that Hamilton was claiming the fee simple in lots 172,175 & 180 Barry & Lloyds as purchaser from the deceased Reid under an agreement dated 29th November, 1958.

(9) On the 1st December, 1965 the first defendant advised the Bank's Solicitors of the claim of the Second defendant and enclosed a copy of the letter received from his Solicitors (page 20).

(10) On the 7th March, 1966, the Bank's Solicitors advised the first defendant that since Mr. Hamilton did not protect his agreement to purchase by caveat, the Bank was claiming priority. The last paragraph

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of the letter reads:

> "Please let us know if you are going to take steps to have Mr. Hamilton removed from the property. If not, it seems that our client's only remedy at this stage will be to apply to the Court for sale of the property under their equitable charge" (page 22).

(11) On the 10th March, 1966 (page 23), the first defendant acknowledged the letter of March 7 and advised that he was seeking opinion:

> "as to what action I should take with regard to the occupancy of the holding by Mr. Hamilton etc."

(12) On the 29th September, 1966 the first defendant, having obtained legal advice, informed the Bank's Solicitors that he will take no steps to remove Mr. Hamilton from the property (page 26).

(13) On the 1st December, 1966, Hamilton's Solicitors informed the Bank's Solicitors that Counsel's opinion has been obtained to the effect:

> "that Mr. Hamilton's equitable interest is prior to that of Barclay's Bank and we are now proceeding to write our client about the advice given."

With this head-on clash between the claim of the Bank and Hamilton what was the Administrator General to do? Firstly, he was under a duty to obtain legal advice and bona fide to act on it. This is what he did. Secondly, it was his duty to inform the contending parties of the state of the assets so far as he was aware. Here again, it is not disputed that he did not do so. Up to the 18th November, 1965, the first defendant appears to have offered every assistance to the Bank in order that its claim may be satisfied. And as early as in March 1966, if not before, it was made very clear that the real contest would concern the respective priority claimed by the Bank and Hamilton (second defendant) over the property in dispute.

For the first defendant to have taken steps "to have Mr. Hamilton removed from the property" as suggested by the Bank's Solicitors in their letter of the 7th March, 1966 would have landed the first defendant in serious trouble. The full force and penalty mentioned in section 41 of Cap.1 (Administrator General Law) could have been invoked by Hamilton and his advisers if the first defendant had adopted the suggestion made by the Bank's Solicitors. The 41st section provides in substance that if the Administrator General shall at any time improperly act, or omit to act in any matter with respect to any estate or trust vested in or administered by

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him, the Court, on the application of any person interested in the estate, may direct the Administrator General

> "to pay out of his own pocket any sum of money required to compensate any person, estate or trust for the consequences of any wrongful act or omission."

If, as in this case, the estate is insolvent such a proceeding could spell disaster for the first defendant.

I find that at all material times the first defendant acted reasonably and that the Bank has involved the first defendant unnecessarily in the expense of litigation. The issue of priority could have been determined between the Bank and the second defendant alone. On a declaration being obtained on the claim or counter-claim as the case may be, an attested copy of the Order could then be served on the first defendant, he being informed by letter or otherwise of the nature of the proceedings that had been taken. The Administrator General who is bound to submit to and respect an order or decree of the Court touching the estate which is vested in him, would then do right as the order or decree directs. Lot 180 which may be regarded as the plank in the shipwreck (tabula in naufragio) will have to bear the weight of Hamilton alone.

But it has been contended by Mr. Muirhead that the first defendant is required to know in what sum the insolvent estate is indebted to the Bank. It has been proved that, calculated at the rate of 9½%, the sum due and owing up to the 23rd January, 1970 is roughly £2431.0.11 (the pleadings were amended to read $4862.09).

I would not be prepared to award this sum or to declare that this is the true amount due and owing pursuant to the Letter of Charge dated the 5th February, 1960. I make the following observations in passing.

Firstly, no mortgagee is entitled to charge compound interest save under an agreement to this effect. I am not satisfied that there is any clear clause in the agreement between the Bank and the deceased to this effect.

Secondly, I am prepared to accept the suggestion that as between a banker and its customer if the relationship of mortgagee and mortgagor exists between them, in order to grant facilities to operate a current account, the bank may make up the account at quarterly, half-yearly or

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yearly rests and charge future interest on the aggregate sum of principal and interest. Such a practice however should be made clear to the customer at the time of the agreement and the agreement or memorandum embodying the terms of the loan should show in clear language that capitalisation could be ascertained as between the outstanding balance and interest thereon by adding the interest due to the principal outstanding at periodical rests.

There is nothing in the Letter of charge nor has it been proved that the deceased Reid was specifically made aware of what the Bank now claims the position to be. However, the Bank has proved the practice and it appears that Reid acquiesced in it. But mere proof of the practice and passive acquiescence by the customer may not be sufficient in all cases.

Thirdly, I am prepared to hold that on the basis of fairness and clear conscience, the personal representative of a party to a contract, which to the knowledge of the other contracting party required the personal attention of the deceased during his lifetime for its fulfilment, cannot be saddled with a claim for failure on the part of the deceased to perform his personal obligation which is over and above the sum ascertained at the date of death. If the deceased did specifically charge his property to bear the burden of his breach of contract with a continuing accretion until such time as the other party was compensated, then it would be a matter of construction and declaration by the Court whether such a clause should be upheld. If a man dies intestate, the law gives his widow, children and other relatives certain statutory rights in and over his asset. If he dies testate he is free to distribute his property as he wishes. But whether he dies testate or intestate a creditor may claim against the estate for such breaches committed by the deceased in his lifetime whether the claim sounds in contract or in tort.

If possible the sum claimed would have to ascertained as on the date of the deceased's death. The question of interest after this date could only arise after judgment had been obtained and by virtue of the same. The deceased died on the 21st July, 1961 and the Bank became aware of this, as I have already pointed, at least from March 14, 1962. On what basis the Bank could have charged interest at 8½% and 9½% on the outstanding balance with quarterly rests after the death of the deceased is a little beyond my understanding.

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The common law rule which allowed a contracting party to sue the personal representative of a deceased contracting party for a breach of contract (except breach of promise to marry) committed during the lifetime of the deceased, is embodied in the Law Reform (Miscellaneous Provisions) Law, 1955 (Law 20/55). This Law came into force on the 6th June, 1955.

The relevant portion of Section 2 (1) of the law states:

> "Subject to the provisions of this section, on the death of any person after the commencement of this Law all causes of action subsisting .. against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate."

From the statement of account which the Bank produced, the deceased was in breach of his agreement at the date of his death. He had not paid promptly the instalments and interests payable in accordance with the letter of charge. In my judgment what survived against the estate of the deceased Reid in this agreement which called for the personal attention of Reid during his lifetime was and is, his breach of the agreement made on the 5th February, 1960 as calculated up to and including the 21st July 1961, the date of his death.

I hold therefore that the Bank is not entitled to claim against the estate more than the sum outstanding and calculated up to the 21st July, 1961. In asking for a declaration of what sum is due and owing, the Bank's calculation is thrown wide open for the Court's inspection and examination. Before I come to a close I shall make one final comment. Mr. Muirhead has submitted that since the estate is insolvent the Bank could not obtain more than 6% per annum as interest. He cites sections 71 (4) and 128 of the Bankruptcy law (Cap. 32) in support of his submission. I need not quote the sections to which he has referred as in my view they do not apply to the facts of this case. These sections may only be invoked where there has been an adjudication in bankruptcy and the estate of the bankrupt is being administered by the Trustee in Bankruptcy. But the spirit behind Mr. Muirhead's submission deserves some commendation.

Since January 1, 1967, the bankruptcy rules apply to every insolvent company in a winding up. The liquidator need not go to the Court for an order to this effect. See Section 293 of the Companies Act 1965 (Act 7 of 1965).

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But the bankruptcy rules only apply to the administration of an insolvent estate if the assets are being administered by the Court. See section 49 (1) of Cap. 180 Judicature (Supreme Court) Law.

In my view, in order to have some uniformity there should be an amendment to the law in order to place insolvent estates on the same footing as insolvent companies so that a ~~Trustee~~ Trustee or a personal representative on the one hand could resort to the bankruptcy rules as freely and easily as the liquidator on the other.

I must record my appreciation for the way Counsel conducted their case and for the industry, clarity and tenacity displayed by them in their arguments.

In the result there must be:

(1) As between the Bank and the first defendant, a declaration that the deceased Reid was indebted in a sum calculated at 7½% with quarterly rests as at July 21, 1961.

(2) As between the Bank and the second defendant, judgment for the second defendant both on the claim and counter-claim with a declaration in favour of the second defendant in terms of paragraphs (a) and (b) of his prayer.

The Bank must pay the costs of the first and second defendants.

Z. L. Farrell
J.