JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 25 & 28/70

BEFORE: The Hon. Mr. Justice Fox, J.A. (Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Robinson, J.A.(ag.).

Barclays Bank D.C.O. - Plaintiff/Appellant

vs.

Administrator General for Jamaica
The Administrator of the estate of Gifford Astor Reid, deceased - first Defendant

and

Ransford Hamilton - second Defendant

Respondents

Mr. R. Alberga, Q.C., and Mr. H.D. Carberry instructed by Mr. John Stone of Messrs. Milholland, Ashenheim and Stone for the Plaintiff/Appellant

Mr. D. Muirhead, Q.C., and Mr. R.D. Codlin instructed by the Crown Solicitor for the first Defendant/Respondent

Mr. Emile George, Q.C., and Mr. W.K. Chin See instructed by Messrs. Silvera and Silvera for the second Defendant/Respondent

Heard:- October 22, 23, 24, 25, 26, 29, 30, 31;
November 1, 2, 6, 7, 9, 16.

FOX, J.A.:

The facts of this case are simple. Towards the end of January, 1960, Gifford Astor Reid, a senior lands officer in the Lands Department, applied for a loan to Chresten Garcia, the Branch Manager of the appellant's bank at May Pen. In reply to enquiries, Reid told Garcia he was in a position to offer security for the loan as he was the owner of three separate lots of land for which he had registered titles, one of these lots being situated at Barry and Lloyds in St. Catherine. Garcia asked to be shown the land being offered as security and Reid took him to Barry and Lloyds and pointed out a house upon land which Garcia estimated to be about three acres. Reid told Garcia that he was a 'Planter' and was applying to the bank for 'facilities' as he "wanted to be assisted in a chicken farm."

On 5th February, 1960, Reid returned to Garcia at the bank, executed an equitable mortgage by way of charge and deposited as security a duplicate Certificate of Title registered at Vol. 864 Folio 98 for lot 180

at Barry and Lloyds. Garcia understood that this certificate referred to the same land at Barry and Lloyds which had previously been pointed out to him by Reid. The lot was one of several lots in a sub-division of a property known as Barry and Lloyds and comprised in a parent Certificate of Title registered at Vol. 312 Folio 127. This parent Certificate of Title was issued on June 27, 1939 in the name of the Colonial Secretary. The Certificate of Title for lot 180 was originally issued to Felix Richards and his wife Elizabeth on April 2, 1958. It contained one further entry of November 4, 1958, recording a transfer of the interest of Mr. and Mrs. Richards to Reid.

As a result of representations made by Garcia to the head office of the bank in Kingston, a search was made in the Titles Office. The register disclosed no caveat outstanding against the Certificate of Title for lot 180 at Vol. 864 Folio 98. On February 8, 1960, the bank lodged a caveat in protection of its equitable mortgage and thereafter Garcia completed arrangements whereby Reid was allowed the facility of an overdraft on a newly opened current account. On July 23, 1961, Reid died intestate indebted to the bank in a sum slightly in excess of a thousand pounds. In April, 1964, the first defendant received information that Reid had sold lot 180 to the second defendant Hamilton. In letter of June 15, 1964, the first defendant notified the bank's solicitor of that fact. On November 19, 1964, letters of administration to the estate of Reid were granted to the first defendant. On July 17, 1967, the bank filed action for a declaration that its equitable mortgage ranked in priority to the rights of the second defendant over the land and for such order as would effect the payment of the amount of the debt and interest due to the bank. The second defendant counter-claimed for a declaration of priority in his favour.

At the trial before Parnell, J. the second defendant, Hamilton, a builder, land owner and Justice of the Peace, produced an agreement dated November 28, 1958, for the sale by Reid to him of lots 180, 172 and 175 in the sub-division at Barry and Lloyds. Parnell J. found:-

(1) that the agreement of sale was drawn up in the handwriting of the deceased and was signed by both Reid and Hamilton;

(2) that Hamilton had entered into possession of lot 180 in November 1958 and had remained in uninterrupted possession thereafter;

(3) that although Hamilton did not live on lot 180 permanently, he had constructed a house, established a pig farm and chicken coop, erected water tanks and had carried out other acts of ownership openly, and that all these activities on lot 180 were within "the knowledge of a wide circle of people";

(4) that the transaction resulting in the equitable mortgage of February 5, 1960, was a fraud practised by Reid upon the bank;

(5) that whereas the bank entered a caveat in respect of lot 180, Hamilton did nothing to protect his equitable interest arising from the circumstance that he was a purchaser in possession under an agreement of sale;

(6) that in 1958 Hamilton did not know the purpose of a caveat in relation to the title of land;

(7) that the measures taken by the bank in effecting the equitable mortgage were in conformity with banking practice in this island;

(8) that the bank had failed to make those reasonable inquiries and inspections which should have been made and which would have enabled Garcia to discover that lot 180 was in the open and well established possession of Hamilton;

(9) that Hamilton's possession "gave the bank constructive notice of his rights and interests;"

(10) that there was no evidence of any act or omission on the part of Hamilton "which was the proximate cause for 'bank' granting the facilities to Reid."

In the light of these findings and of his view of the relevant law, Parnell, J. concluded the issue of priority in favour of Hamilton.

It is appropriate to preface a statement of the relevant law with the observation that there is in Jamaica no local authority on the critical point of priority which is in issue. This case is a test case. The answers of this court to the several questions of law which have arisen will have a far-reaching effect upon the status of an equitable mortgage secured by the deposit of a registered title, and upon the significance of the scheme for registration of interests in land which is described by the provisions of the Registration of Titles Law, Cap. 340. But although local precedent is non-existent, a wealth of assistance is available from the

decisions of courts in England, in Australia where the Torrens system of registration of land prevails, and in Canada where analogous provisions have been enacted. I will therefore notice the answers which would be given to the problems in each of these countries.

The law in Canada is straightforward and unequivocal even if somewhat mechanical. Where there is a contest between two competing interests in relation to registered land, the party who first gets on the register by way of a caveat is given priority. Common Law equitable principles are not allowed to detract from the force of this proposition. Thus, in Friesen v Elias et al [1941] 2 D.L.R. p. 802, although the plaintiff's equitable mortgage was later in time than the bank's equitable mortgage which was also secured by the deposit of title deeds to the land, and protected by the subsequent lodging of a caveat, McDonald, J. awarded priority to the plaintiff's claim over that of the bank because the caveat filed by the plaintiff was prior in time to that filed by the bank. This approach was approved by the Saskatchewan Court of Appeal in Clarke v Barrick et al [1950] 1 D.L.R. 260. Applied to the facts of this case, Canadian law would give priority to the appellant because it had filed a caveat whereas Hamilton failed to do anything in this regard. The value of the Canadian approach is the sanctity and the exclusive authority which it gives to entries in the register, and the resultant certainty of consequences which the law ensures for all persons dealing in registered land. I make this judgment, however, with due reserve and humility because of the possibility that all the relevant Canadian law may not have been brought to our attention and subtleties and distinctions unknown to us may exist.

The decisions of the courts in Australia are numerous. The judgments are closely reasoned and detailed. Scholarly comments on these judgments are equally profuse and profound. This court is indebted to counsel for leading it in an examination of this mass of legal material by submissions which were as careful as they were orderly. At the end, in the particular facts of this case, the considerations which would be decisive in Australia on the question of priority, emerged clear and distinct. As in Canada, the courts in Australia also attach great importance to the state of the register, but they do not give the same categorical significance to the filing of a caveat. That circumstance is only one of several circumstances which the

courts in Australia take into account in evaluating competing equities. Combined with other circumstances, a failure to lodge a caveat may lead to the postponement of an equitable interest. This failure has not in Australia the guillotine effect given to it by the Canadian decisions to which I have referred. Thus, in Butler v Fairclough (1917) 23 C.L.R.78, a plaintiff who had taken a charge on a lease as a security for a debt due to him by the registered proprietor of the lease, lost the priority resulting from the circumstance that his equitable interest had been created first in point of time to the equitable interest of a defendant arising out of a subsequent agreement for the sale of the lease to him. Before execution of the transfer in the prescribed form, and payment of consideration money, the defendant had searched the register and found it clear of the plaintiff's equitable interest. The High Court of Australia held that the defendant's transfer was entitled to be registered, and to the consequent priority over the plaintiff's equitable interest, even though the plaintiff had lodged a caveat, be it observed, five days before the defendant lodged his transfer for registration. This was so, explained Griffith, C.J. because under the Australian system, the lodging of a caveat to protect an equitable charge upon land "operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat." (p.91). The plaintiff had not been sufficiently diligent in registering his charge or in giving notice of it by filing a caveat. He had not taken the steps which would have saved the defendant from subsequent dealings with the registered proprietor. The defendant had acted in reliance upon the state of the register, and this circumstance entitled his interest to priority over that of the plaintiff. The subsequent filing of a caveat by the plaintiff before the defendant lodged his transfer for registration did not affect this position so as to render the registration invalid.

Several cases concerned with competing equitable interests under the Torrens system were cited to us. It is not necessary to burden this judgment with a detailed examination of them all. The examination of the decision in Butler v Fairclough (supra) which I have attempted is sufficient to show that the Torrens system in Australia is operated subject to well known equitable principles which have their fountain-head in the

decisions of the English courts. For a comprehension of the legal position in Australia, it is safe to rely upon the enlightening discussion of Professor Ronald Sackville in his article entitled "Competing Equitable Interests in Land under the Torrens System" which appears in Vol. 45 of the Australian Law Journal, (August 1971) p.396, and his postscript in Vol. 46 of the Journal (July 1972) at p. 344. These articles collect all the cases, state the facts and the law with simple clarity and offer comments on the whole subject of priorities which we have found most informative. Particularly helpful are the conclusions which Professor Sackville states at p.412 of Vol. 45. From these conclusions I venture to state the principles evolved in Australia which are relevant to the problem before this court:

(1) Priority afforded by time to an equitable interest in registered land is not lost unless there is a failure to lodge a caveat;

(2) An omission to caveat will not <u>of itself</u> necessarily warrant postponement of a prior equitable interest;

(3) Postponement occurs only if by his act or omission the holder of the prior equitable interest has contributed to a belief in the holder of the subsequent equitable interest when he acquired his interest, that no outstanding equitable interests were in existence;

(4) The acts or omissions of the prior holder must also have, either directly misled the holder of the later equitable interest, or must have amounted to an "arming" of a third person with power to go out into the world under false colours and thereby to be able to mislead or to deceive the subsequent holder;

(5) If the holder of a later equitable interest knows at the time he acquires his interest that an earlier interest exists, the holder of that prior interest will not be postponed.

The classical factual situation in which these principles are applied so as to postpone a prior holder to the holder of a later equitable interest in registered land, is where the prior holder filed no caveat in protection of his interest and allowed the title deeds to remain, or to come into the possession of the registered proprietor, who then effects an equitable charge on the property with the subsequent holder. In such a situation, if the equitable charge is secured by the deposit of title deeds and the subsequent holder has no knowledge of the earlier equitable interests, the courts in Australia would regard his position vis-a-vis the

prior holder as impregnable.

The failure of the prior holder to lodge a caveat in protection of his interest may be the critical factor in effecting postponement. This position was affirmed by the Privy Council in Abigail v Lapin [1934] A.C.491. In that case the respondents executed transfers of registered land in favour of the nominee of a solicitor, but did so with the intention that the transfers should constitute security for money payments. The respondents did not at that time lodge a caveat to protect their interest. The nominee who had received the duplicate certificate of title procured registration of the transfers. Later, the nominee executed unregistered mortgages in favour of the appellant. In delivering the judgment of the Privy Council, Lord Wright recognised the importance of the failure to lodge a caveat. The respondents had armed the solicitor's nominee with power to misrepresent herself to the world as the registered proprietor of an unencumbered fee simple estate in land. She could have been effectively disarmed of the power by the lodging of a caveat. The respondent's failure in this regard was the decisive factor in the ruling of the Privy Council that the respondent's equitable interest was to be postponed to that of the appellant.

As is to be expected, a similar approach is discernible in case after case in England. I mention three: Waldron v Sloper (1852), 1 Drew. 192 (61 E.R. p.425) where a plaintiff who had released his security of the title deeds for his equitable mortgage to a dishonest party (Matthews) who had failed to keep his promise to return them forthwith, was postponed to a subsequent equitable mortgagee with whom Matthews had deposited the deeds. In his judgment, Vice-Chancellor Kindersley observed at p.200:

> "If ever there was a case in which, as between two innocent parties, that one must suffer who has permitted the fraud to be committed, it is this case, and I am of the opinion that the Plaintiff, who, by his great neglect put it in the power of Matthews to commit the fraud, has no right to come and ask equity to interfere."

Rice v Rice (1853) 2 Drew 73 (61 E.R. 646) where a vendor's lien for unpaid purchase money was postponed to the equitable mortgage of a defendant with whom the purchaser subsequently deposited the title deeds. The vendor had delivered to the purchaser the deeds endorsed with a receipt to the purchase money. Following a classical exposition of the rule "qui prior est tempore potior est jure", Vice-Chancellor Kindersley said:

> "The vendor" voluntarily armed the purchaser with the means of dealing with the estate as the absolute, legal and equitable owner, free from every shadow of encumbrance or adverse equity. In truth it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong, for he has only done that which the vendor authorised and enabled him to do. The defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect by their acts assured the mortgagee that, as far as they (the vendors) were concerned, the mortgager had an absolute indefeasible title both at law and in equity. The mortgagee was guilty of no negligence, he was perfectly justified in trusting to the security of the equitable mortgage by deposit of the deeds, without the slightest obligation to go and enquire of the vendors whether they had received all their purchase money, when they had already given their solemn assurance in writing that they had received every shilling of it, and had conveyed the estate and delivered the deeds; ...."

Even a prior legal estate may be postponed to a subsequent equitable interest. In Lloyds Banking Company v. Jones (1885) 29 Ch. Div. 221, the equity of a trustee of the legal estate of a settlement of leaseholds was held to be inferior to the equity of a bank which had taken an equitable mortgage on the security of title deeds without knowledge of the trust. The deeds had been deposited with the bank prior to the creation of the trust by the proprietor of the leaseholds, since deceased, and the deeds had been allowed to remain in the custody of the bank. In this way the deeds became available as securities for the equitable mortgage. The trustee had not inquired for the title deeds. He assumed that they were in the possession of the solicitor who had prepared the trust settlement. It was held that the trustee's omission was negligence of such a character as prevented him from availing himself of the legal estate to give him priority over the equitable charge of the bank.

I need not multiply authorities. The principles are founded upon a proposition which Parnell, J. recognised when he quoted the dictum of Ashurst, J. in Lickbarrow v. Mason (1787) 2 T.R. 63, 70, (100 E.R. 35): "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."

Parnell, J. found that Hamilton did not know the purpose of a caveat in relation to the title of land. This finding is inconsistent with Hamilton's position as a builder, his previous experience as a purchaser of real estate, and his status as a Justice of the Peace. I cannot agree that he was entitled in 1958 to the retreat of ignorance into which the learned judge was prepared to admit him. Even so, simplemindedness is no ground upon which the provisions of the Registration of Titles Law may be avoided. It is the duty of every purchaser of land to take care to secure for himself a good, sufficient and indefeasible title to the property he proposes to purchase. It will not do for him to come into court and to say, "I was ignorant, I did not know." He must make it his business to know.

Parnell, J. went on to hold that the bank was "unable to point to any act or omission on the part of the second defendant which was the proximate cause of his granting the facility to the deceased Reid." This finding also is not justified by the evidence. Hamilton knew that he would eventually receive from Reid a registered title for lot 180. It was his duty to make specific enquiries concerning that title. For this purpose he should, if necessary, have attended at the Titles Office. If he had done so before he concluded the agreement for sale with Reid and paid the consideration money, he would have discovered not only that the title had been issued, but also that the transfer to Reid had already been effected. He would then have been alerted to the compelling necessity to take effective steps to protect his interest as a purchaser in possession by disarming Reid of the power to mislead third parties. He would have lodged a caveat. The priority afforded by time to his equitable interest would then have been secure.

Mr. George argued that Hamilton was not entitled to possession of the title deeds until all the purchase money was paid and that he was, therefore, in the same position of disability as was the plaintiff in Union Bank of London v. Kent (1888) 39 Ch. Div. 238. In that case a land development company obtained an agreement from the corporation of the City of London to grant them building leases of a certain piece of land. The land development company were to erect houses on the land, and as they were erected leases of them were to be granted, a separate lease of each house being granted if the Company wished. On the 30th April, 1883, a deed was executed by which the land development company gave to mortgagees an

equitable mortgage of their interest under the building agreement and agreed to give the mortgagees legal mortgages by demise of the houses when the leases had been granted. This mortgage was transferred to Kent, who made an equitable mortgage of it to the plaintiffs, that is, to the bank. After this, the land development company obtained leases, and deposited two of them by way of equitable security with another company. In action by the bank to establish the priority of their security, the defendants contended that if the bank had given notice to the corporation, that would have prevented the corporation from handing over the leases to the land development company, and that this failure was a neglect which fatally affected the bank's equity. The Court of Appeal held that although the giving of notice to the corporation would probably have prevented the handing over of the leases to the land development company, still, as notice is not requisite to complete a security on real estate, the omission to give such notice was not sufficient ground for postponement of the bank's equitable mortgage to subsequent incumbrancers.

This case is easily distinguishable from the case before us. Unlike Hamilton who was entitled to receive the certificate of title from Reid, the Union bank could at no time demand a grant of the leases from the corporation, but could only require the land development company to demise the premises by way of a mortgage when the leases were granted to the company. The Union bank was under no duty to do anything further to perfect its security, whereas Hamilton's position is indistinguishable from that of an equitable mortgagee who, knowing that there are title deeds, and knowing that there will be delay in the delivery of them to him, knowingly takes an incomplete security, and gives the mortgagor an opportunity to commit a fraud. As the judgments in the Union Bank of London v Kent show, such an equitable mortgagee would lose his priority as against anyone who gets the deeds through his default. Mr. George pressed upon us a passage in the judgment of Fry, L.J. at p.248 which reads:-

> "The other class of cases is where the mortgagee has taken no precautions against future default by the mortgagor, no default having yet to the knowledge of the mortgagee taken place. I know of no decided case in which the mortgagee has been postponed on the ground that he did not take precautions against a future fraud by the mortgagor; and I do not know of any general rule which obliges you to assume that every person with whom you are dealing is likely

to be a knave."

This proposition may have been appropriate in the particular facts before the learned judge. It is of no relevance here. The case before us is concerned with registered land and attracts all those obligations, rights and duties devolving upon parties dealing with registered land which flow from the provisions of the law. I take the view that by failing to make those enquiries concerning the title which he ought to have made, Hamilton armed Reid with power to go out into the world under false colours. By omitting to lodge a caveat in the Titles Office in protection of his equitable position, Hamilton failed to disarm Reid and placed him in a position where he was able to induce a belief in Garcia and other officers of the appellant bank that the title to lot 180 was clear of any outstanding interest. In this situation equitable principles well established in Australia and England indicate a decision in favour of the bank's claim.

Mr. George, submitted that there was one crucial fact in this case which distinguished it from the classical, factual situation which I outlined; a fact which calls for a more sophisticated and expansive reflection on the general principles. That fact, said Mr. George, is the open and notorious occupation of the land which Hamilton enjoyed without interruption since he was let in possession by Reid in November, 1958. There are two prongs to the contention which Mr. George founded upon this fact. Firstly, he argued that Hamilton's possession gave the bank constructive notice of Hamilton's rights and interests as a purchaser in possession. Parnell, J. accepted this proposition. It was the critical consideration which led him to uphold Hamilton's claim. In his view, Reid had been able to perpetrate the fraud because the bank had failed to make such enquiries and inspections as it ought reasonably to have made and it would be unjust in the light of this failure to deprive Hamilton of the priority afforded to him by time.

At this stage, it is convenient to notice an error which the learned judge made at the inception of the reflections which culminated in his acceptance of the doctrine of constructive notice as a decisive factor in the case. The judge regarded the provisions of section 5 (1) of the Conveyancing Law, Cap. 73, as an obstacle which the bank has failed to surmount. By virtue of these provisions the bank would be prejudicially affected by Hamilton's possession, if, as a result of making such enquiries

and inspections as ought reasonably to have been made the bank would have been informed of Hamilton's possession. Nothing in the Conveyancing Law "shall apply to land brought under the operation of Titles Law." Section 2. The first assumption of the learned Judge was therefore mistaken. Nevertheless, on the basis of the common law, the relevance of the doctrine of constructive notice must be considered.

Before doing so, however, it is necessary to dispose of a contention which Mr. Alberga founded upon the provisions of section 70 of the Registration of Titles Law, Cap. 340. That section provides:-

> "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 ..... 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 submitted that since the bank was taking an equitable charge from the registered proprietor of land, the section applied so as to free the bank from the effect which, at common law, knowledge of Hamilton's possession would have had. In the course of the discussions before us, I expressed the view that the section was restricted to registered interests; a registered fee simple, a registered lease, a registered mortgage or a registered charge, and was not intended to apply to an unregistered interest created for the first time. After careful second thoughts, I remain of the same opinion. Properly construed, the section relieves a person contracting or dealing with, or taking or proposing to take a transfer from, the proprietor of a registered interest, from the disabilities of notice and the obligations described in the concluding provisions of the section. It does not give that protection to a person taking from the proprietor, not the particular interest which is registered, but some other interest dependent upon, or carved out therefrom; for example a mortgage whether in registrable form or not of the registered fee simple estate. A mortgagee of such a mortgage would be adversely affected by notice of a prior equitable interest. This view of the provisions

of section 70 is consistent with the logic that the quality and the effect of a registered interest are not dependent upon the personality of the holder or the nature of that interest, but upon the circumstance that it was registered. Of course, if the transferee of a registered interest should delay registration of his transfer or omit to give notice thereof by lodging a caveat, he could find himself postponed to a subsequent transferee of that same interest who, with knowledge of the existence of the prior transfer, had managed to effect registration of his transfer ahead of the transfer first executed.

This is the explanation for the decision in Hope and Company, Petition, 2 Stephens Report, p. 1975. Marchalleck was proposing to take a transfer of the fee simple estate from the registered proprietor of Red Hill Pen. Provisions similar to those of section 70 applied so as to free him from the adverse effect of any knowledge which he may have had of the prior equitable mortgage effected with Hope and Company; an equitable mortgage, not protected, be it carefully observed, by the lodging of a caveat.

I come now to the heart of this case, namely, the question of the bank's knowledge of Hamilton's occupation of lot 180. Three degrees of knowledge are recognised by the law. The first consists of facts within the physical sensibilities and reasonable inferences to be drawn from those facts; - the apprehended and the comprehended. A second degree of knowledge is described when a person deliberately refrains from making enquiries which he ought to have made so that, by shutting his eyes to obvious means of knowledge, he avoids coming in possession of information which he might not care to have. As Devlin, J. explained in Taylors Central Garages v Roper [1951] W.N. 383 these two degrees of knowledge are recognised in the criminal law, and are frequently labelled 'actual knowledge'. Hereinafter in this judgment these two degrees of knowledge will be so termed. 'Actual knowledge' is, of course, recognised also in the civil law. A third degree of knowledge is confined to civil proceedings. It is a state of mind described by neglect to make such enquiries as a reasonable and prudent man would make. The information which would have been received in the absence of such neglect is known as constructive knowledge.

There is no evidence to support a finding that prior to the execution of the equitable mortgage, the bank was aware of Hamilton's

possession. To the contrary, the evidence is that Reid allowed Garcia to understand that he was in occupation of lot 180. There is no evidence that Garcia deliberately shut his eyes to any means of obtaining knowledge of Hamilton's possession. It is impossible to fix the bank with "actual knowledge" of Hamilton's occupation of the land.

Mr. Alberga submitted that the doctrine of constructive notice was incapable of fixing the bank with notice of Hamilton's interest because the bank did not have "actual knowledge" of Hamilton's occupation of the land, and he cited five cases:

(i) Daniels v. Davison, (1809) 16 Ves. Jun. 249 (33 E.R.978)

(ii) Barnhart v. Greenshields (1853) 9 Moores P.C. cases 18 (14 E.R. 204)

(iii) Hunt v. Luck [1901] 1 Ch. Div. 45; (Farwell J.) [1902] 1 Ch. Div. 428; (Court of Appeal)

(iv) Jones v. Smith (1843) 1 Hare, 43 (66 E.R. 942)

(v) Cavander v. Bulteel (1873) 9 Ch. App. Cas. 79

Mr. Alberga agreed that in none of these cases was it expressly stated that "actual knowledge" of a tenant's possession of land was a necessary factual base for constructive knowledge of the tenant's interest in the land, but he stressed that in all these cases the converse was upheld, and constructive knowledge of a tenant's interest was inferred in a person who had "actual knowledge" of the tenant's possession. This was the foundation of his submission that the weight of authority supported the proposition that constructive knowledge of a tenant's interest in land required as a base, evidence that the person to be affected had "actual knowledge" of the tenant's possession of the land. In my view this submission is valid and ought to be upheld.

Mr. Chin See referred to Holmes v Powell (1856) 8 De G.M.& G. 572, (44 E.R. 510) as authority for the proposition that the fact of possession is conclusive so as to promote the equity of the tenant above that of the holder of a subsequont equitable interest even though that subsequent holder had no "actual knowledge" of the tenant's possession. The passage relied upon in support of the proposition occurs in the judgment of Lord Justice Knight-Bruce at p.580:-

> "I apprehend that by the law of England when a man is of right and de facto in the possession of a corporeal hereditament, he is entitled to impute knowledge of that possession to all who deal for any interest in the property, conflicting or inconsistent with the title or alleged title under which he is in possession or which he has a right to connect with his possession of the property."

The proposition in this passage must not be construed out of the context of the facts of that particular case. The clear evidence there was that when the purchaser of mines took possession under an agreement to purchase the same, there was open evidence that the mines were being worked. This fact could not have escaped the attention of the purchaser. If the dictum of the passage meant to lay down as the law the proposition for which Mr. Chin See contends, then it states the law too widely. I am not prepared to accept its validity in determining priorities in Jamaica under the Registration of Titles Law. I am fortified in taking this stand because the learned judge's apprehension of the common law of England conflicts with authority before and since. Indeed, if it were the well established law of England, that occupation had such serious consequences, the provisions of section 70 of the Land Registration Act, 1925 (U.K.) are to an extent redundant. These provisions were decisive in the case of Hodgson v Marks [1971] 2 W.L.R. 1263 to uphold the priority of a plaintiff who remained in occupation of registered premises against a subsequent mortgagee without notice that a transfer of the premises had been made for the purpose of creating a trust in the plaintiff's favour.

I make one final observation on this question of the bank's knowledge. Even if the doctrine of constructive notice was applicable to the issues in this case, in relation to Hamilton's occupation of the land there is no evidence that the bank neglected to make such enquiries as would have been made in the circumstances by a reasonable and prudent man. In my view, therefore, it has not been established that the bank had constructive knowledge of Hamilton's possession of the land. Consequently, constructive notice of Hamilton's interest as a purchaser in possession may not be imputed to the bank. That is sufficient to dispose of the first prong of Mr. George's submissions on the basis of Hamilton's possession.

The second prong of the submissions is based upon the provisions of section 69 of the Registration of Titles Law, Cap. 340. The proviso to that section makes a certificate of title subject to certain specified interests including, "the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument." Mr. George argued that Hamilton as a purchaser in possession, was a tenant at will and entitled to invoke those provisions. This argument is without merit. The provisions apply to a tenant for a term not exceeding three years. It protects such a tenancy which could be created without a deed. It was not intended to apply to a purchaser in possession. The provisions in Australia which effect that protection are of no relevance here.

In the light of these considerations, I am of the clear view that the bank was entitled to priority over Hamilton and that the Judge was wrong in ruling to the contrary. The appeal on that point, should, therefore, be allowed.

Subsidiary points remain for consideration. The Judge ruled that the bank was entitled to interest at 6½% up to the time of the deceased's death and none thereafter. There is no authority to support the proposition that interest ceases at death. Mr. Muirhead in a straightforward and sensible manner agreed. I would add, with respect, that there is no authority in a court to change the interest payable under a contract between parties unless such payment is illegal. So the bank must be paid interest on the amount of its loan, as stipulated by the agreement made between Reid and the bank up to the date of Reid's death on July 23, 1961.

The Judge also found that the first defendant was unnecessarily involved in the litigation. He looked at the correspondence. He noticed that the estate was insolvent. He observed that the first defendant took up the stand that he was prepared to abide by any decision which the court may make in relation to the competing equitable interests. He said that in those circumstances the first defendant ought not to have been sued. This is not the law. The first defendant was a necessary party to this action - s.96, Judicature (Civil Procedure Code) Cap. 177 (O. 16 R. 8 (1962) Annual Practice and the notes thereon). Mr. Muirhead, very sensibly again, accepted this position. He said he could not contend that the plaintiff was at fault

in joining the first defendant. But Mr. Muirhead entered a caveat. He submitted that by virtue of the provisions of s. 118 Cap. 177, the bank had a discretion. The bank could have sued Hamilton and if it had succeeded in its claim, could have caused the first defendant to be served with notice of the result. Mr. Muirhead contended that the bank had not exercised in a reasonable and fair manner the discretion which it had under the section. This submission is misconceived. Section 118 applies to persons in the position of beneficiaries. It does not relieve the administrator of a deceased's estate. In any event, I cannot agree that the bank wrongly exercised any discretion which it may have had, having regard to the joinder of issue on the interest payable on the loan. This was a live question not only at the trial but in this court. The record of the trial shows that Mr. Muirhead played a leading role in the discussions on this issue. His stand on appeal was consistent with his stand at the trial. His submissions were, as usual, cogent and substantial. They demanded serious consideration. They excited Mr. Carberry in reply to heights of advocacy as delightful as they were decisive.

Finally, Mr. Muirhead submitted also that the plea of plene administravit praeter emerged substantially and distinctly from the defence of the Administrator General. I cannot agree. This plea must be precisely raised. It must not be made to lie in ambush as it were, and then be sprung up suddenly. This submission also is without merit.

The appeal should be allowed. The judgment of the learned trial judge should be reversed on all grounds. There should be a judgment for the bank awarding it priority over Hamilton's claim. The bank is entitled to the payment of the full amount found to be due. This will be a matter of calculations. The bank is also entitled to its costs at the trial and on appeal. I am prepared to listen to the views of my brothers and to such submissions as counsel may wish to make on two questions:-

(1) the rate at which interest is payable after Hamilton's death, and

(2) Costs.

9th November, 1973.

HERCULES, J.A. :

The central issue in this case is the matter of priority between two competing equitable interests in respect of Lot 180, Barry and Lloyds in St. Catherine. The Plaintiffs, Barclays Bank, D.C.O., derived their interest fron a nortgage by way of a charge executed in their favour by the deceased, Gifford Reid, in 1960. The second defendant, Hamilton, derived his interest fron an agreement with Reid executed in 1958 to buy the same lot.

In such a situation the general rule of equity is that the person whose equity is attached to the property first, will be entitled to priority over the other. It must be borne in mind, however, that the rule that the first in time prevails only applies where the equities are equal. If the moral claims of the plaintiff and the defendant are not on an equality, the one who has the better claim will be preferred, although his interest arose after the other's. (See Rice v. Rice (1853) 2 Drew, 73). The learned trial Judge was made fully aware of this principle of equity. At page 23 of his judgment he said as follows:

> "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 way of any act or omission which had or may have had the effect of inducing a complainant later in time to act to his prejudice. No 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."

Let me examine the evidence as to how each competitor dealt with his interest. All the second defendant did was to go into possession of the lot pursuant to the agreement. Although he described

himself as an experienced and shrewd man he did not know about a caveat. His equity was based on the agreement for sale and his going into possession. The learned trial Judge found that his possession was notorious and that such possession was constructive notice to the Bank of his rights and interest. I accept the submission that in order to find constructive notice of someone's interest, it is necessary to establish some basis of fact. There is a distinction between constructive notice of a man's possession and knowledge of his interest or rights based on knowledge of his possession.

There is no evidence and indeed no finding by the learned trial Judge that the bank knew of Hamilton's possession. This knowledge was presumably inferred from the mere fact of Hamilton's possession. If there was evidence that the bank knew of Hamilton's possession, only so could they be deemed to have constructive notice of his rights. I agree with Mr. Alberga that the learned trial Judge assumed what had to be proved.

The learned Judge also fell into grave error when he extended his thinking on the failure of the bank to know of Hamilton's possession by bringing in aid Sec. 5 of the Conveyancing Law, Cap. 73. I quote what he said so as to complete the record - pages 21 - 22 of his judgment:-

> "The Conveyancing Law, Cap. 73 puts this rule in a statutory form. Sec. 5 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 enquiries and inspections had been made as ought to reasonably have been made by him."

But Section 2 of the said Conveyancing Law provides as follows:-

> "Nothing in this law shall apply to land brought under the operation of the Registration of Titles Law."

Lot No. 180 was the subject of a registered title.

Coming after the detailed references to these matters by my learned brother Fox, I need only say categorically that I do not hold that the bank had any notice either actual or constructive of Hamilton's possession. I also hold that Hamilton's failure to protect his interest by at least lodging a caveat had the effect of inducing the bank, later in time, to act to their prejudice. Further, he never even saw the certificate of title, let alone the question of any efforts to get hold of it. The Privy Council in the case of Abigail v. Lapin, (1934) A.C. 491 declared these sufficient grounds for postponing an earlier claimant and thereby affirmed the decision in an Australian case of Butler v. Fairclough, (1917) 23 C.L.R. p. 91 - 92.

What then did the bank do when they effected their charge? It must be remembered that they were merely advancing money on the lot 180 which carried a registered title, they were not purchasing the lot. They took hold of the Certificate of Title, then they searched the register and found no encumbrance, then they lodged a caveat and even took the trouble of going to be shown 'the' property by Reid. I ask: what more could they do? In my view all that they did rendered the equities unequal and constituted a distinct preponderance in their favour.

As a result I have no hesitation in concluding that the first claimant Hamilton should be postponed to the bank. I agree that the learned trial Judge's declaration in favour of the second defendant Hamilton in terms of paragraph (b) of his prayer cannot stand, that is to say, that Hamilton's right is prior to any right which the plaintiff bank may have subsequently acquired.

In respect of the learned trial Judge's declaration which had the effect of freezing deceased Reid's debt to the bank as it stood at 21st July, 1961, this is a somewhat novel judicial posture absolutely devoid of precedent and it is distinctly inimical to well-known and well-established practice in banking and other business circles. I am of the view that this declaration cannot stand. The bank should be allowed to carry on the account after Reid's death in accordance with

established practice.

The last matter I wish to comment on is the question of costs. The order that the bank must pay the costs of the first and second defendants derived from (i) that the second defendant Hamilton had succeeded against the Plaintiff bank and from (ii) a finding "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."

My learned brother Fox has gone into this matter in some detail. I agree with his reasoning and his conclusion on this as on all other aspects of the case as I have indicated above. I would accept Mr. Carberry's submissions. But one in particular stands out. This was an action for payment, sale or foreclosure - see para. 12 (iii) of the Statement of Claim. The Administrator General as administrator, was registered proprietor by transmission. Against whom was the order for payment to be made if the suit remained between the bank and Hamilton and the bank succeeded? Against Hamilton? Against whom was the order for sale to be made? Against Hamilton? Against whom could an order for foreclosure be made? Against Hamilton? Would the trial judge have been able to make an order in vacuo? In my view the plaintiff bank did not unnecessarily involve the Administrator General in the expense of litigation. The bank ought to have the costs of the trial and of the appeal as proposed. I agree with all the reasoning and all the conclusions of my learned brother Fox to the end that the appeal ought to be allowed.

ROBINSON, J.A.(ag.):

I personally must first express my hearty appreciation of the great endeavour and apparent hard work that has been put into the arguments of this case by all the attorneys concerned, ranging as the arguments did over the law of several countries viz. Australia, the U.K., Canada and of course our law in Jamaica. This thoroughness of approach has been of great help to the court.

The facts of this appeal are already well set out in the judgment of Fox J.A. I shall not, therefore, repeat them.

This appeal concerns two rival equitable claimants; the question being whether Hamilton's equitable interests, though first in time, remain so or should be postponed in favour of the bank whose equitable interest was second in time.

On the 5th of February, 1960, Reid executed an equitable mortgage by way of charge with the bank, by deposit of the duplicate Certificate of Title charging the same land, that is lot 180. As to the Bank:

(i) The bank had the title deeds in its possession, searched the register and found no caveat, the Title was clear.

(ii) The bank did not know of Hamilton's interest or possession.

(iii) On the 8th February, 1960, the bank lodged a caveat.

(iv) The bank's manager was ostensibly taken by Reid to certain lands on which there was a house.

(v) It seems to me there were no enquiries or inspections which the bank ought reasonably to have made and did not make in its dealing with this registered proprietor with the title in his possession, nor was there any usual practice which the bank failed to follow.

As to Hamilton:

(1) Hamilton's agreement for purchase of lot 180 from Reid was entered into on the 29th of November, 1958.

(2) The evidence supports the conclusion that Hamilton never made any enquiry about the title to lot 180 until some two years later. Hamilton said in evidence, "I did not go beyond Reid in making enquiries up to the time of his death."

(3) Hamilton did not lodge a caveat as he could do. He would not get the title until the last instalment was paid.

(4) Hamilton did not inform the parent holder of the Certificate of Title, that is, the Lands Department of his interest. In any case there is no evidence that he did. The learned

trial Judge found that Hamilton was in possession of the land; he had a watchman there.

(5) Hamilton took no steps of any kind to protect his interest. In those circumstances, the bank did all that could be possibly expected of it and granted the facilities.

(6) Hamilton did not "search" in 1958 or he would have known that lot 180 was registered land and it was in Reid's name.

On the 2nd of April, 1958, Lot 180 was removed from the parent title and title issued in the name of Mr. and Mrs. Richards. Hamilton knew that lot 180 would be, in the first place, in Richard's name. On the 4th of November, 1958, Lot 180 was transferred by Richards to Reid who became the Registered owner. Hamilton appreciated that title would be issued in the name of Richards and then come to Reid. Hamilton knew that it was a Lands Department sub-division and had he enquired of that department he would have got those same facts to which I have just referred. He did not act as a reasonable and prudent person or he would have found out these facts and lodged a caveat as a consequence.

I might mention, in passing, that Reid died on the 21st of July, 1961 and was indebted to the bank.

On the question of constructive notice several cases were cited, one of which was Jones v Smith, 66 E.R. p. 944. The authorities establish and in particular Jones v Smith, that the doctrine of constructive notice applies in two cases, namely:

(1) Notice in the party charged that the property in dispute is encumbered or in some way affected, in which case he is deemed to have notice of the interest of the encumbrancer, a knowledge whereof he would have been led by due enquiry after the fact which he actually knew.

(2) Where the conduct of the party charged evinces that he had a suspicion of the truth and wilfully and fraudulently determined to avoid receiving actual notice of it.

In this case there is no finding or evidence that the bank knew of Hamilton's possession. In this regard, Mr. George said: "There is no contention on our side that the bank had actual knowledge of Hamilton's possession or even his existence." As to two, there is no evidence to support that conclusion or that the bank did not act prudently and reasonably. It is not clear to which lot the bank's manager was taken, (there is no finding by the learned Trial Judge as to this) but had the manager been

taken to Lot 180, it is mere speculation as to what effect the piggery and two chicken coops would have had on him, bearing in mind that he said that he understood from Reid that he wanted the "facilities" to assist him in a chicken farm. In my view there was no constructive notice in the bank.

On the question of possession in Hamilton vis-a-vis constructive notice in the bank, I wish only to add that in my opinion, such observations as were made in the case of Holmes v. Powell (1856) 44 E.R. 510 must be considered in the light of the pleadings in that case, the evidence in support of those pleadings and the findings of fact on which the court based its decision. The plaintiff had pleaded actual knowledge in the defendant, Powell, of the working of the coal mines before he purchased the estates i.e., that Powell knew of this; that no one could have walked over the estate without seeing the "workings." The Judge found there was actual knowledge of possession in Powell and even if not actual knowledge, the proven and accepted facts were such that Powell couldn't be heard to say that he did not know. The plaintiff's case was accepted in toto. Powell's appeal was dismissed as being groundless.

On the question of priorities, priority in point of time, gives the better equity where the equities are in other respects equal. (See Rice v Rice 61 E.R. p.648). Much has been said to demonstrate that the equities here are not equal. The bank did all it could. There is much that Hamilton could have done and didn't do. The bank has the better equity and is to be preferred. Hamilton by his conduct had put it in the power of Reid to deceive the bank and raise money from the bank and Hamilton must take the consequences.

I agree with the judgments of Fox, J.A. and Hercules J.A. that the appeal be allowed and the Judgment of the court below set aside.

9th November, 1973

November 16, 1973

Since delivery of the judgments on the major issue of priority in this case, we listened to further submissions with respect to interest and costs. Mr. Alberga drew attention to the case of Barclays Bank v. Knight, 7 W.I.R., 241 in which after a careful examination of the authorities, Date J. held that as from the date of death of a debtor, the interest which is payable on any sums due by him is at the rate of simple and not compound interest. We accept this principle.

In relation to the interest to be charged, our attention was also drawn to authority which suggests that the interest could be the fluctuating rate actually in existence during the period after death. Further, that the amount to be paid in the case of redemption is calculated upon principles which differ from those whereby the amount of the debt is ascertained.

In the particular circumstances we propose to be guided by what appears to be fair and reasonable. Without attempting to establish any principle, we fix simple interest at the rate of 7½ per cent, on the amount due after Reid's death. We further order that redemption may be made upon payment of the aggregate sum so calculated, and costs.

The Court orders as hereunder:-

1. The appeal is allowed.
2. The judgment of Parnell J. in the Court below is set aside.
3. There will be a declaration in terms of paragraph (i) of the Plaintiffs' claim, viz.,
   (a) The Plaintiffs are equitable mortgagees of ALL THAT parcel of land part of Barry and Lloyds in the parish of Saint Catherine being Lot No. 180 on the Plan of Barry and Lloyds deposited in the Office of Titles on the 2nd day of December, 1944, and being the land now comprised in Certificate of Title registered under the Registration of Titles Law, Volume 864 Folio 98 in the Register Book of Titles.
   (b) Under the equitable mortgage dated the 5th February, 1960 and made between Gifford Astor Reid, now deceased, and the Plaintiffs, the land specified in the said equitable mortgage is charged with payment of all moneys owing from the said Gifford Astor Reid to the Plaintiffs.

(c) The Plaintiffs' equitable mortgage ranks in priority to whatever right the second Defendant may have in or over the land specified in the said equitable mortgage.

4. As between Plaintiffs and the first Defendant, there will be a declaration that the estate of the deceased Reid is indebted to the Plaintiffs in an aggregate sum calculated as follows:-

(a) The amount due up to the date of Reid's death on 21st July, 1961 as shown by the account between Reid and the Plaintiffs and including interest at rates ascertained in accordance with the agreement between Reid and the Plaintiffs; being the sum of £1,053.4.0.

(b) Simple interest on this sum of £1,053.4.0. at the rate of 7½% to the date of the judgment of Parnell, J. on 4th June, 1970.

This judgment will carry simple interest on the amount of the judgment at the rate of six per cent per annum from 4th June, 1970 to the date of payment.

5. (a) The Defendants or either of them may redeem the equitable mortgage by paying to the Plaintiffs:- the aggregate sum so calculated and the costs pursuant to paragraph 6.

(b) In default of payment of amounts referred to in paragraph 5(a) above the said mortgage may be enforced by sale and failing sale by foreclosure.

(c) The said sale shall be conducted out of Court subject to the reserve price and auctioneer's remuneration being fixed by a Judge of the Court below and that the Plaintiffs' Attorneys have the conduct of the sale.

6. The Plaintiff's costs at the trial and at the Appeal are to be taxed or agreed, and are to be borne by the Defendants in the following proportions:-

(i) as to the trial 2/7ths by 1st Defendant, 5/7ths by 2nd Defendant.

(ii) as to the Appeal 1/10th by 1st Defendant, 9/10ths by 2nd Defendant.

The proportions of costs awarded against the 1st Defendant to be borne by the estate, but not to be a charge upon the land.

7. There shall be liberty to apply to the Court below generally and for accounts to be taken of the moneys owing or to be paid under paragraph 4 or 5(a) of this Order.