C.A.
Land - Caveat - application for removal - whether caveator has interest - Registration of Titles Act ss. 43, 44, 45 - Will - administration of estate. Caveat lodged by beneficiaries under will against application by executrix of original executor who was also a beneficiary to bring land under operation of Registration of Titles Act - land dev. by will not fully/properly distributed - whether caveat valid whether affected by estoppel, laches, waiver or acquiescence. APPEAL DISMISSED and order of Court below refusing the removal of the caveat affirmed. Court makes recommendations as to administration of estate (p 15, 16, 20, 33).
[Cases referred to p 33 (end)]

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 36/94

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	MAVIS RODNEY	PLAINTIFF/APPELLANT
AND	JANE RODNEY-SEALE	1ST DEFENDANT/RESPONDENT
AND	LELEITH RODNEY-ROBERTS	2ND DEFENDANT/RESPONDENT

Dennis Goffe, Q.C. and Michelle Henry, instructed by Myers, Fletcher & Gordon, for the appellant

Crafton Miller and Nancy Anderson, instructed by Crafton Miller & Company, for the respondents

November 7, 8, 9, 10, 11 and December 20, 1994

WRIGHT, J.A.:

This is an interesting case for more reasons than one, the chief of which being that but for a question from the Bench a very significant factor in the case would remain unappreciated. But more of this anon.

This appeal is from the decision of Chester Orr, J. delivered February 25, 1994, in a trial which began on January 24, 1991, dismissing the appellant's Originating Summons seeking the removal of a caveat lodged jointly by the respondents against the registration of a parcel of land described as:

> "...all that parcel of land part of St. Toolies in the parish of Clarendon containing by survey five acres twenty-two perches and three tenths of a perch of the shape and dimensions and butting as appears by the Plan thereof dated the 13th January 1977 prepared by N.W. Irvine, Commissioned Land Surveyor and lodged with Application No. 628849."

Another interesting feature of this appeal is the fact that while Mr. Goffe spent the better part of five days urging his case Mr. Miller spent but a brief time in responding as he chose to concentrate on demonstrating that the caveators had a caveatable interest. He regarded the bulk of Mr. Goffe's submissions as irrelevant to the real issue in the case.

The case is a sad commentary on how family relationships can be soured and events take a different course from the provisions made for smooth relationships to endure after the death of the head of the family.

The land in question is a portion of the estate of Henrietta Rodney late of Toll Gate, Clarendon, who died on October 1, 1958, leaving a Will dated February 28, 1957, probate of which was granted on April 8, 1959, to Percival Rodney, her son who was the sole executor named therein. For purposes of this case, the relevant portion of the Will reads:

> "I GIVE AND BEQUEATH to my (2) Two Sons James Rodney, Percival Rodney and (8) eight daughters namely Adlin Rodney, Hilda Rodney, Lucille Rodney, Delacita Rodney, Lineve Rodney, Jane Rodney, Gwendolyn Rodney and Clarita Rodney all that portion of land known as Paddock and situated at St. Tooliest, Toll Gate, Clarendon. Consisting of (107) one hundred and seven acres of land to be amicable handled and any proceeds from the said land to be equally divided among the (10) ten children mentioned above."

It was Mr. Goffe's contention that this clause created a joint tenancy among the ten beneficiaries in the land. This is not a view that I share but what is significant is that the beneficiaries did not hold that view either and it is, indeed, contrary to what Percival Rodney did which action is sought to be perpetuated by Mavis Rodney, Mr. Goffe's client.

The land stretches along the main road leading from Toll Gate to Clarendon Park for a distance of about 600 feet and about 200 feet from the boundary towards Toll Gate there is a 24 feet wide reserved road providing access to the hinterland. The remaining frontage is roughly 400 feet.

On January 13, 1977, the executor, Percival Rodney, had commissioned Land Surveyor N. W. Irvine survey and cut off for him, the executor, five acres and 22.3 perches of the land. That area began from the reserved road with a frontage of about 250 feet going towards Clarendon Park. On that portion stood the family house and in that same year Percival completed the construction of his own house on that lot of land. Jane was Percival's favourite sister and on February 25, 1977, Percival had Mr. Irvine survey the remaining portion beside Percival's land fronting on the main road in the Clarendon Park direction. That lot contained four acres, one rood and 18.7 perches and was given to Jane, who resided abroad but visited Jamaica occasionally. Later Percival built a house on that lot for her. The result of those two assignments was that Percival and Jane received roughly 400 feet of the 600 feet main road frontage of the land. Of the remaining frontage on the other side of the reserved road and stretching beside it, a lot containing three acres, three roods and 10.4 perches was cut off and assigned to Adlin on February 25, 1977, and on April 19, 1977, the remaining portion with frontage on the main road consisting of three acres, two roods and 25.8 perches was surveyed and given to Lucille. So of the 10 beneficiaries only four received allotments along the main road and in fact no other allotments were made.

Accordingly, in 1979 Gwendolyn Bryan, who was then resident in Canada, took out Originating Summons against Percival Rodney E127/79 claiming, inter alia:

> "2. Directions as to how the said 107 acres of land should be divided."

Paragraph 3 of her supporting affidavit complains:

> "3. I have been unable to get any satisfactory information from the Defendant as to which portion of the 107 acres I will receive and indeed part of the land has been cut up and the only part which remains has no road frontage. I consider it unfair that I should be required to take the portion of the land which has no road frontage and I am therefore asking this Honourable Court to make such order as appears equitable in the circumstances."

Her attorneys were Myers, Fletcher and Gordon, Manton and Hart. Percival was represented by Chambers, Bunny and Steer and they filed a 17 paragraph affidavit dated October 9, 1979, by Percival since when nothing further was done in that matter. In paragraph 5 of his affidavit Percival traversed paragraph 3 of Gwendolyn's affidavit. Paragraph 8 detailed expenses which he said he had to meet without any contribution from the other beneficiaries, then in paragraphs 10 to 16 he gave what was his answer to the administration claim, which is as follows:

> "10. That in spite of the above I got in touch with all the beneficiaries and told them that if they wished to obtain plans or diagrams for their portion of the land that they would have to contribute to the surveyor's fees to have a subdivision plan prepared and passed by the Clarendon Parish Council and that the costs would be high as a Parochial Road would have to be constructed on the land 24 feet wide in order that each beneficiaries frontage would be on a road.
>
> 11. That I obtained the services of Mr. N.W. Irvine a Commissioned Land Surveyor of 25 Anderson Drive, May Pen, Clarendon to prepare a subdivision plan and he made a sketch plan whereby a proposed road of 24 feet wide would run through the land from a main road leading from May Pen to Mandeville touching on the southern boundary of the land.
>
> 12. That I wrote specifically to the Plaintiff herein telling her that if she wanted a plan for her portion of the land devised to her she would have to contribute towards the costs of the subdivision plan and the cost of her separate plan. The Plaintiff has not contributed the amount for the surveyors costs.
>
> 13. That in August 1979 the Plaintiff came out from Canada on a vacation and I again told her that the estate had no funds to carry out the survey of her portion of the land or the preparation and passing of the subdivision plan and shortly after her return to Canada I was served with the Originating Summons in this cause.
>
> 14. That the land belonging to Gwendolyn Bryan has never been leased out but plans have been prepared for four of the beneficiaries who have paid Mr. Irvine for their plans.

"15. That the Plaintiff's portion of the land butts and bounds as follows:

On the North by land partly in my possession and partly on land of Jane Seale (nee Rodney)

On the South by land of Claretta Edwards (nee Rodney)

On the West by the proposed road and on the East of land belonging to Joseph Powell.

16. That whenever the Plaintiff is prepared to pay for the cost of obtaining the plan for her land and for a portion of the cost of the subdivision plan, the services of any surveyor and/or Mr. Irvine could be obtained to continue the work of survey and preparing the plans to be handed over to her."

Why no further steps were taken has not been explained although Gwendolyn's attorneys are in this case though in a different capacity, a matter which has attracted adverse comment from Mr. Miller and about which more will be said later in this judgment.

Percival died on May 20, 1980, leaving a Will dated February 2, 1979, in which his wife Mavis Eunicey Rodney, the appellant, and his daughter, Rose Rodney, were named as executrices. Probate of his Will was granted on September 26, 1980, to Mavis Eunicey Rodney. (Power being reserved to Rose Rodney, the other executrix to come in and qualify).

What precipitated this action was the appellant's application to the Registrar of Titles in October, 1990, to have the portion of land which Percival claimed brought under the Registration of Titles Act. Thereupon the respondents lodged their joint caveat but apart from signing the caveat Leleith has taken no further part in the proceedings. She is, however, acknowledged to be the daughter of Adlin who died in 1982 so much so that she was allowed to build a house on the portion given to Adlin.

The relevant sections of the Registration of Titles Act are sections 43, 44 and 45 and are set out hereunder:

" Caveat against Registration of Land

43. Any person claiming any estate or interest in the land described in the advertisement may, in person or by agent, within the time appointed by the Referee under section 33, lodge a caveat with the Registrar, in the form in the Second Schedule, forbidding the bringing of such land under this Act; every such caveat shall be signed by the caveator or by his agent and shall particularize the estate or interest claimed; and the person lodging such caveat shall, if required by the Registrar, support the same by a statutory declaration, stating the nature of the title under which the claim is made, and also deliver an abstract of his title to such estate or interest.

44. The Registrar, upon receipt of such caveat, shall notify the same to the applicant, and shall suspend proceedings in the matter until such caveat shall have been withdrawn or shall have lapsed as hereinafter provided or until an order in the matter shall have been obtained from the Supreme Court or a Judge.

The applicant may, if he think fit, summon the caveator to attend before the Supreme Court, or a Judge in Chambers, to show cause why such caveat should not be removed, and such Court or Judge may, upon proof that such caveator has been summoned, make such order in the premises, either ex parte or otherwise, as to such Court or Judge may seem fit.

45. After the expiration of one month from the receipt thereof, such caveat shall be deemed to have lapsed unless the person by whom, or on whose behalf, the same was lodged shall within that time have taken proceedings, in a court of competent jurisdiction, to establish his title to the estate or interest specified in the caveat, and shall have given notice thereof to the Registrar, or shall have obtained and served on him an injunction or order of the Supreme Court or a Judge restraining him from bringing the land under the operation of this Act.

A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest."

In keeping with section 45 (supra), the caveators who claim as beneficiaries under Henrietta's Will joined with four others, who claim a like interest, in bringing Suit C.L. 1990/R-145 on October 30, 1990, against Mavis Rodney. The endorsement on the Writ which is also reflected in the Statement of Claim reads:

ENDORSEMENT

The Plaintiffs' claim is against the Defendant for:

1) A Declaration that the Defendant is entitled to only lots 4 and 10 of lands at St. Tollies at Toll Gate District, in the parish of Clarendon, as specified in Sub-division Approval by the Parish Council of Clarendon dated December 8, 1988.

2) Recovery of possession of lot 5 and portions of lots 3 and 10 at St. Tollies at Toll Gate in the parish of Clarendon aforesaid.

3) An order that the Defendant forthwith by herself, her servants and/or agents pull down and remove so much of the said fence as she has erected on lots 5 and 3 and 10 of St. Tollies, Toll Gate in the parish of Clarendon aforesaid.

4) An injunction to restrain the Defendant by herself, her servants and/or agents or otherwise, howsoever, from occupying or erecting or continuing to occupy or erect any fence or building upon lots 5 and 3 St. Tollies, Toll Gate in the parish of Clarendon.

5) Mesne profits at the aforesaid rate of $500.00 per month from the said 2nd day of January, 1990 until possession is delivered up.

6) Damages for Trespass.

7) Interest.

8) Costs.

9) Such further or other relief as may be just."

Acting under section 44 Mavis Rodney brought the present action against the respondents, the caveators, for them to show cause why the caveat should not be removed. After a protracted hearing the application to have the caveat removed was dismissed as mentioned earlier.

On page 3 of that judgment the crux of Mr. Goffe's submission before the court below is represented as follows:

> "Mr. Goffe submitted that the defendants had not established an interest in the land sufficient to support the Caveat. He further submitted that there was non compliance with the provisions of the Act relating to Caveats and that there

> "was no evidence of a nexus between the Will and the Caveators to an interest in the parcel of land which was sought to be registered. In short the Caveat was invalid."

The learned trial judge held that whether the Will created a joint tenancy as Mr. Goffe contended, or a tenancy-in-common as Mr. Miller claimed, the defendants have an interest in the land until the matter has been amicably settled. This decision has been challenged in six grounds which in essence complain:

1. That the learned judge ought to have found that neither caveator had a caveatable interest in the land in question.

2. The first defendant cannot maintain a claim as beneficiary because she had long ago received her share of the estate.

3. The learned judge ought to have found that Leleith had no maintainable claim as "granddaughter".

4. The defendants were estopped by conduct.

5. The learned judge was wrong in finding no acquiescence until the plaintiff had defined the boundaries of the land she claimed.

6. The learned judge erred in regarding the earlier legal proceedings by Gwenaclyn as relevant.

The requirement in Henrietta's Will that the 107 acres of land be "amicable handled" calls for a meeting of minds among the beneficiaries to determine how the land should be divided among them because it is obvious that they never understood that the land should be jointly held and enjoyed but that each beneficiary should have his/her own allotment. At page 3 of his judgment Chester Orr, J. said:

> "It is clear that there never has been an amicable settlement of the land as contemplated by the testator (sic) Henrietta Rodney."

Mr. Goffe laboured hard to persuade the court that there was an agreement which would arise as a matter of inference. However, even in the absence of the exhibited suit brought by

Gwendolyn Rodney there cannot be found any basis for such an agreement. In fact, paragraph 18 of the affidavit of Jane Rodney dated January 27, 1991, reads in part:

> "...I further state that soon after the death of Percival Rodney around 1984, the beneficiaries met and agreed that the said lands should be properly surveyed and sub-divided since, the diagram obtained by Percival Rodney in 1966 was only a 'sketch plan' which did not bear any Land Valuation seal of approval and I further state, it was agreed at that meeting that since the beneficiaries did not approve of the proposed division done by Percival, as evidenced by Gwendolyn Rodney-Bryan's Court Suit against him, that the said lands should be divided in accordance with the Will of Henrietta Rodney."

The "sketch plan" referred to is, indeed, a sketch of a portion of the property showing the sections occupied by Percival, Jane, Adlin, and Lucille referred to earlier. Two other sections are indicated on the sketch inland and behind the four lots on the main road. There is no evidence that the beneficiaries had had anything to do with the making of this sketch nor that they agreed to what it reflects. Indeed, the evidence is to the contrary as the above-cited paragraph from Jane's affidavit together with Gwendolyn's action show. And in Percival's affidavit in that action which is dated October 9, 1979, no reference is made to any such plan as having had the consent of the beneficiaries.

It is clear that the beneficiaries understood the Will to mean and intend to give effect to that meaning, that agreement among the beneficiaries is a condition - precedent to the equitable distribution of the lands. A further extract from the said paragraph 18 of Jane's affidavit reads:

> "I further state that the said lands were surveyed and sub-divided by Mr. N. W. Irvine, Commissioned Land Surveyor who was the said person who had prepared the said 'sketch plan' on behalf of Percival Rodney and I further state that, Mr. Keith Bryan, nephew of Gwendolyn Rodney-Bryan, acting under the written permission of Gwendolyn Rodney-Bryan granted to him on March 23, 1983, to act in her stead in the surveying and subsequent sub-division of 56 acres 2 roods and 7 perches

"of the said lands, applied and obtained subdivision approval of the said portion of the said lands after he had obtained the consent of the beneficiaries including Mavis Rodney. I attach hereto as Exhibit 'D' a copy of the said Consent to Act in Capacity of Beneficiary.

The said Mavis Rodney contributed monies towards the sub-division approval and was given receipt acknowledging her consent by the said Keith Bryan. I attach hereto as Exhibit 'E' a copy of the said receipt.

I further state that the said portion of the lands being some 56 acres 2 roods and 7 perches was subdivided and subdivision approval dated December 8, 1988 was acquired. I attach hereto as Exhibit 'F' a copy of the said sub-division approval.

I further state, the said 56 acres 2 roods and 7 perches of land was divided into 18 lots, nine of the eight lots being at the front of the said lands, one lot going to each of the remaining nine beneficiaries and/or their heir-at-law. My sister, Delacita Rodney having died without leaving any children or heir-at-law, and I state that an equitable division of the said 56 acres 2 roods and 7 perches of the land was done, giving each nine beneficiaries an area of approximately 5½ acres being land at the front and at the back of the said lands.

I further state that lots 1, 2, 3, 4 and 5 being the lands on the southern side of the estate nearest to Clarendon Park, are a little less in area than lots 6, 7, and 8. This is so because there is a reserved road which runs between lots 5 and lots 6 and to do a more equitable division of the frontage of the said 56 acres 2 roods and 7 perches would entail the destruction of the said reserved road or the splitting of a lot to accomplish such an equal division.

I further state that neither Mavis Rodney nor any of the other beneficiaries have offered any objections to the said sub-division and this is evidenced by the fact that she had never authorized her Attorneys-at-Law, during their letters to me concerning the reaping of provisions from the property, to notify me nor any other beneficiary under the said estate concerning her disapproval hereto."

Paragraph 19 presents the thinking behind the lodging of the caveat and paragraph 20 speaks of another meeting of beneficiaries on August 18, 1986. These paragraphs read:

> "19. In reply to paragraph 20, I state as follows; that a Caveat dated October 6, 1990 was lodged by myself and Leleith Rodney-Roberts, the daughter of Adlin Rodney, deceased, against the registration of Application No. 620849 lodged by the Plaintiff for the registration of 5 acres and 22.3 perches of land being lands forming part of the frontage of the said lands, and I further state that since the lodging of the said Caveat document, proceedings have been commenced in this Honourable Court by way of Suit No. C.L. 1990/R 145, seeking among other things a Declaration that the said Plaintiff, Mavis Rodney, is only entitled to lot 4 and lot 16, being a total of approximately 5½ acres of land, a similar amount entitled to by all the beneficiaries; and I further state that if the said Caveat was to be removed at this stage then the substantive issue which concerns serious questions of law and fact to be tried in Suit No. C.L. 1990/R 145 would be put at an end since the lands in Application No. 620849 being 5 acres and 22.3 perches would then be registered and the registration of same would effectively put to an end the substantial issues to be tried in Suit No. C.L. 1990/R 145; and I further state that the portion of lots 3 and 10 being entitled by Antonio Anderson and myself and all of lot 5 being land entitled to by Clarita Rodney-Edwards the youngest of the Rodney children, as consented to by all the beneficiaries, could not be compensated for by an award of damages if the Plaintiff was able to have her said application registered; and I further state that the said lot 5 holds special sentimental value to Clarita Rodney-Edwards since same has thereon, the family house which was the intention of my mother, Henrietta Rodney before her death, to be given to the said Clarita Rodney-Edwards.
>
> 20. That on Sunday August 18, 1986 a meeting of the beneficiaries vis, Mrs. Gwendolyn Rodney-Bryan, Mrs. Mavis Rodney, the Plaintiff herein, myself Mrs. Jane Rodney-Seale, Mrs. Clarita Rodney-Edwards; Mr. Antonio Anderson (only surviving child of Linove Rodney), Mrs. Lucille Rodney-Gooden, Mrs. Doris Rodney-Mason (only surviving child of Hilda Rodney); Mrs. Leleith Rodney-Roberts (daughter of Adlin Rodney); Uriel Eathon Salmon (only child of Mrs. Lucille Rodney-Gooden); Miss E. Campbell and Miss P. Campbell (surviving children of Ruth Rodney),

"Miss Mavis Rodney (only surviving child of James Rodney), held at my home at Toll Gate in the parish of Clarendon at this meeting all the beneficiaries agreed that the lands forming a part of Henrietta Rodney's estate were to be surveyed and subdivision approval were to be applied for. That subdivision approval was obtained in December 1988 in respect of only 56 acres 2 roods and 7 perches was due to the difficulty of the surveyor in locating boundaries in respect of the rest of the said land."

What is abundantly clear from these paragraphs is that the administration of the estate has not been completed. It was this fact which prompted the court to enquire of Mr. Goffe whether it was not Mavis Rodney's responsibility to complete the administration. After consultation he agreed that she stood in the shoes of Percival as the executrix of Henrietta's Will but he added that the thought of her being the administrator of their mother's estate would be a revulsion to the beneficiaries. That disclosure makes it plain that Mavis Rodney, even if she had known of her status vis-a-vis Henrietta's estate (and it is evident that she did not know) would not have been able to achieve an amicable settlement with the beneficiaries regarding the apportioning of the land, as contemplated by the Will. But nevertheless the chain of transmission of executorship was established when Mavis Rodney proved Percival's Will and it is shown by presentation of both probates. Both are in evidence in this case. Indeed, Mavis Rodney, having taken probate of Percival's Will, is not permitted to renounce probate of Henrietta's Will: In the Goods of Perry 163 E.R. 540. See also section 33 of the Conveyancing Act. But if at first it was difficult for her to honour the office, it has now become even more so. The court was informed that she is now blind and confined to a wheelchair.

A fair summary of Mr. Goffe's submission is that neither caveator can show any nexus with the parcel of land against which the caveat has been lodged but that if indeed any such nexus ever existed then by reason of estoppel, evidenced by laches, waiver and acquiescence their claims cannot now be asserted. In the

circumstances that parcel of land is exclusively Percival's land. However, the plan for the distribution of the land upon which all the surviving beneficiaries and the heirs-at-law of the deceased beneficiaries are agreed, makes it plain that they are still waiting for the whole 107 acres to be distributed. And it is significant that the appellant Mavis Rodney has agreed to the proposed sub-division and paid a portion of the costs involved - the receipt for the amount paid is an exhibit in the case. By the same token Charles Sydney Gooden, the widower of Lucille Rodney-Gooden, who had obtained a registered title in 1988 to roughly one-half acre of the lot assigned to Lucille Gooden and had built a house thereon, will not be disturbed. The fact is that the beneficiaries contend that each one should be given a house spot with a road frontage as well as a portion of the hinterland.

To regard the land the subject of the caveat as Percival's would be to give judicial sanction to what, in my opinion, was an act of malfeasance on the part of Percival when he obviously preferred himself by taking possession of over five acres of the more valuable portion of the land and for another seven years up to the time of his death there were beneficiaries who had been given no allotment. His response to Gwendolyn's complaint in 1979 - two years after he had thus benefitted himself - made it clear that unless the beneficiaries provided the necessary funds there would be no allotment to them because approval for sub-division had to be secured. It is obvious that he had not obtained his lot with reference to any such approved plan. That is certainly no way for an executor or trustee to administer an estate. He had the power to raise financing on the security of the property to meet the costs of administration. There is no evidence of any stance other than was disclosed in that action. The result of his conduct is that seven of the original beneficiaries have died and there has since been no amicable settlement of the estate - indeed, no settlement at all.

The disclosures in the action brought by Gwendolyn are both helpful and relevant to the proper understanding of the issue clamouring for justice. That action cannot be dismissed as res inter alios acta. It is unfortunate, therefore, that Mr. Goffe was enabled to shut Mr. Miller's mouth on that matter because in so doing he also shut his own and was thus prevented from disclosing such plausible explanation as there may well be for his firm, at least as the record shows, at different times representing both sides of the issue, that is, the proper administration of the estate of Henrietta Rodney.

Ground 6, complaining that the trial judge erred in treating as relevant the earlier legal proceedings and the events of 1986, was not expressly abandoned but no submissions were made in support thereof. The legal proceedings brought by Gwendolyn forms part of the record of the court and no argument was advanced to justify the complaint that the court can be estopped from looking at its own record.

The stated purpose of the caveat is to forbid the bringing of the relevant parcel of land under the operation of the Registration of Titles Law, 1888. The sub-division agreement of 1986 and the Parish Council approval of the related plan provide evidence of the interest of the caveators in the entire estate until the agreed plan has been put into effect. Because of difficulties encountered in establishing the boundaries of the 107 acres the plan embraces only 56 acres, two roods, seven perches the boundaries of which have been established. At present there are nine beneficiaries, Delacita Rodney having died without heir-at-law. The approved plan assigns to each of the beneficiaries a building lot of approximately one-half acre - eight such lots facing on the main road with the other just behind three of them and being a corner lot facing on two sub-division roads. In addition each beneficiary has agreed to accept another lot further in from the road each such lot being just a little more than five acres.

This plan represents a genuine effort at an equitable distribution of the land.

Mr. Miller submitted that the issues involved in this appeal go to the root of the action pending in the Supreme Court, that is, Suit C.L. 1990/R-145, which should not be allowed to be dealt with in the summary manner which would result from allowing the appeal and removing the caveat. But with all due respect to Mr. Miller, I must observe that that action ignores the real problem requiring solution, namely, the proper administration of Henrietta's estate.

Beneficiaries of real estate under a Will acquire entitlement to their inheritance by the executor vesting the property in them. The pending action does not allow for an order to be made to that effect because Mavis Rodney has not been sued in her capacity as executrix of Henrietta's Will. However, I think the way is now clear for a happy conclusion to this sad affair. Mavis is, indeed, the executrix of Henrietta's Will and as such is the only person empowered to vest the beneficiaries' interest in them. Now that they all have agreed on the method of apportionment and this has been approved, it only remains for Mavis to be duly recognized as the executrix. She should then proceed to vest the agreed lots in the respective beneficiaries. That would take care of the 56 acres, two roods and one perch agreed on. Thereafter they could take steps to have the remaining portion of the land identified and apportioned. There would thus be no need for any further court action.

However, if there be any difficulty in achieving this end then Mavis, and failing her, the beneficiaries could seek the court's direction for the implementation of the agreed plan.

The result, therefore, is that the appeal is dismissed and the order of the court below refusing the removal of the caveat is affirmed. Since Leleith Roberts did not take any part in the case no order as to costs can be made in her behalf. However, the taxed

or agreed costs of Jane are to be paid by Mavis without any recourse to the estate of Henrietta Rodney. I propose the following order:

Order

In the event of a failure to implement the recommended course within three months from the date of this judgment, then Mavis Rodney or the beneficiaries may petition the court under section 532 of the Civil Procedure Code for directions on the implementation of the said agreement. Mavis Rodney to pay the taxed or agreed costs of Jane Rodney. No order as to costs regarding Leleith Roberts.

FORTE J A

Having had the opportunity of reading the judgment (in draft) of Wright J A, I need only express my own opinion in a brief note.

This action arose out of a challenge by the appellant, to a caveat filed against a certain parcel of land, the subject matter of an application for Registration under the Registration of Titles Act (hereinafter referred to as the Act).

The respondent Jane Rodney-Seale having filed the caveat under the provisions of section 43 of the Act, the appellant thereafter by summons, challenged her to show cause why the caveat should not be removed. In doing so, the appellant invoked the provisions of section 44 of the Act which is set out hereunder:

> "The Registrar, upon receipt of such caveat, shall notify the same to the applicant, and shall suspend proceedings in the matter until such caveat shall have been withdrawn or shall have lapsed as hereinafter provided or until an order in the matter shall have been obtained from the Supreme Court or a Judge."

Then following is the relevant paragraph of the section -

> "The applicant may, if he think fit, summon the caveator to attend before the Supreme Court, or a Judge in Chambers, to show cause why such caveat should not be removed, and such Court or Judge may, upon proof that such caveator has been summoned, make such order in the premises, either ex parte or otherwise, as to such Court or Judge may seem fit."

The learned judge in a judgment reserved and delivered two years later found that there was no valid reason for removing the caveat and made an order accordingly.

In this appeal against that order, Mr. Goffe for the appellant, argued in depth, that the respondent Jane Rodney-Seale having been guilty of laches and/or acquiescence, was estopped from claiming any interest in the land sought to be registered.

The affidavit evidence revealed, as detailed in the judgments of Wright and Downer JJA, that the questioned land, was but a part of 107 acres devised by Henrietta Rodney to her 10 children to be "handled amicably" and to share equally in the proceeds therefrom. The questioned land containing 5 acres and more, had been assigned to himself by the executor to Henrietta's will, Percival apparently the eldest of the children.

In her effort to show cause why the caveat should not be removed, Jane sought through her affidavit to show that the assignment to himself by Percival of that particular parcel of land, could not have been done, in faithful obedience to her mother's will, having regard inter alia, to the following (i) Gwendolyn, one of the beneficiaries, had brought action against Percival, as executor, asking the Court to oversee the equitable division of the land, and alleging unfairness by Percival in assigning a choice section of the 107 acres to himself and (ii) she purports that all the other beneficiaries, had had meetings, out of which came an agreement, which in their minds, provided for an equitable distribution, for which they had sought and got Parish Council approval. In furtherance of that agreement also, six of the beneficiaries or their heirs, had since the lodging of the caveat, brought an action against the respondent in respect of the said land, in which they claimed in keeping with their subdivision plan, the recovery of possession of portions of the land assigned to himself by Percival and which the appellant, his widow and executrix of his will now sought to be registered under the Act.

In my view, the evidence disclosed in the affidavits leave it abundantly clear, that the Administration of Henrietta's estate has not been completed, and more importantly, the beneficiaries, some of whom have never benefitted from the estate, have never been in agreement with the purported allotment attempted by Percival and in particular an allotment to himself of so many acres abutting the main road.

Consequently, I would conclude, that to allow the registration to proceed in the face of such allegations would as the respondents contend, deprive the beneficiaries, of their chance to place before a Court, all the evidence, in order to determine the manner in which the administration of the estate should now proceed, given the death of Percival, and the inactivity in its administration since then. In this regard, a passage cited by Mr. Miller for the respondents, from the text "Registration of Title to Land throughout the Empire" by James Edward Hogg, M.A., Oxon dealing with the Torrens system throughout the Commonwealth including Jamaica is of significant relevance. It reads:

> "The necessity for protecting unregistered interests by means of injunctions, and the close resemblance that the caveat bears to an injunction, justify the general principle of giving an extended meaning to the 'interest' which will support a caveat. It must of course be borne in mind that (as already pointed out ante, P. 173) 'interest' includes a claim to an interest; the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests, and of interests that have not yet become actual interests in the land."

In my view, there is, in the affidavits overwhelming evidence that demonstrates ample reasons why the caveat should not be removed until there is a resolution of all the issues of fact, law and equity, in the appropriate jurisdiction. Mr. Miller's citation from **Re Moosecana Subdivision, and Grand Trunk Pacific Branch Lines** 7 D.L.R. 674 at page 679 is most relevant. It reads:

> "If there is any bona fide question of law or equity to be decided as to the right of the caveator to the estate or interest claimed under the caveat, such question should be disposed of in an action, and the caveat should be continued for a sufficient time to allow an action to be brought in which to decide such question: Gaar Scott Co v. Guigere, 2 S.L.R. 374."

For those reasons, I would opine that all the submissions of Mr. Goffe on the question of laches, acquiescence and estoppel, would in the circumstances, and given the state of the "administration of the estate", be better determined in proceedings brought under section 532 of the Civil Procedure Code as is advocated by my brothers Wright and Downer JJA.

In summary, I would hold, that the evidence before the learned judge, supported a finding that "cause" has been shown by the respondents, why the caveat should not be removed, and consequently I would dismiss the appeal and affirm the Order below.

For the reasons, herein expressed, I concur with the conclusions of Wright and Downer JJA including their persuasive recommendation that either the executrix of Percival's estate who now becomes the executrix of Henrietta's estate, or one or more of the beneficiaries, take(s) the appropriate action under section 532 to bring this matter to an end. In so far as the action filed by the six beneficiaries is concerned, like Wright J A I am not convinced that that course by itself will solve all the apparent problems now existing.

DOWNER, J.A.:

Mavis Rodney is the widow of the deceased, Percival Rodney. She was appointed executrix of his estate which was probated on the 26th of September, 1980. In the course of administering her late husband's estate she has sought to register under the Registration of Titles Act (The Act) a parcel of some five (5) acres of the Rodney lands. Percival was the executor of the estate of Henrietta Rodney, his mother who died in 1958. When he died on the 20th May, 1980, Henrietta's estate which included the disputed five (5) acres was still to be administered. Mavis Rodney was by operation of law then the executrix of Henrietta's estate and therefore became trustee of the Rodney lands. It is important to cite the statutory basis of Mavis' status as it does not seem that any reference was made to it in the proceedings below. It is section 33 of the Conveyancing Act which reads:

> "33. Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative, from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were a chattel real vesting in them or him; and for the purposes of this section, the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.
>
> The section applies only in cases of death after the commencement of this Act."

On this basis therefore, the Rodney lands are subject to a trust with Mavis as the trustee until the administration is completed. As to whether Mavis or her legal advisors realized this is debatable despite the authority of **In the Goods of Reid** [1896]P. 129. It is helpful to set out the headnote of this case in full:

> "Probate of a will was granted to one of two executors, power being reserved to make the like grant to the other executor. The acting executor died, not having fully administered; at the date of his death the other executor had not been heard of for fourteen years. The daughter and sole next of kin of the testator, with the assent of the executors of the acting executor, moved for a grant to herself of letters of administration de bonis non:-
>
> Held, that the grant could not be made, as, upon the non-appearance to a citation of the executor to whom power to prove had been reserved, the chain of executorship would be continued in the executors of the acting executor without any fresh grant from the Court. Leave given to effect service of the citation on the absent executor by advertisement."

Turning now to the respondents who lodged the caveat which is the issue in this case, they are Jane Rodney-Seale, a daughter of Henrietta and a beneficiary under her will. The other is Leleith Rodney-Roberts, the granddaughter of Henrietta. Jane stated that Leleith is a beneficiary under the will of Adlin Rodney, her mother who is another daughter of Henrietta. These two, Jane Rodney-Seale and Leleith Rodney-Roberts are the respondent caveators who repelled the challenge of Mavis who had instituted proceedings by Originating Summons to have the caveat removed before Chester Orr, J. in the Supreme Court who made the Order refusing the removal of the caveat. The appellant Mavis was aggrieved by that Order, so she has invoked the jurisdiction of this court.

> Did the respondents Jane and Leleith have the requisite standing to be caveators pursuant to section 43 of the Registration of Titles Act?

Since section 43 of the Act stipulates the requisite conditions for lodging a caveat it is best to set it out. It reads thus:

"Caveat against Registration of Land

> 43. Any person claiming any estate or interest in the land described in the advertisement may, in person or by agent, within the time appointed by the Referee under section 33, lodge a caveat with the Registrar, in the form in the Second Schedule, forbidding the bringing of such land under this Act; every such caveat shall be signed by the caveator or by his agent, and shall particularize the estate or interest claimed; and the person lodging such caveat shall, if required by the Registrar, support the same by a statutory declaration, stating the nature of the title under which the claim is made, and also deliver an abstract of his title to such estate or interest..."

To appreciate the interest which the caveators, Jane and Leleith claim in the land, Mavis the applicant seeks to register, there must be a reference to matriarch Henrietta, whose will reads as follows:

> "THIS IS THE LAST WILL AND TESTAMENT of me Henrietta Rodney of Toll Gate, Clarendon in the County of Middlesex. I HEREBY revoke all wills and testamentary instruments heretofore by me made. I APPOINT PERCIVAL G. RODNEY of Toll Gate, Clarendon to be the Executor of this my will. I direct my Executor to pay my just debts and funeral and Testamentary Expenses. I GIVE AND BEQUEATH to my (2) Two Sons James Rodney, Percival Rodney and (8) eight daughters namely Adlin Rodney, Hilda Rodney, Lucille Rodney, Delacita Rodney, Lineve Rodney, Jane Rodney, Gwendolyn Rodney and Clarita Rodney All that portion of land known as Paddock and situated at St. Toolies, Toll Gate, Clarendon. Consisting of (107) one hundred and seven acres of land to be amicable handled and any proceeds from the said land to be equally divided among the (10) ten children mentioned above. I give and bequeath to my daughter Ruth Rodney (4½) four and a half acres of land part of (9) nine acres of land situated at Lowes-penn, Toll Gate, Clarendon. I give and bequeath the remaining balance of land at Lowes-penn to the other Eleven children aforementioned in this will."

She wished that the distribution be "amicable handled and that the proceeds be divided equally." It seems that all that 'amicable' meant was on the issue of division of the land recourse to the courts should be avoided if possible and the fact that she directed that the

proceeds be divided equally, assuming there was a sale, suggests that the value of each parcel would be roughly equal if the land were to be subdivided. She stated the acreage as one hundred and seven (107) acres but as the land was not then surveyed, this might have been an estimate.

Jane's affidavit must now be examined to ascertain if she had a claim for an estate or interest in the land to satisfy the conditions of section 43 of the Act to lodge a caveat against the registration of five (5) acres in dispute. Since Mavis is the applicant for registering the disputed parcel of land it is helpful to set out the Originating Summons on which she moved the court. It reads:

> "1. An Order that the Defendants do forthwith withdraw the Caveat which they have lodged against all that parcel of land part of St. Toolies in the parish of Clarendon containing by survey five acres twenty-two perches and three tenths of a perch of the shape and dimensions and butting as appears by the Plan thereof dated the 13th January 1977 prepared by N.W. Irvine, Commissioned Land Surveyor and lodged with Application No. 628849."

To appreciate the gist of Jane's case as caveator, it is necessary to refer to paragraph 7 of Mavis' affidavit. It reads:

> "7. Throughout the period Percival was in contact with his sisters abroad, and particularly with Jane, the firstnamed Defendant, who was his favourite (she was the only one of his sisters whom he left anything in his will). By 1965 they had agreed how the part of the land with frontage on to the main road was to be divided, as shown by the Land Valuation Plan dated January 6, 1966 which I exhibit to this affidavit marked 'MER3'."

In response the caveator, Jane replies thus:

> "6. That I deny paragraph 7 of her Affidavit and in reply I state that Percival only kept the other sisters abroad informed of his conduct pertaining to the estate in relation to their share of the payment of land taxes on the said property. That the said land valuation plan dated

"January 6, 1966 referred to in paragraph 7 of the Plaintiff's Affidavit, was done by Mr. N.W. Irvine, Commissioned Land Surveyor and that the said N.W. Irvine, was responsible for the survey of the said land for which subdivisional approval was granted by the Parish Council of Clarendon on December 8, 1988 and that the said division of the land of which December 8 Subdivision is related was, in many respect, in keeping with the January 6, 1966 division of the land by Percival Rodney as indicated in the January 6, 1966 Survey Diagram referred to in paragraph 7 of the Plaintiff's said Affidavit and I attach hereto as Exhibit 'B' a copy of Sub-division Approval dated December 8, 1988."

What is significant to note is that the Land Valuation Plan does not purport a subdivision and that Jane the caveator is indicating that she agrees with the approved subdivision plan. This court asked for a copy of the pleadings in the pending suit of which Jane is the first plaintiff. The endorsement on the writ indicates the gist of the claim as it relates to the disputed parcel of five acres. It reads in part:

" **ENDORSEMENT**

The Plaintiffs' claim is against the Defendant for:

(1) A Declaration that the Defendant is entitled to only lots 4 and 16 of lands at St. Tollies at Toll Gate District, in the parish of Clarendon, as specified in Sub-division Approval by the Parish Council of Clarendon dated December 8, 1988.

(2) Recovery of possession of lot 5 and portions of 3 and 10 at St. Tollies at Toll Gate in the parish of Clarendon aforesaid.

(3) An order that the Defendant forth-with by herself, her servants and/or agents pull down and remove so much of the said fence as she has erected on lots 5 and 3 and 10 of St. Tollies, Toll Gate in the parish of Clarendon aforesaid.

(4) An injunction to restrain the Defendant by herself, her servants and/or agents or otherwise, howsoever, from occupying or erecting or continuing to occupy or erect any fence or building upon lots 5 and 3 St. Tollies, Toll Gate in the parish of Clarendon."

It seems that neither the Writ of Summons nor the Statement of Claim recognized Mavis' status as an executrix by operation of law. Had her status been recognized the appropriate and inexpensive procedure would have been to resort firstly to section 532 or 537 of the Judicature (Civil Procedure Code) Law to compromise or determine the claims of all the beneficiaries. So, Mavis should have sought direction on an Originating Summons as to how the estate should be administered and if she refused, the beneficiaries should have summoned her in her capacity as trustee to have the court give directions on administration. This would not preclude the court from directing that a special issue be tried if that was required. To show how the land sought to be registered was in dispute, paragraph 8 of the caveator, Jane's affidavit is pertinent. It reads:

> "8. That in reply to paragraph 9 of the Plaintiff's Affidavit I state that without the advise of expert evidence it can neither be denied nor affirmed that area marked 21 was area built on by Percival Rodney. I further state that the area marked '21' in the Plaintiff's Affidavit being some 5 acres and 22.3 perches and being frontage of the said land was not alloted to Percival Rodney by way of Consent of all the relevant beneficiaries since such allotment would constitute a division of the said lands without each beneficiary being given a portion of the frontage of the said; and I further state that it was as a result of this appropriation of the said 5 acres and 22.3 perches of land that my sister, Gwendolyn Rodney-Bryan commenced action, Suit No. E. 127 of 1979, filed by Messrs. Myers, Fletcher and Gordon, Manton & Hart, against Percival Rodney for the Court's direction as to the division of the said land, and I further state that the division of the land by Percival Rodney was always in dispute not only by Gwendolyn Rodney-Bryan but by all the other beneficiaries, and I further state that by the admission of Percival Rodney, as stated in his Affidavit dated October 9, 1979, in the said Suit No. E. 127 of 1979, where he stated at paragraph 11 that the services of Mr. N. W. Irvine Commissioned Land Surveyor was obtained

> "by him for the preparation of a subdivision plan and a 'sketch plan' was then made; and I further state that the 'sketch plan' referred to in paragraph 11 of Percival Rodney's said Affidavit which sought to divide the said lands, was never consented to by any of the other beneficiaries under the Will of Henrietta Rodney, and I attach as Exhibit "C" a copy of the Originating Summons, Affidavit of Gwendolyn Rodney-Bryan and Affidavit of Percival Rodney, all being in Suit No. E. 127 of 1979."

Here is paragraph 11 of Percival's affidavit referred to by Jane:

> "**That I obtained the services of** Mr. N. W. Irvine a Commissioned Land Surveyor of 25 Anderson Drive, May Pen, Clarendon to prepare a subdivision plan and he made a sketch plan whereby a proposed road of 24 feet wide would run through the land from a main road leading from May Pen to Mandeville touching on the southern boundary of the land."

That the issue of the 5 acres and 22.3 perches is at the heart of the dispute as seen by the caveator, Jane and others is highlighted in paragraph 10 of her affidavit. It states:

> "10. That in reply to paragraph 11 of the **Plaintiff's** Affidavit, I state that the **Ownership** of the house built by Percival **Rodney has never been in dispute but instead is the area of land currently** occupied by the Plaintiff which is in dispute. That the area currently occupied by the said Plaintiff, Mavis Rodney, was not the area Percival Rodney occupied during his lifetime. The area now occupied by the said Plaintiff is much larger than the area occupied by Percival Rodney in his lifetime; and I further state that the 'Sketch Plan' obtained by Percival Rodney which showed him to have been in occupation of 5 acres 22.3 perches was never implemented nor complied with the beneficiaries and the beneficiaries including myself had not consented to the division as shown in the said 'Sketch Plan'."

Further extracts from paragraph 10 of the caveator, Jane's affidavit are useful. It in part states:

> "I further state that the said lands were surveyed and subdivided by Mr. N.W. Irvine, Commissioned Land Surveyor who was the said person who had prepared the said 'sketch plan' on behalf of Percival Rodney and I further state that, Mr. Keith Bryan, nephew of Gwendolyn Rodney-Bryan, acting under the written permission of Gwendolyn Rodney-Bryan granted to him on March 23, 1983, to act in

"her stead in the surveying and subsequent sub-division of 56 acres 2 roods and 7 perches of the said lands, applied and obtained subdivision approval of the said portion of the said lands after he had obtained the consent of the beneficiaries including Mavis Rodney. I attach hereto as Exhibit "D" a copy of the said Consent to Act in Capacity of Beneficiary.

The said Mavis Rodney contributed monies towards the sub-division approval and was given receipt acknowledging her consent by the said Keith Bryan. I attach hereto as Exhibit "E" a copy of the said receipt."

If these facts are accepted in proceedings pursuant to section 532 of the Judicature (Civil Procedure Code) Law, then there would be grounds for approval of a compromise in accordance with section 532 (f). Then it is pertinent to cite from another paragraph of Jane's affidavit as caveator:

"19. In reply to paragraph 20, I state as follows; that a Caveat dated October 6, 1990 was lodged by myself and Lelèith Rodney-Roberts, the daughter of Adlin Rodney, deceased, against the registration of application No. 628849 lodged by the Plaintiff for the registration of 5 acres and 22.3 perches of land being lands forming part of the frontage of the said lands; and I further state that since the lodging of the said Caveat document, proceedings have been commenced in this Honourable Court by way of Suit No. C.L. 1990/R 145, seeking among other things a Declaration that the said Plaintiff, Mavis Rodney is only entitled to lot 4 and lot 16, being a total of approximately 5½ acres of land, a similar amount entitled to by all the beneficiaries; and I further state that if the said Caveat was to be removed at this stage then the substantive issue which concerns serious questions of law and fact to be tried in Suit No. C.L. 1990/R 145 would be put at an end since the lands in Application No. 628849 being 5 acres and 22.3 perches would then be registered and the registration of same would effectively put to an end the substantial issues to be tried in Suit No. C.L. 1990/R 145; and I further state that the portion of lots 3 and 10 being entitled by Antonio Anderson and myself and all of lot 5 being land entitled to by Clarita Rodney-Edwards the youngest of the Rodney children, as consented to by all the beneficiaries, could not be compensated for by an award of damages if the Plaintiff was able to have her said application registered;..."

It is now appropriate to state that Leleith filed no evidence to substantiate her claim for an estate or interest. She therefore has no standing to be caveator. Jane's case is different, she has made out an arguable case for lodging the caveat and she has made it out against the background of Mavis' evidence. So I find that she has the requisite standing to be a caveator. Had Leleith produced some evidence that she was Adlin's daughter and heir-at-law or executrix of her estate,her position would have been established.

Did Jane adduce an arguable case in law that demonstrated that she was entitled to have the caveat maintained?

In supporting the claim of the caveator Jane, Mr. Miller relied on certain passages from Registration of Titles to land throughout the Empire by James Edward Hogg, M.A., Oxon. Pages 57-58 contain the following relevant passage:

> "In the other eleven jurisdictions then seven Australasian, Manitoba, Trinidad-Tobago, Jamaica, and Leeward Islands - a special procedure is provided for, and as the first step the objector files a 'caveat' in which he 'forbids' the registry to proceed with the application. The filing of this caveat is 'in the nature of initiation of litigation,' and operates as a statutory injunction, staying registration so that the question of disputed title may be settled by the applicant (including any nominee) on the caveator taking proceedings for that purpose. The entry of a caveat and the adoption of the special procedure provided by the statutes is not of course compulsory, and ordinary proceedings by way of action for recovering the land, or obtaining an injunction and declaration of title, could be taken without filing any caveat."

A significant feature of his submission was that the caveator, Jane had a claim for an estate or interest in the five acres of the disputed land, but that her claim was barred by estoppel, laches or acquiescence. He made no response to the numerous authorities cited on behalf of the applicant Mavis because he contended that the proper forum to decide the issue as to title is in the proceedings Jane and other beneficiaries have brought in the Supreme Court. That action is entitled "Jane Rodney-Seale, Gwendolyn Rodney-Bryan,

Clarita Rodney-Edwards, Doris Rodney-Mason, Leleith Rodney-Roberts, Antonio Anderson, Plaintiffs and Mavis Rodney, Defendant, Suit No. CL. S of 1990 and at the court's insistance the Amended Statement of Claim, Defence and Reply were exhibited. These pleadings demonstrate the error of both parties in taking an adversary stance before the estate was administered. The principal fault lies with Mavis, when she failed to resort to Title 43, section 532 of the Judicature (Civil Procedure Code) Law. If there is any issue to be tried, the court may resort to section 539 of the Code although this is a case which might be determined by resort to section 542 if there be agreement of the parties at this stage. It was and is still open to Jane and others to resort to section 537(2) of the Judicature (Civil Procedure Code) Law. Returning to Mr. Miller's submission he cited another passage from the aforementioned text at page 61 which reads thus:

> "On a mere summons or motion to remove the caveat the substantive rights of the parties cannot usually be determined. But if regular proceedings be taken, either in the ordinary way of litigation, or (in New South Wales, South Australia, and Manitoba) under the special procedure, a declaration of title may be made in favour of either caveator or applicant. If the caveator actually claims and is held entitled to the ownership of the land, his rights will be declared accordingly. In the event of his then desiring to be registered - taking in fact the place of the applicant - he might possibly be required by the registry to make a formal application, but a fresh investigation of his title in detail would not usually be necessary."

A useful gloss on section 43 of the Act was referred to from Hogg's text at page 173. It reads:

> "In some enactments the person seeking to have a restrictive entry made is referred to as 'being interested in' the property to be protected, in others as having or claiming 'an interest in' it. It has been said that the former expression 'is of wider compass than' the latter, but it is difficult to see any practical distinction between them, and the expression 'interested in' occurs in New Zealand as well as in Ontario - though in New Zealand a narrower view of the right to enter a caveat has been taken than was taken in the

> "Ontario case cited. The two expressions will be treated here as synonymous.
>
> In some enactments the claimant is referred to as 'interested in' or 'entitled to a right in' the property, in others as 'claiming to be interested' or 'claiming an interest' in it. There appears to be no practical distinction between these expressions for the present purpose, and they will be treated as synonymous. Though not important, it should perhaps be pointed out that it is only in jurisdictions which have the 'caveat' that the word 'claim' occurs."

Section 44 of the Act sets out the procedure in the light of Mavis' summons that the caveat be withdrawn. That section reads:

> "44. The Registrar, upon receipt of such caveat, shall notify the same to the applicant, and shall suspend proceedings in the matter until such caveat shall have been withdrawn or shall have lapsed as hereinafter provided or until an order in the matter shall have been obtained from the Supreme Court or a Judge.
>
> The applicant may, if he think fit, summon the caveator to attend before the Supreme Court, or a Judge in Chambers, to show cause why such caveat should not be removed, and such Court or Judge may, upon proof that such caveator has been summoned, make such order in the premises, either ex parte or otherwise, as to such Court or Judge may seem fit."

So for the test laid down for the caveator to "show cause why such caveat should not be removed", Mr. Miller cited yet another passage from Hogg's text which is appropriate. It reads thus at page 184:

> "The expression 'interest' or 'interested' in land occurs in every one of the enactments by which the caveatable interest is defined, except in the Leeward Islands - where a caveat may be entered by 'any person entitled to stay the registration.' The latter phrase would seem to mean that a claim to any defined right relating to the land and enforceable against its owner will be sufficient caveatable interest. This is in fact a possible interpretation of 'interest' in all jurisdictions, and has received judicial sanction in at least one - Federated Malay States, where the 'wide and comprehensive' wording of the enactment is referred to. That the words of a corresponding enactment authorizing the entry of caveats ' should have a wide interpretation given to them' has also been laid down in New Zealand. The necessity for protecting unregistered interests by

> "means of injunctions, and the close resemblance that the caveat bears to an injunction, justify the general principle of giving an extended meaning to the 'interest' which will support a caveat. It must of course be borne in mind that (as already pointed out ante, p. 173) 'interest' includes a claim to an interest; the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests, and of interests that have not yet become actual interests in the land."

When the principle expressed in this passage is applied to the facts adduced in the caveator, Jane's affidavit, it is clear that she has "shown cause why the caveat should not be removed." It is pertinent to note that in Norma Haddad v. Riverton City Limited and The Registrar of Titles Suit No. E. 230 of 1975 judgment delivered July 7, 1976, an earlier case on caveats under the Act, Chester Orr, J.(actg.) demonstrated a more reasonable approach to support the caveat than his judgment in the instant case. In fact the following passage from that judgment is worth quoting as the principle is relevant to the instant case. Page 3 of the judgment reads thus:

> "Questions as to whether or not the contract was frustrated as a result of the Order under the Flood Control Law, whether or not it was repudiated, whether or not the plaintiff can now maintain an action for Specific Performance are all matters to be decided by the Court of trial.
>
> As Lord Diplock said in American Cyanamid v. Ethicon 1975 1 A.E.R. 504 at 510 dealing with an injunction:
>
> > 'It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that:"...

'it aided the Court
in doing that which
was its great object,
viz **abstaining from**
expressing any opinion
upon the merits of the
case until the hearing.'

(Wakefield v. Duke
Buccleuch)

These observations are apposite to
the present application."

Bearing in mind that the disputed land is part of trust property and that the "rights or interests" of the beneficiaries of Henrietta's estate are of paramount importance, the principle in the above passage is appropriate to the circumstances of this case. Accordingly, therefore, the Order below refusing to remove the caveat is affirmed albeit for somewhat different reasons. The agreed or taxed costs of this appeal is for the respondent, caveator Jane Rodney-Seale. Further, this court ought to direct that either the trustee Mavis or Jane and the other beneficiaries of Henrietta's estate take steps to have the "rights or interests" of the beneficiaries determined pursuant to the provisions of Title 43 of the Judicature (Civil Procedure Code) Law. In this regard, it is almost superfluous to remind the experienced counsel for the parties that proceedings for "the determination of any question arising in the administration of the estate" are not of an adversary nature. Counsel should assist the court to administer the estate in accordance with the spirit and intendment of Henrietta's will.

Cases referred to

(1) In the Goods of Perry 163 E.R. 540

(2) Re Moosecana Subdivision, and Grand Trunk Pacific Branch Lines 7 D.L.R 674

(3) In the Goods of Reid [1896] P129.

(4) Nonna Haddad v. Riverton City Limited and the Registrar of Titles Suit E 23 of 1975 - 7/7/76.