I am practically in accord with the views of *Cullen* C.J. and *Sly* J., and agree that these appeals should be dismissed.

I would add that the offer voluntarily made to proceed to separate assessment in respect of the Livingstone House property and the residue property was very fair.

Appeals dismissed with costs.

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HARRIS v. MINISTER FOR PUBLIC WORKS, N.S.W.

Isaacs J.

Solicitors, for the appellants, *Bradley & Son.*

Solicitor, for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

[HIGH COURT OF AUSTRALIA.]

B. L.

BARRY . . . . . APPELLANT;
PLAINTIFF,

AND

HEIDER AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 17, 18; *Nov.* 19, 20, 23, 24, 25; *Dec.* 16.

Griffith C.J., Barton and Isaacs JJ.

Land—Transfer obtained by fraud—Transfer not registered—Equitable interest created by transferee—Mortgage—Rights of mortgagee—Caveat—Right of solicitor to withdraw—Attestation of instruments—Proof of instruments—Attestation by solicitor—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *secs.* 2 (4), 41, 72, 107, 108.*

* The *Real Property Act* 1900 provides:—

Sec. 2 (4) "All laws, Statutes, Acts, ordinances, rules, regulations, and practice whatsoever relating to freehold and other interests in land and operative on the first day of January one thousand eight hundred and sixty-three are, so far as inconsistent with the provisions of this Act, hereby repealed so far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act."

Sec. 41 (1) "No instrument, until registered in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under

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Notwithstanding the provisions of secs. 2 (4) and 41 of the *Real Property Act* 1900 an unregistered transfer of land confers upon the transferee an equitable claim or right to the land which is assignable by any appropriate means, and it also operates as a representation, addressed to any person into whose hands it may lawfully come without notice of any right of the transferor to have it set aside, that the transferee has such an assignable interest.

The proprietor of land had executed a transfer of it to S., which was not registered and which was voidable by him on the ground of fraud on the part of the transferee. S., to whom the transfer had been delivered, applied to H., who had no notice of the fraud, for a loan on the security of the land. He produced to H. the transfer, which purported to be duly executed and attested, together with an order from the transferor to the Registrar-General to deliver to H.'s solicitors the certificate of title which was lying in the Registrar-General's office. On the faith of these documents, and of an instrument of mortgage executed by S., H. made the loan.

Held, that H. was entitled as against the proprietor to a charge on the land in terms of mortgage.

Subsequently a caveat was lodged by a solicitor on behalf of the proprietor stating that the purchase money had not been paid. During the course of negotiations for a second mortgage by the transferee to G., the solicitor withdrew the caveat, although in fact the purchase money had not been paid. G., who knew of the caveat and of its withdrawal, and also that the solicitor acted for the transferee as well as for the proprietor, lent money on a second mortgage of the land.

Held, that G.'s mortgage should be postponed to the proprietor's lien for the unpaid purchase money.

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the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such instrument, or by this Act declared to be implied in instruments of a like nature."

Sec. 72 (2) provides that every caveat forbidding the registration of an instrument "shall be signed by the caveator or by his solicitor, known agent, or attorney," and (4) that "every such caveat may be withdrawn by the caveator."

Sec. 107 "(1) Instruments executed pursuant to the provisions of this Act shall be held to be duly attested if attested by one witness. (2) The execution of such instrument may be proved—(*a*) if the parties executing the same are resident within New South Wales, before the Registrar-General, or before a notary public, justice of the peace, or a commissioner for taking affidavits; . . ."

Sec. 108 (1) "The execution of any such instrument may be proved in the following manner, that is to say,—(*a*) If the person executing such instrument is personally known to the Registrar-General, justice, or other person as aforesaid, and in New South Wales, he may attend and appear before such Registrar-General, justice, or other person and acknowledge that he did freely and voluntarily sign such instrument, and upon such acknowledgment the Registrar-General, justice, or other person shall attest the same by his signature."

Decision of *Simpson* C.J. in Eq. : *Barry* v. *Schmidt*, 13 S.R. (N.S.W.), 639, affirmed with a variation.

By *Griffith* C.J. and *Barton* J.—The provisions of sec. 107 of the *Real Property Act* 1900 as to attestation of instruments are facultative, and not mandatory, and an instrument the execution of which is attested by a solicitor, may, notwithstanding the provisions of secs. 107 and 108, be registered without further proof of execution.

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that a solicitor who is authorized to lodge a caveat on behalf of a client has, *prima facie*, as regards the Registrar-General, authority under sec. 72 to withdraw it, at least until the caveat has been noted on the title, and, *semble*, also as against a person not put upon inquiry.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equity jurisdiction by Charles Barry against Hector Schmidt, in which the plaintiff asked that the defendant might be restrained by injunction from proceeding with the registration of a transfer of certain land of which the plaintiff was the registered proprietor, and for a declaration that the transfer was void and of no effect, and that the defendant might be ordered to deliver it up to the plaintiff to be cancelled. The defendant put in a statement of defence but did not appear at the hearing, and *Simpson* C.J. in Eq., on 31st March 1913, pronounced judgment granting the injunction asked for, declaring that the transfer was void and ordering Schmidt to deliver it up for cancellation. On 4th April 1913, before the judgment was drawn up, Selina Emily Heider and Charles Clarence Gale, who alleged that Schmidt had executed mortgages of the land in favour of them respectively, applied that all proceedings under the judgment of 31st March should be stayed and that they should be joined as parties to the suit. On 17th April an order was made that Heider and Gale should be made defendants in the suit, and that cause should be heard between the plaintiff and them. The suit accordingly proceeded, and a decree was made whereby, after reciting the order and declaration of 31st March 1913, it was declared that Heider and Gale were entitled as against the plaintiff to charges upon the land in the terms of their respective mortgages, and it was ordered that, subject to such declaration and

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to the execution of proper instruments to carry it into effect, the order of 31st March should stand and be of full effect: *Barry* v. *Schmidt* (1).

From that decision, so far as it declared that Heider and Gale were entitled to charges upon the land, the plaintiff now appealed to the High Court.

The material facts and the nature of the arguments are stated in the judgments hereunder.

Loxton K.C. (with him *Maughan* and *Monahan*), for the appellant.

Knox K.C. and *Bethune*, for the respondent Heider.

Knox K.C. (with him *Coghlan*), for the respondent Gale.

During argument reference was made to *McCheane* v. *Gyles* [*No.* 2] (2); *R.* v. *Inhabitants of Harringworth* (3); *Taylor on Evidence*, 10th ed., vol. II., pars. 1839, 1844, 1845; *Whyman* v. *Garth* (4); *Cussons* v. *Skinner* (5); *Colonial Bank* v. *Cady* (6); *Rimmer* v. *Webster* (7); *Fry* v. *Smellie* (8); *Burgis* v. *Constantine* (9); *Finucane* v. *Registrar of Titles* (10); *National Bank of Australasia* v. *United Hand-in-Hand and Band of Hope Co.* (11); *White* v. *Neaylon* (12); *Chasteauneuf* v. *Capeyron* (13); *Liverpool Borough Bank* v. *Turner* (14); *McEllister* v. *Biggs* (15); *Plumpton* v. *Plumpton* (16); *Kingsford* v. *Merry* (17); *Henderson & Co.* v. *Williams* (18); *Goodwin* v. *Robarts* (19); *Maddison* v. *McCarthy* (20); *Carlisle and Cumberland Banking Co.* v. *Bragg* (21); *Farquharson Brothers & Co.* v. *C. King & Co.* (22); *Balkis Consolidated Co.* v. *Tomkinson* (23); *Mathieson* v. *Mercantile Finance and Agency Co. Ltd.* (24);

(1) 13 S.R. (N.S.W.), 639.
(2) (1902) 1 Ch., 911, at p. 917.
(3) 4 M. & S., 350.
(4) 8 Ex., 803.
(5) 11 M. & W., 161, at p. 167.
(6) 15 App. Cas., 267, at p. 273.
(7) (1902) 2 Ch., 163, at p. 171.
(8) (1912) 3 K.B. 282, at p. 292.
(9) (1903) 2 K.B., 484.
(10) (1902) S.R. (Qd.), 75.
(11) 4 App. Cas., 391.
(12) 11 App. Cas., 171.
(13) 7 App. Cas., 127.
(14) 1 John. & H., 159; 2 DeG. F. & J., 502.
(15) 8 App. Cas., 314.
(16) 11 V.L.R., 733.
(17) 1 H. & N., 503.
(18) (1895) 1 Q.B., 521.
(19) 1 App. Cas., 476, at p. 490.
(20) 2 W.W. & aB. (Eq.), 151.
(21) (1911) 1 K.B., 489.
(22) (1902) A.C., 325.
(23) (1893) A.C., 396, at p. 403.
(24) 17 V.L.R., 271; 12 A.L.T., 220.

Paoro Torotoro v. *Sutton* (1); *Sander* v. *Twigg* (2); *Josephson* v. *Mason* (3); *Cuthbertson* v. *Swan* (4); *Franklin* v. *Ind* (5); *Cornish* v. *Abington* (6); *Carr* v. *London and North Western Railway Co.* (7); *Cave* v. *Cave* (8).

Cur. adv. vult.

Dec. 16.

GRIFFITH C.J. read the following judgment:—The appellant, who was the registered proprietor of land under the *Real Property Act* 1900, on 19th October 1912 signed a memorandum of transfer in the prescribed form, which purported to transfer the land to one Hector Schmidt in consideration of a sum of £1,200, the receipt of which was acknowledged. The transfer was attested by a Mr. E. J. Peterson, a solicitor. The land included in it was not the whole of the land comprised in the certificate of title, the appellant having on the previous 23rd September transferred part of it to one Lawlor. Application had been made by the appellant to the Registrar-General for a fresh certificate of title for the residue, but the new certificate had not been issued when he executed the transfer to Schmidt.

In the same month of October Schmidt, through Peterson, who acted as his solicitor, applied to Messrs. Gale & Gale, who were solicitors for the respondent Mrs. Heider, for a loan of £800 on the security of the land comprised in the transfer from the appellant to Schmidt, which Peterson produced. After inquiry as to the value of the proposed security Mrs. Heider agreed to make the loan. Messrs. Gale & Gale then asked Peterson to obtain an order from the appellant directed to the Registrar-General for delivery of the new certificate of title to them. On 29th October Schmidt and Peterson came together to their office, when Peterson handed to them the transfer of 19th October, together with a document dated 23rd October, signed by appellant and attested by Peterson, by which he authorized and requested the Registrar-General to deliver to Messrs. Gale & Gale the "Deed of the land being balance certificate of title," mention-

(1) 1 N.Z.J.R. (N.S.) S.C., 57, at p. 65.
(2) 13 V.L.R., 765; 9 A.L.T., 101.
(3) 12 S.R. (N.S.W.), 249.
(4) 11 S.A.L.R., 102.
(5) 17 S.A.L.R., 133, at p. 164.
(6) 4 H. & N., 549.
(7) L.R. 10 C.P., 307.
(8) 15 Ch. D., 639.

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ing the register number of the old certificate and describing the land. On the faith of these documents Messrs. Gale & Gale paid over the £800, and Schmidt executed a memorandum of mortgage in the prescribed form in favour of Mrs. Heider. On 3rd December Schmidt executed another mortgage for £400 in favour of the respondent Gale (who was a member of the firm of Gale & Gale) under circumstances which I will afterwards state.

None of these documents had been registered up to 20th December, the delay having apparently been caused by an adjustment of the boundaries of the land rendered necessary by a fresh alignment of the streets on which it fronted.

On that day the appellant commenced this suit against Schmidt alone, alleging that he was an old man with little business capacity, that he had recently ascertained that his signature had been obtained to the memorandum of transfer of 19th October, and that he had in fact agreed to sell the land to Schmidt for £4,000, which was its real value, and denying that he had knowingly signed the transfer. He charged that his signature was obtained by a false and fraudulent representation by the defendant or his agent as to the nature, effect and meaning of the document, or through some fraudulent trick practised on him by the defendant or his agent. He also alleged that the purchase money mentioned in the transfer had not been paid or offered to him, and that it was grossly inadequate. He claimed an injunction against registration of the transfer, a declaration that it was void, and an order that it might be delivered up for cancellation. Schmidt put in a defence, but did not appear at the hearing, which took place on 31st March 1913, before *Simpson* J., Chief Judge in Equity, who pronounced judgment, granting the injunction asked for, declaring that the transfer was void, and ordering Schmidt to deliver it up for cancellation.

Before the judgment was drawn up it came to the knowledge of Messrs. Gale & Gale, and on 4th April 1913 the respondents applied on notice to the plaintiff for an order that they should be joined as parties to the suit, and that all proceedings on the judgment pronounced on 31st March should be stayed. On 17th April the Court ordered that the respondents should be made defendants in the suit, and that the cause should be heard

between the plaintiff and them. They accordingly put in a defence, claiming equitable charges upon the land in question, and submitting that the plaintiff was estopped as against them from disputing the validity of the memorandum of transfer of 19th October. The case came on in September for further hearing as between the appellant and the respondents, and on 7th October judgment was given, by which, after reciting the previous proceedings already stated, the Court declared that the respondents were entitled as against the appellant to charges upon the land in terms of their respective mortgages, and ordered that subject to such declaration and to the execution of proper instruments to carry it into effect the transfer of 19th October should be cancelled, and that in other respects the order pronounced on 31st March should stand. The present appeal is from this judgment.

The first objection taken is that the respondents were improperly joined as defendants. On this point it is sufficient to say that the order joining them was within the competency of the Court, and that on the materials before the Court it was properly made.

The second ground of appeal is that the transfer impeached was a nullity, on the ground that the appellant was deceived as to the nature and character of the document which he was signing, so that the transfer was not his deed (*Foster* v. *Mackinnon* (1)). On this point the learned Judge found against the appellant on the facts, and on the evidence I can see no reason for differing from him.

The substantial ground of appeal is that upon a proper construction of the provisions of the *Real Property Act* the transfer was inoperative for any purpose until registration, so that no claim could be founded upon it of any kind, except, perhaps, a personal right of action by Schmidt himself.

A subsidiary point was made that, even if such a transfer could under some circumstances create a right before registration, the particular transfer in question did not do so, because, it is said, by sec. 107 of the *Real Property Act* 1900 it required

(1) L.R. 4 C.P., 704.

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attestation, and the attesting witness Peterson was not called as a witness at the hearing.

The first answer to this objection is that the plaintiff, having admitted the execution of the transfer in his pleadings and himself put it in evidence, cannot now be allowed to deny the fact of execution. The second answer is that the provisions of sec. 107 are not mandatory, but facultative. That section provides that instruments executed pursuant to the provisions of the Act shall be held to be duly attested, if attested by one witness. The transfer in question purports to be so attested. The section goes on to provide that the execution of such instruments "may be proved before" certain specified persons. I have some difficulty in interpreting this provision, but I understand that in practice it is taken to mean that an instrument attested by any of those persons is admitted to registration. Sec. 108 provides that the execution of an instrument "may be proved" by the attendance and voluntary acknowledgment of the person executing it before any one of certain specified persons to whom he is personally known, or by the attendance of the attesting witness before any one of the persons specified in sec. 107, and answering certain prescribed questions, the answers being certified upon the instrument. This may be done at any time before registration. The operation (if any) of the instrument after execution and before registration is not affected by these provisions. Moreover, it appeared from the evidence of the Deputy Registrar-General that for the last thirty years at least it has been the practice of the office to accept the attestation by a solicitor of the execution of an instrument under the Act as sufficient, and that the transfer in question would have been admitted to registration without further proof of execution. This objection therefore fails.

The main contention for the appellant is that an unregistered instrument is inoperative to create any right with respect to the land itself. This argument is founded upon the provision in sec. 2, sub-sec. 4, of the Act that "All laws, Statutes, Acts, ordinances, rules, regulations and practice whatsoever relating to freehold and other interests in land and operative on the first day of January one thousand eight hundred and sixty-three are, so far as inconsistent with the provisions of this Act, hereby

repealed so far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act," and upon sec. 41, which enacts that "(1) No instrument, until registered in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument, or by this Act declared to be implied in instruments of a like nature. (2) Should two or more instruments executed by the same proprietor and purporting to transfer or encumber the same estate or interest in any land be at the same time presented to the Registrar-General for registration and endorsement, he shall register and endorse that instrument under which the person claims property who shall present to him the grant or certificate of title of such land for that purpose." I note in passing that the second paragraph of this section treats the person presenting an instrument for registration as a person "claiming property" under it.

In my opinion the only relevant words of sec. 2, "All laws . . . rules . . . practice," are not of themselves sufficient to embrace the body of law recognized and administered by Courts of Equity in respect of equitable claims to land arising out of contract or personal confidence. But it is said that the words of sec. 41 "No instrument until registered . . . shall be effectual to pass any estate or interest in any land under the provisions of this Act" have that effect.

It is now more than half a century since the Australian Colonies and New Zealand adopted, in substantially the same form but with some important variations, the system, sometimes called the "Torrens" system, which is now in New South Wales embodied in the *Real Property Act* 1900. With the exception of one decision in South Australia, soon afterwards overruled,

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the contention of the appellant has never been accepted in any of them.

I proceed to consider other provisions of the Act bearing on the question for the purpose of discovering whether equitable rights or claims with respect to land are recognized by it.

Part IX. of the Act deals with trusts. By sec. 82 the Registrar-General is forbidden to make any entry of any notice of trusts, whether expressed, implied or constructive, in the register book. The section goes on to provide that trusts may be declared by any instrument, and that a duplicate or attested copy of the instrument may be deposited with him for safe custody and reference. The instrument itself is not to be registered, but the Registrar-General is required to enter on the register a caveat forbidding the registration of any instrument not in accordance with the trusts and provisions contained in the instrument so deposited. This is, in my opinion, an express recognition of the equitable rights or interests declared by that instrument. Sec. 86 provides that whenever any person "interested in land" under the Act appears to be a trustee within the meaning of any Trustee Act then in force, and a vesting order is made by the Court, the Registrar-General shall enter the vesting order in the register book and on the instrument evidencing the registered title to the land, and that upon such entry being made the person in whom the order purports to vest the land shall be deemed to be the registered proprietor. No restriction is made as to the cases in which the Court may declare a trust. The jurisdiction recognized by this section clearly includes any case in which the Court can make a vesting order under the Trustee Acts. That jurisdiction has always included cases in which specific performance of a contract to sell land has been decreed by the Court. This, again, is an express recognition of an equitable claim or title to land as existing before and irrespective of registration.

The provisions of the Act relating to caveats embody a scheme expressly devised for the protection of equitable rights. The caveat required by sec. 82 to be entered by the Registrar-General is one instance of the application of that scheme.

Sec. 72 provides that any person "claiming any estate or

interest" in land under the Act "under any unregistered instrument" may by caveat forbid the registration of any interest affecting such land, estate or interest. This provision expressly recognizes that an unregistered instrument may create a "claim" cognizable by a Court of Justice, and the caveat is the means devised for the protection of the right of the claimant pending proceedings in a competent Court to enforce it.

Sec. 44 deals with the case of suits for specific performance brought by a registered proprietor against a purchaser without notice of any fraud or other circumstances which would affect the vendor's right, which can only be circumstances creating an equitable right in a third person. I cannot think that the jurisdiction of the Court to grant specific performance as against a registered proprietor vendor is not equally recognized.

In South Australia the jurisdiction of the Court to decree specific performance in such a case was affirmed by the Supreme Court in the case of *Cuthbertson* v. *Swan* (1), overruling an earlier case of *Lange* v. *Ruwoldt* (2). The judgment of the Court (*Way* C.J. and *Stow* J.), which was delivered by *Stow* J., contains a very careful review of the provisions of the Act, entirely in accordance with the view I have expressed.

In 1877 the Queensland legislature gave express recognition to this view by the Real Property Act Amendment Act of that year, which provided (sec. 48):—"Every instrument signed by a proprietor or by others claiming through or under him purporting to pass an estate or interest in or security upon land for the registration of which provision is made by this Act shall until registered be deemed to confer upon the person intended to take under such instrument or other person claiming through or under him a right or claim to the registration of such estate interest or security."

This provision was adopted in South Australia in 1878. In the case of *Franklin* v. *Ind* (3) the Supreme Court of that Colony expressed the opinion that the new Statute merely affirmed the law as declared in *Cuthbertson* v. *Swan* (1).

Opinions to the same general effect were expressed by the

(1) 11 S.A.L.R., 102. (2) 6 S.A.L.R., 75.
(3) 17 S.A.L.R., 133, at p. 164.

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Supreme Court of Victoria in the cases of *Plumpton* v. *Plumpton* (1) and *Sander* v. *Twigg* (2), by the Supreme Court of New Zealand in *Paoro Torotoro* v. *Sutton* (3), and by the Supreme Court of New South Wales in *Josephson* v. *Mason* (4).

In my opinion equitable claims and interests in land are recognized by the Real Property Acts.

It follows that the transfer of 19th October, if valid as between the appellant and Schmidt, would have conferred upon the latter an equitable claim or right to the land in question recognized by the law. I think that it also follows that this claim or right was in its nature assignable by any means appropriate to the assignment of such an interest.

It further follows that the transfer operated as a representation, addressed to any person into whose hands it might lawfully come without notice of Barry's right to have it set aside, that Schmidt had such an assignable interest.

The respondent Heider's case is mainly based upon this representation, but does not entirely rest upon it. Barry's letter of 23rd October authorizing the delivery of the certificate of title to Messrs. Gale & Gale, and delivered to them upon their request to Schmidt for its production, was, in my opinion, an even more emphatic representation that Schmidt had such an interest as entitled him to possession of the certificate of title. Mrs. Heider thereupon became in a position to register the transfer from Barry to Schmidt, and consequent upon it to register Schmidt's mortgage to herself. Her right to do so was complete, although actual registration was formally impeded by the delay in the preparation of the new certificate. So far, therefore, as she is concerned, I think that Barry is not entitled to any relief against her except upon the terms of making good his representations.

With respect to the mortgage to the respondent Gale, it appeared that on or about 30th October a caveat, signed by Peterson, purporting to act as solicitor for Barry, was lodged with the Registrar-General with the proper registration fee, by which Barry, claiming as unpaid vendor, forbade the registration of any instrument affecting the land "except a memorandum of

(1) 11 V.L.R., 733.
(2) 13 V.L.R., 765.
(3) 1 N.Z.J.R. (N.S.) S.C., 57.
(4) 12 S.R. (N.S.W.), 249.

mortgage from Schmidt to Mrs. Heider dated October 1912" for £800. The caveat was not then entered upon the register, apparently by reason of the delay in preparing the new certificate.

The loan by Gale to Schmidt was negotiated by Peterson, acting as solicitor for the latter, with Mr. Gale, junior, acting as solicitor for his father, the respondent, and the money was paid over to Peterson on Schmidt's written order on 4th December. About a week before that date Mr. Gale, junior, had been informed by Peterson of the existence of the caveat. On that date they met in the Registrar-General's office, where Gale saw the caveat. Peterson then informed him that the matter had been adjusted, and handed him a letter of the same date, signed by himself and addressed to the Registrar-General, withdrawing the caveat and requesting a refundment of the registration fee paid in respect of it. Before accepting and acting on this letter Gale made inquiries of the officials, and was informed that as the caveat had not been registered and was signed by Peterson he had authority to withdraw it. On the faith of this assurance and of the withdrawal, which he lodged with the Registrar-General, Gale then and there paid over the £400, less costs, to Peterson in the Registrar-General's office. On these facts, it was contended, on the one hand, that Gale was entitled to rely on Peterson's ostensible authority to act as Barry's solicitor in the matter of the caveat, and, on the other, that, as Peterson was then acting for Schmidt, the purchaser and borrower, Gale was put upon further inquiry both as to his authority to withdraw the caveat, which had been lodged for the protection of the vendor, and as to the actual satisfaction of the vendor's lien. No reason is suggested for any ground for suspecting fraud on the part of either Schmidt or Peterson.

Sec. 72 of the Act requires a caveat to be signed by the caveator or by his solicitor, known agent or attorney, and provides that it may be withdrawn by the caveator. Any notice relating to the caveat, if served at the office of the solicitor who has signed the caveat, is to be deemed to be duly served. The form of the caveat is given in the Sixteenth Schedule to the Act. By it the caveator forbids registration of any instrument affecting the

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land "until this caveat be by me or by order of the Supreme Court or some Judge thereof withdrawn, or until after the lapse of fourteen days" from the service of notice of the intended registration at an address in Sydney given in the caveat for that purpose. In the case of a caveat signed by a solicitor I think that, as between the caveator and the Registrar-General, the solicitor by whom the caveat is lodged has, *primâ facie*, authority to withdraw it, at any rate until it has actually been noted on the title. I am disposed to think, also, that a stranger proposing to enter into a transaction respecting the land may reasonably draw the same inference of authority.

Gale, however, was not a mere stranger coming on the scene for the first time. He knew on 4th December that Peterson was acting as solicitor for Schmidt, the proposed borrower. The letter withdrawing the caveat was equivalent to an acknowledgment by Peterson, as agent for Barry, that the latter's lien for unpaid purchase money was satisfied. The case is, therefore, as if a person proposing to advance money on equitable mortgage were told by the solicitor for the proposed borrower, purporting also to act as solicitor for a prior equitable mortgagee, that the prior equitable mortgage had been satisfied. Can he safely act on such an assurance without further inquiry? After full consideration I have come to the conclusion that he cannot. In one sense it is not unreasonable in such a case, in the absence of any ground for suspecting fraud, to accept the assurance of the solicitor, but it would be more reasonable for the lender to ask for confirmation of the assurance from the prior equitable mortgagee himself or an independent agent. Under these circumstances I think that, in the absence of any positive evidence of Peterson's authority to make the assurance of satisfaction beyond that furnished by his having signed the caveat, Gale cannot rely on it. He is entitled to rely upon the previous representations already referred to, by which Barry is bound as against Mrs. Heider, except so far as they were afterwards qualified by the caveat. But, not having established by positive evidence Peterson's authority to withdraw the caveat, he cannot rely upon the withdrawal as a further representation by Barry.

I think, therefore, that the rule *Qui prior est tempore potior*

est jure must prevail, and that Gale's mortgage must be postponed to Barry's vendor's lien.

BARTON J. I have read the judgment just delivered by the Chief Justice, and think it sufficient to express my agreement.

ISAACS J. read the following judgment:—This case may be stated very simply. Barry is the registered proprietor in fee simple under the *Real Property Act* of certain land, and he instituted a suit in equity to declare void, and to restrain a man named Schmidt and (as amended) Heider and Gale from registering as a transfer to Schmidt, a document actually signed by Barry in regular form and purporting to transfer all his estate and interest in the land to Schmidt in consideration of £1,200, which by the document was acknowledged to have been paid. The signature of Barry purports by the document to be witnessed by a solicitor named Peterson, who, however, in fact, according to the evidence was apparently not present when Barry signed.

The plaintiff's primary case is that he was cheated into signing the document; that though he intended to sign a document giving Schmidt some rights in respect of the land, it was not a transfer at all, and was only a contract for £4,000, that being the sum really agreed upon; and that as Schmidt had never paid anything in fact to Barry, the transaction was fraudulent, and even utterly null and void.

As regards Schmidt no difficulty arises: the learned Chief Judge in Equity was satisfied that Barry was defrauded, and has declared the transfer to be "void and of no effect." Heider and Gale, however, say they acted to their prejudice upon the statement in the document of transfer by lending money to Schmidt upon the security of his apparent interest, and that to the extent of their claims the transfer should be declared to be binding on Barry.

Barry's substantial replies to this are: (1) The document of transfer was *ab initio* void, as he never intended to sign a document of that nature, and therefore nothing can validly rest upon it; (2) if voidable only, the effect of the *Real Property Act* is to forbid both legal and equitable estates or interests in land arising

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except upon registration, and therefore Heider and Gale have no right but a personal right against Schmidt; (3) as to Gale, he did not rely upon the statement in the transfer that the £1,200 had been paid, but on a subsequent statement by Peterson which is not attributable to Barry.

There was a contention as to the incompleteness of the transfer by reason of the absence of proof of attestation, but that cannot be regarded as serious.

(1) As to the document being void, the argument was twofold. First, it was said that the decree expressly declaring that " the said transfer was void and of no effect " meant it was absolutely void *ab initio*. It is quite certain the learned Judge in so declaring did not mean that, otherwise he could not have made the subsequent declarations in the decree. It is manifest he meant exactly what *Erle* C.J. said in *Ex parte Swan* (1). There the learned Lord Chief Justice observed :—" Now, although the deeds of transfer, as between Swan and Oliver, were null and void, yet, as between Swan and a purchaser for value on the faith that they were valid, they may be valid to pass the property, if not directly, yet indirectly, by estopping Swan from setting up his right against such purchaser." As to whether the document ought to be held to be for all purposes a nullity, that is impossible on the evidence before us. The evidence of Barry himself does not even go so far as to show he thought he was not signing a transfer. He does, I agree, say he did not think he was signing a transfer with a statement that £1,200 was the consideration and was paid, but that is not sufficient. The transfer is not the contract creating the obligation. Even if he proved that he believed he was signing a contract only, and not a transfer, the question would arise whether that necessarily would cut away the position of Heider and Gale. Whether it would or not raises an interesting question of law, involving the consideration of several important cases, such as *Stewart* v. *Kennedy* [*No.* 2] (2), *Hunter* v. *Walters* (3), *Henderson & Co.* v. *Williams* (4), *Farquharson Bros. & Co.* v. *King & Co.* (5), and *Carlisle and Cumberland*

(1) 7 C.B. (N.S.), 400, at p. 431.
(2) 15 App. Cas., 108.
(3) L.R. 7 Ch., 75.
(4) (1895) 1 Q.B., 521.
(5) (1902) A.C., 325, at p. 332.

Banking Co. v. *Bragg* (1). But the point does not now present itself for decision.

(2) The transfer being voidable only, and now avoided, as against Schmidt for the gross fraud undoubtedly perpetrated by him in connection with the transaction, the next question is what is the effect of such avoidance?

Mr. *Loxton* argued very strenuously that sec. 41 of the *Real Property Act* was decisive in his favour. It says "No instrument, until registered in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money." His point was that that provision applied to both legal and equitable estates, interests, and liability. I agree with him so far as to the meaning of that provision. "Estate" and "interest," as used in the Act, include both legal and equitable estates and interests. The interpretation section, sec. 3, defines "Proprietor" as "any person seised or possessed of any freehold or other estate or interest in land at law or in equity in possession in futurity or expectancy," and "Transfer" as "the passing of any estate or interest in land under this Act whether for valuable consideration or otherwise." But what follows? Mr. *Loxton* contended that the consequence was that until registration no person can acquire any interest in land legal or equitable. He said that whatever personal liability existed might be enforced as "a chose in action" against the person liable, but not against the land, for the Act recognizes no interests legal or equitable except in the registered proprietor.

Such a contention is absolutely opposed to all hitherto accepted notions in Australia with regard to the Land Transfer Acts. They have long, and in every State, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which Courts of Equity have enforced, as against registered proprietors, conscientious obligations entered into by them. The notion that an equitable right is a mere chose in action, once accepted by the Court (*Finch's Case* (1590) (2)) but definitely and finally parted from by Lord

(1) (1911) 1 K.B., 489. (2) 4 Inst., 85.

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Hardwicke in *Hopkins* v. *Hopkins* (1) and Lord *St. Leonards* in *Stump* v. *Gaby* (2), has not, so far as I know, except in one notable instance been considered by Australasian Courts as applicable to the Land Transfer Acts. In Victoria, in the case of *Maddison* v. *McCarthy* (3), it was held in 1865 by a very distinguished Judge, Sir *Robert Molesworth*, that registered proprietors were compellable in equity to specifically perform their contracts. So in *Paoro Torotoro* v. *Sutton* (4) in 1875; so in *Cuthbertson* v. *Swan* (5) in 1877, reversing an earlier case of *Lange* v. *Ruwoldt* (6), the single instance referred to; and so in *Tierney* v. *Loxton* [*No.* 1] (7) in 1894, a case as to caveats. Not only so, the Privy Council in the case of *Williams* v. *Papworth* (8)—strangely enough not cited in argument—said, by Lord *Macnaghten*:—"It could not, of course, be disputed that the expression 'interest in land,' unless there was something to restrict the meaning, must include equitable as well as legal interests. But it was argued that the scope of the Act rightly understood requires such a restriction." Their Lordships, however, declined to adopt that view, and pointed to expressions in the Act contrary to such a conclusion. They held, affirming the Supreme Court of New South Wales, that beneficiaries under a settlement, if deprived of their equitable interests, could validly claim under sec. 117 (now sec. 126) for damages for loss of an interest in land.

But, said Mr. *Loxton*, at all events that must be restricted to cases where the equity arises independently of the acts of the parties, independently of the force of an unregistered instrument (sec. 41). For this he called in aid the case of *Liverpool Borough Bank* v. *Turner* (9), affirmed by Lord *Campbell* L.C. (10). The distinction between that case and the present may be very briefly stated. A ship is a chattel. At common law a contract to sell a ship may itself transfer the property. As *Wood* V.C. said (11): "Is not the property in a ship sold by contract?" That is to say, do not the property and the full ownership pass by the contract

(1) West, 606.
(2) 2 DeG. M. & G., 623.
(3) 2 W.W. & àB. (Eq.), 151.
(4) 1 N.Z.J.R. (N.S.) S.C., 57.
(5) 11 S.A.L.R., 102.
(6) 6 S.A.L.R., 75; 7 S.A.L.R., 1.
(7) 12 N.S.W.L.R. (L.), 308.
(8) (1900) A.C., 563, at p. 568.
(9) 1 John. & H., 159.
(10) 2 DeG. F. & J., 502.
(11) 1 John. & H., 159, at p. 168.

itself? There is not at common law any formal requirement of conveyance as in the case of land. See as to ships *per Brett* L.J. in *Union Bank of London* v. *Lenanton* (1), and the case of *Benyon* v. *Cresswell* (2). If, then, a Statute says that only contracts made in a certain form are to transfer the property in a ship, it follows that no Court—either at law or in equity—can attribute a transferring effect to any other form of contract without in effect repealing the Statute. And so *Wood* V.C. held. His reasoning was concurred in by the Lord Chancellor. Ships have always been regarded as chattels, having some special attributes, and, according to maritime usage, a bill of sale is the appropriate method of transferring ownership (see *per* Lord *Stowell* in *The Sisters* (3)). But they are not on the same footing as land, and the English legislature thought it necessary to enact that any other method than bill of sale should as to British ships be null and void. As to that Lord *Kenyon* in *Rolleston* v. *Hibbert* (4) treated the bill of sale as an agreement to sell, and, that being in writing, refused to allow other evidence of the terms of any other agreement. The case of *Chasteauneuf* v. *Capeyron* (5) rests on the same principle, and in view of the importance of the subject I may quote a short passage from the judgment in that case. Their Lordships say (6):—"It may be assumed for the purpose of argument that as regards ordinary movables the award of the master to a purchaser on a sale by licitation vests the property in him without any deed or other conveyance, and that according to the law of Mauritius there is no distinction between legal and equitable estates. But the transfer of a British ship is not governed by the rules applicable to movables in general, but by the express provisions of the Merchant Shipping Acts which make a clear distinction between the legal estate and mere beneficial interests in a British ship." And so the Court held that even a sale by order of the Court not by means of a bill of sale, was not sufficient to overcome the provisions of the Act. The contract was not such as the law required.

I may add that though the commercial world regarded the

(1) 3 C.P.D., 243, at p. 250.
(2) 12 Q.B., 899.
(3) 5 C. Rob., 155.
(4) 3 T.R., 406, at pp. 412, 413.
(5) 7 App. Cas., 127.
(6) 7 App. Cas., 127, at p. 133.

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decision in *Liverpool Borough Bank* v. *Turner* (1) as a great hardship, and in consequence Parliament in the following year (1862) provided that equitable titles should be recognized (see *Black* v. *Williams* (2)), we are invited to say that the *Real Property Act* 1900 has retained the harsher rule.

I do not think so, and I think the groundwork of the decisions referred to, as I have expressed it, entirely differentiates the case relied on from the present. The *Land Transfer Act* does not touch the form of contracts. A proprietor may contract as he pleases, and his obligation to fulfil the contract will depend on ordinary principles and rules of law and equity, except as expressly or by necessary implication modified by the Act. Sec. 43, for instance, makes provision with respect to the case of a *bonâ fide* purchaser without notice, and the section says "any rule of law or equity to the contrary notwithstanding." Consequently, sec. 41, in denying effect to an instrument until registration, does not touch whatever rights are behind it. Parties may have a right to have such an instrument executed and registered; and that right, according to accepted rules of equity, is an estate or interest in the land. Until that instrument is executed, sec. 41 cannot affect the matter, and if the instrument is executed it is plain its inefficacy until registered—that is, until statutory completion as an instrument of title—cannot cut down or merge the pre-existing right which led to its execution.

The basis of the contention therefore fails, and we have to consider the position as to equitable remedies as if the land were not under the Statute.

(3) This raises the question of the effect of Barry's conduct. Distinctions have been drawn as to whether such a case is to be solved by the doctrine of estoppel, or by the doctrine that, where one of two innocent persons has to suffer by the fraud of a third, he who, by what Lord *Halsbury*, in adopting the language of an American Judge, calls "an indiscretion," has enabled the third person to commit the fraud, shall bear the loss.

I see no real distinction in principle. I call them both estoppel, because the second principle simply compels the person who

(1) 1 John. & H., 159; 2 DeG. F. & J., 502.
(2) (1895) 1 Ch., 408, at p. 417.

enabled the fraud to be committed to stand by the consequences of his own conduct and precludes him from asserting his really superior title. And I am strengthened in that view by the fact that the doctrine of estoppel *in pais* does not rest on the fraud or moral misconduct of the person estopped, but on the effects of his conduct upon the party claiming the estoppel. This is clearly and authoritatively brought out in a case I have on a former occasion referred to—*Sarat Chunder Dey* v. *Gopal Chunder Laha* (1). Lord *Shand* there says:—"The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet.* It may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement, and acted on it as it was intended he should do."

The Indian *Evidence Act* was under discussion and used the word "intentionally," and the Privy Council held that the word was introduced for the purpose of declaring the law in India to be precisely that of the law of England. Having so stated, their Lordships say (2):—"A person who, by his declaration, act, or omission, had caused another to believe a thing to be true and to act on that belief, must be held to have done so 'intentionally,' within the meaning of the Statute, if a reasonable man would take the representation to be true, and believe it was meant he

(1) L.R. 19 Ind. App., 203, at p. 215. (2) L.R. 19 Ind. App., 203, at p. 219.

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should act upon it. And to this view effect was given in the case of *Cornish* v. *Abington* (1) and the later cases."

Why does not Barry fall within that principle so far as the transfer is concerned? Whatever be the legal effect of the transfer under the Act, it is a statement by Barry, importing that Schmidt was entitled to all his (Barry's) estate and interest in the land, and that not as a volunteer but as a purchaser for £1,200, and that Barry had no further claim or lien on the land, because the whole consideration had been paid. That is equivalent to a declaration that Schmidt was the full equitable owner of the land. And everyone must be taken to know that, armed with such a document, Schmidt if the statements were true could sell or mortgage the property it represented, the registration being a mere formality, apart from the possible fraud of Barry himself, which no one was bound to anticipate, and which, as regards Barry himself, is nothing. In *Vickers* v. *Hertz* (2) Lord *Hatherley* L.C. says:—"When . . . one person arms another with a symbol of property, he should be the sufferer, and not the person who gives credit to the operation and is misled by it."

I apprehend, therefore, the facts so far bring the case absolutely both within the principle of estoppel and the innocent person doctrine if there is really any difference between them. Mrs. Heider lent her money believing and trusting to the accuracy of Barry's own statements in the transfer, and Barry must be held to the truth of those statements as to her, or, as Lord *Selborne* said in the *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (3), he "shall be compelled to make them good."

I attach no importance to the letter signed by Barry dated 23rd October and addressed to the Registrar of Titles. It is doubtful how that came into existence, and for what purpose, and I think Mrs. Heider's rights quite well established without it, and not increased by it.

Mrs. Heider, in my opinion, has a good equitable claim against Barry to have her loan secured in some way on his land.

(1) 4 H. & N., 549.
(2) L.R. 2 H.L. (Sc.), 113, at p. 115.
(3) L.R. 6 H.L., 352, at p. 360.

With regard to Gale the position, in my opinion, is fundamentally different. As to him, I would quote the following words of Lord *Herschell* in *London Joint Stock Bank* v. *Simmons* (1):—"The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments." The onus is thus very distinctly indicated.

Now, before Gale lent his money he was told distinctly that the statement in the transfer as to the £1,200 having been paid was untrue. He was told that, by a caveat which could be seen on searching in the office of the Registrar of Titles, it was said that the money had not been paid. That document was dated 30th October 1912, and bore the office date of lodgment 9th November 1912. It was formally and duly lodged and the necessary fees were paid, and it is treated by all parties as lodged by direction of Barry. To my mind it is quite immaterial whether Barry authorized it or not. It was a distinct statement purporting to be made by Barry through Peterson as his solicitor for that purpose. Gale, junior, acted for the defendant Gale—they are both solicitors—in respect of the search. On 4th December 1912 he searched in connection with Gale's loan, and saw the caveat. He says it had not been registered; but caveats are lodged, not registered. He made some inquiries at the Registrar-General's office, and then on the same day Peterson wrote a letter to the Registrar of Titles purporting to withdraw the caveat, and stating "the matter having now been adjusted." He did not sign as for Barry nor as Barry's solicitor, nor did he—according to the evidence—do more than hand this letter to Gale, junior. Having had distinct notice that the statement in the transfer

(1) (1892) A.C., 201, at p. 215.

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was untrue, he cannot rely upon that as inducing his action. And in his defence he relies on nothing else as to the payment of the money. He knew by the caveat that up to 9th November the money had not been paid; and as the caveat remained till 4th December he was put on inquiry up to that date, and took the risk of it, and unless some new representation can be sheeted home to Barry—which is not even suggested in the defence—Gale's case must fail so far as he seeks priority to the payment of £1,200. The statement by Peterson that the matter had been adjusted, meaning that Barry had been paid, is proved to be absolutely untrue. Then, what has Barry done to estop himself? Why should he be deprived of his property? Unless he can be shown to be responsible for the statement in Peterson's letter of 4th December, put in by the defendant, that the matter was adjusted, Barry cannot be held responsible, for he made no representation as to payment on which Gale ultimately relied. Peterson had purported to witness the original transfer, and afterwards by lodging the caveat admitted the inaccuracy of the statement as to payment, which by his signature he as solicitor alleged he had attested. This was itself a remarkable circumstance calling for explanation. He was also then acting for Schmidt to Gale's knowledge, and by a letter of Schmidt of 3rd December 1912 Gale was authorized to pay to Peterson £400, less £9 costs and fees, and he received £391. There is no evidence stating that Barry had authorized Peterson to make that statement in the letter of 4th December to Gale or to withdraw the caveat, and there is no evidence from which such an inference can be deduced. Barry was undoubtedly swindled; at the time the defendant's evidence was given Barry was mentally incompetent; Peterson, though in Court, was not called, and on this point the onus was on Gale. Now, unless it is to be laid down as a matter of law that because a solicitor is instructed to lodge a caveat he has also implied authority to withdraw it and to make a representation that purchase money has been paid when in fact it has not, then the withdrawal is not Barry's and the representation is not his.

I know of no principle or authority for such a rule of law. The authority to lodge a caveat is complete in itself, and is

exhausted when the caveat is lodged. The caveat when lodged is in the nature of a statutory injunction. It has been so held in New South Wales, Queensland, Victoria, South Australia and New Zealand, as well as by the Privy Council. See cases cited in *Hogg* on the *Australian Torrens System*, at p. 886. The person authorized to lodge the caveat is then *functus officio*.

Peterson had no further connection with the matter for Barry unless otherwise authorized. He could no more surrender Barry's right to his statutory protection in order to receive payments than he could validly bind him by receiving the money itself. Sec. 72 of the Act, while permitting the caveat to be signed by (1) the caveator, (2) his solicitor, (3) his known agent and (4) his attorney, and allowing notices relating to the caveat to be sent to the address of any such person, provides simply that "every such caveat may be withdrawn by the caveator." That is significant. It does not say that the person who lodged it for him may withdraw it for him. And after a caveat has been definitely lodged as here on 9th November, and allowed to stand for nearly a month, it is beyond the competency of the caveator's mere agent for lodgment to withdraw it without further authority in that behalf. If it is not, then he may go on at intervals putting on and taking off the caveat as he chooses till expressly forbidden. The danger to caveators otherwise is obvious. And still less is it competent to the former agent to add to such withdrawal a reason which acts as a representation to bind his former principal.

The true rule is as expressed by *Bramwell* L.J. in *Saffron Walden Second Benefit Building Society* v. *Rayner* (1):—"A man is a solicitor for another only when that other has occasion to employ him as such."

In my opinion Gale should not succeed beyond Barry's own representations acted on, namely, that Schmidt was entitled to the land on payment of £1,200, and otherwise is bound by the facts as they are. To the extent of postponing his security to Barry's right to £1,200 from Schmidt, the appeal should be allowed as to him, leaving him to his remedy against Peterson,

(1) 14 Ch. D., 406, at p. 415.