H. C. OF A. 1930. AUGUSTUS DOWNS PASTORAL CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Profits Tax Assessment Act 1917-1918 without recourse to the provisions of sec. 2 of the *War-time Profits Tax Assessment Act* 1924-1926. Costs of this special case will be costs in the appeal.

Questions answered accordingly.

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Commonwealth Crown Solicitor.

J. B.

Cons *Cash Resources Aust Pty Ltd v BT Securities Ltd* [1990] VR 576

Disc'd *Wu v Glaros* (1991) 55 SASR 408

Cons *Avco Financial Services Ltd v Fishman* [1993] 1 VR 90

Cons *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546

Rev *Abigail v Lapin* (1934) 51 CLR 58

Appl *Platzer v Commonwealth Bank of Australia* [1997] 1 QdR 266

Cons *Thorpe v Bristile Ltd* (1997) 80 FCR 330

Appl *Moffett v Dillon* [1999] 2 VR 480

[HIGH COURT OF AUSTRALIA.]

LAPIN AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

ABIGAIL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1929-1930.

SYDNEY, *Nov.* 25-29, 1929; *Mar.* 28, 1930.

Knox C.J. Isaacs, Gavan Duffy, Starke and Dixon JJ.

Land—Priorities—Conflicting equitable titles—Transfer absolute in form—Intended as security only—Registration—No caveat lodged by transferor—Subsequent unregistered mortgage from registered proprietor of land to third party—No evidence as to search by third party for caveats—Priority of equities—Negligence—Estoppel—Notice—Onus of proof—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *sec.* 43.*

Money-lender—Solicitor—Loan transactions—Nature of transactions and surrounding circumstances—Question of fact as to whether "money-lender"—Onus of proof—Money-lenders and Infants Loans Act 1905 (*N.S.W.*) (*No.* 24 *of* 1905), *sec.* 8.*

The registered proprietors of land under the *Real Property Act* 1900 (N.S.W.), by transfers absolute in form and expressed to be made in consideration of a money payment, transferred the land to the nominee of a creditor as security

* The *Real Property Act* 1900 (N.S.W.) provides, by sec. 43, as follows: "Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered

for the debt. The transferee was registered as proprietor in pursuance of the transfer. The creditor without the knowledge or consent of the transferors, who had lodged no caveat, raised a loan for himself upon the security of the land and caused his nominee as the registered proprietor to execute a registrable mortgage over the land in favour of the lender. The lender did not register his mortgage and he did not, before taking it, search the register, ascertain that the title was free of caveats, or see the contents of the transfers.

Held, by *Knox* C.J., *Isaacs* and *Dixon* JJ. (*Gavan Duffy* and *Starke* JJ. dissenting), that the unregistered security of the lender did not take priority of the transferors' equitable right to redeem, inasmuch as—

(1) Both were equitable rights or interests and the earlier of them in time prevailed unless its priority was lost;

(2) Its priority was not impaired by the transferors parting with the legal estate and causing the party who gave the unregistered mortgage to be registered as proprietor of the land, because possession of the legal estate can be no ground for assuming that the legal estate is not subject to equitable rights in others;

(3) Its priority was not lost by the transferors' failure to caveat or by the statement of the consideration in the transfers, because the lender did not act upon the faith of the title being free of caveats or of the contents of the transfers;

(4) Sec. 43 of the *Real Property Act* 1900 protects registered dealings only.

The lender, a solicitor, obtained a finding in the Courts below that he took bona fide and without notice of the outstanding equities, although he did not call as a witness his clerk who conducted the business.

Held, by *Knox* C.J. and *Dixon* J., that although the evidence was unsatisfactory it was unnecessary to decide whether he had discharged the burden of proof upon this issue, because, even so, he failed to show that his unregistered mortgage gained priority, and, further, by *Isaacs* J., that the finding could not be supported.

Before the lender took his unregistered mortgage, a loan had been raised from a bank without the consent of the transferors, but this loan was secured by a

owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase-money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

The *Money-lenders and Infants Loans Act* 1905 (N.S.W.) provides, by sec. 8, as follows: "The expression 'money-lender' in this Act shall include every person or company whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business, but shall not include—(*a*) any pawnbroker . . . or (*b*) any registered society . . . or (*c*) any body corporate, incorporated or empowered by a special Act of Parliament, to lend money in accordance with such special Act; or (*d*) any person or company . . . bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purpose whereof money is lent."

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registered mortgage. The mortgage to the bank was paid off when the advance was made by the lender and was discharged. It appeared probable that it was so paid off out of the moneys so advanced, but certain evidence had been rejected and it did not appear whether the lender had made his advance upon the faith of obtaining a first mortgage and whether his money had accordingly been applied in discharge of the bank's mortgage.

Held, by *Knox* C.J. and *Dixon* J., that an inquiry should be ordered at the risk of the lender to ascertain whether he was entitled to a charge in respect of moneys so applied ranking in priority to the transferors' equitable right to redeem.

A solicitor repeatedly lent large sums of money at interest in the course of his business, but the Courts below held that in all the circumstances it was not established that he carried on the business of a money-lender within the meaning of the *Money-lenders and Infants Loans Act* 1905 (N.S.W.).

Held, by *Knox* C.J., *Gavan Duffy*, *Starke* and *Dixon* JJ. (*Isaacs* J. doubting), that the finding should not be disturbed.

Decision of the Supreme Court of New South Wales (Full Court): *Lapin* v. *Heavener*, (1929) S.R. (N.S.W.) 514, reversed, except on the last point.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by Mark Lapin and Pearl Lapin, his wife, against Olivia Sophia Heavener, Bertram Theodore Heavener, Ernest Robert Abigail, Alexander McKeachie, Lazarus Harris and the Registrar-General.

On and before 5th December 1923 Mark Lapin and Pearl Lapin, his wife, were respectively registered proprietors of two parcels of land comprised in certificates of title reg. vol. 2450 fol. 52 and certificate of title reg. vol. 3337 fol. 97, under the *Real Property Act* 1900 (N.S.W.), each of the parcels being subject to a registered mortgage in favour of the Union Bank of Australia. Mark Lapin was at that time indebted to Bertram Theodore Heavener, a solicitor, in a considerable sum in respect of costs. On 5th December 1923 the Lapins, by transfers in the form prescribed by the Act, transferred the said lands to Olivia Sophia Heavener, the wife of the above-named Bertram Theodore Heavener. These transfers, though absolute in form, were found by the trial Judge to have been given as security only for payment of the above-mentioned costs and the amount owing to the Union Bank. The mortgage to the Bank was paid off and the transfers to Mrs. Heavener were registered on 18th

December 1923. By memoranda of mortgage dated 14th March 1924 Mrs. Heavener mortgaged the land to the English, Scottish and Australian Bank. These memoranda of mortgage were registered on 14th August 1925, and on 2nd September 1925 they were discharged; and on the same day Mrs. Heavener executed in favour of Abigail a memorandum of mortgage over the said lands to secure repayment of £5,500. This memorandum of mortgage was never registered. It did not appear how or out of whose money the English, Scottish and Australian Bank was paid off, but the sum of £3,500 was paid by Abigail into Heavener's bank account on 2nd September and the balance of £2,000 on 7th September 1925. On 4th September 1925 Abigail's clerk, on behalf of Abigail, lodged a caveat against dealing with the said lands. On 16th October 1925 Lapin commenced proceedings in equity against Heavener for an injunction. Abigail was Heavener's solicitor in those proceedings. On 30th November 1925 Abigail advanced to Heavener a further sum of £1,000, and memoranda of mortgage over the above-mentioned lands were on that day executed by Mrs. Heavener in Abigail's favour to secure the repayment of £6,600. These memoranda were never registered. On 1st December 1925 Abigail caused a caveat to be lodged claiming an interest under such memoranda. In 1927 the Lapins instituted a suit in equity against Heavener and his wife, Abigail and others, the plaintiffs claiming a declaration that the memoranda of transfer from them to Mrs. Heavener were void and that the plaintiffs were respectively entitled to be registered as proprietors in fee simple of the lands in question freed from the mortgage to Abigail. The plaintiffs alleged that the transfers to Mrs. Heavener were obtained by means of representations by Heavener that they were memoranda of mortgage, and that the plaintiffs did not knowingly sign transfers of the lands in question, that Abigail took with notice of the facts alleged; and further that Abigail, when he obtained his securities, was carrying on the business of a money-lender within the meaning of the *Money-lenders and Infants Loans Act* 1905 (N.S.W.) and was not registered. The appellants had not lodged a caveat with respect to the lands in question, and Abigail before advancing the money to the Heaveners had not searched for one.

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The suit was heard by *Long Innes* J., who made a decree declaring in effect that Mrs. Heavener held the respective parcels of land in question in trust for the respective plaintiffs subject, so far as is relevant to this appeal, to the mortgage given by Mrs. Heavener to the defendant Abigail dated 2nd September 1925.

From this decree the plaintiffs appealed to the Full Court of the Supreme Court, which dismissed the appeal: *Lapin* v. *Heavener* (1).

The appellants, Lapin and his wife, now appealed to the High Court from the decision of the Full Court.

Other material facts are stated in the judgments hereunder.

Evatt K.C. and *Miller*, for the appellants. This is a matter which involves two competing equities, that of the appellants' being prior in time. Although had the respondent searched the register he would not have found any caveats registered against the subject lands, the fact remains that he did not search; therefore he took the risk of whatever equitable interests might be outstanding (*National Bank of Australasia Ltd.* v. *Joseph* (2)). The evidence shows that at the relevant date the appellants were in possession of at least one of the subject properties; which is an additional reason why the respondent's equity should not be given priority (*National Bank of Australasia* v. *Joseph* (3)). There is no evidence that the respondent saw the transfer in respect of that property. That is a vital difference between the facts in this case and those in *Barry* v. *Heider* (4) and *Great West Permanent Loan Co.* v. *Friesen* (5). A prudent lender should search up to the moment of lending for notification of bankruptcies and caveats. The main principle is stated by Lord *Cairns* L.C. in *Shropshire Union Railways and Canal Co.* v. *The Queen* (6). As the respondent omitted to search the register, the maxim *Qui prior est tempore potior est jure* applies. A person claiming priority for an equity later in time must show some act or default on the part of the holder of the equity earlier in time by which he was induced to act to his detriment. Not having availed himself of the precautions allowed to him by law in order to

(1) (1929) 29 S.R. (N.S.W.) 514.
(2) (1918) S.A.L.R. 72; (1919) S.A.L.R. 309; (1922) S.A.L.R. 578.
(3) (1922) S.A.L.R. 578.
(4) (1914) 19 C.L.R. 197.
(5) (1925) A.C. 208.
(6) (1875) L.R. 7 H.L. 496, at p. 507.

protect himself from all risk, the respondent is estopped from setting up misconduct or negligence on the part of the appellants (*Burgis* v. *Constantine* (1)). There is no evidence that any representations were made by the appellants to the respondent or that the latter lent the money to Heavener on the faith of the documents ; which constitutes a further distinction between this case and *Barry* v. *Heider* (2) and *Great West Permanent Loan Co.* v. *Friesen* (3). The trial Judge found as a fact that the original agreement between the appellants and Heavener did not contemplate the registration of the transfers. The respondent acted upon representations made to him by Heavener unknown to and unauthorized by the appellants.

[ISAACS J. referred to *Commonwealth Trust Ltd.* v. *Akotey* (4).]

The application in that case of the doctrine laid down in *Lickbarrow* v. *Mason* (5) was dealt with by Lord *Sumner* in *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (6). Even if the appellants were negligent, the negligence of the respondent in not searching brings the case within *Clarke* v. *Palmer* (7). The respondent was not influenced either in his belief or his conduct by any representations which the appellants may have made, and therefore they are not responsible for anything done by the respondent to his prejudice or detriment (*Spencer Bower* on *Estoppel by Representation*, p. 120, par. 137). The four suggested principles relied upon by the respondent, namely, (1) that the statutory provision in sec. 43 of the *Real Property Act* 1900 protects him ; (2) that the appellants are estopped by their conduct (*Barry* v. *Heider* (8)) ; (3) that the appellants were guilty of negligence in not filing a caveat to protect their equitable interests in the land, and (4) that on a comparison of the merits of the parties the respondent should be preferred, do not afford any ground for departing from the rule *Qui prior est tempore potior est jure* (*Gibbs* v. *Messer* (9) ; *Waimiha Sawmilling Co.* v. *Waione Timber Co.* (10) ; *Commissioner of Stamp Duties* (*N.S.W.*) v. *Thomson* (11) ; *Toohey* v. *Gunther* (12)).

(1) (1908) 2 K.B. 484, per *Farwell* L.J. at p. 501.
(2) (1914) 19 C.L.R., at pp. 201-202.
(3) (1925) A.C. 208.
(4) (1926) A.C. 72.
(5) (1787) 2 T.R. 63 ; 100 E.R. 35.
(6) (1926) A.C. 670, at pp. 692-693.
(7) (1882) 21 Ch. D. 124.
(8) (1914) 19 C.L.R. 197.
(9) (1891) A.C. 248.
(10) (1926) A.C. 101, at p. 106.
(11) (1927) 40 C.L.R. 394.
(12) (1928) 41 C.L.R. 181.

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Secs. 41 and 43 of the *Real Property Act* 1900 must be read together. The appellants owed no duty to the respondent. The mere fact that the appellants could have had protection by lodging a caveat does not indicate negligence on their part in omitting to do so (*Hunt* v. *Brassware Ltd.* (1)). As to the practice of searching, see *Beckenham and Harris* on *The Real Property Act* (N.S.W.), pp. 106-117, 253, 254. It does not necessarily follow that because a person holds the *indicia* of title (i.e., legal title) to property that he is the beneficial owner thereof (*Burgis* v. *Constantine* (2)). As the appellants were in possession of part of the subject property at the relevant times, the respondent's title to that part, at least, must be subject to whatever right the appellants had therein (*National Bank of Australasia Ltd.* v. *Joseph* (3)). It is very apparent that the document set up by the respondent as his security has on a number of occasions been altered in material particulars, and it would seem that such alterations were effected subsequent to execution.

The onus is on the respondent to show that he is not a "money-lender" within the meaning of the *Money-lenders and Infants Loans Act* 1905 (*Fagot* v. *Fine* (4)). So far as the lending of money by the respondent is concerned, the evidence shows volume, system, repetition and continuity; and there is no evidence to show that such loans were made for the purposes of the respondent's business as a solicitor. The test to be applied is: is it necessary for a solicitor to lend money in order to carry on the business of a solicitor? The fact that some loans were made to hotelkeepers who were clients of the respondent does not determine the question. Nor is the fact that the respondent is a solicitor conclusive evidence that he is not also a money-lender within the meaning of the Act (*Newton* v. *Pyke* (5); *Edgelow* v. *MacElwee* (6)). The evidence shows that the respondent was carrying on two businesses, that of a solicitor and that of a money-lender.

[DIXON J. referred to *Bonnard* v. *Dott* (7).]

That case was considered in *Kerr* v. *Louisson* (8), where, on facts similar to the facts in this case, it was held that the defendant,

(1) (1926) 26 S.R. (N.S.W.) 449, at p. 452.
(2) (1908) 2 K.B., at p. 501.
(3) (1922) S.A.L.R., at p. 583.
(4) (1911) 105 L.T. 583.
(5) (1908) 25 T.L.R. 127.
(6) (1918) 1 K.B. 205.
(7) (1906) 1 Ch. 740.
(8) (1928) N.Z.L.R. 154.

a solicitor, was also a money-lender. The fact that people went to the respondent for a particular kind of loan must be taken as evidence that he held himself out as being willing to lend money (*Bonnard* v. *Dott* (1)).

[DIXON J. referred to *Bonnard* v. *Dott* as reported in the *Times Law Reports* (2).]

It is a fair inference from the nature and form of the securities taken by the respondent that the loans were not "occasional" loans. The case of *Lodge* v. *National Union Investment Co.* (3) is not applicable to this case.

Teece K.C. (with him *Mason*), for the respondent. When dealing with competing equities the principle to be considered is: was the holder of the prior equity guilty of improper conduct by which the holder of the later equity was induced to act to his prejudice? (See *Rice* v. *Rice* (4).) Here the appellants are responsible for the position in which the respondent finds himself, either by their own conduct or the representations made by Heavener (*Hunter, Curling and Darnell* v. *Walters* (5); *Capell* v. *Winter* (6).) The fact that the appellants executed transfers in absolute form in favour of Heavener is, in the circumstances, sufficient to take the matter out of the operation of the rule *Qui prior est tempore potior est jure* (*Halsbury's Laws of England*, vol. XIII., p. 77). *Burgis* v. *Constantine* (7) was a case in which the registered owner of the property was an express trustee, and the observations of *Farwell* L.J. (8) do not apply to a case in which the beneficial owner vests the real estate in a person who is not his express trustee. Heavener was not an express trustee but a mortgagee.

[KNOX C.J. referred to *Barry* v. *Heider* (9).]

Apart from what the respondent did or did not know, the acts and omissions of the appellants enabled Heavener to obtain the money from the respondent. If a caveat had been lodged by the appellants, Heavener could not have acted as he did. Prima facie a person

(1) (1906) 1 Ch. 740.
(2) (1905) 21 T.L.R. 491.
(3) (1907) 1 Ch. 300.
(4) (1853) 2 Drew. 73; 61 E.R. 646.
(5) (1871) 7 Ch. App. 75, at p. 85.
(6) (1907) 2 Ch. 376.
(7) (1908) 2 K.B. 484.
(8) (1908) 2 K.B., at p. 501.
(9) (1914) 19 C.L.R. 197.

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shown as being the registered proprietor of land under the *Real Property Act* 1900 is the legal and equitable owner of such land; therefore, anyone dealing with him is entitled to assume, without more appearing, that he is such legal and equitable owner. So far as the respondent was concerned Heavener was in that position. As the object of a caveat is to give notice of other interests a person is not prejudiced by not having searched when the position is that, had a search been made, nothing would have been found (*Conveyancing Act* 1919 (N.S.W.), sec. 164). Sec. 43 of the *Real Property Act* 1900 should be read literally, and, if so read, a caveat may be ignored. The protection afforded by that section should apply before registration, and not after registration only as expressed by *Knox* C.J. in *Templeton* v. *Leviathan Pty. Ltd.* (1). Such an interpretation is not a correct interpretation of the words " contracting or dealing with or proposing to take a transfer " as appearing in the section. All the sections in the *Real Property Act* 1900 dealing with caveats are exceptions to sec. 43 of the Act. A caveat makes the result voidable whether before or after registration. The object of the Act was to force people to protect their unregistered interests by caveat (*Oertel* v. *Hordern* (2); *Cooke* v. *Union Bank* (3)). As regards priority of equities, the respondent intended to keep the Bank's mortgage alive for his own benefit and only parted with his money on the understanding that he was to have a legal mortgage over the property (*Whiteley* v. *Delaney* (4)). As between the appellants and the Bank there was a good mortgage. The cases show that where an existing charge is paid off by a third person and that charge could by appropriate conveyance be kept alive for the benefit of that third person, the law will assume it was intended to keep the benefit of such charge alive for such third person (*Butler* v. *Rice* (5); *Halsbury's Laws of England*, vol. XXI., p. 180).

[KNOX C.J. referred to *Real Property Act* 1900, sec. 65 (2).]

Even if the respondent is not entitled to the benefit of the charge, the doctrine that equitable relief will be given only to those who do equity will apply; that is to say, relief will be granted only on the

(1) (1921) 30 C.L.R. 34, at pp. 54-55.
(2) (1902) 2 S.R. (N.S.W.) (Eq.) 37.
(3) (1893) 14 N.S.W.L.R. (Eq.) 280.
(4) (1914) A.C. 132, at pp. 139, 141, 143, 148.
(5) (1910) 2 Ch. 277.

condition that the appellants pay to the respondent the amount of money the latter advanced against the property of the former. There is no satisfactory evidence before the Court that the appellants, or either of them, were in possession of any of the subject properties at material times as alleged. This point—that the appellants were not in possession when the respondent took his security—was not raised in the Court below, and therefore should not be considered by this Court (*North Staffordshire Railway Co.* v. *Edge* (1)). If this Court is of the opinion that there is prima facie evidence of possession by one or both of the appellants, then the matter should be sent back to the primary Judge to be reheard on this point. *Long Innes* J. ordered accounts against Heavener as a mortgagee in possession; he therefore must have found as a fact that Heavener was in possession during the currency of the mortgage.

[STARKE J. referred to *Noyes* v. *Pollock* (2).]

As to whether the respondent was affected with notice, see *Great West Permanent Loan Co.* v. *Friesen* (3). The proper inference the Court will draw from the facts in evidence is that the respondent did not have notice of any interest claimed by the appellants (*Wilkes* v. *Spooner* (4)).

The question as to what constitutes a "money-lender" has not been dealt with by an appellate Court. The test of system, repetition and continuity is not sufficient. In addition to the lending of money, there must be other *indicia* of the business of money-lending; e.g., that the lender has an office for that purpose, that he advertises as such. The investment of money by a wealthy person does not constitute him a "money-lender" (*Bull* v. *Simpson* (5); *Rabone* v. *Deane* (6)). The respondent has no separate office for the purpose of lending money, his money was lent to his clients, to some he did not charge interest. This is a case of a professional man investing the emoluments derived from his profession; but, even if it is deemed that he was carrying on the business of lending money, he comes within the exemptions provided by the Act, because such money was lent in the course and for the purpose of his business as a solicitor, to retain clients and attract new clients.

(1) (1920) A.C. 254.
(2) (1886) 32 Ch. D. 53.
(3) (1925) A.C., at p. 224.
(4) (1911) 2 K.B. 473, at p. 484.
(5) (1915) 15 S.R. (N.S.W.) 365, at p. 371.
(6) (1915) 20 C.L.R. 636.

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The lending of money is a recognized feature of the business of a solicitor (*Furber* v. *Fieldings Ltd.* (1)).

Evatt K.C., in reply. The respondent has not discharged the onus of showing that when he executed the documents on 2nd September 1925 he had no notice of anything which would affect his rights as an owner. Although the respondent's managing clerk, Harris, was said to have had complete charge of the matter, it is significant that he was not called on behalf of the respondent to give evidence. The documents have been altered; this casts a doubt on their authenticity. As to the effect of the altering of documents, see *Beal's Cardinal Rules of Legal Interpretation*, 3rd ed., p. 94. The documents are not evidence against the appellants of any facts stated therein. The Court should not interpret sec. 43 of the *Real Property Act* 1900 as having a meaning different from that which has been accepted in New South Wales for very many years; especially as the Act has been dealt with by the Legislature during that time and not altered in this respect (*Beal's Cardinal Rules of Legal Interpretation*, 3rd ed., pp. 415-420). The view taken in *Templeton* v. *Leviathan Pty. Ltd.* (2) should not be disturbed by this Court; the matter should be left to the Legislature (*Waimiha Sawmilling Co.* v. *Waione Timber Co.* (3)).

[DIXON J. referred to *Webster* v. *Strong* (4).]

Any person relying upon sec. 43 must show that he ascertained the state of the register at the relevant time.

[DIXON J. referred to *Ross* v. *Victorian Permanent Property Investment and Building Society* (5).]

Sec. 43 has no application to a competition between two equities. The respondent has no interest in the land inasmuch as his instruments of mortgage have not been registered (*Taylor* v. *London and County Banking Co.* (6)). The notice of alienation as required by sec. 163 of the *Local Government Act* 1919 and showing the alienation of the land from the appellants to Heavener, was not given until 16th November 1925, being some time after the date of the mortgages given by Heavener to the respondent.

(1) (1907) 23 T.L.R. 362.
(2) (1921) 30 C.L.R. 34.
(3) (1926) A.C., at p. 106.
(4) (1926) V.L.R. 509; 48 A.L.T. 79.
(5) (1882) 8 V.L.R. (Eq.) 254; 4 A.L.T. 17.
(6) (1901) 2 Ch. 231, at pp. 260-262.

[STARKE J. referred to *In re Morgan*; *Pillgrem* v. *Pillgrem* (1).] It is not sufficient to rely upon the mere fact of registration: it must be shown that such registration was relied upon at the relevant time (*M'Iver* v. *Humble* (2)). The view expressed in *Honeybone* v. *National Bank of New Zealand* (3) is no longer the law, nor possible. The whole of the evidence is consistent with Heavener having used the money obtained from the respondent for his own purposes. There is no evidence that the money was applied to the paying off of the Bank's mortgage. The word "business" is defined in *Frost* v. *Caslon and Wilkins* (4).

As to the respondent being a money-lender the question is: was he sufficiently occupied during the relevant period in lending money, for whatever motives he desired to lend money? What those motives were is immaterial. By constant and numerous dealings he held himself out to members of a selected section of the community as being a person ready to lend money to them on terms; this is an ordinary form of advertisement.

Cur. adv. vult.

Mar. 28, 1930.

The following written judgments were delivered:—

KNOX C.J. On and before 5th December 1923 the appellants were respectively registered proprietors of certain lands at Dee Why and Paddington respectively under the provisions of the *Real Property Act*, each parcel being subject to a duly registered mortgage in favour of the Union Bank of Australia to secure payment of £1,300 or thereabout. The appellant Mark Lapin was at that time indebted to the defendant Bertram Theodore Heavener, a solicitor, in a considerable sum in respect of costs. On 5th December 1923 the appellants, by transfers in the form prescribed by the Act, transferred the said parcels of land to the defendant Olivia Sophia Heavener, the wife of the defendant Bertram Theodore Heavener. These transfers were absolute in form and entitled the said Olivia Sophia Heavener by registration thereof to become registered proprietor of the said parcels of land subject only to the mortgage of

(1) (1881) 18 Ch. D. 93.
(2) (1812) 16 East 170, at p. 174; 104 E.R. 1053, at p. 1055.
(3) (1890) 9 N.Z.L.R. 102.
(4) (1929) 2 K.B. 138, at pp. 149, 152.

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the Union Bank. The learned trial Judge found, and it is not now disputed, that these transfers, though absolute in form, were given as security only for payment of the costs owing to the defendant Bertram Theodore Heavener and the amount owing to the Union Bank. The mortgage to the Union Bank was paid off, and these transfers were registered on 18th December 1923, and thereupon Mrs. Heavener became the registered proprietor of the lands.

By memoranda of mortgage dated 14th March 1924 Mrs. Heavener mortgaged the said parcels of land to the English, Scottish and Australian Bank. On 14th August 1925 these memoranda of mortgage were registered, and on 2nd September 1925 they were discharged, and on the same day Mrs. Heavener executed in favour of the respondent Abigail a memorandum of mortgage over the respective parcels of land to secure the repayment of £5,500. This memorandum of mortgage has not been registered. It does not appear how or out of whose money the English, Scottish and Australian Bank was paid off, but the sum of £3,500 was paid by Abigail into Heavener's bank account on 2nd September and the balance of £2,000 on 7th September 1925. On 4th September 1925 one Harris—respondent Abigail's managing clerk—with the authority and on behalf of his principal lodged a caveat against registration of any instrument affecting these parcels of land in the form prescribed by the Sixteenth Schedule to the *Real Property Act* 1900. On 16th October 1925 the appellant Mark Lapin commenced proceedings in equity against Heavener, in which an affidavit of that appellant was filed on 20th October in support of a motion for injunction. The respondent Abigail was solicitor on the record for Heavener in these proceedings, and his managing clerk Harris had the conduct of the case on his behalf. On 30th November 1925 Abigail advanced to Heavener a further sum of £1,000, and memoranda of mortgage over the parcels of land now in question were on that day executed by Mrs. Heavener in his favour to secure the repayment of £6,600. These memoranda of mortgage have never been registered. On 1st December 1925 the respondent Abigail caused a caveat to be lodged, claiming interest under the said memoranda of mortgage. In the year 1927 the appellants filed a statement of claim in equity against Heavener and his wife, the respondent Abigail and other

persons not parties to this appeal, claiming a declaration that the memoranda of transfer from the appellants to Mrs. Heavener were void, a declaration that the respective appellants were respectively entitled to be registered as proprietors in fee simple of the lands contained in the said respective memoranda of transfer freed from the memoranda of mortgage to the respondent Abigail, and consequential and other relief not now material. The appellants alleged that the transfers to Mrs. Heavener were obtained by means of representations by Heavener that they were memoranda of mortgage to secure certain advances and that they did not knowingly sign transfers of the lands in question, that respondent Abigail took with notice of the facts alleged by them, and that the respondent Abigail was, when he obtained his securities, carrying on the business of a money-lender within the meaning of the *Money-lenders and Infants Loans Act* 1905 and was not registered under that Act. By his statement of defence the respondent Abigail set up that at the time he made the advances to Heavener he had no notice, express or implied, of any claim of the appellants, and that he acted bona fide and dealt with the registered proprietor of the said lands, and further that at the time of such dealing the only incumbrance noted on the certificate of title of the said lands was a mortgage to the English, Scottish and Australian Bank Ltd., and that immediately on obtaining the said securities he lodged caveats against dealings with the said lands. He set up further that the mortgage to the English, Scottish and Australian Bank was a valid mortgage and that he advanced the necessary moneys to discharge the same and that, in any event to the extent to which the moneys advanced by him were used to discharge the first mortgage and any other incumbrances over the said lands, he was entitled to security over the said lands. He denied that he at any time carried on the business of a money-lender within the meaning of the Act. He set up, further, that the appellants had been guilty of negligence in (among other things) not lodging caveats against dealings with the said lands and in allowing Mrs. Heavener to become and remain the registered proprietor thereof. The learned trial Judge held (1) that the transfers to Mrs. Heavener were given not as absolute transfers but as security for payment of Heavener's costs and for the repayment

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of the amount owing to the Union Bank; (2) that he was not satisfied that the respondent Abigail was at the material dates carrying on business as a money-lender, though he was not satisfied that he was not doing so; (3) that the respondent Abigail had established his defence that with respect to the mortgage of 2nd September 1925 he was a bona fide purchaser for value without notice; (4) that with respect to the mortgage of 30th November 1925 he had failed to establish that defence; (5) that the respondent Abigail had established to his satisfaction that the advances of £5,500 and £1,000 were made on the faith of the memoranda of transfer executed by the appellants in favour of Mrs. Heavener and of the certificates of title standing in her name and of the execution by her of the relative memoranda of mortgage; (6) that with respect to the mortgage of 2nd September 1925 the decision in *Barry* v. *Heider* (1) applied, and that the appellants were estopped by their representations from asserting against respondent Abigail that their equity was prior in point of time to his. Incidentally the learned Judge held that Harris was the person who acted for respondent Abigail in connection with the conveyancing part of the loan transactions of 2nd September 1925 and was his agent in that respect. With respect to the defence of purchaser for value without notice, his Honor said (2):—"The onus of establishing that he was a bona fide purchaser for value without notice rests on the defendant (*Wilkes* v. *Spooner* (3); see also *Pilcher* v. *Rawlins* (4)). In my view the defendant Abigail has by his own evidence discharged this onus so far as regards the mortgage of the 2nd September 1925 to secure the repayment of the loan of £5,500, which was advanced by his two cheques for £3,500 and £2,000 respectively on the 2nd and 7th September; and I so hold, notwithstanding that his clerk Harris, who attended to the conveyancing part of the matter, was not called to prove that he also had no notice at that time of the plaintiffs' equity. There was not, in my view, any evidence to suggest that at that date Harris had such notice, or knowledge of any facts which might rouse his suspicions or put him on inquiry, and it was not, therefore, in my opinion, incumbent on the defendant Abigail to call him, as he had himself gone

(1) (1914) 19 C.L.R. 197.
(2) (1929) 29 S.R. (N.S.W.), at p. 525.
(3) (1911) 2 K.B., at p. 486.
(4) (1872) 7 Ch. App. 259, at p. 269.

into the box and made what was at least a prima facie case in support of his defence. When he had done that I think it was for the plaintiffs to demolish that prima facie case, and that it was not necessary for him to tender in support of that case every person, whether few or many, who might possibly have had notice which might be imputed to him." On these findings the learned Judge made a decree declaring in effect that Mrs. Heavener held the respective parcels of land in question in trust for the respective appellants subject, so far as is relevant to this appeal, to the mortgage given by Mrs. Heavener to respondent Abigail dated 2nd September 1925. An appeal by the present appellants to the Full Court of the Supreme Court from this decree was dismissed, subject to a variation of the decree in respect of costs which is not now material; and the appellants now appeal to this Court.

The questions raised in the course of the argument on this appeal may be stated as follows:—(1) Were the securities given to the respondent Abigail on 2nd September 1925 void under the *Money-lenders and Infants Loans Act* 1905 ? (2) Has the respondent Abigail established that he took the securities in question without notice of the appellants' equity ? (3) On the facts proved ought the equitable interest of the appellants to be postponed to that of the respondent Abigail ? (4) If the respondent Abigail is not entitled to priority over the appellants, is he entitled to any, and if so what, relief in respect of the payment off of the mortgage to the English, Scottish and Australian Bank ?

The appellants do not dispute their liability in respect of the amount owing to Heavener for costs or the amount paid to the Union Bank in discharge of its mortgage.

As to the first question, I think the learned Judges in the Supreme Court were right in holding that on the evidence it was not affirmatively established that the respondent Abigail was a money-lender within the meaning of the Act 1905 No. 24; and I have nothing to add to the reasons given by *Harvey* C.J. in Eq. in support of that conclusion.

As to the second question, it is clear that the onus of establishing that he was a bona fide purchaser for value without notice was on the respondent Abigail. If it were necessary to decide this question

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I should feel considerable difficulty in holding that the respondent Abigail had discharged the onus of proof which lay on him. But in the view which I take of the case a decision on this question is not necessary. The claim of the respondent Abigail to priority over the earlier equity of the appellants is rested on two grounds: (1) the provisions of sec. 43 of the *Real Property Act* 1900 and, alternatively, (2) that there had been some act or omission on the part of the appellants such as to cause their equitable title which was prior in point of time to be postponed to his subsequent equitable title (*Taylor* v. *London and County Banking Co.* (1)). In cases falling within the scope of sec. 43 of the *Real Property Act* notice of a prior equitable interest is immaterial unless the conduct of the person claiming the protection of the section amounts to fraud. Apart from that section the fact that the holder of an equitable interest acquired it without notice of an equity prior in point of time affords of itself no ground for postponing the prior equity (see *Phillips* v. *Phillips* (2)). If the holder of the subsequent equity acquired it with notice of the prior equity, his claim for priority necessarily fails; but the fact that he took without notice or that it is not proved that he had notice of the prior equity amounts to no more than a fact to be considered in connection with the other circumstances on the question whether the conduct of the holder of the prior equity is such as to entitle the holder of the subsequent equity to priority over him.

On the third question, so far as the claim of the respondent Abigail to priority rests on the provisions of sec. 43 of the *Real Property Act*, I see no reason to modify the opinion expressed by me in *Templeton* v. *Leviathan Pty. Ltd.* (3) that the immunity conferred on the purchaser under this section extends to him only when he becomes registered and not before; and it follows that as the memoranda of mortgage given to the respondent Abigail have never been registered he can claim no priority by virtue of the provisions of the section. Nor do I think that the evidence discloses any act or omission on the part of the appellants such as to cause their equitable title which

(1) (1901) 2 Ch., at p. 260.
(2) (1861) 4 DeG. F. & J. 208, per Lord *Westbury* L.C. at p. 215: 45 E.R. 1164, at p. 1166.
(3) (1921) 30 C.L.R. 34.

was prior in point of time to be postponed to the equitable title of the respondent. Prima facie the equitable title of the appellants, being prior in point of time, takes priority of the equitable title of the respondent Abigail, and it is for him to show facts which render it inequitable for the appellants to insist as against him on that priority. The facts relied on by the respondent Abigail as entitling him to priority are (1) that the appellants executed in favour of Mrs. Heavener transfers absolute in form purporting to be transfers on sale for valuable consideration; (2) that the appellants by such transfers enabled Mrs. Heavener to become registered as proprietor in fee simple and to obtain certificates of title; (3) that the appellants omitted to lodge caveats to protect their equitable interests. In the circumstances of this case these facts appear to me insufficient to justify the postponement of the appellants' equities to the equity of the respondent Abigail. Heavener was the appellants' solicitor, and it does not appear that they had any reason to assume that he was a rogue or that he would make a dishonest use of the certificates of title (*Union Bank of London* v. *Kent* (1)). There is no evidence that Abigail ever saw the transfers or that before the money was advanced any search was made to ascertain if a caveat had been lodged against dealings with the land. The registration of Mrs. Heavener as proprietor in fee simple was consistent with the existence of an equitable interest outstanding in some other person, and not inconsistent with the whole beneficial title to the lands being in the appellants. Mrs. Heavener was in a fiduciary relation to the appellants, and was entitled under the arrangement between them and Heavener to become registered as proprietor and to hold the documents of title until the debt intended to be secured was paid off. The decisions in *Shropshire Union Railways and Canal Co.* v. *The Queen* (2), *Carritt* v. *Real and Personal Advance Co.* (3) and *Taylor* v. *London and County Banking Co.* (4), and the observations of *Farwell* J. in *Rimmer* v. *Webster* (5) and *Burgis* v. *Constantine* (6), seem to me to indicate that the possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act

(1) (1888) 39 Ch. D. 238 (C.A.).
(2) (1875) L.R. 7 H.L. 496.
(3) (1889) 42 Ch. D. 263.
(4) (1901) 2 Ch. 231.
(5) (1902) 2 Ch. 163, at p. 172.
(6) (1908) 2 K.B., at p. 501.

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or omission proved against him has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence. On the evidence as it stands no such act or omission on the part of the appellants has, in my opinion, been proved. The transfers did not amount to such an act, for there is no evidence that Abigail ever saw them. The certificates of title showing Mrs. Heavener as registered proprietor were consistent with the beneficial ownership of the lands being in the appellants or any other persons, and did not indicate that she held the beneficial as well as the legal interest. The omission to lodge a caveat can have had no effect in inducing Abigail to advance the money, for it is not proved that any search was made before the money was advanced. For these reasons I am of opinion that respondent Abigail has failed to establish that his equitable interest in the lands is entitled to priority over that of the appellants, and that on this question the judgment of *Long Innes* J. and of the Supreme Court should be reversed.

The question remains whether the respondent Abigail is entitled to relief in respect of the discharge of the English, Scottish and Australian Bank's mortgage, which, having been registered, constituted a valid incumbrance on the lands as against the appellants. On this question I agree with my brother *Dixon* in thinking that the evidence is not sufficient to enable this Court finally to determine the matter and that the respondent Abigail should be allowed to have an inquiry upon this subject in the Supreme Court on the terms suggested.

I concur in the terms of the order which is about to be made.

ISAACS J. Lapin and Abigail are opposing equitable claimants, each deriving an equity from Heavener. I refer to Lapin as including Mrs. Lapin, and to Heavener as including Mrs. Heavener. Lapin's is the earlier, dating from 1923; Abigail's arising in 1925. Lapin's equity is therefore superior (*Phillips* v. *Phillips* (1); *Cave* v. *Cave* (2) and *In re Morgan*; *Pillgrem* v. *Pillgrem* (3)), unless Abigail establishes that his is the better equity. If he succeeds in doing this,

(1) (1861) 4 DeG. F. & J., at p. 215; 45 E.R., at p. 1166.

(2) (1880) 15 Ch. D. 639, at pp. 646, 647.

(3) (1881) 18 Ch. D., at p. 103.

then, as Lord *Cairns* L.C. said in *Pease* v. *Jackson* (1), "the rule . . . which gives the preference to the first in time as between two equal equities, could not apply, the equities not being equal."

Lapin's equity, according to the facts as found by *Long Innes* J.—and the finding is not challenged—is that subject only to redemption by payment of Heavener's costs as Lapin's solicitor, and of whatever amount Heavener paid in discharge of the Union Bank of Australia mortgage, Heavener held the land in trust for Lapin (see *Carritt* v. *Real and Personal Advance Co.* (2), and *In re Richards*; *Humber* v. *Richards* (3)). A strong case is therefore needed to displace Lapin's equity (per *Turner* L.J. in *Cory* v. *Eyre* (4)). Abigail's alleged equity is that in September 1925, relying on Heavener being the registered proprietor—which was due to Lapin's act in giving an absolute transfer unaccompanied by any caveat lodged—he, without notice of Lapin's prior interest, advanced money to Heavener to pay off a registered mortgage on the land to the English, Scottish and Australian Bank, the money being applied to that purpose. He also claims that in view of sec. 43 of the *Real Property Act* he is protected, even if he had notice. Now, there is no doubt that if Abigail can establish that his is the better equity, he succeeds. What is a better equity?

There are two cases which deal with equality of equities in this connection. In *Bailey* v. *Barnes* (5) *Lindley* L.J. for the Court said: "Equality, here, does not mean or refer to priority in point of time, as is shown by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other." In *Taylor* v. *London and County Banking Co.* (6) *Stirling* L.J., with the approval of the other members of the Court, said that priority in point of time would govern as between purely equitable titles, "unless there has been some act or omission on the part of the owner of an equitable title prior in point of time, such as to cause that title to be postponed to a subsequent equitable interest." In my opinion those enunciations are not exhaustive: they state

(1) (1868) 3 Ch. App. 576, at p. 582.
(2) (1889) 42 Ch. D., at 269.
(3) (1890) 45 Ch. D. 589, at 594.
(4) (1863) 1 DeG. J. & S. 149; 46 E.R. 58.
(5) (1894) 1 Ch. 25, at p. 36.
(6) (1901) 2 Ch., at p. 260.

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rather a working rule, which applies in the great majority of instances, but do not state the principle. The principle is that the Court seeks, not for the worst, but for the best equity. And the best equity—for there may be several claimants—is that which on the whole is the most meritorious, it may be because the others are, by reason of circumstances indicated in the passages quoted, lessened in relative merit, or because one is, by reason of some additional circumstance, not attributable to any act or omission of the others, rendered in the eye of equity more meritorious than the rest. That, I think, is the view taken by *Parker* J. in *Crosbie-Hill* v. *Sayer* (1), where he says: "The mortgages to the plaintiffs, and the mortgage to the first two defendants, are thus all of them equitable mortgages only, and the question I have to decide is whether the plaintiffs or these two defendants have the better equity." Then he says: "In my opinion the plaintiffs have the better equity"; the reason being that the plaintiffs had in the circumstances a better right to call for the legal estate than the first two defendants. That was quite independent of any act or omission on the part of the defendants, which, so to speak, created a special relation on their part towards the plaintiffs. To this I shall return in proper sequence. For the present I advert to the point because, though in the majority of cases the result would be the same, yet in some instances, of which this is one, attention to principle tends to clarify the matter.

In proceeding to determine whether Abigail's equity is better, it is convenient to test it first by the working rule indicated in *Bailey's Case* (2) and *Taylor's Case* (3). What conduct, either by way of act or omission, is imputable to Lapin on which Abigail can found a claim to subordinate the earlier equity to his own? So far as concerns the mere registration of Heavener as proprietor, the contention fails. In *Bradley* v. *Riches* (4) *Fry* J. states both principle and authorities, and acts on them, antagonistically to Abigail's position here. So also *Burgis* v. *Constantine* (5). With regard to the absence of a caveat, the omission is not shown to have in any way influenced Abigail's action in advancing the money. If he, by himself or his agent Harris, had searched the register and found no

(1) (1908) 1 Ch. 866, at p. 875.
(2) (1894) 1 Ch., at p. 36.
(3) (1901) 2 Ch. 231.
(4) (1878) 9 Ch. D. 189, at pp. 191-193.
(5) (1908) 2 K.B. 484.

caveat, he could fairly, in the absence of proof of actual notice, have said to Lapin : " I have been induced to act to my prejudice by your or your solicitor's omission to take a step so ordinarily taken by anyone having an interest to protect, that its omission may be anticipated as likely to mislead." (See *Balkis Consolidated Co.* v. *Tomkinson* (1) and *R. E. Jones Ltd.* v. *Waring and Gillow Ltd.* (2) and *Butler* v. *Fairclough* (3).) But the person relying on the omission must show that his conduct has been in fact affected by it. Lord *Herschell* in *London Joint Stock Bank* v. *Simmons* (4), states the principle. And unless the fact relied on was known to the person relying on it, he cannot say his conduct was affected by it, whatever might be the onus of proof, if once such knowledge was established. (See *Miles* v. *McIlwraith* (5).)

At this point Abigail fails. He did not personally act in the transaction, except as to what may be called formal externals, such as signing completed documents and cheques. He employed and relied on Harris to conduct all the investigations as to title. He said in his evidence :—" I have not done any conveyancing myself for twenty-five years. I have to depend on them "—that is, his clerks—" and I append my signature when a trusted man puts a document before me, or whom I believe when he says everything is in order. Then I sign it." Q. : " So I may take it you left the whole business to Harris ? " A. : " Yes." In *Vane* v. *Vane* (6) *James* L.J. said : " The agent in the matter, and in the course of the transaction acting within the limits of his agency, is the *alter ego* of the principal." Since, so far as " notice " is material, the burden of disproving it in the circumstances rests on Abigail he has failed to do so. He did not call Harris, though pressed to do so, and gave no explanation for his failure. The circumstances, taking into account the appearance of the documents, the mode of making the advances, the method of paying off the Bank mortgage, the caveat, and the non-registration of Abigail's memorandum of mortgage, while not sufficient affirmatively to establish notice to him or Harris of Lapin's prior equity, are no safe ground, in the absence of Harris,

(1) (1893) A.C. 396, at p. 410.
(2) (1926) A.C. 670.
(3) (1917) 23 C.L.R. 78.
(4) (1892) A.C. 201, at p. 215.
(5) (1883) 8 App. Cas. 120, at pp. 133, 134.
(6) (1873) 8 Ch. App. 383, at p. 399.

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on which to rest a conclusion that a search was made disclosing no caveat, that reliance was placed on that, and that Harris had no notice and no reason for inquiry. It is true that *Long Innes* J. (1) came to the conclusion on this point in Abigail's favour. But the learned Judge in doing so said: "There was not, in my view, any evidence to suggest that at that date"—the relevant date—"Harris had such notice, or knowledge of any facts which might rouse his suspicions or put him on inquiry, and it was not, therefore, in my opinion, incumbent on the defendant Abigail to call him, as he had himself gone into the box and made what was at least a prima facie case in support of his defence." That conclusion, with deep respect, is arrived at by placing the burden on the wrong shoulders in the proved circumstances. Abigail's personal want of knowledge of Lapin's equity was the result, not of examining innocent facts but of abstention from any examination at all. The conclusion cannot therefore be taken as a pure finding of fact (see per Viscount *Dunedin* in *Robins* v. *National Trust Co.* (2)). The Full Court's concurrence on that point is open, as I think, to the observation that too great significance is attached to the single fact of Heavener's registration, and too little both to the lack of evidence as to Abigail's conduct being in part influenced by the absence of a caveat, and to the silence of Harris.

At that point it becomes material to consider whether, as argued on behalf of Abigail, sec. 43 of the *Real Property Act* gives him, even though the memorandum of mortgage is yet unregistered, complete protection from Lapin's equity, simply because he dealt with Heavener as registered proprietor. If I thought, supposing it were *res integra*, that sec. 43 ought to be so read, I should still, in view of the decisions cited in *Templeton's Case* (3) and the course of legislation, feel bound to adhere to the view taken in the last-mentioned case. But I would add that I agree with that view. My opinion was to some extent indicated, though not expressed, in *Butler* v. *Fairclough* (4). Consequently, sec. 43 has no application to this case. Up to that point Abigail fails entirely to show that his later equity is the better equity. But the further circumstances have yet to be considered.

(1) (1929) S.R. (N.S.W.), at p. 525.
(2) (1927) A.C. 515, at p. 518.
(3) (1921) 30 C.L.R. 34.
(4) (1917) 23 C.L.R., at p. 100.

The mere fact that the registered proprietor has executed the statutory memorandum of mortgage to him does not confer any superiority in equity. This is very distinctly shown by the Earl of *Selborne* in *Société Générale de Paris* v. *Walker* (1). He there points out that the delivery of the completed transfer of the shares by the registered owner, and its lodgment in the company's office, did not create a better equity than that of the competing claimant. The learned Lord, however, added that if all necessary conditions had been fulfilled which would have given the transfer as between himself and the company a present absolute unconditional right to registration *before the company was informed of a better title*, the case might be different. (See also *Moore* v. *North-Western Bank* (2).) So it is plain that something more is needed than the mere execution of the mortgage memorandum in this case by Heavener. Abigail is not in a position to say he has, subject to mere formal ministerial function, a present absolute and unconditional right to be placed on the register. But another principle of equity comes into play if the facts allow of it. It was, however, held by *Parker* J. in *Crosbie-Hill* v. *Sayer* (3) that "where a third party at the request of a mortgagor pays off a first mortgage with a view to becoming himself a first mortgagee of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, *as against the property*, in the shoes of the first mortgagee."

If Abigail can sustain the allegations of par. 18 of his defence, he comes within the ruling of *Parker* J. That ruling rests on the plainest principles of justice. The mortgage to the English, Scottish and Australian Bank was given, it is true, on 14th March 1924, but it was registered on 14th August 1925, prior to Abigail's first advance. Consequently, whatever the impropriety might have been on the part of Heavener in creating it—as to which I say nothing—it is clear it was as between Lapin and the Bank an unimpeachable security over the land. It was Heavener who was personally liable, and it was at Heavener's request that Abigail lent the money; but all the same, if Abigail's money was advanced and applied for the purpose of releasing Lapin's land from the statutory claims of the

(1) (1885) 11 App. Cas. 20, at pp. 28-29.
(2) (1891) 2 Ch. 599.
(3) (1908) 1 Ch., at p. 877.

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Bank, and if, as appears, Abigail intended to obtain a statutory mortgage over the land for himself, it appears to me that equity will sustain Abigail's claim to the extent that his money was so applied. In *Butler* v. *Rice* (1) *Warrington* J. refers to "the well-known equitable doctrine that if a stranger pays off a mortgage on an estate he presumably does not intend to discharge that mortgage, but to keep it alive for his own benefit." In *Thorne* v. *Cann* (2) Lord *Macnaghten* quotes *James* L.J. in saying: "It is not for this Court to find some recondite technical reason for giving a man a benefit at the expense of another man who was under no liability whatever to pay him." (See also per Lord *Herschell* L.C. and Lord *Macnaghten* in *Brocklesby* v. *Temperance Building Society* (3), and the various cases cited by *Parker* J. in his judgment in *Crosbie-Hill* v. *Sayer* (4).) The difficulty, however, in Abigail's way in this case is in finding the necessary facts to which the doctrine may be applied. It is by no means clear that a single penny of Abigail's money went to discharge the mortgage of the Bank. It is possible, but beyond that it remains in conjecture. Abigail gave Heavener a cheque for £3,500 on 2nd September 1925, and saw him, he says, go to a bank, the exact locality of which does not accurately describe that of the Bank in question. What happened to the cheque does not appear, except that it was credited to Heavener's account, and was paid by Abigail's bank on 4th September. But the mortgage was discharged on 2nd September 1925, though the discharge was not registered until 15th October. It would be unsafe to hold on that evidence that par. 18 of the defence, which was distinctly put in issue, has been proved. Strictly speaking, Dr. *Evatt* was right when he said that the issue as to this had been distinctly raised and that Abigail had failed. Nevertheless, on the whole, I think justice is better served if that be viewed as a matter of costs only, by requiring Abigail to pay the costs up to the present, and affording him an opportunity to apply to the Supreme Court as he may be advised for leave to prove what may be required to enable him to stand to any extent in the shoes of the English, Scottish and Australian Bank, and in such terms as that Court, if it thinks fit to grant leave, may

(1) (1910) 2 Ch., at p. 282.
(2) (1895) A.C. 11, at p. 18.
(3) (1895) A.C. 173, at pp. 183, 185.
(4) (1908) 1 Ch., at p. 875.

choose to require. That Court is in a much better position than this Court to determine whether justice is more likely to be aided or defeated by granting such an application. Subject to that, the appeal should be allowed.

As to the Union Bank of Australia's mortgage, that did not exist when Abigail lent his money; so that, as to anything beyond the English, Scottish and Australian Bank mortgage, Abigail is thrown entirely on Heavener's position. With regard to that, if Heavener paid the earlier mortgage out of the English, Scottish and Australian Bank money, Abigail is already covered by the latter mortgage, if entitled at all. If Heavener paid it out of other moneys, his claim against Lapin stands in precisely the same position as his claim for costs. Then, as to Heavener's costs, and even assuming that these together with the Union Bank of Australia mortgage exceeded the amount of the English, Scottish and Australian Bank mortgage, Abigail stands thus:—Unless Abigail's money can be shown to have been applied so as to pay off Heavener, and thereby discharge Heavener's claims for that excess as against Lapin, Abigail as to them does not bring himself within the doctrine of *Crosbie-Hill* v. *Sayer* (1) and other cases above cited, and therefore has no superior equity as against Lapin. Lapin in that case would still be Heavener's debtor. No pretence was made of any such arrangements. It is utterly inconsistent with the basis on which the defence was conducted. In order to establish it Abigail would have to assert that he regarded Heavener, not as absolute owner, but as an incumbrancer for his costs, and took over debt and incumbrance. I think the ends of justice preclude any permission to Abigail and Heavener to suggest such an arrangement now.

On the question of money-lending, I shall say only a few words. The view taken as to this by the majority of the Court makes it unnecessary, and in fact useless, for me to express my decided opinion on this point. I am not personally sorry, so far as this case is concerned, that my learned brothers have seen their way to arrive at the conclusion that Abigail is not "a person . . . whose business is that of money-lending" (sec. 8 of the Act No. 24 of 1905), because there is no exorbitancy proved and a very large sum is

(1) (1908) 1 Ch. 866.

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involved in his money-lending transactions. For myself, however, to prevent future misapprehension, I ought to say I should have had serious difficulty in coming judicially to the same conclusion. As an illustration of how closely a man may approach the status of a money-lender under the Act without actually reaching it, the facts are interesting. The money (£3,500) was lent to Heavener on 2nd September 1925, and the question therefore is: Was Abigail at that time a person whose business was that of money-lending? It appears that in the period beginning 16th February 1923 and ending 25th November 1925 he had eighty-one money-lending transactions, fairly evenly distributed over the period. Sometimes he had mortgages and sometimes bills of sale as security, once a deposit of jewellery, and always a promissory note. Some four or five loans were to personal friends. The total amount of money lent was over £89,000, of which about £39,000 was advanced to hotel-keepers who employed Abigail as solicitor; but the advances could not be said to be in the course of his business as solicitor. The balance, namely, about £50,000, is left wholly unexplained, except that it included varying sums large and small, as £22, £35, £38, £50, £75, £88, £150, £200, £250, £340, £445, £500, and up to £1,000, £1,441 15s., £1,500, £1,525, £2,000, £2,200, £2,600, £3,000, £3,225, £5,000 and £5,700. He charged interest at from 5 per cent to 10 per cent. He did not publicly advertise having any office except his solicitor's office, which apparently was sufficient for the transactions referred to. I need hardly say the rate of interest does not determine the matter. This is shown by the express exception in sec. 8, par. (*d*), of persons and companies carrying on the business of banking and insurance from the term "money-lender," for in those cases Abigail's highest rate is certainly not exceeded. And Lord *Loreburn's* statement in *Kirkwood* v. *Gadd* (1) that carrying on business "imports a series or repetition of acts" is apparently satisfied in this case. Further, when I read the judgment of *Walton* J. in *Newton* v. *Pyke* (2), and especially the *indicia* there stated, I have grave doubts as to the grounds on which I could hold that Abigail does not fall within the statute. If *Walton* J. had difficulty in absolving the lender in the case before him, I

(1) (1910) A.C. 422, at p. 423.

(2) (1908) 25 T.L.R. 127.

cannot help thinking that, in such circumstances as we have here, he would have been tempted to abandon the effort. Philanthropy may be safely put aside. For income tax purposes, there is little doubt losses would be set against gains. Investment, having regard to the range of amounts and the absence of any evidence as to long terms, is hardly a legitimate conclusion. What, then, is the proper category ? The only method of escape that occurs to me is simply to style Abigail a " financier," and under that colourless but euphemistic and dignified appellation leave him to lend money systematically at interest and on security very much as a money-lender does, but with susceptibilities saved and immunity preserved.

GAVAN DUFFY AND STARKE JJ. In 1923 Mark Lapin was registered as the proprietor of certain lands under the *Real Property Act* 1900 of New South Wales, and his wife, Pearl Lapin, was also registered as the proprietor of certain other lands under the Act. In the same year, they transferred these lands to Olivia Sophia Heavener, who became registered as the proprietor thereof. Olivia Sophia Heavener was the wife of Bertram Theodore Heavener, who at all material times was Lapin's solicitor. The transfer was absolute in form, but was, as has been found as a fact, given as a security only, for the payment of certain costs due to Bertram Theodore Heavener. The legal estate in the lands was, therefore, in Olivia Sophia Heavener, but the Lapins were entitled to redeem the lands upon payment of the moneys due to Bertram Theodore Heavener for costs. The Lapins might, of course, have executed a memorandum of mortgage, instead of absolute transfers ; in which case the mortgage would have had effect as a security but would not have operated as a transfer of the land charged. Or the interests of the Lapins in the lands might have been protected by caveats (see *Real Property Act* 1900 of New South Wales, sec. 72) ; but, doubtless owing to their own neglect or the neglect or misconduct of Heavener, their solicitor, their interests were not so protected. Equitable claims and interests in land, however, are not destroyed by the *Real Property Act*, and consequently the Lapins must be considered as the owners of an equitable estate or interest in the lands transferred

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to Olivia Sophia Heavener (cf. *Great West Permanent Loan Co.* v. *Friesen* (1)).

In March 1924 Olivia Sophia Heavener executed a mortgage of the lands to the English, Scottish and Australian Bank Ltd., and this mortgage was registered in 1925. It was discharged on 2nd September 1925, and the discharge registered on 15th October 1925. About 2nd September 1925 Olivia Sophia Heavener executed a memorandum of mortgage of the lands to Ernest Robert Abigail to secure the sum of £5,500, and on 30th November 1925 a further memorandum of mortgage to Abigail, to secure the same sum of £5,500 and also a further sum of £1,100, but as to this last sum Abigail has been postponed to the Lapins, and he has not challenged the decision so postponing him. Abigail obtained possession of the certificates of title to the lands, but never registered the instruments of mortgage given to him ; and, as these instruments are, until registered, ineffective to render the lands liable as security for the payment of money (see *Real Property Act* 1900 (N.S.W.), sec. 41), Abigail has no legal estate or interest in the lands. Indeed, an instrument of mortgage, even when registered, does not operate as a transfer of land, but only as a security (*Real Property Act* 1900, sec. 57) ; but, as claims or interests in land which are not registered are, under the *Real Property Act*, still recognized by the law, we may say that an equitable estate or interest in, or security over, the lands has been created in favour of Abigail.

The question is which title to the lands takes priority, that of the Lapins or that of Abigail ? The interest of the Lapins is first in point of time, and is therefore, prima facie, entitled to priority. Moreover, it was said that it was Abigail's duty to investigate the title, and that as he and those acting for him made no inquiry at all, in fact shut their eyes, the Court ought not to say that he took without notice (*In re Morgan* ; *Pillgrem* v. *Pillgrem* (2)). In *Agra Bank Ltd.* v. *Barry* (3) Lord *Selborne* thus dealt with a similar contention :—" It has been said in argument that investigation of title and inquiry after deeds is ' the duty ' of a purchaser or a mortgagee ; and, no doubt, there are authorities (not involving any

(1) (1925) A.C., at p. 223.
(2) (1881) 18 Ch. D., at p. 102.
(3) (1874) L.R. 7 H.L. 135, at p. 157.

question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing bona fide in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. . . . It may be evidence, if it is not explained, of a design inconsistent with bona fide dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case; and among these the existence of a public registry . . . must necessarily be very material. It would . . . be quite inconsistent with the policy of the *Register Act*, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed—I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent." Analogous reasoning is applicable to cases within the provisions of the *Real Property Act* 1900. Abigail advanced his money on the faith of the certificates of titles to the lands, which certified that Olivia Sophia Heavener was the registered proprietor of the lands, and, though he made no search of the Register of Titles, such a search would in fact have disclosed nothing.

In these circumstances, *Long Innes* J. and the Full Court both found, as a matter of fact, that Abigail acquired his title without notice of the prior title of the Lapins, and, in our opinion, this Court ought not to disturb that finding.

Abigail's contention is that the Lapins have been guilty of negligence such as to postpone their estate or interest in the lands to his. It is too late in the day to challenge the position that the Lapins were entitled to transfer their lands absolutely to Olivia Sophia Heavener by way of security. This form of security, opposed though it may seem to the provisions of sec. 56 of the *Real Property*

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Act 1900, has been constantly used in Australia, and has been recognized in this Court (cf. *Currey* v. *Federal Building Society* (1)). Further, we accept the position that although the name of Olivia Sophia Heavener appeared on the register as the proprietor of the lands, yet it was possible that some equitable interest subsisted in someone else (*Shropshire Union Railways and Canal Co.* v. *The Queen* (2)). We accept also as settled law—though without much enthusiasm—the proposition that the protection given by sec. 43 of the *Real Property Act* 1900 to persons dealing with or taking or proposing to take a transfer from the registered proprietor is only effective when such persons become registered, and not before (see *Templeton* v. *Leviathan Pty. Ltd.* (3) and the cases there collected). We also accept the proposition of Lord *Cairns* L.C. in *Shropshire Union Railways and Canal Co.* v. *The Queen* (4) "that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced." In the cases, inquiries are made as to the better equity, as to the better right to the legal estate, as to which party was the more vigilant or careful, and whether the conduct of a party estops him from the assertion of a prior title, and so on. But, however the matter is approached, the question must ultimately come down to a consideration of the words or actions of the person having the prior equitable title, and whether those words and actions have caused another to alter his position. "In other words," as Lord *Selborne* L.C. said in *Dixon* v. *Muckleston* (5), "the man who has conducted himself in such a manner is not entitled to deny the truth of his own representations, if it be a case of express representation—he is not entitled to deny being bound by the natural consequences of his own acts, if it be a case of positive acts—he is not entitled to refuse to abide by the consequences of his own wilful and unjustifiable neglect, if that is the nature of the case. By one or other of those means he may have armed another

(1) (1929) 42 C.L.R. 421.
(2) (1875) L.R. 7 H.L., at pp. 505-506.
(3) (1921) 30 C.L.R., at pp. 54-55.
(4) (1875) L.R. 7 H.L., at p. 507.
(5) (1872) 8 Ch. App. 155, at p. 160.

person with the power of going into the world under false colours; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person, he is bound upon equitable principles by the use made of that apparent authority and power."

Now, it must be observed that Olivia Sophia Heavener was in no sense a trustee for the Lapins. The lands were transferred to her absolutely—to be held, true, as security only, but that fact does not appear upon the register and rests entirely upon the agreement of the parties. This form of security was clearly adopted so that Olivia Sophia Heavener might deal with the lands as if they were her own, and without the restrictions created by an instrument of mortgage under the *Real Property Act* 1900. Thus, we apprehend, she might have raised the costs due to her husband by selling or mortgaging the lands: so far as the evidence goes, there was no restriction upon her, and she was necessarily trusted by the Lapins as to the time and method of realization and not to exceed the limit of her security. Again, the Lapins necessarily placed the *indicia* of title—the certificates of title—in her hands, so that she could readily exercise her rights, and appear as the absolute owner of the lands. Further, whether owing to their own neglect or owing to the neglect or misconduct of their solicitor, Heavener, they reinforced the apparent absolute ownership of Olivia Sophia Heavener by neglecting the well-known method of protecting their rights and interests by means of a caveat pursuant to the provisions of the *Real Property Act* 1900. In fact, they "armed" Olivia Sophia Heavener "with the power of going into the world under false colours." The case is more analagous, in our opinion, to such cases as *Brocklesby* v. *Temperance Building Society* (1) than to other cases in the books, such as *Shropshire Union Railways and Canal Co.* v. *The Queen* (2) and *In re Richards*; *Humber* v. *Richards* (3). Olivia Sophia Heavener, or her husband, goes to Abigail with all the *indicia* of absolute ownership given to her by the Lapins, and induces him to advance moneys on the strength of that title, and she—or her husband—delivers to him the certificates of title which certify

(1) (1895) A.C. 173. (2) (1875) L.R. 7 H.L. 496.
(3) (1890) 45 Ch. 589.

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her to be the absolute owner. True, he does not search the Register, but, if he had searched, there was nothing to be found there suggesting any other interest. He certainly took the risk of caveats protecting the interests of the Lapins; otherwise the fact that he did not search has no material bearing on the case.

There are cases in the books which assert that where two equities are equal, possession of the title deeds gives priority. (See *Layard* v. *Maud* (1); *Hunter and Curling* v. *Walters*; *Darnell* v. *Hunter* (2); *Lloyd's Banking Co.* v. *Jones* (3): and, to the contrary, *Thorpe* v. *Holdsworth* (4).) The proposition that possession of the title deeds gives priority goes too far, and, as Mr. *John S. Ewart* remarks in an article in the *Law Quarterly Review*, vol. XIII., p. 46, at p. 153, "not the locality of the deeds, but the conduct of the parties with reference to them, is the important point." The point to be investigated is "whether the conduct of" the person having the first equitable interest "is responsible for the success of the fraud" of the person, "holding himself out as the unincumbered owner of the property."

In our opinion, the Lapins are bound by the natural consequences of their acts in arming Olivia Sophia Heavener with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the lands to other persons, and they ought to be postponed to the equitable rights of Abigail to the extent allowed by the Supreme Court.

Lastly, it was argued that the mortgage transaction between Olivia Sophia Heavener and Abigail was unlawful by reason of the *Money-lenders and Infants Loan Act* 1905 (N.S.W.) (No. 24 of 1905). Abigail it was contended, carried on the business of a money-lender as defined by that Act, and was unregistered. He certainly was not registered as a money-lender. But Abigail was a solicitor, and carried on business as such on a considerable scale. And, whilst he financed many of his clients in connection with their acquisition of hotels, and good-naturedly advanced, in a rather casual manner, no small amount of money to his friends, pecunious and impecunious, both the primary Judge and the Full Court nevertheless found that he was not a money-lender within the meaning of the Act, and we see

(1) (1867) L.R. 4 Eq. 397.
(2) (1870) L.R. 11 Eq. 292, at p. 316.
(3) (1885) 29 Ch. D. 221, at p. 229.
(4) (1868) L.R. 7 Eq. 139.

no reason to disturb that finding. His transactions, though large in the aggregate amount, were scattered over a considerable period, and were not of the nature usually associated with a money-lender's business.

In our opinion, the judgment below was right, and ought to be affirmed.

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DIXON J. The appellants are entitled to equities of redemption in two pieces of land. Their mortgagee, the wife of a solicitor named Heavener, took absolute transfers from them and is registered proprietor of estates in fee simple in the land. Notwithstanding the appellants' equities, she gave to the respondent Abigail, who too is a solicitor, a mortgage of this and other land as security for advances made to her husband. Abigail did not register the mortgage, and the question for decision upon this appeal is whether the appellants are to be postponed to him.

At the trial and upon appeal before the Full Court of the Supreme Court of New South Wales the respondent Abigail succeeded upon the ground that he had dealt with the registered owner of the legal estate bona fide and for value, and had obtained an equity superior to that of the appellants. Before this Court as well as before the Supreme Court the appellants raised a question which precedes that of priorities. They contend that Abigail had no legal or equitable right whatever because he was an unregistered money-lender and took the security in the course of that business. In neither Court below, however, did they obtain a finding that Abigail did in fact carry on the business of a money-lender. The evidence was to the effect that during the years 1923 and 1924 he had lent large sums of money, and by many transactions. But in the year 1925, in September of which his transaction with Heavener took place, Abigail did much less lending. In January 1925 he lent three sums amounting to £2,020, in February two sums amounting to £1,638 and in July one sum of £550, and, after his transaction with Heavener, he lent in November two sums amounting to £493. In his cross-examination Abigail said, in effect, that some of the loans were made to relieve the necessities of friends, others to help deserving cases, and many of them were made in connection with the sale and transfer

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of hotels when he acted as solicitor. No evidence was given that he held himself out as a money-lender, and none that he pursued any system or plan in laying out and getting in his money. His resources were not investigated, and no attempt was made to ascertain from his books how losses were dealt with. In the result, the conclusion that he carried on the business of a money-lender must be drawn, if at all, simply from the number and magnitude of his advances. Having regard to this fact, and to the nature of his practice as a solicitor, and to the comparatively small number of transactions during the material part of 1925, the evidence does not require the conclusion that, at the relevant time, Abigail was "a person whose business was that of money-lending" within the meaning of that expression in sec. 8 of the *Money-lenders and Infants Loans Act* 1905 (N.S.W.).

It therefore becomes necessary to consider the question of priorities. The decision of this question is embarrassed by the lack of proof of the circumstances preceding and attending the transaction between Abigail and Heavener. For this reason it will be convenient to state the more material facts which do appear. According to the finding of *Long Innes* J., which is not disputed upon this appeal, the appellants Mark Lapin and his wife, being registered proprietors of parcels of land situate in Paddington and Dee Why respectively, transferred the land to Mrs. Heavener as security for their indebtedness to her husband, and for moneys to be applied by him in discharge of an existing mortgage thereon. The transfers were expressed to be in consideration of money payments. With a discharge of the existing mortgage, they were registered on 18th December 1923. On 14th March 1924 Mrs. Heavener gave a mortgage to a bank, which it registered on 11th August 1925. On or before 2nd September 1925 Heavener arranged with the respondent Abigail for a loan upon the security of the appellants' two parcels and of some other land. The Bank executed a discharge of its mortgage which bore the date 2nd September 1925. The amount secured by the mortgage was not proved in evidence. On 3rd September 1925 Abigail's cheque for £3,500 in favour of Heavener was paid into Heavener's current account at another bank. The cheque was cleared on 4th September 1925,

and on that date the sum of £2,570 19s. 6d. was placed to the debit of Heavener's account as a withdrawal. A registrable mortgage bearing date 2nd September 1925 was executed by Mrs. Heavener in favour of Abigail, expressed to secure the sum of £5,500 over the two parcels of land together with other land. On 4th September 1925 a caveat on behalf of Abigail was lodged in the Registrar-General's office forbidding registration of any dealings affecting the two parcels of land and another piece of land. Abigail's mortgage was not, however, lodged for registration, and until 15th October 1925 the discharge of the Bank's mortgage was also withheld from registration. On 7th September 1925 Abigail made a further payment of £2,000 to Heavener.

It is clear that at some time Abigail obtained possession of the certificates of title, but when does not appear from the evidence, unless the time may be conjectured from the fact that in the fold of the mortgage given by Mrs. Heavener to Abigail there is a note in the handwriting of one of Heavener's clerks, " Herewith Titles " —specifying the volume and folio ; and from the further fact that the caveat lodged on Abigail's behalf showed upon its face that the person who drew it must have seen either the certificates of title or some search notes. Heavener and Abigail were called as witnesses, but the conversations in which the transaction between them was arranged were objected to and rejected. Moreover, Abigail was unable to give any detailed account of the manner in which the transaction was carried out. After stating that he gave cheques on 2nd September for £3,500 and on 7th September for £2,000 to Heavener, he said that he had " almost a clear recollection of going down with Mr. Heavener to the bank at the corner of King and George Streets ; I am sure I went there and picked up documents, I am certain of that. That bank used to be the A. J. S. and is on the south-west corner of King Street." There is reason to doubt the identity of this institution with the mortgagee Bank. However this may be, Abigail was not prepared to say whether the certificates of title produced in Court were the documents which he picked up at the Bank, saying he could not carry his memory back so far. In cross-examination he said that he had a recollection that when Heavener asked for the loan he gave him a

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document setting out what he wanted and what his assets were, and that he (Abigail) then told his clerk, whose name was Harris, to make a search, and, if it was "right," to make the document to cover the amount, and that he relied upon what Heavener told him and his clerk Harris, when he signed the document, and did not handle the matter personally. Harris was not, however, called as a witness, and there is no evidence whether he did or did not search the register. On 30th November 1925 Abigail advanced a further £1,000 and a new security for the whole of the advances was drawn up, executed, but not registered. Heavener's case, which was not accepted by the trial Judge, *Long Innes* J., was that the transfers by the appellants to his wife were not by way of security but were absolute, and given in satisfaction of the appellants' indebtedness to him. There seems no reason to doubt that Heavener had adopted this view of the transaction at an early date.

Upon these facts the question is whether Abigail's rights take priority to the appellants' equity of redemption. *Long Innes* J. held that Abigail took the unregistered mortgage bona fide and for value in respect of the advance of £5,500, but he considered that he had constructive or imputed notice of the rights of the appellants before he made the further advance of £1,000. Upon appeal, the Full Court of New South Wales, consisting of *Harvey* C.J. in Eq., *Stephen* J. and *Hammond* A.J., expressed the opinion that the decision of *Long Innes* J. was undoubtedly right that Abigail was a purchaser for value without notice of the plaintiffs' equity.

While the evidence supports a finding that Abigail did not himself have notice, an affirmative finding that Harris, acting within the course of his authority, had no notice actual or constructive is more doubtful. The failure to call Harris as a witness is remarkable and invites suspicion. It must not be forgotten, however, that a search at the Registrar-General's office would have disclosed no interest in the appellants inasmuch as they had not lodged a caveat, and that Heavener himself would be unlikely to disclose to Harris any fact suggesting that the appellants had an interest in the land. It is more probable that he would tell the story which he maintained at the trial. Having regard to the unlikelihood of any avenue of information being available to Harris, an affirmative inference that

he had no notice may perhaps be open. It is true that *Long Innes* J. seems to have considered that when absence of notice in Abigail personally was proved, the burden of showing notice in Harris fell upon the plaintiffs. It may be, however, that this merely represents his view of the presumptions of fact which arose from the circumstances in evidence, and does not involve any alteration of the legal onus. Unsatisfactory as the evidence is to establish an affirmative plea of purchaser for value without notice, it does not appear to leave entirely without support the conclusions arrived at by the two Courts below.

It does not follow, however, that Abigail is entitled to succeed simply because he obtained a registrable mortgage for an advance bona fide made without notice. Until registration of his security Abigail had no more than an equitable interest. Prima facie his equitable interest is to be postponed to the prior equitable interest of the appellants. Indeed, although it is often convenient to deal separately with the question whether an equitable interest was taken bona fide for value without notice of a prior equitable interest, in strictness it forms only part of the issue whether the prior equity should lose its priority because the owner of the later equity was misled into its acquisition.

By a line of cases it is settled that sec. 43 of the *Real Property Act* 1900 does not give protection to a person who deals with a registered proprietor unless and until his dealing is registered (see *Cowell* v. *Stacey* (1); *Bakers Creek Consolidated Gold Mining Co.* v. *Hack* (2); *Templeton* v. *Leviathan Pty. Ltd.* (3)). Indeed, sec. 43 is expressed in terms which appear appropriate only to the protection of a legal estate or interest, and no legal estate or interest passes until registration. "Grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities, and the maxim applies, *Qui prior est tempore potior est jure.* The first grantee is *potior*—that is, *potentior.* He has a better and superior—because a prior—equity. The first grantee has a right to be paid first, and it is quite immaterial whether

(1) (1887) 13 V.L.R. 80.

(2) (1894) 15 N.S.W.L.R. (Eq.) 207, at p. 222.

(3) (1921) 30 C.L.R. 34, and particularly at p. 54, per *Knox* C.J.

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the subsequent incumbrancers at the time when they took their securities and paid their money had notice of the first incumbrance or not " (per Lord *Westbury* L.C., *Phillips* v. *Phillips* (1)).

As the priority of an earlier equitable interest depends upon time, the form and language of sec. 43 would be strangely misconceived if it was intended to protect against that priority one who obtained no legal estate or interest but a mere equitable right.

The question, therefore, is whether, for any reason appearing in evidence, the appellants lost their priority. In general an earlier equity is not to be postponed to a later one unless because of some act or neglect of the prior equitable owner. " In order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and . . . it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced " (per Lord *Cairns* L.C., *Shropshire Union Railways and Canal Co.* v. *The Queen* (2)). The act or default of the prior equitable owner must be such as to make it inequitable as between him and the subsequent equitable owner that he should retain his initial priority. This, in effect, generally means that his act or default must in some way have contributed to the assumption upon which the subsequent legal owner acted when acquiring his equity.

No doubt, when the appellants executed transfers which expressed the consideration as the receipt of a money payment, they did something which might well have operated to lead a person who dealt with the transferee on the faith of the transfers and read the statement of the consideration, to suppose that she had bought the land and paid the purchase-money, and thus become beneficial owner. But once the transfers were registered and Mrs. Heavener's certificates of title were issued, it became unlikely that any person would deal with Mrs. Heavener upon the faith of the transfers themselves, and in this case it is not shown or suggested that either Abigail or Harris did in fact see them. In

(1) (1861) 4 DeG. F. & J., at p. 215; 45 E.R., at p. 1166.
(2) (1875) L.R. 7 H.L., at p. 507.

constituting Mrs. Heavener legal owner the appellants did nothing which would warrant an assumption that she held free from all equities. The very nature of an equitable right requires that the legal ownership shall be elsewhere, and to constitute a person legal owner does not *per se* imply any representation, or warrant any supposition, that his legal title is not subject to equities.

Under the Torrens' system it is registration of a dealing which operates to extinguish inconsistent equitable titles. The system provides the machinery of caveats in order to enable the owner of an equitable interest to forbid registration and thus preserve his equity. This step the appellants did not take. The view has sometimes been expressed that failure on the part of a prior equitable owner to lodge a caveat is a default sufficient to postpone his interest to a subsequent equity acquired by one who has searched the register for caveats and, having found none, has thereupon acquired his interest (see *Butler* v. *Fairclough* (1)). It may be remarked that, if this view be correct, a curious consequence has arisen from the legislative attempt to provide a means of securing prior equitable rights from extinguishment by the registration of inconsistent dealings. Although it is registration which extinguishes the equity, and a caveat is therefore provided as a means of preventing registration, nevertheless, upon this view, failure to use that means affords a reason for defeating the equity or postponing it to the very interest, although unregistered, which, upon the terms of the statute, requires registration in order to prevail. No doubt, if it were the settled practice for all owners of equitable interests to lodge caveats, a failure to conform to the practice would naturally lead those who searched to believe that there was no outstanding equity. It may well be doubted, however, whether such a regular practice has actually been established. But in this case the question need not be pursued because, although the appellants did not caveat, it does not appear that any search for caveats was made on Abigail's behalf or that he acted in the belief that there was no caveat. The default of the appellants—if default it be—therefore did not contribute directly to any assumption upon which Abigail may have dealt with the Heaveners.

(1) (1917) 23 C.L.R., at pp. 91-92, per *Griffith* C.J.

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It was suggested that, by constituting Mrs. Heavener the legal owner and by permitting the consideration to be stated in the transfers as a money payment and by failing to caveat, the appellants had put the Heaveners in a position in which they, or one of them, might be emboldened to attempt to deal with third parties, inasmuch as there would be little or no fear of a third party detecting the fraud or receiving notice of any outstanding interest. In this way, it was suggested, the supposed default of the appellants did indirectly contribute to the deception practised upon Abigail. But even if in some circumstances such a process of causation might suffice to postpone a prior equity, there is in this case a failure to establish the requisite facts. All the circumstances which in truth operated to induce Heavener to commit the fraud, and the factors which led Abigail to trust him, would need investigation and proof. In point of fact the case suggested does not appear to have been explicitly made at the trial, and neither cross-examination nor findings of fact appear to have been directed to it. Heavener had dealt with the land on other occasions, and in the transaction with Abigail he was not attempting to defraud the appellants alone. In these circumstances it is impossible now to reach an affirmative conclusion that the failure to caveat led to the dealing by Abigail. There is therefore, so far, nothing to postpone the appellants' prior equity to his.

It may, however, be suggested that, if Abigail obtained a registrable instrument together with the certificates of title, his equity is to be preferred upon the ground that he had an immediate and a better right to call for the legal estate. In the first place, it is not proved satisfactorily, or perhaps at all, that Abigail did obtain the certificates of title at the time of his advance or at any time before he got notice of the appellants' rights. But in any case the equitable doctrine by which he who has a better right to the legal estate obtains priority is not applicable in a registration system in which no legal interest can pass until registration, when the supposed better right to the legal estate consists simply in the ability of the party claiming it to secure priority for a statutory security, if he chose to do so, by registration.

The circumstances, however, suggest that Abigail bargained with Heavener for a first mortgage as security for the loan he made, and that his money was accordingly applied by Heavener to pay off the existing mortgage held by the Bank in order that Abigail's mortgage should have priority. As the Bank's mortgage was registered there can be no doubt that it prevailed over the appellants' equity. It follows that before Abigail's loan was made to Heavener the appellants' equity was subject to the Bank's legal mortgage. The question, therefore, arises whether the discharge of that mortgage should put the appellants in a better position, as it would do if their equity were given complete priority to that of Abigail. "I think that, where a third party at the request of a mortgagor pays off a first mortgage with a view to becoming himself a first mortgagee of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee" (per *Parker* J. in *Crosbie-Hill* v. *Sayer* (1)).

There can in this case be no subrogation in the strict sense, because, after the registration of the discharge on 15th October 1925, the Bank's mortgage ceased to be a security and the land was wholly discharged from the debt. The question is, however, whether the security given to Abigail should not *pro tanto* prevail over the prior equity, which, otherwise, would obtain an advantage as a result of the transaction from which the later equity arose, and of the equitable remedies obtained in order to preserve the prior equity from the destruction which would follow if the later transaction were completed by registration.

The facts upon which this question turns can only be ascertained by conjecture. Neither the Bank's mortgage nor the discharge was put in evidence. The date of the discharge, 2nd September 1925, but no more, does appear from the entry of its registration. Who paid the Bank off does not appear, but it is clear that Abigail did not directly do so. There is no evidence that Abigail in fact bargained for a first mortgage of the land in question, but unfortunately the conversations which may have included such a bargain were rejected. The grounds upon which they were tendered

(1) (1908) 1 Ch., at p. 877.

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are by no means clear, but they do not seem to have included the reason that they were relevant to this issue, although it was raised by a paragraph of Abigail's defence. The amount of the Bank's mortgage is not shown, nor are its terms. From the fact that so large a sum as £2,570 19s. 6d. was debited to Heavener's bank account upon the day upon which Abigail's cheque of £3,500 was credited, and upon which the caveat was lodged, it may be conjectured that the money received by Heavener from Abigail was applied by him in discharging the Bank's mortgage, and obtaining the certificates of title in order to hand them to Abigail or his clerk, who thereupon lodged the caveat. But this is mere guess-work, and could form no foundation for any judicial conclusion. The facts which it would be necessary for Abigail to prove in order to establish priority in respect of such an amount as corresponded with the sum secured by the Bank's mortgage appear to be wholly lacking. In view, however, of the rejection of the evidence, and the manner in which the trial was conducted, it is perhaps just to concede to the respondent Abigail the right to an inquiry upon this subject, but such a concession could only be made upon the terms that he bore the whole costs of the inquiry and subsequent proceedings rendered necessary by his failure to tender evidence upon the proper ground and adduce sufficient evidence of the other facts necessary to establish his title.

It may be suggested that, because the land was transferred to Mrs. Heavener to secure the plaintiffs' indebtedness to her husband, the Heaveners had a beneficial interest in the land upon which the mortgage given to Abigail might operate. It must be remembered, however, that the Heaveners did not intend to transfer to Abigail any such interest in the land, and there is nothing in the instrument of mortgage which could operate as an assignment to Abigail of Lapin's debt to Heavener. The observations of Sir *William Grant* in *Jones* v. *Gibbons* (1) to the effect that by the assignment of the security the debt passes as an incident can scarcely apply when there is no intention to deal with the security at all as such and the debt itself is outstanding and recoverable by a third person. In this case Mrs. Heavener's husband is the creditor. He is

(1) (1804) 9 Ves. 407, at p. 410; 32 E.R. 659, at pp. 660, 661.

entitled to recover and retain the debt which is not in any way assigned. Her right to retain the land until her husband is paid is not a proprietary interest which her mortgage could impart to Abigail. Indeed, the point is really governed by a further observation of Sir *William Grant* (1): "But it is difficult to say, the mortgage passes, and is well assigned to one person, and yet the debt remains in another." It is impossible that it can be so divided. Mrs. Heavener held the land as nominee, and to this extent as the fiduciary, of the creditor to be secured, her husband. There is nothing to pass her interest in debt or security.

The decree appealed from contains directions for the purpose of ascertaining the amount, if any, remaining payable by the plaintiffs to the defendant Bertram Theodore Heavener. This amount would be reduced or extinguished if it were found that the defendant Abigail was in effect remitted to the position of the Bank whose mortgage or charge was created by the wrongful act of Heavener; because the amount with which the land was thus burdened would no doubt be chargeable against Heavener in the account between him and the plaintiffs. The decree should therefore be discharged, except in so far as it deals with certain questions of costs, so that upon further consideration the rights of the parties can be finally dealt with consistently with the order made upon this appeal.

Appeal allowed. Order of Full Court discharged. Respondent Abigail to pay the costs of the appeal to the Full Court and of this appeal. Discharge the decree of Long Innes J. save in so far as it orders taxation and payment of the costs of the plaintiffs of the suit and of certain other costs. Declare that the defendant Olivia Sophia Heavener holds the property comprised in certificate of title reg. vol. 2450 *fol.* 52 *in trust for the plaintiff Mark Lapin, and the property comprised in certificate of title reg. vol.* 3337 *fol.* 97 *in trust for the plaintiff Pearl Lapin subject to the equitable charge in favour of the defendant Abigail which is referred to in the declaration hereinafter contained and after*

(1) (1804) 9 Ves., at p. 411; 32 E.R., at p. 661.

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such lands have answered any moneys secured thereover which may on further consideration be found to remain payable to the defendant Bertram Theodore Heavener by the plaintiffs or either of them. Declare that the mortgage or mortgages given by the defendant Olivia Sophia Heavener to the defendant Ernest Robert Abigail by memoranda of mortgage dated 2nd September and 30th November 1925 *ought not to be registered.*

Declare that the defendant Abigail is entitled to an equitable charge over the said lands to secure the advances made by him to Olivia Sophia Heavener and/or Bertram Theodore Heavener up to but not beyond the sum, if any, in respect of which the defendant Abigail may be found to have priority as the result of the determination of the matters raised by par. 18 *of his defence pursuant to the order hereinafter contained.*

Order that the suit be remitted to the Supreme Court (a) *for the purpose of enabling the said Court on the application of the defendant Abigail and at his cost to determine the matter raised by par.* 18 *of the defendant Abigail's defence whether upon the evidence already adduced or upon further evidence or by an inquiry before the Master as to that Court shall seem just, and* (b) *for the purpose of making a decree on further consideration in this suit dealing with all matters (including questions of costs) not finally disposed of by this order or by so much of the decree of Long Innes J. as is not hereby discharged.*

Solicitor for the appellants, *Abram Landa*.

Solicitor for the respondent, *W. Parker*.

J. B.