[HIGH COURT OF AUSTRALIA.]

WHEELER . . . . . APPELLANT;
PLAINTIFF,

AND

BALDWIN AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 22, 23; *Dec.* 13.

Starke, Dixon and Evatt JJ.

Torrens System—Application to bring land under Act—Caveat—"Estate" or "interest"—Claim by caveatrix based on documentary title and possession—Issues for trial—Right of caveatrix to challenge applicant's documentary title—Pretenced title—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *secs.* 24, 26, 27—*Conveyancing Act* 1919-1932 (*N.S.W.*) (*No.* 6 *of* 1919—*No.* 65 *of* 1932), *sec.* 50—*Pretenced Titles Act* 1540 (32 *Hen. VIII., c.* 9).

In an application to bring certain land under the *Real Property Act* 1900 (N.S.W.), the applicant relied upon a documentary title. A caveat was lodged against the application. The caveatrix claimed an estate or interest in the land, as owner in fee simple, by virtue of certain conveyances, and alternatively, by virtue of possession adverse to the applicant for (*a*) upwards of twenty years by her and her predecessors in title, and (*b*) a period less than the statutory period. The caveatrix alleged that three of the conveyances relied upon by the applicant were made by persons who had not been in possession of the land within one year before the date of the respective conveyances, and, therefore, as against her, they were void as being conveyances of pretenced titles. The allegation was denied by the applicant. The Supreme Court refused to direct that the issues to be tried be other than (*a*) whether the caveatrix had a good possessory title to the land, and (*b*) whether she had a good and valid documentary title thereto.

Held, on appeal to the High Court, that the caveatrix was entitled also to an issue whether the three conveyances relied upon by the applicant were void under the *Pretenced Titles Act* 1540.

Decision of the Supreme Court of New South Wales (*Street* J.) varied.

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APPEAL from the Supreme Court of New South Wales.

In December 1933 Louisa Ann Baldwin, married woman, applied to the Registrar-General to bring certain lands under the provisions of the *Real Property Act* 1900 (N.S.W.). On 2nd January 1934 a caveat was lodged on behalf of Alice Ann Wheeler, married woman, forbidding the bringing of the lands under the Act. Mrs. Wheeler claimed, in the caveat, an estate or interest in the lands, as owner in fee simple by virtue of a certain particularized conveyance, and, alternatively, as owner in fee simple by virtue of possession adverse to Mrs. Baldwin for upwards of twenty years by her and her predecessors in title. In March 1934 Mrs. Wheeler issued an originating summons out of the Supreme Court in its equitable jurisdiction, to which Mrs. Baldwin and the Registrar-General were made defendants, seeking an order that the defendants and each of them be restrained from bringing the lands under the provisions of the Act. In an affidavit sworn by her and filed in connection with the summons Mrs. Wheeler stated, so far as material, substantially as follows :—

3. John Wetherill being seised in fee simple *inter alia* of lots 1, 2, 3, 4, 7, 8, 9, 10, 11, 12 and 13 of section 21 and of lot 6 of section 26 of the Mount Ramsay Estate subdivision, Narrabeen, and of certain lands lying between and contiguous to lots 7, 12 and 13 of section 21 and 5, 6 and 7 of section 26 and the Narrabeen Lagoon known as " Reserve," but which were not included in the subdivision, agreed as regards lots 1, 2, 3, 4, 7, 12 and 13 of section 21 and lot 6 of section 26 by contract dated 24th October 1881 and as regards lot 8 of section 21 by contract dated 16th January 1882 and as regards lots 9, 10 and 11 of section 21 by contract dated 15th January 1883 to sell all the lots to my father-in-law James Wheeler of Narrabeen farmer, who purported to buy such lands as to certain parts for his son my husband James Wheeler the younger, and as to other parts for his son George Wheeler.

4. On or about 25th September 1882 Wetherill being seised in fee simple of lots 5 and 7 of section 26 of the subdivision agreed by a certain contract to sell those lots " including Reserve " to my father-in-law, James Wheeler the elder, who purported to purchase the same for his son, my husband.

5. James Wheeler the elder paid all the purchase money for all the lands mentioned in pars. 3 and 4 hereof.

6. By indenture of conveyance dated 15th December 1881 made between Wetherill of the one part and James Wheeler the younger of the other part registered 31st December 1881, No. 814 Book 236 lots 1, 2, 3, 4 and 7 of section 21 were conveyed and assured unto the said James Wheeler in fee simple.

7. By indenture of conveyance dated 20th November 1885 made between Wetherill of the one part and George Wheeler of the other part registered 26th November 1885, No. 469 Book 327, lots 9, 10 and 11 of section 21 were conveyed and assured unto George Wheeler in fee simple. In the indenture of conveyance the lots are described as being bounded on the north by the Narrabeen Lagoon.

8. By indenture of conveyance dated 20th November 1885 made between Wetherill of the one part and James Wheeler the younger of the other part registered 29th November 1885, No. 470 Book 327, lot 8 of section 21 and lots 5, 6 and 7 of section 26 were conveyed and assured unto James Wheeler the younger in fee simple. Lot 8 of section 21 was, in the conveyance, described as being bounded on the north by the Narrabeen Lagoon.

9. Save as aforesaid the land hereinbefore described as " Reserve " was not specifically conveyed by Wetherill to James Wheeler the younger or at all.

10. By conveyance dated 18th January 1911 registered No. 435 Book 946, E. H. Alcock, T. J. A. Clark and J. P. McArthur the surviving and only trustees of the assigned estate of Wetherill did thereby consent to lots 12 and 13 of section 21 being included in an application, dated 8th December 1910 and numbered 16973, by my husband James Wheeler the younger to have, *inter alia*, those lots brought under the provisions of the *Real Property Act* 1900, and to the issue of a certificate of title therefor in the name of James Wheeler the younger, all purchase money therefor having been long since paid, and a certificate of title for lots 12 and 13 of section 21 was subsequently issued by the Registrar-General in the name of my husband.

11. By conveyance dated 28th July 1905 registered No. 245 Book 786, lots 9, 10 and 11 of section 21 were conveyed by George Wheeler to my husband and William George Wheeler as joint tenants.

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12. William George Wheeler died in 1909.

13. By indenture of conveyance dated 3rd December 1913 made between James Wheeler the younger of the one part and the defendant Louisa Ann Baldwin of the other part registered No. 288 Book 1015, the said James Wheeler conveyed and assured lots 8, 9 and 10 of section 21 to that defendant. These lots are described in the conveyance by metes and bounds.

14. In the year 1882 the whole of the lands mentioned in pars. 3 and 4 hereof including the Reserve were enclosed by a fence erected by James Wheeler the elder, and the lands were thereafter used and occupied by James Wheeler the elder and his son, my husband, until 26th June 1890, when James Wheeler the elder died, and thereafter the lands were used and occupied by my husband James Wheeler the younger.

15. By deed bearing date 25th November 1924 made between my husband and myself, my husband in consideration of the sum of fifty pounds conveyed to me a certain part of the land referred to in par. 4 hereof, namely :—" All that piece or parcel of land situate at Narrabeen in the Parish of Manly Cove County of Cumberland and State of New South Wales commencing at a point on the southern building line of Goodwin Street and being the north-western corner of lot seven section twenty-one of Deposited Plan number 6387 and bounded on the north by the southern building line of Goodwin Street being a line bearing westerly and distant two hundred and eighty feet three inches to Narrabeen Lagoon thence towards the north-west by the waters of the said lagoon bearing south-westerly and distant two hundred and twenty feet one inch thence towards the south by a line being a prolongation of lots one to seven of the said deposited plan and bearing easterly and distant three hundred and eighty-nine feet two inches to lot seven thence towards the east by the western boundary of lot seven being a line bearing northerly and distant one hundred and ninety-one feet three inches to the point of commencement be the said several dimensions all a little more or less."

16. I have known the land referred to in par. 15 hereof for over twenty-five years (it being part of the land hereinbefore mentioned

as "Reserve"), and during the whole of that period it has been used and occupied by my husband or myself.

17. In 1929 I erected at a cost exceeding £800 a substantial dwelling house on the land the subject of the conveyance referred to in par. 15 hereof, and I have resided therein with my husband from that date to the present time, and I still am in occupation and possession thereof.

18. On 6th December 1933 the defendant the Registrar-General notified me that the defendant Louisa Ann Baldwin had applied to bring under the provisions of the *Real Property Act* 1900 part of the lands referred to in par. 15 hereof.

19. On or about 2nd January 1934 I caused to be filed in the office of the Registrar-General a caveat forbidding such land to be brought under the provisions of the Act.

20. The caveat will lapse on 2nd April 1934 unless an injunction is previously obtained from this Honorable Court restraining the Registrar-General from bringing the land under the provisions of the Act.

A submitting appearance was filed on behalf of the Registrar-General. In an affidavit sworn by and filed on her behalf, Mrs. Baldwin stated substantially as follows:—

2. On and before 4th July 1877 one Philip Jenkins was seised of an estate in fee simple in possession in certain lands situated at Narrabeen in the parish of Manly Cove, County of Cumberland and State of New South Wales, including all that piece or parcel of land afterwards forming part of section 21 of the Mount Ramsay Estate, and which piece or parcel of land commences at the north-western corner of lot 7 section 21 of the estate, and is bounded thence by a line westerly one hundred and twenty feet to the high water mark of the lagoon, thence by the lagoon a line south-easterly two hundred and fifty feet to the north-western corner of lot 11 of the section thence by the northern boundary of lots 11, 12 and 13 of the section to the south-western corner of lot 7 thence by that lot a line northerly two hundred feet to the point of commencement. This piece or parcel of land is the land the subject of the dispute in the present proceedings.

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3. On 4th July 1877 Jenkins being seised as aforesaid conveyed, granted and released the piece or parcel of land to John Wetherill, then late of Sydney in the said State, draper, by conveyance dated that date and subsequently registered and numbered 582 Book 107.

4. Wetherill being seised as aforesaid of the piece or parcel of land for the period from 4th July 1877 up to 20th May 1903, to the best of my knowledge, information and belief remained in possession thereof continuously during that period.

5. On 20th May 1903 Wetherill, being seised of an estate in fee simple in possession of the piece or parcel of land, an indenture was on that date executed, and was subsequently registered and is numbered 262 Book 906. The indenture was made between Wetherill therein named as the party of the first part and Thomas James Armour Clark of Sydney, merchant, John Percival McArthur of Sydney, Edward Alcock of Sydney, merchant, William Henry Hoskins and James Leopold Weikert of the second part, and the creditors of Wetherill of the third part, and thereby Wetherill did grant, release and convey unto Clark, McArthur, Alcock, Hoskins and Weikert their heirs, executors, administrators and assigns (hereinafter called the trustees), the piece or parcel of land absolutely upon trust, to collect and receive or sell and dispose of the piece or parcel of land and every part thereof, either by public sale or private contract, and to apply the proceeds derived from such sale as in the conveyance mentioned.

6. Hoskins died on or about 21st March 1906, and Weikert died on or about 20th December 1903.

7. To the best of my information and belief the trustees or the survivors of them from time to time remained in possession of the piece or parcel of land continuously for the period from 20th May 1903 until 24th July 1911.

8. The trustees then surviving on 24th July 1911 were Clark, McArthur and Alcock.

9. On 24th July 1911, by indenture of that date subsequently registered and numbered 283 Book 941, the surviving trustees being then seised of an estate in fee simple in possession of the piece or parcel of land did grant, bargain, sell, alien and release, enfeoff and convey unto one Arthur Francis Desborough of Erskineville near

Sydney, freeholder, all the right, title and interest of them the surviving trustees to and in the piece or parcel of land together with all houses, buildings, &c., to the piece or parcel of land, belonging or in any wise appertaining or therewith generally held, used, occupied or enjoyed, and the reversions, remainders, rents, issues and profits thereof with all proper assurances to effectuate the conveyance of the piece or parcel of land from them the surviving trustees to Desborough.

10. Desborough being seised of an estate in fee simple in the piece or parcel of land from 24th July 1911 until 14th November 1911, was in continuous possession of the piece or parcel of land during that period.

11. On 14th November 1911, Desborough being seised of an estate in fee simple in the piece or parcel of land, an indenture was executed between Desborough of the one part and myself this deponent of the other part (which indenture was subsequently registered at the proper office of the Registrar-General for the registration of the indenture under the *Registration of Deeds Act* 1897 on 15th November 1911, and is numbered 783 Book 950) whereby Desborough did grant, bargain, sell, alien, release and convey unto me this deponent an estate in fee simple in the piece or parcel of land.

12. At or about the time of that conveyance I paid to Desborough in respect of that conveyance the sum of £200 out of money belonging to my separate estate, and at the time of the conveyance I had no notice, actual or constructive, of the existence of any equitable interest in the piece or parcel of land adverse to the title of Desborough, or to his right to convey to me an estate in fee simple free from encumbrances, estates and interests, nor of any possession of the piece or parcel of land adverse to Desborough or to me as purchaser for value of the piece or parcel of land, and in all respects I was in that transaction a bona fide purchaser for value without notice.

13. I have read what purports to be a copy of an affidavit of Alice Ann Wheeler sworn on 28th March 1934 and filed herein, and I crave leave to refer to the affidavit as fully and effectually as though it were herein set forth.

14. I say as to par. 4 of the affidavit that the reserve referred to in the contract set forth in such paragraph is not identical with nor

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is any portion of the reserve identical with the piece or parcel of land in this my affidavit hereinbefore referred to, or of any portion of the piece or parcel of land, and I say that the piece or parcel of land or any part of it never was at any time the subject of the contract referred to in that paragraph, or, to the best of my knowledge, information or belief, any contract between Wetherill and James Wheeler the elder in that paragraph referred to.

15. I say as to par. 9 of that affidavit that the piece or parcel of land in this my affidavit referred to has never been conveyed to the person in that paragraph referred to as James Wheeler the younger.

16. I say as to par. 14 of that affidavit that I cannot admit the facts therein deposed to, and I deny that the James Wheeler the elder in that paragraph referred to or his son referred to in that paragraph at any time up to the year 1929 or thereabouts ever used or occupied the piece or parcel of land in this my affidavit referred to adversely to myself or to my predecessors in title or at all during the years therein stated, and I say that at no time has any person used or occupied the piece or parcel of land adversely to me this deponent with my consent or acquiescence. I further say as to par. 14 that until December 1933 I was not aware that Mrs. Wheeler or any person other than myself was in possession of the piece or parcel of land.

17. As to par. 16 of that affidavit, I deny that the land therein referred to has been used and occupied by Mrs. Wheeler or by her husband for over twenty-five years or for any period except as in this my affidavit set out.

18. I say as to par. 17 of that affidavit that I cannot admit the facts therein deposed to.

19. On 25th March 1929 application was made on my behalf to bring the piece or parcel of land with other lands under the provisions of the *Real Property Act*. The application is still subsisting and is numbered 30172. I am informed by the conveyancer employed by me in and about that application that all requisitions in respect of that application have been satisfactorily dealt with, and that apart from the dispute the subject of the present proceedings he considers that that application will be granted practically forthwith.

A special case, stated under sec. 27 of the *Real Property Act* 1900 on behalf of Mrs. Wheeler, in obedience to a rule of the Court, included, similarly numbered, pars. 3 to 17 inclusive of her affidavit set out above, and then proceeded substantially as follows :—

18. I submit that I have a good possessory title by reason of continuous possession of the subject land by myself and my predecessors in title adversely to the defendant and her predecessors in title for twenty years and upwards.

19. I submit that as against my predecessors in title and as against myself the following conveyances (so far as they are reported to be conveyances of the subject land) were void, namely :—(*a*) The conveyance of 20th May 1903 referred to in par. 5 of the affidavit of Mrs. Baldwin; (*b*) The conveyance of 24th July 1911 referred to in par. 9 of the affidavit of Mrs. Baldwin ; and (*c*) The conveyance of 14th November 1911 referred to in par. 11 of the affidavit of Mrs. Baldwin, as each and every one of those conveyances was a conveyance of a present right of entry in land other than a conveyance to a person in possession thereof by a person who had not been in possession of the land within the space of one whole year next before the date of that conveyance, and that those conveyances were all void as being conveyances of pretenced titles.

20. I submit that the land known as the Reserve and referred to in par. 15 hereof is comprised within the land passing under the conveyances referred to in pars. 6, 7 and 8 hereof, and that I have a good and valid documentary title thereto.

21. I submit that that land did not form part of the land conveyed under the conveyance of 20th May 1903 referred to in par. 5 of the affidavit of Mrs. Baldwin ; and that Mrs. Baldwin has no documentary or other title to the land.

22. I submit that I have a good equitable title to the land, and that Mrs. Baldwin's case as set out in her affidavit does not disclose a good title to the land in that it does not appear that the conveyances referred to in pars. 5, 9 and 11 of her affidavit or any of them were bona fide purchases for value without notice of the equitable estate of the plaintiff Mrs. Wheeler and her predecessors in title.

Street J. ordered that the following issues be tried : (1) Whether the caveatrix—the plaintiff, Mrs. Wheeler— has a good possessory

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title to the lands in question, and (2) whether she has a good and valid documentary title thereto. His Honor refused to direct any other issues, and directed that the caveatrix be plaintiff on both issues.

From that decision the caveatrix now appealed to the High Court.

The Court was informed that the Registrar-General, who was served with a notice of the appeal, did not intend to appear.

Williams (with him *Gain*), for the appellant. The Court below should have directed an issue in accordance with par. 19 of the special case. The appellant claims title to the land by possession and by documents. Her possessory title is good against all persons except the true documentary owner. Even if not in possession for twenty years, the appellant was in possession when the application to the Registrar-General was made, and cannot be turned out of possession by the respondent unless the latter can show a good title to bring the land under the *Real Property Act*. In directing the issues to be tried *Street* J. followed the decision in *Nicholas* v. *Andrew* (1). If restricted to those issues the appellant will be precluded from challenging any of the conveyances referred to in par. 19 of the special case as void under the *Pretenced Titles Act* (32 Hen. VIII., c. 9). A person in possession of certain lands is entitled to raise specific objections to the documentary title of an applicant to bring the land under the Act (*Re Doust* (2)).

The burden of proof has no relation to the question of what the proper issues should be. The appellant is entitled to be put in exactly the same position as if the matter were an action in ejectment (*Asher* v. *Whitlock* (3) ; *Perry* v. *Clissold* (4)). The decisions of the Supreme Court appear to have proceeded on the basis that when a person has a good documentary title and makes application to bring the land under the Act, a caveator has to show a good possessory title in the sense that the defendant had been in adverse possession of the land for twenty years (see *Re Doust* (2) ; *In re Lord* (5) ; *In re Austin* (6) ; *In re Marks* (7) ; *In re Marshall* (8)). Here the

(1) (1919) 19 S.R. (N.S.W.) 119 ; 36 W.N. (N.S.W.) 48.
(2) (1881) 2 L.R. (N.S.W.) (L.) 299.
(3) (1865) L.R. 1 Q.B. 1, at p. 5.
(4) (1907) A.C. 73, at pp. 79, 80.
(5) (1888) 9 L.R. (N.S.W.) (L.) 415 ; 5 W.N. (N.S.W.) 1.
(6) (1892) 13 L.R. (N.S.W.) (L.) 263 ; 9 W.N. (N.S.W.) 64.
(7) (1894) 10 W.N. (N.S.W.) 182.
(8) (1899) 20 L.R. (N.S.W.) (L.) 63 ; 15 W.N. (N.S.W.) 207.

appellant's case does not state that she wishes to impugn the validity of the conveyances referred to in par. 19. Apart from what the Supreme Court has decided, this Court is free to place the proper construction upon the Act if it is of opinion that all or any of these decisions should be overruled. In *Salter* v. *Clarke* (1), an ejectment action, the conveyance there relied upon was declared void under the *Pretenced Titles Act*. The appellant should be permitted to show that the respondent, as applicant, has no estate or interest in the land. A person who is in adverse possession of land has an estate in that land (*Asher* v. *Whitlock* (2)).

Weston K.C. (with him *G. Mitchell*), for the respondent applicant. The title of an applicant to bring land under the Act is a matter for the Registrar-General, not for the Court. The jurisdiction of the Court is limited to the directing of issues or determining the question relating to the interests claimed by the caveator. Alternatively, the Court has a discretion as to the issues it may direct, and it will not direct any issues which are immaterial. What constitutes an " interest in land " is shown in *Tierney* v. *Loxton* (3). Something more is required than mere possession for a short period. The issue between an applicant and a caveator, the parties to the proceedings, is whether the caveator has the interest which he claims. If he has not such an interest he has no *locus standi* as a caveator. The interest, lien or charge claimed by a caveator must be particularized in the caveat (*Brancker* v. *Stewart* (4)). Even if the appellant's possession is sufficient to give her the right which she claims, she is in no better position if the three conveyances are pretenced titles. There is no jurisdiction to inquire into an applicant's title further than is necessarily involved in ascertaining whether the caveator has the title claimed. Even if the appellant's view is right, that the caveator's position is worse in an application to bring the land under the Act than in ejectment, though there may be jurisdiction, it would be an irrelevant issue, because if the caveator has twenty years possession the pretenced titles would be irrelevant.

(1) (1904) 4 S.R. (N.S.W.) 280; 21 W.N. (N.S.W.) 71.
(2) (1865) L.R. 1 Q.B. 1.
(3) (1891) 12 L.R. (N.S.W.) (L.) 308; 8 W.N. (N.S.W.) 79.
(4) (1899) 16 W.N. (N.S.W.) 92.

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The statement of *Griffith* C.J. in *Municipal District of Concord* v. *Coles* (1) seems to support the view that a caveator is placed in the position of a person who has to assert and prove his interest. The issue is whether the caveator has a good possessory title. The view adopted by the Supreme Court was approved by the Privy Council in *Solling* v. *Broughton* (2). The effect of a person becoming seised by possession was dealt with in *Leach* v. *Jay* (3). (See also *Joshua Williams* on *Seisin of the Freehold* (1878) p. 7.)

Williams, in reply. The Court will not construe the *Real Property Act* in such a way as to take away existing rights. The appellant will be deprived of definite rights acquired by her, if the respondent's contention be adopted. The cases stated by the parties to an application of this nature are treated as pleadings (*Pearse* v. *Forssberg* (4); *Beckenham and Harris* on *The Real Property Act* (*N.S.W.*) (1928), p. 58). A person in adverse possession has a good title to the land as against all the world except the true owner. The caveator should be allowed to show that the applicant to bring the land under the Act is not the true owner. The appellant has an estate in fee simple in the land, and is entitled to lodge a caveat (*Asher* v. *Whitlock* (5); *Perry* v. *Clissold* (6)).

Cur. adv. vult.

Dec. 13.

The following written judgments were delivered:—

STARKE J. Louisa Ann Baldwin, one of the respondents to this appeal, applied to bring certain lands under the provisions of the *Real Property Act* 1900, of New South Wales (sec. 14). About December 1933 the appellant Alice Ann Wheeler lodged a caveat with the Registrar-General forbidding the bringing of such lands under the Act (see sec. 24). She claimed, in the caveat, an estate or interest as owner in fee simple by virtue of a conveyance dated 25th November 1925 from James Wheeler to her, registered No. 107 Book 1368, and alternatively as owner in fee simple by virtue of possession adverse to the applicant for upwards of twenty years

(1) (1905) 3 C.L.R. 96, at p. 108.
(2) (1893) A.C. 556.
(3) (1878) 9 Ch. D. 42.
(4) (1899) 16 W.N. (N.S.W.) 94.
(5) (1865) L.R. 1 Q.B. 1.
(6) (1907) A.C. 73.

by her and her predecessors in title. In March 1934 the appellant issued an originating summons out of the Supreme Court of New South Wales, to which the respondent and the Registrar-General were made defendants, seeking an order that the defendants and each of them be restrained from bringing under the provisions of the *Real Property Act* 1900 the lands described in the application made by the respondent Mrs. Baldwin. During the course of this proceeding, both the appellant and the respondent Mrs. Baldwin stated in writing their cases or claims to the lands the subject of the application already mentioned (see Act, sec. 27). *Street* J., before whom the originating summons came, ordered that the following issues be tried :—1. Whether the caveatrix has a good possessory title to the lands in question. 2. Whether the caveatrix has a good and valid documentary title thereto. But he refused to direct an issue whether as against the caveatrix and her predecessors in title certain conveyances relied upon by the respondent Mrs. Baldwin as part of her title were void by reason of the *Pretenced Titles Act* (32 Hen. VIII., c. 9), so far as they purported to be a conveyance of the land the subject of the above-mentioned application. This old Act, it has been held, is in force in New South Wales (*Nichols* v. *Anglo-Australian Investment Finance and Land Co.* (1) ; *Salter* v. *Clarke* (2) ; *Woods* v. *Williams* (3)). The *Real Property Act* 1900 requires that a person lodging a caveat forbidding the bringing of land under the Act shall have or claim interest in that land (sec. 24). " It is only a person who has a legal or equitable interest in land, partaking of the character of an estate in it or equitable claims to it, who can lodge a caveat " (*Municipal District of Concord* v. *Coles* (4) ; *Tierney* v. *Loxton* (5)). But a person in possession of land has such an interest (*Sheridan* v. *Gilles* (6) ; *Bethune* v. *Porteous* (7)). " Possession is a definite legal right." " It is a root of title " effective against all but the true owner, and it " enures to the benefit of all who may be able to show title derived from it by any form of bequest, devolution or conveyance." It is

(1) (1890) 11 L.R. (N.S.W.) (L.) 354 ; 7 W.N. (N.S.W.) 57.
(2) (1904) 4 S.R. (N.S.W.) 280 ; 21 W.N. (N.S.W.) 71.
(3) (1905) 5 S.R. (N.S.W.) 212 ; 22 W.N. (N.S.W.) 65.
(4) (1905) 3 C.L.R., at p. 107.
(5) (1891) 12 L.R. (N.S.W.) (L.) 308 ; 8 W.N. (N.S.W.) 79.
(6) (1887) 21 S.A.L.R. 7.
(7) (1893) 19 V.L.R. 161 ; 14 A.L.T. 265.

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prima facie evidence of the right to possess (*Asher* v. *Whitlock* (1); *Pollock and Wright* on *Possession in the Common Law* (1888), pp. 20-23; *Holdsworth, History of English Law*, 1st ed. (1903), vol. I., pp. 77-88, particularly p. 83). A caveator in possession is not, however, in the same position as a defendant in ejectment (*Solling* v. *Broughton* (2); *Ex parte Hamilton* (3); *Kelly* v. *Bentinck* (4)). It must be observed, however, that proceedings taken in support of the caveat do not establish the caveator's title for the purpose of registration, and it is by no means necessary under the Act that the applicant's title be established to the satisfaction of the Registrar-General before a caveat is lodged. The provisions of the Act are nevertheless designed as a method of protecting the rights of any person having or claiming an interest in the land. But it is not an exclusive remedy (*Public Trustee* v. *Murray* (5)). The protection given by the section is possibly more important in New South Wales than in other States, for sec. 45 of the Act provides: "No title to land adverse to or in derogation of the title of the registered proprietor shall be acquired by any length of possession by virtue of any statute of limitations relating to real estate, nor shall the title of any such registered proprietor be extinguished by the operation of any such statute." The cases lodged by the parties pursuant to sec. 27 are treated as in the nature of pleadings in the matter (*In re Austin* (6); *In re Marshall* (7)). But it is for the Court to decide whether any facts are in bona fide contest between the parties: if the Court finds there are no such facts it then decides the matter upon the cases; if there are such facts then issues may be directed (*Re Lethbridge* v. *Mitchell* (8); *Re Doust* (9); *Re Bank of Australasia* (10); *In re Houison* (11); *Kelly* v. *Bentinck* (4)). Very comprehensive powers are conferred upon the Court (*Re Brodziak* (12)): it can direct not only the issues to be tried, but who shall be plaintiff or defendant in any of those issues (*In re Browning* (13)).

(1) (1865) L.R. 1 Q.B. 1.
(2) (1891) 12 L.R. (N.S.W.) (L.) 189; (1893) A.C. 556.
(3) (1864) 3 S.C.R. (N.S.W.) (L.) 311.
(4) (1902) 22 N.Z.L.R. 235.
(5) (1922) 22 S.R. (N.S.W.) 555; 39 W.N. (N.S.W.) 173.
(6) (1892) 13 L.R. (N.S.W.) (L.) 263; 9 W.N. (N.S.W.) 64.
(7) (1899) 20 L.R. (N.S.W.) (L.) 63; 15 W.N. (N.S.W.) 207.
(8) (1887) 8 L.R. (N.S.W.) (L.) 249; 4 W.N. (N.S.W.) 21.
(9) (1881) 2 L.R. (N.S.W.) (L.) 299.
(10) (1894) 15 L.R. (N.S.W.) (L.) 256.
(11) (1897) 18 L.R. (N.S.W.) (L.) 300; 14 W.N. (N.S.W.) 3.
(12) (1881) 2 L.R. (N.S.W.) (L.) 305.
(13) (1891) 7 W.N. (N.S.W.) 113.

"I see no reason for thinking that the caveator is restricted to the case of possessory title which he sets up, or that he is not at liberty to impugn the title of the applicant by proving, if he can, that some conveyance, or will, on which the applicant relies, is invalid. It appears to me, he is no more restricted in so doing from disputing some matter of fact asserted by the applicant, than he is restricted from challenging some legal inference, or matter of law, on which the applicant relies. It may be that the caveator must show some ground of title in himself to give him a *locus standi* before the Court, but I see no reason for thinking that he cannot take advantage of any weakness in the applicant's case" (*Re Doust* (1), per *Windeyer* J.). But it is said that *Nicholas* v. *Andrew* (2) is contrary to this view, and that the only jurisdiction in the Court is to direct issues as to the caveator's interest in the land the subject of the application. I do not agree. *Nicholas'* *Case* (2) and *Doust's* *Case* (3) are not, I think, in conflict. They illustrate the wide discretion of the Court under the Act in differing circumstances. In *Nicholas'* *Case* (2) an application was made to bring land under the Act based upon a possessory title, whereas in *Doust's* *Case* (3) the application was based upon a documentary title. In the former case (2), the applicant could not succeed in her application unless she established her possessory title, whereas in *Doust's* *Case* (3) the caveators were or claimed to be in possession, and their rights ought, therefore, to be protected unless the documentary title was established. But it does not follow that a party should be allowed to challenge a documentary title generally; he may well be required to state the particular objection or defect to the title, and show that it is a bona fide or arguable matter (*In re Austin* (4); *In re Marshall* (5)).

The following is a short abstract of the title claimed by the applicant:—

4th July 1877: Philip Jenkins seised in fee.

4th July 1877: Conveyance in fee, Philip Jenkins to John Wetherill. Possession obtained by Wetherill.

(1) (1881) 2 L.R. (N.S.W.) (L.), at p. 301.
(2) (1919) 19 S.R. (N.S.W.) 119; 36 W.N. (N.S.W.) 48.
(3) (1881) 2 L.R. (N.S.W.) (L.) 299.
(4) (1892) 13 L.R. (N.S.W.) (L.) 263; 9 W.N. (N.S.W.) 64.
(5) (1899) 20 L.R. (N.S.W.) (L.) 63; 15 W.N. (N.S.W.) 207.

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20th May 1903 : Conveyance in fee, John Wetherill to trustees for benefit of creditors. Possession believed to have been taken by trustees.

24th July 1911 : Conveyance in fee, surviving trustees to Arthur F. Desborough. Possession obtained by Desborough.

14th November 1911 : Conveyance in fee, Arthur F. Desborough to applicant.

On the other hand, the following is a short abstract of the title claimed by the caveatrix, the appellant :—

25th September 1882 : John Wetherill seised in fee.

25th September 1882 : Contract of sale, John Wetherill to James Wheeler, who purchased for his son James Wheeler the younger, the appellant's husband.

1882 : Lands subject to application and other lands enclosed by fence, and occupied by and in possession of James Wheeler and James Wheeler the younger.

26th June 1890 : James Wheeler died, James Wheeler the younger continued in possession.

25th November 1924 : Conveyance, James Wheeler the younger to his wife, the appellant. Possession continued by the appellant, who built a house on the land in 1929.

It seems, on these allegations, a bona fide dispute whether the conveyances of the 20th May 1903, the 24th July 1911, and the 14th November 1911, upon which the respondent relies, were not made by persons then out of possession, contrary to the provisions of the statute 32 Hen. VIII., c. 9, sec. 2. And, as I follow the facts, the appellant is undoubtedly in possession of and has built a house upon the lands which the respondent has applied to bring under the provisions of the *Real Property Act* 1900. In these circumstances, the applicant's title should be established before her application is granted. The possession of the appellant—the caveatrix—should be protected unless that title is established. It is a good title against all but the true owner, and an issue directed to the applicant's title appears to me the only practicable method of protecting it. The issue should be whether the conveyances of the 20th May 1903, the 24th July 1911, and the 14th November 1911 are void under and by reason of the provisions of the statute 32 Hen. VIII., c. 9,

sec. 2. But the appellant should be the plaintiff in the issue as she is attacking the title.

The result is that, in my opinion, the appeal should be allowed in so far as the order appealed from refused the issue last mentioned.

DIXON J. This is an appeal by leave from an order by *Street* J., by which he directed issues to be tried between a caveatrix and an applicant seeking to bring land under the provisions of the *Real Property Act* 1900. His Honor refused to direct any issues except whether the caveatrix had a good possessory title to the lands, the subject of the application, and whether she had a good and valid documentary title. The caveatrix sought an issue or issues upon the question whether three conveyances, upon which the applicant relies, are invalid because, contrary to the *Pretenced Titles Act* (32 Hen. VIII., c. 9), they were conveyances of a present right of entry only by a person who had not been in possession of the land within the space of one year before the dates of the respective conveyances. In New South Wales this statute was in force until the passing of sec. 50 of the *Conveyancing Act* 1919, and its operation had not been affected by any enactment making rights of entry alienable. The documents impugned by the caveatrix were executed before 1919. The effect of the *Pretenced Titles Act* (32 Hen. VIII., c. 9) is discussed in *Holdsworth, History of English Law*, 3rd ed. (1925), vol. VII., p. 50, and in *Salter* v. *Clarke* (1). (Cf. *Jenkins* v. *Jones* (2); *Kennedy* v. *Lyell* (3).) So far as material, its operation in New South Wales was to invalidate conveyances of lands pursuant to sale if the vendor had for a year before the sale been dispossessed of the land. The disputed land lies on the eastern side of the Narrabeen Lagoon and fronts a street called Goodwin Street. The expression "reserve" seems to have been used to describe land of which it formed a part. Apparently both the applicant and the caveatrix claim to derive title under one John Wetherill. The caveatrix alleges that in 1882 John Wetherill contracted to sell to her father-in-law certain lots "including reserve," that the purchase money was paid, that in 1885 a conveyance in intended fulfilment of the contract was made

(1) (1904) 4 S.R. (N.S.W.) 280; 21 W.N. (N.S.W.) 71.
(2) (1882) 9 Q.B.D. 128.
(3) (1885) 15 Q.B.D. 491.

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to her husband, but the parcels in the conveyance did not expressly include the reserve, and that in 1924 her husband conveyed the land in dispute to her. The caveatrix also claims that, until June 1890, her father-in-law and her husband were in exclusive possession of the land, that thereafter, until the conveyance to her in 1924, her husband was in exclusive possession, and that since then she has been in possession, and in 1929 erected a dwelling house thereon which she and her husband have occupied.

The applicant, on the other hand, disputes the allegation that John Wetherill sold the land in 1882, or intended to convey it in 1885. She contends that the expression "reserve" did not refer to the land in question. She alleges that in 1903 John Wetherill, being still the owner of the land, assigned it to trustees for the benefit of creditors, and these in July 1911 sold and conveyed it to one Desborough, from whom, in November 1911, she bought it and obtained a conveyance. The applicant denies that the caveatrix, her husband and father-in-law were in possession, at any rate prior to 1929, and says that she herself and her predecessors in title had possession of the land.

It is apparent from this brief statement of the controversy that the caveatrix has a difficulty to overcome in showing that the legal estate in the land passed to her husband from John Wetherill, and a further difficulty, perhaps, in showing that she is entitled to the benefit of her father-in-law's possession as that of a person under whom she took. It also seems not improbable that neither party so used and occupied the land as to make her possession an evident fact. In these circumstances, the caveatrix desires to rely as an alternative upon her possession since 1929, or some date later than would give her a statutory title, and not to stand or fall upon her ability to show that either by documentary title or by possession for the full twenty years she has acquired absolutely an estate in fee simple in the land, as the order of *Street* J., in effect, requires her to do. She contends that she is entitled to retain possession against all but the true owner, and accordingly, that when the applicant seeks to obtain a certificate of ownership by bringing the land under the Act, she should be allowed, in virtue of her exclusive possession, an opportunity of refuting the applicant's claim to be the owner of

an estate in fee simple in the land, whether she herself has or has not acquired that estate. The attack she wishes to make upon the applicant's title is that the conveyance of 1903 by John Wetherill to trustees for the benefit of his creditors, that of July 1911 by the trustees to Desborough, and that of November 1911 by Desborough to the applicant, were each bad under the *Pretenced Titles Act* 1540, because none of the grantors was in possession of the land or had been within twelve months of the grant. Whether she is entitled to an issue upon this question depends upon the provisions of the *Real Property Act* 1900 dealing with caveats against applications to bring land under that statute. Sec. 24 of the *Real Property Act* 1900 enables any person, having or claiming an interest in land the subject of such an application, to caveat. The caveat must "particularise the estate, interest, lien, or charge claimed by the caveator, and the caveator shall if required deliver a full and complete abstract of his title." Sec. 26 provides that after three months the caveat shall lapse unless the caveator has taken proceedings to establish his title to the estate, interest, lien or charge therein specified, or has obtained from the Supreme Court an order or injunction restraining the Registrar-General from bringing the land under the Act. Sec. 27 provides that where a caveat has been lodged by a caveator claiming the land or an interest therein adversely to the applicant, the latter may state a case for the opinion and direction of the Supreme Court upon the matter. The caveator may apply for an injunction, and the Court may direct him to lodge a case on his own behalf stating whether he claims in his own right or under another person, together with such other particulars, if any, as the Court thinks fit to order. The Court shall thereupon direct issues to be tried, or, if no fact be in contest, it may decide the matter upon the case stated. The question is whether a person who, like the caveatrix, is in possession of land adversely to the applicant who seeks to bring it under the Act, may, although he has not yet acquired a statutory title by length of possession, caveat against the application, and obtain an issue as to the validity or sufficiency of the applicant's documentary title to the land. Upon this question a series of decisions of the Supreme Court of New South Wales is

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material. They do not, however, pursue a course which is altogether consistent.

In *Ex parte Hamilton* (1) it was decided that the person claiming to be owner of land might apply to bring it under the Act, although another person was in possession adversely to him. Both *Stephen* C.J. and *Milford* J. pointed out that the result was to impose upon a person in possession of land the burden of taking affirmative proceedings, by caveat and application for injunction, to establish his own right when an application is made to bring it under the Act, however shadowy may be the title of the applicant. In *Re Doust* (2) the applicant claimed the land under a will as devisee, and the caveator by more than twenty years undisturbed possession. The caveator obtained an issue whether the will was duly executed. *Manning* J. dissented, saying (3) :—" I think that a caveator claiming only by possession should not be allowed to pick holes in the applicant's title. That title has been passed by the examiners, who are the proper tribunal under the Act to decide on the validity of the documents . . . The original Act required the caveator to put forward affirmatively the estate, title, and interest which he claimed, and made it necessary for him to make out his right. It has been decided in *Ex parte Hamilton* (1) that the caveator must take proceedings and make out his case although in possession."

In *In re Lord* (4) a caveator, setting up a possessory title, was refused an issue as to the general sufficiency of the applicant's title upon the ground that, though it was open to such a caveator to point to any specific defect in the applicant's title, he was not entitled to put the applicant to proof of his whole title. This rule was applied in *In re Austin* (5) and in *In re Marks* (6), where *Windeyer* J. said: —" If the caveator wants to attack the applicant's title, he must point to some blot in it. The Court has held that over and over again. The caveator cannot succeed unless he can show title by possession." In *In re Marshall* (7) the Court refused to allow to a caveator setting up a possessory title an issue whether a conveyance

(1) (1864) 3 S.C.R. (N.S.W.) (L.) 311.
(2) (1881) 2 L.R. (N.S.W.) (L.) 299.
(3) (1881) 2 L.R. (N.S.W.) (L.), at pp. 300, 301.
(4) (1888) 9 L.R. (N.S.W.) (L.) 415; 5 W.N. (N.S.W.) 1.
(5) (1892) 13 L.R. (N.S.W.) (L.) 263; 9 W.N. (N.S.W.) 64.
(6) (1894) 10 W.N. (N.S.W.) 182.
(7) (1899) 20 L.R. (N.S.W.) (L.) 63; 15 W.N. (N.S.W.) 207.

made fifty years before was bad as a pretenced title, in the absence of an affidavit that the conveying party was at the date of the conveyance out of possession of the land. In *Brancker* v. *Stewart* (1) the Court ordered the removal of a caveat setting up a possessory title because, consistently with the facts stated in the caveat, the caveator, who relied upon possession of the previous occupier to make up the full statutory period, might have been an independent trespasser whose possession was not derivative. This decision may appear to mean that a caveat cannot be sustained by any possession less than that giving a statutory title, but the applicant's documentary title had been passed, and perhaps was unquestionable unless extinguished by a possessory title. In *Nicholas* v. *Andrew* (2) it was the applicant who relied upon a possessory title, and the caveator upon a documentary title. The applicant sought an issue whether the caveator had a good documentary title deduced from a specified root. The Court refused any issue except whether the applicant had a good possessory title. The applicant alleged that the caveator was setting up a pretenced title, and pointed to a particular document. The Court appears to have acted upon the view that the applicant could not succeed in defeating the caveat except by the strength of the title which the applicant sought to bring under the Act. Such a view appears to be inconsistent with the principle to which previous authorities give at least partial effect, namely, that the caveator must establish the estate, interest, lien or charge upon which his competence as a caveator depends.

That, to enable him to lodge a caveat, the caveator must have some right falling within the description, estate, interest, lien or charge, is not open to dispute.

In *Tierney* v. *Loxton* (3) an order settling issues was rescinded upon the ground that it appeared that the caveator had no estate or interest in the land. *Windeyer* J. said (4) :—" We have come to the conclusion that the intention of the Legislature in using the word 'interest' was that only a person having, or claiming to have, some legal or equitable interest in the land partaking of the character of an

(1) (1899) 16 W.N. (N.S.W.) 92.
(2) (1919) 19 S.R. (N.S.W.) 119 ; 36 W.N. (N.S.W.) 48.
(3) (1891) 12 L.R. (N.S.W.) (L.) 308 ; 8 W.N. (N.S.W.) 79.
(4) (1891) 12 L.R. (N.S.W.) (L.), at pp. 314, 315 ; 8 W.N. (N.S.W.), at p. 79.

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estate, or of an equitable claim upon the land, could be a caveator. This inference is to be drawn not only from the way in which the word 'interest' is used in the latter part of the section in connection with the words 'estate, lien, or charge,' which points to the conclusion that the interest is to be one *ejusdem generis*, and, therefore, one which gives the caveator a legal or equitable claim to or upon the land itself, but also from the concluding words of the section under which the caveator may be required to deliver a full and complete abstract of his title." This statement was approved in *Municipal District of Concord* v. *Coles* (1). Indeed, the terms of secs. 24 and 26 clearly require that an estate, interest, lien or charge shall be claimed by the caveator. The existence of such an interest in the land gives him his *locus standi* to caveat. If this *locus standi* is established he is entitled to call in question the applicant's right to bring the land under the Act. But the applicant's right depends upon his title to an estate in the land. Except in cases when one or other of them relies upon a possessory title or possession, the question of the applicant's title cannot be separated from the question of the caveator's *locus standi*. Rival claims to interests in the same land depending upon derivative documentary titles must be traceable to a common root, and an investigation of the claim of one cannot be complete without a consideration of the claim of the other. It is probably for this reason that Mr. *Hogg* in his book upon the *Australian Torrens System*, (1905), at p. 744, formulates the principle that the power of making or concurring in an application to bring land under the Act and the power of caveating against such an application are correlative, so that the caveator must have an interest in the land sufficient to enable him to apply to bring the land under the Act. But when the caveator relies upon a possessory title of the statutory duration and the applicant upon a documentary title, or vice versa, the validity of the two titles depends upon independent considerations: the possessory title extinguishes the documentary title in virtue of extrinsic collateral facts. The question whether the applicant has a good documentary title or a bad one is usually irrelevant to the acquisition of the possessory title of the caveator. The doctrine, which the cases decided in the Supreme Court of New

(1) (1905) 3 C.L.R. 96.

South Wales for the most part follow, appears to require that the caveator shall establish that he is entitled to an estate in land acquired by the statutory period of possession, but, at the same time, to allow him to impeach the validity of the documentary title of the applicant on the ground of some particular specified defect, notwithstanding that his own possessory title is not affected thereby. This doctrine appears to imply that the caveator may succeed either by showing that the documentary title has been extinguished by his acquisition of a possessory title, or, although he cannot show that, by his impugning the validity of the applicant's documentary title. Unless the doctrine does mean this, it involves an inconsistency. For, if the caveator's *locus standi* to caveat depends upon the existence in him of a complete possessory title, he ought not to be permitted to attack the documentary title, except in so far as it may chance to be material to the proof of his possessory title, unless and until he makes out his complete possessory title. But, if he does make that title out, the documentary title is extinguished whether the applicant is able to show a good or bad chain of title. On the other hand, if independent and exclusive possession of the land is enough to give a *locus standi* to caveat, the caveator should be entitled to attack the documentary title of the applicant. Such a person can be dispossessed only by the true owner of an estate or interest in possession. If the applicant obtains a certificate of title, he will become true owner, or, at any rate, he will have conclusive evidence of his ownership. The pending application thus endangers the continuance of his right to possession, and, if he is entitled to caveat, he must be entitled to contest the validity of the applicant's claim to bring the land under the Act and to obtain a certificate of title. The real question, therefore, is whether an independent and exclusive possession for less than the statutory period gives a *locus standi* to caveat. To do so it must answer the description, contained in secs. 24 and 26, estate, interest, lien or charge in the land. It cannot do this unless it is adverse to the true owner of the first estate or interest in possession. For mere possession under a person entitled gives no interest in the land. But does exclusive or adverse possession give such an interest? The answer to this question depends upon a principle of our law of property which at the present day

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we are apt to overlook, as a survival of legal doctrines which no longer obtain. This doctrine is stated by Mr. *Joshua Williams* in his lectures on the *Seisin of the Freehold* (1878), at p. 7, as follows:— "The rule of law still is, and it is a rule of great importance, that the mere *possession of land is prima facie evidence of a seisin in fee.* I say prima facie evidence, for the presumption may be rebutted by evidence, showing that the possessor has in fact a less estate. But, in the absence of any such evidence, the person found in possession will, to the present day, be presumed to be seised in his demesne as of fee.

There is another rule still in existence, founded apparently on the same principles, and that rule is, that an estate gained by wrong is always an estate in fee simple. If a person wrongfully gets possession of the land of another, he becomes wrongfully entitled to an estate in fee simple, and to no less an estate in that land; thus, if a squatter wrongfully encloses a bit of waste land, and builds a hut on it and lives there, he acquires an estate in fee simple by his own wrong in the land which he has enclosed. He is seised, and the owner of waste is disseised. It is true that until, by length of time, the Statute of Limitations shall have confirmed his title, he may be turned out by legal process. But as long as he remains, he is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs. The rightful owner, meantime, has but a right of entry, a right in many respects equivalent to seisin; but he is not actually seised, for if one person is seised, another person cannot be so."

In *Maitland's* essay upon *The Mystery of Seisin*, *Collected Papers* (1911), vol. I., p. 370, he states what formerly was the law governing the position of the disseisor:—"He who is seised, though he has no title to the seisin, can alienate the land; he can make a feoffment and he can make a will (for he who *has* land is enabled to devise it by statute), and his heir shall inherit, shall inherit from him, for he is a stock of descent; and there shall be dower and there shall be curtesy, and the lord shall have an escheat and the king a forfeiture, for such a one has land 'to give and to forfeit.' This may make seisin look very much like ownership, and in truth our old law seems

this (and has it ever been changed ?) that seisin does give ownership good against all save those who have better because older title. Nevertheless we err if we begin to think of seisin as ownership or any modification of ownership ; after all it is but possession."

A full account of the development of the law will be found in *Holdsworth's History of English Law*, 3rd ed. (1925), vol. VII., pp. 23 to 81. He answers at pp. 59, 60, the question of *Maitland*, namely, " Has it ever been changed ? " He says : " Thus the medieval principle that possession is ownership as against all the world except as against those who can show a better title, having been maintained in law of this period, remains part of our modern law."

But does this amount to an estate or interest in the land ? That it is properly described by these words is shown by *Perry* v. *Clissold* (1). The question in that case was whether a person occupying land as an adverse possessor or " squatter " had an estate or interest within the meaning of the compensation provisions of an enactment for the compulsory acquisition of land. Although some attention was paid by the Privy Council to the purposes of the Act, it does not appear that any special meaning was given to the words estate and interest. In giving an affirmative answer to the question, the Privy Council appears to have acted upon the doctrine discussed above, which Lord *Macnaghten* expressed as follows :—" It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title " (2).

For these reasons I think that a person in possession claiming inconsistently with the title of the owner of the first estate in possession has a *locus standi* to caveat, and that he is entitled to an issue as to the validity or sufficiency of the applicant's title. Whether an issue in general terms should be settled, or whether the caveator should be required to state his objections to the title in some specific

(1) (1907) A.C. 73.

(2) (1907) A.C., at p. 79.

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way, is a matter within the discretion of the Court, which should be exercised upon a consideration of the nature of the title produced by the applicant, the opportunities of the caveator to examine it, and his knowledge of the facts. In the present case, the caveatrix asks for issues specifically directed to an attack upon the validity of particular conveyances on stated grounds. In my opinion the issues she seeks should be directed.

The appeal should be allowed with costs. The order of *Street* J. should be varied by adding after the second issue thereby directed, the following:—"3. Whether as against the plaintiff and her predecessors in title the undermentioned conveyances (so far as they are purported to be conveyances of the subject land) were void as being conveyances of a present right of entry in land other than a conveyance to a person in possession thereof by a person who had not been in possession of the said land within the space of one whole year next before the date of such conveyance and as being conveyances of pretenced titles:—

(*a*) The conveyance of 20th day of May 1903 from John Wetherill to Clark and others.

(*b*) The conveyance of 24th day of July 1911 from Clark and others to Desborough; and

(*c*) The conveyance of 14th day of November 1911 from Desborough to the defendant."

EVATT J. By sec. 14 (2) of the *Real Property Act* the Registrar-General is directed to receive applications for the purpose of bringing old system land under the provisions of the Act. The applications are referred to in the sub-section as being "in the form of the Second Schedule." The form of the Second Schedule includes a statement: "And I further declare that there is no person in possession or occupation of the said lands adversely to my estate or interest therein." By sec. 16 of the Act the applicant is required to make and subscribe a declaration of the truth of the statements in his application, and is bound to state therein whether the land is occupied or unoccupied and, if occupied, "the name and description of the occupant and the nature of his occupancy *and whether such occupancy be adverse or otherwise.*" (The italics are mine.)

If the matter were *res integra* it could be held readily that there is no inconsistency between the implied requirement evidenced by the declaration of the applicant, that there is no adverse possession, and the provision in sec. 16 (1) (*b*) that the applicant must state whether the occupancy of the occupier is adverse or otherwise. Sec. 14 (2) seems to demand the conclusion that where a stranger is in adverse possession of old system land, an application to bring lands under the Act should fail. If this is so, sec. 16 (1) (*b*) merely secures that the necessary information shall be placed before the Registrar-General. In other words, if the occupancy is adverse, the Registrar-General should be informed; if it is not adverse, that should also be stated. Moreover, sec. 103 contemplates variations from prescribed form only so long as they are not "in matter of substance."

Therefore, but for the prior history of the matter, it should be concluded that the intention of the Legislature was to remit to their rights under the general law both the person applying to bring old system land under the Act and the person in adverse possession of such land at the time of the application. If so, the latter would have been enabled, when proceedings for ejectment were instituted, to attack the title of the former at its weakest point. Incidentally the person in adverse possession could have relied upon the provisions of the *Pretenced Titles Act* 1540 which is in force in New South Wales (*Hogg, Conveyancing and Property Law* (1909), p. 8).

But the decision in *Ex parte Hamilton* (1) precludes this method of interpreting the *Real Property Act*. *Stephen* C.J. reached such a conclusion "with reluctance and . . . after much hesitation" (2); and *Wise* J., after stating that the form in the Schedule was inconsistent with his view of the Act, added the pious hope that "even if not bound to do so, I cannot doubt that the Registrar-General will, in such cases, require notice to be served upon the person so in possession, and that every care will be taken in working out the statute to prevent injustice being done" (3).

None the less, the examination of the cases which *Dixon* J. has made shows no sufficiently strong current of decision to prevent a person in adverse possession from assuming the rôle of caveator

(1) (1864) 3 S.C.R. (N.S.W.) (L.) 311.
(2) (1864) 3 S.C.R. (N.S.W.) (L.), at p. 314.
(3) (1864) 3 S.C.R. (N.S.W.) (L.), at p. 319.

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under the statute, with the result that there will fall to be determined similar issues to those which the adverse possessor could have raised had the applicant been remitted to his position outside the statute, and so been compelled to bring proceedings in ejectment.

I am in agreement with the judgment of *Dixon* J., and think that the appeal should be allowed and an issue directed as proposed.

Appeal allowed with costs. Order of Street J. varied by adding after the second issue thereby directed the following: —(3) *Whether as against the plaintiff and her predecessors in title the undermentioned conveyances (so far as they are purported to be conveyances of the subject land) were void as being conveyances of a present right of entry in the land other than a conveyance to a person in possession thereof by a person who had not been in possession of the said land within the space of one whole year next before the date of such conveyance and as being conveyances of pretenced titles: (a) The conveyance of 20th day of May* 1903 *from John Wetherill to Clark and others; (b) the conveyance of 24th day of July* 1911 *from Clark and others to Desborough; and (c) the conveyance of 14th day of November* 1911 *from Desborough to the defendant. And in the direction of the said order that the caveatrix be plaintiff by substitution for the word "both" the word "all."*

Solicitors for the appellant, *Perkins, Stevenson & Co.*

Solicitors for the respondent Baldwin, *Alfred J. Morgan & Co.*

Solicitor for the Registrar-General, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.