Modern Consequences of Earlier Confusion Between a Vendor's Lien and the Interest of a Cestui Que Trust

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I

The case of *Gordon* v. *Hipwell*[1] presents interesting and unusual facts and raises fundamental problems concerning the nature of an unpaid vendor's equitable lien. The case also demonstrates that legislation (such as the British Columbia Land Registry Act) providing for modified Torrens land titles registration does not make obsolete all rules of law and equity relating to land which might be covered in a general analytical course in real property. On most of the problems raised in *Gordon* v. *Hipwell* the British Columbia Court of Appeal divided and I found myself disagreeing with both sides of the divided court. For some time I considered recasting my lengthy comment on the case into conventional article form, but came to the following conclusions:

(1) the facts in *Gordon* v. *Hipwell* form a necessary background for proper presentation of the related problems raised by them;

(2) the method of setting forth (a) the facts of a difficult case, (b) the conclusions reached by the court, (c) the reasons the court gave for its conclusions, and (d) a critique of these reasons is the most effective method of discussing any legal problem;

(3) there was therefore nothing to be gained and a great deal

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[1] [1951] 2 D.L.R. 733 (Wood J.); [1952] 3 D.L.R. 173 (B.C.C.A.). The decision of the Court of Appeal is also reported in (1952) 5 W.W.R. (N.S.) 433. I could find no report of the trial judgment in the Western Weekly Reports.

to be lost by abandoning the facts and sacrificing my analysis of the case in order to offer something which presented a single thesis or collected the cases on a particular topic.

II

My title is nevertheless intended to introduce the discussion which follows. The main difficulty in the case lies in the fact that the court accepted dicta which confused a vendor's lien with the interest of a *cestui que trust.*

The facts in the case were as follows. Mr. and Mrs. Hipwell moved from England to Vancouver. Blocked by currency restrictions from converting sterling into dollars, Hipwell followed an ancient pattern and brought diamonds with him. He made a declaration covering settlers' effects, but apparently failed to call attention of the customs officers to his diamonds and failed to pay Canadian customs duty on them. In Vancouver Hipwell found a home which he desired to purchase from Gordon, who desired to sell. An agreement with respect to price was reached. Hipwell offered sterling; Gordon did not want sterling. Hipwell then offered diamonds. Gordon agreed to take diamonds properly appraised by a reputable jeweller. Diamonds were produced, appraised and delivered to Gordon, who executed and delivered to Hipwell a deed, which recited that for and in consideration of $10,500 of lawful money of Canada, and so on. Hipwell registered his conveyance. Under the Land Registry Act such registration made him the owner of what is called an indefeasible estate in fee simple, subject however to a mortgage to Credit Foncier Company for $2,300.

About two months later Gordon was visited by Royal Canadian Mounted Police officers, who questioned him concerning the consideration for the property sold to Hipwell. Gordon told the police that he had acquired diamonds from Hipwell, and at their request surrendered them. Gordon consulted a solicitor who lodged a caveat with the registrar prohibiting further disposition of the land Gordon had conveyed to Hipwell. This caveat recited the history of the transaction, the surrender of the diamonds, and stated that Gordon had received no consideration for his conveyance.

Several months passed, during which Gordon tried to get Hipwell to pay again. Hipwell made representations to the Collector of Customs. The collector was adamant: the diamonds were declared forfeit for non-payment of duty. While negotiations looking

to payment were continuing between the solicitors of Gordon and Hipwell, unfortunate differences arose between Mr. and Mrs. Hipwell, and Hipwell, who had returned to England, had been refused re-admission to Canada by the immigration authorities. Before leaving for England, Hipwell had executed a power of attorney in favour of Mrs. Hipwell. This power he had revoked, but had failed to bring his revocation to the attention of the Land Registry Office. Mrs. Hipwell, purporting to act on behalf of her husband, applied to the registrar to have Gordon's caveat cancelled[2] on the ground that it had lapsed, because Gordon had for more than two months failed to follow it up by instituting proceedings to assert his claim to the land. The registrar cancelled the caveat. Mrs. Hipwell sold the property to *X*, a bona fide purchaser for value. *X* registered his transfer and became the registered owner. Gordon, having no recourse against either house or diamonds, now sued both Mr. and Mrs. Hipwell for damages and joined the Attorney-General as nominal defendant for the purpose of reaching the Assurance Fund, the real object of his action.

III

At this point it is necessary to explain briefly the statutory provisions for reaching the Assurance Fund as well as the statutory provisions respecting caveats, because both form a necessary background for the case.[3] The fund is fed out of a graduated fee imposed on the registration of documents. A fraction of this fee goes to the fund; the larger residue falls into consolidated revenue. Consolidated revenue, which in this respect appears to mean taxing power, may be reached in the event the fund becomes depleted. Large sums have been collected and have run over into consolidated revenue from the over-flowing cup from which, so far as appears in the reports, one person only has been privileged to drink. Smaller sums have been sipped as a result of settlement out of court.[4] The fund, the creature of the legislature, is well guarded by its creator.

[2] This is the language of the judgment. The Land Registry Act, s. 218, provides that upon application the registrar shall make an entry in the registry of the lapse. At this stage the registrar would appear from the language of the Act to have no discretion at all. The Act appears to contemplate that the registrar makes his decision whether the caveat is a two month or a permanent caveat at the time it is filed. Had this matter been clarified between the registrar and Gordon at the time of filing, this case would never have come up, but the Act set up no machinery for such clarification.

[3] For an excellent short exposition of the nature of the Land Registry system in force in British Columbia, and a fuller consideration of the assurance fund provisions, see H. L. Robinson, The Assurance Fund in British Columbia (1952), 30 Can. Bar Rev. 444.

[4] *The King* (*ex rel. Andler*) v. *Minister of Finance* (1934), 49 B.C.R. 223,

Theoretically, two methods of reaching the fund are provided. Sections 221 and 222 of the Land Registry Act offer what may be called the indirect method of attack. To reach the fund under these sections the plaintiff who has been deprived of land (or an interest therein) must prove that:

(1) the loss occurred as the result of the operation of the Land Registry Act;

(2) the loss occurred in consequence of fraud, misrepresentation or wrongful act in the registration of some other person as owner;

(3) the plaintiff cannot now reach the land.[5]

A plaintiff who can prove these things may sue the wrongdoer and join the attorney-general. The fund stands ready to guarantee satisfaction of the judgment recovered. The attorney-general has a right of indemnity (by hypothesis not particularly valuable) against the wrongdoer.

Sections 223 and following offer what may be called the direct method of attack on the fund. To recover damages under this section, the plaintiff must sue the attorney-general alone. Since no one else has done wrong or contributed to the loss, no right of indemnity is provided. The plaintiff must prove merely that he has suffered loss or damage caused *solely* by an omission, mistake or misfeasance of the registrar.[6]

[1935] 1 D.L.R. 333, [1935] 1 W.W.R. 113 (B.C.C.A.); *Minister of Finance* v. *The King*, [1935] S.C.R. 278, [1935] 3 D.L.R. 316 (S.C.C.). The legislature immediately passed legislation designed to prevent any further payments out of the fund in similar circumstances: Stats. B.C., 1935, c. 40, s. 2.

[5] S. 221, Land Registry Act, R.S.B.C., 1948, c. 171, reads as follows:

"(1) Any person deprived of land or any estate or interest in land as a result of the operation of this Act, and in consequence of any fraud, misrepresentation, or wrongful act, in the registration of any other person as owner of the land, estate, or interest, and who is barred under the provisions of this Act, or otherwise precluded from bringing an action for possession, or other action for the recovery of the land, estate, or interest, or for the rectification of the register, may, subject to the provisions of subsection (2) bring and maintain an action in the Supreme Court for the recovery of damages against the person by whose fraud, misrepresentation, or wrongful act the person bringing the action has been deprived of his land or his estate or interest therein.

"(2) In every action so brought, the Attorney-General shall be joined as nominal party defendant for the purpose of recovering the amount of the damages and costs from the Assurance Fund, and he shall have the right in the action to plead in opposition to the plaintiff's claim all defences available for the purpose of protecting the Assurance Fund."

There are four other subsections in s. 221.

[6] S. 223 reads:

"(1) Subject to the provisions of section 228, any person sustaining loss or damages caused solely as a result of any omission, mistake or misfeasance of the Registrar, or any of his officers or clerks, in the execution of their respective duties under the provisions of this Act, may bring and maintain an action in the Supreme Court against the Attorney

In support of Gordon's claim against the fund under the direct attack (section 223) it was claimed that the registrar's cancellation of the caveat on Mrs. Hipwell's application was a mistake which *solely* caused Gordon's loss of his unpaid vendor's lien. The relevant sections with respect to caveats are sections 208[7] and 219.[8] Section 208 provides:

> Any person claiming to be interested . . . howsoever, in any land . . . may . . . lodge a caveat with the Registrar to the effect that no disposition of that land shall be made . . .

Section 219(1) provides that:

> . . . on the expiration of the period of two months from the date of the receipt of the caveat by the Registrar, the caveat shall be deemed to have lapsed, unless the caveator, his solicitor or agent, has within the respective period mentioned filed with the Registrar evidence that proceedings have been taken before a Court or Judge to establish the title of the caveator to the land or charge affected by the caveat or his right as set out in the caveat.

Evidence that proceedings have been taken is provided by filing a *lis pendens* as set out in section 180.

Section 219 continues in subsection 2 (I should say continued,

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General as nominal defendant for the purpose of recovering the amount of the loss or damages and costs from the Assurance Fund."

There are two other subsections in s. 223. Gordon appears to have consolidated his two separate actions. If he were suing under s. 223 only, there would have been no point whatever in joining the Hipwells. The trial judge and the majority of the Court of Appeal ignore Gordon's argument for liability against the fund through the Hipwells under s. 221 and deal only with s. 223.

[7] In full the section provides:

"Any person claiming to be interested under any unregistered instrument, or as heir-at-law, or otherwise howsoever, in any land the title to which has been registered may by leave of the Registrar for the district in which the land is situate, to be granted upon such terms (if any) as the Registrar may see fit to impose, lodge a caveat with the Registrar to the effect that no disposition of that land shall be made either absolutely or in such manner and to such extent only as in the caveat may be expressed, or until notice has been served on the person lodging the caveat (in this Act called 'the caveator'), or unless the instrument of disposition is expressed to be subject to the claim of the caveator, as may be required in the caveat, and to all lawful conditions expressed therein."

[8] S. 219 reads in full:

"(1) Where a caveat has been lodged and notice has been served as mentioned in the caveat, then, on the expiration of the period of twenty-one days from the date of the service of the notice, or if no notice has been served, then, on the expiration of the period of two months from the date of the receipt of the caveat by the Registrar, the caveat shall be deemed to have lapsed, unless the caveator, his solicitor or agent, has within the respective period mentioned filed with the Registrar evidence that proceedings have been taken before a Court or Judge to establish the title of the caveator to the land or charge affected by the caveat or his right as set out in the caveat.

"(2) This section shall not apply in the case of a caveat lodged by the Registrar or lodged on behalf of the Crown or lodged under section 34

because what follows was, while *Gordon* v. *Hipwell* was looming on the horizon, repealed[9]):

> This section shall not apply in the case of a caveat lodged . . . on behalf of any *cestui que trust*, . . . accompanied by the filing of evidence to the satisfaction of the Registrar that the caveator has a vested interest in the land . . . affected by the caveat.

As has been stated, Gordon had filed a caveat (which Mrs. Hipwell had removed before selling the land to a bona fide purchaser). In cancelling Gordon's caveat the registrar acted on the hypothesis that it was a temporary caveat under section 219(1)[10] and not a continuing caveat under section 219(2).[11]

The trial judge, Wood J., and the majority of the Court of Appeal (Robertson and Bird JJ.A.), ignoring section 221, imposed liability upon the attorney-general and hence upon the fund under section 223. O'Halloran J.A. in the Court of Appeal came to the conclusion that no liability attached under section 223, but gave reasons for imposing liability under section 221.

IV

The majority chain of reasoning imposing liability under section 223 may be set forth as follows:

(1) Under the Customs Act[12] the declaration of forfeiture relates back to the date of the customs offence which attracted the declaration.

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or section 209, nor in the case of a caveat lodged on behalf of any cestui que trust, heir-at-law, or person under disability, accompanied by the filing of evidence to the satisfaction of the Registrar that the caveator has a vested interest in the land or charge affected by the caveat."

[9] Stats. B.C., 1950, c. 36, s. 11: "Section 219 is amended by striking out subsection 2".

[10] See footnote 8, sub-s.(1).

[11] See footnote 8, sub-s.(2).

[12] The Customs Act, R.S.C., 1927, c. 42, s. 2(0) reads:

"In the Act, or in any other law relating to the Customs, unless otherwise required,

(o) 'seized and forfeited', 'liable to forfeiture' or 'subject to forfeiture' or any other expression which might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offense in respect of which the penalty or forfeiture is imposed."

One might wonder to what extent, as a matter of legislative interpretation, one should swallow for all purposes the accidental devices a draftsman uses to accomplish a particular purpose. Here the draftsman meant to declare the intent of the Crown to seize smuggled goods from a bona fide purchaser and used the circumlocution to accomplish this and other purposes. (Cf. *Mason* v. *Rex*, [1935] S.C.R. 513. But see also R.S.C., 1927, c. 42, s. 256.) Fictitiously making the forfeiture relate back may be necessary for the accomplishment of certain purposes connected with Customs, but this does not mean that that concept should be applied rigidly to matters not within those purposes.

(2) There was therefore a failure of consideration, because Gordon got nothing for his deed.

(3) Because there is a failure of consideration, Gordon has an unpaid vendor's lien.

(4) Because Gordon had an unpaid vendor's lien, he was a *cestui que trust* under section 219(2) of the Land Registry Act.

(5) The *cestui que trust* interest of an unpaid vendor's lien is, anterior to any declaration by the court that such an interest exists, a vested interest. Gordon's caveat therefore satisfied all the requirements of section 219(2) of the Land Registry Act, and was a continuing caveat.

(6) The registrar therefore made a mistake in cancelling Gordon's continuing caveat.

(7) Gordon's loss was "caused solely as a result of the mistake of the registrar". Therefore the fund is liable under the provisions of section 223.

Step 1 is in one sense clear enough. The words of the Customs Act specifically say so.[12] Step 2 is clear. There was a failure of performance which the court calls failure of consideration—a not infrequent use of this phrase. Steps 3 and 4 are difficult to separate, because the court took them at one jump by assuming 3. Step 5 (regarded by the majority as the major problem in the case) raises hidden questions of a metaphysical nature. These are pointed out, but the court got into its major difficulty in step 4; and from then on there is for the majority no pausing or turning back. I do not discuss step 6, which involves two assumptions: (a) the registrar's classification of a caveat is *not*, notwithstanding the language of the section, in any case final; and (b) mistake in section 223 includes mistake in legal analysis of a complicated nature. Step 7 will be discussed.

V

With respect to step 3, the majority assumed that Gordon was entitled to an unpaid vendor's lien, but might have reached the same result had it given that question consideration. There are cases[13] which deny a lien when the circumstances in which the conveyance was made offer manifest evidence of intention not to rely on a lien. There was in fact clear evidence of such intention in *Gordon* v. *Hipwell*. But in the great bulk of the cases the courts yield to the impulse to assist the vendor applying for the declara-

[13] See, for example, Lord Elgin's disposition of the annuity issue in *Macreth* v. *Symmons* (1808), 15 Ves. 329; 33 E.R. 778 (High Court of Chancery).

tion of lien. He needs help, and the lien is available only against the purchaser and those claiming through him otherwise than as bona fide purchasers for value. No great harm is done to anyone in *Gordon* v. *Hipwell* who has any moral right to object. The declaration gives the unpaid vendor the right to have the land he has incautiously conveyed sold to pay as much of the unpaid purchase money as it will fetch. The vendor can get a deficiency judgment for the balance. The knowledge that the court will declare a lien is an effective inducement to payment without resort to the courts.

On some such basis the Chancellor first intervened to create the doctrine, which at the time of its origin was much more necessary for the protection of the vendor than it is today, because land then was not available for the satisfaction of a debt. Without the doctrine of vendor's lien the unfortunate grantor would have parted with his land and been without effective remedy for his price. For these reasons courts have been generous in granting the lien.

Unfortunately, in cases which did not involve any problem connected with the unpaid vendor's lien, judgments purporting to explain it were delivered. These judgments, through our all too common method of preparing factums and writing judgments by means of scissors and paste, have engulfed the whole subject in a mass of confusion.

The two chief offenders have been cases in which the vendor under an agreement for sale has been pursuing his remedies for specific performance or cancellation, and cases in which someone sees fit to expound the metaphysical mysteries of equitable conversion. The following quotation demonstrates the confusion from the first class of cases as set forth in one of the second class of cases:

> [The settled doctrine of equity is] that from the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchase of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money . . .[14]

It is of course impossible to *prove* that this reference to vendor's lien by the Master of the Rolls as "arising at the moment you have a valid contract for sale" is a slip. One can only say that since (1) the vendor by hypothesis has at this stage his legal title and

[14] Jessel M.R. in *Lysaght* v. *Edwards* (1876), L.R. 2 Ch. D. 499, at p. 506. The case involved the problem whether consent by the heir-at-law was necessary to complete a conveyance executed in performance of a contract entered into during the lifetime of the deceased.

(2) the purchaser may well pay cash in full against delivery of the deed or may execute a mortgage to secure the unpaid purchase price, it is unnecessary to talk about giving the vendor a lien, *at least* until we have seen what happens when the vendor conveys. The vendor who still has legal title needs an equitable lien much less than a cat needs two tails. Such a vendor has his remedies for specific performance or cancellation.

That situation is obviously very different from the case in which the vendor has conveyed away his land without having received payment. Here the vendor may need a lien. The question whether he has a lien at the moment the contract is entered into never has and never will come up but, on the construction which the court in *Gordon* v. *Hipwell* made of the nature of the vendor's lien, the question whether the lien came into existence before a declaration by the court may be said to have come up, and is discussed under step 5.

VI

Step 4 in the court's reasoning, transmuting a vendor's lien into the interest of a *cestui que trust* within the meaning of that phrase in section 219(2) of the Land Registry Act, rests on nothing but an unfortunate habit of using the word "trust" loosely. This practice was particularly popular in expounding the effects of notional equitable conversion in cases concerned with the administration of decedents' estates. An unpaid vendor's lien bears the least resemblance to the interest of a *cestui que trust* of any of the wide variety of equitable phenomena which have (in dicta) at one time or another attracted that designation. The fact is that the purchaser who has acquired title on credit holds his estate subject to the risk that the unpaid vendor may descend on him and sell him out in order to recover the purchase price. The purchaser owes no fiduciary duties to the vendor. The purchaser may sell. If the purchaser is a landlord, he is surely not accountable to the vendor for the rents he receives, although if the language of the courts is repeated often enough, and is taken seriously, the conclusion that he is is inescapable. Confusing the unpaid vendor's lien with the interest of a *cestui que trust* would mean that if *A* sold and conveyed Blackacre to *B* without taking a mortgage to secure the unpaid balance and *B* rents to *C*, *B* may not use the money *C* pays him to buy groceries without finding himself charged with embezzlement. *B* may escape conviction on the ground of colour of right. But if the unpaid vendor is a *cestui que trust*, the grocer, if he knows that *A* is unpaid when he takes *C*'s rent cheques in

settlement of *B*'s grocery bills, knowingly participates in a breach of trust and is liable as a constructive trustee to *A*. This remarkable result follows, not because *B* is a rogue, but because of the confusion between a trust and a vendor's lien.

The vendor's lien, being an equitable security, is however available against anyone taking from the purchaser otherwise than as a purchaser for value without notice. In this respect it resembles a trust. Being conscious of resemblances is harmless if one is also conscious of differences. Gasoline and kerosene resemble each other in many respects, but the differences are just as important as the resemblances. So with lien and trust, although the consequences of confusion are less spectacular.

As an illustration of the unreliability of talking about trusts in connection with the vendor-purchaser relationship, consider the following:

> according to the well-known rule in equity when the contract of sale was signed by the parties, Sir William Foster [the vendor] became a trustee of the estate for Pooley [the vendee] and Pooley a trustee of the purchase money for Sir William Foster.[15]

Pooley the purchaser is said to be a trustee of the purchase money. What purchase money? If anything is clear in the law of trusts it is that there must be a trust *res*. In fact courts wishing to use the language of trusts in order to reach a result often strain hard to find one.

The truth is that Pooley is a debtor. Suppose that Pooley did go to his bank and borrow sufficient cash to pay the purchase price, placed it in his purse, and set out for the Foster manor intending to pay Sir William for the land. Suppose further that Pooley is waylaid by highwaymen who (notwithstanding his courageous resistance) overpower and rob him. Could he drag his battered body into Sir William's presence and say: "Sir William, it was your money that was stolen. Lord Chelmsford has said so. I admit it may have been a little difficult to find the trust *res* when I had no purchase money, so what he meant was probably that I was trustee of my obligation to pay you. However that may be, once I obtained the purchase money I became trustee of it. At that instant it ceased to be mine and became yours. In order that there should be no doubt about that, I expressly declared myself trustee as I walked out of the Bank." Obviously

[15] Lord Chelmsford in *Shaw* v. *Foster* (1872), 5 E. & I. App. 321, at p. 333. This case decided that notice of a contract giving the promissee the right to call for an assignment, of an agreement for sale, is not notice of the assignment of the agreement for sale, so that the vendor was free (in fact bound) to convey to the original purchaser.

Pooley is a debtor and he still owes the money. He is no more trustee of the purchase money before conveyance than he is of the land after conveyance, although the dicta make him indifferently trustee of both land and purchase money.

Because some minds have a tendency to infer indentities from superficial resemblances, every interest a person might have with respect to what we call property which was protected in equity has been described at one time or another in terms of the trustee - *cestui que trust* relationship. The unpaid vendor's lien has in fact suffered less linguistic abuse in this respect than have other rights because not infrequently the courts (as did the Master of the Rolls in the passage I have quoted from *Lysaght* v. *Edwards*[14]) called it a lien or charge. Courts sometimes describe the vendor's interest as being that of a mortgagee. Having several other names to go by, the mathematical chance of an unpaid vendor's lien escaping being called a trust interest is only slightly less than is the interest of a mortgagor, which also has not entirely escaped.

Until *Gordon* v. *Hipwell,* the name calling has been merely name calling, but in this case, as an interpretation of section 219(2), the name calling was functional (for the purposes of the section). That is, the court had to come to the conclusion that Gordon's interest was that of a *cestui que trust* or it could not have proceeded to its conclusion.

In determining that an unpaid vendor with a lien was a *cestui que trust* for the purposes of making his caveat a continuing caveat under section 219(2), the majority treated 219(2) in vacuo, that is, it paid no attention to other sections of the Land Registry Act which might have made that construction of *cestui que trust* difficult.

The only possible justification for calling an unpaid vendor a *cestui que trust* is the fact that his interest is an equitable interest encumbering a legal (or an equitable) title. This involves making the purchaser under an agreement for sale a *cestui que trust.* It also involves making an equitable mortgagee by deposit of title deeds a *cestui que trust,* because all that, in the language of equity, can be said of an unpaid vendor can be said of an equitable mortgagee, and similarly all that can be said of an unpaid vendor can be said of the purchaser under an agreement for sale.

The Land Registry Act (section 35) denies (except *inter partes*) any effect to agreements for sale until registered. These agreements, which (before registration *inter partes*) create an equitable interest, are registered as charges for a graduated but substantial fee. If *Gordon* v. *Hipwell* were right, the purchaser as a *cestui que*

trust could avoid this expense by registering a continuing caveat under section 219(2). This of course is a possible interpretation to put on 219(2), but scarcely one which the legislature intended.

The Land Registry Act (section 47) expressly prohibits the registration of equitable mortgages created by deposit of title deeds, whether accompanied by memorandum or not. If *Gordon* v. *Hipwell* is right, any equitable mortgagee by deposit was until the amendment of 1950, because he was a *cestui que trust*, entitled to lodge a continuing caveat. This is of course possible also. But it is not probable that the legislature intended to give with 219(2) something similar to what it deliberately took away in section 47.

These two illustrations are sufficient to make one wonder whether the legislature in section 219(2) had not intended to use *cestui que trust* more narrowly and confine it to a person with respect to whom a trustee owed fiduciary duties and who was normally not in a position to enforce his remedies except through his trustee: which might be a reason for giving him protection by means of a caveat for a period longer than two months without requiring him to institute proceedings to substantiate his claim.[16]

This suspicion is confirmed by an examination of section 219(1), which provides (roughly) that all caveats shall lapse at the end of two months unless the claim is sooner prosecuted. Section 219(2) creates some exceptions to this general rule, including the one under discussion.

Now if the unpaid vendor and all other persons entitled to equitable relief are included in the phrase *cestui que trust* (because there is neither on analysis nor on the dicta in the cases any possible reason for labelling an unpaid vendor a *cestui que trust* and stopping short of so labelling all other persons entitled to equitable relief), this one exception eats up the whole rule and means that there is no such thing as a two-month caveat. All caveats must be caveats filed by a *cestui que trust* because the registered owner is the legal owner (subject to registered charges) and the interest of any normal caveator would by hypothesis be merely equitable.[17]

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[16] It is of course also possible that the whole subsection is one of those little accidents with which we clutter the statute books, because we do many things connected with law as cheaply as possible and so fail to provide that thorough historical analysis shall accompany revision. Pursuit of the section back would probably demonstrate that this part of it was our first, and for some time only, method of getting trusts on the register. It is more than unlikely that the draftsman was providing for the permanent registration of an unpaid vendor's lien as an interest of a *cestui que trust*.

[17] I must confess to difficulty here over the interest of a grantee (from the registered owner) who had lost his deed and sought to protect himself by caveat while he tried to persuade or force the registered owner to execute

VII

We now come to step 5. To this the court gave most of its attention. It searched for an answer to the question: What did the legislature mean by the phrase "vested interest"? "Vested" as contrasted with "contingent" is an interesting and difficult concept in the law relating to remainders. In testamentary cases "vested" is sometimes used to mean transmissible, so that the legatee need not survive to the period of distribution for his issue to take. "Vested" has its own peculiar meaning under the rule against perpetuities.

The court grappled with the problem by inquiring whether a vendor's lien conferred an interest in the land before the declaration of lien by a court at the suit of the vendor. The problem arose in this form because the court read into the section the unexpressed but irresistibly implied contrasting word "contingent" and, having to give some meaning to it in order to give some meaning to "vested", makes "contingent" mean contingent on the declaration by the court, which of course assumes that the section is intended to apply to a vendor's lien.

Leaving aside the *cestui que trust* issue and the necessity for distinguishing between "vested" and "contingent", the answer to the problem posed in step 5 with respect to the interest of the unpaid vendor is, I think, clear. The unpaid vendor has an interest in the land before he obtains a declaration by the court. At the same time he cannot enforce his lien without obtaining the declaration—obtaining the declaration is his method of enforcement. The problem is a purely artificial one created by the taking of step 4, which draws in the word "vested", as opposed to or contrasted with "contingent".

As was almost inevitable in a problem essentially metaphysical, there was no dearth of dicta, mostly casual, which looked both ways. The members of the court collect a reasonable amount of it, including some from *Rice* v. *Rice*,[18] a case which in one sense

another deed. At common law the grantee has legal title. Under the Land Registry Act, s. 35, he has (except vis-à-vis his grantee) nothing but a right to apply for registration. Does this mean that the grantee has legal title but that other sections of the Act protect persons who deal with the registered owner? If that is so, does section 35 really accomplish anything? Is its effect purely exhortatory? The results in *Gregg* v. *Palmer* (1932), 45 B.C.R. 267, [1932] 3 D.L.R. 640 (C.A.B.C.), and *Davidson* v. *Davidson*, [1946] S.C.R. 115, indicate that it is.

[18] *Rice* v. *Rice* (1854), 2 Drew. 73, 61 E.R. 646 (Vice-Chancellor Kindersley). In *Gordon* v. *Hipwell* in the Court of Appeal, Robertson J.A. quoted from *Rice* v. *Rice* (p. 89) the statement that: "There is no *constat* of the right of the vendor to his lien for unpaid purchase money until it has been declared by a decree of a court of equity", but, after quoting from a number of other cases, the majority of which he thought leaned the other way, he

raised the problem. Robertson J. A. came to the conclusion that a vendor's lien is not contingent on a declaration by the court but arises at the time the contract is made. Bird J. A. agrees that the lien is not contingent upon declaration, but finds that it arose upon conveyance by Gordon to Hipwell, and O'Halloran J. A. came to the conclusion that a vendor's lien is contingent on the declaration by a court of equity.

Although, as these divergent views demonstrate, there were dicta to suit every taste, no case was cited which could be said to have decided anything, and it is extremely difficult to conceive of one which will. One might think that the most promising place to look would be cases involving problems of priority between an unpaid vendor's lien and other interests, but unfortunately even these cases fail to answer the question. They are nevertheless worth examining to clarify the difficulties in the problem.

Let us consider this case. Suppose that a vendor conveys to a purchaser who has not paid. The purchaser sells to *X* who knows that the purchaser has not paid. The vendor brings an action against *X* for declaration and enforcement of his lien. The vendor will win. Does this assist us? Not at all. *X* is not a bona fide purchaser without notice. His conscience is affected. He stands no higher than the purchaser, and the vendor's equitable rights are just as available against him as they are against the purchaser. This case requires no back-dating of the lien. And if a court deciding the case stated that it so decided on the ground that the lien had a prior existence or the declaration of lien a retroactive effect, we could not be sure that this form of words was necessary for the decision.

This same result would follow (apart from complications arising out of the Land Registry Act and section 35 of the Executions Act[19]) if the contest is between the vendor and an execu-

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came to the conclusion, [1952] 3 D.L.R. at p. 197, that: "Gordon had a lien, if he required it, up to the time of transfer, as the title to the property was in his name, and so long as he was in this position he had the right to enforce payment of monies due him. See *Shaw* v. *Foster*, 1872, L.R. 5 H.L. 321 at 338. The moment the transfer was made, then, in my opinion his vendor's lien continued or arose."

Bird J.A. quotes from a number of cases and comes to the conclusion, see [1952] 3 D.L.R. at p. 203: "In my opinion the relation of trustee and cestui que trust exists between the appellant Hipwell and the respondent from the day of execution of the conveyance to the appellant Hipwell, who thereafter and until payment of the purchaser price, was a trustee of the purchase money for the respondent".

These two quotations are influenced by and lean towards the expositions by Jessel M. R. and Lord Chelmsford, already referred to. Mr. Justice O'Halloran (see [1952] 3 D.L.R. at pp. 180-1) accepts the statement from *Rice* v. *Rice* quoted at the beginning of the footnote.

[19] R.S.B.C., 1948, c. 114, s. 35, reads:

tion creditor of the purchaser and for the same reason that the creditor, not being a purchaser for value, stands in his debtor's shoes.

But suppose (ignoring the Land Registry Act in order to avoid the difficult problem of the effect of a mortgage) that the vendor sells to a purchaser Blackacre, which is already mortgaged to *Y*. The purchaser conveys to *X*, a second bona fide purchaser who does not know that the first purchaser has not paid the vendor for the equity of redemption. Then suppose that the unpaid vendor brings an action against *X* for declaration and enforcement of his lien. If the vendor's lien exists before declaration, under orthodox theory this case should settle the problem in favour of the vendor on the ground that the vendor's equity is prior and must prevail. Likewise if the vendor's lien does not exist before declaration, this case should settle the problem in favour of *X* on the same grounds because *X*'s interest would then be the prior interest.

This case did in substance come before the courts in *Rice* v. *Rice*,[18] but the decision did not settle anything. Here a vendor conveyed leasehold to a purchaser, the deed (as usual) acknowledging payment. In fact payment had not been made. The purchaser, who had in his possession his own deed and his unpaid vendor's title deeds (which, according to the custom, had been handed over to him), deposited the lot with *X* to secure a present advance. This made *X* an equitable mortgagee. The decision which gave the equitable mortgagee priority can be explained in four ways:

1. The decree of the court creating the unpaid vendor's lien is ineffective against the equitable mortgagee because the unpaid vendor has no right until the decree, which is subsequent in time to the equitable interest created by the equitable mortgage.

2. The unpaid vendor had from the time of (a) the contract or (b) the conveyance, a vendor's lien on the property, which the

"Immediately upon any judgment being entered or recovered in this Province, the judgment may be registered in any or all of the Land Registry Offices in the Province, and from the time of registering the same the judgment shall form a lien and charge on all the lands of the judgment debtor in the several land registration districts in which the judgment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of the judgment the judgment creditor may, if he wishes to do so, forthwith proceed upon the lien and charge thereby created."

It could be argued that registration of the judgment creates a legal lien against the land, which has priority over the unpaid vendor's purely equitable interest. The problem here raised resembles the problem in *Gregg* v. *Palmer* and *Davidson* v. *Davidson*, cited *supra* footnote 17, but with just the difference that in those cases the unregistered interest was legal, whereas the unpaid vendor's interest is purely equitable, and it is conceivable that a legal lien could displace it.

declaration of the court merely recognizes. But the prior equitable rights of the unpaid vendor are postponed to the subsequent rights of the equitable mortgagee, because the unpaid vendor has (1) been negligent in clothing the purchaser with the indicia of ownership, which enabled him to obtain the advance from the equitable mortgagee, or (2) is estopped by his conduct in clothing the purchaser with the indicia of ownership.

3. There was no pre-existing interest in the unpaid vendor. But the decree recognizing the unpaid vendor's lien would normally have related back to the date of the delivery of the deed, and therefore normally would have been prior in time, but it nevertheless postponed as in 2(1) or (2) above.

4. Notwithstanding the fact that under 2 or 3 the unpaid vendor had an equitable interest which is prior in point of time, there is no valid reason for confining the doctrine of bona fide purchase free from equities to bona fide purchase of the *legal* as distinct from the *equitable* title, and the equitable mortgagee, who is a bona fide purchaser, cuts off to the extent of his mortgage interest whatever equitable rights the unpaid vendor may have had.[20]

A similar case (different in that an equity of redemption was involved), *Abigail* v. *Lapin*,[21] shows how difficult it is to raise the problem squarely because it goes off on the same mixed ground of negligence and estoppel as could have *Rice* v. *Rice*. In that case the Lapins transferred land to Heavener by transfer absolute on its face, but secretly by way of security. Heavener registered her title. Heavener mortgaged to Abigail, who gave value without knowledge of any qualification upon Heavener's title. Abigail, however, did not register and was therefore treated in the Australian courts and by the Judicial Committee as being an equitable mortgagee only. Abigail was held entitled to priority on the ground that the Lapins were bound by the consequences of arming Heavener with the power to go out into the world as absolute owner and there mislead innocent purchasers or mortgagees.[22]

[20] This is Ames's view. See James Barr Ames, Purchaser for Value without Notice (1887), 1 Harv. Law Rev. 1. The cases do not fit any consistent pattern. But English cases involving the interest of a *cestui que trust* under an express trust do not appear to support Ames. See some of the cases reviewed by Lord Wright in *Abigail* v. *Lapin*, [1934] A.C. 491.

[21] [1934] A.C. 491.

[22] Incidentally in this case Lord Wright, in dicta, distinguished between an unpaid vendor and a *cestui que trust*, [1934] A.C. at p. 235: ". . . but even the equity of a cestui que trust may be defeated, as Lord Cairns said, 'by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title'. But the rule [that the prior equity prevails] is one which has been applied to trusts [to protect the Chancellor's protégé] and not to equitable

Because of the other possible reasons for deciding cases like *Rice* v. *Rice* and *Abigail* v. *Lapin*, we do not get much help from the cases involving priority. But *Abigail* v. *Lapin* can show us that an undoubted antecedent equitable interest (an equity of redemption) will in circumstances similar to those in *Rice* v. *Rice* be similarly postponed to a subsequent equitable interest. So that the fact that a vendor's lien was postponed in *Rice* v. *Rice* should not lead us to jump to the conclusion that a vendor's lien has no existence before a declaration by a court of equity.

Abigail v. *Lapin*, or one of the concepts involved in it (the mortgagor's equity of redemption), can also show us much more. Historically, the mortgagor's equity of redemption, which we now see clearly as an interest in the land, was nothing. The mortgagor who had made default in payment on the law day had lost his land. But very early he could bring before the Chancellor a bill praying to be permitted to redeem his land. This relief the Chancellor granted first in the exercise of his discretion, later as a matter of course. Because the Chancellor would grant the remedy of redemption, it began to be said that the mortgagor had in equity a right to redeem and this right, through frequent assertion, finally came to be regarded as an estate in the land existing before the law day arrived. The equity of redemption became a type of ownership in which estates paralleled the legal estates, with most of the common law incidents, so that we had in the equity of redemption not only the fee simple but life estates, remainders, vested and contingent, and reversions.

How did this parallel estate in equity arise? It arose in the same manner as all interests or forms of ownership arise, by inference from remedies granted by the court. We use the concept of a right (legal or equitable) to describe the fact that we have observed a remedy. Similarly we use the concept of ownership, legal or equitable, to describe a large and characteristic collection of rights. Rights (legal or equitable) are generalizations (inferences) drawn from remedies; ownership is merely a more generalized generalization drawn from a number of rights. An interest, as that word is used in the expression "an interest in land", usually means something less than the full bundle of proprietary rights we call ownership.

A lien (legal or equitable), which is a type of interest less extensive than ownership, describes a collection of rights differing

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estates or interests, such as those of unpaid vendor's . . .". This passage, it should be noted, indicated that Lord Wright probably thought that in *Rice* v. *Rice* the unpaid vendor had a prior equity.

from the rights of ownership in that the rights included in the designation "lien" are usually limited to rights designed to assist in enforcing the payment of a debt.

The typical common law lien gave the lien holder merely a right to retain possession and so worry the debtor into payment. The typical equitable lien gave the lien holder, who had neither title nor possession, the remedy of a sale by order of the court as a method of enforcing payment of his debt. These different liens each differ from ownership because the remedies, and as a necessary consequence the rights, are narrower.

The right of the person with an equitable lien is his right to a declaration of lien and an order for sale. This right, along with the debt to which it is auxiliary, is transmissible on death. It is also assignable inter vivos.

Undoubtedly the unpaid vendor who has an equitable lien has, before he goes to court to enforce his lien, less than he has when he gets his declaration and order. Before going to court he had only his right (upon proof of the necessary facts *a qualification upon any right*) to obtain what he gets when he goes to court. But it is his right to go to court and get his declaration and order which is his lien. This obviously he has before he goes there.

The whole concept of equitable ownership inhering in the purchaser who has a specifically enforceable contract to buy Blackacre is similarly the result of an inference from the fact that he can go to court and get a decree of specific performance. It is no more correct to deny the existence of the vendor's lien before declaration than it would be to deny equitable ownership of Blackacre until the purchaser obtains his decree or to say that the mortgagor has no equity of redemption until he has obtained his decree for redemption. These last rights have been so frequently asserted that everyone is familiar with them and recognizes that an interest exists before the decree. Familiarity is the only difference in this respect between these interests and the interest of the unpaid vendor.

The majority in *Gordon* v. *Hipwell* is correct in coming to the conclusion that the unpaid vendor's lien exists before the declaration. The lien exists whenever there are circumstances which if brought before the court would entitle the vendor to his declaration.

The lien however cannot exist before conveyance by the vendor. To say that it does is to confuse the unpaid vendor's lien with an entirely different set of rights and remedies. Nor is the unpaid vendor a *cestui que trust*. To so describe him is to confuse the

special rights and remedies of the lien holder with still another and different set of rights and remedies.

VIII

Step 6, as earlier indicated, I do not discuss. The court took the seventh step (that the registrar's mistake was the sole cause of Gordon's loss) by ignoring the word *solely*. Wood J. did it in these words: "the mistake of the registrar was the sole cause of Gordon's loss because as a result of it Mrs. Hipwell was enabled to perpetrate a fraud upon Gordon".[23] He also found Mrs. Hipwell liable, thereby determining that she also had caused Gordon's loss. This boldly ignores the word "solely".

Robertson J.A. used a more indirect method of overcoming the difficulty. He identifies Gordon's lien with Gordon's power to prevent purchasers from Hipwell from acquiring title. Robertson J.A. expresses his views in these words:[24]

> If the caveat covers the vendor's lien and had not been cancelled, the property would have been subject to the lien. As it was cancelled before the transfer to the purchaser, any right which Gordon had fell with the cancellation.

Later, at page 199, this passage appears:

> In the result, I am of the opinion that the respondent has sustained loss caused solely as a result of the mistake of the Registrar.

Loss here appears to be the loss of the stop which prohibited the registrar from registering the subsequent purchaser's title. Caveats are not really interests in the land; they are prohibitions directed to the registrar. If the registrar made the mistake of registering a transfer notwithstanding a caveat, it could, I think, properly be said that the registrar's mistake had caused the loss of the caveator's interest. But even in that case it is impossible to say that the registrar's mistake is the *sole* cause of the loss.[25] It

[23] Wood J. at the trial, [1951] 1 D.L.R. at p. 743.

[24] [1952] 3 D.L.R. at pp. 197-8.

[25] Actually it would be more in accord with the settled use of language for the court to have found Mrs. Hipwell's act of conscious wrongdoing the *sole* cause of the loss and the registrar's mistake as merely a condition. Such a description would be untrue, but an untruth sanctified by frequent repetition by the highest authorities. The distinction between a condition and a cause is one of the favorite circumlocutions in the law of torts.

The sharp separation of ss. 221 and 223 is one of the main difficulties arising out of the assurance fund recovery provisions. S. 221 seems to be intended to cover a loss caused by wrongful act of a third person accomplishing his purpose through the provisions of the Act with no mistake by the registrar; and s. 223 a loss caused by a mistake of the registrar with no wrongful act of mistake made by any of the parties to the transaction. Between these two stools fall cases in which there has been a wrongful act *and* a mistake by the registrar. But I cannot see any mistake by the registrar

is obvious (assuming mistake on the part of the registrar) that the stop which the caveat creates was lost not solely by the mistake of the registrar but partly by mistake of the registrar and partly by the fraudulent application for cancellation by Mrs. Hipwell.

Bird J.A.[26] expresses himself in these words:

> I am satisfied that the loss sustained by the respondent, in terms of Section 223 of the Land Registry Act, was caused solely as a result of the mistake of the Registrar of Titles, as the real property could not have been conveyed free of the respondent's lien save for the removal of the caveat.

This is saying that any *causa sine qua non* must, because it is a cause without which the event could not have happened, be therefore the *sole* cause of the event, which is a new kind of heresy. It is at the same time a rephrasing of Robertson J.A.'s argument that Gordon's real loss was not his loss of the land but the loss of the stop imposed by the caveat. This is an ingenious translation of the word "loss", but it does not escape the objection that the loss was also caused partly by Mrs. Hipwell's application.

The majority judges' view, that the loss of the *stop* rather than the loss of the *land* is the loss the registrar's mistake caused, partially obscures the fact that they are ignoring the legislative requirement that under section 223 the plaintiff's loss or damage must be caused solely by the mistake of the registrar.

IX

We now come to two difficulties not mentioned in any of the judgments. Both these arise out of section 228 of the Land Registry Act, which reads in part as follows:

> The assurance fund or the Attorney General as nominal defendant shall not under any circumstances be liable for compensation for any loss, damage, or deprivation:-
>
> (b) occasioned by breach by a registered owner, of any trust, whether express, implied or constructive.
>
> (h) where the loss, damage, or deprivation has been caused or contributed to by the act, neglect, or default of the plaintiff.

Section 223 is by express words within itself made subject to section 228. Section 221 is not by express words subject to section 228.

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in *Gordon* v. *Hipwell*, unless it was a mistake for him not to endorse Gordon's caveat in bright red ink "Valid for two months only". The Act provided no machinery for this.

[26] [1952] 3 D.L.R. at p. 204.

The court expressly found that Hipwell was a trustee for Gordon. It did not try to avoid section 228 by the argument that it was not Hipwell but Mrs. Hipwell who sold the land. I do not think that such an argument would have been acceptable because, assuming that Hipwell is trustee for Gordon: (a) it would have been a negligent breach of trust for Hipwell to have left the power of attorney outstanding, or (b) Hipwell may have committed a breach of trust by his attorney (his wife). It would, of course, have been disappointing, from the wider viewpoint of the meaning of the section, had 228(b) been disposed of on such accidental circumstances, but it was not. The whole section was ignored.

The problems created by the Act with its present wording are more serious than its mere application to the case of *Gordon* v. *Hipwell*. If section 228(b) is applicable to section 221, and it can be argued that it is, and if "constructive trust" is used in the sense of any obligation which might be imposed on a registered owner for remedial purposes, it is almost inconceivable that the fund would ever be liable, even under section 221. For instance, to put a case in which everyone would agree that the fund should be liable, suppose that *A*, a forger, forges a conveyance from *B*, which he registers. Suppose that *A* now conveys to *C*, a confederate who participates in *A*'s dishonesty and gives no value. *C* registers his conveyance and then sells to *D*, a bona fide purchaser, who registers his conveyance. Clearly *D* takes clear of *B*'s rights.[27] But if 228(b) applies to 221 and means what it says, the fund is not liable to *B*, not because 221 is not otherwise satisfied, but because *C* could be called a constructive trustee for *B*, and because it could be said that *C*, the constructive trustee, has committed a breach of trust by conveying the land to a bona fide purchaser. Surely there is some escape from this conclusion, but the Act should be clarified. If anyone knows why 228(b) is in the Act, it should be made to say what it is meant to say.

The other problem not dealt with by the court is the possible contributory negligence of Gordon, an antique dealer, in taking diamonds from a person who had obviously recently arrived from England. Perhaps contributory negligence was not pleaded or argued in *Gordon* v. *Hipwell*. Section 228(h) is nevertheless a possible trap. In so far as it applies to 223, it is surely already embodied in the main section 223, because if the plaintiff has contributed to his loss, his loss has not been caused solely by the mistake of the registrar. If it applies to 221 and is widely in-

[27] *Brown* v. *Broughton* (1915), 25 Man. L.R. 489, 24 D.L.R. 244, 8 W.W.R. 889, following a strong dictum in *Gibbs* v. *Messer*, [1891] A.C. 248 (P.C.).

terpreted, it may become very easy for the fund to escape liability. It is difficult to imagine circumstances in which additional care could not have been taken, and it is always possible to argue that in dealing with a valuable right a person who takes less care than could have been taken is negligent.

What is this section meant to accomplish? Between the two extremes of making it impossible to recover from the assurance fund and making recovery too easy, some line should be drawn. The section as it now stands on the books is in my opinion unreasonably obscure in its implications for inclusion in what amounts to a compulsory insurance contract.

X

O'Halloran J.A.'s reasoning, which runs through thirteen pages, is not easy to condense. He accepts the first two steps in the majority chain of reasoning. From there he starts with step 6, and works backward, disagreeing with the main conclusions arrived at by the majority, except step 4, that Gordon was a *cestui que trust*, which he arrives at by an entirely different route.

In dealing with step 6, O'Halloran J.A. reaches the conclusion that no mistake was made by the registrar because *inter alia* there was nothing on the face of the caveat or elsewhere in the materials filed to indicate that Gordon was, or was even claiming to be, a *cestui que trust*. In his view Gordon's caveat was a 219(1) caveat, which must lapse at the end of two months, and the registrar did no more than formally remove the dead caveat.

In Mr. Justice O'Halloran's opinion, there was no vendor's lien because the failure of consideration destroyed the whole contract and, since there was no contract of sale, there could be no vendor's lien. If there were a vendor's lien, it could have no existence before a declaration by a court of equity.[18]

But the fund is liable as a guarantor under section 221 because, before the Land Registry Act, Gordon would have been a *cestui que trust* on quasi-contractual grounds to prevent unjust enrichment by Hipwell. This interest would have been an equitable interest in the land itself.

O'Halloran J.A. then concludes that the Land Registry Act, by making Hipwell the owner at law and in equity, has reduced Gordon's quasi-contractual trust right in rem into a mere right in personam. This, combined with the wrongful act of Hipwell in paying for the land with diamonds he did not own, and securing registration as owner, satisfied section 221, and the sale by Mrs. Hipwell has blocked Gordon's action for rectification of the regis-

ter. Alternatively, Mrs. Hipwell's wrongful sale has rendered her liable, and through her indirectly the fund, by similarly blocking Gordon's action for rectification of the register.

It is not probable that the learned judge relies on the mere metaphysical change from an equitable right in rem into an equitable right in personam, without the subsequent events, as being sufficient to satisfy the conditions of 221; and it is probable that the effect attributed to the subsequent sale by Mrs. Hipwell is based on an assumption that, apart from the Land Registry Act, Gordon could have recovered the land from the bona fide purchaser.

A bona fide purchase of the legal title always cuts off any purely equitable interest. Mr. Justice O'Halloran does not rely on the fact that the land was mortgaged and, if he did, *Rice* v. *Rice*[18] protected the purchaser of a purely equitable interest without the intervention of any registry act.

If the learned judge had not assumed that, apart from the Land Registry Act, Gordon would have been able to recover the land from *X*, his argument would have stressed the fact that section 221, in providing that the loss must arise by reason of the operation of the Act, does not provide that the loss must be one which would not have arisen *without* the operation of the Act. It is conceivable that the fund was created to protect against *all* losses arising from the operation of the principle that registration creates indefeasible title — not merely *some* losses, that is, not excluding those which would have arisen apart from the Act by the operation of the principle of bona fide purchase. The Act has occupied the field and has by section 44[28] at least cut down seriously the effect of notice (express, implied and constructive).

Apart from the possible assumption by O'Halloran J.A. that, aside from the Land Registry Act, Gordon could have recovered the land from *X*, the bona fide purchaser, the chief difficulty with this judgment lies in its conclusion that non-performance by Hipwell (failure of consideration) rendered the contract void.

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[28] S. 44 of the Land Registry Act reads:

"(1) No person contracting or dealing with or taking or proposing to take from the registered owner of or from the holder of a registered charge upon any land a transfer of or a charge upon such land, or a transfer or assignment of or charge upon such registered charge, shall be affected by any notice, express, implied, or constructive, of any unregistered interest affecting such land or registered charge other than an interest the registration of which is pending, or a leasehold interest in possession for a term not exceeding three years, or the title of any person as against which the certificate of title is void under subsection (2) of section 38, any rule of law or equity to the contrary notwithstanding."

Subsection 2 defines "registered owner".

If Gordon has been buying Hipwell's diamonds and paying for them by conveying his land to Hipwell, it might have been interesting to pursue further the problem of whether error as to title could have rendered the contract void, or to pursue what would then have been the alternative possibility that the contract was voidable on the ground of Hipwell's fraud.[29]

None of these interesting speculations are possible on the facts, because Gordon and Hipwell entered into a contract to buy and sell Gordon's land for money. Subsequently, as a substitute performance for the payment of money, Hipwell offered, and Gordon accepted, value in diamonds, and it was this substitute performance which failed. Neither the contract nor the conveyance is void or voidable. Suppose, for instance, that after the diamonds were forfeit, the land increased sharply in value, and that Hipwell by that time has acquired Canadian money, and is able, ready and willing to pay the full price in Canadian funds. Could Gordon then say: "I do not want your money. This contract is either (a) void or (b) voidable. Give me back my land"? To ask this question is to answer it. There was no mistake with respect to the subject matter of the contract, and the only failure of consideration was Hipwell's non-performance of his promise to pay. Clearly Hipwell can pay and keep the land. The contract was neither void nor voidable.

XI

As my discussion should show, it is extremely difficult to offer reasons for allowing recovery by Gordon against the fund. In my discussion of O'Halloran J.A.'s reasoning, I offered one ground which I considered possibly satisfactory. I now offer another. With the Land Registry Act occupying the field, the only practical step for Gordon to take is to lodge a caveat under section 208.

The provisions of section 219(1) and (2) are obscurely drafted. The trial judge and two members of the Court of Appeal are of the opinion that the caveat is a continuing caveat under section 219(2). The registrar, O'Halloran J. and the writer, all on different grounds, are clearly satisfied that the caveat is a 219(1) caveat. The net result is that in addition to counsel, who were presumably divided in opinion, six barristers and solicitors who have given the matter consideration divide evenly on the question.

It therefore seems a fair inference that, although Gordon is justified in believing that it is a 219(2) caveat, the registrar is also

[29] If Hipwell were to be imputed with knowledge of his lack of title, or, assuming that the diamonds had been classified as settler's effects, of lack of power to sell them until he had spent a year in the country.

justified in believing that it is a 219(1) caveat, which he is not only justified, but under the protection of section 218 required to record. The registrar's act is the result of the operation of the Land Registry Act. It is indeed the very execution of the provisions of the Act. This act of the registrar gave Mrs. Hipwell the power to transfer indefeasible title to a bona fide purchaser who by another section of the Land Registry Act (section 44[28]) is protected from the consequences of notice "express, implied or constructive" of Gordon's possible interest.[30] All these consequences result from the operation of the Act. The other requirements of section 221 are satisfied. Consequently the attorney-general, as nominal defendant, is obliged to guarantee the judgment recovered against Mr. and Mrs. Hipwell.

This argument stops short of giving full effect to section 228(b) on the ground that if and in so far as its generalization includes these particular facts, it is repugnant to the assurance fund provisions, and to interpret the section in that way would impute to the legislature an intent it is inconceivable the legislature could have had. The argument also leaves out of consideration section 228(h), because it is impossible to pass on a question of negligence without a clearer definition of the duty the insurer intended to impose on the assured and a fuller knowledge of the facts than the report provides.

Some Qualities of the Advocate

It is, I think, a reason for congratulating you that the legal profession is an honourable one, a learned one, one of which we can be proud and one in which great happiness may be found. The fact that it is an honourable profession lies at the very root of our legal systems both here and in my country. All of us, when we begin our legal careers, know that absolute trust and confidence between Bench and Bar are essential and we know that absolute trust and confidence between members of the Bar working together and appearing in cases are also essential. As the years go on and as we pass our time in the law, we come to appreciate more fully the complete truth of the fact that confidence and integrity are the essential bases upon which our systems are conducted. It is also necessary to have a Bar that is zealous, fearless and independent. Courtesy to the Bench and courtesy to fellow members of the Bar are not inconsistent with these qualities of zealousness, fearlessness and independence in an advocate. (The Rt. Hon. Sir John Morris at a special convocation for call to the Bar held at Osgoode Hall, Toronto, on September 24th, 1952)

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[30] This is not the time or place for a discussion of when notice will be treated as fraud.