THE CAVEAT IN THE TORRENS SYSTEM.

Some comparatively recent decisions involving caveats filed under the Torrens System in western land titles offices have drawn attention to the fact that the effect and operation of the caveat—that distinctive instrument of the Torrens System—is not as simple and uniform as is often assumed. A study of this question is not only instructive but discloses some unexpected variations in the law of the various provinces. For the purpose of this discussion, only the Acts of Manitoba, Saskatchewan and Alberta, which are constructed on similar lines and follow rather closely the Australian precedents, will be considered. Practitioners in Ontario and British Columbia, whose Acts are more in harmony with the English precedents, may draw their own conclusions as to the applicability of the law discussed.

To arrive at a true understanding of the operation of the caveat, it is useful to take first a historical view. The original Torrens Act in South Australia, introduced in 1858, and its successors, profess as their object "the simplification of the law relating to the transfer and encumbrance of land." For that purpose the law of real property was to be assimilated to that of personal property, a register was to be established and no interests in land were to exist off the register. There seems to be no doubt that the original framers of the Acts meant this theory to be carried to its rigorous and logical conclusion. There was to be an end of equitable estates—using the word "equitable" in the sense which by common consent has been accorded it in treating of land under the Torrens Acts, namely, as opposed to registered—the registered being treated as the legal estate and interests off the register as equitable estates.

This view of the operation of the Acts was carried out consistently in the case of *Lange* v. *Ruwoldt*.[1] There the owner of land under the system had sold under agreement of sale and received the whole of the purchase money. He died having made a will with a general devise of all his property, but without having transferred the land sold. The purchaser brought suit against the devisees for a conveyance. The court, and on appeal the full court, held that the effect of the contract, had the land not been under the system, would have been to pass an equitable fee simple to the purchaser, but that under the system no such estate or interest could pass, the contract not having been registered and being incapable of registration; that the

[1] (1872) 6 S. A. R. 75, 7 S. A. R. 1.

power of the court to decree specific performance depended on an equitable estate having been conveyed to the purchaser; that the provisions of the statute effectually prevented any separation of the legal and equitable estates; and that the plaintiff was not entitled to have the land conveyed to him but had merely a right to recover his purchase money. Gwynne, J., said:

"The contract had no binding effect on the land and was only a personal obligation."

This decision, however, was subsequently specifically stated to be overruled by the judgment of the same court, *Cuthbertson* v. *Swan*,[2] where it was laid down that—

"The system of trusts, except so far as is necessary for the maintenance of the one principle involved in the Real Property Act, namely, the indefeasibility of title on a sale to a bona fide purchaser, is not swept away by the Real Property Act."

The Canadian courts have followed the reasoning of the latter case. Numerous authorities might be quoted on this point, but it is sufficient to mention the latest pronouncement of the Supreme Court of Canada, namely, in *Church* v. *Hill*,[3] where the leading authorities are collected to support the statement that "equitable doctrines and jurisdiction apply to land under the Land Titles or Torrens System of registration, and equitable interests in such land may be created and will be recognized and protected."

From the beginning, however, we find the Australian Acts recognizing the right of one person to restrain another from dealing with land, and from the beginning, therefore, we find the caveat. We need not at this point attempt to differentiate, if it can be done, between, on the one hand, an action *in personam* to compel a vendor to execute a conveyance and, on the other, a suit to give effect to an equitable estate. For even when the existence of equitable estates in registered land became acknowledged, no change was made in the policy of the Acts so far as to actually give such estates a place on the register. They had none. Therefore, from the first in the Australian Acts the caveat designed to "protect" these equitable interests was merely a temporary expedient. In the majority of the jurisdictions it operated as an absolute prohibition, or stop, on all dealings affecting the interests against which the caveat was filed; and in all the jurisdictions, with certain limited exceptions not affecting the general rule, this operation of the caveat was confined to a limited period of from fourteen days to three months.

[2] 11 S. A. R. 102.
[3] (1923) S. C. R. 642; (1923) 3 W. W. R. 405.

The effect of filing a caveat under these Acts was quite clear. There was no question of "notice" or of "taking subject to" the interest of the caveator. He was simply authorized to stretch out his arm as it were, and say to the traffic: "Stop, I claim an interest. We will crystallize things just as they are at this moment and, if I really have an interest, I am going to have it declared or appropriately enforced." No new validity or efficacy was given the caveator's claim. No new law or principles of equity were applied to it. But, taking the law and doctrines of equity as they applied to his claim stated in the caveat, the caveator was ensured an opportunity of establishing and enforcing that claim without being faced with the possibility of a fresh registration under an Act which, in favour of the new registration, would ordinarily sweep aside equitable—non-registered—claims.

The caveat as carried into the Real Property Act, (Dom.) 1886, and the Land Titles Act, (Dom.) 1894, the progenitors of the Acts of Saskatchewan and Alberta, introduced a new feature. The operation of the caveat was limited to three months, but during that time registrations were not held up; they were simply made "subject to the claim of the caveator." This does not mean that a person taking the benefit of a registration during these three months deliberately subjected himself to the claim made in the caveat and admitted that he was bound thereby, but merely that whatever rights the caveator had against registered interests at the time of filing his caveat, he retained as against the new party on the register: *O'Brien* v. *Pearson.*[4] Therefore, if we are correct in our deduction as to the effect of a caveat in Australia, it seems to follow that under these early Dominion Acts it was practically the same. Registrations, it is true, might go on, but the caveator preserved his right to establish his claim on the basis of things as they were when he filed his caveat.

Once having broken away, however, from the principle of a caveat being an absolute though temporary injunction against further registrations, pending judicial decision, it was an easy transition to regarding it as a method of in some way "protecting" rights, more or less permanently. In the old North West Territories, while the three months caveat was still in use, older practitioners well remember the endless judge's orders that were obtained from time to time for keeping caveats alive. In the new provincial Acts of Saskatchewan and Alberta, the next step in the development of the idea of permanency was taken by making the caveat effective until terminated by notice given on the initiative of some one claiming an interest in the land affected by the instrument. This step was more easily taken and

[4] 22 Man. R. 175; 1 W. W. R. 1026.

more obvious in those provinces because already adopted by Manitoba in the year 1885, the same year as the passing of the first Dominion Act. The progress of development in the other provinces has been followed because it seems to exhibit more clearly the forces at work to produce the final result which the Manitoba legislature reached by omitting some of the intermediate phases.

In all the development which has been traced there does not seem any reason, however, in fact or in law, to conclude that the real effect of the caveat had been in any way changed; only the length of its operative period had been altered. That being the case, it would appear that a caveat to-day in Saskatchewan (leaving out Alberta and Manitoba on account of other statutory provisions to be mentioned), produces simply this result, that the caveator may be called on to establish his caveat, or in the alternative, suffer its lapse, and that he is given an opportunity to show, if he can, that on the recognized principles of equity he was entitled to the interest claimed in his caveat at the time of filing, in which case the court will confirm him in that interest, and no subsequent registrations can be set up, by the persons who effected those registrations, as a bar to such confirmation.

A further development above hinted at has now to be considered, namely, the provisions in Manitoba, appearing first in the amendment to the Manitoba Act of 1891 and subsequently copied into the new Alberta Act passed after provincial establishment in 1906, that "registration by way of caveat shall have the same effect as to priority as registration of an instrument under this Act."[5]

It cannot be denied that this section has introduced a new and, it is submitted, a confusing element into the determination of the question as to just what result a caveat does produce. Its very terminology is foreign to the spirit and letter of the Acts. There is no such a thing as "registration" by way of caveat. Registration under the Acts is accorded only to instruments in the form and executed in the manner required by the Acts. This was part of the very essence of the legislation, to secure simplicity by limiting the number and variety of instruments which would be registered. The registrar decides when an instrument is fit for registration, and when registered the instrument is embodied in the register and creates the interest mentioned therein. The flimsy grounds set out in caveats filed are common knowledge. Can it possibly be that the caveator thereby, over the head of the registrar and the provisions of the statute, secures to himself the "creation or transfer" of the interest claimed?

[5] R. S. Man., 1913, ch. 171, sec. 151; R. S. Alta., 1922, ch. 133, sec. 134.

To ask the question would appear to answer it in the negative. Registration is the essential process and can only be obtained after the registrar has satisfied himself that the instrument is in proper form and that all the requirements of the law have been complied with. Registration of the caveat we might understand, but registration "by way of" caveat—that is registration of some instrument by registering a caveat alleging a claim under it—is puzzling.

However, it may be answered, the point need not be laboured, as the section deals only with priorities and therefore in any event it is only with respect to priority that such registration is equivalent to registration of an instrument. The latter part of the section, it will be urged, emphasizes this. It provides for the subsequent lifting out, as it were, of the caveat and the substitution in its place of the instrument under which the caveator made his claim, provided that such instrument be one that may be registered. The cases where this is possible obviously form only a portion, and that a small one, of those in which caveats are filed.

It would appear then that for the sake of a very limited number of cases, the legislatures which have adopted this section have introduced a quite new principle into the law so far as the effect of caveats is concerned. For, if we are right in our statement of the effect of a caveat under the Acts as they originally stood, that effect in any event was not necessarily to determine priorities. Only full registration does that, and full registration was granted only to specified instruments, transfers, mortgages, leases and a few other recognized instruments. The caveat gave the claimant in the caveat simply a stay of proceedings during which he could attempt to establish his claim and his priority, but the priority depended on recognized principles of equity. The Acts did not attempt, outside of formal registration, to settle priorities between unregistered and often unregistrable instruments which never actually came within their operation.

This point has been dwelt on at some length, not with the intention of being hypercritical and controversial, but because it is believed that a full understanding of these special sections necessarily leads one direct to the root of the question as to the effect of a caveat.

Reference to a concrete case will emphasize the distinction made. The Appellate Division in Alberta, in *Re Royal Bank and La Banque de Hochelaga,*[6] considered this feature squarely. In the judgment of Simmons, J., is found an excellent summary of the two points of view. The contest was between two equitable mortgagees, the Royal Bank by virtue of a mortgage made by way of deposit of duplicate certificate

[6] (1914) 8 A. L. R. 125; 7 W. W. R. 817.

of title, and La Banque de Hochelaga by virtue of a subsequent mortgage in statutory form. La Banque de Hochelaga filed a caveat and the Royal Bank did not. Stuart, J. (dissenting), impressed by the anomalies of section 97 (registration by way of caveat, etc.), practically threw it into the discard, and, taking the view above outlined as the historical and logical meaning of a caveat, held that a caveat is "a warning, a notice and a prohibition, that it creates no new rights but prevents new ones arising in others thereafter, that it is intended strictly to preserve the *status quo ante,* to keep things exactly as they are and no more." The claim of both banks being equitable (unregistered) and there being no other controlling equities, the first in time prevailed. The other three judges, however, held that effect must be given to section 97, that it governed, and that by reason thereof La Banque de Hochelaga obtained a new and absolute priority.

The same question had been discussed by the same court in *Stephen* v. *Bannan and Gray,*[7] and the same conclusion arrived at by the majority, namely, that under the caveat the caveator went further than merely to establish his "equity." Registration of the caveat conferred on him a new and substantive priority. For further discussion of this view the reader is referred to a short note by the writer in the issue of the CANADIAN BAR REVIEW for February, 1923, at page 193, where the cases of *Union Bank* v. *Turner,*[8] and *McKay* v. *McDougall,*[9] are cited to illustrate the same divergence of result in Manitoba and Saskatchewan.

As legal history goes, the Acts of Manitoba and Alberta containing the special provision under discussion are still young, and it is too soon to expect to have fully brought to light the difficulties which those provinces have created for themselves by straying from the straight and narrow path of settling priorities only by registration, and by enabling a caveator, by means of an informal instrument, to secure a priority to himself which he would not have had on ordinary principles of equity. *Grace* v. *Kuebler,*[10] as discussed by the late Mr. Spencer in his essay on the caveat, "Some principles of the Real Property (Land Titles) Acts of Western Canada," chap. 8, illustrates one possibility. There a vendor of land sold what is colloquially called his "equity," assigned his agreement of sale and executed a transfer of the land to the assignee. The assignee filed a caveat but did not notify the original purchaser, who accordingly, continued to

[7] 5 W. W. R. 201.
[8] 32 Man. R. 435; (1922) 3 W. W. R. 1138.
[9] 14 Sask. L. R. 111.
[10] 56 S. C. R. 1.

make his payments to the original vendor until the latter was paid in full. The assignee of the contract brought action against the purchaser for payment of the monies outstanding at the time of the assignment, and the purchaser counterclaimed for the delivery of a conveyance. The action was dismissed and the counterclaim allowed by the trial judge, the Appellate Division in Alberta and the Supreme Court of Canada.

The essayist argues that the decision was wrong on the ground that, the original purchaser and the assignee of the contract both being equitable claimants, the latter took priority, having filed a caveat. It would indeed appear that where a person without fraud (and there was no finding of fraud in this case) registered a transfer of land against which there are no prior registrations, he would not be bound by a prior outstanding agreement of sale. In this case the transferee had filed a caveat, with respect to which the Act says registration of a caveat shall have the same effect as to priority as the registration of an instrument, but in fact the courts throughout discussed the situation on grounds of equity.

If the argument of the essayist, based on the provisions of the Act, was advanced by counsel, they seem to have been met by ignoring them, but by so doing a result was reached which undoubtedly impresses one as having satisfied the ends of justice, even if it be correct that section 97 (now 134) was not given effect to. There are in fact several decisions in which section 134 of the Alberta Act, and section 151 of the Manitoba Act, are called into play, but on reading these cases one cannot help feeling that it would have been more conducive to a proper determination of the rights of the parties had such determination been left to the well tried and long established principles of equity.

We have gone so fully into this divergence between the statutory provisions of Manitoba and Alberta on the one hand and Saskatchewan on the other, in order to emphasize what seems properly to be the essential purpose of a caveat, that we have not developed one further feature required to better round out the consideration of the matter. We have seen that in Saskatchewan the caveat merely acts as a stay against any one acquiring an interest without the caveator having a chance of establishing his right. The Act contemplates a subsequent registration, and the conflict dealt with by the Act is between the claim of the caveator and that under a subsequent registered instrument. Nothing is said as to the operation of a caveat with respect to transactions or instruments which never find their way to the register at all. But in *Alexander* v. *McKillop and*

Benjafield,[11] the existence of a caveat was held to prevent an opposing claimant securing approval of an assignment of contract in his favour except subject to the claim of the caveat, something quite apart from the register.

This seems to establish what might look like an extension of the operation of the caveat, a reasonable extension, however, which is in no way inconsistent with the conclusions already arrived at. The effect of the Act is that not only shall the registrar not register any subsequent instrument except subject to the claim of the caveator, with the result which we have already considered, but that no person acquiring an interest off the register shall do so except subject to the claim of the caveator in the same way. Obviously, when a person is acquiring an interest of any nature in land, he should search the register. There may be mortgages or transfers or other registered instruments which affect the interest to be acquired and to which any new dealings must be subject by reason of the positive operative effect which the Acts give to registered instruments. Being, therefore, bound by any registered instrument, it is equally reasonable that he should be bound by any claim made in a caveat which is disclosed by the same search. But, with respect to such claim in a caveat, there is nothing in either the Act or the cases to indicate (in Saskatchewan) that the result of the caveat is, as against the dealing off the register, anything more than it would have been against a proposed dealing on the register, that is to say, merely a stop order to preserve the *status quo,* to enable the caveator to attempt to establish his claim as it stood at the time of the entry of the caveat.

It is unnecessary to cover the ground again as to the result which would follow in a similar case in Manitoba or Alberta. Though both dealings are off the register, the legislature has intervened to give a stronger position to that claimant who files a caveat, not only stronger but having the great and almost unassailable strength of a registered instrument. A claimant can therefore improve his position to a remarkable extent by merely swearing to the truth of certain statements and presenting the instrument to the registrar.

This article, begun as a short note, has already run to such length that space forbids a detailed discussion of the numerous cases either bearing on or bearing out the views herein presented. The writer, however, believes those views are a sound deduction from the cases, and further that in the principles here laid down will be found the solution of many problems in priorities in the reports which have been somewhat clouded by reason of the absence of a guiding principle

[11] 45 S. C. R. 551.

such as an endeavour has been made to lay down, at least for the Saskatchewan Act. So far as the Manitoba and Alberta Acts are concerned, sections 151 and 134 were no doubt intended to establish even a more clear and simple principle, but if the conclusions of this article are correct, it would seem to follow that the result has been rather the opposite.

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THE THEORY OF JUDICIAL DECISION.

II.

NINETEENTH-CENTURY THEORIES OF JUDICIAL FINDING OF LAW.[1]

All nineteenth-century theories of judicial decision in one way or another grow out of the natural-law thinking of the seventeenth and eighteenth centuries. According to the classical natural-law theory all positive law, *i.e.*, the whole body of legal precepts that furnish the grounds of actual decision in the courts, was a more or less feeble reflection of an ideal body of perfect rules, demonstrable by reason, and valid for all times, all places and all men. Positive legal precepts got their whole validity from their conformity to these ideal rules. In other words, jurists and judges were striving to make the grounds of decision conform to an ideal philosophical pattern resting on reason and identical with an ideal moral pattern. With the breakdown of the natural-law philosophy at the end of the eighteenth century, the ideal philosophical pattern was replaced in general use by an ideal analytical pattern—a conception of a body of logically interdependent legal precepts commanded or authoritatively recognized by the state or derivable by logical processes from precepts so commanded or so recognized—or by a historical pattern of a body of traditional principles and conceptions, representing the unfolding of an idea of right or an idea of freedom in human experience of the administration of justice, and fixing for all time the lines of legal development since it revealed the orbit of the self-realization of the idea. The latter left to the jurist only a task of observation and formulation and to the judge a mere task of finding the historically determined grounds of decision and formulating them in his opinion.

[1] The second of three lectures delivered before the Bar Association of the City of New York on January 9th, 17th and 23rd, 1923. It appeared in the *Harvard Law Review*, vol. 36, p. 802. It is reprinted here with the permission of the author, the Harvard Law Review Association and the Bar Association of the City of New York.