Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sarah Wilson v. *John Francis Charles McIntosh, from the Supreme Court of NewSouth Wales; delivered 10th February* 1894.

Present:

LORD WATSON.
LORD HALSBURY.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.
LORD JUSTICE DAVEY.

[*Delivered by Lord Justice Davey.*]

In this case their Lordships are under the disadvantage of not having had the case of the Respondent argued by Counsel on his behalf. They will therefore abstain from any expression of opinion on the points argued for the Appellant beyond what is strictly necessary for the decision of the appeal. The facts of the case are as follows.

On the 8th January 1887 the present Respondent lodged an application in the office of the Registrar General to bring under the Real Property Act (26 Vict. No. 9) certain lands comprising about 40 acres. The applicant's title (it is alleged) depended on the will of one Cornelius Sheehan a former owner of the lands, whereby he devised his real estate to his then wife Isabella Sheehan for life with remainder to the applicant in fee. In his declaration in

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support of the application he declared that there was no person in possession or occupation of the said lands adversely to his estate or interest therein, and (in general terms) that there did not exist any fact or circumstance whatever material to the title which was not thereby fully and fairly disclosed to the utmost extent of the applicant's knowledge, information, and belief. On the 12th of May, 1887, the present appellant duly lodged a caveat against the land being brought under the provisions of the Act; but she did not take any proceedings to establish her title to the land or apply for an injunction restraining the Registrar General from bringing the land under the provisions of the Act. The appellant denied the title of the respondent on the allegation that Isabella Sheehan, the former wife of the testator Cornelius Sheehan, died in his lifetime, and that the testator had subsequently married again and thereby revoked his will, and she further alleged that she and those through whom she claimed had acquired a title to the land by possession under the Statute of Limitations .

On the 1st of November, 1887, and more than three months after the lodging of the caveat the respondent, in pursuance of sect. 21 of the Real Property Act (Amendment Act), stated a case for the opinion and direction of the Supreme Court, and the same was duly filed. On the 4th of November, 1887, the respondent applied for and obtained an order of the Court directing the appellant to state and file a case on her behalf, and in compliance with such order the appellant, on the 18th of November, 1887, stated and filed a case accordingly. The respondent took no steps to have issues settled, or to have the case set down for argument before the Court, or to obtain the decision of the Court on the questions thereby raised between the parties, and in fact the respondent, having obtained

from the Appellant a statement of his case, did not further proceed with his application. But on the 24th July 1890 the Respondent served the Appellant with notice of motion to have the Appellant's caveat set aside and removed, on the ground that the Appellant having failed to take any proceedings within three months after filing of the caveat as provided by section 23 of the Real Property Act the caveat had lapsed. It appeared from the Appellant's affidavits in opposition to the motion that on the 8th May 1888 her solicitor inquired by letter what the Respondent intended to do in the matter, and whether he intended proceeding with the case, and not having received any answer he sent his clerk to inquire, and the clerk stated that the Respondent's solicitor informed him there was some dispute between him and his client as to costs and gave the clerk to understand he would have nothing more to do with the matter. On the other hand the Respondent's present solicitor made an affidavit of his belief that his client was not aware until recently that the Appellant had not obtained an injunction. On the 8th August 1890 an order was made removing the caveat which is the subject of the present appeal.

The material sections of the Real Property Act are the 22nd and 23rd which are in the following terms:—

"The Registrar General upon receipt of any "such caveat within the time limited as aforesaid "shall notify the same to such applicant pro- "prietor and shall suspend further action in the "matter and the lands in respect of which such "caveat may have been lodged shall not be "brought under the provisions of this Act until "such caveat shall have been withdrawn or shall "have lapsed from any of the causes hereinafter "provided or until a decision shall have been

obtained from the Court having jurisdiction in the matter."

"After the expiration of three months from the receipt thereof every such caveat shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged, shall within that time have taken proceedings in any Court of competent jurisdiction to establish his title to the estate interest lien or charge therein specified, and shall have given written notice thereof to the Registrar General, or shall have obtained from the Supreme Court an order or injunction restraining the Registrar General from bringing the land therein referred to under the provisions of this Act."

In sect. 4 of the Amending Act (41 Vict. No. 18) it is provided:—

"Where any caveat against an application to bring land under the principal Act shall have been lodged in pursuance of the twenty-first section by any person (hereinafter called the caveator) claiming such land or a portion thereof or an interest therein adversely to the applicant, it shall not be necessary for such caveator to take proceedings in any Court to establish such claim, but the applicant may state a case for the opinion and direction of the Supreme Court upon the matter, and the caveator may apply to the said Court for an order on the Registrar General as provided by the twenty-third section to restrain him from proceeding until the further order of the Court. And the Court may make such an order and may in its discretion direct the caveator to lodge in the Court on or before a certain day a case on his own behalf, stating whether he claims in his own right or under another person, together with such other particulars (if any) as the Court shall think fit to order, and the

" Court shall thereupon direct an issue or issues " to be tried by a Jury as to any fact or facts " or should no fact be in contest may decide the " matter upon the case stated and for the pur- " poses aforesaid may make all such orders as " the Court shall think fit and the decision of " the Court finally upon the matter shall be " conclusive on the parties and on the Registrar " General and Commissioners. And the costs " of every proceeding under this section shall " be borne by the party finally unsuccessful."

Their Lordships are of opinion that the limitation of time contained in Section 23 is introduced for the benefit of the applicant to enable him to obtain a speedy determination of his right to have the land brought under the provisions of the Act without being embarrassed by the filing of a caveat which is not proceeded with in due time. It was argued on behalf of the Appellant that the effect of Section 4 of the Amending Act is to prevent the lapse of the caveat by reason of the caveator not taking any proceeding, inasmuch as it is thereby provided that " it shall not be neces- " sary for such caveator to take proceedings," and liberty is given to the applicant to take the initiative by stating a case and no time is limited within which the case must be stated. Their Lordships do not think it necessary to express any opinion upon this point or upon the question whether if the caveat has lapsed, the caveator is concluded and deprived of every other means of asserting her title. Their Lordships are of opinion that the maxim *Quilibet potest renunciare juri pro se introducto* applies to this case, that it was competent for the applicant to waive the limit of the three months and the lapse of the caveat by Section 23, and that the Respondent did waive it by stating a case and applying for and

obtaining an order upon the appellant to state her case, both which steps assumed and proceeded on the assumption of the continued existence of the caveat. In holding that it was competent for an applicant to waive the lapse, their Lordships do not understand that they are differing from the learned judges in the Court below. In Phillips v. Martin 1 the facts were very similar to those in the present case, with the addition that issues had been settled on the cases stated, and had been tried by a jury who found against the applicant, and proceedings had then been taken unsuccessfully for a new trial ending in an appeal to this Board. In the course of his judgment on that case the Chief Justice said:

"Here there is abundant evidence of waiver, and it is quite clear that a man may by his conduct waive a provision of an Act of Parliament intended for his benefit. The caveator was not brought into Court in any way until the caveat had lapsed. And now the applicant, after all these proceedings have been taken by him, after doubtless much expense has been incurred on the part of the caveator, and after lying by and hoping to get a judgment of the Court in his favour, asks the Court to do that which but for some reasons known to himself he might have asked the Court to do before any other step in the proceedings had been taken. I think he is altogether too late. It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts."

Their Lordships agree with these observations of the chief Justice, and think that

they apply to the present case, notwithstanding that the Respondent did not think fit to obtain a decision of the Court on the case which he had compelled the present Appellant to state. Mr. Justice Windeyer distinguished the case of *Phillips* v. *Martin* from the present case on the ground that the case has not gone so far as it went in *Phillips* v. *Martin*. The learned Judge said :—"In *Phillips* v. *Martin* the applicant "brought the case before this Court, and obtained "a decision, and from that decision he unsuc- "cessfully appealed to the Privy Council, and "that case was decided upon the clear principle "of law that where, although the Court has no "jurisdiction, the parties have allowed it to "exercise jurisdiction and to go to the length of "pronouncing judgment, the unsuccessful party "cannot then turn round and deny the juris- "diction of the Court. That principle however "has no application in the present case."

Their Lordships cannot regard these circumstances as making any difference in principle. The Respondent in the present case invoked the jurisdiction of the Court to compel the Appellant to state her case and the Appellant did so and no doubt incurred costs in doing so and all the risk involved in showing her title. If it be once admitted that an applicant may waive the lapse it is a question of fact on the circumstances of each case whether there has been a waiver or not. Their Lordships agree with the observations of Mr. Justice Stephen on this part of the case. Their Lordships will therefore humbly advise Her Majesty that the order appealed from be reversed and the original motion refused with costs. The Respondent must also pay the costs of this appeal.