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*Feb. 1, 2
Mar. 27

ST. MARY'S PARISH CREDIT UNION LIMITED (*Defendant*) — APPELLANT;

AND

T. M. BALL LUMBER COMPANY LIMITED (*Plaintiff*) ..... — RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Real property—Filing of caveat by equitable mortgagee with knowledge of prior unregistered equitable mortgage—Priority as between equitable mortgages—Subsequent registered mortgage—Question of merger—The Land Titles Act, R.S.S. 1953, c. 108, ss. 65(1)(2), 71, 138, 145.

*PRESENT: Kerwin C.J. and Locke, Martland, Judson and Ritchie JJ.

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Z, a building contractor, pledged the title to his house property by way of equitable mortgage in favour of the defendant credit union "to secure the repayment of $2,000 and any moneys borrowed" by him from the defendant. The duplicate certificate of title was deposited with the defendant pursuant to this agreement. In the course of his business Z made purchases of building materials from the plaintiff and became indebted to it for the purchase price. Security was asked for this debt and Z, after telling the plaintiff that there was a mortgage in favour of the credit union, and that it had the duplicate certificate of title, executed an equitable mortgage upon "his equity in" the land in favour of the plaintiff. The latter filed a caveat claiming an interest in the land by virtue of its mortgage.

Subsequently Z executed, in favour of the credit union, a mortgage in registrable form, under *The Land Titles Act,* which was later registered. The plaintiff commenced action against Z, and the credit union was added as a party defendant. The plaintiff sought a declaration that it had a valid charge against the land and foreclosure of its mortgage. At trial judgment was given in favour of the plaintiff, and this judgment was sustained by a majority in the Court of Appeal. The credit union appealed to this Court.

Held: The appeal should be allowed, the judgment at trial should be set aside and the appellant should be entitled to a declaration that its equitable mortgage had priority over that of the respondent.

In addition to priority as to time, the defendant's mortgage ranked ahead of that of the plaintiff because of the form of the latter mortgage, which was not drafted as a registrable mortgage under *The Land Titles Act,* but only purported to charge Z's equity in the land. The defendant had a valid equitable interest in the land at the time that the plaintiff took the mortgage of Z's equity. The wording of the plaintiff's mortgage took the form which it did because both Z and the plaintiff knew of the existence of the defendant's equitable mortgage and intended that Z could only mortgage his remaining equitable interest in the land.

The two equitable mortgages which were in competition here were not the same. That of the plaintiff, by its terms, was expressly limited to a charge upon "my equity". It was, therefore, a mortgage of only a limited interest in the land. The filing of the caveat could not create a charge upon more than that which had been charged by Z under the terms of the instrument itself. Stated at its highest, the plaintiff's position after registration of the caveat could only be the same as if the equitable mortgage itself could have been and had been registered as an instrument under the Act. According to the tenor and intent of that document it only constituted a mortgage upon a partial interest in the land.

Jellett v. Wilkie (1896), 26 S.C.R. 282, followed; *Hackworth v. Baker,* [1936] 1 W.W.R. 321; *Clark v. Barrick,* [1949] 2 W.W.R. 1009, explained; *Bank of Hamilton v. Hartery* (1919), 58 S.C.R. 338; *Davidson v. Davidson,* [1946] S.C.R. 115; *Church v. Hill,* [1923] S.C.R. 642; *McKillop & Benjafield v. Alexander* (1912), 45 S.C.R. 551, referred to.

With respect to the question of merger, the defendant could not be considered to have intended to surrender a prior interest, in favour of the plaintiff's subsequent interest, by the taking of the legal mortgage in substitution for its existing security. It could not, in the circum-

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stances, have intended to effect a merger of its two securities. Even if a merger were held to have occurred that would not automatically increase the interest granted to the plaintiff by the terms of its mortgage. At no time did Z have a complete interest in the land which he could mortgage to the plaintiff by a mortgage of "his equity", because at all times there existed a charge on the land in favour of the defendant. This situation continued, even if it were held that a merger had taken place. *Ghana Commercial Bank v. Chandiram,* [1960] 2 All E.R. 865, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Davis J. Appeal allowed.

D. A. Schmeiser, for the defendant, appellant.

James L. Robertson, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—Anton Zirtz, who was a building contractor carrying on business in Saskatoon, borrowed money from the appellant in order to build his own house and to assist him in his business. On June 14, 1957, he executed, in favour of the appellant, a "Pledge of Title" by way of equitable mortgage upon his house property, comprising Lots 27 to 30 inclusive, in Block 28, in the city of Saskatoon, according to plan of record in the Land Titles Office for the Saskatoon Land Registration District as No. G. 131 (hereinafter referred to as "the land"), "to secure the repayment of $2,000 and any moneys borrowed" by Zirtz from the appellant. The duplicate certificate of title for the land was deposited with the appellant pursuant to this agreement. In addition to the $2,000 mentioned in the agreement, $4,400 was loaned by the appellant to Zirtz after June 14, 1957, and prior to June 19, 1958.

In the course of his business Zirtz made purchases of lumber and other building supplies from the respondent and became indebted to it for the purchase price. The respondent asked for security for this debt and Zirtz, on June 19, 1958, executed an equitable mortgage, in favour of the respondent, upon the land. This document recited a present indebtedness in excess of $26,000 and that the respondent had requested Zirtz to give a charge and mortgage on his equity in the land for the sum of $6,000 as collateral security for his indebtedness as well as for any

[1] (1960), 32 W.W.R. 97, 24 D.L.R. (2d) 284.

moneys which might become owing to the respondent for lumber and supplies purchased by Zirtz. It then went on to provide:

> NOW THEREFORE the debtor does hereby charge and mortgage his equity in said Lots 27 & 28, in Block 28, Plan G. 131, Saskatoon, Saskatchewan, to the extent of $6,000 to the Company as collateral security for payment of the lumber and builder's supplies heretofore purchased by the debtor from the Company or which may hereafter be purchased by him from the Company;

It is conceded that this document was not a registrable mortgage under *The Land Titles Act* of Saskatchewan, R.S.S. 1953, c. 108, which was in force at all times material to these proceedings. Even if it had been in registrable form, it could not have been registered by the respondent because of the fact that the duplicate certificate of title for the land was in the possession of the appellant as security for its equitable mortgage.

The circumstances relating to the granting of this equitable mortgage by Zirtz to the respondent are summarized in the judgment of Gordon J.A., using Zirtz's own words, as follows:

> I told Mr. Ball and Mr. Dingwall that there was a mortgage against my home for $6,400 in favour of The St. Mary's Parish Credit Union and that they had the title. I told them the building was worth $15,000. Although the word "equity" was not used I told them that I could only use my interest in the property to get material to finish the buildings.

Ball was the President of the respondent at that time and Dingwall was then a Vice-President.

The respondent filed a caveat on June 20, 1958, claiming an interest in the land under the document of June 19, 1958, wherein the respondent stated that Zirtz had "mortgaged and charged the said land" to the respondent.

On July 15, 1958, Zirtz executed, in favour of the appellant, a mortgage in registrable form, under *The Land Titles Act,* which was registered on the following day. It was not until the time of registration of this document that the appellant became aware of the existence of the respondent's caveat.

The respondent commenced action against Zirtz and the appellant was added as a party defendant. The respondent sought a declaration that it had a valid charge against the land and foreclosure of its mortgage. The appellant, in its

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statement of defence, asked for a declaration that its interest in the land was entitled to priority over any interest of the respondent.

At the trial, judgment was given in favour of the respondent. It was held that its mortgage took priority over that of the appellant and a foreclosure order in favour of the respondent was granted.

This judgment was sustained on appeal to the Court of Appeal of Saskatchewan[1], McNiven J.A. dissenting. The contention of the respondent on that appeal, which was accepted by the majority of the Court, is summarized in the majority judgment as follows:

> The contention of the plaintiff is that it and the Cerdit Union were both creditors of Zirtz, each endeavouring to obtain security for the sums that he owed them; that they knew that the title to the property was clear but for three mechanic's liens, two of them filed by the plaintiff itself, and a third by Myers Construction Co., Ltd., for the small sum of $98. They knew that any equitable mortgage held by the Credit Union was unregistered and that it passed no interest until registered and that therefore the equity that Zirtz had to offer as security was the full equity as shown by the title. The plaintiff relies on the cases of Hackworth v. Baker [1936] 1 W.W.R. 321, and Clark v. Barrick [1949] 2 W.W.R. 1009.

The following conclusion is stated:

> In this case, at the time the respondent obtained the mortgage from Zirtz, it is fair to say that both Zirtz and the respondent believed such mortgage would be subject to the prior claim by the appellant. The priority which the respondent obtained upon registration of the caveat was simply by the operation of the provisions of *The Land Titles Act*, a priority which under the Act is unassailable in the absence of fraud.

It was also held that the appellant's equitable mortgage of June 14, 1957, had become merged in the registered mortgage of July 15, 1958, and that, as the latter document had been registered subsequent to the filing of the respondent's caveat, it ranked subject to the respondent's equitable mortgage.

McNiven J.A. held that there had been fraud on the part of the respondent, within the meaning of *The Land Titles Act*, in the light of the construction placed on the meaning of that word by the Court of Appeal of Saskatchewan in *Independent Lumber Company v. Gardiner*[2].

[1] (1960), 32 W.W.R. 97, 24 D.L.R. (2d) 284.
[2] (1910), 13 W.L.R. 548, 3 Sask. L.R. 140.

He also held:

Zirtz recognized his obligation to St. Mary's—told the plaintiff St. Mary's held the duplicate certificate of title and that he could not and would not mortgage its interest in the home property. The plaintiff agreed and the agreement prepared by the plaintiff was in my opinion intended to exclude St. Mary's claim from its operation. It was carved out of the security given the plaintiff under its mortgage with its consent. In case of doubt as to its meaning a document is most strongly construed against the party who prepared it.

He further held that the respondent's caveat had misrepresented the document upon which it was based.

The appellant has appealed from the judgment of the Court of Appeal. Zirtz is not a party to this appeal.

Up to the time of the filing of the respondent's caveat the situation was that both the appellant and the respondent had equitable mortgages upon the land. That of the appellant was prior in time to that of the respondent and ranked first in equity. Neither mortgage was in registrable form under the provisions of *The Land Titles Act,* but the appellant had possession of the duplicate certificate of title for the land. In addition to priority as to time, it seems to me that the appellant's mortgage ranked ahead of that of the respondent because of the form of the latter mortgage. It appears clear, from the terms of that document and in the light of the evidence, that it was intended to charge, not the whole of the owner's interest in the land, but only the equitable interest which remained in Zirtz after he had granted to the appellant the earlier mortgage. The respondent's mortgage, which was drawn by its solicitors, was not drafted as a registrable mortgage under *The Land Titles Act,* but only purported to charge "his equity" in the land.

What was that equity? It was the interest which he retained in the land, subject to the appellant's equitable mortgage. It is true that the appellant's interest was an unregistered interest, but it did confer rights on the appellant and such rights were enforceable against Zirtz. Several cases in this Court have recognized the validity of equitable interests in lands which are subject to the Torrens system of titles and which are not themselves registrable interests

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under that system. The leading case is *Jellett v. Wilkie*[1], which held that a writ of execution registered pursuant to the provisions of the *Territories Real Property Act*, 49 Vict. (Can.), c. 51, would only attach the interest of the registered owner of the lands subject to existing equities and that, therefore, it would not take priority over a previous unregistered transfer of those lands.

It was suggested in *Clark v. Barrick*[2], a decision of the Court of Appeal of Saskatchewan, which is cited in the majority decision in the present case, that *Jellett v. Wilkie* had been overruled by the judgment of this Court in *Bank of Hamilton v. Hartery*[3]. It appears to be clear, however, from the judgment in *Davidson v. Davidson*[4], which was not referred to in the reasons in *Clark v. Barrick*, that this conclusion is not correct. The judgment in the *Bank of Hamilton v. Hartery* case turned on the interpretation of certain sections of the *Land Registry Act of British Columbia*, R.S.B.C. 1911, c. 127, which had been amended prior to the decision in the *Davidson* case. The principle formulated in *Jellett v. Wilkie* was applied by this Court in the latter case.

The position of equitable interests under a Torrens system of titles is clearly stated by Anglin J., as he then was, in *Church v. Hill*[5], as follows:

> The result of decisions of this court in Jellett v. Wilkie, (1896) 26 Can. S.C.R. 282, Williams v. Box, (1910) 44 Can. S.C.R. 1, Smith v. National Trust Co., (1912) 45 Can. S.C.R. 618, Yockney v. Thomson, (1914) 50 Can. S.C.R. 1, Grace v. Kuebler, (1917) 56 Can. S.C.R. 1, and other cases, is that, notwithstanding such provisions as s. 41 of ch. 24 of the Alberta statutes of 1906, equitable doctrines and jurisdiction apply to lands under the Land Titles or Torrens system of registration and equitable interests in such lands may be created and will be recognized and protected.

The section of the Alberta *Real Property Act* to which he refers provided as follows:

> 41. After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money; but upon the registration of any instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and

[1] (1896), 26 S.C.R. 282.
[2] [1949] 2 W.W.R. 1009.
[3] (1919), 58 S.C.R. 338.
[4] [1946] S.C.R. 115.
[5] [1923] S.C.R. 642 at 644, 3 D.L.R. 1045.

subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.

The equivalent section of *The Land Titles Act* of Saskatchewan provides:

65. (1) After a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land therein comprised, except a leasehold interest not exceeding three years where there is actual occupation of the land under the same, or render such land liable as security for the payment of money except as against the person making the same.

(2) Every instrument shall become operative according to the tenor and intent thereof when registered and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land, estate or interest therein mentioned.

It will be noted that subs. (1) of s. 65 contains, as s. 41 of the Alberta *Real Property Act* did not, the significant words "except as against the person making the same". A similar change in wording had occurred in the *Land Registry Act* of British Columbia in the interval between the decisions in *Bank of Hamilton v. Hartery* and *Davidson v. Davidson.*

In my opinion the appellant had a valid equitable interest in the land at the time that the respondent took the mortgage of Zirtz's equity in the land. The wording of the respondent's mortgage is significant and, in my view, took the form which it did because both Zirtz and the respondent knew of the existence of the appellant's equitable mortgage and intended that Zirtz could only mortgage his remaining equitable interest in the land.

What then was the effect of the registration of the respondent's caveat? The judgment of the Court of Appeal is that the respondent thereby obtained a priority over the appellant's mortgage by reason of the operation of the provisions of *The Land Titles Act.* That decision is based upon the authority of *Hackworth v. Baker*[1] *and Clark v. Barrick, supra.*

The former case involved the issue of priority as between two transfers of the same land. The one which had been executed the later was registered and the earlier one was not. The Court ruled in favour of the transferee who had registered his transfer. It held that the fact that a person,

[1] [1936] 1 W.W.R. 321.

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who obtained a transfer of land and registered it, knew that there was an outstanding unregistered transfer of the same land did not amount to "fraud" within the meaning of s. 216 of *The Land Titles Act*, R.S.S. 1930, c. 80.

Clark v. Barrick was a case in which the competing interests were as between two agreements for sale of the same lands. The purchaser under the agreement which was later in point of time registered a caveat against the lands to protect his interest. The purchaser under the earlier agreement did not. The Court held in favour of that purchaser who had filed a caveat, holding that an unregistered instrument, protected by a caveat claiming an estate or interest in land, must, when the claim is established, be given its full effect according to its tenor, regardless of any other unregistered instrument, whether prior or subsequent, not protected by a caveat, or protected by a caveat subsequent to the one first mentioned.

Clark v. Barrick was overruled in this Court[1], but on other grounds.

The relevant sections of *The Land Titles Act* which deal with the filing and the effect of caveats are ss. 138 and 145, which provide as follows:

> 138. Any person claiming to be interested in land may file a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the land shall be made, and no certificate of title to the land granted, until the caveat has been withdrawn or has lapsed as provided by section 146, 147, 148 or 149, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in the caveat.
>
> 145. While a caveat remains in force the registrar shall not enter in the register any memorandum of a transfer or other instrument purporting to transfer, encumber or otherwise deal with or affect the land with respect to which the caveat is registered, except subject to the claim of the caveator.

The matter of the priority of registered instruments is dealt with in s. 71 of the Act, which reads:

> 71. Instruments registered in respect of or affecting the same land shall be entitled to priority, the one over the other, according to the time of registration and not according to the date of execution.

Counsel for the appellant argued that a caveat filed under s. 138 of the Act did not have the effect attributed to it in the judgment in *Clark v. Barrick*. His contention was that the caveat would serve only as a stop order to preserve the

[1] [1951] S.C.R. 177, [1950] 4 D.L.R. 529.

status quo as of the time of its filing, so as to prevent any further dealing with the lands thereafter, save subject to the unregistered instrument which the caveat protected. He pointed out that the Saskatchewan Act does not contain any provision such as s. 148(1) of the Manitoba *Real Property Act*, R.S.M. 1954, c. 220, or s. 152 of the Alberta *Land Titles Act*, R.S.A. 1955, c. 170, the relevant portions of which sections provide as follows:

148(1) The filing of a caveat by the district registrar or by a caveator gives the same effect, as to priority, to the instrument or subject matter on which the caveat is based, as the registration of an instrument under this Act;

* * *

152 Registration by way of caveat, whether by the Registrar or by any caveator, has the same effect as to priority as the registration of any instrument under this Act . . .

Each of the Manitoba and the Alberta Acts contains a provision similar to s. 71 of the Saskatchewan Act dealing generally with the priority of registered instruments.

I do not find it necessary to resolve this question because, even if the view of the effect of filing a caveat in Saskatchewan as stated in *Clark v. Barrick* is correct, I do not think that it establishes the respondent's claim in this case. In both that case and *Hackworth v. Baker* the competing interests were the same in form. In the former case a caveat had been registered by one purchaser, under an agreement for sale, who was thereby held to have obtained a priority over another purchaser, under an earlier agreement for sale, of the same lands. In the latter case a transferee who registered his transfer obtained priority over the holder of an earlier, unregistered transfer of the same lands. In each case it was held that under the provisions of the Act the registration of the instrument conferred priority.

In the present case, however, the two equitable mortgages which are in competition are not the same. That of the respondent, by its terms, was expressly limited to a charge upon "my equity". It was, therefore, a mortgage of only a limited interest in the land. The filing of the caveat gave notice of that interest in the respondent, and any one dealing thereafter with the land could do so only subject to that interest of the respondent, but the filing of the caveat could not and did not increase the extent of the respondent's

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interest in the land. It could not create a charge upon more than that which had been charged by Zirtz under the terms of the instrument itself.

This proposition is clearly stated in the judgment of Duff J., as he then was, in *McKillop & Benjafield v. Alexander*[1], where he said, in reference to the Saskatchewan *Land Titles Act,* 6 Edw. VII, c. 24:

> The fundamental principle of the system of conveyancing established by this and like enactments is that title to land and interests in land is to depend upon registration by a public officer and not upon the effect of transactions *inter partes*. The Act at the same time recognizes unregistered rights respecting land, confirms the jurisdiction of the courts in respect of such rights and, furthermore, makes provision—by the machinery of the caveat—for protecting such rights without resort to the courts. This machinery, however, was designed for the protection of rights—not for the creation of rights. A caveat prevents any disposition of his title by the registered proprietor in derogation of the caveator's claim until that claim has been satisfied or disposed of; but the caveator's claim must stand or fall on its own merits.

Duff J. dissented in this case on the issue as to whether the respondent, Alexander, had acquired an interest in the lands in question, but the majority of the Court did not disagree with the above statement of the law.

Subsection (2) of s. 65 of the Act previously quoted, referring to the effect of a registered instrument under the Act, says that, when registered, it shall become operative "according to the tenor and intent thereof".

Stated at its highest, the respondent's position after registration of the caveat could only be the same as if the equitable mortgage itself could have been and had been registered as an instrument under the Act. According to the tenor and intent of that document it only constituted a mortgage upon a partial interest in the land.

For these reasons, therefore, I do not agree that, by virtue of the filing of its caveat, the respondent obtained, under the provisions of *The Land Titles Act,* a priority over the prior equitable interest of the appellant.

I turn now to the question of merger. The respondent's argument is that the rule stated in Halsbury, 3rd ed., p. 420, para. 819, applies:

> As a general rule a person, by taking or acquiring a security of a higher nature in legal valuation than one he already possesses, merges and extinguishes his legal remedies upon the inferior security or cause of

[1] (1912), 45 S.C.R. 551 at 566, 1 D.L.R. 586.

action; thus the taking of a bond or covenant, or the obtaining of a judgment for a simple contract debt, merges and extinguishes the simple contract debt. For this purpose, however, the superior security must be co-extensive with the inferior security and between the same parties; and a security, given by one of two co-debtors to secure a simple contract debt, does not merge the simple contract debt.

He also relies on para. 821, which states:

A mere charge created by deposit of deeds is extinguished by the taking of a formal mortgage, even though the mortgage does not confer a legal estate, and the sum thenceforth secured is the sum mentioned in the mortgage, notwithstanding that other sums were covered by the deposit. But, where a charge on two estates is kept alive in equity in favour of a person paying it off, he does not lose the benefit of the charge by taking a mortgage of one estate, and an equitable security is not merged by taking a security which is ineffectual.

The rule at common law as to merger in relation to a mortgage was that, if a mortgage on land and the ownership of the land subject to the mortgage became united in the same person, the mortgage was merged in the ownership and the mortgage was extinguished. In equity merger did not necessarily follow upon the union of the two interests and whether or not such union did occur depended upon the intention, express or implied, of the mortgagee. Dealing with the matter of intention, Falconbridge on The Law of Mortgages, 3rd ed., p. 372, para. 204, says:

In the absence of evidence of actual intention, either express or implied from the circumstances of the transaction, the presumption of merger ordinarily arising from the union of a charge and the estate subject to the charge may be rebutted by the consideration that it is more for the benefit of the owner of the charge and the estate that merger shall not take place, as, for example, if the effect of merger would be to confer priority upon subsequent encumbrancers.

While this proposition, as stated by Falconbridge, relates to a merger of a mortgage and the estate, it is also, in my opinion, applicable with respect to the matter of the merger of a security of a lower nature into one of a higher nature in legal valuation.

Authority for this view is found in a recent decision of the Privy Council in *Ghana Commercial Bank v. Chandiram*[1]. That was a case in which it was argued that the appellant bank, possessed of an equitable charge on land, had merged that charge in a legal mortgage of the

[1] [1960] 2 All E.R. 865, 3 W.L.R. 328.

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same land which was subsequently taken. The legal mortgage proved to be invalid. The argument in favour of merger was rejected and it was said at p. 871:

> While not disputing that the Ghana Bank's intention was to substitute the legal mortgage for the equitable charge, they find it impossible to accept the view that the Ghana Bank intended the equitable charge to be extinguished in the event of the legal mortgage proving for any reason to be invalid or ineffective. In other words, their Lordships take the intention of the Ghana Bank to have been to replace the equitable charge by a valid and effective legal mortgage, but to keep it alive for their own benefit save in so far as it was so replaced.

In that case the legal mortgage was invalid. The appellant's legal mortgage in the present case was valid, but, if it were to rank subsequent to the respondent's caveat, so that the respondent's mortgage would charge the entire interest of Zirtz in the land, it would be ineffective. I think the same reasoning is applicable in the present case in seeking to determine what was the appellant's intention. I do not see how the appellant could be considered to have intended to surrender a prior interest, in favour of the respondent's subsequent interest, by the taking of the legal mortgage in substitution for its existing security. It cannot, in the circumstances, have intended to effect a merger of its two securities.

In any event, even if a merger were held to have occurred, I do not see how that would automatically increase the interest granted to the respondent by the terms of its mortgage. At no time did Zirtz have a complete interest in the land which he could mortgage to the respondent by a mortgage of "his equity", because at all times there existed a charge on the land in favour of the appellant. This situation continued, even if it were held that a merger had taken place.

For these reasons, in my opinion, the appeal should be allowed, the judgment at the trial should be set aside and the appellant should be entitled to a declaration that its equitable mortgage had priority over that of the respondent.

There is one further point to be determined and that is as to the amount of the appellant's prior charge. At the time the respondent took its mortgage on the equity of Zirtz he was indebted to the appellant in the principal amount of $6,400. Subsequent to the execution of the equitable mortgage to the respondent and the registration of

its caveat, a further $3,000 was advanced to Zirtz by the appellant, making a total of $9,400, which appears as the principal amount of the appellant's legal mortgage. The appellant contended that it was entitled to priority for the entire amount, but I cannot accept that contention. The respondent's mortgage, protected by caveat, applied to the equity of Zirtz as it existed at the time of the execution of the respondent's mortgage. At that time and at the time of the filing of the caveat the principal amount of the prior mortgage was $6,400. As from the time of the registration of its caveat the respondent had a valid charge upon the remaining interest of Zirtz in the land. In my opinion, therefore, the appellant's priority is limited to the extent of $6,400, together with simple interest, at the rate of one per cent per month as provided in the appellant's equitable mortgage, from time to time on unpaid balances to June 19, 1958.

The appellant, in my opinion, is entitled to its costs throughout, including the costs of the motions for leave to appeal to this Court made before the Court of Appeal and this Court.

Appeal allowed with costs.

Solicitor for the defendant, appellant: Douglas A. Schmeiser, Saskatoon.

Solicitors for the plaintiff, respondent: Moxon, Schmitt, Estey and Robertson, Saskatoon.