

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 081 OF 1978

BETWEEN

EDWARD LYNCH

AND

DENNIS LYNCH

PLAINTIFFS

AND

DIANNE ENNEVOR

AND

ELI JACKSON

DEFENDANTS

W. B. Frankson Q.C. for the Plaintiffs
Dr L. Barnett and G. Robinson for the defendants

January 19, 20, 21 1981 and

JUDGMENT

WRIGHT J

Presenting the issue sought to be resolved by this action may be more conveniently achieved by setting out the rival claims. The Statement of Claim runs thus:-

1. The Plaintiffs are the owners of an estate in fee simple in a parcel of land part of Mount Pleasant Estate in the Parish of Westmoreland.
2. The said parcel of land includes a smaller parcel of land 12.7 perches in area which is bounded on the North-east by land previously owned by the Second Defendant Eli Jackson, but subsequently sold to the First Defendant Dianne Ennevor, on the South-west by lands owned and occupied by the Plaintiffs, on the South-east by a reserved road and on the North-west by the Caribbean sea.
3. The Second Defendant on about the 2nd day of April 1975 entered into an agreement to sell approximately one/half acre of land to the First Defendant.
4. The aforesaid one/half acre of land encroached upon and included the plaintiff's parcel of land described at paragraph 2 thereof.
5. Subsequent to the sale of the said land the Defendants fraudulently procured the registration of the Plaintiffs' said smaller parcel of land as part of the said one/half acre of land at Volume 1137 Folio 216 of the Register Book of Titles in the name of the First Defendant for an estate in fee simple absolute in possession, and have fraudulently deprived the Plaintiffs of their estate in fee simple absolute

in possession in the said smaller parcel of land.

PARTICULARS

1. The said Defendants falsely and fraudulently represented to the Registrar of Titles that the said Second Defendant was the owner of an estate in fee simple in possession of all the land when they know or ought to have known that the said parcel of land, the subject matter of this suit was the Plaintiff's and was in their possession.
2. The Second Defendant falsely and fraudulently declared to the Registrar of Titles that he was not aware that any other person had any estate or interest (in the said land) at law or in equity, in possession, remainder, reversion, contingency or expectancy when the Defendants knew or ought to have known that the Plaintiffs were the owners of the said small parcel of land and was (sic) in possession thereof.
3. The said Defendants fraudulently procured and/or induced George Moore and George Ellis to declare to the Registrar of Titles that all of the said land was owned by Francis Barrett and Adella Jones who lived in undisturbed peaceful and quiet possession and occupation of the said land and sold same to the Second Defendant Eli Jackson in the year 1948, when they knew or ought to have known that the Plaintiffs were always in open undisturbed and quiet possession of that small parcel of land for upwards of 35 years.
6. By reason of the premises the Plaintiffs have been deprived of their estate in the said parcel of land and have suffered loss and damages.

AND THE PLAINTIFF'S CLAIM:-

- (a) A Declaration that the Plaintiffs are the beneficial owners of an estate in fee simple in possession of the said parcel of land.
- (b) An order for possession of the said parcel of land.
- (c) An order that the Certificate of Title in respect of the said parcel of land registered at Volume 1137 Folio 216 be rectified.
- (d) Damages.
- (e) Costs.

The defendants admit the sale, survey and registration of the parcel of land but deny any encroachment or fraudulent procuring of the registration maintaining that the second defendant had by purchase acquired the said parcel of land in 1948 and had been in continuous and undisturbed possession thereof until the time

3.

of its sale in April, 1975 to the first defendant. Further the first defendant counter-claims for -

1. Damages for trespass to the said parcel of land.
2. An injunction to restrain the plaintiffs whether by their servants or agents or otherwise howsoever from entering or carrying out any works on the same parcel of land.

In their Reply and Defence to Counter-claim the plaintiffs join issue with the defendants on their defence and deny the defendants' claim to any relief.

The first plaintiff is the father of the second plaintiff. It is the plaintiffs' case that the 1st plaintiff purchased from his mother, Christiana Hylton, a parcel of land - a little over 8 acres at Ironshore, including the parcel in dispute, and has been in occupation of such land for roughly 30 years. The plaintiffs and the second defendant shared a common boundary on the north-east. Neither at the time of purchase nor subsequently did the first plaintiff receive any diagram of the holding from his mother. In 1967 he had a survey done by Mr. H. C. Perry, Commissioned Land Surveyor, and a checked plan prepared. A copy of this plan was put in evidence as Exhibit 1.

The land is represented as a long narrow strip stretching from the hills to the sea and being bisected by a reserve road running East to West - which has since been developed into a main road. By far the smaller portion of the land lies between the reserve road and the sea being only 3 roods 13.87 perches. The disputed parcel lies within this smaller area as shown in the diagram. The boundaries of Mr. Lynch's holding were well marked by Mr. Perry.

At the time of the survey, the second defendant Mr. Eli Jackson was living in England. His sister Mrs. Clementina Barnett was left as his agent and her husband Richard Barnett represented her at the survey. No objection was raised at the survey and it appears from the plan that the boundaries were ascertained from existing marks. It must be noted, however, that Mr. Lynch testified that before the survey

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he did not know the corner by the sea. However, after the survey the corner by the sea was marked by a wooden peg against an iron peg. The pegs put in by Mr. Perry were hardwood pegs. So the inference from this bit of evidence would seem to be that the corner had previous to the survey been marked by an iron peg in the rock. Mr. Lynch maintains that he occupied all the land shown on the plan without any hindrance or objection from anyone. Nor had he ever had any dispute with Mr. Eli Jackson over the boundary. He reared stock on the land and his son, the second plaintiff, did work on the portion by the sea thereby greatly enhancing its value.

The coastline is rocky and the evidence is that there is a drop of about 35 feet to the sea. The work done by the second plaintiff was with a view to making the place a tourist attraction. He had lived abroad for some time and apparently had ideas he would put into effect e.g. a floating raft. He planned to have a restaurant there and so did preparatory work. He bulldozed the area, built a cut-stone wall about 2½ feet high and 30 ft. - 40 ft. in length, cut stairways in the cliff down to the sea - in three different sections and had masonry done to the same as well as other masonry to the cliff. Even the first defendant conceded that considerable work had been done though she disagrees as to the time the work began. She insists the work commenced since she claimed possession whereas the second plaintiff's evidence is that the work was in progress for about 5 years. Indeed, the very nature and extent of the work would suggest a fairly long period - much longer than the first defendant will admit.

Mr. Lynch does not recall exactly when it was that Mr. Jackson returned to the area but Mr. Jackson's evidence is that he had left the island on January 1, 1956 and returned May 18, 1974. In 1975 the first plaintiff was served a notice to attend the survey of Mr. Jackson's land but, says he, he was sick and could not attend. Accordingly, he requested the second plaintiff to attend. Mr. Dennis Lynch states that he attended and waited all day but saw no one. If indeed he attended he must

have done so too late. For although I have not seen the notice I assume the survey was done on the date as notified. Sometime after the survey, Mr. Lynch says he visited the land and observed that a substantial peg had been put in where the previous peg had been by the sea; so he concluded everything was in order. Nothing else attracted his attention then. However, a few weeks later he saw a man chopping on his land and when he spoke to this man the latter showed him the point to which he had been directed to clear. This point, says Mr. Lynch, was some 40 ft. inside his land. Thereafter, he saw and spoke with Mr. Eli Jackson disputing the survey and for the first time, it would seem, he was told by Mr. Jackson that the corner was at a rock called Margaret Rock. This he refuted. Work on the cliff continued and Miss Ennevor took action in the Resident Magistrate's Court for tresspass.

On behalf of the defence there was tendered in evidence, as part of an agreed bundle of documents marked Exhibit 2, a copy of a Common Law Conveyance dated 9th September, 1948 evidencing the sale to Eli Jackson by Francis Barrett and Adella Jones of

"All that piece or parcel of land part of Ironshore in the parish of Westmoreland containing by measurement Three Acres and butting and bounding North land belonging to the said Francis Barrett and Adella Jones South by sea, West land belonging to Herman Moore and East by Christiana Woodcock.

The purchase price was Twelve Pounds. Mr. Jackson contends that he enjoyed undisputed possession of the land until he returned from England when he was first informed that Mr. Lynch was claiming the disputed strip.

Both Mr. Lynch and Mr. Jackson had grown up together as boys in the area. Mr. Jackson being older by about seven years. They have been friends over the years and both claim a continuation of this friendship. It follows, that while they occupied adjoining parcels of land no particular attention was paid to any observance of their common boundary. They both reared animals on their lands without dispute even though animals would stray into each other's land. Mr. Lynch did not mention any usage of his land but cattle-rearing.

However, Mr. Jackson mentioned in addition, that they both planted tobacco and coconut up to the boundary. Such use of the land was not put to Mr. Lynch. He had mentioned that Mr. Jackson used to fish by the sea, and though he walked on his (Jackson's) land to get to the sea he could also walk across the disputed portion as well. But in the atmosphere of good neighbourliness that prevailed between these two gentlemen over the years such passage across the land would not be regarded as a show of ownership.

Mr. Jackson gave a history of the two parcels of land owned by himself and Mr. Lynch, respectively, which I find to be not free from confusion. His evidence ran thus:

"When I was 13 years old the two properties were owned by my great-grand father and grand father. Land sold to Lynch's grand father by my grand father who showed me the boundary - a split in a rock at a point over the seaside. He then showed me the corner by the mountainside."

In cross-examination he said that Francis Barrett and Adella Jones, from whom he purchased and whom he called his aunts, were his grandmother's sisters and that they acquired the land by descent from their grandfather. They had occupied and used the land before he bought it and so far as he knew they never surveyed the land before he bought it.

When challenged in cross-examination on his knowledge of the boundary he said that a few weeks (2 - 3) before his grand father died in 1918, when he Jackson was 13 years of age, the two of them had gone to the sea-side and on that lone occasion and for no disclosed reason the grand father had shown him the boundary. But what does cast suspicion in his veracity is that his grand father was never in possession of that land. The inevitable question is why should this old man who has nothing to do with this piece of land take it upon himself to be pointing out the boundaries to a child who was also a stranger to the land? It becomes even more ridiculous when from his own evidence he was much younger than he had testified. He gave his date of birth as December 19, 1908. So obviously, in 1918 he was only 10 years of age. Of what interest would land boundaries be to him at that

tender age? Having regard to the fact that his grand-father did not survive this rather strange performance by more than two or three weeks it is patent that the deed was done on just about the last occasion he would have had the opportunity to do so. The importance of this aspect of Mr. Jackson's case is better appreciated by taking into account his evidence that his 'aunties' were old at the time of the sale to him and that they, in addition to never having done a survey of the land, did not show him any boundaries'. So that for the thirty years that he survived his grand-father up to the time of his purchase he had acquired no further knowledge of the boundary from the owners who were in occupation of the land. All he has to go by is this gratuitous and near-death-bed act by a grand-father who had no interest in the land.

Dealing further with the land Mr. Jackson said he bought the land between 40 and 42 years after the death of his grand father and went into possession then. At that time Mr. Lynch's mother owned the lot now owned by Mr. Lynch. And in continuation he said that Mr. Lynch has been on the land from he (Lynch) was a little boy up to now and has been using it. By this admission he naturally concedes to Mr. Lynch a better opportunity of knowing the boundary. There is one factor however, which renders the matter less clear than it might have been. That is that up to sometime in 1975 when Mr. Lynch put up a fence after a survey of Jackson's land there had been no fence along the boundary between the road and the sea. It would seem that because of the nature of the land - the coast is very rocky - the use to which it could ordinarily be put was very limited. As Mr. Lynch said he used to tie animals there. Accordingly there was no pressing need to pay any particular attention to the boundary. The land was in rinate.

A new element was introduced into the relatively calm relationship between Edward Lynch and Eli Jackson when the first defendant Dianne Ennever began displaying an interest in acquiring the lot owned by Eli Jackson. Although there was no contractual relationship between Jackson and Miss Ennever until April 21,

1975, she was instrumental in having Jackson's land surveyed on February 20, 1975 by Mais Dean and Associates, Commissioned Land Surveyors. Miss Ennevor claims she was a part owner in the lands adjoining Jackson's land to the north and wished to acquire Jackson's land apparently to facilitate the better use of her previous holding. However, the plan of the survey of Jackson's land which she tendered in evidence as Exhibit 3 records her as occupier and Peter Wood et ux as the registered owners and the copy certificate of the title to that piece of land tendered in evidence as Exhibit 4 shows that as of August 16, 1974 the registered owner was D. C. R. Limited of George Town, Grand Cayman. The most therefore, that she can be is a share-holder in D. C. R. Ltd. but after insisting she is a part owner in D.C.R. Ltd. she settled down to being a share holder. It is not a distinction without a difference which should be known to her because she was at one time a Real Estate Agent.

Some items of interest contained in the memorandum on Exhibit 3 are as follows:

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|--|---|
| 1. Area | OA-IR-38P |
| 2. The name of the party at whose instance the survey was made | Miss Diane Ennevor |
| 3. The dates between which the survey was made | on 20th February 1975 |
| 4. The grounds of the surveyors decision | Instructions, marks on earth and old plans. |

I have already referred to the evidence of Dennis Lynch in which he stated that he waited all day but saw no one. Miss Ennevor's evidence is that the survey was done on February 21, 1975.

The plan gives the date of the survey as February 20, 1975. While Dennis Lynch did not give the date on which he attended in accordance with the notice it does appear that room for doubt exists as to the actual date of the survey. At any rate it appears that it is intended to be done on February 20, 1975.

Miss Ennevor was very much present at the survey. She says she was there in the capacity of an adjoining owner who

had been served notice. The memorandum in the plan (Exhibit 3) shows the persons notified as -

The Secretary Beach Control Authority
Edward Lynch, Eli Jackson, George Ennis.

Miss Ennevor's name does not appear in that capacity but in the capacity of the persons who requested the survey and as one of the two persons who attended; the other being Eli Jackson.

It was extracted from her in cross-examination that she made all the arrangements for the survey, that she was present throughout the survey and that the surveyor worked on her instructions. She said at that time she had an oral option with Mr. Jackson to purchase the land said to be $\frac{1}{2}$ acre, more or less.

Implicit in the cross-examination is the suggestion that at the time of the survey the disputed area was a kind of Naboth's Vineyard and that she was a member of Lhab's household bent on getting that vineyard.

She admitted to Mr. Frankson that in the early part of 1973 while she operated as a Real Estate Agent she had accepted a commission from Mr. Edward Lynch to sell his land and that in pursuance thereof she had, with the authorisation of Mr. Lynch, procured from Mr. H. C. Perry a copy of the plan of survey of Mr. Lynch's land which had been done on 6/12/67. She gave the impression that she did visit Mr. Lynch's land but denied any knowledge of the land having been cleared subsequent to her accepting the commission. Actually, her original stance was that she could not visit Lynch's land because it was in bush but under pressure to say what she had done by way of endeavouring to sell the land she apologised if she had given the impression that she had not done so. She is an intelligent and informed witness - at the time of her appearance at court she was Area Manager for The Jamaica Tourist Board. With her background as Real Estate Agent she would be well able to anticipate the questions which would naturally flow from the fact that she had had the plan of Lynch's land and had agreed to sell it. Prominent among such questions would be whether she had familiarized herself with the land in any way. Another would be whether at the time of the

survey she was not well aware for the previous two years of the delineations of Mr. Lynch's land. It would seem to me that by first denying any visit to the land she was endeavouring to avoid that suggestion but she was forced to alter her position when her bona fides concerning the commission to sell was questioned. In the result she compromised her credit.

In the agreed bundle of documents (Exhibit 2) is a copy of the plan of survey done by Mais Dean and Associates on 20/2/75 showing the area to be OA-IR-37.5P (compare Exhibit 3 which shows the acreage to be OA-IR-38P). On this plan the boundary as shown by Mr. Perry's plan is shown as a broken line. On Exhibit 3 this line is continuous and has the word "ENCROACHMENT" written along its length. It is clear therefore that the survey of 1975 is treating as an encroachment the boundary shown by the survey of 1967. How did this come about?

It will be recalled from Mr. Jackson's evidence that no survey of his land had been done up to the time of the one in 1975. He had no plans. The plan of the 1975 survey refers to "instructions, marks on earth and old plans" as the grounds of the surveyor's decision. Miss Ennever's evidence in cross-examination is that -

"Mr. Mais had a plan which showed the boundary as the broken line but Mr. Jackson protested and showed to Mr. Mais what he considered to be the boundary. The old plan I gave Mr. Mais showed the boundary as the broken line. I don't know what Mr. Jackson showed to Mr. Mais as the boundary."

Her evidence-in-chief had avoided the details of the conduct of the survey. She did say however, that up to the morning of the survey she did not know the correct boundaries of Jackson's land for although she had visited the land with him as well as on her own he had not pointed out anything to her. It may be useful to juxtapose the evidence of Mr. Jackson as to how the survey was conducted. His evidence-in-chief was:

"I was present at survey and pointed out the split in the rock to him on the sea-side as well as Spanish Machete from up to the road. Tree was dug out so I could not show him that. The survey started at the road middle and before he started I showed him the split rock by the sea. That was the line of the land Miss Ennever bought from me."

This is how the cross-examined version came out:

"At the time of the survey I had no plan of the land. I had boundary mark - split in the rock and the tree."

The natural query is why no mark was shown to the intending purchaser to enable her to obtain a fair idea, at least, of the land she was hoping to purchase especially bearing in mind the small acreage and rocky nature of the coast-line? But that's not all. He continued:

"Not so that I did not disagree with the survey he did. Yes, I did tell him that the boundary he found between me and Lynch was not the right one. Yes I disagreed with the first boundary he surveyed. I said that was not the line. Yes and then pointed to him where I said the point by the sea should be i.e. by the split in the rock.... Yes survey began from a point adjoining the roadway. Before that I had taken him to the broken rock. Not so that despite my showing him the line he first surveyed where the fence is now. Surveyor surveyed the line where Lynch's fence is at 10 o'clock. He did the line to the rock first. I did not tell the surveyor not to bother do the broken line because Lynch had no line there."

Mr. Jackson was under severe pressure from cross-examination by an able advocate who made no pretence he was Mr. Jackson's friend. He did his best to hold on to the split rock but it seemed rather slippery and the split not wide enough to hide him. In the process, whether from confusion brought on by a realisation that the truth was mocking him or a determination not to admit the truth, he lied; and patently so. It is clear that the surveyor followed the boundary indicated by the plans in his possession and only struck the other boundary after Mr. Jackson had protested. It seems remarkable therefore that Mr. Mais could choose to ignore the plans, record the plan boundary as an encroachment and state on the relevant section of the memorandum to the plan that -

"There were no objections to the survey."

Further reference to Miss Ennevor's cross-examination regarding the survey is appropriate:

Question - Is it a fact that the land originally surveyed was bounded by the broken line?

Answer - Yes. No, I did not then ask and he told me no the area surveyed was not $\frac{1}{2}$ acre. No, I did not then tell him to re-survey and take in a portion of Lynch's to bring my land to $\frac{1}{2}$ acre. I first became aware of the broken line boundary when Mr. Mais did the survey. I saw no marks on earth on the land claimed by Lynch. While survey being done saw no iron peg on part of land surveyed by him. Only mark I saw was at boundary of land in which I have interest. I saw Mr. Mais put in iron pegs by the sea-coast but I saw no other. I saw no hard wood post but I don't doubt that he saw Mr. Mais changed the broken line boundary because Jackson said from the old plan that Mr. Mais had the point no. 6 was not correct." (This is the point where the broken line ends by the sea coast).

It is timely to observe that Mr. Jackson can neither read nor write. In this request he is on par with Mr. Edward Lynch.

Having seen and heard the witnesses I am left in no doubt whatsoever that the survey exercise was expected to lay the ground-work for securing to Miss Ennevor the portion of land in dispute. And it did. She testified in chief:

"I got diagram from Mr. Mais about the end of May, 1975 - no, I think March - April - before we entered into agreement to purchase. I had no doubt about the correctness of the boundaries of the land Jackson selling me."

On the 21st day of April 1975 Miss Ennevor entered into a contract with Mr. Jackson for the purchase of the land surveyed. Relevant portions of the contract reads:

"Property: All that parcel of land part of Ironshore in the parish of Westmoreland being approximately $\frac{1}{2}$ acre bounded on the north-east by a reserve road leading from Negril to Pitkelleny Mountain on the Northwest by land owned by Peter Wood or DCR Ltd. on the southwest by the sea and on the south east by land being the area of land in possession of Edward Lynch and being the area of land comprised in the diagram attached hereto prepared by Mais Dear and Associates."

"Title: The cost of Title to be borne by both parties in equal moieties. The purchaser has agreed to pay the costs of survey. The vendor shall apply for a registered title."

Possession: Immediate on signing hereof.

In keeping with the provisions of the contract Mr. Jackson either late 1975 or sometime during 1976 lodged an application to bring the land under the operation of the Registration of Titles Law. But the application was Mr. Jackson's

only in name. The work was largely the work of Miss Ennever in getting together the necessary documentation. She was already in possession and, quite naturally, wished to have her possession confirmed by a registered title. The schedule of documents accompanying the application, so far as is relevant, reads:

1. Contract of Sale between Eli Jackson and Dianne Ennever.
2. Plan and Diagram prepared by Hais Dear and Associates bearing Survey Department Examination Number 135144.
3. Conveyance dated the 9th day of September 1948 from Francis Barrett and Adella Jones to Eli Jackson.
4. Declaration of applicant.
5. Declaration of George Moore.
6. Declaration of George Ennis.

Extracts from Mr. Jackson's application reads:

- para. 1. That I am the owner of an estate in fee simple in ALL THAT parcel of land being an area of 1 rood 37.5 perches situated at Mount Pleasant Estate in the parish of Westmoreland and being the land delineated on the Plan bearing Survey Department Examination number 135144 annexed hereto.
2.
 3. That the deeds, documents or other evidence on which I rely in support of my title to the said land are set forth in the schedule hereto to the best of my knowledge and belief, and there are no deeds, documents or evidence invalidating my title to the said land.
 4. That I am not aware of any mortgage or incumbrance affecting the said land or that any other person hath any estate or interest therein at law or in equity in possession remainder, reversion, contingency or expectancy.
 5.
 6. (Lists the names of the owners of contiguous lands).
 7.

His accompanying declaration contains the following:

- para. 2 - That the lands the subject matter of this application has been known to me for a period of forty years upwards.
- 3 - That the said lands were owned by Francis Barrett and Adella Jones who enjoyed undisturbed peaceful open possession and occupation of the lands until they sold the said lands to me in 1948.
 - 4 - That I have enjoyed undisturbed peaceful open possession and occupation of the said lands from the time of my purchase until the date

hereof.

- 5 - AND I MAKE this solemn Declaration conscientiously believing the same to be true etc.

George Moore's Declaration reads (in part):

- para 2 - That I have known the lands the subject matter of this application a period of thirty years and upwards.
- 3 - That when I just knew the said lands it was owned by Francis Barrett and Adella Jones who lived in undisturbed peaceful quiet possession and occupation of the said lands.
- 4 - That the said Francis Barrett and Adella Jones sold the said lands to Eli Jackson in the year 1948.
- 5 - That the said Eli Jackson enjoyed undisturbed peaceful quiet possession and occupation of the same from the date of the purchase until the said Eli Jackson sold the said lands to Dianne Ennevor by Contract of Sale dated the 21st day of April, 1975.
- 6 -

Paragraphs 2, 3, 4 and 5 of George Ennis' Declaration are similar to George Moore's.

No objection to the application appears to have been lodged and so on the 12th day of April 1977 title was issued to Dianne Ennevor and registered at Volume 1137 Folio 216. Title and Diagram attached were tendered in evidence as Exhibit 3.

Of the application to register the land Miss Ennevor had this to say in cross-examination:-

"Yes, I knew when the application was being made that it comprised the land which Lynch was claiming as his."

Concerning the application Jackson said in cross-examination:

"I don't recall when I first knew Lynch claiming the disputed strip. I heard he was doing so when I came home. I knew at time of signing that he was claiming that piece of land. The lawyer signed the application to register the land. I understood what was being signed i.e. that I was applying to register the land including the piece claimed by Lynch. The document was read over to me but that was not read to me. I did not tell the lawyer Lynch claiming the land."

The lawyers who acted for the applicant are Edsel Keith Belisser & Co.

The application and the three declarations were signed before W. Hogg, Justice of the Peace for Westmoreland and there is a foot-note to Jackson's that it was "read over and explained to him and that he expressed himself fully to understand and intend the same and so signified by making his mark hereto."

In the light of the evidence demonstrably, calculatedly, and knowingly false are paragraphs 1, 3 and 4 of Jackson's application as well as paragraphs 3, 4 and 5 of his Declaration. Of the same classification are paragraphs 2, 3 and 5 of the supporting Declarations of George Moore and George Ennis.

Dr. Barnett had apparently intended to call both these gentlemen but after the performance of Mr. Ennis, which can properly be termed disastrous, he announced that no purpose would be served by calling further evidence. Mr. Ennis' evidence was to the effect that the land referred to as being owned by Peter Wood et ux had formerly been his but he had sold it to them a long time ago - probably about 1963 - that he knew Mr. Edward Lynch as a much older person from the time the witness was growing up and in his evidence-in-chief he said he knew the dividing line between Lynch and Jackson. By the sea the line ended at a little split in the rock. While Jackson was in England and after the death of Jackson's wife, he leased the land from Mrs. Barrett, Jackson's sister who was then in charge of the land. He first became aware of Jackson's claim to the disputed area when Lynch's land was surveyed.

Cross-examination was to demonstrate that his evidence was not reliable and that it had been procured to serve the specific purpose of having Jackson's land registered. It was elicited that from the time he sold his land he had moved out of the area long before Lynch's land was surveyed. When his former lot was compared with Jackson's and Lynch he at first testified that one could not walk from his land to the sea - one would have to jump to get to the sea. Confronted with the merits of Lynch's land he said Lynch's land is not the only one from which one can walk to the sea. It is possible to do so from some parts of his

land. One cannot walk to the sea from Jackson's land. Then he retracted and said one cannot get to the sea from Lynch's land.

It is interesting to note how he determined the boundary between his former lot and Jackson's building. He said he saw a mark (chop) in the rock by the sea and claimed it as his boundary mark, though no one ever told him that that represented his boundary. When he was a little boy fishing in the area he heard that the split in the rock marked the boundary between Jackson and Lynch - "other people showed me the line" he said. He did not name anyone and it is clear that he would have no interest in the Jackson/Lynch boundary which had nothing to do with his land. He himself was to make this clear as I shall show later.

Referred to paragraph 3 of his declaration which states:

"That when I just knew the said lands it was owned by Francis Barrett and Adella Jones who lived in undisturbed peaceful quiet possession and occupation of the said land."

he responded that he knew Francis Barrett but not Adella Jones. Then he effectively destroyed his declaration when he testified-

"I knew no more owner of the land but Jackson. I don't know them, so I can't tell if they lived in unmolested peaceful quiet possession and occupation of the said lands. I didn't know that they sold the land to Jackson in 1948. Miss Dianne asked me to sign the paper. I wasn't helping her out. I supposed to sign the paper to register the land. I was helping out Miss Dianne to register the land."

That ended his cross-examination so dramatically that Dr. Barnett did not even attempt to re-examine him. That would obviously have been an effort at putting humpty dumpty together again. And that was necessarily so because despite his declaration, he had earlier said in cross-examination that the first time he became aware of the importance of any boundary between Jackson and Lynch was when he was asked to sign the declaration.

In answer to the court he said that he had known and knew at the time he signed the declaration that Lynch was still claiming the area in dispute.

At this point it is convenient to evaluate the evidence relating to the existence of the boundary line between the Jackson and Lynch holdings. The only doubt that Edward Lynch admitted regarding this boundary prior to the survey was the corner by the sea and if his evidence is believed the survey confirmed his claim as to the extent of his land because he testified that he had occupied all the land shown in the Perry's plan (Exhibit 1) without let or hindrance and that there was never any dispute between Jackson and himself concerning the boundary.

There are two limbs to Eli Jackson's boundary claim:

- (a) his evidence that at the age of 10 years he was shown the boundary by his grandfather and
- (b) the evidence of George Ennis that from the age of 15 years he heard that the split in the rock marked the boundary between Lynch and Jackson.

This latter aspect of the claim faintly points in the direction of a reputed boundary but this would require some evidence from the community. There was no such evidence.

To be considered in this evaluation, too, is section 45 of the Limitations of Actions Act from which Mr. Frankson seeks support. The relevant portion of the section reads:-

"In all cases where the lands of several proprietors bind or have bound upon each other, and a reputed boundary hath been or shall be acquiesced in and submitted to by several proprietors owning such lands or the persons under whom such proprietors claim for a space of seven years together, such reputed boundary shall for ever be deemed and adjudged to be the true boundary between such proprietors, and such reputed boundary shall and may be given in evidence upon the general issue, in all trials to be had or held concerning lands or the boundaries of the same any law custom or usage to the contrary in anywise notwithstanding."

It is Mr. Frankson's contention that the boundary line as surveyed by Mr. Perry on the 6th December, 1967 falls to be considered in the light of this section but I find this contention to be not well-founded. The section speaks not of a boundary

which is known to one land owner but which is reputed i.e. generally known, and is acquiesced in and submitted to by the several proprietors. There must have been a tacit agreement to this boundary and a usage that spells submission. But unless the presence of Richard Barrett at the survey on the 6th day of December 1967 can be construed as fixing Eli Jackson with notice of the boundary then it can be concluded that up to the time of Jackson's return from England on May 18, 1974 he did not know of the finding of the survey and so could not have either acquiesced in nor submitted to the delineation of the boundary. And it is to be noted that the statutory seven years would be almost spent by the time he would have become aware of the boundary points. Then, too, when it is observed that a boundary falling within the section is fixed forever I recoil from a construction which is obviously repugnant to the intendment of the section.

The section can only be invoked when its requirements have been satisfied and among the unsatisfied requirements here is the seven year period. Accordingly, a resort to authority is not necessary to resolve the issue. But if authority were needed to support the proposition that the unilateral establishment of a boundary by one party which is not acquiesced in by the other is not basis for the acquisition of a possessory title then reference could be made to Clark vs. Elphinstone et al (1880 - 1881) 6 Appeal Cases 164. In that case the occupancy period of 10 years was proved but not the acquiescence and such occupancy was denied its claimed effect.

To a similar fate of being rejected must come, too, a submission by Dr. Barnett based on his observation of the boundaries of the three lots as reflected in the exhibits tendered in evidence i.e. the lots owned by Peter Wood et ux Eli Jackson and Edward Lynch. The observation is that between the road and the sea coast the boundaries claimed by Lynch is completely inconsistent with the manner in which the other boundaries ~~claimed by Lynch is completely inconsistent with the~~

run i.e. roughly at right angles to the road. Interesting though the observation may be, I am not satisfied that it has any evidential value such as to impugn the boundary claimed by Lynch.

In the result, therefore, the question of the boundary must be resolved on the basis which I had earlier indicated. I have no hesitation in rejecting the testimony of George Ennis in this regard. In considering the claim of Eli Jackson there are two significant points to bear in mind viz. how he came by his knowledge of the point by the sea and the fact that he did not show Miss Ennevor the boundary of the land he was selling her. The latter naturally militates against his claim that he knew the boundary. As to the former I have already indicated the improbability of the boundary having been pointed out to him at the time and in the manner contended for by him. It is relevant consideration that his grandfather was neither making a declaration against interest - he being a stranger to the land - nor attesting to a reputed boundary. Also of significance is the fact that at the time Jackson purchased the land the vendor did not point out any boundary to him. More probable it seems that the marks on earth referred to by Mr. Perry were well recognised by the vendors so much so that there was no need to point out the boundaries to Jackson. The balance of probabilities favours the boundary claimed by Edward Lynch and this is how I find.

I say Edward Lynch deliberately. His evidence is that he purchased the land roughly thirty years ago at a time when, according to the evidence, Dennis Lynch would be about 3 years of age. The fee simple would then be vested in the purchaser alone. There is no evidence that at any subsequent date and at a time when Dennis Lynch had the capacity to own land, anything was ever done by Edward Lynch, to let his son Dennis in to sharing the fee simple with him. Accordingly, I find that Dennis Lynch has not been shown to be an owner of an estate in fee simple as claimed. As such he has no locus

standi in the case. It follows that the area in dispute is beneficially owned by Edward Lynch. The next question is whether the registered title of Dianne Ennevor, which includes this disputed area, can be rectified so as to secure this parcel to Edward Lynch. This involves a consideration of the relevant sections of the Registration of Titles Act (hereinafter referred to as "the Act"), Section 29 deals with the manner of making application to bring lands under the Act. It provides:-

"Every such application shall be accompanied by the deeds and documents or other evidence that the applicant relies on in support of his title, and by an affidavit containing such particulars as may be prescribed, and by a certificate from the proper officer that all quit rents and property tax affecting the land have been paid up to the date of the application and by a receipt or receipts from the proper officer showing that all succession duties that have become payable in respect of the land have been paid".....

The documents submitted along with Mr. Jackson's application are in purported compliance with this section and it was submitted that since he had disclosed all he knew about the land the registered title issued pursuant to his application was indefeasible save for fraud - that is, actual fraud. This submission bears the marks of being at the very core of the issue but its consideration must be deferred until further reference has been made to other provisions of the Act.

Section 31 of the Act, where relevant, provides:-

"The Registrar shall submit such application, together with the deeds, documents or other evidence as aforesaid to one of the Referees for his direction; and if the Referee shall in consideration of the deeds document or other evidence aforesaid, be of opinion that the applicant is a person entitled to make application under this Act and that he is in possession by himself or a tenant of the land described or identified in the application and that he would be entitled to maintain and defend such possession against any other person claiming the same or any part thereof, he shall provisionally approve the registration of the title of the applicant or his nominee as an absolute title to the land described or identified in the application".....

The first defendant Dianne Ennevor was the applicant's nominee.

In accordance with the provisions of the section the Referee of

Titles directed that the land be registered provisionally, a certificate of title therefore be issued in the name of Dianne Ennevor and further -

1. That notice of the Provisional Approval be given by advertisement to be published once in the Jamaica Gazette and once a week for 3 weeks in the Daily Gleaner Newspaper and by service upon the owners and persons in possession, occupation or charge of all adjoining lands.
2. The Certificate of Title to be issuable at or after the expiration of 7 weeks from the appearance of the first of such advertisements in such newspaper unless in the meantime a Caveat shall have been duly lodged."

No objection was lodged to the application and no evidence was rendered relevant to compliance with these directions by the Referee. It seems to have been assumed that all proprieties were observed. However Mr. Lynch, even if he had had notice of the application would not, from the wording of the notice exhibited, have been alerted to the real facts affecting his land. Indeed, from his testimony, which I accept, he was not aware of any claim to the disputed parcel of land until after title had been issued and he discovered a man cleaning the land.

It was submitted on behalf of the defendants that the plaintiff had not availed himself of the benefit of lodging Caveats against the application and so his rights were exhausted and so barring fraud, the title was unassailable.

Sections 70 and 71 of the Act are relevant to the question under consideration. Section 70 states, in part -

"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall except in the case of fraud, hold the same as the same may be described or identified in the certificate of title subject to any qualification that may be specified in the certificate and to such incumbrances as may be noted on the folium of the Register Book constituted by his certificate absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except

as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser."

It is clear, therefore, that only fraud can defeat the registered title which is held absolutely free from all encumbrances except those specifically set out in the section.

In like vein section 71 exempts a person, except in the case of fraud, from tracing the root of title of any registered land with which he proposes to deal.

But fraud simpliciter will not avail. Such fraud must be brought home to the person whose registered title is impeached or to his agents. This was clearly stated in the judgment of the House of Lords in the noted case of *Assets Co. Ltd. vs. Mere Koihi* (1905) AC 176 dealing with the question of fraud in the Torrens act. At page 210 Lord Lindley had this to say -

".....by fraud in these acts is meant actual fraud that is dishonesty of some sort; not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from prior registered owner or from a person claiming under a title certified under the Native Land Acts must be brought home to the person whose registered title is impeached or to his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further enquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making enquiries for fear of leaving the truth the case is very different and fraud may be properly ascribed to him."

In this case the person whose registered title is being impeached is Dianne Ennever and her agent for the purpose of securing the registration is Eli Jackson. It is to them or either of them that the fraud must be brought home. But the resolution of that issue must be post-poned to the establishment of actual fraud in proving the registration.

It is important to bear in mind that what Miss Ennever

contracted to purchase was not registered land. She was already in possession of the land several months before the application to register was made. Accordingly, she cannot invoke the protection accorded a purchaser from a registered proprietor (See *Vicks and another vs. Bennett and others* (1921) 30 CLR 80 where it was held per Higgins J at p94 -

"Where there is nothing but knowledge of unregistered interest, it is not a fraud to buy. Such knowledge may be an element in building up a case of fraud but it does not of itself constitute fraud."

The undisputedly false contents of the application of Eli Jackson and the supporting declarations of George Ennis and George Moore have already been alluded to.

The submission that the documents comprising Mr. Jackson's application made a full disclosure of relevant facts such as to negative any suggestion of fraud must now be addressed.

In dealing with the question of fraud in *Vicks'* case (supra) Higgins J had this to say (at page 94):

"It is not necessary or perhaps possible to define fraud. Fraud is a fact to be proved."

In resolving the issue at hand I rely on this principle. Examination of the situation has already shown that matters which are crucial to securing the registration of the land were disclosed to be true when in fact they were not known to be true. In fact, the declarations were known to the declarants to be false but without such declarations the application to register would not meet the statutory requirements. Particular consideration must be given to the disclosure of the boundary indicated as an "encroachment". The obviously intended and actual effect of the declarations considered along with the plan showing the "encroachment" must be to show that the "encroachment" had lost its effect in law. Had the Referee and/or the Registrar knowledge that the declarations are false so that the effect of the "encroachment" could not be said to have been spent, then, of necessity, the application to register must have been refused. In effect, they were deceived into accepting as true essential

matters which are in fact not true. I find as a fact that fraud has been proved.

I find also that the falsehood of Mr. Jackson was not an innocent misrepresentation but actual fraud. That would meet the requirements of Section 70 of the Act but it would not represent a full adjudication of all the issues one of which is whether Miss Ennever herself is tainted, not vicariously, by the fraud of her agent Mr. Jackson but whether she is herself guilty of fraud that adversely affects her title. Reference has already been made to the active part she played in procuring those false declarations which secured the registration of the land under the Act. On that evidence and having regard to the knowledge which she herself had about the lands in question I have no hesitation in concluding that she is guilty of actual fraud.

In the circumstances I -

1. Grant a Declaration that Edward Lynch is the beneficial owner of an estate in fee simple in possession of the parcel of land described at paragraph 2 of the Statement of Claim.
2. Order that possession of the said parcel of land be given to the said Edward Lynch.
3. Order that the Certificate of Title issued to Dianne Ennever and registered at Volume 1137 Folio 216 be rectified so as to exclude the said parcel of land containing 12.7 perches.

The Plaintiffs writ included claims for mesne profits (item 4) and damages (item 5)

The claim to mesne profits was not pursued in the Statement of Claim and though the claim for damages was carried forward in the Statement of Claim no evidence was advanced in respect thereof.

There will be costs to Edward Lynch to be agreed or taxed.

On the counter-claim there will be judgment for the plaintiff Edward Lynch with costs to be agreed or taxed.

As regards Dennis Lynch judgment is entered for the defendants on the Claim ~~claim~~ with no order as to costs.