

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R-082 OF 1984

BETWEEN	CLARENCE REID	PLAINTIFF
A N D	BOBBY WILSON	FIRST DEFENDANT
A N D	WINNIFRED KERR	SECOND DEFENDANT

Burnham J. Scott Q.C., instructed by Burnham Scott & Company for the Plaintiff.

David Muirhead Q.C., instructed by Dr. Adolph Edwards for the Defendants.

HEARD: 20th, 21st and 22nd June, 1988 -
19th, 20th, 21st, 22nd, 23rd, 26th,
27th, 28th, 29th, 30th March, 1990
2nd, 3rd, April, 2nd July, 1990 and
24th March, 1994.

MALCOLM, J.

After the filing of a Writ of Summons herein on the 16th day of February, 1984 and an Order for Speedy Trial made on the 25th day of January, 1988, this action proceeded on its obstacle course of applications to amend and numerous adjournments until finally judgment was reserved herein on the 3rd day of July, 1990.

The delivery of this Judgment like the speedy trial has been long in coming and the Court apologises for the lengthy delay which has been occasioned by a multiplicity of reasons which if given will certainly vindicate me but may not satisfy the litigants or their Attorneys..

THE PLEADINGS

The Statement of Claim filed herein and bearing date the 16th day of February, 1984 reads as follows:

1. The Plaintiff is and was at all material times the owner entitled to possession of land situate at Spots Savannah in the parish of Manchester and registered at Volume 1165 Folio 57 of the Register Book in the Office of Titles.
2. From and since about the 1st of January, 1982 the Defendants by themselves, their servants and/or their agents have on several dates wrongfully entered upon the said land, have cut down trees on the said land; destroyed notice thereon; uprooted fence posts and have harassed the Plaintiff's tenants who are in occupation of the said land.

3. The Defendants wrongfully claim that they are entitled to possession of the said land and have on several dates discouraged prospective purchasers from purchasing plots of the said land.
4. The Defendants threaten and intend, unless restrained by this Honourable Court, to repeat the acts complained of.
5. By reason of the matters aforesaid the Plaintiff has suffered loss and damage.

PARTICULARS

Value of the said trees cut down	\$500.00
Value of notice destroyed	\$100.00
Value of fence posts	<u>\$200.00</u>
	<u>\$800.00</u>

And the Plaintiff Claims:

1. A declaration that the Defendants are not entitled to possession of the said land.
2. An Injunction to restrain the Defendants whether by themselves, their servants and/or their agents or otherwise howsoever, from entering upon the said land.
3. Damages.
4. Costs etc.

A Defence and Counterclaim dated 17th December, 1985 was thereafter filed by the Defendant's Attorney-at-Law which was thereafter superseded by an Amended Defence and Counterclaim filed pursuant to my order made on 2nd April, 1990.

The said Amended Defence and Counterclaim reads as follows:-

1. The Defendants deny paragraphs 1 and 2 of the Statement of Claim.
2. Save that the Defendants deny that their Counterclaim was wrongful, the Defendants admit paragraph 3 of the Statement of Claim. The Defendants say that the said lands referred to in paragraphs 1, 2 and 3 of the Statement of Claim and land in the the amount of 19 acres registered at Volume 1197 Folio 957 on the 26th February, 1986 in the name of the Plaintiff are owned by them and are registered at Volume 1077 Folio 886.
3. The Defendants further say that the said lands were brought under the Registration of Titles Act by the said Certificate of Title registered at Volume 1077 Folio 886 and dated the 21st September, 1971.

4. The Defendants further say that the said lands registered at Volume 1077 Folio 886 were transferred to them in January, 1982.
5. The Defendants say that the Plaintiff improperly and illegally obtained a registered title for the said lands in October, 1991 by Certificate of Title registered at Volume 1165 Folio 57 and in February, 1986 by Certificate of Title registered at Volume 1197 Folio 957.
6. Further or in the alternative the Defendants say that the said Certificates of Title registered at Volume 1165 Folio 57 and Volume 1197 Folio 957 in the name of the Plaintiff were obtained by fraud.

Particulars of Fraud of the Plaintiff

- (a) Obtaining Certificate of Title for 21 acres and 19 acres respectively and claiming the 40 acres owned by the Defendants.
- (b) Improperly and incorrectly claiming to be in undisputed possession of the said land.
- (c) Improperly causing false declarations to be made in the application to register the said land.
- (d) Causing the said lands to be improperly and incorrectly described.
7. As to paragraph 5 of the Statement of Claim the Defendants make no admission as to any alleged loss, damage or expense.
8. The Defendants deny that the Plaintiff is entitled to any of the reliefs claimed in the Statement of Claim.
9. Save as is hereinbefore expressly admitted the Defendants deny serviation.

Counterclaim

10. The Defendants repeat paragraphs 1 - 9 of the Defence.
11. The Plaintiff has by himself his servants or agents committed repeated acts of trespass on the Defendant's lands and has attempted to sell portions of the said land.

Wherefore the Defendants claim:

- (a) A declaration that the defendants are the owners of the lands registered at Volume 1077 Folio 886 as described in Plan bearing Survey Department Examination No. 2038104 of land surveyed by Trevor Barrett, Commissioned Land Surveyor and approved by R.S. Robinson, Director of Surveys and dually

registered at Volume 1165 Folio 57 and the 19 acres registered at Volume 1197 Folio 957 and more particularly described as Section 4 in the Plan bearing Survey Department Examination number 208104 of land surveyed by Trevor Barrett, Commissioned Land Surveyor and approved by R. S. Robinson, Director of Surveys.

- (b) Delivery up for cancellation of the said Certificate of Title registered at Volume 1165 Folio 57 and delivery up and cancellation of first entry described as hereafter stated in Certificate of Title registered Volume 1197 Folio 957, namely "firstly in All that parcel of land part of Spots Savannah in the parish of Manchester containing by estimation nineteen acres more or less and butting Northerly on land belonging to Lester Allen, Easterly on lands belonging to the Commissioner of Lands, Westerly by a Bridle Path belonging to the Manchester Parish Council and Southerly on lands belonging to the said Clarence Reid AND"
- (c) Recovery of possession of the said lands from the Plaintiff.
- (d) An injunction to restrain the Plaintiff whether by himself, his servants and/or agents or otherwise howsoever, from entering upon the said lands.
- (e) Damages.
- (f) Costs.
- (g) Further or other relief."

The Plaintiff's Case

After a short opening Mr. Scott informed the Court that an Agreed Bundle by the Plaintiff was being tendered by consent as Ex. A and Agreed Bundle by the Defendants was also being tendered by consent as Ex. B. He referred to the Statement of Claim filed herein which I have set out in extenso above and thereafter called the Plaintiff.

I shall as briefly as I can, set out what I consider the salient features of his evidence.

An employee of the P.W.D. he stated in chief that he had lived at Spots Savannah in Manchester for a period of 26 years in all. His grandfather Luther Wint had put him in possession of land and he had remained in undisturbed possession since 1982.

One morning he saw two gentlemen and a lady at the gate of the property - Bobby Wilson the first Defendant was ripping off the notice on the gate, the other gentleman was chopping down dog wood trees. Mr. Wilson used abusive and threatening language

to him and pushed down six of his fence posts. He testified that the said male Defendant started to curse his brother berating him for allowing me to build on his land. About five days after, the two Defendants visited his work place in Mandeville and there was further abuse from the first Defendant. The plaintiff was shown several documents from Ex. "A" (Plaintiff's Agreed Bundle). The first one was a Caveat at page 12 and said "they lodged this Caveat supported by a Declaration at Page 13."

The Caveat reads:

"Caveat Forbidding Registration etc.

IN THE MATTER of lands at Long Bay in the parish of Manchester registered at Vol. 1165 Folio 57

AND

IN THE MATTER of the Registration of Titles Act.

TO THE REGISTRAR OF TITLES:

Take Notice that we, Florence Winnifred Kerr of 125 Joan Court, Elmont, New York, United States of America and Robert Lindon Wilson of 761 North West 39th Avenue, Fort Lauderdale, Florida, United States of America, claim an interest as owners in the land described in Certificate of Title registered at Volume 1165 Folio 57 and we forbid the registration of any person as transferor or proprietor of and of any instrument affecting such estate or interest until after notice of the intended registration or dealing be given to us.

We appoint 15 Duke Street, Kingston, c/o Adolph Edwards Attoreney-at-Law, as the place at which notices and proceedings relating hereto may be served and we direct that this said Caveat may be withdrawn by our Attorney-at-Law.

Dated the 24th day of May, 1985

Sworn by the saidetc."

The Declaration mentioned earlier by the Plaintiff read as follows:-

Voluntary Declaration

IN THE MATTER of lands at Long Bay in the parish of Manchester registered at Volume 1165 Folio 57

A N D

IN THE MATTER of the Registration of Titles Act.

We, Florence Winnifred Kerr and Robert Lindon Wilson do solemnly and sincerely declare and state as follows:

1. That I Florence Winnifred Kerr state that my place of abode and postal address are 125 Joan Court, Elmont, New York, United States of America.
2. That I Robert Lindon Wilson state that my place of abode and postal address are 761 39th Avenue, Fort Lauderdale, Florida, United States of America.
3. That we are the registered proprietors of all that parcel of land registered at Volume 1077 Folio 886 of the Register Book of Titles having been registered as proprietors by Transfer No. 398427 on the 28th January, 1982. The said Certificate of Titles was first registered on the 21st of September, 1971.
4. That by Certificate of Title date 13th October, 1981 and registered at Volume 1165 Folio 57, Clarence Reid became the registered proprietor of lands at Long Bay in the parish of Manchester.
5. That we have made attempts to have the lands registered at Volume 1077 Folio 886 surveyed but our attempts have been frustrated by the said Clarence Reid who has objected to the said survey.
6. That Clarence Reid is alleged to have had the said land registered at Volume 1165 Folio 57 surveyed and the Survey Diagram bears Survey Department Examination Number 137807.
7. That following discussions between our Attorney and Mr. Reid's Attorney it was agreed that our Surveyors would attend at our lands registered at Volume 1077 Folio 886 for purposes of doing a survey.
8. That the surveyors have reported that our lands registered at Volume 1077 Folio 886 are the same lands which are described by Plan with Survey Department. Examination No. 137807 which are being claimed by Clarence Reid. We exhibit herewith marked "A" a copy of the Surveyor's Report dated 23rd November, 1984.
9. That to the best of our knowledge the value of the said land is approximately Seventy Thousand Dollars (\$70,000.00).
10. That we accordingly claim an interest as owners in the said land registered at Volume 1165 Folio 57.

AND WE MAKE this Solemn Declaration conscientiously believing the same to be true and by virtue of the Voluntary Declarations Act.

Taken and acknowledged atetc."

Among other documents shown him was a Surveyors Report which read as follows:-

Surveyors' Report

Part of Long Bay, Manchester Volume 1077 Folio 886 -

Mrs. Winnifred Kerr and Mr. Robert Wilson.

Notice of Survey was served on The Commissioner of Lands - 20 North Street, Kingston, The Chief Technical Director - Ministry of Construction (Works) 140 Maxfield Avenue, Kingston 10 and Mrs. Clarence Reid, Cross Keys P.O., Manchester to carry out a survey of the above mentioned property on the 22nd November, 1984. Mr. Clarence Reid, Mrs. Winnifred Kerr and Mr. Robert Wilson were present at the survey.

The survey was arranged consequent on Suit C.L. 1984/R082 - Reid v. Wilson and letter dated July 11, 1984 from Mr. Adolph Edwards, Attorney-at-Law and addressed to Mr. S.A. Ingram Attorney-at-Law (copy of Survey Notice and letter attached).

On the date of the survey I had copy of the plan part of Hudson's Bottom bearing Survey Departments Examination Number 137807 which was surveyed at the request of Mr. Clarence Reid. This survey contained Forty (40) acres, Three (3) Roods and Thirty-seven (37) perches. Mrs. Kerr and Mr. Wilson pointed out to me on ground the lands they claim are registered at Volume 1077 Folio 886 and of which they are the registered owners. This land is registered by description and contains by estimation Forty (40) Acres. This is the same land which is described by plan at Survey Department's Examination Number 137807 and which confirms that both Reid and Wilson are claiming the same land.

E.H.D. Wilson
.....

E.H.D. Wilson & Associates

23/11/84."

The Plaintiff was also shown Surveyor's Notice at 16 of the Agreed Bundle

"A" and, it reads as follows:

"I hereby give notice that I am instructed by Mrs. Winnifred Kerr to survey that parcel of land situate in the parish of Manchester and known by the name of Part of Long Bay which adjoins lands said to belong to you or in

your possession and I shall commence to survey the same on Thursday the 22nd day of November, 1984 between the hours of 10:30 a.m. and 10:45 a.m. of the clock commencing at a point on the main road leading from Alligator Pond to Milk River, at which time and place you are requested to attend by yourself or agent as you may think fit and in the meantime I shall make such traverses as I may deem requisite. You must bring all diagrams and other papers referring to your land in order to protect your interest therein.

Dated the 26th day of October, 1984

- To: (1) The Commissioner of Lands 20 North Street, Kingston
 (2) The Chief Technical Director, Ministry of Construction (Works) 140 Maxfield Avenue, Kingston 10.
 (3) Mr. Clarence Reid, Cross Keys P.O., Manchester.

E.H.D. Wilson
 Surveyor
 2½ Kensington Crescent
 Kingston 5. "

He was also shown Surveyor's Report at P. 19, it reads:

Surveyor's Report Re: Lands
 Registered at Volume 1165 Folio 57

The Plan Ex. 137807 by D. L. Rowe shows the names and addresses of all the adjoining owners. The Plan Ex. 137807 agrees exactly with the descriptions of the lands now registered at Volume 1165 Folio 57 save and except the neighbour to the north of the third portion namely Ralston Reid whose land was included in the survey by D.L. Rowe at Ex. 137807.

The survey by D.L. Rowe of Ex. 137807 was carried out in February and March, 1975. Ex. 137807 shows land belonging to I.P. Delapenha as being registered at Volume 430 Folio 93 which Certificate of Title was issued in March, 1945, yet no mention is made of the name I.P. Delapenha in the description of the lands now Registered at Volume 1077 Folio 886 which was issued in September, 1971.

Ex. 137807 shows adjoining lands to the west belonging to Samuel Hart as being registered at Volume 417 Folio 103 which states that Samuel Hart was in possession of this land from November 1972 and that a previous owner Richard Booth was in possession from October, 1960 to November, 1972 and that the owner before Richard Booth one C.C. Lancaster was the owner from May, 1944 to October, 1960 during which time one J.A. Speak was in charge of the property yet no mention is made of any of the above names in the description of lands now registered at Volume 1077 Folio 886 which certificate was issued in September, 1971.

In the description of lands now registered as Volume 1077 Folio 886 no mention is made of Main Road yet as far back as June, 1941 a main road was in existence as shown on the plan attached to the Certificate of Title registered at Volume 417 Folio 103.

It is obvious that the location of lands registered at Volume 1077 Folio 886 could never be confused with the location of land registered at Volume 1155 Folio 57.

Allan Roye
C.L.S. 7/11/86"

Other documents were shown the plaintiff including sub-division plan of land at "Lower Spot Savannah," copy of Resolution passed by Parish Council of Manchester signed by O.E. Hammond, Secretary/Manager. He identified a letter from the Parish Council's Office granting approval of the sub-division plan. The Plaintiff was also shown Probate and Copy Will re: Luther Calvin Reid late of Marlie Hill in Manchester - granted on the 15th April, 1970 (part of Ex. "O"). It makes strange reading and is wellnigh unintelligible in parts. The Executor is Hubert Alexander Logan and the will reads inter alia:-

"I give and Bequeath all that property owned by me and my Deceased Brother James Reid and my sister Alice Goulbourne both of Marlie Hill in the parish of Manchester known as long Bay, in the said parish sic. of Manchester estimated at about one hundred Acres sic. less or more I therefore directed that this said sic. property be divided equally among the children of my deceased brother James Reid and my deceased sister Alice Goulbourne mentioned above and my children. This said property is bounded on the sic. East by Govt. Lands at Hudson Bay Running North across sic. the Coast Road to a point attached to Conoey Valley property on the North by Lands owned or in the possession of Lester Allen and William King, running West to a point touching Lands owned or in the possession of William Shaw, on the South by Lands own by Mrs. Kerla sic. running East to a point touching Lands own by Lancaster at little Bay and running Northwards along the said piece of sic. Long Bay Property touching the said Long Bay Property to North This said property runs from the East of the said Lands owned by Lancaster from the sea running north touching the said property of Lancaster at the North East on the West by Lands owned by Reynolds Company.

X Luther Calvin Reid"

This will bears date April 25, 1967.

He testified that thereafter he tried to sell some of the lots but because of the caveat would-be purchasers were reluctant to do business. Mr. Reid said he started to clear the land which was in ~~ruinate~~ and that he built his first house on the property and started to live there in 1962. Later he built a modern five bedroom house there.

Cross-examined by Mr. Muirhead the Plaintiff stated that he went to school in England where he studied Accounts. He first went to England in 1958. He did accounts in Sheffield but lived in Leeds at the time. He was shown Ex. C, a Cadastral Map which had earlier been tendered in evidence. He knew a property named "Great Valley" in Wilson's family. After closer scrutiny of the map he said "I see there - Herbert Egerton Wilson et al is name shown as owner."

When shown Ex. D, another map marked "Preliminary Edition," and asked by Mr. Muirhead if he saw an area bounded by red lines he answered "yes" and went on to say that it represented the general area where the disputed land was. He was shown another Planometric Sheet which was tendered by consent as Ex. 4. He was asked to compare it with, firstly Ex. E, and was asked whether he was aware that the rectangular red lines on that Exhibit were identical to what the Defendants were claiming - he replied in the negative. Thereafter the evidence reads:

"Ques: Are you saying that both you and the Defendants were claiming the same parcel of land?"

Ans: Yes. The defendants came to my premises in January 1982, only then was I aware of it."

The plaintiff testified that he employed Attorneys - Hamilton and Bennett for the purpose of getting Title for the land. He was shown Page 40 of Ex. B (agreed bundle). This was a letter dated 23rd November, 1977 from the said attorneys to Mr. Hubert Wilson. The letter reads:

"23rd November, 1977

Mr. Hubert Wilsson
Wigton,
Cross Keys P.O.,
Manchester.

Dear Sir,

Re: Property Valuation No. 2304001003

We act on behalf of Mr. Clarence Reid in this matter. Our instructions are that the Reid family have been in possession of lands situate at Alligator Pond in the parish of Manchester from the beginning of this century. Originally the acreage was over 100 acres but this has been reduced to 40 acres more or less, the remainder having been taken over by the Commissioner of Lands. This land has been essentially family land having been handed down through various generations of the Reid's family. We have in our possession proof as to this.

We further informed that for the past few years prior to 1974, the name Ralston Reid appeared on the Tax Roll in respect of the land in question. However since the imposition of the new land valuation in 1974 by some error of the land Valuation Department your name now appears. Mr. Reid informs us that since then he has been making attempts to have the matter rectified but has been met with one set back or the other. We are desirous of remedying this situation. Mr. Reid indicated to us that on Wednesday the 24th August, 1977 he visited you and was accompanied by Mr. Scott of the Land Valuation Department, Kingston to discuss the matter. He tells us that from the discussions that took place you assured him that the land in which your name appears on the Tax Roll as owner is not in fact your land but that you own land further east.

In the light of these circumstances we think the proper course to be taken by you is to send "Notice of Objection" to the Commissioner of Valuations, as you have the burden of paying taxes on land which you admit you do not own. Enclosed you will therefore find two forms of "Notice of Objection" for your perusal and your signature. Please sign towards the bottom of the forms where you see three X's in ink. When you have done this please return and we will submit same to the Land Valuation Department for the appropriate adjustments to be made.

We urge you to co-operate in this matter and look forward to an early return of these forms. You must appreciate the fact that the Reids are anxious to have their names re-instated on the Tax Roll as at no time at all did they ever dispose, sell or carry out any transaction with anyone involving the said lands.

Thanking you.

Yours respectfully,

Hamilton and Bennett
Per: N.E. Hamilton "

The plaintiff testified that it was he who gave instructions to Hamilton and Bannett. He stated as follows:-

"There is an error, it should read - The acreage is 100 acres and had never been reduced. The lawyer was wrong. The words "remainder having been taken over etc" should not be there. I don't know where the lawyer got it from - it is wrong. Myself and other members of the family gave documents, para. 2 of letter is in keeping with instructions I gave lawyer."

Mr. Reid was shown letter at P. 42 of agreed bundle "B" It was read to him by Mr. Muirhead. His evidence on this aspect of the case was:-

"I agree that the lawyer in P. 42 is asserting its their land and land in the Registered Title. I agree letter denies what I was instructing. "He was shown several other documents and in particular Ex. F a letter from Hamilton and Bennett to S.A. Ingram - Attorney-at-law dated 15/3/83. He did not agree that the land at "Spots Savannah" - put on Valuation Roll was represented as being a different

land from the subject of correspondence at P. 40-42 -
disputed land. He said reading, the letter," that's
what the letter says."

The letter mentioned above reads:-

"March 15, 1983

S.A. Ingram
Attorney-at-Law
Grove Court
Mandeville.

Dear Sir:

Re: Property Valuation No. 2230, 400, 1003

We regret our delay in responding to your letter of the 4th August, 1982. Our instructions were that the land belonging to Mr. Wilson and to Mr. Reid are two separate bits of land, having different descriptions.

The matter was taken up by the Lands Valuation Department by Mr. Reid to have their land placed back on the Tax Roll. It was removed during the inception of the new Tax Roll system. The land valuation Department advised that it was not able to assist as documentary evidence was not inconsistent with Mr. Wilson's name being on the Tax Roll. Sometime in 1980 Mr. Reid advised that he eventually had the matter rectified and had the matter placed on the Tax Roll. He produced tax receipts bearing Valuation No. 223, 400,2009. We subsequently applied for Title and same was granted.

Mr. Reid has been living on the land since 1973 when he built the house that is currently there. Before that his other relatives were living there at all time free from any molestation. If your client feels sure that his land and Mr. Reid's land are one and the same then the matter would best be finalised in the courts.

Yours faithfully,

Hamilton and Bennett
Per: N.E. Hamilton
Narcisse E. Hamilton "

Mr. Reid disagreed with Mr. Muirhead's suggestion that he had been living on the land since 1973 - as stated in the letter, he said - "the lawyer is wrong again."

The plaintiff was asked - "If some of the 100 acres was in fact forfeited to the Crown would that fundamentally undermine your claim?" His answer was in the affirmative.

He testified that he did not have a discussion with his mother Icilda Reid for the Title to be issued in his name.

In the light of the uncertainty surrounding certain aspects of the disputed land - the court on the 22/6/88 on the application of Mr. Muirhead for the Defendants (the Plaintiff's Attorney not opposing) ordered the appointment of a Surveyor to be agreed on by both parties failing which to be appointed by the Director of Surveyors. Such Surveyor was ordered to get "on ground" survey or identification of lands contained in the Defendant's Certificate of Titles at Volume 1077 Folio 886 as also "on ground"

survey or identification of the land allegedly contained in Plaintiff's Certificate of Title registered at Volume 1165 Folio 57.

Re Land at Volume 1197 Folio 957 referred to by the Plaintiff in his "Exhibit A" containing 73 acres at "Spots Savannah" (being two parcels of 19 acres and 54 acres respectively such Certificate of Title issued on application made in February pursuant to Section 42 of the Registrar of Titles Law 1976), Court ordered that the documents filed in connection therewith No.86436 - be produced in court by the Registrar of Titles when required, or alternatively that the said Registrar make the documents available to both parties for inspection and for both parties to make copies thereof if they so desire.

Attorneys for the Defendants to have carriage of this Order.

Question of Costs in respect of this application hereby reserved etc.

Thereafter one of the adjournments mentioned in the preamble to my Judgment occurred. After the 22/6/88 the hearing resumed on the 19/3/90 over one year six months after. Continuing his evidence, the plaintiff when asked in cross-examination by Dr. Edwards:- "Did you on the last occasion say that it was you who turned off one Alfred Morrison off the land in 1960?" To which he replied - "I did say that, I now say that that was a mistake, it was James Morrison not Alfred. It was 1960, no mistake about the year." He was shown Page 14 of Agreed Bundle "B" - Letters of Administration in Estate - Alfred Morrison and some of his answers to Dr. Edwards were both confusing and incomprehensible. He said:- "I see the date of death of Alfred Morrison as 4th July, 1954 - Can't accept that - not sure of the exact date It was James - Alfred's son that I turned off the land. On last occasion I was speaking the truth.....it would not be true that he was alive in 1960."

He testified also that his grandfather Luther gave him instructions to go and take care of the land - he was put in possession by Luther in 1960. He stated that in 1982 he knew the land he was claiming was the land the Wilson's were claiming. The cross-examination of the Plaintiff by Dr. Edwards continued over many days, was exhaustive and searching and during its course several exhibits were shown to him.

He stated, inter alia, that he gave his lawyers instructions about the second Title and that on his instructions Declarations were prepared. He would have been the one to carry them to the various persons for execution. He presumed the area claimed by Mrs. Kerr was about 40 acres. He said that in 1975 he had a survey done by Mr. Roye and testified that he was aware that a Surveyor from the Survey Department

made a Report as ordered by the Court on the 22nd June, 1988. The Report of Mr. Barrett was shown to him and the said Report and Plans were tendered as Exhibit H.

The evidence of Allan L. Roye Commissioned Land Surveyor was interposed at this stage - He was shown several documents including Mr. Barrett's Report and plan prepared by him. In addition to a lengthy examination in chief, he was searchingly cross-examined by Dr. Edwards. I make brief reference to some of his replies:

"When I did plan at page 18 of Agreed Bundle "A" it was Mr. Reid who pointed out boundaries - The importance of Rival Claimants not vital - not a boundary dispute."

He was shown Mr. Barrett's Report and Mr. Wilson's earlier Report and agreed with the suggestion that both Barrett and Wilson came to the same conclusion that the lands claimed by both sides were the same land. After further cross-examination Mr. Scott closed the case for the Plaintiff.

Mr. Trevor Barrett, Commissioned Land Surveyor attached to the Survey Department was called at this stage. He testified that at the request of the Court as evidenced in the Order made on 23rd June, 1988 he carried out a survey. He referred to his Report (tendered earlier as Exhibit H). He identified this Report and read portions of same. Under "Observation" the said Report reads:-

"Having examined the Documents available, I would like to make the following observations:

1. Lands at Certificate of Title at Volume 1077 Folio 886 are registered by description as part of Long Bay, containing approximately 40 acres.
2. Lands at Certificate of Title at Volume 1165 Folio 57 are registered by description as part of Spots Savannah, containing approximately 21 acres.
3. In the Certificate of Title at Volume 1165 Folio 57, the adjoining property described as belonging to Manton and Hart, is registered at Volume 417 Folio 103 in the name of Samuel Hart.
4. In the Certificate of Title at Volume 1165 Folio 57 the adjoining property described as belonging to L.P. Delpenha has been transferred to Volume 448 Folio 6 in the name of the Commissioner of Lands.
5. Whereas the description of lands registered at Certificate of Title at Volume 1165 Folio 57 is adequate for the identification of the area on ground, the description of lands registered at Certificate of Title at Volume 1077 Folio 886 is not.
6. Plans dated 9th June, 1941, attached to Certificate of Titles at Volume 417 Folio 103 and Volume 448 Folio 6 show "Alfred Morrison" to be the occupier

and owner respectively of lands now registered at Certificate of Title at Volume 1165 Folio 57.

7. Conveyance "A.W. Thompson et al to William G.H. Wilson" - dated 30th July, 1934 shows the said "Alfred Morrison" to be owner of the said lands described at Certificate of Title at Volume 1077 Folio 886.

It is to be concluded, therefore, that parts of the 40 acre property are dually registered in Certificate of Title at Volume 1077 Folio 886 and Volume 1165 Folio 57. This is to be verified and established on ground."

Mr. Barrett's report went on to set out the nature of the "Field Work" which was carried out between the 19th-27th days of October, 1988. The Report ends thus:-

"Conclusion:

As a result of information gathered from the conveyance James E. Reid et al to Andrew W. Thompson et al, dated 3rd March, 1931; plan of Spots Savannah bearing Survey Department Ex. No. 200828 and all the Documents hereinbefore mentioned, I decided to carry out further searches in the Records Section of Survey Department. There I found a certified plan, reference No. K66, which is the result of a survey that was carried out from June 9, 1941 to August 14, 1946 by Messrs. L.H. Myers and K.G. Lopes - Government Surveyors - on Government's property adjoining the area represented by plan Ex. No. 137807. Information given on this plan has further strengthened my earlier statement that this is a dual Registration of Titles. Details of this are clearly highlighted on the plans accompanying this report.

In respect of part of lands registered at Certificate of Title at Volume 1197 Folio 957 in the name of Clarence Reid, it is also clear that this is another case of dual registration with part of land registered at Certificate of Title at Volume 1077 Folio 886. The extent of the area of this dual registration is shown on the accompanying Surveyor's Plan."

On the 2nd April, 1990 Mr. Muirhead sought and was granted leave to amend the Defence and Counterclaim. His reason for this application, was to ensure that the issues in controversy between the parties could be adjudicated on with finality.

On the following day 3rd April, 1990, the plaintiff was granted leave to file and deliver an Amended Reply and Defence to the Defendant's Amended Defence and Counterclaim. Those amended pleadings were referred to and set out supra.

The Defendant's Case

Winnifred Kerr the second named Defendant, testified in this matter. She was born in June 1912 and is the daughter of William George Hogg Wilson who died in 1950. She said that after his death her brother and herself purchased the land from the Executors - Gerald and Hubert Wilson. In January 1982 the land was transferred to her as is evidenced by transfer recorded on the Title.

Later in her evidence she stated that she went to live in the U.S.A. in 1968 and was accustomed to come to Jamaica about once per year. In 1981 she went to the land and saw a newly built house on her land - it was not quite finished. After enquiries she went to see Mr. Reid the plaintiff who she did not know before.

She went on to say:- "I asked him how he came to be in possession of these lands, he said don't ask me go and ask my lawyer." She went and saw Mr. Ingram. She denied that any trees had been cut down by herself or her brother and stated she never dug up any fence posts. She saw a "No Trespassing" sign there which her son-in-law took and threw away.

When shown P.15 of Ex. A - (Surveyors Report by Wilson) she said "both are claiming the same land" - shown Mr. Barrett's report (Ex. H) she testified:- "I accompanied Mr. Barrett on survey over rocks foot to foot identifying my land. I was aware there was dual registration - both 19 acre piece and other piece made up my 40 acre piece.

Ques: "You are saying that Volume 1165 Folio 57 and Volume 1197 Folio 957 by Mr. Reid are your identical piece of land, land belonging to you?"

Ans: Yes.

They were after my Title in time. I saw his declarations they are false - they described differently lands described in my Title. He has given a different description it is the same piece of land. She said, looking at my title it flows from Conveyance Ex. "N". She stated she never claimed any other land than what she had claimed in Court. Cross-examined by Mr. Scott she said she did not participate in the making of Indenture at Ex. "N". In January 1982 she never sent anyone to cut trees or poles.

Submissions and the Law

Mr. Scott referred to Sections 68, 70 and 71 of the Registration of Titles Act. Section 68 speaks of a Certificate of Title being conclusive evidence of title. It reads:

"No Certificate of Title registered and granted under this Act shall be impeaced or defeasible by reason or on account of any informality or

irregularity in the application for the same or in the proceedings previous to the registration of the certificate, and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth and of the entry thereof in the Registrar Book

Section 70 speaks of preferential and prior rights being defeated in favour of the registered proprietor except in case of fraud (the emphasis is mine). Section 71 refers to protection to parties dealing with registered proprietor except in cases of fraud.

He cited Frazer vs. Walker & Rodomiski A.C. (Vol. 1) [1967] 569. This case dealt with a fraudulent mortgage granted by one of two registered proprietors. He said the first time a claim was made by the Defendants in respect of the 19 acres was on the 3rd April, 1990.

Mr. Scott referred too to the case of Bater v. Bater 2 ALL E.R. 458 which dealt with the standard of proof, proof beyond reasonable doubt required in a Divorce case granted on the ground of cruelty.

The Court readily recognised and accepts that where fraud is alleged, as in this case, it must be strictly proved, it must be established that Mr. Reid obtained material advantage by unfair or wrongful means. The two authorities cited have not proved of much assistance in determining the issue which the Court has to determine.

Mr. Scott cited also the following case Hornal v. Neuberger Product Limited [1965] 3 ALL E.R. 970 - dealing with "Fraud - Standard of proof - Balance of probabilities." He also cited the case of McQueen vs. The Great Western Railway Company 1874-1875 10 L.R. Q.B. Page 569. These cases too I did not find of much assistance.

Mr. Scott submitted (and here I quote him) "the allegations as to fraud are not allegations at all." Further, on the evidence, the Defendants have not even made out a prima facie case - on the basis of the evidence they were not entitled to the relief sought. He asked for Judgment in favour of the Plaintiff.

Mr. Muirhead on behalf of the Defendants referred to the Registration of Titles Act Section 161 (d) and (f) and submitted that a person who registered first in time has a right to recover his land and to a Declaration. Section 161 reads:-

"No action of ejectment or other action, suit or proceedings for the recovery of

any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say: (a) (b) (c) (d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud (e) (f) the case of a registered proprietor with an absolute title claiming under a Certificate of Title prior in date of registration under the provisions of this act, in any case in which two or more certificates of title or a certificate of title maybe registered under the provisions of this Act in respect of the same lands, and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described, any rule of law or equity to the contrary notwithstanding."

In his view Section 161 (f) is crystal clear - he compared it with Sections 68 and 70 and said here we are dealing with the same land - not same description.

Exception: Where you have two persons registered as proprietor for the same land the second or later certificate of title will not be treated as estoppel. He invited the Court to make findings based on the evidence. The plaintiffs and defendants were laying claim through their respective Registered Titles to same land. Defendants claim is through Volume 1077 Folio 886 which is prior in time - registered on 21st September, 1971. Plaintiff's title Volume 1165 Folio 57 was registered on 13th October, 1981.

Referring to the letter from Hamilton and Bennett bearing date 23rd November, 1977 (letter to Hubert Wilson) he said it was "central to the issue of knowledge and Fraud." It was clear that plaintiff was a competing owner and claimant for the 40 acre piece of land.

Referring to letter at page 42 (Ex. F) he submitted that this letter was enough to ground Fraud of the type spoken of. As of that amount the plaintiff was charged with certain knowledge that the land he was seeking to have entered on the Tax Roll is registered in name of the Defendants' predecessors in title.

He cited the case of Assetts Company Limited v. Mere Roihi (1905) AC 176 an appeal from the Court of Appeal of New Zealand - it dealt with the question of Fraud and the fraud which must be proved to invalidate the title of a registered purchaser for value. Mr. Muirhead referred to the Declarations, to the Will, to the Conveyance and said - Defendants got conveyance of the whole land - the will he said, describes property at Long Bay. It was submitted that on the plaintiff's part, there was a total departure of description in order to effect registration. There was clear evidence of fraud designed to deceive the Registrar of Titles.

Findings and Conclusions

It is clear from an examination of the numerous documents tendered and of the oral evidence given that both sides are claiming the said land. In addition the evidence shows that this is a rare case of Dual Registration, possibly the only case of this nature on record.

I accept the submissions of Counsel for the Defendants and I find that fraud on the part of the plaintiff Clarence Reid has been clearly and strictly proved - proved to the standard the law requires.

Accordingly there will be Judgment for the Defendants in terms of the relief prayed at (a) (b) (c) and (d) of the Counterclaim as set out in the Amended Defence and Counterclaim filed herein. Costs to the Defendants to be agreed or taxed. This will include also the cost of the Survey done by Mr. Trevor Barrett in pursuance of the Court's Order. Stay of execution granted for six weeks.