JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 111/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.(AG.)

BETWEEN CHRISTIAN ORITSETIMEYIN ALELE APPLICANT/APPELLANT

AND ROBERT D. HONIBALL

GEORGE A. BROWN PLAINTIFFS/RESPONDENTS

R.N.A. Henriques, Q.C. & Allan Wood
for Appellant

Dennis Morrison & Mrs. Janet Morgan
for Respondents

4th, 5th, 6th December, 1990 &
14th March, 1991

CAREY, J.A.

Introduction

In this appeal, we are concerned essentially with the conduct of Mr. George Brown (one of the respondents) an Attorney-at-Law of some standing who in purported execution of a judgment debt by way of sale of land proceedings had three lots of land, two of which belonged to a judgment debtor, vested in himself and the other respondent as also the third plot of land which belonged to the present appellant, he was in fact the equitable owner. The question for the Court is whether the method Mr. Brown adopted to achieve this purpose amounted to fraud within the meaning of section 161 of the Registration of Titles Law and therefore not only capable of defeating the appellant's title to the land, but also enabling the appellant to have his name registered as legal owner.

The Procedural History

The appellant who is a citizen of the United States of America, purchased the property, being lot 96 situate at Cardiff Hall in St. Ann, as far back as the year 1968 from

Cardiff Hall Estates Limited. This property was registered at Volume 1072 Folio 413 in the Register Book of Titles. Some three years later, the vendors' Attorneys-at-Law provided Mr. Alele's Attorneys-at-Law with the instrument of transfer and the duplicate Certificate of Title. Although Mr. Alele has paid property taxes on the property since that time, he has never troubled himself to register his transfer for reasons which are not relevant for the purposes of this appeal. Then in June 1988, his Attorneys-at-Law advised him that his Certificate of Title had been cancelled and title issued in the names of the present respondents. He meant, of course, his unregistered Certificate of Title.

I can now detail the remarkable process whereby this appellant became dispossessed of his property. In 1977, the respondents commenced an action against Cardiff Hall Estates Limited (referred to hereafter as Cardiff Hall) claiming damages in the sum of $8,875 of which $5,000 was the deposit and the balance interest, in respect of which, judgment by default was duly entered. The claim was to recover the deposit on lot No. 309 being part of Cardiff Hall Plantation and Unity Pen in St. Ann. Cardiff Hall was served with the writ through its accountant at the registered office of the company which had however, gone into voluntary liquidation on 20th November, 1975: it was not, "by reason of its liabilities, able to continue its business." The creditors of the company appointed Mr. Brian Mair of 2 West Arcadia Avenue, Kingston 5 as liquidator. The respondent Mr. Brown had threatened legal proceedings against the company in May 1977 and he was made aware by E.A. Lai a director of the company by a letter copied to him, that the matter was being handled by Mair, Russell & Partners. Certainly, by his own admission, on or about 4th April, 1978 he was aware that Mr. Mair was the liquidator.

Mr. Brown deposed that -

> "Mr. Brian Mair had due notice of the proceedings.....[because] he had a continuing responsiblity to monitor proceedings and he was deemed duly served.....".

On 29th March, 1978 Cardiff Hall not having appeared to the writ, judgment was entered in favour of the respondents in $9,063.64 and costs. Thereafter, they took steps to enforce that judgment by way of sale of land proceedings. I think it is right to make it perfectly clear that the sole deponent to all affidavits supporting the various summonses or applications was Mr. Brown: Mr. Honiball's name was not mentioned at any time in any of Mr. Brown's affidavits. On the face of it, he took all responsibility. On 7th November, 1979 an order for leave to issue a writ for sale of land was issued in the terms which I very much regret having to set them out in full -

> "1. The Registrar do make all such enquiries as may be necessary pending the issue of the Writ of Sale of the Estate and interest of the Defendant and that the costs of and incidental to this application be paid by the Defendant and that pending such sale as aforesaid the Judgment Debt herein be charged upon the said lands.
>
> 2. That the land registered at Volume 1072 Folio 645 of the Register Book of Titles be sold at Public Auction by the Bailiff of the Court or failing him by an Estate Agent to be appointed by the Registrar.
>
> 3. That the lands registered at Volume 1072 Folios 310, 311, 313, 314, 315, 335, 336, 341-346 inclusive, 348, 351, 357, 375, 413, 417, 611, 615-617 inclusive 624, 642, 643, 650, 674 and 675 of the Register Book of Titles be sold at a Public Auction by the Bailiff of the Court or failing him by an Estate Agent to be appointed by the Registrar.

"4. That the lands registered at Volume 1078 Folios 682 - 685 inclusive, 687 and 698 inclusive be sold at a Public Auction by the Bailiff of the Court or failing him by an Estate Agent to be appointed by the Registrar.

5. That the lands registered at Volume 1103 Folios 392 - 401 inclusive be sold at Public Auction by the Bailiff of the Court or failing him by an Estate Agent to be appointed by the Registrar.

6. That the Plaintiffs or either of them be permitted to attend the Auction Sale and bid for the purchaser or purchasers thereof.

7. That the Plaintiffs' Attorneys-at-Law, Milholland, Ashenheim & Stone have the carriage of sale, that the remuneration of the auctioneer be a commission of 5% of the sale price if the property is sold or a withdrawal fee to be fixed on the hearing of this Summons if the property is not sold together with a sum to be fixed on the hearing of the Summons for his disbursements for advertising.

8. That the Reserve price to be the sum fixed by the Registrar.

9. That upon such sale as aforesaid the purchase money of the said land be applied in the following manner:-

(a) In payment of all taxes accrued due on the said land.

(b) In payment of the fees of the Auctioneer and disbursements for advertising and the cost of any transfer in pursuance of such sale.

(c) In payment of the costs of this action and of execution.

(d) If any enquiries are ordered and it appears on such enquiries that there is any debt which is charged on the lands, in payment of the sum so charged or, if there be more than one according to their respective priorities.

> " (e) In payment of the Judgment entered herein in favour of the Plaintiffs together with interest at $6.00 per centum per annum and any balance outstanding to be paid to the Defendant."

We do not know why it would be necessary to put up for sale so many lots of land, but one comment could be made. Included in the numerous lots being put up for sale was the appellant's lot, viz that registered at Volume 1072 Folio 413, see paragraph 3 of the order for leave. According to Mr. Brown, at the Registrar's enquiry held on 30th June, 1981 pursuant to that order, it was found that all the lands mentioned therein were charged and encumbered except one lot registered at Volume 1072 Folio 645. This statement as to lots being charged and encumbered could hardly be true of the appellant's land. Be that as it may, this affidavit continued as follows -

> " Accordingly, we proceeded against that property alone (i.e. that registered at Vol. 1072 F. 645) with leave to proceed against the other lands in the event that we had to recover the full sum of the judgment debt."

In the event, Mr. Brown said, between October 1981 and October 1985 several attempts to dispose of that land by public auction proved abortive, but both respondents did purchase the property at a price beyond the reserve price. Matters did not end there however. When they endeavoured to register the land, they discovered that it had been acquired by a third party. Their judgment remained unsatisfied.

Thus far the procedure adopted by the respondents was entirely correct because it is authorised by the Civil Procedure Code Law - sections 621 - 623 - Execution by Sale of Real Property.

These events prompted Mr. Brown in 1986 to proceed against three lots of land viz, lots registered at Volume 1072 Folio 413

the appellant's land) Volume 1072 Folio 674 and Volume 1103 Folio 394; "under leave reserved to proceed against the other lands mentioned in the order of 7th November, 1979." That order which is set out earlier in this judgment does not appear to me, to express any such reservation.

He deposed that the proceeds of these three lots would be adequate to cover the judgment debt. An order for the issue of a writ for sale was made by the Master on 24th April in respect of these three lots. The Registrar was further ordered to make the usual enquiries of the estate and interest of Cardiff Hall. At this Enquiry, the debt owed by Cardiff Hall Estates Limited was certified to be $14,128.43. There was however no order for the fixing of a reserve price nor the manner in which the purchase price should be applied, but it required that -

> "4. That the Registrar of Titles do cancel the Certificates of Title to the lands and issue a new Certificate of Title and the duplicate thereof in the names of the Plaintiffs or their nominee(s) should the Plaintiffs purchase the said lands." [Emphasis supplied]

The next significant event in this unfolding execution drama was the issue on the 10th November 1987 of a summons for leave to issue a writ for sale of land and for an order that -

> "1. A Certificate of Sale of Land be issued in the names of the Plaintiffs against lands registered at Volume 1072 Folio 413; Volume 1072 Folio 674 and Volume 1103 Folio 394 subject to existing encumbrances.
>
> 2. That the terms of the Order of the Court dated the 24th day of April, 1987 be accordingly varied.

"3. That the Registrar of Titles do cancel Certificates of Title to the lands mentioned above and the new Certificates and the Duplicates thereof be issued in the names of the Plaintiffs or their nominees subject to any existing encumbrances."

An order in terms of that summons was made by the Master on 10th December, 1987. As stated before the affidavit in support of the summons was sworn to, by Mr. Brown. The significant paragraphs are the last four, which appear below -

"11. That leave sought was obtained on the 24th April, 1986. Under the terms of that Order the Plaintiffs were obliged to proceed to a second Enquiry which was held on the 10th March, 1987. The Deputy Registrar (Ag.) certified that (inter alia) the amount due from the Defendant to the Plaintiffs to the 10th March, 1987 was $14,128.43.

12. That it is a further term of the said Order that the lands be disposed of by Public Auction by a Private Auctioneer on at least two occasions and that failing disposal of the properties by that method that the lands be disposed of by Private Treaty with leave to the Plaintiffs to attend and bid at the Auctions.

13. That the Plaintiffs verily believe that under the terms of the previous Order dated the 28th October, 1981 when it proved impossible to dispose of the lands registered at Volume 1072 Folio 645 by Public Auction that this exercise shall also be futile and further protract the execution of this Judgment entered nine years ago.

14. That alternatively, the Plaintiffs seek leave for the Court to issue a Certificate for Sale of Land in the names of the Plaintiffs re lands registered at Volume 1072 Folio 413; Volume 1072 Folio 674 and Volume 1103 Folio 394 subject to the existing encumbrances mentioned thereon."

Mr. Brown filed an affidavit of value. In the relevant paragraph, (paragraph 2) he deposed as follows -

> "2. I beg to refer to my Affidavit filed herein dated the 27th October, 1987 and beg to state further that I verily believe that the said lands registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 are together worth no more than $10,000.00."

Having obtained by judicial process the order he sought, he submitted to the Registrar of Titles a Declaration, the relevant portions of which must also be set out -

> "2. I beg to refer to an Order of the Supreme Court of Judicature of Jamaica dated the 10th December, 1987 lodged herewith and in particular to paragraph 3 wherein it is ordered that the Registrar of Titles do cancel Certificate of Title registered at Volume 1072 Folio 413 and two others and to issue in place thereof a new Certificate of Title in the names of the Plaintiffs who are ROBERT D. HONNIBALL AND GEORGE A. BROWN, the declarant.
>
> 3. I hereby request that the said new Certificate of Titles be issued with a Plan.
>
> 4. I am informed and verily believe that the said lands registered at Volume 1072 Folio 413 is valued at no more than $3,500.00.

The Registrar of Titles acted pursuant to the order of the Master and did as he was bid.

## The Hearing

When Dr. Alele was advised that he no longer had any right or title to his lot, he filed a motion in the Suit C.L. 1977/H150 Robert D. Honiball, George A. Brown v. Cardiff Hall Estates Limited. He sought the following relief -

> "1. An Order giving the said CHRISTIAN ORITSETIMEYIN ALELE liberty to intervene as an interested party in Suit C.L. H-150 of 1977 commenced by Robert D. Honiball and George A. Brown against Cardiff Hall Estates Limited and to be joined as Second Defendant to the said action, and

> "2. An Order setting aside the Ex Parte Order of the Learned Master dated the 10th day of December 1987 in the said action and also setting aside the cancellation of the Certificates of Title registered at Volume 1072 Folio 413 for the land known as Lot 96 Cardiff Hall Estates in the Parish of Saint Ann, and setting aside the issue of Certificate of Title registered at Volume 1209 Folio 991 for the said land in the names of the Plaintiffs and setting aside the judgment in favour of the Plaintiffs entered in default of appearance on March 29, 1978."

Walker J, having heard submissions on 12th and 18th October, 1989 delivered his judgment on 18th December, dismissing the appellant's motion. The present appeal is taken against that judgment and order. The appeal raises for consideration a matter of procedure, viz, whether the appellant had any locus standi to intervene to set aside the orders made by Master Vanderpump vesting the appellant's lot of land in the respondents. It also raises the question of law which I have identified at the outset of this judgment.

## The Procedural question

The first order sought by the appellant on his motion was for liberty to intervene as an interested party in the suit by the respondents against Cardiff Hall. The appellant justified this course in reliance on Section 93 of the Civil Procedure Code which provides as follows -

> "93. It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest."

Counsel argued by reference to a gloss to a similar rule in the United Kingdom viz, R.S.C.r.15/6/7 whereby a person may be added as a party who is directly affected, either legally or financially by any order which may be made in the action. **Gurtner v. Circuit** [1968] 2 Q.B. 587: 1 All E.R. 328.

The learned judge in the Court below held that the appellant had no locus standi because he was not a person within the contemplation of Section 161 (d) of the Registration of Titles Act. The provision is in these terms -

> "161. No action of ejectment or other action, suit or proceeding, 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 - 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, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud."

That approach was wholly irrelevant to the question of locus standi, for anyone who alleges fraud, has locus standi. Be that as it may, in my view, this question is largely of academic interest. The issue between the appellant and the respondents is whether the title registered in the names of the respondents can be defeated by the fraud alleged against them. That issue was determined by the judge, not as a preliminary issue, but as the substantive matter before him.

The appellant had no need to apply to be joined as a party in the proceedings against Cardiff Hall. He was entitled to proceed against these respondents, not indirectly, in a suit involving Cardiff Hall, but directly by way of an

application to set aside the registration on the basis of fraud under section 161 of the Registration of Titles Act. No one sought to suggest in argument, that a motion was an inappropriate method of proceeding against these respondents. The practical effect of the appellant's procedure of a motion seeking (inter alia) to intervene, in my judgment, amounts to the same as if he had proceeded directly. This circuitous route which the appellant choose pales into insignificance and merges into the real issue which fell to be determined, namely, whether the appellant could prove fraud. I suspect the reason for the procedure adopted by the appellant, which as I think to be perfectly understandable, was a belief that the appellant needed to set aside the orders of the Master vesting title of the appellant's land in the respondents before dealing with the respondents on the basis of their alleged fraud. But really this provision under section 93 the Civil Procedure Code does not allow intervention in a suit when all issues have been disposed of and judgment satisfied. It is too late to intervene when lis finis.

The learned judge came to the view that the appellant had no locus standi because he found no fraud on the part of the respondents. But in that exercise which he performed, he was constrained to consider the matter of substance imperfectly spelled out in the relief sought by the appellant in paragraph 2 of his Motion. It was not truly a preliminary issue.

The approach of the Judge and the issue of fraud

Mr. Wood who argued this issue, said that Mr. Brown, the sole deponent in the affidavit in support of the summons whereby the appellant's lot of land was vested in the respondents, acted recklessly in giving a valuation on the property. He pointed out that although Mr. Brown claimed no skill as a valuer,

he nevertheless failed to obtain an independent valuation. Further, for his own interest, he assumed the burden of providing a valuation which was self serving and vital in order to vest the land in himself.

The manner in which the learned judge dealt with the issue of the valuation is interesting. I cite the following extract from his judgment which deals with it at pp. 101-102 -

> "..... the plaintiff, George A. Brown, in an affidavit dated December 7, 1987 swore, inter alia, as follows:
>
> 'I beg to refer to my affidavit filed herein dated the 27th October, 1987 and beg to state further that I verily believe that the said lands registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 are together worth no more than $10,000.00.'
>
> Subsequently, in a declaration dated January 19, 1988, the same plaintiff declared as follows:
>
> "I am informed and verily believed that the said lands registered at Volume 1072 Folio 413 is valued at no more than $3,500.00.'
>
> Counsel for the applicant severely criticised these two valuations of the plaintiff, Brown, and pointed to two valuations of Lot 96 which were furnished on the applicant's behalf. The first of these relates to an inspection of Lot 96 which was done on July 27, 1988 and which resulted in the property being valued as of July 27, 1987 at $180,000.00; the second valuation which was in respect of an inspection done on September 3, 1988 valued the property as at that date at $250,000.00. Both valuations, it is to be observed, post-dated all the steps taken by the plaintiffs to become registered proprietors of Lot 96. It is therefore, impossible to contend that the plaintiffs, or either one of them, knew or ought to have known of these valuations at the time that they (the plaintiffs) were seeking to acquire Lot 96. It is a notorious fact that in the decade 1970 - 1980

> "the value of land in Jamaica depreciated greatly and that this phenomenon applied island-wide. Obviously, the Cardiff Hall Estates subdivision in Saint Ann did not escape this general depreciation, hence the difficulty which the plaintiffs encountered in attempting to dispose of the land registered at Volume 1072 Folio 645, and the fear expressed that they would experience similar difficulty in selling Lot 96 and the other lands, all of which formed part of the same sub-division. It is, too, to be remembered that by the time the plaintiffs resorted to sale of land proceedings the total sum of the judgment debt and costs owing to them had increased with the accretion of interest to an amount of $14,128.43. It is also to be noted that in making the affidavit and declaration above referred to the plaintiff, George A. Brown, prefaced his valuations, in the one by the words 'I verily believe' and in the other by the words 'I am informed and verily believe'. This suggests that in both instances he was speaking as to information given to him rather than from information within his personal knowledge. The question is, did he hold an honest belief in the statements made in these two documents? In this regard I agree with the submission of counsel for the plaintiffs that an honest belief, no matter how unreasonable, cannot constitute fraud. In the circumstances of this case, and bearing in mind the fact that the onus is on the applicant to prove fraud, I cannot say that the plaintiff, George A. Brown, did not honestly believe the contents of these two documents which he made."

It cannot be ignored as the judge appeared to have done, that the evidence of valuation was provided by this respondent himself, a person who did not pretend to any skill or expertise in valuing land. Such a valuation was not an independent valuation given by an expert in the field. It was, with respect, entirely valueless. Nor was the judge entitled to take judicial notice of depreciated land values in any decade. The rise and fall of land values is not a "notorious fact", which obviates

the need to call evidence. The point at issue was the value of land at the material time the affidavit was made. The judge's personal knowledge of the value of land at any given time in historical terms cannot be of a fact of which he can take judicial notice. Further, in disagreement with the judge, it is nothing to the value of the document that the evidence was hearsay. Such hearsay evidence is indeed allowable but only where the deponent sets out the source of the information and the grounds of belief. See section 400 the Civil Procedure Code. With respect to this affidavit albeit thoroughly worthless, it was put forward by the respondent Brown with the intention that the Court should act upon the representation therein contained. The valuation of the lands, in respect of which Mr. Brown was seeking leave to have vested in his name and that of the other respondent, was a matter of importance, because, based solely on Mr. Brown's valuation, they would be acquiring lands of the judgment debtor in area, far greater than that parcel which they had unsuccessfully sought to purchase. I will return to this point hereafter.

Seen in this light, the possibility of fraud is manifest. But the matter does not end there. The respondent Brown used as well, a procedure to have the land vested in himself, that has no warrant at law. He can hardly plead ignorance. He knew the procedure of sale of land. He had invoked it a few short years before in regard to the same judgment debt. He is an Attorney-at-Law. Ignorantia iuris haud excusat applies to all citizens alike, but he knew the law. His conduct cannot, in the circumstances, be regarded as negligent: it was deliberate. It seems to me that the entire conduct of this respondent calls for scrutiny as it relates to his registering the appellant's land in his name.

No where in the learned judge's judgment did he address the question that the respondents' method of execution to judgment was unsupportable and that therefore Master Vanderpump had no jurisdiction whatever to vest the appellant's land in the respondents. Indeed, the impression created by the judge, was that (a) the depreciation in land values and (b) the previous abortive attempts to dispose of other of the judgment debtor's lands rendered it perfectly correct to vest land in a judgment creditor without any sale whatever taking place. I have no doubt that if the judge had considered for a moment that the proceedings by way of sale of land, involve necessarily a sale, the fruits of which would satisfy the debt and the balance, if any, returned to the debtor, he would not have dealt with the matter in the wholly regrettable and unsatisfactory way he did. He was content to say, as the extract from his judgment shows, that once the respondent had a registered title, the manner of that registration was an irrelevant issue. In the situation which occurred, viz, on a valuation of the lots put at less than the judgment debt, it permitted the lands to be vested in the respondents as judgment creditors. In this way, other lands of the judgment debtor could be vested in the respondents until all the judgment debtor's lands were similarly acquired. But take the contrary situation where the value of lands being vested, exceeded the debt, how would the difference be refunded? Would that refund manifest itself in the return of a portion of the land or in money? Whatever the circumstances, the value placed on the land would be that of the respondent Mr. Brown.

Having succeeded by the order of Master Vanderpump dated 10th December, 1987 in obtaining the necessary certificate of sale of the three lots, he then applied to the Registrar of Titles to transfer title of one of these, the appellant's in the names of himself and the other respondent. He served upon

the Registrar of Titles, a document intituled Certificate for Sale of Land. It was accompanied by a declaration which values the appellant's land "at no more than $3,500." The certificate recites that the respondents have been declared "the purchasers on the 10th day of December, 1987 of the right, titles and interest of Cardiff Hall Estates Limited.....".

Clearly there had been no sale. Accordingly, there could be no purchase. The respondents were not purchasers of any interest in the judgment debtor's land. They had most assuredly acquired the judgment debtor's land and the other two lots but those lots had not been "purchased." It would be a gross misuse of language to term that acquisition, a purchase. To so describe it, is far from the truth.

But more importantly, that use of word "purchaser" is not supportable in law. "Sale" is co-relative to "purchase." per Channell J., West London Syndicate v. Inland Revenue Commissioners [1898] 2 Q.B. 507 "and prima facie, means a sale effectual in point of law.....". A "sale" means the exchanging of property for money and applies to a sale of land and to a sale of chattels equally. An agreement to extinguish an existing debt if land is transferred, is not a contract for the sale of land. Simpson v. Connolly [1953] 1 W.L.R. 911. It is clear from these statements of the law that a sale requires a consensus ad idem between two parties and consideration. The Registration of Titles Act does not give to the word "purchaser" any statutory definition. It therefore bears the same meaning as in the ordinary use of language.

The issue of that certificate in my view, was entirely misleading. The respondent Brown knew that there had been no purchase but nevertheless, submitted a document which he knew to be false in order to have title transferred to himself and the other respondent. Regrettably, the judge below never

addressed his mind to this aspect of the case. He considered Mr. Brown's valuations valid and held that the respondent had an honest belief in his valuation. That, he concluded, could not amount to fraud. Regrettably, the importance of this document was never addressed by the judge. If the conduct of the respondent in registering the lots in his name was under examination, then this document which was the proximate cause of the registration could hardly escape attention.

There is another matter which bears examination. The judgment debtor Cardiff Hall was since 1975 a company in voluntary liquidation. A liquidator Mr. Brian Mair had been appointed but he had migrated to the knowledge of the respondents. No appearance was ever entered to any of the proceedings initiated by the respondents either to obtain judgment or to recover the fruits of their judgment. The question of service of the proceedings in this connection is, I think, of significance.

Service of the writ issued by the respondents against the company was effected by handing the writ to a "Mr. G. West, Accounts" on 18th November, 1977 at the company's registered office. But service was never effected on the liquidator. He had long since migrated to the United States. The respondent Brown was well aware that Mr. Brian Mair was the liquidator of Cardiff Hall and that he had migrated. His view was that it was the liquidator's responsibility to monitor service on the company itself.

As a lawyer, he would be well aware that in those circumstances, it would be the liquidator, whoever he might be, who would have the power to deal with the claim being made by himself and the other respondent. See section 224 (1) (e) and (f) of the Companies Act which is very relevant in this regard.

"224.—(1) The liquidator in a winding up by the Court shall have power with the sanction either of the Court or of the committee of inspection—

(a - d).....

(e) to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(f) to compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory, or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof."

But nowhere in any affidavit has he stated as a fact how service was effected upon the liquidator. Incidentally, it would seem to me that if he was seriously interested in completion of the sale agreement, he would have included a claim for specific performance but curiously he only claimed to recover the deposit with interest thereon. This conduct, I would incline to think curious, if not highly suggestive. Cardiff Hall, he was aware, owned several lots. One is entitled to ask what reason could the company have for not completing the sale if the liquidator who had sole power to make arrangements with

creditors, had been advised of the company's liability. Logically, it stood to gain. That judgment thereafter entered in default of appearance, could scarcely cause any surprise with that beginning. Such evidence as appears on the record in regard to notification of Sale of Land proceedings on 10th December, 1987 shows that a notification was forwarded by registered mail to "Liquidator" at an address at which the liquidator neither resided nor carried on business - viz, 4 West Kirkland Heights. This could not be regarded as effective service for the likelihood of the proceedings being brought to the attention of the liquidator was quite remote. Mr. Henriques had argued that the hearings regarding the various sale of land proceedings were ex parte applications. I do not suppose it would be inaccurate to describe the hearings as ex parte if it can be concluded that it was never intended to serve the proceedings on the liquidator. But service in this case, was obligatory.

In his judgment at p. 99, Walker J, referred to a note on the United Kingdom R.S.C. Order 65 rule 3/5 which provides -

> "**Company in Liquidation.**—Where an order has been made for winding up leave to commence proceedings must first be obtained from the Court which made the order (Companies Act, 1948, s. 231) and the writ is served personally on the liquidator. In voluntary liquidation no leave is required (**Tandberg v. Strand Wood Co.**, Buckley, J. (unreported), April 10, 1905), and the writ may be served on the liquidator or on the company."

It makes a distinction between service on a company under voluntary winding up and one by the Court. In the latter, leave to continue proceedings is necessary from the Court and the writ is served personally on the liquidator. In the former, the writ may be served on either the company or the liquidator.

Documents being served on a company may be delivered at the registered office or sent there by registered mail: section 370 Companies Act. So far as the liquidator is concerned, I understand the note to mean that in both types of liquidation, service on the liquidator is personal.

Although it cannot be stated definitively that service of all documents on a liquidator must be personal, there seems little doubt that he too should be served. In the instant case, the respondent Brown knew that the company was no longer carrying on business and he was aware as well of the identity of the liquidator. He never attempted to serve the liquidator personally and the reason therefor is not far to seek. He was of opinion that the liquidator had the responsibility of "monitoring proceedings against the company." The liquidator was "deemed served with all proceedings relating to the writ for sale of land under the Rules of the Companies Act." In one instance only, was notice of proceedings set for 10th December, 1987 sent to the liquidator and then at an address viz 4 West Kirkland Heights which was not his correct address. In the circumstances of this case, this respondent knew the true facts with regard to Cardiff Hall. He did not in fact serve the liquidator. His non-service on the liquidator is, in my view an element to be considered in determining whether fraud existed.

It is not inappropriate to observe that at no time in the affidavits seeking leave to issue writs for sale, did Mr. Brown bring to the Court's attention the fact that the company was in liquidation. As an Attorney of some experience, he would not be unaware of the rights of other creditors where a company is in liquidation. For example see section 299(1) of the

Companies Act which provides -

> "229.—(1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up."

This coincidence of failure by the respondent Mr. Brown, to make full and frank disclosure to the Court which results in considerable benefit to him, is, in my judgment, not without significance. I am not concerned with a lay-man but with a lawyer. The conclusion seems inevitable that the concatenation of events which I have identified, represented this respondent's modus operandi to acquire, the judgment debtor's property and as well, the appellant's in extinguishment of his deposit. It is incredulous that a prospective purchaser of one lot of land who sues to recover the deposit on that lot ends up owning not one lot, but three lots which he alleges belong to the vendor without purchasing any of them. But it is beyond incredulity when one of the acquisitions in reality formed no part of the assets of the vendor.

The statement of affairs of the company which is a public document was duly filed by the liquidator of the company on 22nd May, 1975. Among the documents filed was a schedule of unsold lots, and these did not include the appellant's lot No. 96. Mr. Brown did not feel obliged to make enquiries in this regard at the Registrar of Companies for if he had prudently done so, he must have observed that omission. His check was at the Registrar of Titles where he found that there had been no transfer of this lot. Mr. Brown well knew that the judgment debtor was in liquidation. But he shut his eyes to

what was required of any creditor with his knowledge of the true status of the company. He properly ought to have made enquiries at the Registrar of Companies to satisfy himself as to the company's land assets. The discrepancy would have put him on enquiry because he had an earlier experience in which a lot registered at Volume 1072 Folio 645 which both respondents had purchased at a price beyond the reserve price could not be registered, because it had been acquired by some third party. This lot curiously enough, was not among the judgment debtor's list of unsold lots. At the Sale of Land enquiry before the Registrar, Mr. Brown was obliged to disclose that the judgment debtor was in liquidation. But he did not. He could not ignore the fact that for all he knew, the company may have indeed been dissolved at the time. I have, of course, no evidence whether it was or not, and I do not suggest it was.

## Conclusion

The appellant cannot succeed in recovering his land unless he brings himself within section 161 (d) of the Registration of Titles Act -

> "161. No action of ejectment or other action, suit or proceeding, 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 - 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, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;"
>
> (f) .....

Fraud is not defined in the Registration of Titles Act but in similar statutes in New Zealand, it has been interpreted as meaning actual fraud, not constructive or equitable fraud. The locus classicus often relied on, is Assets Co. v. Mere Roihi [1905] A.C. 176 at p. 210. There Lord Lindley stated the law in these terms -

> ".....by fraud in these Acts is meant actual fraud, i.e., 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 a 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. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

This case was followed by this Court in Timoll-Uylett v. Timoll S.C.C.A. 28/76 (unreported) 5th December, 1980. Kerr J.A.

delivering the judgment of the Court said - at p. 6

> " I accept as a correct statement that "fraud" in the Registration of Titles Act means actual fraud i.e. "dishonesty of some sort" - but the question will always be "what sort?"

I therefore accept that in this connection, fraud is infinite in its variety, and must involve a deliberate or conscious act of dishonesty on the part of the registered proprietor. There is one other point which I think need to be made at this point and was illustrated in the case cited. A distinction is to be made between the case of an original applicant for registration and a party dealing with the registered proprietor.

> ".....while the transferee need not concern himself with matters behind the screen provided by the Certificate of Title the original applicant cannot use the certificate to shield his own mala fides in procuring the Registered Title. His position is clearly not as sheltered as for example the bona fide purchaser for value who takes under a title which on the face of it is free from fault."

per Kerr J.A. (ibid) at p. 8. In this case, the concern is with the respondent Brown, an original applicant.

The textbook writers do provide some assistance in this regard. We were referred to the Law and Practice relating to Torrens Title in Australasia by E.A. Francis Volume 1 (1972 ed.). At pp. 602 - 603 of that work, he sums up the legal position of fraud as follows -

> "1. No definition is given, either by statute or by judicial decision of what constitutes fraud, nor, it seems, is any such definition possible.
>
> 2. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.
>
> 3. Fraud must involve an element of dishonesty or moral turpitude.

> "4. Notice of the existence of any trust, or unregistered instrument, does not of itself constitute fraud, but may be an element in the establishment of the existence of fraud.
>
> 5. Abstaining from inquiry, when suspicions have been aroused, may constitute fraud.
>
> 6. The presentation for registration of a forged or fraudulently obtained instrument does not constitute fraud if the person presenting it honestly believes it to be a genuine document.
>
> 7. The fraud to which the sections refer is that of the registered proprietor or his agent.
>
> 8. Gross negligence without mala fides will not be regarded as fraud in New Zealand, or, it seems, in Australia."

I accept this summary as useful guidelines, relevant to the proper consideration of the defeasibility by fraud of title under the Torrens system of registration of land which applies in this country.

Before applying these principles to the facts and circumstances of the instant case, I must deal with the case of Boyd v. Wellington Corporation [1924] N.Z.L.R. 1174 which was cited to us. In that case the plaintiff sought a declaration that a Proclamation vesting the plaintiff's land in the defendant was void for want of compliance with certain mandatory statutory requirements, that the registration of the Proclamation was fraudulently or otherwise wrongfully obtained and that the plaintiff was entitled to have the Land Transfer Register corrected and rectified by the removal therefrom of the entry of such registration. It was held that even assuming the Proclamation to be void, its registration under the Land Transfer Act had conferred on the Corporation, in the absence of fraud, an indefeasible title to the land affected. The Court also held that there was no evidence of fraud. It was

contended before us that the instant case and the case cited were on all fours and accordingly the appellant's claim should similarly be dismissed.

That case is authority for the proposition that any person who without fraud, succeeds in procuring himself to be registered a proprietor of land under the Act (in Jamaica, the Registration of Titles Act) has an indefeasible title whether he is a purchaser for value or not and although the documents which form the basis of his registration are absolutely inoperative in themselves. We will see in a moment whether this principle enures to the benefit of the respondents.

Were the respondents registered as proprietors of the appellant's land through fraud? In order to have their names registered as proprietors, the respondent Brown submitted (inter alia) two documents which form part of the Record, viz:

(i) Certificate for Sale of Land;

(ii) Declaration of George Brown.

It is, I fear, necessary to recite the material portions of the contents that -

> "TO: The Registrar of Titles
>
> This is to certify that ROBERT D. HONIBALL of 1 Great House Boulevard, Kingston 6 in the parish of Saint Andrew, Business Executive and GEORGE ALFRED BROWN of 6 Wagner Avenue, Kingston 8 in the parish of Saint Andrew, Attorney-at-Law, have been declared the Purchasers on the 10th day of December, 1987 of the right, titles and interest of Cardiff Hall Estates Limited, a Company duly incorporated in Jamaica with its registered office at 35 Trafalgar Road, Kingston 10 in the parish of Saint Andrew in the land mentioned and described in Certificates of Title registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 of the Register Book of Titles and that the land aforesaid was sold pursuant to an Order of the Supreme Court of Judicature of Jamaica dated the 10th day of December, 1987."

As to the Declaration, it provided a valuation of the appellant's only lot being registered in the following terms -

> "4. I am informed and verily believe that the said lands registered at Volume 1072 Folio 413 is valued at no more than $3,500.00."

With respect to the first instrument, it told a lie. It stated that the respondents had been declared "the Purchasers on the 10th day of December, 1987 of the right, titles and interest of Cardiff Hall Estates Limited," and later, "that the land aforesaid was sold pursuant to an Order of the Supreme Court of Judicature of Jamaica dated the 10th day of December, 1987." Those statements were manifestly false. They were made by him wilfully: he knew he was not a purchaser of these lots. Nor could he honestly believe he was. That was dishonesty and in my judgment, amounts to actual fraud. It follows that he had fraudulently procured himself and the other respondent to be registered as proprietors on the title and to deprive the appellant of his land by fraud. This instrument was, in my view, voidable. Until set aside by order of the Court, it remained valid. The Registrar of Titles was constrained to act in accordance with its terms for on the face of it, it appeared regular. But the judicial process which allowed that registration to be effected was a nullity because the Master had no power whatever to short-circuit execution by sale of land proceedings to vest title in the respondents. In my view, Boyd v. Wellington Corporation (supra) is distinguishable.

Moreover, I think the false statement made in that instrument intended to have the respondent registered as proprietor, amounted to an offence under the Registration of Titles Act, section 170. It provides (so far as is material) -

> "178. If any person wilfully makes any false statement or declaration in any application to bring land under the operation of this Act, or in any application to be registered as proprietor, whether in possession, remainder, reversion or otherwise,
> .....
> .....
> such person shall be guilty of a misdemeanour, and shall incur a penalty not exceeding one thousand dollars, or may at the discretion of the Court by which he is convicted, be imprisoned with or without hard labour for a period not exceeding two years; and any certificate of title, entry, erasure or alteration so procured or made by fraud shall be void as against all parties or privies to such fraud."

The valuation provided by this respondent was false. The unimproved value of the appellant's lot alone, was $38,000. The unimproved value of the land is a matter of public record. It is a notorious fact that the unimproved value of land bears no relation whatever to the market or commercial value of land. In 1981, when this respondent was endeavouring to sell the lot 109 registered at Volume 1072 Folio 645 he obtained a valuation of that lot which is in the same sub-division as the appellant's. That valuation carried out by an independent valuator on his behalf, put the market value at $8,000 and the price on a forced sale at $6,000. That plot was approximately 22,425 square feet. The appellant's land area was 72,840 square feet. He could not therefore honestly believe that the value of the appellant's 1.67 acre lot and the total of three lots was as he stated. "This was an expression of opinion not honestly entertained and intended to be acted upon. It cannot be regarded otherwise than as a fraud." I adopt this statement of Willes J. in Anderson v. Pacific Insurance Co. [1872] L.R. 7 C.P. at p. 69.

The respondent put forward documents to the Court in the proceedings leading up to the appellant's land being vested in him, which contained statements or misrepresentations which he could not honestly believe to be true, e.g. valuations of lots and intending them to be acted upon. He also concealed relevant facts e.g. that the judgment debtor was in liquidation, his non-service of documents on the liquidator, his persistence on standing on "his legal and equitable rights" when he was advised that lot 96 was the appellant's land which he had purchased in 1972, and in respect of which he held an unregistered transfer. The reply courteous from this respondent's attorneys when he was apprised of the cancellation of the appellant's title was -

> " Our clients obtained Title by virtue of due process of law and by operation of the Registration of Titles Act."

He had not of course, obtained the appellant's land by any process known to law. His parting thrust was -

> ".....the alleged equity which your client claims appears clearly to be statute barred."

No question of limitation of action arose because the appellant was in possession of his land, until 1988 when he was dispossessed. It was then that any cause of action accrued. Time only began to run from that date. These were all conscious acts on this respondent's part.

In my judgment, there is ample proof of fraud on the part of this respondent. I would therefore allow the appeal against the order of Walker J., in the Court below and set aside the order of Master Vanderpump dated 10th December, 1987. The Certificates issued to the respondents must be cancelled and a new Certificate of Title issued to the appellant.

I would also order the papers to be submitted to the Director of Public Prosecutions for such action as he may be advised under the Registration of Titles Act. The appellant is entitled to his costs both here and below.

DOWNER, J.A.

Dr. Christian Alele, the appellant is an injured man. He had bought lot 96 in Cardiff Hall and planned to develop it. Then he found out that George Brown an Attorney-at-Law had registered his name on the title of lot 96. Alele then went to the Supreme Court to recover his estate. That court confirmed Brown's title. So Alele now seeks to set aside the judgment of Walker J, made on a motion entitled **Robert Honiball & George Brown v. Cardiff Hall Estates Ltd.** The company was in liquidation. This judgment dismissed the notice of motion and to appreciate the effect of the dismissal, it is appropriate to refer to the remedies Alele sought.

> "1. An Order giving the said CHRISTIAN ORITSETIMEYIN ALELE liberty to intervene as an interested party in Suit C.L. H-150 of 1977 commenced by Robert D. Honiball and George A. Brown against Cardiff Hall Estates Limited and to be joined as Second Defendant to the said action, and
>
> 2. An Order setting aside the Ex Parte Order of the Learned Master dated the 10th day of December, 1987 in the said action and also setting aside the cancellation of the Certificate of Title registered at Volume 1072 Folio 413 for the land known as Lot 96 Cardiff Hall Estates in the Parish of Saint Ann and setting aside the issue of Certificate of Title registered at Volume 1209 Folio 991 for the said land in the names of the Plaintiffs and setting aside the judgment, in favour of the Plaintiffs entered in default of appearance on March 29, 1978."

The substance of the matter is that the proceedings below were so entitled because Alele sought to intervene in proceedings between Brown and Cardiff Hall Estates Ltd. When he sought to intervene on the 1st of June, 1989, the proceedings in which intervention was sought was already concluded before

the Master on 10th December, 1987. In the light of that, the first issue to be determined was whether Alele had a right to institute proceedings as an intervener or against Brown et al.

> **Did the combined effect of Sections 161 & 158 (2) of the Registration of Titles Act - The Act - give Alele a right of action against Brown for restitution of Lot 96?**

In a recent case **DoJap Investments Ltd. v. Workers Trust & Merchant Bank Ltd.** (unreported) S.C.C.A. No. 22/90 delivered February 11, 1991 this Court awarded restitution to the claimant by virtue of common law and equitable decisions. This was to rectify unjust enrichment by a vendor of realty who had forfeited a large deposit on the failure to complete the sale. By contrast in this case, Alele relies on statutory provisions to award him restitution to correct the unjust enrichment which accrued to Brown through fraud. It is therefore necessary to examine section 161 and after that section 158 (2) of The Act. The first section reads as follows -

> "161.— No action of ejectment or other action, suit or proceeding, 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-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, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;
>
> (e-f) .....
>
> 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."

Alele sought to cancel the Certificate of Title registered in Brown's name and the only way he could succeed was if he alleged and proved fraud on the part of Brown. There is no allegation of fraud in the Notice of Motion, but it was averred in the affidavit in support of the motion at paragraph 7. It reads thus -

> " That I do say that the Order made by the Master on the 10th day of December 1987 and the subsequent vesting and cancellation of my Title in the lands registered at Volume 1072 Folio 413 was based on evidence given fraudulently and dishonestly in that the said Affidavit of the Second Plaintiff, George A. Brown, an Attorney-at-Law, and sworn to on the 7th day of December 1987 wherein it was deponed to that the said parcel of land registered at Volume 1072 Folio 413 and two other parcels were together worth no more than $10,000.00 is a statement which was known to be false and/or which was made recklessly not caring whether it was true or false and constitutes a fundamental misrepresentation to this Honourable Court. That in truth and in fact the said land which was registered at Volume 1072 Folio 413 was worth far in excess of $10,000.00 and I do verily believe that the true value of the said lands ranged between $180,000.00 and $250,000.00."

As for the right to intervene, here is how the learned judge disposed of the issue at p. 104 of the Record -

> ".....Admittedly, the applicant does have an equitable interest in Lot 96 but the fact of the matter is that he has no interest whatever in the subject matter of the plaintiffs' claim against the defendant and his intervention is in no way necessary to a determination of the issues between the plaintiffs and the defendant. In this sense he is, in my judgment, a stranger to the plaintiffs' action and, as such, has no legal right to intervene in that action. His application for leave to intervene must therefore fail."

However, once there was an allegation of fraud, then section 161 (d) of The Act gives Alele a right of action. It provides that an action suit or proceeding shall lie in the case of a person deprived of any land by fraud even though that person is a registered proprietor. So the motion below was properly instituted, albeit it was described as an intervention in proceedings already concluded.

The principal remedy sought by Alele is the cancellation of the certificate in Brown's name in respect of lot 96. Also sought was the setting aside the Order of the Master dated the 10th day of December 1987, and the issuing of a new Certificate of Title and duplicate in Alele's name. Section 158 the other provision of The Act which enables Alele to ask for restitution of his property reads thus -

> "158.—(1) .....
>
> (a-b) .....
>
> (2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar—
>
> (a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or
>
> (b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge."

The combined effect of section 161 which gives the right of action and section 158 which stipulates the relief, is that they provide a classic instance of the remedy of restitution as a corrective to the unjust enrichment of Brown at the expense of Alele. It was unjust because if Alele's allegations are proved,

Brown would have gained lot 96 by fraudulent evidence and conduct.

The action having been properly instituted, the larger issue is whether the action ought to have succeeded in the court below.

> **Did Alele establish on the evidence that Brown resorted to fraud before the Master to become the registered proprietor of Lot 96?**

(I) Concealment

The presumption must be that Mr. George A. Brown, the respondent knew what he was doing when he swore to his affidavits for he is an Attorney-at-Law and officer of the Supreme Court. Brown brought an action against Cardiff Hall Estates Ltd. for a debt of $5,000, with an additional claim for 10% interest. He secured a default judgment on 29th March 1978, for $9,636.64 with taxed costs. The date is important for on that date Cardiff Hall Estates Ltd. was in liquidation and that was its status from 20th November, 1975. Moreover, it was in liquidation when the Statement of Claim was filed on 14th November 1977. It is important to establish at the outset that Brown knew of the company's status from the time he instituted proceedings. Here is the material part of his affidavit confirming that he knew that the company was in liquidation from 1977 -

> "4. I refer also to a letter dated the 12th May, 1977 addressed to Cardiff Hall Estates Limited written by this deponent which advises of the claim that the Plaintiffs have against the Defendant and which threatened legal proceedings without further notice if the Defendant failed to complete the sale to the Plaintiffs' (sic) within thirty (30) days of that letter. Exhibited hereto is the said letter marked "GAB2" and copied at the foot thereof is a registered slip #5129 which evidences that it was sent by registered mail to the registered office of the Defendant at 35 Trafalgar Road, Kingston 5.

"Exhibited hereto is a copy letter dated the 5th August, 1977 written by Lai Corporation Limited.

5. On or about the 4th and the 6th April, 1978 the deponent spoke to Mr. Redwood a member of the firm of Mair, Russell & Partners, Accountants and Auditors aforesaid about the matter of completion of the sale to the Plaintiff's and the (sic) deponent was advised by Mr. Redwood that that firm was handling the accounts of the Defendants and that Brian Mair was the liquidator and that the Writ filed by the Plaintiffs (referring to this claim herein) was forwarded by George West to Lai Corporation a Director of the defendant Company."

It is also essential to establish that Brown knew of Mair's address from August 1977. This can be noted from the copy letter exhibited to his affidavit. It is as follows -

" August 5, 1977

Messrs. Mair, Russell & Partners,
2 West Arcadia Avenue,
Kingston 5.

Dear Sirs:

Re: Cardiff Hall Estate Lot 309
Plantation & Unity Pen
St. Ann

We herewith enclose correspondence dated May 12, 1977 in respect of the above for your kind attention.

Yours sincerely,
LAI CORPORATION LTD.

Per:
.....
E.A. Lai

c.c. G.A. Brown, Attorney-at-Law,
60 Knutsford Boulevard, Kgn. 5."

The next step involves Alele so it is important to note what it entailed and what was omitted by Brown in his application to the Master. Brown secured a Writ of Sale of Land for lot 96 from the Master on 10th December, 1987. Here are

its terms -

> "(1) That a Certificate of Sale of Land be issued in the names of the Plaintiffs against lands registered at Volume 1072 Folio 413 Volume 1072 Folio 674 and Volume 1103 Folio 394 of the Register Book of Titles subject to existing Encumbrances.
>
> (2) That the terms of the Order of the Court dated the 24th April, 1987 be accordingly varied.
>
> (3) That the Registrar of Titles do cancel Certificates of Title to the lands mentioned above and that new certificates and duplicates thereof be issued in the names of the Plaintiffs or their nominees subject to any existing encumbrances." (emphasis supplied)

It is useful to analyse this order as regards its legal effects and note the affidavit in support of the summons on which the order was based. As for this affidavit, it was dated 27th October, 1987 and nowhere in it does Brown disclose that the company was in liquidation. To conceal so important a fact from the Master was the initial step in Brown's conduct which merits close examination. Such conduct ought to be measured against Lord Cairns' dictum in Peck v. Gurney [1873] L.R. 6 HL. 377 at 403. It reads thus -

> "There must be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

There was a deliberate withholding of facts which made it appear that Cardiff Hall was in control of its assets when the truth was, such assets were in law controlled by the liquidator. It led the Master to believe that there was real estate which was under the control of the company, and this was not so.

The other feature as regards the affidavits which was note-worthy was the absence of any cross-examination. This was

so because proceedings before the Master were conducted with Brown as the only party and these circumstances must be explained

But before that, it must be admitted, the fraud is difficult to prove especially in this case, where Alele sets out to do so by relying on Brown's conduct and affidavits before the Master. Again there was no cross-examination before Walker J, so that Alele must establish that Brown's evidence and conduct was tainted by fraud.

(II) **Distortion**

In addition to concealing the fact that the company was in liquidation, Brown must be held responsible for not serving the liquidator at the correct address which he knew from 1977 and in any event was available at the Registrar of Companies from 20th November, 1975. This was the letter written to the liquidator on 17th November, 1987 on behalf of Brown -

> "17th November, 1987
>
> Liquidator
> Cardiff Hall Estates Limited
> 4 West Kirkland Heights
> Red Hills P.O.
>
> Dear Sir:
>
> Re: Robert Honiball and George Brown
> v. Cardiff Hall Estates Limited
> Suit No. C.L. H150 of 1977
>
> You are hereby deemed served with the enclosed sealed copy Summons for Writ of Sale of Land set for hearing on the 10th December, 1987."

Brian Mair of 2 West Arcadia Avenue, Kingston 5 disappears and was never a party before the Deputy Registrar at her enquiry ordered by the Master nor even before the Master herself. This deception of having an important letter sent to an incorrect address is the type of fraud which section 161 of The Act contemplates. Lord Lindley in **Assets Co. Ltd. v. Roihi** [1905] A.C. 176 at 210 described it as "actual fraud" i.e. dishonesty of some sort not what is called constructive or equitable fraud.

It is necessary to examine what follows once this address of 4 West Kirkland Heights was introduced. The following passage from the Deputy Registrar's Report of 4th August, 1987 while conducting her enquiry in the presence of Brown's representative and a representative from the Registrar of Titles reads -

> "There was no appearance by or on behalf of the defendant although sealed copies Notice of enquiry were served on two interested parties, Mr. Brian Mair Liquidator of Cardiff Hall Estates Limited at 4 West Kirkland Heights, Red Hills P.O. and Syndicated Developers Limited at 60 Knutsford Boulevard Kingston 5."

In the light of this convincing evidence of distortion concerning the address of the company and conduct which prevented the liquidator from being present, it is hardly necessary to state that Brian Mair stated in his affidavit that he was never served. Also Alele was never aware of these proceedings, and Ian McConnell who knew of the proceedings denied he had any knowledge of Alele or was ever retained by him although he was a partner in that firm retained by Alele.

(III) <u>Wilful refusal to make enquiry</u>

There is another circumstance which amounted to fraud and it must be examined. Alele has adduced the statutory documents kept at the Registrar of Companies pertaining to the Creditor's Voluntary Winding Up of Cardiff Hall Estates Ltd. He had bought lot 96 from the company and had paid the full purchase price. In 1971, he was the equitable owner with right to the legal title as well. Here is his version -

> ".....Further, on or about the 6th day of May 1971 the Defendant, Cardiff Hall Estates Limited, sent to my Attorneys-at-Law, Messrs. Livingston, Alexander & Levy, an Instrument of Transfer duly executed by the Defendant whereby

> "the aforesaid lands registered at Volume 1072 Folio 413 were transferred pursuant to the aforesaid contract. The Defendant Cardiff Hall Estates Limited also sent to my Attorneys-at-Law with the Instrument of Transfer the duplicate Certificate of Title registered at Volume 1072 Folio 413."

A most important aspect of the Statement of Affairs is that it gives a schedule of unsold lots. Significantly, lot 96 was not there as it was sold and fully paid for. Also Alele had the duplicate Certificate of Title. He was not served, and this was concealed from the Master. This is the other aspect of concealment which to my mind, amounts to fraud. Even if lot 96 was still part of the assets of the Cardiff Hall Estates Ltd., the liquidator would be entitled to institute proceedings against Brown on the same basis as Alele, as Section 299 of the Companies Act makes the following provision. The material part reads -

> "299.—(1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up."

These three instances of fraud made what was stated in Brown's affidavit namely, that lot 96 was owned by Cardiff Hall which was represented as a company in business "absolutely false."

(IV) <u>Brown's deliberate undervalue of lot 96</u>

The other facet of fraud established by the evidence was Brown's evidence in his affidavit of value. He presented this to the Master to secure a Certificate of Sale. He was not a valuer and he knew from previous experience that he ought to have secured the expert evidence of a valuer. He did so in

proceedings with respect to lot 102 when he secured an affidavit from Verdi Heron who had 45 years experience in valuation of Real Estates. Why then did he depart from this procedure when it came to lot 96? The inference must be that he intended to mislead the court. Here are his words. On 7th December 1987, he said -

> "..........
>
> 2. I beg to refer to my Affidavit filed herein dated the 27th October, 1987 and beg to state further that I verily believe that the said lands registered at Volume 1072 Folio 413 (lot 96) , Volume 1072 Folio 674 and Volume 1103 Folio 394 are together worth no more than $10,000.00." (emphasis supplied)

He compounded this untruth when in his Declaration of January 19 1988 to the Registrar of Titles to secure registration of lot 96 in his name he declared -

> "..........
>
> 2. I beg to refer to an Order of the Supreme Court of Judicature of Jamaica dated the 10th December, 1987 lodged herewith and in particular to paragraph 3 wherein it is ordered that the Registrar of Titles do cancel Certificate of Title registered at Volume 1072 Folio 413 and two others and to issue in place thereof a new Certificate of Title in the names of the Plaintiffs who are ROBERT D. HONIBALL and GEORGE A BROWN, the declarant.
>
> 3. I hereby request that the said new Certificate of Titles be issued with a Plan.
>
> 4. I am informed and verily believe that the said lands registered at Volume 1072 Folio 413 is valued at no more than $3,500.00.
>
> AND I MAKE THIS SOLEMN DECLARATION conscientiously believing the same to be true and by virtue of the Voluntary Declarations Act."

Apart from being of no evidential value, see Re J. L. Young Manufacturing Co. Ltd. [1900] 83 L.T. 418 both these documents are distortions of the truth. Furthermore, it must be noted that by section 134 of The Act, this Declaration of January 1988 was the basis on which the Registrar of Titles was induced "to enter his name on the Register Book" after the "land so specified shall have been sold under any such writ." Further, this section empowered the Registrar of Titles on "receiving the certificate of sale" to treat the purchaser as "deemed the proprietor of such land."

Apart from the consequences in civil law, Brown's action in making this false declaration, could be brought to the attention of the Director of Public Prosecutions pursuant to section 180 of The Act.

Alele on the other hand, on the issue of value, sought valuation reports from two reputable appraisors and Real Estate Brokers. C.D. Alexander and Company puts the value on lot 96 at July 27, 1987 as $180,000. The report of Orville Grey and Associates is even more significant. It gives the unimproved value on the taxation roll as more than ten times Brown's valuation. This report was so comprehensive that it even gives the valuation No. 016,05-322-124 on the tax roll. It is notorious in Jamaica that the unimproved value for taxation is always considerably below the market value.

Counsel for the appellant, cited Clerk & Lindsell on Torts 15th edition which has a useful heading at paragraph 17-06 captioned Misstatement of opinion. It reads -

> " As with intention so with opinion; the question whether a man does or does not entertain a particular opinion is a question of

> "fact. An expression of opinion not honestly entertained and intended to be acted upon cannot be regarded otherwise than as a fraud see per Willes J. Anderson v. Pacific Insurance Co. [1872] L.R. 7 C.P. 65, 69 and a statement of opinion is always a statement of fact to the extent that it is an assertion that the maker does in fact hold that opinion Per Lord Evershed M.R. Brown v. Raphael [1958] Ch. 636, 641. If a man says he expects so and so when he does not, his statement is an untrue statement of fact Karberg's Case [1892] 3 Ch. 1. 11."

The cumulative effect of Brown's deliberate concealment of the status of the company, the part he must have played in contriving for the liquidator's absence from proceedings before the Master and the distortion of the truth by making the gross under-value is best summarized by citing Aaron's Reefs Ltd. v. Twiss [1896] A.C. 273 at p. 281 where Lord Halsbury said -

> " Then inasmuch as the jury have found that, I think, upon very good evidence in the prospectus itself, it remains only to consider the final question, namely, whether or not there was evidence for the jury which would justify them in finding that this was a fraudulent prospectus—that these statements were fraudulent and false. Now, in dealing with that question, again I say I protest against being called on only to look at some specific allegation in it; I think one is entitled to look at the whole document and see what it means taken together."

Emphasizing the point that it is the overall effect which determines the falsity of the statement, Lord Halsbury continues thus -

> ".....If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in shewing that any specific statement is untrue."

See also Lord Brampton's statement in **George Whitechurch Ltd. v. Cavanah** [1902] A.C. 117 at p. 145. The approach is very much like a criminal lawyer's assessment of circumstantial evidence to establish guilt.

What consequences flow from a finding of fraud?

Perhaps the best approach to this issue is to cite Denning L.J. in **Lazarus Estates Ltd. v. Berverley** [1956] 1 Q.B. 702 at 712 -

> ".....No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, nc order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever: see as to deeds, **Collins v. Blantern** [1767] 1 Smith's L.C., 13th ed. 406; as to judgments, **Duchess of Kingston's case** [1776] 2 Smith's L.C. 13th ed. 644, 646, 651 and as to contracts, **Master v. Miller** [1791] 1 Smith's L.C., 13th ed., 780, 799. So here I am of opinion that if this declaration is proved to have been false and fraudulent, it is a nullity and void and the landlords cannot recover any increase of rent by virtue of it."

As it is sought to set aside the Master's judgment, it is useful to quote directly from the **Duchess of Kingston's** case 2 Smith's L.C. 12th ed., 754 at 762 where Sir William deGray L.C.J., Court of Common Pleas said -

> "Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal."

On this basis the Certificate for Sale of Land issued as a result of Brown's affidavit before the Master was vitiated by fraud. There ought to have been a sale for money and it would, in other circumstances be arguable that the Master had no power to

order that Brown's name be placed on the Certificate of Title without there being a sale at public auction or private treaty. See sections 621, 622 and 623 of the Judicature Civil Procedure Code. It is unnecessary to consider this point as a finding of fraud pursuant to section 161 (d) of The Act was the only basis on which the Certificate for Sale could be set aside. See section 68 of The Act and Fraser v. Walker [1967] 1 A.C. 569 - This case has been followed in Jamaica: see Nunes & Appleton Hall Ltd. v. Roy Williams (unreported) C.A. Nos. 64 & 67/84 where the statement by Lord Wilberforce that "it is the fact of the registration and not its antecedents which vests and divests title" was approved.

It was on the basis of the Certificate of Sale that the Registrar of Titles acted. The narrative the Certificate gave was that the property was conveyed to Brown by a sale. It is therefore important to set it out -

> "TO: The Registrar of Titles
>
> This is to certify that ROBERT D. HONIBALL of 1 Great House Boulevard, Kingston 6 in the parish of Saint Andrew, Business Executive and GEORGE ALFRED BROWN of 6 Wagner Avenue, Kingston 6 in the parish of Saint Andrew, Attorney-at-Law, have been declared the Purchasers on the 10th day of December, 1987 of the right, titles and interest of Cardiff Hall Estates Limited, a Company duly incorporated in Jamaica with its registered office at 35 Trafalgar Road, Kingston 10 in the parish of Saint Andrew in the land mentioned and described in Certificates of Title registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 of the Register Book of Titles and that the land aforesaid was sold pursuant to an Order of the Supreme Court of Judicature of Jamaica dated the 10th day of December, 1987.
>
> DATED the 19th day of January 1988."

This remarkable document issued by the Acting Registrar of the Supreme Court tells two lies on its face. Cardiff Hall Estates Ltd. was in liquidation at that time. As the company was in liquidation, the liquidator would, in law, have had control of all its assets. Brown and Honiball certainly did not purchase lot 96. Brown used fraudulent means to obtain a fraudulent certificate which must be set aside. It is a sale that never was. Further, to reiterate the Declaration of George Brown as to the value, was false and Brown knew of its falsity. He knew for he secured a valuation on lot 102 in 1981. This lot was of a much less area and the fair market value given as $8,000. His representation to the Registrar of Titles on lot 96 implied that he was competently advised on the value and that he had been a purchaser of the estate.

It must always be borne in mind that Brown is an Attorney-at-Law. He knew that, if he kept the liquidator away from the Master a dishonest request might slip through the court without notice. His affidavit of 27th October, 1987 is a classic contrivance. He knew as an officer of the court, that an application for a writ for sale of land means that a sale ought to be effected and the proceeds used to pay creditors. Yet he contrived to get his name on the title directly without recourse to a sale. Here is his request in paragraph 14 of his affidavit.

> "14. That alternatively, the Plaintiffs seek leave for the Court to issue a Certificate for Sale of Land in the names of the Plaintiffs re lands registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 subject to the existing encumbrances mentioned thereon."

It was on the basis of this fraudulent request that the Certificate was issued by the Acting Registrar of the Supreme Court. Further, it was the Certificate of Sale so issued which induced the Registrar of Titles to register Brown's name on the

title of lot 96. In Gibbs v. Messer [1891] A.C. 248 the Privy Council had to deal with a dishonest solicitor Cresswell who with an intent to defraud, purported to register a fictitious person as owner to property which belonged to Mrs. Messer. At p. 253 here is how Lord Watson disposed of him -

> "It is clear that the registration of the name Hugh Cameron a fictitious and non-existing transferee, cannot impede the right of the true owner Mrs. Messer, who has been thereby defrauded to have her name restored to the register."

When an Attorney-at-Law gets his name on the Register by inducing the Registrar of Titles to put his name on the Register of Titles by means of a tainted Certificate of Sale, certain consequences must flow. The Certificate of Title in the names of Brown and Honiball must therefore be cancelled as it was issued on the basis of evidence tainted with fraud.

**Why was there no finding of fraud in the Court below?**

The learned judge found that it was not necessary to continue the action with the liquidator as a party. Here is how he puts it at p. 99 of the record -

> "..... Again, the terms of O.65 r. 3(5) of the Rules of the Supreme Court do not seem to me to support the contention of Counsel for the applicant. O.65 R.3 (5) provides inter alia, as follows:
>
> > 'Company in liquidation - where an order has been made for winding up leave to commence proceedings must first be obtained from the Court which made the order (Companies Act, 1948, s 231) and the writ is served personally on the liquidator. In voluntary liquidation no leave is required (Tandberg v. Strand Wood Co., Buckley, J. (unreported), April 10, 1905) and the writ may be served on the liquidator or on the company.'
>
> I conclude, therefore, that the plaintiffs acted within their rights, and in no way fraudulently, in instituting and continuing this action in its present form."

It is substantive law which governs the rights of parties and the Companies Act does make it obligatory for the liquidator to be present in an action after a winding up has commenced although the learned judge stated that -

> ".....I know of no authority and, indeed none was cited to me to support a proposition that in pursuing civil proceedings against a company in voluntary liquidation a plaintiff is obliged either to join the liquidator as a party to the action, or to commence or continue the action in such a form as will disclose the factual position of the company."

There is such statutory authority. Under the heading Provisions applicable to every voluntary winding up. Section 280 of the Companies Act reads -

> "280.—(1) The liquidator may—
>
> (a) in the case of a members' voluntary winding up, with the sanction of an extra-ordinary resolution of the company, and, in the case of a creditors' voluntary winding up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by paragraphs (d), (e) and (f) of subsection (1) of section 224 to a liquidator in a winding up by the Court.
>
> (b) without sanction, exercise any of the other powers by this Act given to the liquidator in a winding up by the Court....."

The reference in section 280 is to section 224 under the heading Liquidation -

> "224.—(1) The liquidator in a winding up by the Court shall have power with the sanction either of the Court or of the committee of inspection—
>
> (a) to bring or defend any action or other legal proceeding in the name and on behalf of the company;....."

The statutory provisions are logical. Who, save the liquidator, would attend to the company's affairs in court since the power of the directors cease once a winding up commences? Order 65 r. 3 (5) therefore ought to be construed, not in the manner proposed by the learned judge, but as a procedural provision as to who may be served. It does not embrace who should institute or defend actions in court as section 224 of the Companies Act occupies that field. Once that error in interpretation was made, then there could be no finding of concealing the status of the company or regarding the failure to serve the liquidator as part of a fraudulent scheme. Nor did the learned judge pay any adequate account to the statement of affairs which the directors of the company were obliged by statute to file, so that the liquidator would know the assets and liabilities of the company. It was here that the absence of lot 96 ought not to have been ignored except to one with a fraudulent intent.

As for the gross under value, here is how the learned judge treated the matter -

> ".....It is also to be noted that in making the affidavit and declaration above referred to the plaintiff, George A. Brown, prefaced his valuations, in the one by the words 'I verily believe' and in the other by the words 'I am informed and verily believe.' This suggests that in both instances he was speaking as to information given to him rather than from information within his personal knowledge. The question is, did he hold an honest belief in the statements made in these two documents? In this regard I agree with the submission of counsel for the plaintiffs that an honest belief no matter how unreasonable, cannot constitute fraud. In the circumstances of this case, and bearing in mind the fact that the onus is on the applicant to prove fraud, I cannot say that the plaintiff, George A. Brown, did not honestly believe the contents of these two documents which he made."

With regard to a somewhat similar submission, Lord Evershed in Brown v. Raphael [1958] Ch. 636 at 647 said -

> "..... It was said that the implied representation as to grounds of belief was in some sense subsidiary; from which it was sought to say that, once the belief put forward was held to be honest, however incredibly, that was the end of the matter. I can find no basis in authority or good sense for that view, and I reject it."

It should be emphasized that Brown knew the correct procedure for obtaining an affidavit of value. He did not secure an independent valuer on this occasion as he did not intend to sell the land and collect his debt, but he intended and did purport to acquire the land for himself. That ought to have been the view of the court below especially as prior to this under valuing, there were the other incidents of fraud of which this was a part. Additionally, the learned judge found that Alele was guilty of laches as he slept on his rights for upwards of twenty years. The fact is that Alele was informed of the Master's Order of 10th December 1978, on June 1988 and his Notice of Motion was filed 1st June, 1989. Having regard to the fact that he now resides in the United States, I do not find undue delay. Further, if Brown were to be allowed to keep the property, the law would have sanctioned enrichment by fraud.

## Conclusion

So important does the legislature regard fraudulent conduct with regard to the Register of Titles, that the declaration of value of 19th January, 1988 might well have attracted section 178 of The Act which imposes criminal sanctions. That section in part reads -

> "178. If any person wilfully makes any false statement or declaration in any application to bring land under the operation of this Act, or in any application to be registered as proprietor, whether in possession, remainder, reversion or otherwise, on a transmission, or in any other application to be registered under this Act as proprietor of any land, lease, mortgage or charge; or suppresses, withholds or conceals, or assists or joins in or is privy to the suppressing withholding or concealing, from the Registrar or a Referee, any material document, fact or matter of information. .....
> .....
> .....such person shall be guilty of a misdemeanour, and shall incur a penalty not exceeding one thousand dollars, or may at the discretion of the Court by which he is convicted, be imprisoned with or without hard labour for a period not exceeding two years; and any certificate of title, entry, erasure or alteration so procured or made by fraud shall be void as against all parties or privies to such fraud."

Be it noted a conviction also vitiates a title procured by fraudulent conduct.

To my mind Dr. Alele has proved his case convincingly and has succeeded in securing the remedy of cancelling the Certificate of Title in the name of Brown and Honiball. Were it not so, there would have been a grave defect in our legal system. The appeal is allowed as the title is defeasible as it was acquired by fraud and at the expense of Alele. The Act usefully specifies that directions can be given to the Registrar of Titles to issue a new Certificate of Title in the name of the person specified for the purpose on the order and that is the appropriate remedy in this case. The appellant should have his taxed or agreed costs both here and below.

GORDON, J.A. (AG.)

On 1st November, 1968 the appellant entered into an agreement to purchase from Cardiff Hall Estates Limited for £5,000 ($10,000.00) Lot #96, part of Cardiff Hall Plantation and Unity Pen in the parish of St. Ann being part of lands formerly comprised in Certificates of Title registered at Volume 1037 Folios 44, 45 and 46 of the Register Book of Titles. Title to this lot was on 6th April, 1971 issued in the name of the vendor and registered at Volume 1072 Folio 413 of the Register Book of Titles. The vendor's attorneys-at-law on or about the 8th May, 1971 sent to the appellant's attorneys-at-law an instrument of transfer duly executed by the vendor pursuant to the said sale together with the duplicate Certificate of Title to the said lot. The appellant on receipt of the instrument of transfer retained it and did not register it. He was contemplating how to develop the land. He did not protect his interest by lodging a caveat by virtue of the Registration of Titles Act.

On 19th January, 1988 the Registrar of the Supreme Court issued the following certificate:

"CERTIFICATE FOR SALE OF LAND

Suit No. C.L. H150/1977

IN THE MATTER OF ALL THOSE parcels of lands registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 of the Register Book of Titles.

TO: The Registrar of Titles

This is to certify that ROBERT D. HONIBALL of 1 Great House Boulevard, Kingston 6 in the parish of Saint Andrew, Business Executive and GEORGE ALFRED BROWN of 6 Wagner Avenue, Kingston 8 in the parish of Saint Andrew, Attorney-at-law, have been declared the Purchasers on the 10th day of December, 1987 of

"the right, titles and interest of Cardiff Hall Estates Limited, a Company duly incorporated in Jamaica with its registered office at 35 Trafalgar Road, Kingston 10 in the parish of Saint Andrew in the land mentioned and described in Certificates of Title registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 of the Register Book of Titles and that the land aforesaid was sold pursuant to an Order of the Supreme Court of Judicature of Jamaica dated the 10th day of December, 1987.

DATED the 19th day of January, 1988

GIVEN under my hand and the SEAL of the Court this 19th day of January, 1988.

(Sgd.) K.S. Harrison
REGISTRAR OF THE SUPREME COURT (Ag.)"

This certificate was issued pursuant to a default judgment for $9,036.64 and costs $159.60 entered in suit brought by the respondents against Cardiff Hall Estates Ltd and sale of land proceedings which followed for enforcement of the judgment. The Registrar of Titles in obedience to this certificate cancelled the Certificate of Title registered at Volume 1072 Folio 413 and issued in lieu thereof a new certificate registered at Volume 1209 Folio 991 in the names of the respondents. The title in Lot 96 Cardiff Hall Plantation thereby passed from Cardiff Hall Estates Limited to the respondents.

The action of the respondents has its genesis in a deed of assignment made on or about the 30th day of September, 1974. By this deed one Donald Cyril Trezel formerly of Discovery Bay in the parish of St. Ann assigned to the respondents his interest in Lot 309 Part of Cardiff Hall Plantation and Unity Pen which he had, on or about the 5th day of February, 1970, agreed to purchase from Cardiff Hall

Estates Limited and in pursuance of which said agreement the assignor had paid to the vendor a deposit of $5,000. The respondents sought by a writ filed on 14th November 1977 to recover from Cardiff Hall Estates Ltd (hereafter called the Company) the deposit of $5,000.00 and interest thereon at 10% per annum from 5th February, 1970 to the date of Judgment or payment; in the alternative, they claimed damages for breach of contract of sale.

On 29th March, 1978 default judgment was entered herein for $9,036.64 and the judgment being unsatisfied, the respondents thereafter by summons obtained an order to issue a writ for sale of land. The order made by the Master on 7th November, 1979 was that:

> "1. The Registrar do make all such enquiries as may be necessary pending the issue of the Writ of Sale of the Estate and interest of the Defendant and that the costs of and incidental to this application be paid by the Defendant and that pending such sale as aforesaid the Judgment Debt herein be charged upon the said lands.
>
> 2. That the land registered at Volume 1072 Folio 645 of the Register Book of Titles be sold at Public Auction by the Bailiff of the Court or failing him by an Estate Agent to be appointed by the Registrar.
>
> 3. That the lands registered at Volume 1072 Folios 310, 311, 313, 314, 315, 335, 336, 341-346 inclusive, 348, 351, 357, 375, 413, 417, 611 615-617 inclusive 624, 642, 643, 650, 674 and 675 of the Register Book of Titles be sold at a Public Auction by the Bailiff of the Court or failing him by an Estate Agent to be appointed by the Registrar.

"4. That the lands registered at Volume 1078 Folios 682-685 inclusive, 687 and 698 inclusive be sold at a Public Auction by the Bailee of the Court or failing him by an Estate Agent to be appointed by the Registrar.

5. That the lands registered at Volume 1103 Folios 392-401 inclusive be sold at a Public Auction by the Bailiff of the Court or failing him by an Estate Agent to be appointed by the Registrar.

6. That the Plaintiffs or either of them be permitted to attend the Auction Sale and bid for the purchase of the property or properties and become the purchaser or purchasers thereof."

Neither the summons nor the affidavit in support thereof is in the bundle filed but the facts are that the judgment debt to be satisfied was $9,036.64 and costs $159.00 against a lot which at the time of deposit some 9½ years before was valued at $15,000.00. The order for sale involved 46 lots in the same subdivision.

By evidence contained in an affidavit filed by the 2nd respondent on 13th March, 1986 in support of a summons for leave to issue a writ for sale of land, the 2nd respondent deposed that pursuant to the order made on 7th November, 1979 the enquiry required by law was held and it was disclosed that all the lots save that registered at Volume 1072 Folio 645 of the Register Book of Titles were encumbered. The proceedings were continued against the lot and:

"5. That between October, 1981 and the 15th October, 1985 when a Certificate for Sale of Land of the said land registered at Volume 1072 Folio 645 was issued in the name of the Plaintiffs, several attempts at a sale by public auction failed and proposed sales by Private Treaty fell through having not reached the reserved price.

"The Plaintiffs having bid beyond the reserved price purchased the lands by virtue of an Agreement for Sale under the Order of the Court dated the 30th March, 1984 (marked 'A' is a copy annexed hereto).

6. That all the documents necessary to vest title in the said land registered at Volume 1072 Folio 645 in the Plaintiffs' names were lodged at the Titles Office on or about November, 1985. That we simultaneously made an application for cancellation of Volume 1072 Folio 645 and requested issuance of a new Title as the Plaintiffs did not have access to the duplicate. The application was however returned with the Registrar's note that the Title had already been cancelled and a new Title issued therefor in the name of a third party.

7. That obviously, between October 1981 and November, 1985 a third party without notice of the Plaintiffs' interest had acquired the interest in the lands registered at Volume 1072 Folio 645 so as to defeat the interest of the Plaintiffs therein under the Court Order.

8. That under the leave reserved to proceed against the other lands mentioned in the Order of 7th November, 1979 the Plaintiff craves leave to proceed against three lands mentioned therein namely -

   Volume 1072 Folio 413
   Volume 1072 Folio 674
   Volume 1103 Folio 394.

   The Plaintiffs verily believe that the proceeds of sale of these lands would be adequate to cover the Judgment debt and taxed costs and interest thereon due to date which are outstanding from the Defendant.

9. I accordingly pray, that leave be granted as prayed in the summons filed herein."

On the 24th April, 1986 the Master in Chambers made an order in terms of the summons filed and it is worthy to note that paragraphs 2, 3 and 4 of the order require:

"2. That the Registrar do make all such enquiries as may be necessary pending the issue of the Writ for Sale of the estate and interest of the Defendant and that the costs of and incidental to this application be paid by the Defendant.

3. That the said lands be disposed of by Public Auction by a private Auctioneer but upon failing to dispose of the property on at least two dates set for public auction two weeks apart, that the lands be disposed of by private treaty. That the plaintiffs have leave to attend and bid at the said Auctions.

6. That the Registrar of Titles do cancel Certificates of Title to the lands and issue a new Certificate of Title and the duplicate thereof in the names of the Plaintiffs or their nominee(s) should the Plaintiffs purchase the said lands." (emphasis supplied)

By summons dated the 10th November, 1987 supported by an affidavit filed by the 2nd respondent dated 27th October, 1987 the respondents sought a variation of the order made by the Master on 24th April, 1986. In his affidavit asking for this order the 2nd respondent recited what he deposed on 13th March, 1986 declared that the amount due to the respondents to 10th March, 1987 was $14,128.43 and added:

"13. That the Plaintiffs verily believe that under the terms of the previous Order dated the 28th October, 1981 when it proved impossible to dispose of the lands registered at Volume 1072 Folio 645 by Public Auction that this exercise shall also be futile and further protract the execution of this Judgment entered nine years ago.

"14. That alternatively, the Plaintiffs seek leave for the Court to issue a Certificate for Sale of Land in the names of the Plaintiffs re lands registered at Volume 1072 Folio 413; Volume 1072 Folio 674 and Volume 1103 Folio 394 subject to the existing encumbrances mentioned thereon."

In addition in his affidavit of value of the 7th December, 1987 he stated at paragraph 2:

"2. I beg to refer to my affidavit filed herein dated the 27th October, 1987 and beg to state further that I verily believe that the said lands registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 are together worth no more than $10,000.00."

The variation the respondents sought is contained in the order of the Master dated 10th December, 1987 thus:

"1. That a Certificate of Sale of land be issued in the names of the Plaintiffs against lands registered at Volume 1072 Folio 413, Volume 1072 Folio 674 and Volume 1103 Folio 394 of the Register Book of Titles subject to existing encumbrances.

2. That the terms of the Order of the Court dated the 24th April, 1987 be accordingly varied.

3. That the Registrar of Titles do cancel Certificates of Title to the lands mentioned above and that new Certificates and duplicates thereof be issued in the names of the Plaintiffs or their nominees subject to any existing encumbrances."

In all orders made by the Master in the suit the respondents were represented. No one appeared for the defendant.

The appellant by motion filed sought the assistance of the Court by moving for, inter alia, an order:

"(i) giving him leave to intervene in the suit brought by the Plaintiff/ Respondents against the defendant and

"(ii) for an order setting aside the ex-parte order of the learned Master dated the 10th day of December 1987 in the said action and also setting aside the cancellation of the Certificate of Title registered at Volume 1072 Folio 413 for the land known as Lot 96 Cardiff Hall Estates in the parish of St. Ann and setting aside the issue of Certificate of Title registered at Volume 1209 Folio 991 for the said land in the names of the plaintiffs. ....."

On October 12 and 18 Walker J., heard the motion and on December 18, 1989 in a written judgment he dismissed the motion. This is an appeal from that judgment by which the appellant seeks to have the order set aside and that he be given leave to intervene as an interested party in the suit C.L. 1977 H-150 and that the order made by the Master on 10th December, 1987 be also set aside. This order of 10th December, 1987 resulted in the cancellation of the Certificate of Title registered at Volume 1072 Folio 413 of the Register Book of Titles in respect of lands known as Lot 96 Cardiff Hall Estates and the subsequent registration of this lot at Volume 1209 Folio 991 in the names of the respondents. What in effect the appellant sought, was the cancellation of the subsequent registration and the restoration of the prior registration of Lot 96 Cardiff Hall Estates Ltd in the names of the original owners. The appellant contended that he had been deprived of a legal and equitable interest in the said land Lot 96 registered at Volume 1072 Folio 413 and therefore had sufficient locus standi to have the order set aside.

Sale of Land proceedings are governed by Section 621-623 of the Civil Procedure Code Law. The sections are as follows:

"621. The Court may, on the application of the person prosecuting a judgment or order issue a writ for the sale of the land of the judgment debtor. In such case the land shall not be bound until it has been actually delivered in execution, or until proceedings for a sale of the land have been actually commenced under the writ.
Land for the purposes of this section includes all corporeal or incorporeal hereditaments, or any legal or equitable estate therein.
The Court may direct all such inquiries to be made as may be necessary for the proper execution of the above writ.
If it appears on such inquiries that any other debt is a charge on the land, the person entitled to the benefit of such charge shall be served with notice of the writ, and shall be bound thereby, and may attend the proceedings under the writ, and have the benefit thereof, and the proceeds of the sale shall be distributed among the persons found entitled thereto, according to their respective priorities.
The writ of sale, and all proceedings consequent thereon shall bind persons claiming any interest in such land through or under the debtor, by any means, subsequent to the delivery of the land in execution, or to the commencement of such proceedings as above mentioned.

622. All sales in execution of judgments or orders shall be conducted according to such orders as the Court may make, and all such sales shall be made by public auction: Provided that it shall be competent to the Court to authorise the sale to be made in such other manner as it may deem advisable.

623. After the sale of the interest of any judgment debtor in any lands, tenements or hereditaments, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title and interest, of the defendant in the property sold; and such certificate shall be liable to the same stamp duty as a conveyance or assignment of the same property, and when duly stamped

> " as aforesaid shall be taken and deemed to be a valid transfer of such right, title and interest, and may be recorded in the same manner as any deed of conveyance or assignment."

Section 622 requires all sales to be by public auction but the proviso empowers the court to "authorise the sale in such other manner as it may deem advisable," hence the provision in the orders made by the Learned Master for the judgment debtors (plaintiffs/respondents) to attend and bid and for sale by private treaty in the event that the auction fails. There was also provision in these orders of a reserve price. This is the normal practice in sales by Auction and of this practice the court can take judicial notice. Under these provisions of the Civil Procedure Code, the Bailiff is empowered to sell and "a power to sell means, in the absence of any context, a power to sell for money; and a person who exercises such a power is bound to sell for money." (per Sterling J., in **Paine v. Cork Co** 69 L.J. Ch. 158).

There certainly was no "sale" of the lot registered at Volume 1072 Folio 413 and the Certificate of the Registrar of the Supreme Court issued on 19th January, 1988 in purported compliance with Section 623 of the Civil Procedure Code was not issued by him "to the person who may have been declared the purchaser at such sale". The certificate is required to be issued "after the sale of the interest of any judgment debtor and shall be taken and deemed to be a valid transfer of such title and interest".

The appellant was the holder of the equitable estate in Lot 96 with a right to have the legal estate transferred to him and he had been in possession and paying the taxes due thereon from the time he bought it until he was, by the order of the Master of 10th December, 1987, deprived of his estate

in the property by the subsequent registration of the title in the names of the respondents. There is no evidence to the contrary. The appellant was therefore by the act of the Master dispossessed and as a "person deprived of land", he is entitled to maintain a claim under Section 161 of the Registration of Titles Act.

Mr. Henriques and Mr. Wood for the appellant and Mr. Morrison for the respondents agree that the respondents have obtained a title which can only be defeated by proof of fraud. However irregular or erroneous the procedure leading up to Registration may have been there has to be proof of fraud in the respondents to impeach their title.

The evidence shows that the Company by resolution on 20th November, 1975 went into a creditors voluntary winding up and Mr. Brian Mair of 2 West Arcadia Avenue Kingston 5 was appointed liquidator by them on that date. Mr. Edward Alphanso Lai a director of the company up to 20th November, 1975 by affidavit dated 1976 identified the Statement of Affairs of the Company dated 22nd May, 1975. This statement was filed at the date of appointment of the receiver as is required by the Company's Act. The statement gives a list of the unsold lots held by the company and lot 96, understandably, was not on this list. These documents were of course open to inspection at the Registrar of Companies.

When the respondents filed writ on 14th November, 1977 the statement of the Company's affairs as at 22nd May, 1975 was with the Registrar of Companies. It was then some two years after the Company went into voluntary liquidation and the state of the Company's affairs could have been ascertained with reasonable diligence exercised by or on behalf of the respondents.

When sale of land proceedings were commenced by the respondents, there was evidence available that the Company had no interest in Lot 96. The 2nd respondent in his affidavit of 13th March 1986 deposed that the Registrar's enquiry had revealed that the only unencumbered lot was that registered at Volume 1072 Folio 645 of the Register Book of Titles. When the order on summons for leave to issue writ for sale of land was given, it was given for the sale of some 46 lots to satisfy the judgment debt. Neither the summons nor the affidavit in support thereof was included in the bundle, so the evidence on which the Master acted was not scrutinized by us. When real estate is ordered to be sold by the court, the practice has developed for the Court to order that the property be valued by an independent valuator and on the basis of this valuation a reserved price is fixed by the Registrar. Indeed in the sale of Lot 109 Registered at Volume 1072 Folio 645, the principal lot for sale in the order made on 7th November, 1979, Mr. Verdi Heron a Real Estate Valuator of 45 years experience placed a valuation of $8,000.00 as the market price and $6,000.00 on a forced sale. This was the value at 24th October, 1981. Lot 109 was not one of the unsold lots given in the statement of affairs of the Company.

This lot was sold by private treaty to the respondents but their effort to have the title vested in themselves was thwarted by the prior registration of the title in some third party. Presumably, the purchaser from the Company pre-empted the respondents by registering the transfer they had obtained from the Company. The respondents then turned their attention to three other lots in the subdivision registered at Volume 1072 Folio 413 (Lot 96) Folio 674 and Volume 1103 Folio 394. Lot 96 was not on the Company's list of unsold lots. Its size

was approximately 1.6 acres. This was more than twice the size of the average lot shown on the subdivision plan. The procedures adopted by way of sale of land proceedings were regular at first. By the order of the Master the lots were to be sold by public auction or private treaty and the respondents had leave to attend and bid at the auction. This order of the Master was made on 24th April, 1986. This order was varied on the 10th December 1987 and forms the basis of these proceedings. The variation is set out above.

Section 161 of the Registration of Titles Act provides:

> "161. No action of ejectment or other action, suit or proceeding, 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 - 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, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud; .....".

A litigant who alleges fraud must prove actual fraud. "Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false. A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement if made in the honest belief that it is true is not fraudulent." **Derry vs. Peek** (1889 L.R. 14 A.C. 337. To defraud is to deprive by deceit: **Welham vs. D.P.P.** [1961] A.C. 103.

**The respondents obtained Lot 96. Was it obtained by fraud?**

In the aborted sale of lot 109, the respondents had a valuation done by a Real Estate Broker, Mr. Verdi Heron. His valuation was done professionally. The 2nd respondent is an attorney-at-law and he is presumed to know the procedure to be followed in the sale he sought of those lots, the subject of the order of the Master made on 10th December 1987. He did not employ the services of an independent valuator but proceeded to place a value on the lots himself. This was contrary to the custom in sale of land proceedings.

In his affidavit of 7th December, 1987 he deposed "..... I verily believe that the said lands ..... are together worth no more than $10,000.00." It is to be noted that the order of the Master is dated 10th December, 1987 and the inescapable inference is that this affidavit was filed to complete his application for the issuance of the Certificate of Sale of Land. This, coming from an attorney-at-law, a person of integrity, it did what it was intended to do, it persuaded the Master to grant the order sought. One now has to examine whether the respondents had an honest belief in the truth of that statement.

The appellant exhibited two valuations given by highly reputable valuators who assessed the value of Lot 96. C.D. Alexander Company Realty Ltd inspected the property on 27th July, 1988 and valued it at $180,000.00. Orville Gray & Associates assessed the value at 8th September, 1988 at $250,000.00. The land is entered on the tax roll for the parish of St. Ann, the valuation number is 016-05-032-124, the unimproved value is given as $38,000.00 and the annual tax thereon is $552.00. In a Declaration of value dated 19th January 1988 supporting his affidavit for registration of title, Mr. George Alfred Brown declared:

"3. I hereby request that the said new certificate of title be issued with a plan.

4. I am informed and verily believe that the said land registered at Volume 1072 Folio 413 is valued no more than $3,500.00.

5. And I make this solemn Declaration conscientiously believing the same to be true and by virtue of the Voluntary Declaration Act."

**What is the basis of his belief? What is the source of his information?**

The source of the information is not stated, this renders paragraph 4 valueless. In the transfer of titles it is a requirement that taxes due if any, be paid. Paragraph 9 (a) of the Order for Leave to so issue a writ for sale of land referred to above places "payment of all taxes accrued due on the said land." as the first charge on the proceeds of sale. This requires checking with the Collector of Taxes. The valuation on the tax roll is not a cloistered secret and is one of the areas checked in transactions. The agreement for sale signed by the assignor and tendered by the respondents requires the purchaser to pay taxes from the date of possession. It is a notorious fact in Jamaica that land values on the valuation roll are far below market values. In his judgment the learned judge observed:

> "It is a notorious fact that in the decade 1970 - 1980 the value of land in Jamaica depreciated greatly and that this phenomenon applied island-wide."

The learned judge here took judicial notice of a state of affairs that existed in the 1970's. The author of Cross on Evidence 6th Edition had this to say on the subject of judicial notice at page 63:

> "It would be pointless to endeavour to make a list of cases in which the courts have taken judicial notice of facts without inquiry. The justification for their action in this way is that the fact in question is too notorious to be the subject of serious dispute."

I adopt this statement and I accept the statement of Walker J., as accurate. In Jamaica it is notorious that real estate values plummetted in the period of 1970-1980 but it is equally notorious that they rose astronomically in the decade of 1981-1990 and are still rising. It is also true that Cardiff Hall Estates is on the North Coast of Jamaica where tourist development goes on apace. The values given by the 2nd respondent were given in 1987 and 1988. They are baseless and were calculated to obtain for himself a benefit by deceit.

At page 844 paragraph 17-32 of **Clerk & Lindsell on Torts** 6th Edition there appears this statement which I accept as good law:

> "Absence of belief in truth. Although the party making the representation may have had no knowledge of its falsehood, yet he will be equally responsible if he had no belief in its truth and made it 'not caring whether it was true or false. Per Smith J **Joliffe v. Baker** (1883) 11 Q.B.D. 255, 275. If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Per Maule J., **Evans v. Edmonds** (1853) 13 C.B. 777, 786. Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least that he believes it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true. Per Lord Herschell **Derry v. Peek** (1889) 14 App. Cas. 337, 368; and see **Pritty v. Child** (1902) 71 L.J.K.B."

The 2nd respondent knew that the debt had been incurred when $5,000.00 was deposited on 5th May, 1970 on a lot valued at $15,000.00 in the subdivision yet on 7th December, 1987 he swore that three lots including one of 1.6 acres (Lot 96) were together worth no more than $10,000.00 This statement was fraudulent, it was intended to deceive and secure for himself a benefit. The valuation on the tax roll was $38,000.00. If the 2nd respondent had checked this roll as he ought to have done then he would have seen this valuation. When therefore in January of 1988 for the purpose of obtaining registration of the title to Lot 96 in the respondents' names he declared his belief, that this lot was worth $3,500.00, this declaration was false, hence fraudulent. If he had not checked the valuation he was reckless in making the declaration. Hence he was fraudulent.

Fraud having been established in the respondents, the appellant is entitled to sustain these proceedings as a person deprived of land by fraud. I would allow the appeal, set aside the judgment of the Court below and order the Registrar of Titles to cancel the Title registered at Volume 1209 Folio 991 in the name of the respondents. The appellant will have his costs here and below to be taxed if not agreed.

**CAREY, J.A.**

The appeal is allowed. The Order of Walker J. is set aside and ordered that Registrar of Titles cancel Certificate of Title issued to the respondents and issue a new Certificate of Title and duplicate thereof in the name of the appellant. The appellant is entitled to costs both here and below.

Record to be sent to the Director of Public Prosecutions for his consideration.