Civil Law
Registration of Titles Act — Adverse Possession

C.A. LAND LAW — (Trespass — adverse possession — Limitation of Action Act — Registration of Titles Act)

Action for trespass — defence ownership of land — later amended to adverse possession — ss. 3, 4, 5, 21 and 30 Limitation of Action Act — ss. 68, 70, 130 JAMAICA Registration of Titles Act. (Judgment for plaintiff and deft. ordered to quit and deliver land and pay damages)

IN THE COURT OF APPEAL

ON APPEAL — whether judgment against weight of evidence — whether respondent entitled to possession by virtue of legal estate vested in her — whether evidence adequate to establish adverse possession (dispossession of registered owner or abandonment by owner) Damages — whether awarded on basis that was wrong.

SUPREME COURT CIVIL APPEAL NO: 38/86

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Bingham, J.A. (Ag.)

APPEAL DISMISSED (Appellants case not supported by evidence — damages awarded justified)

BETWEEN	GEORGE BECKFORD	DEFENDANT/APPELLANT
AND	GLORIA CUMPER	PLAINTIFF/RESPONDENT

Mr. B. Macaulay Q.C. and Mr. R. Francis for the Appellant

Mr. S. Shelton instructed by Myers, Fletcher & Gordon, Manton & Hart for the Respondent

September 30, October 1 - 3, December 8 - 12, 1986
& June 12, 1987

CARBERRY J.A.

I have had the opportunity of reading in draft the judgment of Wright J.A. and I agree with the conclusions to which he has come, namely that the defendant/respondent has not established that he or his predecessors acquired the disputed land, which clearly fell within the registered title of the plaintiff, by adverse possession under the Limitation of Actions Act; and that the judgment of Harrison J. should be affirmed, with costs to the Respondent.

In retrospect, it is not easy to see why the appeal should have lasted as long as it did, as basically what was in issue was or were questions of fact rather than law. However, having regard to the length of the argument I add a few brief words of my own. In view of the careful exposition of the facts and the evidence in the judgment of Wright J.A. I am content to merely outline the facts and issues.

Cases referred to:

1. Leigh v Jack (1879) 5 Ex D 264
2. Williams Brothers Direct Supply Stores Ltd v Raftery (1958) 1 QB 159 (1957) 3 All ER 593
3. Archer v Georgiana Holdings Ltd (1974) 21 W.I.R. 431 / 12 J.L.R. 1421
4. Harrison Johnson, McFarlane and Williams (1971) 17 W.I.R. 84 / 12 J.L.R. 375
5. Edwards v Bradkwaite (1978) 32 W.I.R. 85
6. Perry v Clissold and Others (1907) A.C. 73
7. McLeod v McRae (1918) 43 D.L.R. 350
8. Sherren v Pearson (1988) 14 Can. S.C.R. 581
9. Chisholm v Hall (1959) 7 J.L.R. 164
10. Richardson v Lawrence (1966) 10 W.I.R. 234
11. Smith v Lloyd (1854) 9 Ex Ch 572

On the 14th February, 1924, registered title to some land situate on the slopes of the Blue Mountains was issued in the name of Reginald Ernest Henriques Melhado. The title was registered at Vol. 168 Folio 95 of the Register Book of Titles. It is recorded in it that it covered some "one thousand one hundred and eighty six acres of the shape and butting as appears on the plan hereunto annexed" but it also listed certain exceptions, these apparently were pieces of land falling within the plan but which had been sold to the persons named before the title issued. The land itself was an estate known as Green Valley. Adjacent to it, as shown on the plan, were a number of other large estates, and at the south west was the Mavis Bank Plantation. The South Western corner of the Registered Plan for Green Valley also shows marked out on it an area marked as 7 (A) 1 (R) and inscribed on it the name Mr. Garrick Graham. Also shown on it two large dots marked "House". Mr. Graham's name does not appear on the face of the title amongst the list of excepted holdings, unless perhaps his land is the "7 acres formerly sold and conveyed by James Low Stewart to James Campbell."

Be that as it may, both sides in this case have treated the Plan attached to this registered title as showing that at the time of its issue Garrick Graham was entitled to and owned 7 acres 1 rood of land that fell within the boundary of the registered title Vol. 168 Folio 95. Further, both sides have accepted that on that 7 acre piece of land stood or stands the "great house" that formerly belonged to Green Valley.

It appears then that at that time there was a family, the Grahams, living in that area. The defendant/appellant's case was that Garrick owned that land, that he had a son called Henry Graham, who in turn sired Walter Graham and his sister Eva Graham. The defendant/appellant claimed to have brought the disputed land from Eva Graham, (not the last of the Grahams as she has a living sister whose entitlement seems to have been overlooked).

The registered title to Green Valley was transferred to William Carpenter, a land surveyor, by a transfer dated 30th November, and registered on the 8th December, 1925. Mr. Carpenter was the father of the plaintiff Mrs. Gloria Cumper. He died on or about the 23rd January, 1959, and the plaintiff was registered as taking his land on transmission by an entry dated 2nd April, 1965.

Entries on the registered title to Green Valley show that Mr. Carpenter in his lifetime sold some of the lands to others, but not apparently to the Grahams.

The plaintiff, an attorney at law, now residing in England, discovered in 1981 that the defendant/appellant had apparently entered onto the land at Green Valley, erected some buildings, cut down some trees, built a road, and was running a pig farm on her land. To anticipate, the defendant/appellant had some 27 acres 7 acres of which consisted of the area delineated as belonging to Garrick Graham on the plan attached to the Green Valley title, plus 20 acres which were found on the evidence to come from the Green Valley lands.

The plaintiff brought an action for trespass, and claimed an damages and/injunction. She alleged that the defendant had entered into and trespassed on land falling within her registered title.

The defendant/appellant, in reply to this claim, set up that he owned 30½ acres which he had bought from Miss Eva Louise Graham, and in effect that this land had nothing at all to do with Green Valley estate or the land shown in its registered title.

The evidence produced showed that this was untennable. Both sides made concessions: the Plaintiff who had claimed that the "Great House" was still within her title, was found to have erred, and eventually conceded before us, that the "Great House" such as it was, fell within the 7 acres 1 rood of Garrick Graham as shown on the Green Valley Registered title; the defendant/appellant, through his lawyers, eventually conceded that the remaining 20 acres did in fact come from the land shown in the Green Valley Title, and at that stage he sought

to amend his defence by setting up that it had been acquired by the Grahams by adverse possession. This amendment to raise the issue of adverse possession was raised after all the evidence had been taken, and though leave was granted for the plaintiff to re-enter the witness box and address this issue, unfortunately she had fallen so ill in England as to be unable to return and give further evidence on this issue.

The ultimate issue in the case then became what evidence was there to show that possession by the plaintiff continued, or that the Grahams through whom the defendant claimed had ever entered on this land and dispossessed the plaintiff. Within the meaning of sections 3 and 4 (a) of the Limitation of Actions Act it was necessary for the defendant/appellant to show that either he or the Grahams had dispossessed the plaintiff, or that the plaintiff had discontinued possession.

In considering the weight and effect of such evidence as there is, an important factor is the nature of the land in question and what acts of ownership or possession may reasonably be expected thereon. This was land high up in the Blue Mountains. The plan shows some roads had been cut on a section of it, and some development there, but it is only comparatively recently that population pressures have led to any real development taking place in such remote hill areas.

Cases such as Leigh v. Jack (1879) 5 Ex. D 264, Williams Brothers Direct Supply Stores Ltd v. Raftery (1958) 1 Q.B. 159; (1957) 3 All E.R. 593 and Archer v. Georgiana Holdings Ltd (1974) 21 W.I.R. 431 and 12 J.L.R. 1421 show the onus that rests on the person setting up adverse possession. To cite from the head note in Archer's case:

"Held: (1) that an owner of land did not necessarily discontinue possession of it merely by not using it, but that each case depended upon the nature of the land in question and the circumstances under which it was held; in the present case lack of user was by itself no evidence to warrant a finding of discontinuance and there was otherwise no evidence on which discontinuance could be found;

(2) that a finding of adverse possession required some affirmative unequivocal evidence going beyond mere evidence of discontinuance and consistent with an attempt to exclude the true owner's possession, the nature of the property being again relevant; ....."

Such evidence as existed in this case in my view fell within the type of evidence referred to in the headnote above as being inadequate to establish adverse possession.

On the plaintiff's side, at a time when adverse possession had not yet been raised, plaintiff indicated that Walter Graham had been a headman to her father and had "minded" the property for him. He had apparently been allowed to cultivate some portion of it and had brought fruits from the land to her father from time to time. Had she described him by the more genteel title of "Over-seer" perhaps the witness Miss Eva Graham would have been less offended. Certainly she denied this relationship vehemently. Incidentally it should be remembered that Eva Graham went to the States in 1924, and claims that she visited the land at least once every year on her annual holiday. Mr. Carpenter did not acquire this land till 1925, after she had left. He did not live in the area, and it seems unlikely that their occasional visits on either side would ever have coincided. Nor is there any evidence as to Miss Graham's means or employment in the United States such as would support an annual vacation in Jamaica every year since 1924. Be that as it may, the suggested relationship between Mr. Carpenter and Walter Graham was used to found an argument that whether he was a tenant, licensee or employee,

Walter could not prescribe as long as this status continued, and cases such as Harris v. Johnson, McLaren and Williams (1971) 17 W.I.R. 84; 12 J.L.R. 375 and Edwards v. Braithwaite (1978) 32 W.I.R. 85 were relied on. The trial judge accepted the plaintiff's evidence on this point see his finding No 6:

> "Walter Graham was probably headman for William Carpenter re the 20 acre piece."

The plaintiff gave evidence also on another point. She stated that some time before her father died there had been discussion between her father and Walter Graham about the possibility that Walter might buy some of the disputed land near the great house. The transaction was never concluded and the land had never been transferred to Walter or anyone else.

Curiously enough the defendant/appellant produced a diagram for his land, 27 acres RI, P32. 5, showing that a survey had been made on the 26th July, 1961, by Mr. Cyril P. Stuart, a commissioned ...equest of Walter Graham, and that the plan had ... September, 1961 and again on 31st May 1963. ...dicated as an adjoining area of land, it is ...given of this survey to its owner, or to any ...ers of Green Valley. ...m died on the 5th September, 1963, and any ...nd Mr. Carpenter who had died on 23rd January, ...th both of them. The plaintiff is firm that no such dealing was ever concluded, and apart from the plan nothing suggests that it ever was. The survey and the plan were made nearly two years after Mr. Carpenter's death, and no approach was ever made to his family, or to the plaintiff, his executrix, to conclude a sale. Such evidence as there was shows that the Graham Diagram embraced the original 7 acre 1 rood said to belong to Garrick Graham, plus 20 additional acres, this being the disputed land: land which the plaintiff proved fell within her registered title.

The evidence advanced by the defendant, and the Grahams, particularly Miss Eva Graham fell far short of proving either abandonment of the land by the plaintiff and or Mr. Carpenter her predecessor, or any clear act of dispossession by either Walter Graham, or later by his sister Eva Graham. Not until the defendant/appellant purports to buy the land from Eva Graham in 1980-1981 and erects buildings thereon do we find any clear act of dispossession, or a clear assertion of an interest incompatible with that of the registered owners. The plaintiff's action commenced on 28th September, 1982.

The evidence advanced on behalf of the Defendant was critically analysed by the trial judge, and has again been reviewed in the judgment of Wright J.A. and I accept their comments upon it, and that the defendant has not discharged the onus of proving either dispossession of the registered owners, or abandonment by them.

Nor have I been persuaded by the defendant/appellant's argument that damages ought not to have been awarded, or have been awarded on a basis that is wrong. I agree that the appeal should be dismissed, the judgment of Harrison J. should be affirmed, and the respondent should have her costs both here and below: such costs to be t taxed or agreed.

WRIGHT J.A.:

This is an appeal from the judgment of Harrison J. on behalf of the plaintiff delivered 17th June, 1986 whereby he awarded the plaintiff $2,500.00 for damages and ordered the defendant "to quit and deliver up possession of the lands the subject of the claim comprised in Certificate of Title registered at Volume 168 Folio 95, to the plaintiff on or before 31st December, 1986, with costs to the plaintiff to be agreed or taxed. Stay of execution granted for six weeks".

The Register Book of Titles records that by Transmission Application No. 2754 the plaintiff Gloria Cumper was registered on April 2, 1965 as the proprietor of the lands referred to in the Order and by Section 130 of the Registration of Titles Act she is deemed to be the absolute proprietor thereof.

The Grounds of Appeal and relief sought are as follows:

"1. The judgment of the learned trial Judge is against the weight of the evidence.

The learned trial Judge erred in law in inter-relating two different questions:

a) Whether or not the Plaintiff/Respondent was entitled to possession by virtue of a legal estate vested in her.

b) Whether the Plaintiff/Respondent's action was barred by virtue of sections 3-5 and 21 and 30 of The Limitation of Actions Act.

The Defendant/Appellant therefore seeks the following

(i) An order that the Plaintiff/Respondent's action was barred.

(ii) An order of rectification of The Register Book of Titles or such other Order pursuant to section 158 of The Registration of Titles Act."

The Statement of Claim and the unamended Defence are as follows:

" STATEMENT OF CLAIM

SUIT NO. C.L. C 294 OF 1982

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN GLORIA CUMPER PLAINTIFF

A N D GEORGE BECKFORD DEFENDANT

1. The Plaintiff is the Executor of the Estate of the late William Carpenter, and is the registered proprietor (on transmission) of all that parcel of land known as Green Valley in the Saint David District in the parish of Saint Andrew, being the remainder of the land in Certificate of Title registered at Volume 168 Folio 95, and is entitled to possession thereof.

2. The Defendant has wrongfully trespassed on the Plaintiff's said premises and taken possession of a portion thereof, and threatens and intends to continue the said trespass and wrongful possession unless restrained by this Honourable Court.

3. The Plaintiff therefore claims:

(a) Possession of the said premises.

(b) An injunction to prevent the Defendant from repeating or continuing the said trespass.

(c) Damages.

(d) Costs.

DATED the 29th day of October, 1982

SETTLED

/s/ B. ST. MICHAEL HYLTON "

It is readily observed that whereas the plaintiff's claim is to a portion of land comprised in a registered title the defendant claims 30½ acres without reference to any such title. The difference is not without significance as the progress of the trial revealed. There was confusion on both sides as to the identities of the respective parcels of land - the plaintiff claiming lands which the learned trial judge correctly, in my view, found were not (and were never) included in her title and the defendant

denying that the plaintiff owned any lands in the area claimed by her. Although the judgment of the learned trial judge sought to resolve the confusion it was, strange as it may seem, resurrected on appeal and persisted in by Mr. Macaulay up to the 8th of December, 1986 (the 5th day of hearing before us) when he admitted that having visited the Titles Office he had satisfied himself that the case involves contiguous parcels of land and not unrelated parcels as had been strenuously asserted by him. And indeed such persistence seemed all the more strange when it is borne in mind that Mr. Macaulay is relying on an amendment secured by Mr. Kirlew, Q.C. who represented the defendant at the trial when, after the close of the defence on the 3rd day of trial, he applied for and obtained leave to amend the defence to add the following as paragraph 4:

> "Any claim the plaintiff might have had to the land in issue was extinguished by the long possession of Walter Graham and Eva Graham - the predecessors in title of the defendant."

The question readily comes to mind: "How could adverse possession be claimed against someone who had never possessed the lands in question?" But of this more anon

The lands in dispute lie nestled in the foothills of the Blue Mountains and are a portion of lands acquired by William Augustus Carpenter, the father of the plaintiff and her predecessor in title, from Ernest Henriques Melhado in the early part of this century viz. 8th December, 1925. The duplicate Certificate of Title registered at Volume 168 Folio 95 of the Register Book of Titles which was admitted in evidence as Exhibit 1 reads thus:

REGISTERED BOOK

VOLUME 168. FOLIO 95

JAMAICA

CERTIFICATE OF TITLE UNDER THE REGISTRATION OF TITLES LAW, 1888

REGINALD ERNEST HENRIQUES MELHADO

OF KINGSTON, ESQUIRE

"is now the proprietor of an estate in fee simple _____ subject to the incumbrances notified hereunder in ALL THAT parcel of land known as Green Valley in the Saint David District in the parish of Saint Andrew containing One thousand one hundred and eighty six acres of the shape and butting as appears by the plan thereof hereunto annexed Save and except seven acres formerly sold and conveyed by James Low Stewart to James Campbell and Save and except also eleven acres one rood and ten perches sold to different parties and three hundred and ninety one acres and four perches transferred to several parties being the remaining untransferred land registered in Volume 36 folio 94 and being the parcel of land comprised in Certificate of Title registered in Volume 154 folio 75.

Dated the Fourteenth day of February one thousand nine hundred and twenty four.

/s/ Register of Titles "

Incumbrances referred to:

No. 16750 Transfer dated the 30th of November and registered on the 8th of December 1925 from the abovenamed Reginald Ernest Henriques Melhado of all his estate in the land comprised in this Certificate to William Augustus Carpenter, of Kingston, Land Surveyor. Consideration money One hundred and fifty pounds.

/s/ Register of Titles "

Accordingly, Mr. Carpenter acquired roughly 777 acres but by the time the plaintiff was registered as proprietor in 1965 several transfers had been made by Mr. Carpenter to several persons. The diagram annexed to Mr. Melhado's title bearing date 14th February, 1924 shows lands well-watered by three rivers but for the purpose of the case the significant observation is that in the South-Western corner of the lands represented on the diagram is a wire-fence enclosure in which appears the name Mr. Garrick Graham and the figures 7: 1: 00 (meaning 7 acres 1 rood). Within the enclosure, too, and very close to the wire-fence, are two spots by which is written the word "House", which appear to be the Great House which features very prominently in the evidence.

In 1925 when William Carpenter acquired his lands Garrick Graham had already been dead for fifteen-years and was buried at the Great House as was his son Henry Graham who had died in 1921. Such was the evidence of Eva Louise Graham, the grand-daughter of Garrick Graham and sister of Walter Graham who she claims lived at the Great House up to the time of his death in 1963 following upon which Eva Graham claims she took possession by virtue of which she eventually sold to the defendant in 1981.

The plaintiff said she knew Walter Graham and that he lived at the Great House. But her testimony concerning such residence differs fundamentally from the evidence adduced by the defence, for whereas the defence maintains it was the Grahams' family home the plaintiff said he went to live at the Great House subsequent to his becoming headman for her father's property in 1956 after first being on the property as a tenant. Prior to 1956 she did not know where he lived. Having regard to the evidence supplied by Exhibit 1, and there being no evidence that Garrick Graham's land ever became a part of William Carpenter's property, it is patent that the plaintiff's evidence concerning Walter Graham's residence in virtue of being her father's headman is mistaken. Mistaken too, as Harrison J. found, is her claim to the Great House as part of the property she inherited from her father. However, further evidence she gave concerning Walter Graham which remains unchallenged is that after he became headman he planted and reaped crops in the portion of land she claims (which she estimates at 18 acres) and would at most twice per year bring a portion of the crop for her father who then lived in the corporate area.

Though she had known the lands from 1930 she only became fully involved with the management thereof in 1956 due to her father's ill-health. It was her evidence that at sometime before her father's death on 23rd January, 1959 there was discussion between him and Walter Graham about Graham's purchasing an area which she said included the Great House. It is not known how far these discussions proceeded and there is no direct evidence in contradiction. However, Exhibit 3 which is the plan of a survey done on the 26th of September, 1961 by Cyril P. Stuart, Commissioned Land Surveyor

at the request of Walter Graham on the 26th of July, 1961 showing an acreage of 27 acres 1 rood 32.5 perches could possibly have some bearing on the matter. The plan has been shown by Derrick Dixon, a Commissioned Land Surveyor called by the plaintiff, to include Garrick Graham's parcel of land in addition to a portion of William Carpenter's land registered at Volume 168 Folio 95 which is the land claimed by the plaintiff. However, the date of the plan which is more than two years after the death of Mr. Carpenter would exclude it from being considered in relation to the aforesaid negotiations. It is worthy of note that although notices of survey were served on fourteen adjoining land-owners none was served on the plaintiff nor the Estate of William Carpenter. Further consideration will be given to this aspect of the matter later in this judgment. But the question must be asked as to the basis on which Walter Graham requested a survey of the Graham land along with what was then and still is registered as what I call, for convenience, Carpenter land. Was he thereby evidencing an appropriation of the Carpenter land or is it that in pursuance of some negotiation he proposed to have a single title for both parcels of land? But with whom would such negotiations have taken place? William Carpenter was dead and no other person of competence apart from the plaintiff has been shown by the evidence who could deal with the land. A relevant reference on the plan Exhibit 3 reads: "Vol. 168 Fol. 95 W.A. Carpenter (regd. owner)." Of the plan Mr. Dixon, the Surveyor, testified that it comprised lands in two separate registered titles viz. Garrick Graham's and W.A. Carpenter's (now Gloria Cumper's). The evidence of Carlton Richards a witness called from the Titles Office is that since W.A. Carpenter was registered as owner of the lands at Volume 168 Folio 95 there have been transfers of portions of land but none was made to Walter Graham, Eva Graham, Louise Graham or the defendant George Beckford. Such was the position up to the time when the plaintiff was registered on the 2nd of April, 1965 and that position has remained unchanged.

The plaintiff, who now resides in England, testified that since assuming responsibility for the property she paid visits at least once per year and that up to 1979 when she appointed the Rev. Clement Thomas as her agent she had observed no signs of encroachment.

The Rev. Thomas said he visited the property in 1979 and saw no evidence of what he subsequently saw in 1981 viz., land bull-dozed, piggery built and Great House renovated. He had given no permission. Following this the plaintiff visited the property in 1982 and then contacted her attorneys-at-law. A writ of summons was issued on the 28th September, 1982. From this it is clear that there was no delay in asserting her claim.

Because of the error in the plaintiff's claim already referred to, there is undoubtedly the need for great care in sorting out the evidence as it relates to the Graham land and the Carpenter land, respectively. But this apart, there is an obvious haziness in the defendant's evidence in relation to the land. Stating his date of birth as 13th January, 1920 he testified that he knew William Carpenter having seen him once, but that he had never seen him on the land in question though from he was 8-10 years of age (1928-1930) he saw Walter Graham on the land - living at the Great House. He saw Walter plant and reap crops on the land where he lived up to the time of his death. This could of course be true of the Graham land but with his lack of knowledge of Carpenter's ownership of any land in the area is it necessarily true of the Carpenter land? And if he did see Walter cultivate what is in fact Carpenter land would it have been in the capacity of tenant or headman as the plaintiff testified? Up to the time of Walter's death the defendant said he knew of no other Graham living at the Great House. After his death "Eva Louise Graham used to stay there - just occasionally when she came from abroad she used to stop there. She had an agent named Linton Boyden but he did not stay at the Great House." Concerning his claim to the land the defendant testified:

> "I leased the land at first and I purchased a portion of it and she decided to sell me the entire holding - 27 acres and 1 rood. I have established a farm on the land - a pig farm."

But although the date of his testimony (22/10/84) was no more than three years from the date of such acquisition his evidence was that "I do not remember how much I paid for that land". Unthinkable! He confirmed that he has no title for the land and said further that he had never known those lands to have ever been owned by Mr. Carpenter - he only knew them to belong to Walter Graham. The comment may be made that such evidence, which is not the only such in the case, is essential to maintaining the defendant's case - however else it may appear having regard to the totality of the evidence. Indeed, although Exhibit 1 shows the lands acquired by Carpenter from Melhado to border in the South-West on Mavis Bank Plantation the defendant said in cross-examination that he had never known the Carpenter's family to own lands at Mavis Bank. Simply incredible! Such lands he knew to have been owned by the Carpenter's family were far away from the area in dispute.

In addition to the failed memory about the price he had paid for the land, cross-examination was to unearth further uncertainty about the acquisition of the lands. Said he:

> "I want to buy this piece of land of 27 acres 1 rood - it could have been in 1981. I went to Mr. Gilroy English, my attorney-at-law. It could be I signed agreement for sale on 27.5.81 - was to purchase the whole 27 acres 1 rood.
>
> There was no paper drawn up for the piece I bought before. I was to pay a certain deposit in full. I did not get a survey in 1981 when buying the land. I never found out that the land contained in title. I understood that the land I was buying and all other land - even the land on which I was born - was registered in name W.A. Carpenter. I understood that since I bought in 1982."

Not only has he no title to the land but there was not put in evidence even an agreement for sale. Not so much as a receipt for the deposit or indeed for any other sum paid. Also there is contradiction in his evidence, for although there is no evidence of Mr. Carpenter acquiring

any lands in the area prior to the purchase from Mr. Melhado in 1925, five years after the birth of the defendant, it is his evidence that the lands on which he was born on 13th January, 1920 were registered in the name W.A. Carpenter. And on his own account after he learnt that the land was registered in the name of W.A. Carpenter he did tremendous expansion on the property "even expanded my pig houses on the property." Yet he cannot remember whether he informed his attorney about the registration of the land. But at the time when he claims he secured this information the lands had for the past seventeen years been registered in the name of the plaintiff but of this he seems to have had no information. Question: If he had in fact purchased through Mr. English as he claims, is it possible that Mr. English could have concluded the agreement without ascertaining this vital information or having been thus informed could he still have persisted with the purchase? Mr. English was not a witness in the case and no answer is forthcoming from the evidence.

Back-tracking somewhat, the defendant said he thinks he took over "the whole 27 acres in 1980". At that time, said he, there were "couple tenants well" on the land with their cultivations of "potatoes, gungo peas, cane and a few coffee trees and pimento trees". But he said also, "the entire place was bush land - about 4 - 5 acres in woodland - ruinate".

The evidence of Linton Boyden who said he was agent for Eva Louise Graham for the period 1964-1976 may be of some assistance in unravelling the incongruity in the defendant's evidence. He was positive there were no tenants even in the Great House during 1975-1980. Such tenants as had been on any part of the land in dispute had been in the Great House but had left between 1975 and 1980. He lived near to the land in dispute and so was in a position to observe the use of the land at the time when the defendant said he took possession. He mentioned no tenants since the departure of those who occupied the Great House and, apparently, its environs. The evidence of the plaintiff and her witness the Rev. Clement Thomas that up to 1979 there was no evidence of any encroachment on the land and not until 1981 did the Rev. Thomas observe any change, would tend to

suggest that the land lay in ruinate and not being put to any particular use. Boyden knew of lands called Empire below the Great House which were owned by the Grahams and which were occupied. These lands he claimed were sold. He did not oversee them. The only area from which he reaped was around the Great House. He did not know Mr. Carpenter and, extraordinary as it may seem, he at age sixty-three and living in the area, had not, until the day he testified, heard Mr. Carpenter's name. If this is indicative of an effort to exclude the plaintiff's claim then it seems to have been overdone.

The evidence of Eva Louise Graham is crucial to the defendant's case. The defendant claims to have purchased from her lands which she maintains were hers partly by purchase from her brother Walter Graham (one and one-half acres) and partly by devolution consequent upon the death of the said Walter Graham. Henry Graham, Walter's brother, who was her father died in 1921. She had been living in the U.S.A. since 1924 - the year before Mr. Carpenter purchased from Mr. Melhado. However, she said that up to 1963 she paid several visits to Jamaica at which times she stayed at the Great House and at 37 Border Avenue. She began staying at the latter address either 1926 or 1927 - at least twenty years before such an address came into being! She did not know Mr. Carpenter and like Mr. Boyden she had never heard of him! She and Walter had lived at the Great House as children. Walter eventually had the control of the Great House property, which she thinks consisted of 33 or 27 acres, up to the time of his death on the 5th September, 1963. Fourteen years later in 1977 she obtained letters of Administration to his estate (Ex. 5). But in the meantime Linton Boyden had been in charge as her agent. Despite all this, however, there is still an unsolved problem. No inventory was exhibited to indicate what lands, if any, were declared as belonging to the estate of Walter Graham. However, in an apparent effort to fill this gap a witness Mordecai Stewart, sixty-six years old, who owns lands adjoining a portion of the western boundary of the lands in dispute, was called by the defence. He claims he knew Eva's father Henry Graham who died 1910, some eight years before the witness was born, if his age was indeed sixty-six years as he said! He purports to know the

boundaries of the Great House property and proceeds to name the adjoining occupiers but he omits several of the names reflected in Exhibit 3 - the plan of the survey done by Cyril Stuart on the 26th July, 1961. He claims that he used to oversee the land on behalf of Walter Graham who did not work the land himself but let it out to tenants who planted gardens. Question: Is this how produce became available to Walter to take to Mr. Carpenter as the plaintiff testified? It seems not unlikely, because the area delineated by this witness obviously includes the Graham land and lands claimed by the plaintiff. He claims that from he was seven years of age he saw the land occupied by Henry Graham, the father of Eva and Walter Graham. Quite apart from the fact that at that tender age he would not be able to say anything credible about the extent of such occupancy he would be testifying to the impossible because he would have been seven years of age in 1925 probably before Mr. Carpenter made his purchase on 30th November, 1925, and four years after the death of Henry Graham! Obviously this evidence does not meet the requirements.

Further, Eva Graham in order to support the claim that the lands in question were included in lands held by her gave evidence that she paid taxes for the Great House property which she claims included the lands in question and in keeping with this tax receipts in respect of 19½ acres in the name of Walter Graham were tendered by herself and Linton Boyden but not even the Collector of Taxes called by the defence was able to relate these receipts to the lands in question. Although the lands in dispute are registered the lands in respect of which the taxes are paid are not referred to by any Volume and Folio numbers on the Tax Roll.

As I have said before after the close of the defence Mr. Kirlew for reasons already stated sought and obtained an amendment to his defence. Mr. Shelton was understandably embarrassed but was in the circumstances granted leave to re-open his case in order to meet the amendment. This was on 24th October, 1984 on which date the case was adjourned. On the resumption on 14th January, 1985 the plaintiff was not available being then involved in a project at the London University and, said Mr. Shelton, the

date had been fixed without his knowledge. An adjournment was granted but when the case came up again on 16th June, 1986 the plaintiff who in the meantime unfortunately had had major surgery in London was unable to attend. Accordingly, the plaintiff's case remained closed and no further evidence was adduced. Therefore, if the challenge mounted by the amendment was to be met the answer would have to be found in the evidence on record.

So far as the Great House property is concerned the amendment was not necessary to justify the finding of the trial judge denying the plaintiff's claim thereto because William Carpenter never occupied nor owned that parcel of land and the plaintiff claims by transmission from him. What has happened, however, is that the amendment has given the defendant a weapon with which to challenge the plaintiff's claim to the remaining twenty acres because although the plaintiff has a registered title for the lands yet by virtue of Section 68 of the Registration of Titles Act such title is "subject to the subsequent operation of any Statute of Limitations". Accordingly, if the defendant can show a dispossession of, or an abandonment of possession, by the registered owner for the statutory period of twelve years he will succeed against the registered owner. Section 3 of the Limitation of Actions Act which contains the provision reads:

> "No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

The defendant had pleaded that he was not in possession of any part of the registered land in question, a plea which is in direct conflict with the plea in the amendment. However, it suffices under the amendment if he can show adverse possession either by himself or such possession which enures for his benefit under the Statute.

From his evidence his first connection with the lands in dispute viz. 27 acres 1 rood, was in 1960 when, according to him, he leased the lands from Eva Louise Graham. But the trial judge found this to be unlikely and held that if lease there was it would probably be from Walter. Up to that time with Walter alive Eva was not asserting any claim to the Great House property which is the base from which the claim to the 20 acres is launched. Such a finding by the trial judge is wholly in keeping with the evidence. During the tenure of his lease up to 1979 he said he grew flowers and vegetables on the land. If he is in fact speaking about the 20 acres where was such cultivation when the plaintiff and her agent the Rev. Thomas visited the land in 1979 and why was there nothing to attract the attention of the Rev. Thomas until 1981? It must be borne in mind, however, that he said that he "stopped growing vegetables around 1979 - flower growing phased out just with the vegetables". But how consistent would this be with his evidence that "the property was in woodland - that part of it - the entire place in bush land - about 4 - 5 acres in woodland - ruinate - the rest of it partially cultivated. Tenants were on the 27 acres - couple tenants well?" As the trial judge found whatever tenants there had been were on the Great House property and such a finding is consistent with the evidence of Linton Boyden who had reaped only from the area around the Great House.

Further, the defendant does not claim to have acquired title by adversary possession against either Walter or Eva Graham for then he would not proceed to purchase from Eva, as he said. Accordingly, adverse possession against the plaintiff's title must have originated with Walter.

Mr. Macaulay submitted that even if the plaintiff acquired possession of her father's property upon his death on 23rd January, 1959, then since before action was brought more than twelve years would have elapsed, then, if in that interim someone else was in possession of the property she had acquired her title would be extinguished. Inherent in that submission is a requirement that may be stated thus:

(a) At sometime Walter Graham must have asserted possession against the true owner which possession must have continued uninterrupted for the statutory period; or

(b) If Walter Graham did not acquire possessory title up to the time of his death then his successor in title must have continued in actual and uninterrupted possession to complete the necessary period.

(c) In the further alternative Eva Graham in her own right must have entered into adverse possession and thereby acquire a possessory title before action was brought.

And indeed such possessory title would extinguish the plaintiff's title to the portion of land to which it relates (see Section 30 of the Limitation of Actions Act). Contending that such a title has been acquired against the plaintiff Mr. Macaulay cited in support Perry v. Clissold and Others (1907) A.C. 73 in which Lord MacNaghten at p. 79 said:

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title."

This was an appeal to the House of Lords from the High Court of New South Wales. It concerned a parcel of land which Clissold without knowing the true owner, who appeared to have been out of possession, had entered into possession thinking it was vacant land and had enclosed it with substantial fencing and had for ten years without notice of any adverse claim up to the time when the land was duly resumed by the Minister of Public Instruction, held exclusive possession receiving in the meantime the rents and paid rates and taxes in respect of the land which stood in his name in the rate-books of the municipality. Lord MacNaghten said that the only point in the appeal was whether a prima facie case for compensation had been disclosed which would not be the case if Clissold were a mere trespassor.

The judgment made it clear that Clissold was no mere trespasser but one who had a possessory title which at that point in time was good against the whole world with the exception of the true owner who could then intervene and prevent such a title from maturing into one which would extinguish the true owner's title. But in that case there was no doubt that Clissold had been in exclusive possession of the land which was open and visible to all the world. This is a point of distinction with the present case.

The trial judge, obviously accepting the plaintiff's unchallenged evidence that in 1956 Walter Graham entered into negotiations with her father to purchase the lands in question but that such negotiations broke down, held that Walter was thereby making a declaration against interest as owner, such conduct being inconsistent with ownership by him. He held also that there was no act on the part of Walter consistent with his asserting ownership e.g. he did not pay any taxes for these lands. Consequently there was no period of possession by Walter which would qualify for consideration under either (a) or (b) supra. On the contrary the trial judge found that "Walter Graham probably headman for William Carpenter re 20 acre piece". Mr. Macaulay criticised the wording of this finding but, as Mr. Shelton submitted, I think it only means that on a balance of probabilities he was headman for Mr. Carpenter. Be it observed that there was adduced no evidence denying or qualifying the plaintiff's evidence of the relationship between her father and Walter Graham and of the sharing by her father in the crops produced on the land during that period. But whether Walter was headman (employee) or licensee, submitted Mr. Shelton, it is settled law that he could not acquire a possessory title against Mr. Carpenter - a submission with which Mr. Macaulay agreed (see Harris vs. Johnson (1971) 17 W.I.R. 84., 12 J.L.R. 375.

There remains for consideration in this context Exhibit 3, the plan of the survey done at the request of Walter Graham which includes 20 acres of land then registered in Mr. Carpenter's name. How must it be explained? Until late in the day Mr. Macaulay contended that the plan had nothing to do with Mr. Carpenter's land (now the plaintiff's) (despite the

notation thereon - (Vol. 168 Fol. 95 W.A. Carpenter (regd. owner)). Indeed he regarded it as no more than the unwarranted endeavour of the plaintiff's witness Derrick Dixon, a Commissioned Land Surveyor, to support the plaintiff's claim. When, therefore, he was obliged to admit the relevance of the plan he could produce no argument in favour of its evidential value as proof of an adverse claim being set up by Walter Graham. For what it would be worth there is not even any evidence that he ever paid any taxes for the land. But even the payment of taxes would at best be equivocal and would not suffice to establish the burden assumed by the defendant to prove that he had dispossessed the true owner and kept him out of possession for twelve years prior to the filing of the writ. The truth is that there is no evidence in the case at tending to throw any light on the signifficance of this Exhibit. However, since the survey was done at the request of Walter Graham, the most generous construction that could be placed on it would be an indication of, at the most, an attempt to expropriate the 20 acres in dispute. But even such generosity would not avail the defendant because of the lack of evidence of twelve years uninterrupted possession by Walter. Accordingly, such lands would not fall into Walter's estate and the trial judge's findings that "Eva under misconception as to what Walter possessed - mere 7 acres 1 rood 32.5 perches" is justified.

But even if there was evidence of actual possession of the disputed 20 acres by Walter Graham that factor alone would not suffice to establish the defendant's claim. There is need to prove an intent to dispossess the registered owner - Leigh v. Jack (1879) 5 Ex. D. 264. The decision in Leigh v. Jack was applied in Williams Brothers Direct Supply Ltd. v. Raftery (1958) 1 Q.B.D. 159; (1957) 3 All E.R. 593, in which it was held that possession even in excess of the statutory period (1943-1957) without the intention to dispossess the registered owner did not affect the latter's title. In fact this was a case in which the defendant, a tenant, thought he was doing no more than exercising such rights as were accorded him as a tenant. There was no animus possidendi.

Furthermore, intermittent and clandestine acts of trespass persisted in for the statutory period will not avail. In dealing with a not dissimilar question before the Appellate Division of the Ontario Supreme Court in the case of McLeod v. McRae (1918) 43 D.L.R. 350 Clute J. at p. 353 after comparing the acts of possession by a person who has a defective title with those of a person seeking to acquire title by adverse possession had, this to say (at page 353):

> "In the present case, the defendant has not colour of title; it is a case where he must show 'open, obvious, exclusive, and continuous possession,' to make title against the true owner."

Later in his judgment at p. 357 he cited in support of his view Sherren v. Pearson (1888) 14 Can. S.C.R. 581 in which it was held that, (Head-note):

> "Isolated acts of trespass, committed on wild lands from year to year, will not give the trespasser a title under the Statute of Limitations, and there was no misdirection in the Judge at the trial of an action for trespass on such land refusing to leave to the jury for their consideration such isolated acts of trespass as evidencing possession under the statute. To acquire such title there must be open, visible, and continuous possession, known or which might have been known to the owner, not a possession equivocal, occasional or for a special or temporary purpose."

In a supportive contribution Mulock C.J. Ex. said at page 371:

> "Mere fencing, or payment of taxes, unaccompanied by actual, visible, and continuous possession, could not give title."

The reason for such requirements is, in my opinion, not difficult both to identify and justify. It must be that such acts must be of a nature that the true owner can become aware of them as a challenge to his possession and be able to resist the challenge. For obvious reasons Mr. Shelton finds support in this case. While the lands in question in the instant case may not be as wild as the lands in McLeod v. McRae or Sherren v. Pearson the principle nevertheless in my opinion applies. Apart from the survey done in 1961 (see Ex. 3 (supra)) the evidence does not disclose any act on the part of Walter Graham which could fructify into a title. So far, therefore, as Walter Graham is concerned it is profitless to examine several other authorities referred to dealing with the principles applicable to the acquisition of a

possessory title because the strongest authorities will not avail a party from whose case the relevant facts are missing. It follows, therefore, that Walter Graham's estate which by law devolved upon Eva Louise Graham as his personal representative did not include any of the plaintiff's land.

The next question then is this: Did Eva Louise Graham acquire a possessory title to the plaintiff's land? And in considering this question the principles already alluded to with respect to Walter Graham apply. But since more than twelve years had passed between the death of Walter Graham and the bringing of the action it is important also to consider the question of abandonment by the plaintiff during the interim. It is important, therefore, to consider the question: What is required to show that the registered owner retains possession of his property? Obviously such requirements will be dictated by the nature and use of the land.

> "It is sufficient for the plaintiff, as owner of the fee, to show that the land continued in its natural state, ..." (Quoted by Clute J. in McLeod v. McRae (supra) citing Retchie C.J. in Des Barres v. White (1842) 14 Can. S.C.R. at p. 586)."

Whereas twelve years non-collection of rent from a tenant occupying a house will militate against the owner of the house twelve years non-activity on ruinate land or woodland would not necessarily produce the same effect. In this regard there is the very relevant consideration that not only did Eva Louise Graham fail to show open, obvious, exclusive, continuous and uninterrupted possession of the disputed land by her for the statutory period but what is even worse the evidence does not show that she had even once set foot on the disputed land. There had never been any actual possession by her. Even possession by her agent Linton Boyden would not suffice but not even such possession could she show. Mr. Boyden never lived on the land nor even cultivated it.

Apparently oblivious of the law Mr. Macaulay had castigated the plaintiff's action as a case of attempted unjust enrichment because prior to the discovery of the buildings which the defendant placed on the land she had made no attempt to do anything about the land - she had made

no attempt to re-assert possession until she found valuable property - chattels were on the land. He complained further that the plaintiff's disinterestedness in possession of the land is evidenced by arrangements to sell the land to the defendant's predecessor in title which did not come through. He emphasized that the defence is that the defendant claims to be the true owner of the land or in the alternative that he has a possessory title.

I must confess to having missed the logic of all this. What was it that he required of the plaintiff before the first signs of an encroachment appeared? He mistakes where the burden lay. It is for the one who claims to have ousted the title of the registered owner to show that by actual, open and continuous possession for the statutory period he had challenged the possession of the registered owner who nonetheless allowed time to run without taking up the challenge. See Richardson v. Lawrence (1966) 10 W.I.R. 234. The registered owner is under no obligation to be continuously engaged in activity on the land.

"He who challenges the registered owner must show:

1. Actual possession by such person.
2. Clear evidence of an intention on his part to dispossess the registered proprietor and assert actual ownership rights over the property.
3. Affirmatively and unequivocally discontinuance of ownership by the registered proprietor."

So submitted Mr. Shelton is what the cases show to be required by the Statute of Limitations to extinguish the title of the registered proprietor. Mr. Macaulay claims these requirements have been met. If that is so it has been shielded from disclosure. It does not appear in the evidence.

The authority of Archer vs. Georgiana Holdings Ltd. (1974) 21 W.I.R. 431; 12 J.L.R. 1421 as good law is underscored by the fact that both parties are relying on it in support of their contentions - Mr. Macaulay on finding (2) and Mr. Shelton on finding (1) as set out in the Head-note thus:

> "(i) That an owner of land did not necessarily discontinue possession of it merely by not using it, but that each case depended upon the nature of the land in question and the circumstances under which it was held; in the present case lack of user was by itself no evidence to warrant a finding of discontinuance and there was otherwise no evidence on which discontinuance could be found;
>
> (ii) That a finding of adverse possession required some affirmative, unequivocal evidence going beyond mere evidence of the discontinuance and consistent with an attempt to exclude the true owner's possession, the nature of the property being again relevant."

It is difficult to see how Mr. Macaulay can rely on finding (ii) when it is abundantly clear from Eva Graham's evidence that she never had William Carpenter or the plaintiff or any other rival owner in contemplation since she regarded the lands in question as being part of the estate of Walter Graham against whom she was not setting up any claim. The farthest thing from her mind was any "attempt to exclude the true owner's possession." On the other hand Mr. Shelton's position is well supported by finding (i). It is instructive to note that whereas Eva Graham cannot point to any evidence to satisfy the requirements of finding (ii) the claimant in the Archer case had done very substantial work including fencing, dumping of "gully land" and building a wall all of which activity involved a substantial portion of the registered proprietor's land. But this was all done for the better enjoyment of the claimant's land and though consistent with an attempt to exclude the true owner was said in finding (iii) to be:

> ".... all equivocal in that they provided an equal balance between an intent to exclude the true owner from possession, and an intent merely to derive some enjoyment from the land wholly consistent with such use as the true owner might wish to make of it ....."

To my mind this is just another instance when the authority cited is not supported by the necessary evidence to which it can be applied.

It is my view, therefore, that it has been demonstrated that insofar as Eva Graham is concerned any claim that she acquired title by adverse possession of the land in question is wholly misconceived. And on the principle of nemo dat quod not habet (No one can give what he does not possess) the defendant could acquire no title from her. It is patent that apart from the rather questionable sale by Eva Graham to the defendant there is no other basis on which he purports to be the true owner of the land, which claim Mr. Macaulay maintains is the main defence.

In this regard it is interesting to note Mr. Shelton's criticism of the presentation of the appeal which is not without good cause. Says he, the argument was not presented along the lines of the grounds filed. It appears that Ground 2 has been abandoned because no effort was made to show how the learned trial judge erred in law in interrelating the two different questions mentioned. Instead Ground 1 has been argued in two parts viz:

1. On the evidence the disputed portion of land - 20 acres - properly belongs to the defendant or predecessors in title and is not the land in Certificate of Title registered at Volume 168 Folio 95.

2. Alternatively if (1) is not accepted that by virtue of the Limitation of Actions Act the plaintiff's title to the said property was extinguished and that the defendant was now the proper holder of the title to the property.

   Following upon (2) the Court is asked to make an order for rectification - removing the plaintiff's name from the title and inserting the defendant's name instead.

I think that Mr. Shelton's analysis is correct. It follows, therefore, that when Mr. Macaulay was forced to agree that his contention as at (1) was wrong, his alternative became his rallying point but the examination of the evidence shows, I think, that he was not then on safe ground. He is left without a leg upon which to stand. There has not been proved any prescription by the defendant or his predecessors in title. It is my conclusion that the learned trial judge's determination that the

plaintiff had not lost possession of the disputed land - 20 acres is correct.

The question of rectification is now only of academic interest but requires a word of comment in passing. This is a remedy being sought for the very first time. It was not pleaded and neither was it raised as an issue at the trial where the defence was confined to a denial of the reliefs sought. In the circumstances it would be passing strange if so substantial a remedy could be sought on appeal when the learned trial judge never had this relief to contemplate. It could not be countenanced.

Criticism was levelled at the judgment viz:

> "Court allows amount of $500 per annum from 1982 to 1986 for rental of land."

It is correct that the plaintiff did not, and indeed, could not, make any claim for rental there being no landlord-and-tenant relationship. What was claimed was damages and in an effort to place before the Court a basis for assessment of such damages, the plaintiff had testified that she would charge a rental of about $1,000.00 per annum, for rental of the portion of land, which she claimed that defendant was wrongfully occupying. Be it noted however, that this included the Great House and the 7 acres 1 rood on which it stands. It is clear, therefore, how mention of rental crept into the award which can only mean an award of damages at the rate of $500.00 per annum for the five years - 1982-86 i.e. $2,500.00.

Apart, therefore from this adjustment I would dismiss the appeal and affirm the judgment of the Court below with costs in the Court below and costs of the appeal to the plaintiff to be taxed if not agreed.

BINGHAM J.A. (AG.)

The facts and the arguments as well as the relevant authorities in this matter have been very carefully detailed and set out in the opinion prepared by my learned brother Wright J.A. In so far as he has proceeded in that direction therefore that area will not require much repetition on my part except where such is unavoidable.

Before Harrison J. below the action was contested based upon one main issue, that is up to the stage just before the close of the case for the defence, when Mr. Kirlew leading Counsel who appeared for the defendant was successful in persuading the learned judge to allow an amendment to the defence pleaded to include a further claim based upon adverse possession by the defendant's predecessors in title Walter and Eva Graham to the land in dispute. Such a claim, one totally inconsistent with the original defence pleaded was, however, within the discretion of the learned trial judge to grant and on that basis I will endeavour to refrain as far as is humanly possible from commenting much further on the manner in which the trial judge sought to determine the application. Suffice it to say that coming so late in the case as it did, the question of the possible injustice that the amendment might have caused to the plaintiff's presentation of her case and answering this claim, seemed to have escaped the attention of the learned trial judge in applying his mind to the determination of the matter.

One needs to be reminded that such applications ought only to be granted during the course of a trial of an action where it can be done without any injustice to the other side. The effect of the amendment was therefore one which has succeeded in giving the defendant another "string to his bow" and has now to be carefully examined as if he was successful in establishing this claim of adverse possession it would have the result of defeating the plaintiff's title to an area of land being twenty acres contiguous to the boundary of other lands which have devolved to the defendants by purchase from Eva Louise Graham.

The effect of the claim succeeding would result in the plaintiff's title being ousted by virtue of Section 3 of the Limitation of Actions Act.

Sections 68 and 130 of the Registration of Titles Act while recognizing and giving validity to the indefeasibility of the plaintiff's title as the registered proprietor by transmission to all the lands comprised in Volume 168, Folio 95 of the Register Book of Titles, which said title has a registered plan annexed to it, also makes provision for the extinction of the plaintiff's title to the lands in dispute by way of adverse possession being "subject as it is to the provisions of the Limitation Act."

It becomes necessary therefore to look firstly at the main issue which arose for determination based upon the pleadings and in this regard it becomes necessary to refer to the Statement of Claim and the Defence to that Claim.

The Statement of Claim reads as follows:

"1. The plaintiff is the Executor of the Estate of the late William Carpenter, and is the registered proprietor (on transmission) of all that parcel of land known as Green Valley in the Saint David District in the parish of Saint Andrew, being the remainder of the land in Certificate of Title registered at Volume 168 Folio 95, and is entitled to possession thereof.

2. The Defendant has wrongfully trespassed on the plaintiff's said premises and taken possession of a portion thereof, and threatens and intends to continue the said trespass and wrongful possession unless restrained by this Honourable Court.

3. The plaintiff therefore claims:

(a) Possession of the said premises.

(b) An injunction to prevent the Defendant from repeating or continuing the said trespass.

(c) Damages

(d) Costs."

The Defence on the other hand stated that:

"1. The Defendant does not admit paragraph (1) of the Statement of Claim and denies that the plaintiff is entitled to any land occupied by him, and says that he owns thirty and one half (30½) acres of land more or less that is part of what was once GREEN VALLEY ESTATE which he purchased from Miss Eva Louise Graham.

2. The Defendant denies that he has wrongfully trespassed on any land in the possession or occupation of the plaintiff; and denies that he is in possession of any land wrongfully.

3. The Defendant denies that the plaintiff is entitled to :

(a) Possession of any land occupied by him.

(b) An injunction restraining him from continuing or repeating any act of trespass.

(c) Any damages.

(d) Any costs.

4. Any claim the plaintiff might have had to the land in issue was extinguished by the long possession of Walter Graham and Eva Graham - the predecessors in title of the defendant.

5. Save and except as herein admitted the Defendant denies each and every allegation in the plaintiff Statement of Claim as if the same were herein set out and traversed seriatim."

As can clearly be seen from the pleadings what the Learned Trial Judge had before him at the outset of the trial for his determination were two competing claims as to the ownership of the disputed area; one by the plaintiff in which on her evidence she also sought to lay a claim to a Great House situated on what may conveniently be referred to as the Graham lands, and the other by the defendant denying the plaintiff's assertion of ownership and contending to being the purchaser of 27½ acres including the disputed lands from one Eva Graham.

The plaintiff's claim to the Great House was based, no doubt, on its position as shown on the registered plan annexed to her title, situated as it appears thereon very near to the boundary between what was in effect the lands which the plaintiff acquired by transmission as Executor of the estate of her late father William Carpenter following his death in January 1959. As was stated before, these lands are contiguous to the lands shown on the plan as being formerly in the occupation of one Garrick Graham the grandfather of Eva Graham and the predecessor in title of the defendant. These lands are shown on the plan to be some seven acres, one rood in area.

The learned trial judge found on the evidence before him, and in my view quite correctly, that the claim of the plaintiff to the Great House was erroneous and was based upon a mistaken view that was predicated no doubt on the fact that Walter Graham a brother of Eva Graham and someone who on the evidence lived in the Great House for most of his life was probably a headman employed to the plaintiff's father William Carpenter.

It was the evidence of the plaintiff that Walter Graham occupied an area of land being some eighteen acres of the lands now in dispute with the permission of her father and that he cultivated the same.

Her father was the registered owner of a very large tract of the lands in this area, the entire property being referred to as Green Valley, he having acquired some 777 acres of that property in 1925. By virtue of this fact the plaintiff held the belief, though erroneous, that the Great House also fell within the lands forming part of that comprised in the lands registered at Volume 168, Folio 95 acquired by her father.

The correctness of the learned trial judge's finding as to the siting of the Great House is further buttressed by the evidence of the fact that the Graham family were buried on the Great House lands where their tombstones are situated. There was also the further evidence of the plaintiff's witness Derrick Dixon, a Surveyor, to the effect that

the Great House fell within the area of land shown on the registered plan as being formerly in the occupation of Garrick Graham.

The evidence relating to the determination of the main issue turned on the account given by the Surveyor Derrick Dixon. He came into the picture sometime in 1983 when following a request made by the Attorneys for the plaintiff he went to the Survey Department in Kingston, inspected the Master plan of the entire property and submitted a report to the Attorneys.

He subsequently in March, 1984 visited the property in the company of the plaintiff and made certain observations. It was his evidence based on certain measurements that he carried out on the property that the Great House fell within the position shown on the registered plan as being seven acres, one rood formerly in the occupation of Garrick Graham. He also interpreted the two dots shown on the plan to be a house and being situated as it is so close to the boundary between what can be commonly referred to as Graham lands/Carpenters land, it can be reasonably inferred that the house being referred to on the plan was the Great House.

The Learned trial judge sought to rely upon the testimony of Derrick Dixon in determining the main issue as to the ownership of the twenty acres of land in dispute.

It was Dixon's evidence that both based upon the documentary evidence he saw at the Survey Department and on a physical inspection of the property along with the comparisons he was able to make, that the lands in dispute fell within those lands comprised in the registered title Volume 168, Folio 95.

His conclusion is borne out by an examination of the registered title and plan which indicates:-

1. An area of seven acres one rood as being Graham land.

2. Does not show a transfer of any area of land to the Grahams and more particularly any transfer of the disputed lands contiguous to the Graham lands.

On the question of ownership based upon the competing claims arising out of the main issue raised on the pleadings therefore the learned trial judge accepted the evidence of Derrick Dixon and found accordingly. This finding is in my view correct.

Before us, however, to reiterate what has already been stated by my learned brother Wright, Mr. Macaulay for the appellants spent the first five days of the hearing of this appeal vigorously asserting that this aspect of the plaintiff's claim was misconceived. With the greatest of respect to leading counsel for the appellants his arguments in this regard were for the most part illogical and he misconstrued to a large extent the evidence of the Surveyor and this led him to a conclusion in examining the findings of the learned trial judge which was erroneous, based as it was on a false premise. All this arose because he formed the mistaken view that the Surveyor Dixon had testified that the Great House fell within the larger portion of land, that being the 20 acres in dispute. His arguments therefore were that the evidence being clearly in favour of a finding that the Great House and the surrounding lands was Graham land, it followed that the finding of the learned trial judge was against the weight of the evidence and therefore erroneous.

Before the first session devoted to the hearing of the appeal was ended the learned presiding judge Carberry J.A. requested Mr. Macaulay to arrange to bring the original Register Book of Titles with the original plan of the area for the Courts inspection.

When the hearing of the appeal resumed on 8th December, 1986, Mr. Macaulay, no doubt having taken the opportunity in the interim to inspect the original title and the registered plan, stated that he was now prepared to concede that the evidence of the Surveyor Derrick Dixon as to the siting of the Great House was indeed correct and that the finding of the trial judge as to where the lands in dispute fell could also not be successfully challenged by the appellants.

The remainder of Mr. Macaulay's time in this appeal was spent in arguing for the most part the secondary issue of adverse possession.

In examining this question two areas call for careful consideration. These are:

1. The nature of user by the registered owners of the said lands in dispute.

2. The nature of the acts of possession by the defendant and those through whom he sought to assert his claim to adverse possession, those persons being in particular the Graham family going back to Garrick Graham.

The Claim of Adverse Possession

As Mr. Shelton has quite correctly observed, ground 1 of the appeal has been no doubt abandoned as this ground was not argued.

In so far as the second ground was concerned there has been a concession in relation to the first part and the only ground which has been argued has been the second part of ground 2 which related to the question of Adverse Possession.

In reverting to the question of the nature of the user of the lands in dispute by the registered owners, it is common ground and not in dispute that such use as they made of the property was nebulous. It seemed from all appearances that William Carpenter acquired the property in 1925 based upon its development potential. Apart from a relatively small portion which he transferred to some four persons no further attempt was made by him during the remainder of his lifetime to utilise the said lands for any particular purpose. A similar trend seemed to have followed when the plaintiff took over control of it in 1956 following her father's illness.

This lack of user on their part, however, would not have affected their proprietory interest in the property. It is trite law that a registered owner of land does not have to be in actual physical possession of it in order to assert his claim to such land. The mere fact that he is the registered owner, by that very nature gives him a right and

an entitlement to possession of the said lands. If authority is required for this proposition one need only refer to the case of Archer v. Georgiana Holdings Limited (1974) 12 J.L.R. 1421/ 21 W.I.R. 431 which case was relied upon by both sides in this appeal. There it was held by the Court (per Swaby J.A.) that:

> "An owner of land did not necessarily discontinue possession of it merely by not using it, but that each case depended upon the nature of the land in question and the circumstances under which it is held; in the present case lack of user was by itself no evidence to warrant a finding of discontinuance and there was otherwise no evidence upon which discontinuance could be found."

Inherent in the finding of the learned trial judge, Harrison J. that the twenty acres of land in dispute, which finding was based upon the evidence of Derrick Dixon the Surveyor which he accepted, properly fell within the plaintiff's registered title, it was a reasonable inference to be drawn that the plaintiff was therefore by virtue of being the registered owner the person entitled to possession of the said lands and that her right and entitlement had not been altered by her being out of physical possession of the same.

Before going on to deal with the arguments and the authorities cited by both sides one has now to attempt an analysis of the evidence relating to such acts of possession of the defendant and his predecessors in title beginning with that of Garrick Graham who died in 1910. This summary is necessary for the onus of proof on this issue of Adverse Possession, as indeed on the main issue of the claim of ownership as well, rested upon the defendant to bring evidence establishing upon a balance of probabilities that either:

1. The plaintiff and or her father William Carpenter, the registered owners, had been dispossessed of the said lands in dispute or,

2. They had discontinued possession.

3. In either of the above instances, they had remained out of possession for a period sufficient to satisfy Sections3 and 30 of the Limitation Act in which event their title to the said lands would have become statute barred.

Although the law in this area is well settled, there are two cases, which bear out what has just been stated above.

The starting point is Chisholm v. Hall (1959) 7 J.L.R. 164; 1 W.I.R. 413, the locus classicus on the subject of adverse possession. There is also the case of Richardson v. Lawrence (1966) 10 W.I.R. 234. This case, one based upon the Real Property Limitation Ordinance of Trinidad and /Tobago which requires a somewhat longer period of 16 years in order for the Registered Proprietor's title to become statute barred, offers nevertheless similar guidance as to nature of the possession required in order to establish the ouster of the registered proprietor's interest in the land. To quote from the dictum of Wooding C.J. citing Parke B in Smith v. Lloyd (1854) 9 Ex. Ch. at 572 at page 238 (B)

> "The Statute applies not to want of actual possession by the plaintiff but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession whether adverse or not, to be protected to bring the case within the statute."

The registered plan annexed to the title of William Carpenter registered at Volume 168 Folio 95 gives recognition to the fact that Garrick Graham was in occupation of land, seven acres one rood, situated to the south eastern boundary of the lands comprised in Carpenter's title.

The Certificate of Title dated 14th February, 1924 and which was issued on the first registration of the property known as Green Valley to Reginald Ernest Henriques Melhado also bears reference to a prior transfer being made by one James Low Stewart Campbell, no doubt the predecessor in title to the first registered owner. This portion of seven acres along with several other parcels of land were expressly excluded from the lands comprised in the certificate of title issued to Melhado.

This first registration with the registered plan of survey delineating as it does the adjoining occupiers of land does not acknowledge Garrick Graham as being in possession of any other lands apart from the seven acres, one rood with a house referred by the two dots on the plan and situated close to the south eastern boundary of the lands which William Carpenter acquired from Reginald Ernest Henriques Melhado by way of a transfer on 30th November, 1925 which transfer was registered on 8th December, 1925.

In this regard therefore the claim in adverse possession can gain no assistance from the factual situation existing on the evidence relating to the possession of the disputed lands during Garrick Graham's lifetime.

Neither can this claim gain any support from such acts of possession on the part of his son Henry Graham. The only evidence relating to this person, came from Charles Taylor who was 86 years of age at the time of the trial of the action. He testified to being a boy when Henry Graham died.

Whatever claim either Garrick or Henry Graham might have had by way of adverse possession to the lands in dispute would in any event have been extinguished by the Certificate of Title acquired by Reginald Ernest Henriques Melhado in 1924 as such first registration would have had the statutory effect under section 70 of the Registration of Titles Act of extinguishing all prior claims to the lands comprised in the Certificate of Title.

Such period of time required therefore to run in favour of an adverse possessor would have had to commence from the date that the said lands in dispute first became the subject of a registered title, that is, from 14th February, 1924.

As Garrick Graham and Henry Graham had both by such a point in time left this earthly abode, being both deceased, it is to the acts of possession exercised by Walter Graham and Eva Louise Graham that one has to look to see if such user as there was on their part can assist the defendant's claim. As my learned brother Wright J.A. quite properly observed the defendant is not contending that he is asserting any adverse claim during the lifetime of Walter Graham.

It therefore seemed to me to be passing strange as to how therefore, although it is clear on the evidence that Walter Graham lived in the Great House all his life and was in control of the lands surrounding it, how the defendant who on his evidence had no dealings with Walter who died in 1963, claimed to have leased from Eva Graham a large portion of the lands in dispute from 1960. This fact seemed all the more remarkable as apart from the annual visits which she paid to Jamaica from she departed for the United States of America in 1924 and the evidence is to the effect that she still resides there; Eva Graham did not take over control of the Great House and the surrounding lands until after Walter died. Although she testified to her grandfather Garrick Graham owning some 33 acres of land, of which he sold off a small portion, this was not borne out by the documentary evidence contained in the Certificate of Title and the registered plan of survey relating to the property which includes the portion that Garrick Graham was in occupation of. The lands occupied by him eventually devolved to Walter and it is more than likely that the inventory relating to the Estate of Walter Graham may have offered some guide to the truth as to just how much land Walter was seized of at the time of his death.

No such document was however, tendered in evidence before Harrison J. Even on the assumption that Garrick Graham and his immediate successor in title Henry Graham who died in 1921 according to the evidence of Eva Graham, were in occupation of any or all of the disputed lands in their lifetime, it is incontrovertible that the issuance of the

first Certificate of Title registered at Volume 168, Folio 95 in respect of these lands to Reginald Ernest Henriques Melhado, which title was issued on 14th February, 1924, had the effect of defeating all prior claims held by anyone against the first registered owner even by the process of limitation.

To return to Chisholm v. Hall (1959) 7 J.L.R. 164, a decision of the Privy Council and therefore binding on this Court, the Board took the opportunity to construe the relevant provisions of the Registration of Titles Act.

In dealing with section 69 of the Act, the Revised Laws of Jamaica 1953, now section 70 of the Current Act, Lord Jenkins who delivered the Judgment of the Board had this to say at page 175:

> "The scheme of Section 69 is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any rights of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission."

This decision has not been overruled and is still good law.

In the light of the statement of the Board in Chisholm v. Hall referred to supra, it would be spurious for one to assert that such user as Garrick or Henry Graham might have had to the twenty acres of land now in dispute following the first registration of the said lands by Reginald Ernest Henriques Melhado in February 1924, that such a claim if it existed still enured for the benefit of their successors in title. The effect of that first registration was to wipe out and destroy all such prior claims of whatsoever a nature to those lands.

It did not, however, affect any subsequent claims by way of limitation. As my learned brother Wright J.A. has correctly observed in referring to section 68 of the relevant Act, although the Act gives recognition to the indefeasibility of a registered title it makes provision for it to be defeated by the process of the Limitation Act being subject as it is to the provisions of that Act.

Sections 3 and 30 of this Act have been referred to in detail in the judgment of Wright J.A. and I will not go to the extreme course of setting out these sections in detail. Both are of relevance in reviewing the question raised as a result of the amendment granted by Harrison J. below and which in my view is the substantive ground in this appeal.

Although Mr. Macaulay had spent a great part of the period allotted to the presentation of his arguments dealing with the period prior to the occupation of the Great House by Walter Graham, it is of significance that the amendment applied for by Mr. Kirlew in the Court below which was granted by the learned trial judge sought to deal only with acts of possession of an adversary nature in relation to Walter and Eva Graham.

This had to be so in the light of the effect of the decision in Chisholm v. Hall and section 69 of the Registration of Titles Law (now) section 70 of the Registration Titles Act. The nature of user of the disputed lands has to be looked at, but before this is done it has to be recognized that for the plaintiff's title to be defeated one has to look at the period subsequent to February 1924, when the lands were first brought under the Registration of Titles Act.

One now has to look therefore at such acts of possession in relation to the lands in dispute as there were done by:

1. Walter Graham
2. Eva Louise Graham
3. The Defendant George Beckford

In combing through the evidence led in the Court below and on an exhaustive examination of the arguments and submissions advanced on both sides before us it is abundantly clear that the only act that one can point to which sought to establish a dealing in the lands in dispute in a manner inconsistent with the rights and interest of the registered owner, the plaintiff, was the bulldozing and cleaning of these lands and the subsequent erection of the piggery thereon, which on the evidence commenced around 1981. The evidence of the defendant himself is that the erection of the piggery actually took place after he became aware that all the lands in that area including his own land and the lands in dispute were the subject of a registered title in the name of William Carpenter. This evidence is of paramount significance in the determination of the question as to the correctness of the learned trial judge's conclusion on what turned out to be the substantive issue before him and also before this Court. This has to be so, as the defendant acquired the Graham lands by purchase merely two years before the action in trespass in this matter commenced, and this is being generous to him, as on his own evidence he is not certain whether it was 1980 or 1981 - the agreement for sale being prepared even after the trial of the action had commenced. For the basis of the claim of adverse possession therefore, one has to look to the acts of Walter Graham in his lifetime and such acts as Eva Graham may have exercised over the land in dispute.

Try as I might to tease out some evidence of any acts by Walter Graham which points in a direction suggesting that such user as he might have made of the lands in dispute or any portion of it being of an adversary nature, I can find no act by him which was of a nature inconsistent with the use that the registered proprietors William Carpenter and the plaintiff may have wished to make of these lands.

An examination of the evidence indicated that these lands were far up in the Blue Mountains and had been purchased by William Carpenter in 1925, no doubt with some development potential in mind, or maybe even for resale at a latter date when such time became opportune.

The plaintiff took over control of these lands in 1956 when her father became ill. Neither of them made any use of these lands but there was a continuing interest shown in the property which negatives any question of abandonment or discontinuance of possession on their part.

There is the evidence, however, of Walter Graham carrying out a survey in 1961 of 27 acres of land which not only included the Graham lands (7 acres one rood) but the 20 acres contiguous to it, being the area in dispute.

The plaintiff gave evidence of Walter Graham at one time cultivating a portion of these lands, some eighteen acres as a tenant of her father and afterwards being a headman for the entire Carpenter property. According to her he used to bring produce for her father to the family house at 11 Hope Road twice per year. She also spoke of negotiations which were proceeding between her father and Walter Graham to purchase a portion of these lands.

Eva Graham who migrated to the United States of America and has lived in that country since 1924 to the present date denied that her brother Walter was ever a headman for William Carpenter. The survey can be viewed from two aspects, firstly it may suggest that the negotiations to which the plaintiff made reference were concluded prior to her father's death and that the survey was done in keeping with this fact with a view to Walter Graham acquiring one title encompassing both parcels of land. If this was so, one is led to ask two questions:

1. Where is the document evidencing such a sale?

2. When the survey was being arranged, although several adjoining land owners were notified, why was there no attempt made to serve a notice on the personal representatives of the estate of William Carpenter?

The only reasonable inference that could be drawn from the absence of this vital bit of evidence is that such negotiations which Walter Graham had with William Carpenter did not come to fruition prior to Carpenter's death and that the survey and the manner in which it was carried out had as its main purpose therefore the acquisition by Walter Graham of the 20 acres now in dispute which with the death of William Carpenter and the land being far up in the Blue Mountains he no doubt hoped that he would have been able to covet that portion.

All this effort would have profited him nothing as the failure to serve a notice of the intention to carry out the survey meant in effect that the plaintiff in her capacity as the Executor of William Carpenter's Estate was not therefore bound by what took place.

When one examines therefore the evidence relating to the user by Walter Graham what it revealed is a situation in which, if one were to assume that the learned trial judge's conclusion in accepting the plaintiff's evidence that "Walter Graham was probably headman for William Carpenter concerning 20 acre piece" then that fact would have precluded such acts of possession by him in relation to the land in dispute being taken into consideration in determining the question of adverse possession, such acts not being of the nature of establishing a dispossession on a discontinuance of possession on the part of the registered owners as on the authority of Harris v. Johnson (1971) 17 W.I.R. 84 the fact that Walter Graham or his successors in title as an employee of William Carpenter would disqualify him for setting up such a claim, as to acts of a possessory nature exercised by him during his lifetime.

Assuming that Walter Graham made use of the lands in dispute without William Carpenter's permission during his lifetime, having regard to the nature of the property, being for the most part in a ruinate state, such user in so far as it did not interfere with any acts of enjoyment by the true owner or was inconsistent with such use that the true owner might wish to make of it, such user by Walter Graham would not have amounted to adverse possession on his part.

The following cases are relevant to this proposition:

1. Leigh v. Jack (1879) 5 Exchequer Dvision 264

2. Williams Brothers Direct Supply Ltd v. Raftery (1958) 1 Q.B. 159; (1957) 3 All E.R. 593

3. Archer v. Georgiana Holdings Ltd (1974) 12 J.L.R. 1421; 21 W.I.R. 431 to which reference has already been made.

All these authorities have been dealt with at some length by my learned brother Wright J.A. and I will not add to his analysis of these cases by way of commenting on the facts. There is, however, the authority of Leigh v. Jack which is of extreme importance and apposite to the instant case and calls for some comment and it is to this case that I now wish to advert.

Suffice it to say that the nature of the user in all three cases cited went far beyond any of the possessory acts of Walter and Eva Graham in the instant case.

In Leigh v. Jack where the defendant had blocked off an area of land which had before his acquisition of the lands surrounding the area in question, been dedicated as a highway, such user for a period in excess of 20 years by the defendant was held not to have defeated the grant by way of the statute of limitations.

Cockburn C.J. at 271 on the question of user had this to say:

> "I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The defendant simply used the land until the time should come for carrying out the object originally contemplated. If a man does not use his land, either by himself or by some person claiming through him he does not necessarily discontinue possession of it. I think that the title of the plaintiff is not barred by the statute of limitations." (emphasis mine)

Bramwell L.J. added in no less a vein: (p. 273):

> "I do not think that there was any dispossession of the plaintiff by the acts of the defendant, acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it, that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land but to devote it at some future time to public purposes. The plaintiff has not been dispossessed nor has she discontinued possession, her title has not been taken away, and she is entitled to our judgment."

And Cotton L.J. also added this joinder:(p. 274):

> "In deciding whether there has been a discontinuance of possession the nature of the property must be looked at. I am of the opinion that there can be no discontinuance by absence of use and enjoyment where land is not capable of use and enjoyment. In the present case the property sought to be recovered is a piece of land intended to be dedicated to the public as a road. At one end of it was a fence consisting of posts and rails; within twenty years before action the fence was repaired by J.S. Leigh; this was a user of it sufficient to defeat the provisions of the Statute of Limitations."

The case of Leigh v. Jack has been applied ever since and the principle enunciated therein was applied in the other two cases referred to supra. The last of these being a judgment of our own Court. Reference has already been made to this case which has been relied upon by both sides before us in this Appeal.

In so far as the user by Walter Graham is concerned therefore the only remaining question which needs to be asked in the light of the authorities referred to and the law which is abundantly clear is, when the acts of possession by Walter Graham are examined, in whatever manner they are looked at, is there anything in these possessory acts capable of suggesting acts of an adversary nature on his part? I would answer this question as did the learned trial judge in the negative.

This leaves therefore only the question of user by Eva Graham to be determined. One has to bear in mind that on her own evidence she has been for the most part of each year residing continuously in the United States of America from before William Carpenter acquired the land in dispute from Reginald Melhado in 1925, that is except in 1983, when due to illness she did not come to Jamaica.

Following the death of her brother Walter Graham in 1963, the Graham lands with the Great House devolved on her, and she appointed as agent one Linton Boyden to oversee the Great House and the lands surrounding it. It was the unchallenged evidence of this witness before Harrison J. below that the Great House and lands surrounding it were tenanted out during the period 1964-75.

It is significant that although Eva Graham had testified to paying taxes for an area of land being some 19½ acres, which would have been in excess of the seven acres one rood which comprised the Great House lands, there was evidence that the Graham family owned lands at another section of the Mavis Bank area referred to as Empire.

The payment of taxes by itself is an act of an equivocal nature. The Collector of Taxes called by the defendant was of no assistance in identifying the lands to which the tax receipts for the 19½ acres related.

In Richardson v. Lawrence (1966) 10 W.I.R. 234 referred to supra dealing with a not too dissimilar question, Sir Hugh Wooding C.J. in delivering the judgment of the Court of Appeal had this to say at page 238 (I)

> "Put another way, rates are not a yield from, but an imposition upon the land. They do not represent an income or profit, they are a charge or liability, they are not payable necessarily by an owner or even by an occupier, anybody who chooses to pay, officiously or otherwise, may do so and on its acceptance by the authority entitled to the rates, whether the government or the local authority, a receipt is given for the payment in the name of the person who is recorded in the Rate book as owner of the land."

In the light of the above the payment of taxes therefore does not take the defendant's case any further.

An even greater hurdle, however, remains for Eva Graham to surmount. In this regard for her to show possession of a nature adverse to the Plaintiff, she would have to show possession of a nature which was not merely inconsistent with the plaintiff's use and enjoyment of the lands in dispute. (Leigh v. Jack and the cases cite in support) but a possession of a nature which was open, obvious, exclusive and continuous, in order to make title against the true owner. See McLeod v. McRae (1918) 43 D.L.R. 350.

As Eva Graham has been for the most part absent from the Island she would not be able to show a user which is continuous in nature and in any event her own agent's evidence went towards establishing what is now her admitted ownership of the Great House and the Graham lands.

The defendant's account is in conflict with Boyden's evidence, as he seeks to place himself on the lands in dispute as a lessee from 1960, even before Walter Graham's death. This would be remarkable as Walter Graham was on the evidence in full control of the Great House and the lands surrounding it during his lifetime to the exclusion of all others including Eva Graham.

Mr. Macaulay sought to rely on finding(2) in Archer v. Georgiana Holdings Ltd. This due no doubt to the acts of the defendant since 1980 or 1981 in clearing the disputed area and erecting buildings on the said lands.

As these acts were followed by the plaintiff launching her writ upon discovery of the encroachment the question of ouster of her title by adverse possession based upon the defendants acts cannot arise. This finding relied on by Mr. Macaulay therefore can gain no support from the facts of this case.

He also sought to rely upon Richardson v. Lawrence referred to supra and Perry v. Clissold etal (1907) App. cases 73 with particular reference to pages 79-80.

In both cases the decisions turned on facts which brought the claim of adverse possession within the limitation period and the nature of the user was of a character which made the registered proprietor aware of the adverse possessor's presence on the property in dispute.

In conclusion therefore I would summarise the defendant's situation as one in which all he can show as his own part on the evidence led in the court below are possessory acts of an adverse nature dating from 1980 or 1981, a year or two prior to the commencement of this action.

Although successive acts of an adverse nature can be relied upon in establishing possession for a period sufficient to bring the defendant's claim within the limitation period, when the nature of the user by both Walter and Eva Graham are examined, there were no possessory acts going towards establishing user of the class required to oust the plaintiff's title to the lands in dispute.

In this regard the case of McLeod v. McRae relied upon by Mr. Shelton is of some relevance in so far as the nature of the property, being wild lands not easily accessible bears some comparison with the land in dispute, the position of the property having some relevance to the nature of the user of the adverse possessor. As my learned brother Wright has correctly observed "such acts must be of a nature that the true owner can become aware of them as a challenge to his possession and be able to resist the challenge."

There now remains the question of:

1. The award of $2,500.00 for damages and
2. the complaint made of unjust enrichment.

Much has been said by my learned brother Wright in his judgment on both matters and I am in agreement with his observations and the manner in which he has dealt with both.

In so far as the award of $2,500.00 for damages is concerned Mr. Macaulay's complaint is directed at the yardstick or measure which the learned trial judge used as a basis for his award. The total award

represented an amount calculated at $500.00 per year for the plaintiff being kept out of possession of the lands in dispute. The sum claimed had been $1000.00 per year but this amount was based upon a mistaken view of the plaintiff that she was entitled to the Great House, the sum was reduced by the learned trial judge. The plaintiff had testified that her actual loss by virtue of her being dispossessed by the defendant from 1981 to the date of the judgment in 1986 was $1000.00 for the obvious reason that had her possession not been disturbed, she would have been able to rent the lands in dispute including the Great House at an annual rental of $1000.00. The use of the term rental, there being no relationship of landlord and tenant, is what has been complained of.

As the claim is for mesne profits of which the loss of rental would be a proper basis, I can see no valid reason for such a complaint and the measure of damages used in determining the award is in my opinion totally justified on the facts which the learned trial judge had before him.

On the question of unjust enrichment there exists on the facts no basis for a complaint in this area. This is the case of a defendant who on his own evidence was fully aware that the lands in dispute as well as his own lands which he occupied was the subject of a registered title in the name of the plaintiff's father William Carpenter. Despite this fact, rather than proceeding to investigate the title before entering into negotiations to purchase the lands in dispute from Eva Graham he went ahead and carried out gross and clandestine acts of trespass by not only bulldozing the disputed area but erecting permanent structures thereon. It is difficult to imagine a more brazen and high handed conduct on the part of someone who was not sure of his rights to these lands or those of whom the person through/he was claiming as purchaser.

In my view he has no basis for any such complaint and had only him himself to blame.

The end result is that the defendant acquired only what Eva Graham by virtue of what lands including the Great House, which devolved upon her, could transfer to him.

The appeal in my view ought to be dismissed and the judgment of the learned trial judge affirmed with costs order as proposed by Wright J.A.