JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 70/81

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

BETWEEN	GEORGE BOOTHE CARLOS CLARKE	DEFENDANTS/APPELLANTS
A N D	COLIN COOKE	PLAINTIFF/RESPONDENT

Mr. Carl Rattary Q.C. and Mr. Raphael Codlin for Appellants

Dr. Lloyd Barnett for Respondent

March 17, 18 May 10, 11 & July 16, 1982

ROWE J.A.

Napthulie Gordon Hope was on September 21, 1973 the registered proprietor of a parcel of land known as 48 Constant Spring Road and comprised in Certificate of Title registered at Volume 951 Folio 211 of the Register Book of Titles. On that day an Agreement for Sale was made between Mr. Hope as vendor and the appellant Mr. Boothe as purchaser. The negotiations for the sale of the property were conducted through Mr. W.H. Smith, a partner in the firm of Livingston, Alexander and Levy and Mr. Smith signed the Agreement on behalf of the vendor while Mr. Boothe signed on his own behalf. The purchase price was fixed at $80,000.00 and the payment structure was as follows. Mr. Boothe should and did pay a deposit of $11,500.00 on the signing of the agreement. Thereafter he was required to pay $3,500.00 on December 15, 1973; $5,000.00 on March 15, 1974; $5,000.00 ~~on June~~ 15, 1974 $5,000.00 on September 15, 1974 and the balance on completion. If this schedule was maintained on September 15, 1974 Mr. Boothe would have paid $30,000.00 towards the purchase price leaving a balance of $50,000.00. It was further

provided in the Agreement for Sale that completion should be on or before September 30, 1974. Three special conditions were agreed upon. The first provided for the vendor to allow the sum of $50,000.00 to remain owing as first mortgage on the premises bearing interest at 10% per annum and with provision for the yearly reduction of the principal sum. The second special condition concerned the modification of a restrictive covenant, and by the third, the purchaser agreed to pay interest at the rate of 9% per annum on the balance of the purchase money owing from time to time from the date of possession to the date of completion. Mr. Boothe went into possession under the Agreement on September 30, 1973.

Mr. Boothe did not maintain the payment schedule set out above. Between September 21, 1973 and August 7, 1974 he paid only $3,500.00 whereas under the agreement the amount due was $13,500.00. Predictably, Mr. Hope took certain steps. His lawyers wrote to Mr. Boothe giving him notice that, due to his default, if the outstanding amounts were not paid within 21 days of August 7, 1974, the amounts previously paid would be forfeited, the Contract of Sale would be cancelled and the property would be sold to another purchaser. Mr Boothe acted promptly when he got the threatening letter. He apologised for and gave explanations for his inability to fulfil his contractual obligations and sent along some post-dated cheques which were to be cashed on a weekly basis. The cheques were returned to Mr. Boothe by letter of September 9, 1974 and he was informed, inter alia, "that the contract has been cancelled and that we are advertising the premises for sale either by Public Auction or by Private Treaty as the vendor shall decide." In the letter Mr. Boothe was given formal notice to quit and deliver up the premises immediately. That, however, was not the end of the matter as on September 11, 1974 Mr. Boothe attended on Mr. W.H. Smith, the attorney who had been acting on behalf of the vendor and they varied the original agreement as under:

"Agreed (a) He will send me signed cheques for $500.00 each dated 20/8/74 to 31/12/74 on weekly dates i.e. 20/8/74 - 27/8/74 etc.

(b) He will pay $5,000.00 on the 30th Sept. 1974.

(c) He will pay int. on mortgage at 12½% from 1/10/74

(d) if any default made in any of the above payments e.g. any cheque dishonoured by the Bank then the forfeiture set out in the letter d/d 9/9/74 will take effect and apply.

(e) This is a final chance being given to Mr. Boothe to redeem his arrears and bring payments up to date."

This memorandum was signed by Mr. Smith and Mr. Boothe. So over the next fourteen weeks Mr. Boothe bound himself to pay $14.000.00 on the purchase price of the property under the contract. He tried, but he only managed to pay $7,100 by December 31, 1974. Notwithstanding this default no action was then taken by the vendor as was provided for in the memorandum of September 11, 1974. In 1975 he made 4 payments totalling $3,000.00 and then the matter came off the active list.

The next angry salvo was fired on August 19, 1977. Mr. Boothe was again given notice by Messrs. Livingston, Alexander and Levy, Attorneys and Agents for and on behalf of Napthulie G. Hope that he "having made default in the payment of moneys due and interest payable under and by virtue of the Contract of Sale dated the 21st day of September 1973 ..... and also in respect of the subsequent arrangement made by you on the 11th day of September, 1974" he was required to make all payments due under the Contract of Sale together with all arrears of interest within 21 days of the demand and on failure to do so the contract would be cancelled, the payments forfeited and the property would be put up for sale without further notice to him. By that time Mr. Boothe was in Miami and the best that he could do was to promise to pay through Mr. Cleveland Barnett who was managing in Jamaica for him the sum of $500.00 per month. The lawyers wrote back

on September 23, 1977 refusing this offer and advised,

> "we are accordingly proceeding to put the premises up for sale as advised in our letter of 10th August, 1977."

It appears that Mr. Boothe appreciated the seriousness of the matter and so he wrote sometime in October revising his offer and caused $5,000.00 to be paid on account with a promise of $600.00 monthly. In response to Mr. Boothe's request, the attorneys sent him a statement of account up to December 1977 which revealed that up to then Mr. Boothe's total indebtedness was $102, 464.56 out of which he had paid $30,600.00 which when added to the sum of $50,000.00 which was to remain on mortgage, would leave an outstanding balance of $21,864,56. That letter of December 5, 1977 ended with the warning that if the amount of $21,864.56 was not paid by December 30, 1977 and satisfactory arrangements made for the mortgage payments the vendor would put up the premises for sale in accordance with the notice of August 19, 1977. It did not bring any immediate fruit but on June 1, 1978 $1,100.00 were paid followed by payments totalling $3,000.00 in 1979.

The 1980 correspondence began on April 15. The demand then was for the payment of $29,597.80 within 30 days with the now familiar threat to re-sell. It was followed by a short businesslike note of September 5, 1980 which after taking note of the fact that Mr. Boothe had failed to make the monthly payments of $2,000.00 to $2,500.00 to settle the arrears of interest and other costs and expenses ended up with the chilling statement.

> "We have therefore been instructed to sell these premises to another purchaser and we will do so without further delay."

Nine months passed before there were further noises from the vendor's attorneys. This time it was a very ominous noise. The letter of January 8, 1981 said that the amount overdue was $26,687.47 and that the Solicitors were then instructing a firm of real estate agents to find another purchaser for 48 Constant Spring Road. Mr. Boothe did not

then address himself to this challenge except that he consulted Messrs. Eric Desnoes & Co. attorneys-at-law and made through them on February 18, 1981 a tender of $7,597.80 by cheque. This cheque was returned by letter of even date saying:

> "The vendor has now sold the premises to another purchaser and Mr. Boothe should therefore vacate the premises immediately."

The final stages of the correspondence began on April 8, 1981. Messrs. Livingston, Alexander and Levy wrote to Mr. Boothe saying that he was entitled to a refund of all the moneys paid by him less the deposit which was forfeited. On may 12, 1981 Messrs. Eric Desnoes & Co., attorneys-at-law, wrote to Messrs. Livingston, Alexander & Levy and made three points. Firstly, they said that notwithstanding the letter of February 18 which advised that the property had been sold to someone other than Mr. Boothe, that gentleman still desired to complete the purchase but they could not "understand all the details from him." Then the letter spoke of the writer's suspicion that Mr. Boothe was being offered a mortgage and lastly that they understood that Mr. Boothe was then in a position to pay up the balance due with interest thereon and to take up the mortgage loan that was being offered. The letter ended on this plaintive note, "would you kindly advise whether Mr. Boothe may proceed on this original understanding."

There was an immediate reply. Eric Desnoes & Co., were informed that the mortgage offer had been withdrawn and the sale agreement had been rescinded. Those lawyers were told that Mr. Boothe would get a refund of $35,297.80, the same amount referred to in their letter to Mr. Boothe of April, 8 1981. A cheque was sent to Mr. Desnoes on June 23, 1981 for $35,297.80 less "water rates owing to 30/5/81 - $322.85. Taxes owing for period 1975 - 1981 $11,958.25 = $12,311.10 leaving a balance of $22,786.70.

It was said in argument that this cheque was accepted by or on behalf of Mr. Boothe as it was never returned to the sender. And so ended the first phase.

By instrument of Transfer dated June 12, 1981, N.G. Hope transferred to Colin Raymond Cooke all that parcel of land known as 48 Constant Spring Road for the consideration money of $140,000.00. This transfer was registered on June 24, 1981 and on the same day Mortgage No. 368239 was registered to Jamaica Citizens Bank Ltd stamped to cover $100,000.00 with interest. With the baton firmly in his hand, Mr. Cooke through his attorneys, Myers, Fletcher & Gordon, Manton & Hart, wrote to "The Occupier" of 48 Constant Spring Road on June 25, 1981 informing him that Mr. Cooke was now the registered owner of those premises, and saying such occupier had no legal right to be on the premises as he was not a tenant or anything of that nature. The final paragraph was explicit:-

> "Our client requires vacant possession of the premises and has asked us to indicate to you that you should vacate same within ten days failing which he will take such steps as he is legally entitled to take."

Mr. Cooke took this letter to the premises on June 28, 1981 and handed it to Mr. Carlos Clarke who appeared to him to be in possession. In Mr. Cooke's affidavit it is said that on that occasion Mr. Clarke told him that he was not a tenant but that he occupied the premises on the instructions of Mr. George Boothe. one of the principals of the company which owned the adjoining piece of land at 46 Constant Spring Road.

About July 15, 1981, Mr. Cooke returned to 48 Constant Spring Road. He saw and spoke to Mr. Boothe who then said that he Mr. Boothe was the owner of the land. Mr. Cooke relied upon his registered title and then told Mr. Boothe that he would be coming to take possession. And so he did on July 25, 1981. It was a Saturday and Mr. Cooke along with a detachment of police, a Surveyor and some workmen, went to the premises. They entered and the Surveyor established the boundaries. Mr. Cooke gave instructions to the workmen to erect a concrete-block wall on the boundary and this they did. While the work was in progress, Mr. Boothe telephoned Mr. Cooke from Miami and, said Mr. Cooke, he

abused me and said he was coming to Jamaica to "deal with me". That evening Mr. Cooke left the premises under the control of a Security Guard. During the night he was informed by the Guard that Mr. Clarke was attempting to break down the wall. Mr. Cooke visited and saw Mr. Clarke and three men breaking down his newly erected wall. On Sunday 26th, when Mr. Cooke visited, there was a large crowd on the premises including Mr. Boothe and a wall was being built blocking the entrance to the premises, apparently under the supervision of Mr. Boothe. Mr. Cooke said in his affidavit that, fearing for his safety, he has not re-visited the premises but he has observed that the wall had completely blocked his entrance.

On these facts Mr. Cooke sought an injunction to restrain Mr. Boothe and Mr. Clarke, their servants or agents, from trespassing on his property or interfering with him in his occupation of the same. The defendants entered appearance, filed affidavits and on the hearing of the summons were represented by their attorney-at-law. Panton J. (Ag.) in chambers, granted the injunction in terms of the Summons.

Two grounds of appeal were originally filed but on the hearing of the appeal leave was granted for three additional grounds to be argued. All five grounds are set out below:

> "(i) That the orders made by the Learned Judge are unreasonable and were made without due judicial consideration in that the Affidavits filed by the Defendant/Appellants in answer to the Plaintiff/respondent's Affidavits, contained enough evidence to warrant a finding that there was a serious question to be tried and that the Defendants/appellants being in possession of the premises herein ought to have been allowed to carry on their business thereon until the trial of the said action.
>
> (ii) That if the Defendants/Appellants are not allowed to carry on their business the damage done to the Defendants/Appellants will be irreparable and could not be adequately compensated for in monetary terms should the Defendants/Appellants succeed at the trial of the action.

(a) The Order made by the Learned Judge in Chambers is in fact a final Order and will have the effect of determining the issues without trial in that the Plaintiff/respondent will be put in possession of the property now in the possession of the Defendants/Appellants thus disturbing the status quo rather than maintaining it as an Interlocutory Injunction is supposed to do.

(b) That the Plaintiff/Respondent in seeking this Interlocutory Injunction is attempting to obtain in a trespass action an Order for possession and the Interlocutory Injunction granted by the Learned Judge in Chambers permits the Plaintiff/Respondent to achieve this purpose.

(c) That the Interlocutory Injunction presumes that the Plaintiff/Respondent is in occupation of the property when in fact it is the Defendants/Appellants who are in possession of the property and this was amply established on the Affidavits.

A comment on the original grounds is justified. They complain that the appellants are carrying on business on the premises and if not allowed to continue to carry on such business they will suffer irreparable damage which could not be adequately compensated for in monetary terms. However, the only evidence, as to what use the appellants make of the premises is that contained in the affidavit of Mr. Boothe that he resides there. And, moreover, the Record is replete with correspondence to show that Mr. Boothe was at least temporarily resident in Miami for some years prior to July 1981. So those grounds seem to have been drafted in part without factual support.

Before I come to consider the legal submissions, I must mention an interesting feature of the case. Mr. Boothe did not meet with or have any personal dealing with Mr. Hope. His contact throughout the negotiations was Mr. Smith of Livingston, Alexander & Levy. The appellant Clarke deponed that in about September 1973 a man came to him at 46 Constant Spring Road and said he was "Hope from 48 Constant Spring Road and that he was the person negotiating with Mr. Martin George Boothe for the purchase of 48 Constant Spring Road." Mr. Clarke never saw that man again and after this action was brought Mr. Clarke said he went to

Vere in Clarendon to search for Mr. Napthulie Gordon Hope but no one of that name could be discovered. Mr. Harold Hope, a 62 year old Lighthouse Attendant of Portland Cottage in Clarendon swore that so far as he is aware his family is the only family in Jamaica with the surname Hope and that although he has lived throughout at Vere in Clarendon he has never known anyone by the name of Napthulie Gordon Hope.

Mr. Boothe himself in paragraph 18 of his affidavit sworn to on 20th August 1981, had this to say,

> "That sometime in or about 1974 or 1975 I received information that the said Napthulie Gordon Hope had died."

Mr. Cooke, the respondent, never met or dealt personally with Mr. Hope. His contact was Mr. Peter Myers who stated in his affidavit that the person who signed the Transfer from Hope to the Plaintiff in 'my presence' identified himself to be Mr. Hope. Mr. Myers exhibited a letter from Mr. Smith which was dated September 22, 1981 and which read in part:

> "This suggestion that N.G. Hope died in '1974 or 1975' is preposterous. Indeed, I saw him when I came to Jamaica in August/September, and it would therefore appear that 'the reports of Hope's death are greatly exaggerated.' "

The affidavit evidence went one step further. Mr. Cleveland Wilson, a handwriting expert with over 30 years experience in the comparison and identification of handwriting said that he compared the signature of N.G. Hope on the Instrument of Transfer when 48 Constant Spring Road was transferred to him from J.O.S. with the signature N.G. Hope appearing on the Transfer from Mr. Hope to Mr. Cooke and he concluded that both signatures were not written by one and the same person.

There is no factual dispute that Mr. Cooke is the registered proprietor of 48 Constant Spring Road. There is no dispute that he, his surveyor, his workmen and his security guard went to those premises on July 2, 1981 and did the several acts already recounted. There is no dispute that the appellants demolished his wall and built one of their

own. On these facts is it open to the respondent to found and maintain an action in trespass. In the 3rd Edition of Halsbury's Laws Volume 38 at paragraph 1215, it is said:-

> "A person having the right to the possession of land acquires by entry the lawful possession of it and may maintain trespass against any person who, being in possession at the time of entry, wrongfully continues on the land."

The footnote to that passage makes it clear that "the entry is effective, although made forcibly within the Statute of Forcibly Entry" and reliance is placed on Hemmings v. Stoke Pages Golf Club (1920) 1 K.B. 720:

There is a relevant decision of the Court of Appeal of Jamaica on this point to be found in the judgment of Waddington J.A. in Miller v. Commissioner of Lands (1968) 10 J.L.R. at 429. That was a case in which the Commissioner of Lands had a registered title for 51 acres of land referred to as a River Reserve which was a small part of a great tract of land formerly owned by the Commissioner of Lands but sold off to land settlement owners. The land was fenced and on one occasion the servants or agents of the registered owners went on the land and had a conversation with the appellants who were squatters, in an endeavour to persuade them to quit and deliver up possession. On the facts found by the learned resident magistrate that the appellants had been squatting on the lands for only two years, the Court of Appeal affirmed his decision that the registered owner had a sufficient possession to maintain trespass. Waddington J.A. said:-

> "There is no doubt that in an action for trespass the plaintiff must show that he was in possession of the land in question . But possession, in my view, is a question of degree and it depends, I should think, on the nature of the property and on the acts which the plaintiff exercise over the property in order to determine whether or not he was in possession."

Waddington J.A. expressly incorporated into his judgment that portion of the opinion of the Privy Council in Wuta-ofei v. Danquah (1961) 3 All E.R. 596 where the Board said:

> "In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession would be sufficient."

In 1969 the case of Ocean Estates Ltd v. Pinder reported at (1969) 2 A.C. 19 went from the Court of Appeal for the Bahama Islands to the Privy Council. The plaintiffs a development company sued in trespass claiming damages and asking for an injunction to restrain further trespass. Smith J. at trial awarded damages of £100 and granted a perpetual injunction restraining the respondents from continuing the trespass. That decision, overturned by the Court of Appeal for the Bahama Islands, was restored by the Privy Council.

In order to support their action for trespass, the plaintiffs relied upon thier documentary title to the land; on the use of the land by the director of their pre-decessor in title, between 1941 and 1946 when he planted and harvested fruit trees on parts of the land and also by the plaintiffs own exercise of powers of dominion over the land in 1957 and from 1959 to 1969 by having the land inspected and surveyed for future building development.

It was contended before the Board on behalf of the respondents, that notwithstanding the fact that the plaintiffs showed a sufficient documentary title to the land, the particular form of action which they selected, viz, one of trespass to land, was not available to them because they failed to show that at the time the action was brought they had sufficient possession of the land to maintain an action for trespass. As to this argument, Lord Diplock said:

> "This contention is based upon a relic of the ancient law of seisn under which actual entry upon land was required to perfect title and to enable the owner to bring a personal action founded on possession such as ejectment or trespass. In Bristow v. Cormican (1878) 3 App. Cases 641, Lord Blackburn at p. 661, explains how in the development of the action of ejectment the entry ceased to be actual and became a mere legal fiction. It is in their Lordship's view unnecessary to consider to what extent at the present day, more than a century after the abolition of forms of action, actual entry by the person having title to the land is necessary to found a cause of action in trespass as distinct from ejectment or recovery of possession. Put it at its highest against the plaintiffs it is clear law that the slightest acts by the person having title to the land or by his predecessors in title, indicating his intention to take possession, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title unless there can be shown a subsequent intention on the part of the person having the title to abandon the constructive possession so acquired."

He relied upon Danquah's case and that of Bristow v. Cormican supra, which incidentally were both relied upon by Waddington J.A. in Miller v. Commissioner of Lands (supra).

Mr. Cooke sought the protection of the Court within a matter of days after his wall as torn down, his security guard chased away and the erection of the blocking wall by the appellants. The acts of Mr. Cooke were positive and direct acts of possession and the complaint before us that he was not sufficiently in possession to maintain trespass is without substance and fails.

Where there are disputed facts, a plaintiff who seeks an Interlocutory injunction must show at the very outset that there are serious questions for trial. He need not show a prima facie case. Mr. Cooke's real contention is that the appellants have no chance of success at trial as the facts and the law are all on his side. If, says, he Mr. Boothe has a remedy, it may lie against the person with whom he had a contract for sale but as between themselres, he Mr. Cooke, is completely protected by the provisions of the Registration of Titles Act under which his title is

indefeasible, save for actual fraud. As to this latter aspect, the appellants have repeatedly asserted that they have absolutely no evidence of fraud in relation to Mr. Cooke and consequently they have not pleaded it and do not and cannot rely upon any such proposition.

Section 71 of the Registration of Titles Act on which the respondent relies provides:

> "Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

I can best introduce the interpretation of this section by a reference to Baalman on the Torrens System in New South Wales (1951) at page 132, where the learned author in commenting on a statutory provision the "mother" of and similar to section 71 quoted above, said:

> "The design of the Act for attaining that objective (the declaration of titles to land and the facilitation of its transfer) is to eliminate the element of uncertainity attendant on titles under the common law; so it confers a positive measure of certainity on titles which come under its provisions. The instrument of title is called a Certificate. In it, the positive statement is made that A. is now the proprietor of an estate in a defined parcel of land. Subject to certain exceptions, when the certificate of title has become embodied in the register-book that statement becomes conclusive, incontrovertible."

The extent to which the title becomes conclusive and incontrovertible is illustrated by the decision of the Privy Council in Frazer v. Walker (1967) 1 A.C. 569. Husband and wife were there the

registered proprietors of land under the Land Transfer Act 1952 of New Zealand, the provisions of which are not dissimilar from those of section 71 of our Registration of Titles Act. The wife, professing to act on behalf of herself and her husband, arranged to borrow from an innocent third party £3,000 on the security of the property. The solicitors for the third party prepared a form of mortgage and gave it to the wife who took it to her own solicitors for execution. A clerk in her solicitor's office witnessed her genuine signature to the mortgage and also a signature purporting to be that of her husband which the wife had previously inserted on the document. On the basis of this document the amount of £3,000.00 was paid partly to the wife's solicitors and partly to discharge the former mortgage and the lenders were registered as mortgagees. On default by the wife, the mortgagees exercised their power of sale and sold the property at auction to fourth persons. An instrument of transfer was executed and duly registered. Neither the mortgagees nor the purchasers from them had any knowledge of the wife's forgery. The husband was rudely awakened when the new registered proprietor sued him for possession of the property. He claimed that his interest in the land was not affected by the purported mortgage or by the auction sale to the registered proprietor and that the mortgage was a nullity.

The Supreme Court of New Zealand held that, although the husband had given no authority to his wife to mortgage his interest in the land, the purchaser at the auction sale in whose name the title was now registered, had obtained an indefeasible title as registered proprietor. An appeal against this decision was dismissed by the Court of Appeal and a further appeal was taken to the Privy Council and the Board upheld the decision of the New Zealand Courts. After referring to statutory provisions which are indistinguishable from those in the Jamaican Registration of Titles Act, Lord Wilberforce

at page 580 of the Report said:

> "It is these sections which, together with those next referred to, confer upon the registered proprietor what has come to be called 'indefeasibility of title' The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him."

One adverse claim and one adverse claim only, is referred to in section 71 of the Registration of Titles Act and it is fraud. The section opens with the words "Except in the case of fraud ....." and ends with the phrase "and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." There is binding judicial authority that "fraud" as used in section 71 means actual fraud and not constructive fraud. This is to be found in the decision of the Privy Council in Assets Co. Ltd v. Mere Roihi (1905) A.C. 176. In construing similar language as that found in section 71 of the Registration of Titles Act, Lord Lindley said at page 510:-

> "Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sections 46, 119, 129 and 130 of the Land Transfer Act 1870 and the corresponding sections of the Act of 1885 (namely sections 55, 56, 189 and 190) appear to their Lordships to show that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead but often used, for want of a better term, to denote transactions having

> "consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agent ..... a person who presents for registration a document which is forged or has been fradulently or improperly obtained is not guilty of fraud if he honetsly believes it to be a genuine document which can be properly acted upon."

This statement of the law was expressly approved and followed by the Privy Council in Frazer v. Walker supra in which their Lordships, having distinguished Gibbs v. Messer (1981) A.C. 248, itself a decision of the Privy Council, and to which I will return later, went on to say at page 585 of the Report:-

> "First in following and approving in this respect the two decisions in Assets Co. Ltd v. Mere Roihi and Boyd v. Mayor etc of Wellington (1924) N.Z.L.R. (1174) their Lordships have accepted the general principle that Registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted.""

Neither actual nor constructive fraud is alleged against Mr. Cooke or his agents. Relying, therefore, upon section 71 of the Registration of Titles Act his title would appear to be indefeasible. But the appellants argue that the instrument of transfer was signed by a fictitious person and in consequence Mr. Cooke obtains no interest under a registration upon that transfer, although he being a real person could and did pass a good legal title to the mortgagees who lent him one hundred thousand dollars on the security of the property, They concede that the bank's title is indefeasible but contend that Mr. Cooke is not in a similarly fortunate position. The appellants seek to support their contention that N.G. Hope is dead by the bare assertion in Mr. Boothe's affidavit; to the inability of Mr. Boothe's investigators to locate

anyone by the name of N.G. Hope in the Vere area of Clarendon and to the testimony of the handwriting expert to all of which I have earlier adverted.

In the first place Mr. Boothe's assertion that he heard of the death of Mr. Hope is not admissible as evidence of that fact. He did not give the source of his information as he was required to do by section 408 of the Judicature Civil Procedure Code, which provides that:

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings ..... an affidavit may contain statements of information and belief with the sources and grounds thereof."

In my opinion there was no admissible evidence before the learned trial judge which could properly raise the issue that N.G. Hope was dead and from which would follow as a natural consequence that who-ever signed for him on the instant transfer was a fictitious person. However, I will deal with the case of Gibbs v. Messer (1891) A.C. 248, relied upon by the appellants. The facts in that case were that the registered proprietor of land situate in Victoria lived in Scotland but she left with her solicitor in Hamilton, Victoria, her certificate of title. He devised a complicated fraudulent scheme by which he forged a transfer to Hugh Cameron, a non-existent person, and caused that transfer, to be registered, acting thus as agent for Hugh Cameron. Next, still professing to act for Hugh Cameron, he mortgaged the property for £3,000 and appropriated that sum to his own use and benefit.

As the headnote to the Report of the case states:

> "The Victorian, Transfer of Land Statute protected those who derived a registered title bona fide and for value from a registered owner. Accordingly they did not need to investigate the title of such owner, because they are not affected by its infirmities. But they should ascertain at their own peril his existence and identity, the authority of any agent to act for him, and the validity of the deed under which they claimed."

At page 257 of the Report, Lord Watson said:-

> "Although a forged transfer or mortgage, which is void at common law, will when duly entered on the register, become the root of a valid title, in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgage under a null deed."

When this case was cited and relied upon by the respondents in Assets Co. Ltd v. Mere Roihi and Frazer v. Walker supra it was distinguished and not followed.

About it, Lord Wilberforce said in Frazer v. Walker at page 584:

> "The appellant relied on the earlier decision of the board in Gibbs v. Messer as supporting a contrary view but their Lordships do not find anything in the case which can be of assistance to him. Without restating the unusual facts, which are sufficiently well known, it is sufficient to say that no question there arose as to the effect of such sections as corresponded (under the very similar Victorian Act) with sections 62 and 63 of the Act now under consideration. The board was then concerned with the position of a 'bona fide' purchaser for value from a fraudulent person and the decision is founded on a distinction drawn between such a case and that of a bona fide purchaser from a real registered proprietor. The decision has in their Lordships opinion no application as regards adverse claims made against a registered proprietor such as came before the courts in Assets Co. Ltd v. Mere Roihi in Boyd v. Mayor etc of Wellington and in the present case."

When the matter comes up for trial if Mr. Boothe then has admissible evidence that the curious circumstances exists in this case, similar to those in Gibbs v. Messer then that will be an issue for the learned trial judge.

I do not consider that this is a case where damages would be an adequate remedy. Mr. Cooke must keep up mortgage payments on $100,000.00 at, we are told, 15% interest per annum. Throughout his long association with Mr. Hope, Mr. Boothe was never able to meet his financial obligations on time or at all and there is no evidence that his financial position has changed. If Mr. Boothe retains possession, Mr. Cooke would have to service

his loan, without the enjoyment of the property and at the end of the day may not be able to recoup himself in damages.

The balance of convenience is clearly on his side too. There was no evidence as to what use Mr. Boothe had made of No. 48 Constant Spring Road, save for the reference in his affidavit that he resides there. In contrast, however, there is much material that he has spent the greater part of the last preceding years in Miami. Mr. Boothe enjoyed years of opportunities within which to complete the purchase and at every turn he was advised of what the vendors contemplated. Yet he took no adequate step to pay. When he knew that the land had indeed been sold he took no step to lodge a caveat to protect whatever interest he claimed. When the refund of his payments, less certain deductions, were tendered to him, he did not return the cheque. Not a single complaint has been made in relation to the conduct of Mr. Cooke in his negotiations for the purchase of the land, and of his subsequent action in getting himself on the Register. To test the matter one step further, Mr. Rattary was not sure whether at this stage Mr. Boothe had a caveatable interest against the land.

I am of the view that the learned trial judge correctly exercised his discretion to grant the interlocutory injunction to Mr. Cooke and it is for these reasons that I agree that the appeal should be dismissed with costs to the respondent to be agreed or taxed.

CARBERRY J.A.

I agree.

WRIGHT J.A. (AG.)