

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.40 of 1979

IN THE ESTATE of PEARLINE AGATHA TAYLOR
late of Steer Town in the parish of
Saint Ann, Widow, deceased, intestate.

A N D

IN THE MATTER of the claim by DERVENT
TAYLOR Administrator of the Estate of
Pearline Agatha Taylor, deceased for a
Declaration and Order that he is entitled
to be registered as proprietor of an
estate in fee simple in possession of
lands registered at Volume 1029 Folio 593
of the Register Book of Titles.

A N D

IN THE MATTER of the Rectification of
the Title to the lands registered at
Volume 1029 Folio 593.

A N D

IN THE MATTER of the Registration of
Titles Act.

Dr. L. Barnett and P. Millingen instructed by Messrs. Clinton Hart and
Co. for the Applicant Bruce Realty Company of Florida, U.S.A.

W. B. Frankson Q.C. instructed by Messrs. Gaynair & Fraser for the
Respondent Derwent Taylor Administrator of the Estate of Pearline
Agatha Taylor Deceased.

SUMMONS TO SET ASIDE OR DISCHARGE EX PARTE ORDER

Heard in Chambers on May 28, 1981.

Ruling delivered in open Court on June 18, 1981.

BEHIND ORDER

CAMPBELL J.

On the 13th day of March, 1979, an Originating Summons
intituled as above was filed in this Court on behalf of the respondent
Derwent Taylor. The reliefs sought in this Originating Summons are
as hereunder namely:

- (a) A Declaration that he (Derwent Taylor)
is entitled to be registered as the
owner of an estate in fee simple in
possession of all that parcel of land
part of Mamme Bay in the Parish of
Saint Ann, comprising 28 acres 3 roods
and 36.4 perches and being part of the

- (a) land registered at Volume 1029 Folio 593 of the Register Book of Titles free of all encumbrances save and except caveat Number 122880 in favour of Jamaica Public Service Company Limited;
- (b) An order that the said Derwent Taylor be registered as the owner of the said land;
- (c) An order that the Certificate of Title registered at Volume 1029 Folio 593 in the name of Twin Reef Acres Limited, be rectified.

The Originating Summons bore the following statement:

"Note: This is an ex parte application and it is not intended to serve anyone".

The above statement clearly and expressly demonstrates that the Originating Summons was intended to be heard ex parte.

The Originating Summons was subsequently heard ex parte in Chambers by Farquharson J. (Acting) on 5th June, 1979, and an order made in the following terms:

" Upon the Originating Summons coming on for hearing this day and after hearing Mr. W. B. Frankson of Counsel instructed by Messrs. Gaynair & Fraser, Attorneys-at-Law for the applicant Derwent Taylor and having read the Affidavit of Derwent Taylor, Alphonso Hinds, and Gloria Elaine Edwards and the exhibits filed herein it is hereby ordered:

1. That the Declaration prayed for is hereby granted;
2. That the Certificate of Title registered at Volume 1029 Folio 593 and the duplicate thereof be cancelled and in lieu thereof a new Certificate of Title and duplicate thereof be issued in the name of Derwent Taylor as Administrator of the Estate of Pearline Agatha Taylor, deceased, free of encumbrances except Caveat Number 122880 in favour of the Jamaica Public Service Company Limited".

The Affidavit of Derwent Taylor which was before the Learned Judge is to the effect that from credible information which he believed, the land in question was first owned by one Samuel Hinds his ancestor and by mesne transmission became vested in one Teddy Hinds and Pearline Agatha Taylor, his uncle and mother respectively. He the deponent aged 46 had throughout his life-time been going to, occupying

and using the land until in 1955 his uncle Teddy Hinds gave him possession of the latter's interest in the land. He continued to use and occupy the land together with his mother Pearline Agatha Taylor until her death intestate on 29th January, 1972.

Dervent Taylor further deponed that he continued in sole, peaceful, open and undisturbed possession of the said lands save for an action in trespass brought against him by Twin Reef Acres Limited about March 1974, in the Resident Magistrates Court of St. Anns which was on 18th April, 1974, adjourned sine die and that Twin Reef Acres Limited is now dissolved. He exhibited photo-copies of relevant documents such as Certificate of Title to the land in question, Certificate of Incorporation of Twin Reef Acres Limited and certified copies of documents evidencing the voluntary liquidation and winding up of Twin Reef Acres Limited. He concluded that with the dissolution of Twin Reef Acres Limited he knew of no other person who has or claims any estate or interest in the land.

The Affidavit of Alphonso Hinds is supportive of the successive undisturbed ownership and possession of the ancestors of Dervent Taylor culminating in the latter's undisturbed possession. The Affidavit of Gloria Elaine Edwards the Registrar of Companies is to the effect that Twin Reef Acres Limited was duly registered under the Companies Act on 6th August, 1969, and went into voluntary liquidation on 28th July, 1972, and was finally dissolved on 21st March, 1974.

She further deponed that "Bruce Realty Company of New York Incorporated" does not and has never appeared on the Register of Companies. Presumably she meant Bruce Realty Company of Florida, U.S.A.

The applicant herein namely Bruce Realty Company of Florida, U.S.A., asks for an order setting aside the orders made by Farquharson J. (Acting) on the grounds that:

- (a) The Learned Trial Judge had no jurisdiction to cancel a Certificate of Title on an ex parte Summons;

- (b) The procedure was irregular in that a person who has an interest and legal title was deprived of their interest and legal title without notice;
- (c) It was illegal and contrary to the Registration of Titles Act which gives an indefeasible title to a bona fide purchaser for value.

The application has been strenuously and vigorously resisted by Mr. W. B. Frankson on behalf of the respondent Derwent Taylor.

Normally, when there is an application to set aside an order made on an ex parte hearing before a Judge, the same sought, if possible and convenient, to be heard by the same Judge who heard the matter. This is to ensure that the considerations underpinning the making of the order by that Judge may continue to have their interplay with any new or additional facts on the basis of which, the order is sought to be set aside.

In this matter the Learned Judge has demitted office. It is therefore impossible to have him consider the application. I will bear in mind the submissions made by Mr. Frankson in this regard, namely that the Learned Judge must be assumed to have considered fully the Affidavits and Exhibits which were before him. Further that he must have considered, in the light of the Affidavits and Exhibits, that in the circumstances of the case, no notice was required to be given to any person of the application of Derwent Taylor. That the Learned Judge validly exercised the discretionary power ^{residing} in him under Section 158(2) of the Registration of Titles Act in making the order for cancellation of the title registered at Volume 1029 Folio 593 in the Register Book of Titles. Such discretionary exercise by him of his power under Section 158(2) cannot be called in question except on appeal.

It is necessary in considering these submissions to first consider the powers conferred on the Supreme Court or a Judge thereof under the Registration of Titles Act so to determine the scope of Section 158 and in particular to determine whether the Court or a

Judge has unlimited jurisdiction to entertain under that section any proceeding whatsoever in law or equity creative of or pertaining to a registered estate or interest in land under the Act.

A consideration of the various provisions of the Act reveal without any doubt that the intention of the legislature was to confer only limited powers on the Supreme Court or a Judge in effecting the purpose of the Act which purpose is primarily to be effected by the Registrar of Title.

Section 12 enjoins all Courts and Judges and persons acting judicially to take judicial notice of the seal of the Office of Titles, and of the signature of the Registrar of Title and of any person appointed to act in his stead.

Section 13 provides that all Certificates of Title and other documents purporting to be sealed (with the seal of the Office of Titles) and signed by the Registrar of Title shall be admissible as evidence without further proof.

Section 15 empowers a Judge to deal with persons as for a contempt of the Supreme Court, who refuse and or neglect to respond to the summons of the Registrar of Title or otherwise refuse and or neglect to supply information or give explanation pursuant to and necessary for the discharge by him of his duties under the Act.

Section 40 empowers a Judge in Chambers on the application of a person seeking to bring land under the Act to order any person having in his possession, custody or control, relevant deeds, instruments or evidence of title to produce the same to the Registrar of Title. Such application may be made by summons.

Sections 41 and 143 empower a Judge in Chamber to award compensation to a caveator on his summons (Section 41) where he has been put to expense without sufficient cause, by reason of an application for the Registration of Land which has subsequently been withdrawn or to any person who has suffered damage (Section 143) by the lodgment of a caveat by a caveator.

Section 42 empowers a Judge to order inspection of documents evidencing the title of a person on the basis of which he secured a registered title, which said documents are by the Act retained in the custody and possession of the Registrar of Title.

Sections 44 and 140 empower the Supreme Court or a Judge in Chambers to hear and determine an application brought against a caveator by an applicant for registration, to show cause why such caveat should not be removed. Such application is to be by summons and on proof that the caveator has been summoned the Court or Judge may make such order in the premises either "ex parte " or otherwise as to such Court or Judge may seem fit.

Section 45 empowers the Supreme Court or a Judge to make an injunction order or other order directed to the Registrar of Titles (in proceedings brought by a caveator to establish his title to the estate or interest specified in the caveat) restraining him from bringing the land under the operation of the Act.

Sections 66 and 67 empower the Supreme Court or a Judge on motion or petition to make an order in favour of some only of the joint registered proprietors (in cases when the title is endorsed with the words "no survivorship") authorising or directing them to transfer or otherwise deal with the property subject to all necessary safeguards.

Section 131 provides that in case there is any doubt, dispute or litigation under section 130 (which deals with the acquisition by transmission of registered land) as to the true construction or legal validity or effect of any will or settlement relating to registered land or where the person entitled to any registered land..... under any will, settlement or instrument cannot be ascertained, a Judge is empowered to appoint a person to be registered as the representative of such land and such person when registered, shall become the transferee and be deemed to be the proprietor thereof for the purposes of the Act, subject to direction from time to time given by order of the Judge. Such registration shall be made by the Registrar of Title.

Section 135 empowers the Supreme Court to make vesting orders in favour of trustees with direction to the Registrar of Title to make the appropriate entry in the Register Book on the Certificate of Title. Such a trustee shall thereafter be deemed the proprietor.

Section 153 empowers the Supreme Court or a Judge on the application of the Registrar of Titles to issue a summons, or if necessary, a warrant of arrest, to enforce the appearance before the Supreme Court or Judge of any person to show cause why he should not deliver up to the Registrar of Titles Certificates of Title or other instruments for cancellation or correction in exercise of the powers in that behalf given to the Registrar of Titles.

Section 156 provides that where, upon the application of any owner or proprietor for registration or to have any transaction or transmission registered or recorded, or have any Certificate of Title, foreclosure, order or other document issued, or to have any act or duty done or performed which by the Act is required to be done or performed by the Registrar of Title, he refuse to accede to such application ^{or} if such owner or proprietor shall be dissatisfied with the direction upon his application given by the Referee, he may call on the Registrar of Title or the Referee as the case maybe to set forth in writing the grounds of his refusal or the ground upon which such direction was given; the owner or proprietor may then summon the Registrar of Title or Referee as the case may be, to appear before a Judge to substantiate and uphold the ground of his refusal or of such direction.

Upon this summons the Judge may, if any question of fact is involved, direct an issue to be tried to decide such fact and thereafter the Judge shall make such order in the premises as the circumstances of the case may require and the Registrar shall obey such order.

It is against the background of these express provisions prescribing the powers and function of the Supreme Court or a Judge that I must determine whether section 158 and in particular

subsection 2 thereof confers such a plenitude of powers on the Judge in Chambers to entertain the Originating Summons for the relief sought and to make the orders therein as he did.

In my view Section 158(1) in conferring the powers on a Court or a Judge to direct the Registrar to cancel or correct a Certificate of Title, following the recovery of any land, estate of interest by proceeding at law or equity from the person registered as proprietor thereof, is conferring such power only in action, suits or proceedings authorised and brought by the categories of persons mentioned in Section 161(a-f).

In relation to Section 158(2), my view is that it refers to proceedings at law or equity provided for under the Act, other than those expressly mentioned in Section 161(a-f). Such other proceedings in law or equity are limited to the instances where the Court or a Judge is empowered to entertain applications under the Act by persons therein mentioned and in the form prescribed. Such instances for example are by caveators (Sections 44, 45, 140); by joint proprietors (Sections 66 and 67), by claimants who rest their claim to acquisition by transmission on the true construction or legal validity or effect of wills, settlements or instruments (envisaged by section 131) and by complainants in proceedings against the Registrar of Title or Referee under Section 156.

The Originating Summons filed by Derwent Taylor was not a recovery proceeding under Section 158(1) since it was not permissible under Section 161 because he did not come within any of the exceptions stated in paragraphs (a) to (f) thereof. The Learned Judge accordingly in my view should have dismissed the Originating Summons as one of which he had no jurisdiction to make any order by way of granting relief under Section 158(1).

Equally though the Originating Summons could be regarded as a proceeding in equity in relation to land under the operation of the Act, it was not brought by a person within any of the other categories of persons entitled under the Act to invoke the jurisdiction and

assistance of the Judge. Derwent Taylor was not a caveator, he was not an owner or proprietor who was dissatisfied with any refusal of the Registrar to register him. In so far as his claim is based on acquisition by transmission, he is not shown to be relying on the construction of, or the pronouncement on the validity or legal effect by a Judge of any will, settlement or instrument under which he claims. In so far as his claim for a declaration is based on prescriptive or possessory rights, the Judge had no jurisdiction to pronounce thereon except in proceedings brought by Derwent Taylor against the Registrar of Title pursuant to Section 156 of the Act. The right to be registered based on the acquisition of possessory rights and the procedure for securing such registration are expressly laid down in Sections 85 to 87 of the Registration of Titles Act. There is no statutory provision for registration of such rights pursuant to a declaration by a Court or Judge except by invoking the provisions of Section 156 of the Act after prior effort to secure registration under Sections 85 and 87 has failed. This cannot be ex parte as the Registrar of Title is a necessary party.

This view that the Supreme Court or a Judge is not empowered to entertain proceedings brought under the Registration of Titles Act except in the circumstances specified in the Act gains supports when one considers the scheme of the Act and the express powers conferred on the Registrar of Title, such for example as the powers of issuing Certificate of Title on first registration with the procedure to be followed (Sections 24, 29, 31 and 36); the powers of cancellation or correction of Certificates of Title (Section 153) the power to register possessory rights acquired against a registered proprietor (Sections 85 - 87) and the power to entertain proceedings for foreclosure, to issue order of foreclosure and to enter the same in the Register Book (Sections 119 - 120).

In considering the powers of the Supreme Court under the Land Transfer Acts 1870 - 1885 (New Zealand) the provisions of which are "in pari materia" with our Registration of Titles Act, Lord Lindley

in Assets Company Limited v. Mere Roihi (1905) A.C. at page 195 had this to say:

" There does not, moreover, appear to be any power conferred on the Supreme Court to cancel or correct any Certificate of Title or entry on the register unless applied to by the Registrar or on appeal from him, except where land or some estate or interest therein is recovered by some proceeding in that Court from a registered proprietor. In such a case if the proceeding is not expressly barred - i.e. if having regard to Section 56 (our Section 161) the plaintiff is entitled to recover - the Supreme Court or a Judge can direct the Registrar to cancel a certificate or entry and to substitute another for it".

For the above reasons I hold that the Learned Judge had no jurisdiction to entertain the Originating Summons, his orders made and thereon are in consequence void/on this ground ought to be set aside.

Dr. Barnett for the applicant based his application on the narrower ground that the Learned Judge had no jurisdiction to cancel a Certificate of Title on an ex parte summons. That the procedure adopted was irregular in that by the procedure adopted a person who had an interest and legal title was deprived thereof without notice.

If I am wrong in concluding that the Learned Judge did not for the reasons given, have any jurisdiction whatsoever to entertain Derwent Taylor's application, and that on the contrary he could entertain the same, then I must consider whether in entertaining the same on an ex parte Originating Summons and failing to cause notice to be given to interested parties, the Judge committed a fundamental error in procedure and breached a fundamental principle on which justice is administered such that his order is vitiated, rendered void and ought therefore to be set aside.

The facts then before the Learned Judge based on the Affidavit of Derwent Taylor and the Certificate of Title exhibited revealed that:

- (a) The first registration of the land disclosed "Bruce Realty Company of Florida, United States as the proprietor of the estate in fee simple". It was described as a Corporation existing under the Laws of the State of Florida;

- (b) The land was transferred on 1st October, from Bruce Realty Company to Twin Reef Acres Limited of 36 Duke Street, Kingston and was registered on 16th December, 1969;
- (c) The land was encumbered by a mortgage dated 2nd October and registered on 16th December, 1969, executed by Twin Reef Acres Limited in favour of Bruce Realty Company to secure US\$733,500 with interest, presumably the balance of the unpaid purchase consideration owed by Twin Reef Acres Limited.

On these facts it cannot be said that Derwent Taylor was being frank and sincere when he deponed that with the liquidation and dissolution of Twin Reef Acres Limited he knew of "no other person who has or claims any estate or interest in the land". Even if he felt that with the dissolution of Twin Reef Acres Limited it ceased to be the proprietor of the registered land, he could not be such a simpleton not to contemplate the position of the registered mortgagee.

Was that mortgagee to be divested of its registered estate and interest in the land albeit not absolute, without any attempt whatsoever to notify it of his adverse claim? The application of Derwent Taylor was not for a declaration of title subject to the mortgage which would possibly obviate the necessity for the mortgagee to be notified. It was for a declaration of title free of all encumbrances save and except a caveat in favour of Jamaica Public Service Company Limited.

This was patently a case where notice ought to have been given to Bruce Realty Company as a mortgagee. Even if at the date of the application the said Derwent Taylor was genuinely unaware of the change in legal status of Bruce Realty Company from a mortgagee to a proprietor duly registered, he would still be reasonably expected to know that the mortgagee ought to be notified.

In Bonaker v. Evans (1851) 16 Q.B.D. 162 a bishop sequestrated the profits of a benefice after lengthy and acrimonious correspondence between him and the incumbent due to the latter's admitted non-residence. The incumbent had been warned of the consequence of his non-residence. The statute under which the sequestration was effected

had merely provided that in the event of failure to reside after warning "it shall be lawful for the bishop to sequester the profits".

The Court of Exchequer Chamber held that sequestration without a hearing was void. Parke B said at page 171:

" No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless indeed the legislature had expressly or impliedly given an authority to act without that necessary preliminary".

In the application before the Learned Judge, Bruce Realty Company was not even shown to be an offender. There is no foundation for the submission by Mr. Frankson that Bruce Realty Company had so conducted its affair and had so obscured its identity that it contributed to the oversight of Derwent Taylor and his advisers in not notifying it of his adverse claim. The Registration of Titles Act under which Derwent Taylor brought his application is itself replete with the many and varied instances where notices have to be advertised in addition to being served on parties likely to be affected by decisions of the Registrar of Title. Further, all summons to the Court or a Judge provided for under the Registration of Titles Act, by their nature envisage in my view, service thereof on parties likely to be affected. In particular where adjudications are to be made which may affect proprietary rights of persons as for example applications against caveators (Sections 44 and 140) it is expressly provided as a condition precedent to the Judge making orders "ex parte" that there must be proof that such caveators have been summoned.

Fleet Mortgage v. Lower Maisonette (1972) 2 All E.R. 737 is a case most relevant to these proceedings in that it dealt with a case in which the aggrieved party was completely unaware of the proceedings involving him.

A landlord had brought an action seeking forfeiture of a lease, the order was duly made but by agreement between the parties it was suspended on certain conditions to be observed by the tenant.

The original landlord having assigned his reversion, the assignee without giving any notice to the tenant, applied to a Master for leave to issue a Writ of possession on the ground that the tenant was in breach of the condition on the basis of which the order for forfeiture was suspended. Leave was granted and the Writ of possession was issued. Application was made by the tenant to set aside the Master's order and the Writ on the ground that the Master's order was a nullity. Pennycuick V.C. did so and in doing so, he said at page 742:

" Apart from any provisions in the Rules of the Supreme Court, it appears to me too clear for words that natural justice required that notice of this application should be given to the tenants".

A perusal of Order 32 in the Supreme Court Practice 1970 (England) which, as stated by the editors, groups together in a convenient and coherent way, all the rules relating to applications and proceedings in Chambers, fails to disclose, as submitted by Dr. Barnett, any precedent for an ex parte summons to secure the relief sought by Derwent Taylor.

It is not in doubt, even though not expressly stated in any Section of our Civil Procedure Code Law, that a party affected by an ex parte order may apply to the Court to discharge it on the sufficient ground that he has not had an opportunity of being heard.

It is totally irrelevant to speculate on whether the Judge would still have made the order having heard the aggrieved party. The order having been made in fundamental breach of the principle of "audi alteram partem", any person affected thereby who ought properly to have been given an opportunity to be heard has a right ex debito justitiae to have the order set aside.

I accordingly hold on this alternative ground that the ex parte order made on 5th June, 1979, should be set aside as being void due to the adoption of an erroneous procedure which breached a fundamental principle of natural justice.

Mr. Frankson has however submitted that even if the order

made by Farquharson J (Acting) is void for want of jurisdiction or for any other conceivable reason, the setting aside of the said order at this stage would be of no avail, since it is an executed order on the basis of which Derwent Taylor was registered as the proprietor of the land in question and he has thus acquired an unimpeachable and indefeasible title against the whole world, as no fraud has been proved in this application or at all against him.

In support of this submission Mr. Frankson referred me to Section 68 and Section 70 of the Registration of Titles Act and cited Assets Company Limited v. Mere Roihi and Ors. (1905) A.C. page 176 and Fraser v. Walker and Ors. (1967) 1 All E.R. P. 649 as authorities on the unimpeachability of a registered title. Section 68 is to the following effect:

" Section 68 - No Certificate of Title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every Certificate of Title issued under any of the provisions herein contained shall be received in all Courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power".

Section 70 so far as is relevant is to the following effect:

" Section 70 - Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the Certificate of Title subject to any qualification that may be specified in the certificate, and to such encumbrances as may be notified on the folium of the Register Book constituted by his Certificate of Title but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered Certificate of Title....."

The case of Assets Company Limited v. Mere Roihi and Ors. (1905) A.C. as interpreted in Fraser v. Walker and Ors. (1967) 1 All E.R. page 649 do in fact establish beyond any doubt that it is the fact of registration and not its antecedents which vests and divests title. In sum total, these cases establish that even if the proceedings precedent to registration were not merely irregular but void, any registration effected thereby remain operative and establish in the person registered an indefeasible and unimpeachable title subject to the cases specifically excepted by the Registration of Titles Act. Such excepted cases are totally independent of the existence or non existence of fraud.

Mr. Frankson in making his submissions and relying on these cases has failed to advert his mind to the excepted cases recognised in the two cases, and expressly stated in Section 70.

In this case Bruce Realty Company of Florida U.S.A. was registered with an absolute title on 6th May, 1976, its title was registered at Volume 1029 Folio 593. The fact that its title was cancelled on 10th July, 1979, and an absolute title registered in the name of Derwent Taylor at Volume 1156 Folio 222, does not deprive Bruce Realty Company of the status of a proprietor who was the "holder of an estate or interest in the same land and who is now claiming the land under a prior registered title". The fact of the company's prior registration cannot be circumvented by Derwent Taylor holding up his title registered at Volume 1156 Folio 222 and saying it is a first registration.

Even the entry cancelling Bruce Realty Company's title bespeaks the existence of its prior title; if such did not exist, there would be nothing to cancel. This cancellation was a condition precedent to the issue of Derwent Taylor's registered title at Volume 1156 Folio 222.

Under Section 161 of the Registration of Titles Act, Bruce Realty Company would be entitled to bring a recovery action against Derwent Taylor for recovery of the land. Bruce Realty Company is a

registered proprietor with an absolute title claiming under a Certificate of Title prior in date of registration under the provisions of the Act. See Section 161(f).

Further, on the facts disclosed in these proceedings, there are grounds on which Bruce Realty Company could equally secure recovery of its land by substantiating its allegation of fraud based on the following namely:

- (a) The issuing of the Originating Summons by Derwent Taylor in the capacity of Administrator of the Estate of Pearline Agatha Taylor when no registration by transmission was in issue under Section 130;
- ✓(b) The failure to give notice of the Originating Summons to Bruce Realty Company of whose existence he was aware as evidenced by his requisition for search as to whether it was on the Register of Company;
- (c) Knowledge of the rights of Bruce Realty Company at least as mortgagee as evidenced by the photo-copy of the Certificate of Title registered at Volume 1029 Folio 593 tendered in the proceedings;
- (d) Misrepresentation to the Registrar of Title of the nature of the proceedings out of which the order for cancellation was made, namely that it was proceedings under Section 158(1) of the Registration of Titles Act when no such proceedings were brought.

The entry on Volume 1029 Folio 593 reads as follows:

" Miscellaneous No. 70881 entered the 10th day of July, 1979, Order of the Supreme Court of Judicature of Jamaica in suit No. E. 40 of 1979 dated the 5th day of June, 1979, this Certificate of Title is cancelled and a new certificate in duplicate to Derwent Taylor is registered at Volume 1156 Folio 222 pursuant to Section 158(1) of the Registration of Titles Act. No entry has been made on the duplicate thereof as same was not produce hereof".

Section 158(1) reads as follows:

" 158(1) upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the Court or a Judge to direct the Registrar -

- (a) To cancel or correct any Certificate of Title or instrument or memorandum in the Register Book, relating to such land, estate or interest; and

- (b) to issue, make or substitute such Certificate of Title, instrument, entry or memorandum or do such other act as the circumstances of the case may require, and the Registrar shall give effect to that direction".

Now for any action, suit or proceeding for the recovery of registered land to be instituted, it had to be against the person registered as proprietor thereof and had to come within one of the cases excepted in Section 161.

Derwent Taylor did not either in his Originating Summons, or in his Affidavit manifest any intention that the proceeding was to recover the land from any registered proprietor on any ground of fraud, or that he was a registered proprietor with an absolute title who was claiming against a subsequent registered proprietor of an absolute title (not being a transferee bona fide for value). These are the only two grounds on which Derwent Taylor could conceivably have brought proceedings under Section 158(1).

He brought no such proceeding, as he was not a person entitled to bring any such proceedings. His Originating Summons was for a declaration of title based on possessory rights in registered land with respect to which I have already held that it was not competent for the Learned Judge to entertain the same.

It is a matter of great concern that a registered proprietor should have had his Certificate of Title cancelled, based on alleged proceedings under Section 158(1), without a copy of the proceedings wherein the order was made, being called for, especially where as in this case, the nature of the declaration prayed for and which was granted was never specified in the formal order, an attested copy of which preumably was served on the Registrar.

By way of recapitulation and for the reasons already given I find as follows:

- (1) On a proper construction of the Registration of Titles Act, the Supreme Court or a Judge thereof has no jurisdiction to grant a declaration that a person has acquired possessory rights in registered land except on an appeal from the Registrar of Title under Section 156 of the Act. The Originating

- (1) Summons instituted by Derwent Taylor for a declaration as to possessory rights heard by Farquharson J (Actg.) was heard without jurisdiction. The orders made thereon are in consequence void and of no effect;
- (2) The Originating Summons being one which affected the proprietary rights of a person was not one which the Judge had jurisdiction to hear ex parte either under the Registration of Titles Act, or at all;
- (3) The registered proprietor Bruce Realty Company Limited was given no notice of the proceedings even though at the date thereof it had been duly registered. An inspection of the Register Book at the date of filing of the Originating Summons would have disclosed its existence. There is accordingly no satisfactory reason why it was not notified. Not being notified it has a right ex debito justitiae to have the order set aside;
- (4) Derwent Taylor has not acquired any indefeasible or unimpeachable title against Bruce Realty Company under the Registration of Titles Act since the latter is a person who is excepted under Section 161 and can thus bring recovery action under Section 158(1) to obtain an order cancelling the title of Derwent Taylor;
- (5) The cancellation of the registered title of Bruce Realty Company for the reason stated by the Registrar namely as having been done pursuant to Section 158(1) is made in error, since no proceedings under Section 158(1) has ever been instituted;
- (6) The circumstances surrounding the registration of Derwent Taylor are such that fraud could and in my view is established against him.

For the above reasons, I hereby set aside and discharge the order made by Farquharson J (Acting) on 5th June, 1979. The Registrar of Title is required to take immediate steps under its statutory powers to rectify the Register Book at Volume 1029 Folio 593 to reflect the position immediately preceding the entry numbered, miscellaneous No. 70881, and to cancel the registration entered at Volume 1156 Folio 222 to obviate the necessity for proceedings being brought under Section 156 or Section 158(1) of the Act.

U. V. CAMPBELL,
Judge.