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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN GRAND CAYMAN

CAUSE #19 OF 1992

IN THE MATTER OF THE ESTATE OF WILLIAM EDEN, SENIOR, DECEASED

BETWEEN:	EDEN KENSINGTON COOK-BODDEN as administrator of the Estate of the above-named William Eden, Sr., deceased	PLAINTIFF
AND	MOSES I. KIRKCONNELL	FIRST DEFENDANT
	and MABRY KIRKCONNELL	SECOND DEFENDANT

For the plaintiff: Mr. Enos Grant of Counsel, instructed by Keith Collins & Co

For the defendants: Pierre LaMontagne Q.C., instructed by Charles Adams Ritchie & Duckworth

HARRE C.J. **JUDGMENT**

This is a dispute over ownership of four parcels of land in Little Cayman. They are Block 82A, Parcels 2, 7 and 16 and Block 80A, Parcel 87.

I shall refer to Parcels 7 and 16 collectively as "the Jacksons lands". Parcels 2 and 87 are situated at Bloody Bay, and I shall call them "the Bloody Bay Lands". For references to individual parcels I shall use the parcel numbers only except when I am referring to lands other than the Jacksons or Bloody Bay lands.

Many of the facts in this case are not in dispute, but they need to be set out at some length if the legal issues arising from

them are to be understood. In doing so I have been greatly assisted by the written submissions made by counsel on both sides, from which I shall be drawing extensively.

William Eden died in 1880. He was a prominent person who owned large tracts of land in the Cayman Islands and elsewhere. He had a son of the same name who died in 1909. I shall refer to the father as "Eden the Elder" and the son as "Eden Senior", as has been done throughout this case.

The plaintiff, who is the personal representative of the estate of Eden Senior and who is said to be, by succession, the personal representative of the estate of Eden the Elder, bases his claim on the following two grounds; that -

(a) the defendants are executors de son tort of the estate of Eden senior and are liable for damages to the estate.

(b) the defendants are trustees de son tort or constructive trustees of parcels 2, 7, 16 and 87 of which they are the registered owners. Consequently, on the equitable principle of tracing, they must transfer the lands back to the estate and account for any profit they have made from the lands and pay whatever damages the estate has suffered.

The registered proprietors of Parcels 2, 7 and 87 are the defendants and Parcel 16 is registered in the name of the first defendant as administrator of the estate of Alvernie Kirkconnell, deceased, the defendants' mother. Alvernie Kirkconnell was a daughter of Eden Senior.

Eden the Elder left seven surviving children. He bequeathed the residue of his estate - including his lands in Little Cayman - to trustees for the benefit of these children and the children of his deceased son and daughter. There were thus nine shares of that residue, and the trustees were directed either to sell it and divide the proceeds between the beneficiaries or distribute it in specie

"unto the shares hereinbefore bequeathed and so that as fair a division as practicable may take place with the least possible expense". It is common ground that the residue of the estate of Eden the Elder, including the four disputed parcels, became "trust property" on his death in 1880.

Eden Senior was one of the trustees and executors named in the Will of Eden the Elder, and in a conveyance dated 19th April, 1904 he is described as "sole surviving Trustee and Executor". That conveyance is evidence of administration of the estate of Eden the Elder and there is other documentary evidence on the basis of which the defendants claim that at least some of the property of that estate went to some of the beneficiaries under his will in specie and deny that Eden Senior was possessed of all the land which Eden the Elder owned in Little Cayman after Eden the Elder's death. In 1904 Eden Senior, acting in his personal capacity, executed a deed of conveyance of land which he described as "the rest residue and remainder of my one ninth (1/9) portion" of certain lands "being my portion of my Fathers Estate". In 1905, Antoinette Marie McTaggart, a daughter of Eden the Elder, acting for herself and on behalf of three of her sisters, conveyed land "being a part of the Estate of her deceased father William Eden." Also in 1905, Ann Victoria Orrett sold land described as "being the one ninth portion and my full share of the estate known as 'Charles' Sound' in Little Cayman" and Julia Catherine Hitchins (the plaintiff's grandmother) conveyed, in 1905, her portion of the same land. In 1909, William Mearns Coe sold "the two-ninths and one-tenth of another ninth share" of Land in Little Cayman, described as "being portions purchased of the Legatees of the Estate of William Eden deceased." All those dealings were in shares of land described as originating from the estate of Eden the elder who, by his will, had divided the residue of his estate into nine equal shares, though they purport to deal with only some of the lands which formed part of the estate of Eden the Elder in 1880.

The defendants acknowledge that Eden Senior did hold property

in Little Cayman which had been owned by his father during his lifetime, but say that his land holding there appears to have been limited to the Jackso s and Bloody Bay areas and further limited to a one-third interest in land at Bloody Bay, a "portion of the coconut walk", a "one-third portion of the house" and the "back land" and other land with coconut trees at Jacksons by reason of evidence which I shall now describe. Whether proper title to those lands ever passed from Eden the Elder to Eden Senior, however, is a matter in dispute between the parties as indeed is the question as to whether any lands were properly transferred from the estate of Eden the Elder to anyone.

By a deed of gift dated 18th June 1904 ("the deed of gift") Eden Senior gave, among other property -

(a) "(M)y one third portion of the cultivated land at Bloody Bay Little Cayman owned with the late John S. Wood" to his second wife, his sons Charles and Salisbury Eden and four daughters.

(b) "My one third portion of the said uncultivated lands at Bloody Bay" to three sons and one daughter.

In his will, Eden Senior confirmed the deed of gift and left certain real estate in trust for one year after his death, including -

> "(M)y portion of the coconut walk at Jacksons (Little Cayman) from the sea to the cliff".

Other gifts under the will included -

> "after the release of the one year -----
> twentyfive coconut trees at Jacksons, Little Cayman and the land they are growing on;
> One third portion of the house at Jacksons;
> The backland at Jacksons".

I think that it is strained to describe the assertions of ownership by Eden senior in this and other documents as "admissions" which are admissible on that ground as evidence to prove title and that the plaintiff is bound by these "admissions" because they are

privies in law as personal representatives to a testator. But they are among the many acts of ownership and dealing which I take into account in determining the applicability of any presumption relating to the issue as to whether the defendants are trustees.

Probate of the will of Eden Senior was granted to Charles Eden, who died in 1925. There is evidence that before that event transactions purporting to be in furtherance of the provisions of the will took place, but it is common ground that the administration of the estate was never completed. At the time of the adjudication process provided for in The Land Adjudication Law, 1971 the defendants claimed Parcels for that estate. These were not the lands now in dispute. In 1979 the plaintiff sought and obtained his substitution for Charles Eden as personal representative on the ground, inter alia, that Charles Eden had not completed the administration. He has begun the present action as personal representative of the estate.

I now continue the history of the parcels in dispute. In making reference to the deed of gift and other instruments, I am leaving until later consideration of the plaintiff's claim that most if not all of them did not have the effect of transferring any property to the intended transferees because they were allegedly not duly recorded.

In 1911 Eden Senior's son Salisbury purported to convey land at the east side of Bloody Bay to Moses Kirkconnell, the defendants' father. Another document describes the land to the east thereof as being owned by Eden Senior's son, John Lytton Eden, and the land to the west thereof as being owned by his daughter Edena Bodden. I accept that the land conveyed to Moses Kirkconnell is part of Parcel 2. Moreover, in or about 1945 John Lytton Eden purported to sell backland at the west side of Bloody Bay to Alvernie Kirkconnel, the defendant's mother, part of which is now Parcel 87. Salisbury Eden, John Lytton Eden and Edena Bodden were donees of lands at Bloody Bay under the deed of gift.

There is evidence in the form of a receipt that another part of the land which became Parcel 2 was sold to Alvernie Kirkconnell by Limeon A. Banks, acting as representative of the estate of A. Ebanks, deceased, on 9th May, 1954. The land continued to be cultivated, as a whole, for the benefit of Alvernie Kirkconnell, the Defendants' mother.

All that is the basis of the second defendant's evidence that neither his mother nor any other member of his immediate family ever inherited any lands at Bloody Bay from Eden Senior.

The second defendant claimed what is now Parcel 2 for his mother's estate during the adjudication process and it was adjudicated in favour of that estate. The defendants subsequently became registered as proprietors in common of the parcel and they have subdivided it and sold lots.

Parcel 87, another property at Bloody Bay, was not claimed by the defendants during the adjudication process. It was, however, adjudicated in their favour and they were registered as the first proprietors.

I now turn to the relevant history of parcels 7 and 16, the Jacksons lands.

On the 16th January, 1925, Antoinette Marie McTaggart, one of the daughters of Eden the elder gave, inter alia, property situated at Jacksons to her three sons, Percy, Timothy and Roy ("Dr. Roy"), in equal shares and on 21st December, 1950, Percy gave his one-third share of that property to his brother, Dr. Roy. On 28th May, 1959, Dr. Roy sold his share of the property to the late Charles G. Kirkconnell. Dr Roy is described in the deed of conveyance as being

> "seized of and possessed of an unencumbered estate in fee simple in the hereditaments hereinafter described and intended to be hereby conveyed" and as "beneficial owner".

On 12 May, 1959, Timothy sold his share of the property to Alvernie Kirkconnell. The deed of conveyance also contains a description of the vendor in similar terms.

Alvernie Kirkconnell was also given one of the thirteen shares of some of Eden Senior's land at Jacksons by his will.

During the course of the adjudication process, what is now parcel 7 was adjudicated in favour of the estate of Alvernie Kirkconnell, as claimed, and eventually transferred to the defendants as tenants in common. Parcel 8 was subdivided into what are now parcels 16 and 17, parcel 17 being registered in the name of the Crown and parcel 16 in the name of the first defendant as administrator of the estate of his mother, Alvernie Kirkconnell.

According to the evidence of the second defendant, at the time of the adjudication process, the defendants, believing that certain properties were owned by the estate of their grandfather, contacted a number of his descendants, not including the plaintiff. He testified that they all felt that something should be done to protect the lands of the estate of Eden, Senior, and that the defendants should take the necessary steps.

They did not seek to be substituted as personal representatives of the estate, but instead the second defendant claimed parcels 79A8 and 82A6 and, unsuccessfully, other lands for the estate. They are not the subject of this action. Following his appointment as personal representative of the estate of Eden Senior the plaintiff transferred Parcels 79 A8 and 82 A6 into his own name, on the ground that his grandmother, Julia had never received her share in the land in Little Cayman which was allegedly left to her by her father, Eden Senior.

In relation to all these parcels, the second defendant said in evidence at the trial that he was aware that Eden the Elder had extensive land holdings in Little Cayman and had left a Will. He

first saw that Will in 1991. To his knowledge, no one except his brother, himself and his mother's estate had any interest in Parcels 2, 7, 16 and 87. He had only become aware of the plaintiff's claim on behalf of the estate of Eden Senior when it was first put forward, in 1986.

The defendants admit that Eden the Elder owned and was possessed of several hundred acres of land in Little Cayman, that his will gave rise to a trust or trusts and that the residue of his estate, which included the four parcels in dispute was, immediately after his death in 1880, trust property. They also admit that Eden Senior was the sole surviving executor and trustee of the estate of Eden the elder when he died in 1909 but the say that the lands now in dispute never formed part of his estate. They also say that -

> they knew very well when the second defendant entered a claim to the Jackson's land under the Land Adjudication Law and when the first defendant applied for rectification of the Land Register that their mother, Alvernie Kirkconnell, was the legal and beneficial owner thereof when she died. They did not believe, nor did they have any reason to believe, that anyone else had any interest therein;
>
> from 9th May 1954 onwards, after part of the land which became parcel 2 was sold by Limeon Ebanks to the Defendants' mother, the defendants' mother considered that she owned all of the land which became Parcel 2; they have never believed, nor did they ever have any reason to believe, that Parcel 2 was owned by anyone other than Salisbury Eden on 2nd December 1911 and by the estate of A. Ebanks, Sr,. deceased on 9th May 1954 or by anyone other than their father and/or their mother at the time of their deaths;
>
> they have never believed, nor did they ever have any reason to believe, that what is now Parcel 87 was owned by anyone other than the said John Eden when they became the owners thereof or by anyone other than themselves at

the time when they claimed it under The Land Adjudication Law.

Section 23 of the Registered Land Law provides that the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel. That is subject to the proviso that nothing in section 23 shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee. In that connection it is important to remember the express purpose of the Land Adjudication law, 1971. It was this -

> "This Law is designed to pave the way for the establishment of a modern system of land registration, whereby titles to all land in the Islands will become certain and guaranteed by the Government, and transfers and other dealings in land can be accomplished simply and expeditiously.
>
> ....
>
> One effect of this Law will be to put an end to any existing uncertainty over land ownership.".

In my judgment the burden of proof must lie upon a person invoking the proviso to S 23 of the Registered Land Law to prove that the registered proprietor is a trustee who owes a duty or obligation to him as the beneficiary of a trust to which the registered land is subject. The proviso is not a means of fighting a battle which is no more than a dispute about title. The following was said in the judgment of the Privy Council in Assets Company, Limited vs. Roihi et al, (1905) A.C. 176:

> "Then it is contended that a registered owner may hold as trustee and be compelled to execute the trusts subject to which he holds. This is true; for, although trusts are kept off the register, a registered owner may not be beneficially entitled to the lands registered in his name. But if the alleged cestui que trust is a rival claimant, who can prove no trust apart from his own alleged

> ownership, it is plain that to treat him as a cestui que trust is to destroy all benefit from registration. Here the plaintiff set up an adverse title and nothing else; and to hold in their favour that there is any resulting or other trust entitling them to the property is, in their Lordships' opinion, to do the very thing which registration is designed to prevent.".

It is true that the genesis of plaintiff's claim is a trust which is acknowledged to have come into being in 1880. But it is for him to prove that the trust which he now asserts against the defendants existed at the material time and that the defendants acted inconsistently with the trust and converted the trust property to their own use. The plaintiff sought to show, citing Life Association of Scotland v. Siddall (1861) DeG. F & J 58, that the plaintiff's case was clear and free from difficulty and the onus was on the respondents to displace it. But in Life Association of Scotland v Siddall it had been found that there was no doubt that a specific act in permitting money to be received and retained was a breach of trust. The appellant's case was prima facie proved. That is a totally different matter from requiring a defendant to furnish proof of matters, including negatives, which occurred many decades ago and which in the nature of things are lost to both parties in the mists of time. It is for the plaintiff to prove his case on the strength of some title of his own not by relying on allegation of weakness in the defendants' title. See Goodtitle d. Parker v Baldwin (1803-13) All ER 474 at 476.

An example of the difficulty in which the defendants would find themselves if it were otherwise is this. The plea that the defendants' father and mother were purchasers for value without notice of the parcels in dispute is not available to the defendants. That is a single indivisible plea and no direct evidence of lack of notice can possibly now be brought. They have to rely on inferences to be drawn from surrounding circumstances as to ownership and on presumption correctly applied. As was said in Over v Harwood (1900)

1 AB 803 at 806 -

> "Generally the only way of proving a negative is by presumption, and the Court has to apply the proper presumption."

I do not think that the presumption stated in Duffield et al v Duffield et al (1824-34) that "all estates are to be holden to be vested except estates in the devise of which a condition precedent to the vesting is -- clearly expressed" helps the defendants. What the House of Lords was considering in that case was the distinction between vested and executory or contingent interests - not whether a legal interest vested by registration was subject to a trust. Under a registerd land system "it is in fact the registration and not its antecedents which vests and divests title" (per Lord Wilberforce in Frazer v Walker (1967) 1 All ER 649 at 651. There is no need for any presumption of vesting in that regard, but in this case the plaintiff is calling in aid those very antecedents of the vested legal title to which Lord Wilberforce referred in seeking to prove the existence of a trust.

I was given the benefit of much research on both sides as to the relevant principles of testamentary and trust law, and I can deal quite briefly with Executor de son tort. It is well established that a person may be chargeable as an executor de son tort to the extent of real or personal estate of a deceased which is wrongfully received or coming to his hands, or of a debt or liability to the estate released. The circumstance giving rise to that liability is intermeddling with the assets of an estate in such a way as to denote an assumption of the authority or an intention to exercise the functions of an executor. That could only apply in this case to the lands which were claimed on behalf of the estate, which are not the subject of this action. The real issue in this case is whether or not the defendants were trustees de son tort or constructive trustees.

I shall, therefore, deal in more detail with the matters of trust law.

In Selangor United Rubber Estates Ltd. vs Cradock (a bankrupt) et al (No.3), (1968) 2 All E.R. 1073, at p 1095 Ungoed-Thomas J considered the question how far a stranger to the trust can become liable as constructive trustee in respect of a breach of trust, and distinguished the following two very different kinds of so-called constructive trustees. They were -

"(i) Those who, though not appointed trustees, take on themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries, and (b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty so assumed), and so their status as trustees precedes the occurrence which may be the subject of claim against them.

(ii) Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Distinguishing features are (a) that such trustees claim to act in their own right and not for beneficiaries, and (b) no trusteeship arises before, but only by reason of, the action complained of."

As I understand it, the plaintiff argues that the defendants fall into the first category by reason of their making claim to Parcels 79A6 and 7, 79A8 and 82A6 on behalf of the estate of Eden Senior. In the words of the amended statement of claim, the "duty assumed" in claiming certain parcels from the estate was "to pursue the interest of the said estate and/or claim all the lands that were due to the said estate and/or not to place themselves in a position where their interests clashed with that of the said estate and/or not

to make a profit from their position."

The breaches of duty were claimed to be as follows -

> "In breach of these duties, the Defendants while acting as the Personal Representatives as aforesaid failed and/or neglected to claim all the lands for the said estate, in particular, 4 parcels of land registered at Block 82A Parcels 2, 7 and 8 and Block 80A Parcel 87 but rather claimed the said Parcels 2, 7 and 8 for the estate of their mother, Alvernie Kirkconnell, deceased, of which they were the sole beneficiaries and the said parcel 87 for themselves".

The further or alternative claim seeks to put the defendants in the second category. It is that -

> "the Defendants made material representations that the said parcels 2, 7 and 16, part of the said parcel 8 were owned by their mother, the said Alvernie Kirkconnell, deceased, and that the said parcel 87 belonged to them to the Adjudicator under Land Adjudication Law with the intent that the Adjudicator should rely on the said representations; in all the circumstances, they ought to have known that the said representations were false; in fact, the said lands were not so owned but belonged to the estate of Eden Senior or Eden, the elder; alternatively they made the said representations recklessly as to whether they were true or false;"

Against these claims, the circumstances on which I was invited to rely were the fact of cultivation of parcels 2 and 87 by Moses and Alvernie Kirkconnell, as described in evidence by the second defendant; the dispositions which I have described by Antoinette McTaggart and her sons; all the circumstances surrounding the sales and purchases of the parcels in dispute; the very high degree of

improbability that either of these estates could possibly still have any interest in these lands; and the conclusions arrived at by the officials involved in the adjudication process.

A substantial number of apparently honest and indeed prominent citizens of this small community believed that they owned land in Little Cayman which became, later, Parcels 2, 7, 16 and 87. These include Eden Senior, Antoinette McTaggart and her sons, Percy, Roy and Timothy, Charles Kirkconnell, Salisbury Eden, Moses Kirkconnell, Limeon Banks, John Lytton Eden and Alvernie Kirkconnell. It is against this body of evidence that the plaintiff seeks to prove that throughout the long history and today, it was the estate of Eden the Elder or the Estate of Eden Senior which was beneficially entitled to these parcels.

Eden the Elder died in 1880. An unfortunate feature of this case is that the Public Records from 1810 to mid 1906 are not at present available for inspection or production. But the circumstantial evidence to which I have already referred, satisfy me that the disputed parcels do not remain today subject to any trusts arising under the estates of Eden the Elder or Eden Senior.

It is certain that with the exception of Crown land, all real properties in the Cayman Islands were owned by some person or estate other than today's registered proprietor in 1880. If the absence of evidence of written vesting assents or other conveyances of all such lands by such estates or owners more than one hundred years ago is evidence that, <u>today</u> they are still part of those estates there is no secure title in the Cayman Islands despite the introduction of a registered land system. That is repugnant to common sense and it is therefore a source of satisfaction that I am not forced to the conclusion that it represents the law. I adopt and commend the very sensible observation of the Adjudicator in relation to one of the hearings in which the defendants were involved. He said this -

> "It is a simple matter after a lapse of 50 years to find legal loopholes in the documentary evidence,

and what I have to decide is what was the intention and what were the actions of the persons concerned at the time."

The plaintiff's claims seem to me to be seeking to impose an impossible standard on the defendants. In his evidence the second defendant said that to his knowledge no one except his brother and himself had any interest in his mother's estate. They had known it to have been in their parents' unchallenged possession since their childhood. In the light of the evidence which I have described I do not think that the defendants can be blamed, let alone found to be fraudulent, for not having investigated the possibility that this was not the case. One obstacle in their path had they done so would have been what the plaintiff describes in his statement of claim as "the absence of any duly recorded document transferring any of the said parcels from Eden the Elder or Eden Senior." I shall refer later to the complex question of the requirements in the Cayman Islands for the recording of documents at the material times. The matter to which I now refer is the plaintiff's difficulty, the burden of proof being on him, in determining in the light of the very absence of such documentation on which he relies, whether the lands which he claims to be trust property form part of the estate of Eden the Elder of Eden Senior. The matter of onus of proof is crucial to all his legal arguments, and in particular his assertion that judgment should be given against the first defendant because he gave no evidence of his knowledge or notice on his own behalf. In the end he can be seen simply to be attacking the defendant's title, without the ability to prove a beneficial title of his own. That is why he must fail.

The defendants also pleaded an estoppel in relation to the Jacksons lands in the following terms -

"The Plaintiff began an action on 18th December, 1986 in Cause No. 408 of 1986 ("the 1986 action") wherein he sought rectification of the Land

Register with respect to Parcel 7 by cancellation of the present registration and by registration of himself, as administrator of the estate of Eden, Senior, deceased, as proprietor thereof. His claim to Parcel 7 or to an interest therein in the action herein is similar to that in the 1986 action and the allegations made therein with respect to his proprietorship of Parcel 7 are essentially the same as those made in the action herein with respect to his claim to beneficial ownership of the Jacksons land.

Parcel 7 and Parcel 16 are, in reality, two legal parts of the same physical land.

The Plaintiff has been aware of the facts stated ... since at least 15th July, 1991.

The 1986 action was dismissed by a final judgment of this Honourable Court given on 22nd October, 1991.

In the premises, the Plaintiff is estopped from making any claim to the Jacksons lands.".

In relation to that pleading the defendants seek to apply the principles stated in Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd et al (1975) AC 581 at 590 by saying that the plaintiff could have raised, in the 1986 action, all issues which he has raised in this case. He could have set out all the facts which he has averred herein. He could have led the same evidence. He could have sought the same relief as that which he seeks in this case. He could have made the very same claim in the 1986 action with respect to Parcel 16: the determination of the issues, old and new, raised with respect to the Plaintiff's claim to Parcel 7 are determinative of the ownership of Parcel 16. In short, he now seeks to litigate anew the question of the ownership of Parcels 7 and 16 which was at the core of the 1986 action.

In Yat Tung their lordships were considering the application

of a doctrine of estoppel, namely res judicata in the wider sense in which the doctrine may be invoked, so that it became an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. As was said in Greenhalgh v Mallard (1947) 2 All ER 255, 257 by Somervell L.J. -

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of process of the court to allow a new proceeding to be started in respect of them.".

The defendants pleaded estoppel, clearly indicating that they relied on estoppel per rem judicatam in the wide sense enunciated in Yat Tung. Reliance on that principle was sufficiently pleaded, albeit without express reference to abuse of process. In my judgment this case falls fairly and squarely within the principle in relation to parcels 7 and 16 and I would have found for the defendants on that ground alone in relation to those parcels.

Finally, in support of his argument that the trust of the residue of the estate of Eden the Elder, including parcels 2, 7, 16 and 87 devolved in him when he became personal representative of the estate of Eden, Senior the plaintiff relies on the absence of any document transferring any of the parcels from either estate to anyone, and the fact that all deeds in respect of the parcels which are relied on by the the defendants were not "duly recorded". That, too, is something which he says that the defendants ought to have known. The very elaboration of the arguments on the statutory requirements regarding "due record" which were presented on this aspect of the case indicate the burden which such an obligation would have placed on the defendants.

It is, unfortunately, a feature of the British Imperial inheritance that there are few Commonwealth jurisdictions for which it is possible to provide a definitive statement of the statutes which have been inherited and currently have local effect. Sometimes it is only litigation which determines whether a given statute has local application or not. The Cayman Islands are no exception. Indeed, the difficulties are compounded by the fact that the Islands were for many years under the governance of Jamaica, itself a British possession.

Before I enter this arena I have to say that my observations will be obiter, because the issue in this case is whether the defendants are executors or trustees de son tort, or constructive trustees, of the parcels registered in their name, or any of them. The antecedents of their registered title are relevant only to that issue and, I have already indicated the reasons for my view that the onus of proof is on the plaintiff throughout in that regard and that he has failed to discharge it and that to seek to rely on these antecedents in this case in order to establish that the registered owners are trustees in the very thing which registration is designed to prevent. That was the basis of my conclusion that the plaintiff's case must fail.

However, it would be unhelpful of me not to say something on the plaintiff's submission that any deed which, at the material time, was not recorded within three months of its date was ineffective to pass title. Before going into the arguments I must review the legislative history.

The first Jamaica statute dealing with the recording of deeds was An Act for Registering Deeds and Patents 33 Car II Cap 12 which was passed in 1681, ("The 1681 Statute) Section 1 reads as follows -

> "BE it enacted, that a deed, in due form of law made, and within three months after the date thereof acknowledged by the party or parties that grant the same, or proved by the oath of one

> sufficient witness, or more, before the governor, or some one of the judges of the courts of this Island, and the same recorded at length in the office of enrolments, (which said office shall always be kept at St. Jago de la Vega,) within the said three months shall be valid to pass the same, without livery, seisin, attornment or any other act or ceremony in the law whatsoever; and that no deed hereafter made without such acknowledgement or proof, and enrolment, shall be sufficient to pass away any freehold or inheritance, or to grant any lease for above three years.".

The second such Jamaica statute of importance to the arguments in the present case was An Act for the better preserving of the records in the several Public Offices of this Island, supplying and remedying defects in several former laws for preventing fraudulent Deeds and Conveyances, and recording old wills in a prefixed time 4 Geo II Cap 5, passed in 1731, ("the 1731 Statute"). There were other statutes of that era, but I need not refer to them now.

Sections 2, 4, 5 and 6 of the 1731 Statute read as follows -

> "2. AND in order to prevent the difficulty that attends the proving titles to estates, where the original patents, wills, or deeds are or may be lost or mislaid, or the witnesses who attested the same are dead, or gone off this Island, or not to be found; be it enacted, That the record of any letters patent enrolled in the secretary's office, or office of enrolments in this island; and the record of any deeds duly executed and proved or acknowledged and enrolled in the said office, or any other office of record, according to the several acts of the governor in council and assembly, in that case made and provided; and the

record or enrolment of any last wills and testaments, duly executed according to law, and proved before the governor or commander-in-chief, by one or more of the subscribing witnesses thereto, shall at all times hereafter be deemed, judged and taken sufficient evidence of the several persons, titles to any lands, tenements, ..., hereditaments or estates whatsoever, real or personal, claimed under the said patents, deeds, conveyances or wills; and the same shall be read and allowed in all and every court or courts of law or equity within this islands as if the original patents, deeds, conveyances or wills were actually produced, proved and read in all and every the said courts.

...

4. And be it further enacted, that all and every deed or deeds heretofore made of any lands, tenements, ... or hereditaments whatsoever in this island that has or have been duly proved or acknowledged before the governor or commander-in-chief, or some judge or judges of the grand court, or any other court of record in this island, such deed and deeds shall be, and they are hereby enacted, declared and adjudged to be, good and valid in the law to pass and convey a just title for all such lands, tenements, ... and hereditaments, to all and every purchaser and purchasers, grantee and grantees, where no second sale as before directed by the said law.

5. And be it enacted, That all deeds which shall be made or executed within this island, after the 1st May 1732, for any lands, tenements, ... or hereditaments whatsoever, shall be duly proved or acknowledged and recorded, within ninety days after

the dates of such deeds, otherwise to stand void and of no effect against all other purchasers or mortgagees bona fide for valuable consideration of the said land, tenements, ... or hereditaments, who shall duly prove and record their deeds within the time prescribed by this act, from the date of their respective deeds.

6. Provided always nevertheless, That if any vendee or mortgagee of any lands, tenements, ... or hereditaments, shall hereafter omit to prove and record his deed within the time, and pursuant to the form prescribed by this act, but shall at any time afterwards do the same, no second sale or mortgage being made by the first vendor or mortgagor, his heirs or assigns, the same shall nevertheless be good to the said vendee or mortgagee, his heirs or executors, and a perpetual bar against the first vendor or mortgagor and his heirs.".

It appears that no relevant statute was passed in Jamaica in the century before 1863, the year when An act for the Government of the Cayman Islands, which was an Imperial Statute and which I shall refer to by that description, was passed. Among other things, the Imperial Statute validated laws already made in Cayman, subject to the signature of the Governor of Jamaica in verification thereof, gave the Jamaica legislature power to make laws for the peace, order and good government of the Cayman Islands and to give the Cayman legislature the power to pass laws for local purposes. The Governor of Jamaica was given the the same power and authority in respect of the Cayman Islands as if they had been part of Jamaica.

Section 5 of the Imperial Statute provided as follows -

"5. Except as they may be inconsistent with the aforesaid Acts or Resolutions (already in force in

the Cayman Islands or to be made after 1863), and subject to any such Alternations as may be made by or by Authority of the aforesaid Legislature of Jamaica, and to such Regulation as may from Time to Time be made under Authority of this Act, the Laws now in force in Jamaica shall from the Date of this Act be deemed to be in force in the said Islands, so far as the same shall be applicable to the circumstances thereof."

The Cayman Islands Government Law 1893 was the next statute to which I need refer. It sought to declare, for the avoidance of doubt, which Acts of Jamaica were deemed to be and to have been in force in accordance with the Imperial statute, to the same extent as they were in force in Jamaica at the passing of the said laws. These Acts were enumerated in a schedule and included sections 3, 4 and 7 of the 1681 statute and the whole of the 1731 statute. Section 1 of the 1681 statute was added by an amendment in 1894.

The plaintiff says that there is no repugnancy between the Imperial Act and the 1893 statute; it was simply carrying out the terms of the Imperial Act, which made the Cayman Islands de jure dependencies of Jamaica which they remained until 1958; section 1 of the 1681 statute and all subsequent laws were all combined to make up the Record of Deeds and Letters patent Law and are now incorporated into the Public Recorder Law of Cayman after being accidently repealed; if there had been any such implied repeal as suggested by the Defendants, it would have been so stated in the several authorities dealing with the matter; the only cases in which full effect is not given to the section are those which involve sales or mortgages but in all those cases, the efficacy of the section is always underlined by the judges; the weight of the authorities is that the section applies to voluntary deeds and that if registration does not occur within the period, the title to the land does not pass. That is the interpretation which the plaintiff says applies to the statutes of 1681 and thereafter, read together.

The defendants say that, to the extent that it is relevant to any aspect of the present case (which they say it is not), section 1 of the 1681 statute did not render a deed which was not recorded until after three months from the date of its execution effectual to pass title to land, but if it did have that effect it was impliedly repealed by a major change in the law brought about by section 5 of the 1731 statute. If that be the case, say the defendants, that part of section 2 of The Cayman Islands Government Law, 1893, Amendment Law 1894 (Jam.) which sought to add section 1 of the 1681 statute to Schedule II of the 1893 statute was void and inoperative by virtue of section 2 of the Colonial Laws Validity Act 1865 (U.K.) because it was repugnant to section 5 of the Imperial statute; and all subsequent legislative enactments, in Jamaica or in the Cayman Islands, which may have had the effect of making section 1 of the 1681 statute or section 2 of The Record of Deeds, Wills and Letters Patent Law (Jam.) part of the law of these Islands were also absolutely void and inoperative for the same reasons.

That is not the necessary result if the effect of section 1 of the 1681 statute is not to render the failure to record a deed, even a voluntary conveyance, ineffectual to pass title in every case. That is my view of the matter, which I believe to be in accordance with the weight of the authorities which were cited. Effect has to be given to the expression "valid -- without livery, seisin, attornment or any other act or ceremony in the law whatsoever" (my emphasis) and to the distinction between the word 'valid' in tht expression and 'sufficient' later in the section.

The interpretation which I place upon the section is that a deed accompanied by livery, seisin etc. may be valid to pass title even if not registered, but if not registered it is not sufficient (that is to say it requires more, for example livery, seisin etc) to pass the title.

If that is the correct interpretation, the effect of the 1681 statute was not to render ineffectual to pass title any deed which was

not recorded within three months of the date of its execution. Rather, its sets up alternative methods of passing a freehold or inheritance, either by a duly recorded deed or, without recording of a deed, by a procedure which includes one or other of the acts or ceremonies referred to in the section. That interpretation addresses the point as to whether the 1681 statute was applicable to the circumstances of the Cayman Islands, since I do not doubt that title, to the extent that title was of much concern to anyone here at that time, was based primarily if not exclusively on seisin.

The 1731 statute deals with different matters - modes of proving, as a matter of evidence, title to estates; validation of deeds already made; and establishment of priorities between purchasers and mortgagees based on due proof, acknowledgement and recording of deeds within ninety days, or thereafter if no second sale or mortgage has been made. That is a matter of notice, rather than validity, of title. That is how I reconcile the two enactments and conclude that it is unnecessary to conclude tht S 1 of the 1681 statute was impliedly repealed by the 1731 statute - a conclusion which would be inconsistent with the subsequent legislative history up to and including our Public Records Law (Revised).

Be that as it may, for the reasons which I hope I have made sufficiently clear, my decision in the present case does not turn on these interesting historical researches but on my view of the meaning and intent of the Registered Land Law and the adjudication process.

G. E. Harre
Chief Justice

7th January 1994.