who is in possession or in receipt of the

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or in receipt of the profits thereof at the time when the application for rectification is made or omitted by fraud or mistake.

a first registration has been obtained, satisfied that any registration including cancelled or amended where it is by directing that any registration be may order rectification of the register provisions of subsection (2), the court Land Adjudication Law, 1971 and to the "(1) Subject to any provisions of the

- as follows

of the Registered Land Law on the ground of mistake. Section 140 reads

The plaintiff now seeks rectification of the register under S. 140 (1)

On 24th February 1976, land known as Little Cayman West Block 82 A, Parcel 7 was entered as a first registration in the name of the personal representatives of the estate of Alvernie Kirkconnell. It is now standing in the names of Moses and Mabry Kirkconnell.

The plaintiff was substituted as personal representative of the estate of William Eden on 22nd November 1979. He replaced Charles A. Eden who had died in 1925 without completing the administration of the estate.

JUDGMENT

For the plaintiff: William Chin See Q.C. and Mr. Enos Grant
For the defendants: Pierre Lamontagne Q.C. and Mr. Charles Adams

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 408/86

Doc # 402

BETWEEN:	EDEN COOK-BODDEN
	PLAINTIFF
AND:	MOSES KIRKCONNELL
	FIRST DEFENDANT
	MABRY KIRKCONNELL
	SECOND DEFENDANT

> rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

The mistake is alleged to have arisen during the course of the process under the Land Adjudication Law, 1971 and to be reflected in the first registration to which I have referred.

It was agreed that the question of whether the court had power to order rectification of the register in such circumstances should be determined as a preliminary issue.

In Ebanks v. Powery (Cause No 571/1978) Sir John Summerfield CJ expressed the following view on an application for rectification, the purpose of which was to reopen issues in the Land Adjudication on the ground of alleged mistake -

> "Although section 140 (1) permits rectification of a first registration I am of the opinion that this does not permit the re-opening of the adjudication process itself. There must be some fraud or mistake subsequent to the adjudication to permit these provisions to be invoked. For example, the adjudication may have been incorrectly reflected in the final adjudication record submitted for entry in the Land Register by reason of mistake or fraud; the result of an appeal may have been incorrectly reflected the final adjudication record; the officials in the Land Registry may have made incorrect entries from the final adjudication record or other source because of some fraud or mistake.
>
> The only way to have challenged the adjudication record before it came final, or any other decision in the course of the adjudication process, was pursuant to sections 15, 20 and 23 of the Land Adjudication Law, i.e. by reference of the dispute to the Tribunal, petition and appeal to this court, and thereafter to the Court of Appeal. Those provisions gave a claimant every facility for the redress of any legitimate grievance in the course of the adjudication process. He cannot stand by, fail to avail himself of these ample facilities and then seek to reopen the adjudication years after the event by summons under section 140 (1). If it were otherwise there would be

> no finality about the adjudication process. No land owner would know where he stood. The certainty sought by the Registered Land Law would be undermined."

He formally adopted that view in Wood v. Wood and anor (Cause No. 411 of 1980) and made the following additional observations at that time -

> "Once the adjudication record becomes final under section 22 of the Land Adjudication Law (read with section 21) it extinguishes all legal estates and registrable rights and interests in land not reflected in the adjudication record. Any person claiming a legal estate or registrable right or interest not reflected in the adjudication record had his remedy under section 15, 20 or 23 of that Law. This court cannot allow any other process to debase the finality of the final adjudication record by way of alteration or the setting up of additional registrable estates or rights or interests in land. The plaintiff had his remedies under those sections."

He then postulated an alternative extended construction of section 140, contrary to the opinion he had expressed, and found on the facts of the case that the plaintiff would fail even on that construction. That, in my view, in no way derogates from the unequivocal expression of his own opinion which I have quoted.

Wood v. Wood went to appeal, where the court said, (as reported in CILR 1980-3 281 at 293) the following in relation to that opinion -

> "In the event, the learned Chief Justice found for the respondents, the two sisters, on two bases: (a) that on his construction of the relationship between the provisions of the Land Adjudication Law, 1971, and the Registered Land Law (Revised), it was not open to a person who had failed to use, or exhaust the provisions in the Land Adjudication Law with respect to the prosecuting of disputed claims to land being adjudicated on, to come forward and invoke the provisions of S. 140 of the Registered Land Law (Revised) and invite the courts once more to review his claims. He had had the chance to seek the court's intervention under S. 23 of the Land Adjudication Law, and it seemed anomalous that he should have a second chance to do so under the Registered Land Law (Revised). The Chief Justice regarded the finality of the land adjudication process under S. 22 of that Law as extinguishing "all (other) legal estates and registrable rights and interests in

> land not reflected in the adjudication record."
>
> There is much to be said in favour of this point of view, both as a matter of common sense and of law; we are not, however, presently prepared to endorse it and wish to leave the matter open for argument in some future case. (The argument in the present case turned largely on the Limitation of Actions Law).
>
> We have observed that there is absent from the Land Registration Law the equivalent of S. 70 of the Jamaican Registration of Titles Law, which can be described as the very kernel of all Torrens systems of land registration. It specifically provides for the extinguishment of all prior rights, save in the case of fraud (or double or overlapping registrations). Section 23 of the Cayman Registered Land Law (Revised) falls short of achieving this and it is to be observed tht S. 140 (1), as noted earlier, specifically provides for the court to rectify"any registration, including a first registration" where the same has been "obtained, made or omitted by fraud or mistake."

The last local case to which I must refer is the Court of Appeal judgment in <u>Bodden and anor v. Wilson</u> (Civil Appeal 23/89). The Court affirmed the judgment of Collett CJ on the Grand Court, finding no fault with the following passage in his judgment -

> "On behalf of the defendants it was submitted that this "- that is to say the proposition tht the right of way in dispute had its origin in the adjudication process itself -"could not be the case because the scheme of the Land Adjudication Law was to declare only existing rights for purposes of registration rather than to create any new rights. I agree that this was the intention of the Legislature as is apparent from the wording of the statute but it is equally clear that this intention was imperfectly carried out. Adjudication in the manner it laid down is a process of quieting of titles. It is an inescapable feature of such a process that, unless corrected in the course of the in-built appellate provisions, a mistake on the part of those responsible for a particular adjudication is one apt to become final, binding and conclusive in law despite the absence of any adequate basis for the decision in question in the first place.
>
> This court is not entitled to go behind such a final adjudication or the first

> registration of any parcel which features on the Register under the 1971 legislation but I am not on that account obliged to assume that the legal rights accepted in the adjudication process must necessarily have had their origin in the documents which were submitted during that process. Nor will the court do so where there is no indication that those rights have their actual origin in any of those documents which have been put in evidence before it.
>
> I find that if those responsible for the adjudication of the land which subsequently became registered as parcels 88 and 42 respectively had had before this court, their proper course would have been to record the 20 foot strip at the northern extremity of what is now parcel 88 as part of parcel 42 and to have included no reference to any vehicular right of way. They did not do so. We are bound by what they did do."

Now there is an important distinction between Bodden v. Wilson and the present case. Bodden v. Wilson was not an application for rectification of the register. The learned Chief Justice was considering the extent of his powers to look behind the register as it stood. Nevertheless what he said shows a unity of approach with his predecessor as to the general principles governing the relationship between the registration and the antecedent procedures under the Land Adjudication Law 1971. The question remains however - would he or would he not have added the rectification procedure under the Registered Land Law as well as the "in-built appellate provisions" as a means of correcting a mistake in the adjudication procedure if that issue had been before him. That question must remain unanswered and the case is the less directly helpful for that reason.

Now a feature of Ebanks v. Powery and Wood v. Wood was that in each case there was an element of neglect to use the Land Adjudication Law, 1971. No such criticism can be laid personally against the plaintiff in this case. He had no locus standi in the matter at the relevant time. It was submitted on his behalf that he was therefore under a disability at the time of the adjudication, or at any rate in a position analogous to a person under disability. Such persons are afforded special protection under S 9 (2) of the Land Adjudication Law, through a mandatory procedure for the appointment of a guardian.

That in my view, is quite inapplicable to the present plaintiff. Of more relevance is section 9 (1), which provides that the Adjudicator Demarcator or Records Officer may, but shall not be bound, to proceed as if a claim has been made if he is satisfied that any person who has not made a claim has a claim to any interest in the land. A fortiori he cannot be so bound if he knows nothing of such a person.

However, the basis of the plaintiff's argument on the preliminary point is this - The adjudicator must do his best at the time of the adjudication on the materials before him, but the court has a separate and residual power, on the material before it, to order rectification if it is satisfied as to any of the matters set out in section 140 (1). That section does not define the nature of the mistake or lay it at the door of any particular person, although all the reported cases indicate that the plaintiff had knowledge of the adjudication process, or could with due diligence have discovered it, and taken steps to present a claim. Counsel for the plaintiff sought to persuade me that it was only in relation to that kind of mistake that the residual power of the court should be excluded, and least of all should it be excluded because the mistake arose out of the documentation submitted by the very persons who now seek to profit by it. That was advanced as the converse of the proposition about the documentation expressed by Collett CJ in Wilson v. Bodden and anor, and arguments were advanced as to the deficiencies of the documents as a basis for a good documentary title, and in support of the proposition that the court should go behind the adjudication where the registration arising from it could be shown to have had its origin in defective documents. That the documents were defective was contested and that issue would have fallen for further consideration later had I come to a different view.

In the end I ask myself two questions -

Is the absence of any claim on behalf of an estate by reason of the fact that the estate had remained unrepresented and unadministered since 1925 a situation which leads to the same conclusion as that arrived at by Summerfield CH in Ebanks v. Powery and Wood v. Wood ?

In my view the answer to that is "yes". I can find no sufficient ground for distinguishing the present case. An element of neglect over many years existed. The matter was left open for argument by the Court of Appeal but I do not take that as an invitation to this court to ignore what was said by the learned Chief Justice, any more than would be the case if the matter had not been before the Court of Appeal at all.

I was at one stage of this judgment inclining to the view that had I been approaching this matter de novo I might have come to a conclusion different to his. One of the factors which drew me back to the opposite conclusion was section 141 of the Registered Land Law. A mistake or omission in a first registration which cannot be rectified does not give rise to an entitlement to indemnity under the section, whereas other such mistakes or omissions do. What can those mistakes or omissions in a first registration be which not only cannot be rectified but which give no entitlement to indemnity? They must, in my view, be those which arose out of the adjudication process. There are undoubtedly some first registrations which can be rectified. Section 140 (1) says so, and examples are given in the judgment in Ebanks and Powery of frauds or mistakes subsequent to the adjudication which could ground a claim to rectification. Consequently the right to indemnity in respect of these arises under S 141 (1) (a). This distinction, in my view, lends support to the proposition that the adjudication process was intended to be and is, veiled in all respects from scrutiny under the powers of rectification contained in S. 140 of the Registered Land Law. That is the view to which I have come.

In consequence the defendants have succeeded on their preliminary point of law.

Action dismissed with costs in favour of defendants. Bond for security for costs of an appeal fixed in the sum of $2000.

G.E. Harre
Judge

22nd October 1991