JAMAICA

IN THE COURT OF APPEAL
RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 11/1973

BEFORE: The Hon. Mr. Justice Luckhoo, J. A.
The Hon. Mr. Justice Edun, J. A.
The Hon. Mr. Justice Graham-Perkins, J. A.

BETWEEN: PERCY BROWN — Defendant/Appellant.

and

FOSTER PLUMMER
(Executor, estate Walter
George Brown, dec'd) and
DORCAS BROWN — Plaintiffs/Respondents

H. G. Edwards, Q. C., for appellant
C. U. Hines for respondents

March 4, 8, 1974

GRAHAM - PERKINS, J. A.

At the conclusion of the submissions herein on the 4th instant we dismissed the appeal and promised to put our reasons therefor in writing. This we now do.

The respondent Dorcas Brown is the widow of Walter George Brown who died on March 23, 1968, having appointed Foster Plummer and Wilberforce Beckford executors of his will. The deceased had lived with the respondent up to the time of his death at their home in Morris Hall, St. Catherine. By his will he gave to his wife everything of which he died possessed including two parcels of land, one of which comprised three and one-half acres on which their home was situated. After the death of her husband the respondent continued to occupy the matrimonial home and, as she said, 'lived off the cultivation," presumably of both parcels of land. While the respondent was so in occupation the appellant, a son of her late husband, arrived one night in a truck with a number of men and women at her home. He threatened to kill her and 'kicked off a door." The respondent reported this incident at a police station. She said that 'police came and I showed them what happened. "Nevertheless she abandoned her home later that night and sought refuge in her sister's house, undoubtedly because of the threat to her life issued by the appellant. In the result the respondent brought an action in trespass against the appellant. Joining with her as a co-plaint

was Foster Plummer, one of her late husband's executors. In his oral defence stated at the commencement of the trial the appellant asserted that he was 'in possession of the land with the leave and licence of one of the executors Wilberforce Beckford." In his evidence he said 'I am not prepared to accept what is in the will." While not expressly admitting the respondent's allegation the appellant did not deny that he had entered her home and damaged a door. Nor did he give any evidence in support of his assertion that he was in possession of the land. He did say, however, that he had asked Beckford to permit him to "reap the crop." He called Beckford as his witness. Beckford said:

> 'I am co-executor with Plummer. Defendant is deceased's son. I saw defendant a few weeks after the deceased's death. He asked me if he could reap and I gave him permission as he is the son and I the executor."

In his reasons for judgment the learned resident magistrate expressed himself thus:

> ". . . it became a particularly heavy burden for Percy Brown to prove that his possession was lawful. The only evidence which he adduced (and which I rejected out of hand) was that of Wilberforce Beckford . . . "

It would appear from this extract that the magistrate was of the view that the appellant was in possession and that the critical issue was whether 'his possession was lawful." It is, we think, manifest that any such view was totally unsupported by the evidence adduced at the trial. At the end of the day the appellant's assertion, by way of his oral defence, that he was in possession of the land with Beckford's permission remained a mere assertion unsupported by any evidence given by him or by Beckford. Permission to enter land and reap a crop is, in our view, a very far cry from being in possession of that land. Misconceived though the magistrate's view may have been, he did, in the end, accept the respondent's evidence as to the trespass committed by the appellant. He accordingly entered judgment for the respondent. In our view he was eminently justified in so doing.

Before parting with this unhappy case we desire to make the following observations. Mr. Edwards devoted a considerable amount of time and effort, in spite of what each member of this court indicated during his submissions,

in attempting to persuade us (i) that the learned magistrate was wrong in rejecting the evidence of Beckford, and (ii) that Beckford had an equal right with his co-executor, Plummer, to put whomsoever he chose in possession of the very land of which the respondent was in possession with the authority and permission of Plummer.

As to (i) it is our view that such evidence as Beckford gave was completely valueless for the purpose of the resolution of any issue that the magistrate was required to decide. That the magistrate erred in his view of the effect of Beckford's evidence, and of the burden of proof on the appellant is nothing to the point. As to (ii) we agree that until assent a beneficiary has only an incohate right to the property devised to him. There can be no doubt, however, that an executor has the right to permit a beneficiary before assent to continue in, or to assume possession of, land the subject matter of a devise. See Williams on Executors and Administrators, 14 Edn. 413 et seq. Be that, however, as it may, the magistrate found that the respondent was in possession of the land at the material time. The fundamental fallacy in Mr. Edwards' submission proceeds from his failure to appreciate that joint executors are, and always have been, regarded by the law as a single individual. In that classic work, Bacon's Abridgement of the Law, 7th Edn. Vol. 3 p. 453, the following appears:

> "If a man appoints several executors, they are esteemed in law but as one person, representing the testator, and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all, for they have a joint and entire authority over the whole."

It is on this principle that, for example, a release by one executor of a debt due to the estate is binding on his co-executors. See Charlton v. Earl of Durham (1869) 4 Ch. App. 433.

In this case it is clear that the possession of the respondent, by and with the authority and permission of Plummer, was, as a matter of law, a possession by and with the authority and permission of Beckford. In this circumstance it would follow that there was here no question of an "equal right" in the sense contended for by Mr. Edwards. Let it suffice to say that we detected no merit

in any of the submissions advanced by Mr. Edwards during the hearing of this appeal. This was an extremely simple case of trespass by a very daring wrong-doer, a case that should never have reached this Court.

Finally we question the propriety of Foster Plummer having been joined as a co-plaintiff. The evidence does not disclose that he was in possession of land the subject matter of the trespass herein complained of.