JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1522 of 1965

CORAM: WHITE J.

BETWEEN	VERNAL FABLE	PLAINTIFF
AND	JOHN TIMOLL ROBERT TIMOLL GABRIEL TIMOLL CLINTON TIMOLL PATRICK JOHNSON EDNA MORRISON	DEFENDANTS

December 10-12, 1979, March 3 & 4, 6, 7, 1980 May 5 & 6, 1980 February 23 - 27, 1981 March 5, 6, & 10 1981

R.S. Pershadsingh, Q.C., Stanley Fyffe, and Miss Mavis Watts for Plaintiff. E.C.L. Parkinson, Q.C., and Horace Edwards, Q.C. for Defendants.

The evidence which I have heard in this case relates to a Claim in Trespass brought by the plaintiff, Vernal Fable, against the original defendants, John Timol, Robert Timol, Gabriel Timol, Clinton Timol, Granville Timol and Patrick Jackson. The evidence discloses that all the male defendants are brothers, being the sons of the female defendants, Edna Morrison, who was added at a later stage. All the defendants are cousins of the plaintiff.

By Writ dated 22nd of September, 1965, the plaintiff claimed against the male defendants.

> "jointly and each of them separately for damages for trespass, for that they on Thursday the 8th day of July, 1965, and on divers other days and times between that date and the filing of this Writ, unlawfully and illegally trespassed on plaintiff's close situated at Paisley Avenue in the parish of Clarendon containing by estimation four (4) acres or thereabouts, used a tractor on the said land destroying the plaintiff's yams, tomatoes, cucumber, cabbages, calalu, pumpkins and melons and other wrongs then and there did to the great injury and damage of the Plaintiff."

The male defendants entered appearance on the 8th day of October, 1965, and subsequently the Statement of Claim dated the 10th February, 1966 was filed. By this the plaintiff claimed that he "is and was at all material times in possession" of the above-mentioned parcel of land, and he repeated the details of the trespass alleged in the Writ of Summons. By reason of those allegations the Plaintiff claimed damages, at the same time quantifying the damage to the cultivation caused by the ploughing up of the crops at £777. In addition, the plaintiff asked for a declaration that he "is entitled to possession of the said land." He asked also that the Court grant an Injunction to restrain the defendants from wrongfully entering or interfering with the said land; and lastly, he asked "for such further or other relief as in the opinion of this Honourable Court shall seem just or equitable."

The course of proceedings after that were interrupted for one thing, by the death of the late Sir Donald Sangster, the Solicitor for the defendants, thus necessitating a change of legal representation. Although this notice of change of Solicitor dated the 20th day of September, 1967 was served on the opposite party, nothing more was apparently done until Notice of Motion to proceed on behalf of the plaintiff was filed by Miss Mavis Watts, who was how Attorney-at-Law for the plaintiff. This was served on the defendants, on the 20th March, 1973, she obtained on Interlocutory Judgment in Default of Defence. This Judgment by default was set aside on summons taken out by the defendants, and they were given time to comply with an Order that they file and deliver their defence within fourteen days of the Order setting aside the Judgment.

It is observed, that nothing was done by the defendants between the date of the setting aside of the Interlocutory Judgment on the 14th March, 1974 and the 7th day of August, 1975, on which latter date Miss Mavis D. Watts, the Attorney-at-Law for the plaintiff, filed and served a Notice of Intention to Proceed, and again took out Summons for an Order to Proceed to Assessment of Damages.

On behalf of the plaintiff a Summons dated 30th May, 1973 seeking an order to proceed to assessment of damages was taken out. On the 17th August, 1973, by Notice of Change of Representation, Messrs Silvera and Silvera informed that they were now Attorney-at-Law for the defendants. Another summons dated 26th February, 1974 and returnable on the 14th day of March, 1974 seeking leave to proceed to assessment of damages was taken out. In the meantime, the defendants filed and served a summons dated 9th March, 1974, applying to set aside the Judgment by Default of Defence and that the defendants be at liberty to defend the action by filing a defence within fourteen days. Upon this application, the Interlocutory Judgment entered on the 20th March, 1973, was ordered set aside and defendants were ordered to deliver their Defence within fourteen days. Costs were awarded against them.

I will quote the Defence which was filed consequent on the setting aside of the Interlocutory Judgment:

1. In reply to paragraph 1 of Statement of Claim the defendants deny that the plaintiff is or was at any material time in possession of the land or premises referred to in the Statement of Claim.

2. Paragraph 2 of the Statement of Claim is denied and the defendants say that the plaintiff is estopped from denying the defendant's possession of the land by reason that before the commencement of this action in an action in the Resident Magistrate's Court for the parish of Clarendon in Plaint No. 168 of 1965, brought by the plaintiff against the present defendants with the exception of the defendant, Patrick Jackson, herein, the plaintiff claimed trespass, inter alia, to the said land referred to in the Statement of Claim and on the issue being tried on 11th day of May, 1965, before his Honour the Learned Residemt Magistrate,

Mr. J.R. Astwood, the Learned Resident Magistrate found the plaintiff was not entitled to possession of the land and judgment was entered for the defendant, which judgment remains in force.

3. The loss and damage alleged are not admitted.

4. Save as is hereinbefore expressly admitted the defendants deny each and every allegation contained in the Statement of Claim as fully as though each were herein set out and traversed separately.

During the hiatus in these proceedings the late Mr. E.C.L. Parkinson, Q.C. came into the matter as Attorney-at-Law for the defendants, on the 28th day of September, 1978. On two subsequent dates when the matter came on for trial, it was taken out of the list on the application of the defendants, but on the usual terms. Thereafter, on the 26th day of March, 1979, they obtained leave that Edna Morrison be added as a defendant to the Writ and that the Defence be amended by adding the following paragraph:

"The defendants say that Edna Morrison is the Registered Proprietress of the land in question, and has been in possession along with the other defendants at all times."

This necessitated an Amended Reply which I will set out in extenso so as to adequately indicate the areas of contention, and the issues which have to be decided.

1. The plaintiff joins issue with the defendants on their Amended Defence and the plaintiff specifically denies that the Learned Resident Magistrate in Claim 168 of 1965 said that the plaintiff was not entitled to possession of the land as alleged in paragraph two of the Amended Defence. What was found was merely "Judgment/Defendants, costs agreed at £ 12 12s." The finding upon which this Judgment was made was that the alleged act of trespass was not satisfactorily proved.

2. As regards paragraph five of the Amended Defence, the plaintiff specifically denies that Edna Morrison has been in possession along with the other Defendants at all material times as alleged or at all and the plaintiff hereby repeats that at all material times he was in possession as owner of the land, the subject of this action, and that he still in such possession.

3. The plaintiff now admits that Edna Morrison is the registered proprietor of the land in question and says further that her registered title was obtained by fraud of Agatha Morrison and herself.

Particulars of Fraud:

(i) In Suit number C.L. 1525 of 1965 (still pending) brought by Agatha Morrison (mother of Edna Morrison) as administratrix of the estate of William Fable against Vernal Fable (the plaintiff herein), as Defendant, Agatha Morrison claims to recover possession of the said land from Vernal Fable thereby admitting that Vernal Fable was then in possession;

(ii) misleading the Registrar of Titles as to the true intent and decision of the Resident Magistrate in Claim No. 168/65 aforesaid;

(iii) William Fable was the grandfather of Vernal Fable;

(iv) any claim that Edna Morrison may allege must be under and through Agatha Morrison, but Agatha Morrison had no specific interest in the land. She was merely administratrix of the estate of William Fable;

(v) the instant suit was pending from 1965 to the knowledge of Agatha and Edna Morrison, nevertheless the former supported by the latter proceeded to apply for the registered title in 1969 without disclosing the claim of Vernal Fable to the Registrar of Titles or the existence of the

instant suit thereby deceiving the Registrar of Titles as to the true facts.

(vi) obtaining the said Registered Title by deceiving and misleading the appropriate Officer of the Titles Office concerned and failing to disclose to them and concealing from them material facts and particulars relevant to the obtaining and issue of the said Title.

4. In any event, the title of Edna Morrison, having been obtained over twelve years from the date of trespass, has no relevance or bearing on this action.

The plaintiff therefore repeats the Claim made in the Statement of Claim and further claims.

(a) a declaration that the registered title of the said land was (a) obtained by fraud

(b) an order cancelling the said Title

(c) an order directing Edna Morrison to deliver up the said Title for cancellation

(d) an order directed to the Registrar of Titles to cancel the said Title.

I should point out before I proceed with the facts that the Amended Reply which I just recited was the result of an application to me at the start of the trial on the first day when Mr. Fyffe was opening the case for the plaintiff. So that, in effect, the reply was amended twice and was amended to accord with the facts as disclosed by the holding of a certificate of registered title for the land, the subject matter of this action. Although according to the pleadings this land contains by estimation, four acres, more or less. I note that the certificate of title describes the land as an area of five and a half acres. However, what is important is the boundaries

of the land. And, regarding that, there is certainly no dispute. It is butted and bounded on the east by land belonging to one Radlein; on the south by the road leading from May Pen to Kingston via Old Harbour; on the west by the land formerly owned by someone named McIntyre, but is now owned by the Housing Trust according to the Plaintiff; and on the north by Artwell Gardens. There is no dispute about the boundaries. Every witness who gave evidence about the land, in describing where it is situated gives the boundaries as I have just set out, and it is this land which the plaintiff says he was in possession of on the 8th of July, 1965. He said that he has been in possession of this land from his father, John Fable, died in 1935. He asks me to accept as true that he was in possession of that land at the date of the filing of the Writ, and, indeed up to the trial.

The plaintiff told me that his father during his lifetime owned the land and cultivated the land. It was a matter of fact that after the death of his father, according to the plaintiff, he continued to cultivate the land and he has been in full possession of the land. He describes the land by the name of "Out of Sight." He admitted that he knew David Morrison, who from all the evidence is now dead, and has been admitted by the plaintiff, to have been the father of Edna Morrison, the newly joined defendant. According to Mr. Vernal Fable, David Morrison who died in 1947, rented one acre of land from his father. His widow, Agatha, who was the mother of Edna Morrison, remained on the land for two years after David Morrison's death. It was after this two years that the plaintiff took full possession of that piece of land. He emphasized that Agatha Morrison left that piece of land after the two years and subsequent to the death of her husband. He told me that he was born on the land. He lived there with his father while he was growing up, and, in fact, he remained on the land until he was eighteen years of age and he put it this way: "From I was born and growing up my father, John Fable, with my grandfather, William Fable, were living on the land. William Fable died in 1929. My father continued to live on the land till he died."

The plaintiff said that he himself took full possession of the land up to 1960 when he left Jamaica and went to England where he remained for three years. He returned in 1963 and I do not know whether what I am going to quote is not hearsay, but I will repeat it. He said that during his stay abroad it was rented out to one Raymond Wynter, who is now dead and his wife used to collect the rental from Raymond Wynter. Well, about four months after he retruned from England, the plaintiff took possession of the land again and, according to him he started cultivating again on the land. Now, in 1965, he said that he had brought a case against the Defendants. Those proceedings are those mentioned in the defence. He lost that case. Amongst the defendants was Miss Agatha Morrison, who as I stated before, is now deceased. It is a fact that this case in the Resident Magistrate's Court for the parish of Clarendon resulted in the Judgement being given against the plaintiff. This was in January, 1965; but on the 8th of July, 1965, according to the plaintiff, he was down at his field and on this piece of land which he describes as "Out of Sight." While he was there at about 9:00 a.m., he saw the following defendants, John Timol, Gabriel Timol, Clinton Timol, Robert Timol, Cyril Timol, Patrick Jackson, coming along the road. John Timol, was driving a tractor. Gabriel was on the tractor. Gabriel Timol pulled the gate in to the piece of land. The plaintiff made it quite clear that he saw seven persons and that Edna Morrison was not present. Although he said he saw seven persons I must observe that at this stage of Examination-in-chief he named only six. When the defendant John Timol came he started to plough up the cultivation which the plaintiff had there and, said the plaintiff,

> "I asked him why he ploughed up my cultivation. He said I am going to kill you. Come out of this land. This is my grandmother's land."

The plaintiff, when he saw the tractor ploughing up his cucumbers, cabbage patch, plants of tomatoes, the pumpkins, the vines of melon and the yams and the calaloo and a nursery which was there,

ran out of the land and he said "the other ones I mentioned started to pull up the tomato sticks and yam sticks." "Their attitude to me was not friendly, it was hostile." He went back at about 4:30 p.m., of the same day. He was accompanied by the Valuator, Mr. Ferdinand Reece, who is now dead. An estimate was made of the value of the crops destroyed. He gave evidence which showed the total loss in money terms of £77.

He had no independent evidence in support of his Claim regarding the extent of the damage, although he did call a Mr. Stanley Hayles who supported him in so far as the alleged act of trespass on the 8th of July, 1965, was concerned. Mr. Hayles said he knew the cultivation before that day. He saw the plaintiff in the cultivation on that day. He was in the habit of buying vegetables from Mr. Fable and he had gone there on this Thursday, the 8th of July, 1965, to buy vegetables from him. While he was there, he said he saw the tractor coming along the road. It came through the gate, the gate having been opened by one of the brothers; and he said that that brother who opened the gate was called Romper, whom he didn't see in the Court room at the time he was giving evidence. He only knew that his surname was Timol. He identified John Timol as the one who remained on the tractor and drove it into the land. He went on to say that the other five persons were there. "I knew one named Clinton, another named Boris" - (who identified himself to me as Gabriel Timol). He said he knew Patrick Jackson also, and another was Cyril Timol. These five people all started to root up the tomato sticks. The tractor started to plough the land. The yam sticks were all rooted up, tomatoes ploughed, and on his account, Mr. Fable asked: "Man what unno doing coming to plough up my field?" And someone answered, "I will plough up your rass instead of the field, for the land is for my granny." I listened to Mr. Hayles and the note which I made at the time of listening to him was that "I am not happy about this witness." He struck me as a shifter.

But the point is: regardless of that assessment of him, is there any evidence which has supported the allegation that the

male defendants, or any of them, went on to this land which Vernal Fable claim as his. That evidence was given by John Timol himself, who said that he did drive the tractor; he did go on the land, and he did do some ploughing; but he denied that there was any cultivation on the land whatsoever. He said that his brother, Gabriel, opened the gate for him and at the time when he drove the tractor on to the land, he and Gabriel were the only two of the defendants who were present. He said that later on the others came. Gabriel Timol himself gave evidence, and generally, from the defendants' own side there is evidence that certainly two of them went on the land on that morning. What has been giving me some problem is whether all of these male defendants ever went on the land on that morning. That started because Mr. Fable said that at one stage "I know Gabriel Timol. He was not one of those who trespassed on me." "On the 8th of July he was one of the seven." And my doubts were increased regarding Mr. Granville Timol when I listened to Mr. Hayles whose evidence, while it mentioned Granville Timol, did not mention Gabriel or Robert Timol. As I said, Gabriel said he was there. John said Gabriel was there. According to John "We went first and in the evening the others came. I left there at about 2:00 p.m., and when I was bout to leave they came, Robert, Cyril, Patrick came. Granville, was not there on that day; nor was Clinton." So that there is evidence about the defendants some of them being present, and even if I were to say that all the male defendants went there together on the morning of the 8th July, 1969, I would still have to question whether they had committed a trespass on the land. Such a trespass would have given Mr. Fable a right to complain, and a right to demand payment for any damage cause by these defendants. Trespass being a wrong to possession, the plaintiff sought to strengthen his claim basing it on ownership. What is clear is that although he said he had obtained Letters of Administration in the estate of John Fable deceased, those were not produced for me to see,

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I might very well have had some doubts as to how he came to obtain Letters of Administration in the estate of his father, who was the illegitimate son of William Fable, but I would have had to pay due regard to the Letters of Administration if they had been produced. Because, although Mr. Vernal Fable is the illegitimate son of John Fable, if he could prove that he was in undisturbed possession of this land for such a time as the Law allows to give him Possessory Title, his possession would be unassailable. He said that having obtained the letters of Administration he got his name on the title. He made an in-giving to the Collector of Taxes, which he produced, and he said that between 1967 and 1973

> "I paid taxes in my name. Before 1967 I paid taxes in the name of John Fable."

Well, that is one basis for his claiming the land as his.

Another is the fact that he according to him, has been cultivating the land for some length of time. He denied that Edna Morrison was in possession of that land at any time. He denied that Agatha Morrison was ever in possession of that land at any time. Despite this I cannot fail to pay regard to the fact that both Edna Morrison and Agatha Morrison were defendants in the action in the Resident Magistrate's Court and succeeded along with the other then named defendants. Mr. Fable was adamant that he had a right to the land superior to the right of anybody else.

When he was cross-examined by the late Mr. Parkinson Q.C., who was then in the case, he said that he does not know that Williams Fable had two parcels of land. He did not know that one piece is now Paisley Avenue and the other was called "Out of Sight." In fact, throughout the case he was insistent that the land which is the subject matter of this action is called "Out of Sight." He didn't know that "Out of Sight" is an entirely separate piece of land from Paisley Avenue and he didn't accept that "Out of Sight" was ever 7½ acres of land. He didn't know that his grandfather, William Fable had left by the Will, 7½ acres of land for his lawful sons. The

The plaintiff denied that he sold off any part of the land at "Out of Sight." I have to consider some other answers given by him. Firstly, when Mr. Parkinson asked him: "Where did John, your father get the land from?" he answered "I cannot say." Apart from denying any knowledge of William Fable having made a Will he went on to deny that William Fable occupied the land along with Mrs. Agatha Morrison. Then in the next answer, he said he did occupy the land, but Agatha did not; nor did Edna Morrison. When he was asked if he knew what was stated in the Will of William Fable, assuming that he had left a Will, he said he did not know. Mr. Parkinson continued to press him as to who lived on the land. He repeated again that William Fable lived there, but his niece, Agatha Morrison, did not live there. He denied that the piece of land had any house on it and then he said it had only one house. According to him the persons who were living there were his grandfather, his father, his mother and sister. The plaintiff said that David Morrison did not pay any expenses for the burial of William Fable. He did not know that David Morrison was Executor of the Will of William Fable; nor did he know that David Morrison, as Executor, sent John Fable to pay the taxes on the land in Mary Fable's name, instead of which John Fable put his name on the Tax Roll. Mary Fable, I may point out at this stage, was the sister of William Fable, and the mother of Agatha Morrison. She was, therefore the grandmother of Edna Morrison. He was asked certain further questions, the answers to which I have noted here.

> "Mary Fable died. She was the grandmother of Edna Morrison. Mary Fable did leave Agatha Morrison in charge of the Property at Paisley Avenue. "Not so that when Agatha Morrison died Edna Morrison in charge of the property at Paisley Avenue. Not so that when Agatha Morrison remained in possession of the land.

He denied that he ever went and sought permission from Agatha Morrison to be allowed to plant peas "over the gully" - apparently there is a gully traversing the land.

He also denied that Edna Morrison interceded for him so that her mother allowed the plaintiff to plant peas but just for one crop. He denied all that; also that that was how he came to be on the land, subsequent to which he started to put a house on the land, and began to molest Agatha Morrison and Edna Morrison in their stated claim to the land.

As I understand the cross-examination it was being put to him from then - "look there were two pieces of land, the subject matter forming the estate of William Fable, deceased, and that Agatha Morrison and Edna Morrison at one stage occupied the land which you are now claiming." He admitted that at the present time when he was giving evidence nobody was living on the land. He denied that Edna Morrison and others, although they were not living on the alnd from 1964, were cultivating it. He denied that he ever took a plough on to the land and destroyed the crops of Edna Morrison and the other persons who planted on the land, at which she complained, resulting in a threat by him that if she came on the land he would chop her up. He denied all that. The significance of that, in my view, is to indicate, to begin with, that contrary to what the plaintiff has been saying, there always has been a dispute between himself and Edna Morrison, and her mother in respect of the land.

He denied that he wanted to run a wire fence around the land and they stopped him. He said no one could run a wire fence. He didn't elaborate on this. Contrary to his declaration, and his knowledge, that he is the illegitimate son of John Fable, he went on to say that, "I did tell Edna Morrison that I was the only lawful son and the land was mine." In the very next breath "I am not a lawful son. I never told them I was the only lawful son." When asked in more detail about "Out of Sight," he sought to distinguish "Out of Sight" as he knows it, from a district known as Rum Lane. It was his view that whether one uses the term "Out of Sight" or Paisley Avenue or Palmers Cross to describe the land, the subject matter of the action is still the land known as "Out of Sight." He was asked these questions:

Q: "You feel, don't you, that because John Fable was the natural son of your grandfather you are entitled to this land in question?

A: Yes.

Q: Because that is how you felt those Timols or any persons connected to them who came on the land you used to run them down with cutlass?

A: If they don't come on the land / how could I run them down? I never ran them down." And he restated the basis of his Claim. "I felt that it is my parent's land." I did not tell Defendants so. Edna Morrison and the Timols did not plough the land; they did not plant the land."

His denial of the exercise of any acts which would contradict his ownership and his possession of the land will have to be considered carefully against the evidence given by Edna Morrison and the other defendants who gave evidence.

He couldn't say if his son Del ran down Robert Timol with a machete when he saw Robert Timol ploughing the land / He denied that he was a trespasser and that the defendants, were in / possession. According to him, he knew that Agatha Morrison paid taxes for the land in respect of one year, and Edna Morrison paid taxes in 1974, having got her name on the land valuation roll.

I would like to put on record the Will of the deceased, William Fable, which was the subject of Letters of Administration with the Will annexed, granted to Agatha Morrison on the 16th day of April, 1974, and to note that the grant of Letters of Administration was previous to either of the actions of trespass brought by this plaintiff. I won't read the Letters of Administration with the Will annexed, except to say that Agatha Morrison is therein described as "of Palmer's Cross in the parish of Clarendon, widow and sole surviving beneficiary of the said William Fable, deceased."

Now, the Will reads as follows:

"The last Will and Testament of William Fable, native of Cross District in the parish of Clarendon, island of Jamaica, county of Middlesex. 1st, I am a widower, 2nd, I am in my sound mind, knowledge and memory say that owing to the uncertainty of living and when I will die have made this my last Will and Testament, hereby revoking any other Will hithertofore made by me. 3rd, I do will and bequeath to my five sons, "George," "Charles" and Thomas Fable" (lawful sons) John and William (Bastard sons), the piece of land known as Out-of-Sight. 4th that the piece of land and two (2) houses at Cross District now occupied by myself and niece (Mrs. Agatha Morrison) is belonging to myself and wife Mary Fable, my sister, Mrs. Agatha Morrison, mother my f.....t. Houses must be ian Heir and assigned after my death. 5th the seven acres known as Out-of-Sight must be divided as follows: Half (½) acre to George and Charles Fable, One and a half (1½) acres to Thomas Fable, my lawful son; Four (4) acres for John Fable and half (½) acre for William Fable, my bastard sons. 6th: I appoint Messrs. David Morrison and William McLeod my only executors and that during my life I can dispose of any portion of Out-of-Sight or otherwise 7th: If my son, John Fable who is supporting me were to die before me, his portion of Out-of-Sight land must be given to his children Adina and Vernal Augustus Fable. 8th: In support of what mentioned in said Will, now set signature in the presence of the below-mentioned witnesses this 25th day of December, One Thousand, Nine Hundred and Twenty-three (1923) 9th: Signed, sealed and delivered in the presence of these witnesses: William Fable, David Morrison, William McCleod, James Tully, (his mark) Witness: G. Anderson.

Apart from the description of the real estate in the Will,

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I heard evidence from Edna Morrison and Mr. Eli Sampson to the effect that "Out-of-Sight" is an entirely different piece of land from the land which is the subject matter of this action. As I understand the evidence, when you are coming from May Pen, going towards Old Harbour on the main road, you would reach an intersection formed by that main road with the Rosewell main road. This last intersection is on the left hand of the May Pen/Old Harbour main road. Then you would have to travel some distance up Rosewell Road, after which another intersection is reached, this time with the Rosewell Road and a parochial road and one would walk along this parochial road, which is known as Rum Lane, to reach "Out-of-Sight." Whether "Out-of-Sight" is a district or a property, I have no doubt in my mind that "Out-of-Sight" is an entirely different piece of land from the land at Palmer's Cross, the subject matter of this action.

I enquired into whether there was any difference between the name Palmer's Cross and Paisley Avenue and it was Mr. Sampson who informed me that Paisley Avenue is the main road referred to earlier which bisects what was Palmer's property. I understand that Palmer's Cross is really the name of the Postal Agency for persons living in Cross District and surrounding districts. I don't think I need go into any more detail about the geography and the name of the district. What I am concerned with is to say that there is no doubt at all in my mind that the "Out-of-Sight" referred to in the Will of William Fable is an entirely different piece of land from that referred to secondly in the Will, and in my view, I identified that second piece of land with the land the subject matter of this action. Therefore one of the questions I ask myself is why is it that Mr. Vernal Fable, the plaintiff, was so intent on insisting that Out-of-Sight is the name of the land the subject matter of the action. He brought Mr. Hayles to say that he knew the land as "Out-of-Sight." Frankly, I do not believe Mr. Hayles at all; certainly noto on this point. Mr. Hayles came to sustain Mr. Vernal Fable in his attempt to claim this land. I should point out that Mr. Sampson has had wide

knowledge and long acquaintance with the area, not only as an employee of the Public Works Department but also as a Revenue Runner, and a Member of the then Parochial Board for the parish of Clarendon. He said that the area in which division he served as a Parish Councillor, is the same division in which he worked as a Revenue Runner and as a Stone Checker for the Public Works Department. That division included several districts one of which was the district of "Out-of-Sight which one reaches by way of Rum Lane from Rosewell main road.

The other matter which I asked about is the insistence of Mr. Fable that there were not two houses on the land. I reject his evidence outright on that, He said there were never two houses on the land. He is sixty-six years of age. Certainly, I do not believe that his memory failed him to the extent that he could be making a mistake. I think he deliberately lied to me on that point.

To go back to the Will. One of the important things to notice about it is that if John Fable died before the testator William Fable, John's son, Vernal Augustus Fable, was one of the persons who would succeed to John Fable's share. I am satisfied that the plaintiff is the Vernal Augustus Fable referred to in the Will. John died after William Fable so that the gift over in my view would not have taken effect. The only land in which John Fable had any interest was "Out-of-Sight," and I have not heard any evidence apart from that given by Edna Morrison as to what happened to "Out-of-Sight." It was suggested to Mr. Vernal Fable that he had sold out portions of that land. He denied it, and my recollection is that Edna Morrison did say that he had done so. Be that as it may, whatever happened to that land I am satisfied that it was a distinct piece of land from the one which is thesubject matter of this action.

The other thing to observe about the Will is that in the fourth paragraph the Testator states that there are two houses on the land and I think I can rightly say that he is saying that those two houses were at the time of the making of the Will occupied by himself,

his niece, Mrs. Agatha Morrison, and that the land belonged to himself and his wife, who was then dead. She was known as "Nursey." He mentioned Mary Fable, his sister, as the mother of Agatha Morrison, his niece, and I can only interpret all that as indicating his setting out a position where all these persons were living on the land and having some interest in the land. Mr. Edwards submitted that that interest was a joint interest. I don't know if I can go that far because I am not really interested in interpreting the Will except in so far as I can find from its terms what property the Testator presumably had, certainly at the time of the making of the Will, and at his death.

In examining the documents lodged in support of her application for Letters of Administration for the Will annexed, I observe that the Inventory submitted by Agatha Morrison stated two pieces of land according as they are described in the Will. As late as 1977, the property which formed part of the estate of the deceased, William Fable is described in the terms of the two pieces of land.

On the death of Mr. William Fable, David Morrison and William McLeod, the two named Executors, if they were alive - and certainly Mr. David Morrison was alive at that time - were the persons entitled to deal with the legal estate by virtue of their Executorship. What I am trying to point out is that when David Morrison failed to apply for Probate even years after the death of William Fable, it was certainly competent for another person rightfully entitled to apply to administer the estate, this Agatha Morrison did. As I said before she obtained Letters of Administration with the Will annexed.

Mr. Edwards rested the effect of this on the doctrine of Relation Back, Mr. Fyffe said that the doctrine of relation back wouldn't apply where there are vested interests acquired between the time of the death and the obtaining of administration. He depended on the decision of the Court of Appeal in Fred Long and Son Ltd. v. Burgess /1950/ 1 K.B. 115. I am mindful of the fact that the doctrine of Relation Back of Letters of Administration must only be applied to protect the estate from wrongful injury occurring between

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the interval of the death and the granting of the Letters of Administration. I am also aware of the limitations on that doctrine, that a title cannot relate back if it is a title/to something which has perished or has been extinguished without fault or wrong on the part of anyone during the said interval. This was Mr. Fyffe's point that the principle of relation back cannot be applied to invalidate interests acquired during the said interval. One must here observe that the operative phrase is "lawfully acquired."

But, it has been argued for the plaintiff in this case, "I was undisturbed because I was cultivating thus exercising possession," and it is part of his case that that possession was for upwards of twelve years. I am not averse to dealing with this question of whether mere acts of cultivation are sufficient to prove sole possession.

I start off with the authority of West Bank Estates Ltd., v. Shakespeare Cornelius Arthur and others (1967) A.C. 665. This was a judgment delivered by the Judicial Committee of the Privy Council on Appeal from the Federal Supreme Court which itself heard an Appeal from a judge of the Supreme Court of the then British Guiana. While I must concede that Guyana Law, does not have the same common law foundation as Jamaica law, it seems to me that the opinion of Lord Morris of Borth-y-Gest, Lord Hodson and Lord Wilberforce contain matter germane to some of the issues raised in this case. The respondents sought to support a prescriptive title by, among other things, evidence of cultivation.

Quoting from page 677:

"The learned judge, as their Lordships read his judgment, applied his mind correctly to the question whether the respondents had proved "sole and undisturbed possession, user and enjoyment" of the disputed strip. As the Federal Supreme Court itself stated, these words convey the same meaning as possession to the exclusion of the true owner. The learned judge gave recognition to the fact that what constitutes possession, adequate to establish

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a prescriptive claim, may depend upon the physical characteristics of the land. On the other hand, he was, in their Lordships view, correct in regarding such acts as cutting timber and grass from time to time as not sufficient to prove the sole possession which is required: in this case he was supported by the Canadian cases of Sherrep v. Pearson (1887) 14 S.C.R. 581; McIntyre v. Thompson (1901) 1 Ont L.R. 163; and McInnes v. Stewart (1912) 45 N.S.R. 435 and by the English case of Williams Brothers Direct Supply Ltd v. Raftery /1958/ 1 Q.B. 159 following Leigh v. Jack (1879) 5 Exd 265 C.A. The acts were, as he put it, not inconsistent with the enjoyment of the land by the person entitled.

"The Federal Supreme Court derived a different conclusion from the evidence: they held that woodlands and rough country can be useful to a farmer if they afford natural products which he wishes to take from time to time, leaving it to nature to replenish her ~~won~~ own supplies. The respondents had, in their view, proved that they had made what was for persons of their means and class normal user of the land up to the line of the southern ditch. This does not appear to be a correct approach to the evidence. Admitting the utility of the respondents' operations, and that they did what was normal for small peasant farmers, this still does not establish a sufficient degree of sole possession and user to satisfy the Ordinance, or carry the matter beyond a user which remains consistent with the possession of the true owner. What is sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants."

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There is an important aspect of the plaintiff's case, which is further exemplified by the argument of Mr. Fyffe, that the plaintiff had acquired a possessory title. Apart from adverting to the absence of the Letters of Administration to the estate of John Fable, which the plaintiff said he had - the non-production of which has not been satisfactorily explained - I must be guided by the remarks of Lord Denning M.R., in the case of Wallis's Clayton Bay Holiday Camp Ltd., v. Shell-Max and B.P. L d., (1974) 3 W.L.R. 387 at pages 392E to 393A:

> "Possession by itself is not enough to give a title. It must be adverse possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor. That is shown by a series of cases in this Court which, on their very facts, show this proposition to be true:-
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> "When the true owner of the land intends to use it for a particular purpose in future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years, or more: see Leigh v. Jack (1879) 5 Exd D. 264: Williams Brothers Direct Supply Ltd., v. Raftery (1958) 1 Q.B. 159; and Techild Ltd., v. Chamberlain (1969) 20 P & C.R. 633. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decisions is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be

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ascribed to the licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it: and the owner by not turning him off, impliedly gives permission. And it has been held many times in this Court that acts done under licence or permitted by the owner do not give a licensee a title under the Limitation Act 1939. They do not amount to adverse possession: See Cobb v. Lane (1952) 1 T.L.R. 1037; British Railways Board v. G.J. Holdings Ltd., March 25 1974: Bar Library Transcript No. 81 of 1974 in this Court."

Now, what Mr. Fyffe had argued was that according to the evidence of the plaintiff, he had acquired a possessory title to the land having been in possession of it from 1935, the year of the death of his father, and he had been undisturbed because not only was he cultivating the land, but he was paying taxes on the land. Apart from Mr. Stanley Hayles, the plaintiff called Mrs. May Causwell, who was formerly Mrs. Ashton. She said that she and her then husband occupied land next to this land the subject matter of the action. She said that between the year 1957 to 1963, she used to buy vegetables from Mr. Fable and his wife. They used to cultivate those vegetables and other ground provisions on the land in question. She used to traverse the land as a short cut, to get from the main road where her restaurant was to her land.

I am not disposed to disregard the evidence regarding the plaintiff cultivating on this land. The evidence for the defence is that he never cultivated on the land, but I am not disposed to say that he never cultivated on the land. What I am clear about is that for some time the two groups of claimants for the land have been wrangling over this land, and that before 1965 this wrangling had been going on for some time. Miss Morrison said it started from before in the 1950's, and I have no doubt in my mind that this contention over the land never ceased from the time it began previous to 1965.

I am inclined to the conclusion that it wa because of this contention why Agatha Morrison obtained Letters of Administration with the Will annexed to the estate of William Fable, the deceased.

In addition to the evidence of Mrs. Causwell's regarding the cultivation, I have to consider the evidence of Vincent Smikle, the brother of the plaintiff/I take careful note of the fact that Mr. Smikle is eighty-one years of age. Despite this he gave his evidence clearly. Whether I believe the evidence or not despite its clarity is another matter. Certainly I don't accept that what Mr. Smikle said identifying "Out-of-Sight" with this piece of land is the true position. I don't accept that at all. In any event, even assuming that Mr. Vernal Fable was cultivating the land, I still have to be mindful of the reasonable inference to be drawn from everything that I have heard; that there has been some dispute over the land; and that in the forefront of that dispute was Mrs. Agatha Morrison.

To this end I would here deal more fully with the doctrine of relation back. The executor or the administrator with the Will annexed is thereby enabled to preserve the property belonging to the estate of the deceased, and the entry of the executor upon the land which is in possession of a squatter or a trespasser is not such an act of trespass as would sound in damages. For that I have the authority of Shirley Campbell against Pearline Jackson, (1972) 12 Jamaica Law Reports 952, where the Court was concerned with a dispute regarding land occupied by the plaintiff, the common-law wife of the deceased owner. She contended that in his life time the deceased had given this land to her; but unknown to her, the deceased had made a Will in which he named the appellant, his lawful son, as an executor. This Will was duly probated and in exercise of his right to possession of the land of the deceased, the appellant, the executor, entered upon the land occupied by the respondent and effectively took possession thereof. In the Court below the Resident Magistrate accepted the evidence of the respondent/common-law wife of the deceased owner, and

on the basis that it was supported by inferences which he felt free to draw from facts found by him that the land had not been mentioned in the deceased's Will and that the respondent had collected rent from the tenants, whereas the appellant had made no attempt to do so since his father's death, he gave judgment for the respondent. The Court of Appeal set aside the judgment, stating that it was clear that the appellant had entered the land in pursuance of his right to immediate possession thereof by virtue of the Will and could not be guilty of an act of trespass in so doing:

I would like to quote from the judgment of Fox J.A. in Shirley Campbell and Pearline Jackson (1972) 12 J.L.R. 952 at page 953, beginning from letter l to page 954 letter C.

> "It is clear and elementary law that the person who has the right in law to immediate possession of land, does not commit a trespass when he enters upon that land pursuant to the exercise of that right. Such an entry has the effect of extinguishing the right of any person who may be in actual possession of the land at the time of entry. This is so because of the superiority of the title of the person who is in law entitled to the immediate possession of the land. Indeed, by virtue of the doctrine of trespass by relation back, the person having the right to immediate possession is deemed upon entry to be in actual possession from the date when his right accrued. The paramountcy of the position of the person who is entitled to possession was explained by MAUL J., in Jones v. Chapman (1847) 2 Exch. at p. 821) thus:
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> > "As soon as a person is entitled to possession, and enters in the assertion of that possession the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the

assertion of the right of possession and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."

"This passage was quoted by Lord Selborne with approval in Lows v. Telford /1876/ 1 A.C. 414. When the defendant entered upon the land in exercise of his right to possession the actual possession was in him and not in the plaintiff. The defendant could not therefore be held liable in trespass to the plaintiff."

So that in considering the question of whether the plaintiff has possession to the exclusion of Agatha Morrison and those claiming under her, I have to bear those remarks in mind because the mere fact of his cultivating the land does not by itself give him any interest in the land, so as to exclude the rights of the administratrix with the Will annexed.

I will quote from another case, this time the judgment of Mr. Justice Waddington in Emmanuel Levi Miller and Rupert Miller v. the Commissioner of Lands, (1968) 10 Jamaica Law Reports, 426. I preface the quotation that I am going to read with this: that ground III before the Court of Appeal stated that the learned Resident Magistrate failed to consider the position of Absalom, a person who had been in quiet undisturbed possession of the said parcel of land in dispute and through whom the defendants went into possession.

Reading from page 429 letter D.

"With regard to ground three, it was urged that the plaintiff had not discharged the onus of proof which was on him to prove that he was in possession of the land at the material time. Counsel submitted that this was an action of trespass and that the gist of the action was possession, and for the plaintiff to succeed he must prove that he was in possession of the land. In support of this submission, learned counsel cited the cases of Fairweather v. St. Marylebone Property Co., Ltd., /1963/A.C. 510; /1961/ All E.R. Rep. 288 Cooper v. Crabtree; Wallis v. Hands and Chowood Ltd. v. Lyall /1930/All E.R. Rep. 402; /1930/2 Ch. 156; /1881 - 85/ All E.R. Rep. 1057; (1882) 20 Ch. 156; All E.R. Rep. 19; /1893/2 Ch. 75.

The Court has considered these cases but, speaking for myself, I do not think that they are relevant to the point in issue in the instant case, and I do not propose to review them. There is no doubt that in an action for trespass the plaintiff must show that he was in possession of the land in question. But, possession in my view, is a question of degree and it depends, I should think, on the nature of the property and on the acts which the Plaintiff exercised over the property in order to determine whether or not he was in possession. In this respect, I think that the cases which were cited by Mr. Mundell, in reply and particularly the case of Amity Hall Co. Ltd. v. Knight, Clarks' Reports 217 are relevant to this issue. In that case, the learned acting Chief Justice, Defreitas, in delivering the judgment of the Court said:

"The trespass complained of was that the defendants entered the close defined in the plaint and prevented servants of the plaintiffs from cutting firewood growing in the close and also prevented servants of the plaintiff from entering the close from New Road for the purpose of cutting firewood. The defence was that the defendants were the owners by long possession of several strips of land in different parts of the close, and that they were justified in repelling any entry upon them. For the defence it was argued, inter alia, that it was essential for plaintiffs to prove their actual occupation of the particular spots of the land upon which the trespass were alleged to have been committed. That is a fallacy. The plaintiffs having defined by abuttals in their plaint the particular piece of land upon some one or more spots in which they allege the trespass were committed, it is sufficient for them to prove their possession of that defined close as a whole and to prove a trespass on any spot in that close."

In Jones v. Williams (1835 - 1842) AllE.R. Rep. 423;

(1837) A 326 at p. 331 Baron Parke said:

"Ownership may be proved by proof of possession and that can be shown only by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass made may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury, that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close the claimant may give in evidence acts of ownership in any part of the same inclosure; for the owner of one part causes a reasonable inference that other belonged to the same person; though it by no means follows as a necessary consequence, for different persons may have balks of land in the same inclosure; but this is a fact to be submitted to the jury."

"The Court would also like to refer to the case cited by Mr. Mundell, of Wuta-Ofei v. Danquah [1961] 3 All E.R. 596; [1961] 1 W.L.R. 1238 a decision of the Privy Council, in which Lord Guest in delivering the opinion of the Board had

this to say:

> "Their Lordships do not consider that, in order to establish possession, it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must very with the type of land. In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances, the slightest amount of possession would be sufficient."

> "In Bristow v. Cormican (1878) 3 App Cas. 641 Lord Hatherley said:

> "There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever - as a mere stranger; that is to say, it is sufficient against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

Upon the strength of these dicta, I have to interpret the facts which I have heard to decide whether Mr. Vernal Fable was in possession of the land to the exclusion of anybody else including Agatha Morrison, including Edna Morrison, who claimed as the beneficiary of the Will of Agatha Morrison, she having died in 1947. The evidence given by Mr. Vernal Fable and by Stanley Hayles, and for that matter, by Mrs. Causwell and by Mr. Vincent Smikle is to the effect that none of them had ever seen Agatha Morrison, Edna Morrison ior the other defendants cultivating the land. The Defendant, Edna Morrison, asserts that she ~~ad~~ and did her mother before her has been engaged in cultivating this land from time to time. In this she is bourne out by Robert Timol and John Timol. There is denial by them of the evidence for the plaintiff that Raymond Wynter used to cultivate the land while the plaintiff was abroad. Miss Morrison herself said this: "In 1965 when Vernal Fable took us to May Pen Court there was nothing on the land but pure bush. In 1965 there was no crops growing on the land." The same evidence was given by John Timol: "pure bush and dry grass on the land in July, 1965. It was dry weather and there was no cultivation on the land at that time.

He said: "I drove tractor on the land to clear the land in preparation for the rain season."

Now, leaving aside the question of the cultivation for the time being I have to remind myself that John Timol said he went there, with the permission and authority of his grandmother, Mrs. Agatha Morrison, and in fact although he denied that he saw Vernal Fable and Stanley Hayles there, I am prepared to accept Vernal Fable's evidence on this point as true, when he said that when the male defendants came on to the premises John told him to leave it because it was his grandmother's land. The question then arises; did they go on to that land to exercise the superior title of their grandmother? I so find: when they went on the land it was in pursuance of Agatha Morrison's right, she being the person who had her title to the land, that title constituted as it was by the grant of Letters of Administration with the Will annexed in the estate of William Fable, deceased. Looking at all the evidence which I have heard I find that in so far as the trespass is concerned, because of the history of the dispute regarding this land between Vernal Fable and Agatha Morrison and the others, the defendants were not claiming to eject Vernal Fable in their own right. On his story he knew that the male defendants had come there to lay a claim by reason of their grandmother's interest over-riding his. A person having the right to possession of land acquires by entry the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of entry wrong-fully continued on the land.

Mr. Vernal Fable's claim to the land was non-existent not only because of the terms of the Will, His father did not die before William Fable to allow John Fable to take under the Will. His father death was after William Fable's death, and the father of the plaintiff has nowhere been shown by evidence to have succeeded to this four acres of the land with which his name is linked. Indeed he could not have succeeded because the condition for the land going to him was not satisfied. If it had been so satisfied the plaintiff would, of course, have

obtained the land to the exclusion of everybody else. It is necessary to bear in mind too that if an owner who has a right to enter makes an entry on land his right of possession relates back to the time at which his right of entry accrued and he may sue for trespass before his entry. The wrongdoer becomes a trespasser. As I see the facts again, assuming that there was a cultivation there, Agatha Morrison had a superior right by virtue of the Letters of Administration with the Will annexed to those of any other person. She had the legal title but having the legal title placed her under an obligation to distribute the estate according to the devises in the Will. I have not heard any evidence regarding the dates of the death, (if they are dead), of any of the beneficiaries under the Will. According to the evidence which I have heard the only persons who outlived the Testator in the terms of succession after his death were David Morrison, the Executor, and his wife Agatha, the niece of the deceased.

In the result, on the balance of probabilities I am constrained to find insofar as trespass is concerned, that there was an entry. I am not certain from the evidence of Mr. Fable that Gabriel Timol was there, Nor am I certain from the evidence of Mr. Hayles, that Gabriel Timol and Robert Timol were present.

Mr. Fyffe tried to argue that what Mr. Fable wanted to say was that Granville was there but he did not do any uprooting of crops. Well, I don't know, if I should put such a strained interpretation on it. What is certain is that at first he said Granville was not one of those who trespassed on him. Then he said he was one of those. I am not prepared at this length of time away from the incident to say that Granville was such a person, and I come to that conclusion despite the fact that Mr. Stanley Hayles puts him there.

As regards Gabriel Timol and Robert Timol, here again, as I pointed out before, Mr. Hayles does not agree or did not mention Gabriel, those two, and I am not happy about it at all. I said earlier on that I reminded myself that John had said Gabriel was there. Although there is that haziness in the evidence regarding the last two, the fact still remains that whether I find that all seven went

at one time or only two went in the morning and the others went later on, there does seem to have been some entry on that date. I will try to deal with the effects of that entry, bearing in mind the rights of Agatha Morrison.

Now, did they plough up any cultivation? I think there was cultivation there at the time. Mrs. Causwell, of course, can't speak about that, and although earlier on I made that stricture about Mr. Hayles, I am prepared to accept that there was some form of cultivation. But, of course, that does not give the plaintiff an overriding right to the land and I say that in the light of the passages which I quoted. The upshot is that as far as trespass is concerned, there was no trespass at all in the sense in which that term is understood; and, in the light of the authorities, no excessive force was used. The defendants were exercising a right to eject a squatter which I find Mr. Fable was. He had not acquired any possessory title, although he tried to make out that he was in undisturbed possession, but as I said before, I am of the view that there was some dispute over the land for many years before.

Now, I turn to something else and this deals with the obtaining of the registered title. Much criticism was made by Mr. Fyffe about this. The documents in support of the application for the Certificate of Registered Title are all in evidence and it isn't necessary for me to go through them one by one, but I will just point out that apart from what I will call the formal application, there are statutory declarations by Edna Morrison and Agatha Morrison, who was the applicant. There is also a statutory declaration by one M. Kentish, a teacher. Those statutory declarations each traced the history of the land as far as those persons knew the land, also the fact that Vernal Fable had taken Agatha Morrison and others to the Resident Magistrate's Court in May Pen, and that the Resident Magistrate had given the judgment against him. That reference on the application was with respect to Plaint number 168 of 1965. They exhibit, not only the Plaint note, but the summons with the endorsement of the

judgment by the Resident Magistrate. Also the Letters of Administration with the Will annexed in the estate of William Fable, deceased.

The application, I have no doubt, was duly considered by the Registrar of Titles, who must in the normal course of things have passed it on to the Referees of Titles. These functionaries would in due course have authorised the advertisement of the application by Agatha Morrison to bring the land under the Registration of Titles Act. It is wrong to say that any claim that Edna Morrison may have made must be under and through Agatha Morrison but that Agatha Morrison had no beneficial interest in the land. The wrong part is to say Agatha Morrison had no beneficial interest in the land. She had legal title to the land and she could apply for a Certificate of Registered Title, albeit she should have done so in the name of beneficiaries. But what was her status under the Will; did she have any right under the Will? It seems to me that Administration was properly granted to her. She was identified in the Will and it is not inappropriate and far-fetched to suggest that the Referees must have considered her status and so have decided that, provided there are no objections to the Certificate of Title being issued, it could properly be made to Agatha Morrison. As I have said before, there was no evidence as to what happened to the other persons at the time when she got the Letterso of Administration. Thereafter she made a Will naming Edna her sole beneficiary. After probate of that Will was granted the Executor directed the Registrar of Titles that, considering the death of Agatha Morrison the Certificate of Title should issue in the name of Edna Morrison.

Mr. Fyffe argued, andit was the pleading by the plaintiff, that since this case was pending from 1965, and since Agatha Morrison had herself brought a suit against the plaintiff for recovery of possession there was fraud in applying for the Certificate of Title, because the pendency of this suit and the pendency of Suit No. C.L. 1522 of 1965, should have been disclosed to the Registrar of Titles.

It is put in this way, that Edna Morrison supported Agatha Morrison

in the application for Registered Title in 1969 without disclosing the claim of Vernal Fable to the Registrar of Titles or the existence of the instant suit, thereby deceiving the Registrar of Titles as to the true facts.

I have given the submissions of Mr. Fyffe careful consideration. I do not interpret the evidence which I have heard, nor the documents which I have seen to discover in what way there has been fraud in Agatha and Edna Morrison. As a matter of fact, we had much dialogue in Court on it, and I cannot in any way see that because the pending suits were not disclosed to the Registrar of Titles there was fraud in the application. I need not dilate upon the matter to the extent of enquiring what constitutes fraud in this sort of application, except to say that the moment Agatha Morrison obtained Letters of Administration with the Will annexed by the Doctrine of Relation Back, any claim of Vernal Fable was eradicated and erased in so far as title to the land was concerned. Until I am shown the contrary I will hold to that view.

During the arguments I pointed out to Mr. Edwards as well as to Mr. Fyffe the inexactitude with which the first particulars of fraud were filed and this about the pending suit in the Supreme Court thereby admitting that Vernal Fable was then in possession. What we must always bear in mind that although pleadings recorded in one cause are admissible in evidence to prove the institution and subject-matter of such a cause they are generally inadmissible even against parties or privies as proof of the truth of the facts stated therein. This statement of the Law is to be found in Vol. 5 Halsbury's Laws of England, under the title "Evidence," at para. 709, page 387, In addition I refer to the Estate of Park v. Park (1954) (1953) 2 All E.R. 408 in which Karminski J, dealt with this problem - if it is a problem. This is one of the cases cited by Halsbury in support of the principle which I have just read from the text; so that the mere fact of a claim being laid for recovery of possession of land is neither here nor there. It doesn't prove

anything; it is just like a claim for trespass and unless there are affidavits filed and/or evidence in support of what is stated in the Writ of Summons I cannot use it as evidence of the facts stated therein. Incidentally the file of Suit No. C.L. 1522 of 1965, was put in evidence, I observe that at one time Mr. H.W. Norton, who was then the Attorney for the now plaintiff, gave notice - "Take Notice that Defendants herein will Proceed against you, the Plaintiff, after the expiration of one month from the date hereof." There is no evidence that any further step was taken in the Action after that date, the 14th/March, 1970.

There was a further complaint by the plaintiff in his reply that the fraud was of this nature: obtaining the said registered title by deceiving and misleading the appropriate officers of the Titles Office concerned, and failing to disclose to them and concealing from them material facts and figures relevant to the obtaining and issue of the said title. I do not see anything in the evidence which will by any stretch of the imagination lead me to accept that what is stated there has been proved, especially when one remembers that/only the Registrar but the Referees of Title are professional lawyers. They have to be such before they can be appointed to the posts; that is a statutory requirement. I would here like to say that during his evidence, I asked Mr. Vernal Fable if he received any information that an application for registered title had been made. As a matter of fact, I think that he was asked that by Mr. Fyffe and my question to him was directed to inquire whether any of the neighbours around that land ever informed him that application for registered title was being made by Agatha Morrison. Let me summarise his evidence by saying that he didn't read in any newspaper about the application and in fact if he had known of the application he would have filed a caveat to stop the application being granted. My distinct memory of my reaction to Mr. Fable when he was giving that piece of evidence was that even if I could not go as far as to say he was deceptious, at any rate, my mind was clouded as to what he was saying;

because if he was interested in this land as he said he was, if he had been in possession of it, and the neighbours around had got notice of the application for registered title, I have no doubt that one of them would have informed him, or somebody would have known and told him about it. Mr. Fable didn't strike me as a man who is so ignorant that he doesn't know what is happening around him. That may be a very strong expression of opinion, but I have seen him. That is another point in his evidence upon which I have very great disquiet.

I would like to make a comment on two matters which are very important in view of the findings at which I have arrived. Mr. Fyffe said that when the amended defence pleads in paragraph five that the defence says that Edna Morrison is the registered proprietress of the land in question and has been in possession along with the other defendants at all material times that is not stating the facts truly. I agree with that adverse comment. Although she is the registered proprietress of the land in question, except by the fact that her mother, Agatha Morrison had legal title to the land relating back to the time of the death of the deceased, William Fable Edna Morrison did not have possession of the land by herself, through her own title in 1956. According to her evidence, she lived on the land and certainly worked the land with her mother. But she did not have any exclusive right to the land, and in her evidence, at one stage she placed herself in a very delicate position by denying the fact that she had signed the statutory declarations which were tendered in evidence and which in fact had been submitted in support of her mother's application for registered title. I don't know why she made that denial. I don't know what she hoped to gain by making that denial at that stage; but I must say that later on she corrected the impression by saying; "When I denied having signed the documents which I saw this morning while I was in thewitness box, it was so only because I saw the two different hand writings and I said probably is not mine but not to disacknowledge my signature. My head get sickly sometimes."

I do not think that that effectively, by itself, destroyed the evidence which she had given. Her father and mother lived on the land in contention in the suit. Children lived there with those two parents and according to her while William Fable was alive, John Fable lived there, and he took care of William until John could no longer manage to take care of William. William died in 1929. John died in 1935. John lived in the same house as William up to the death of William. After William died, John lived in that house; after William's house broke down, John came and lived in the "house of my father," according to her. William's house broke down after about a year before John died and that was the period of time during which he lived in her father's house.

It was in 1934 that her parents moved from that house. She herself added that apart from John Fable living on one of the rooms after her mother and father left the land, Clarence Megie lived in one. She said that: "After William Fable's death, apart from my father cultivating tobacco, Timol's father, used to assist." Her father, David Morrison died in 1947. So there again up to 1947, up to the time lof the death, Mr. David Morrison had the right to the legal estate in the land as the Executor of the Will of William Fable. Then Mrs. Morrison goes on to say that Agatha Morrison put the Timols in charge of the land to cultivate and that she went on the land with Timol, the father of her children. She did planting. I have already indicated the supplication by Mr. Vernal Fable to Agatha Morrison, to allow him to plant up part of the land. I have also indicated that he started to make trouble before the 1951 hurricane. He used to put cows on the land and while leading them through the land the cows would destroy the crops.

So as I come back to the finding which I made earlier on, that I am satisfied that clearly over the years there has been a lot of contention of this land. Mr. Vernal Fable, thought that because his grandfather had the land he was entitled to it, alttough he didn't know his grandfather and he didn't know how his father, John, had got the land. His father, John, could not have got the land by any lawful

means, considering that the Executor was alive up to the death of his father, John, and alive after the death up to some twelve years. I have at this stage not gone into a great deal of facts to recite and recount every little question and answer which was given. I have been only concerned to put down sufficient information which will indicate to all interested parties the thinking which I have formulated on the strength of the evidence which I heard.
To sum-up then, I find that Vernal Fable's claim for trespass against the named defendants has not been made out.

There is another matter to which I would like to refer in this context. That is the attempt by both the late Mr. Parkinson Q.C. and Mr. Horace Edwards, Q.C. that the notes of evidence in a Resident Magistrate's Court were admissible without more upon their being certified to be a true copy of the notes of evidence. I would only like to say that it is necessary for the parties to bear in mind the judgment in Charlton v. Reid, 3 West Indian Law Reports. I add that it is always necessary where documents are needed as evidence that the parties should consider whether they shpuld not be applied for on Summons for Directions. To make a general comment: for some inexplicable reason not enough, or not sufficient use is being made of the Summons for Directions to facilitate the easy and early production of evidence, and I can only express the hope that legal practitioners will make every effort to pay due regard to what can be asked for on the Summons for Directions.

To sum up then, I find that Vernal Fable's claim for trespass against the defendant fails. As regards the claim by the plaintiff for a declaration that the Registered Title for the said land was obtained by fraud, I will not make that declaration because no fraud in my view has been established, and it may be of use in this respect to refer to the recent decision of the Court of Appeal in Enid Timol-Uylett and George Timol, Supreme Court Civil Appeal No. 28 of 1976 in which judgment was delivered on December 5, 1980. This gave some guidance as to what constituted fraud in the litigation for Registered

title, The application was under scrutiny in that case/was a primary application in respect of which there are set procedures, not only for scrutiny of the application and the documents supporting the application but also for public notice to be given of the application, Considering what I have described as the non-existence of title in Vernal Fable I do not see that there has been any fraud.

I will not make an Order, therefore, cancelling the said Certificate of Title nor will I make an Order directing Edna Morrison to deliver up the said Title for cancellation, nor an Order directed to the Registrar of Titles cancelling the said Title. All this follows from the findings which I reached.

There will be judgment for the defendants with costs to be agreed or taxed.