JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE 'S CIVIL APPEAL NO.16/2000

BEFORE: **THE HON.MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE SMITH J.A.(Ag.)

BETWEEN	**THELMA GRANT BY ATTORNEY DOTLYN WHITE**	**PLAINTIFF/APPELLANT**
A N D	**BEATRICE BARNES**	**DEFENDANT/RESPONDENT**

Audel Cunningham instructed by Nancy Tulloch-Darby for the Appellant

Judith Clarke instructed by Jeremy Palmer for the Respondent

April 2, and June 7, 2001

DOWNER, J.A.

In the Resident Magistrate's Court for the parish of St. Elizabeth, holden at Malvern, Thelma Grant through her Attorney, Dotlyn White claimed damages of $10,000.00 in the Plaint Note for trespass to land filed against Beatrice Barnes. An injunction was prayed for in the Particulars Of Claim to restrain the defendant, her servants, workmen, or agents from entering the land or further interfering with the plaintiff's possession of the land. The trial before His Honour Mr. John Moodie was a marathon . It was heard over many days between 14th July 1994, and 16th April, 1999, and concluded with judgment in favour of the defendant. The plaintiff, Dotlyn White, was aggrieved by that

decision and has appealed to this court to reverse the order made against her in the Court below. In view of the claim for a prohibitory injunction it is perhaps useful to set out the claim as sought in the Particulars Of Claim. It reads thus:

> "The Plaintiff's claim is for TEN THOUSAND (10,000.00 DOLLARS damages for TRESPASS TO LAND for that from and since the month of August, 1991 the Defendant his servant, workmen and or Agent have repeatedly trespassed on lands in the possession of the Plaintiff at STEVEN RUN in the parish of Saint Elizabeth which said land is butted and bounded as appears by the plan thereof dated the 2nd day of November, 1976 bearing Survey Department Examination No. 149052 and being part of the land comprised in Certificate of Title registered at Volume 115 Folio 125 of the Register Book of Titles and has displaced tenants thereon and has tilled the soil thereof and has planted crops thereon.
>
> The Plaintiff prays that this Honourable Court will grant an injunction restraining the Defendant her servant, workmen and or agents from entering the said land or from further interfering with the Plaintiff's said land."

Did the appellant Dotlyn White prove possession of the parcel of land in issue at the time of the alleged trespass?

Dotlyn White, who has a power of attorney, is the sister of Thelma Grant the appellant. It was Dotlyn White who gave evidence. As regards the parcel of land in issue she gave evidence that it belonged to their father and was passed on to their mother. When their mother died Thelma Grant obtained Letters of Administration for the land. Sometime in 1976 the land was surveyed at the instance of the appellant, the survey number being 149052. The size is about three acres.

The evidence concerning trespass first occurred in August 1991 when Dotlyn White states that the respondent Beatrice Barnes disturbed her tenants

on the land. The respondent even destroyed the gungo trees of her brother Stanhope. Under cross-examination she gave the following evidence at page 8 of the record:

> "Tenants have always been on the land. My father also had people cultivating it and even up to family recently. My tenants are not on the land now. Miss Beatrice Barnes turned them off. When she want to turn them off I went to an Inspector at Nain Police Station. That was some time after Miss Beatrice Barnes was on it. It was after 1991 that the people I had on it were removed. I not recall whom. My cousin was actually the caretaker for the land. He was in charge of the people who cultivate the land. His name is Albert Witter. I don't know what consideration the tenants gave to be on the land. "

It was put to her that the plaint was lodged in Court in June 1993, yet her evidence was of trespass which commenced in August 1991. Her response in re-examination was that the appellant tried to settle the issue with the respondent but failed. It was against that background that the proceedings were commenced by plaint.

Albert Witter who was seventy years when he gave evidence said that he knew the land belonged to Stanford Witter, the father of the appellant. Further he acted as caretaker for the land on behalf of the appellant from 1979 to 1991 when Thelma Grant's brother Stanhope presumably took over. As recounted earlier Dotlyn White confirmed that, Albert Witter, her cousin was caretaker. Albert Witter was emphatic in stating that neither Mary Sloss the respondent's mother or David Barnes her father had anything to do with the land in issue.

The other witness who gave evidence for the appellant was Victoria Fulford of the Collectorate of Taxes, St. Elizabeth at Santa Cruz. She stated that

at Vol. 202 100 7010 the owner of a three(3) acre parcel of land at Stevens Run was recorded as Stanford Witter. It should also be noted that the appellant's tax receipts Nos. 02626, 597835, and 045921 were exhibits. It was on the basis of this evidence that the respondent Beatrice Barnes was called upon to answer.

How did the respondent Beatrice Barnes answer to the evidence which disclosed that she was a trespasser?

Beatrice Barnes' account was that the land in dispute was not the land owned by Stanford Witter. She claims the land through ownership by her mother which she alleged runs back to her great, great grandfather. A very important aspect of her evidence runs thus at page 12 of the record:

> "In 1990 sometime I went to the land noticed them working the land. Mr. Albert Witter died – and I gave him a notice. Notice served on him and he come off. And I start to work the land."

On the issue of possession this was the case for the respondent.

What were the findings and conclusion of the learned Resident Magistrate?

There are some oddities about the proceedings in the Court below and the reasons for judgment which are inexplicable. Firstly, after the addresses of both counsel, further cross-examination by Mr. Jeremy Palmer for the defendant was permitted. There is no indication who was cross-examined. It is appropriate to set out how it appears in the record:

> **"By permission further XXN by Mr. Palmer**
>
> Exhibit 7 shown to witness
>
> By how the Valuation number are compared this valuation number conforms to the area Steven's Run."

Exhibit 7 is listed in the exhibits as Three Tax Receipts 98841, 838931,116607 put in by the respondent Beatrice Barnes. Such a course is exceptional. Then the following paragraph appears in the learned Resident Magistrate's reasons at page 22 of the Record:

> "After the case for the defence was closed the Plaintiff was allowed to call Mr. Martin Richards of the Land valuation Department. He produced a map of the Stevens Run area (Exhibit 10). The Plaintiff's and defendant's tax receipts were shown to him. He identified Lot number 10 on his map, as, similar to that referred to on Plaintiff's tax receipts. The plot number on Defendant's receipts does not appear on the map. He, however, admits that number would have been on his map at some stage and that he can not tell from his personal knowledge how 46 is not there. He does not know when the plan was made nor if any alterations were done. He did give two ways in which the number of a particular parcel can be changed or cancelled on his map. Plot number 10 on his map is similar to both survey diagrams and the diagram on the registered title. The question which arises is whether the Plaintiff's valuation number being on the map and the Defendant's number not being there tips the scales in favour of the Plaintiff."(Emphasis supplied)

Here are the Resident Magistrate's reasons with respect to this evidence:

> "I am not satisfied that the evidence of Mr. Martin Richards and the map he produced can be relied on to show who is in possession of the land. There are gaps which need to be filled."

It does not appear that the learned Resident Magistrate directed his mind to the evidence of Dotlyn White and Albert Witter who gave positive evidence on the issue of possession.

Then comes the only finding in the reasons for judgment at page 23 of the Record:

> "The valuation number on the Defendant's tax receipts is in respect of land at Stevens Run which is no (sic)tax roll and taxes are being paid.
>
> A registered title exists. Although it is not the Defendant's title she can use it to deny the Plaintiff any claim to possession.
>
> I therefore enter judgment for the Defendant. Costs to be agreed or taxed."

The registered Title is in the name of Alfred Barnes who is the great grandfather of the respondent Beatrice Barnes.

The grounds of appeal

Two grounds of appeal were argued by Mr. Audel Cunningham with considerable skill. They were as follows:

> "1.That the judgment of the Learned Resident magistrate is in error because of his failure to consider adequately or at all the question of the possession of the subject land at the time of the alleged trespass.
>
> 2. That the Learned Resident Magistrate did not take into consideration rights which had been acquired by Stafford Witter over the land registered at Volume 115 Folio 125 of the Register book of Titles in the name of Alfred Barnes."

The first point to note is that the learned Resident Magistrate made no finding with respect to possession. So can this court in rehearing the matter make such a finding, or is it obliged to enter a nonsuit as Ms. Judith Clarke for the respondent contended? There is an aspect of the evidence coming from the respondent which is of vital importance. It came in examination in chief and although adverted to previously must be repeated:

> "In 1990 sometime I went to the land noticed them working the land - Mr. Albert Witter died – and I gave him a notice. Notice served on him and he come off. And I start to work the land."

Albert Witter denied that he was given a notice to leave the land. In his evidence on this aspect he said:

> "My parents own property jut on the other side of the road. We used to carry animals morning and evening down there. After a period of time Mr. Stanford Witter died in about 1967. His wife died about 1976 and then the man working the land all the years Joshua Genius – he died. After that Mrs. Thelma Grant ask me to oversee the land. That was later part of 1979. I agreed and got somebody to work the land. Joshua Genius son is the one I got to work the land – Ben Nembhard. Overlook the land for about 12 years to about 1991."

Then he continued thus:

> "I stopped because Mrs. Grant ask me that her brother will take over. Not long after I got a letter from Mr. Palmer disposing me off the land."

But the crucial finding that must be made is that the respondent acknowledged that Albert Witter was in occupancy of the land in dispute in 1991. A telling admission from respondent Beatrice Barnes was as follows at page 12 of the Record:

> "I saw Mr. Albert Witter on that land. Gave him a notice to come off. I don't know how long he was on it because I was not down there.
>
> While I was away I had family in Steven's Run – and Littiz. Now say in Littiz but not in Steven's Run."

Albert Witter's unchallenged evidence was that he was the caretaker for the appellant Thelma Grant, from 1979-1991, a period of twelve years. Further, his evidence states that he handed over the caretaking to the appellant's brother (presumably Stanhope Witter) and Dotlyn White had given evidence that the respondent had destroyed Stanhope's gungo crop.

So the finding that for twelve years and upwards the appellant was in occupancy is an appropriate finding that ought to have been made by the learned Resident Magistrate. Additionally, prior to those twelve years, Dotlyn White gave evidence that she knew that her father owned the land for fifty years and then when her father died it passed to her mother whose estate is being administered.

Further, on the issue of damages the evidence from the appellant was that the respondent was cultivating the land and renting it out to other people. The respondent confirms this in part. She said in her evidence at page 12 of the record:

> "I am farming land now. Took up a peanut crop recently."

The respondent admitted in cross-examination that on 25th February 1997 as follows:

> "My mother died 24 years now. In those years I went away for over 20 years. I hear what happen to the land over that time."

So the inference was that her mother died in 1973 and that she was away from Jamaica from 1977. So during the period 1977 to 1991 she had no direct knowledge of what was happening to the land. On the other hand, the appellant has given direct evidence of occupancy for upwards of twelve years before 1991, occupancy firstly by her father and thereafter by her mother. It is against this background that the law on the twin issues of possession and trespass must be considered.

The law relating to trespass and damages

In **Perry v Clissold** [1907] A.C. 73 at 79 Lord MacNaghten said:

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title."

In the case of **Wuta-Ofei v Danquah** [1961] 3 All E.R. 599 at 599, Lord Guest said:

> "In order to maintain an action for trespass, the respondent must have been in possession at the date of the appellant's entry on the land in 1948. This is very largely a question of fact on which the Board do not have the benefit of much evidence. Nor do they have the assistance of the courts below"

Then at 600 Lord Guest continued:

> "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 vary 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. at p. 657, 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 as 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.'
>
> There is no evidence that the respondent ever abandoned her possession which in virtue of her grant in 1939 she obtained. Therefore, if there is evidence after 1940 of an intention to retain possession, that would, in their Lordships' view, be sufficient to entitle her to maintain an action for trespass. It was said that her conduct was neutral. Their Lordships do not agree. It is true there is no evidence when the pillars were erected. But, if they were erected after 1940, that would be a definite act indicating possession. Even if erected before 1940, their continuance is some evidence of the respondent's state of mind as affecting possession. In the indenture of 1945, which was registered, the respondent declared that she had entered into possession of the land and been in possession ever since. The only reasonable inference from her evidence is that, up to 1948, the date of the appellant's entry on the land, she deputed her mother to look after the plot and that she was keeping watch on the land to see that no one intruded. At any rate, when she did notice the appellant's blocks on the land she took prompt action to warn the appellant off the land. The evidence is exiguous, but, in their Lordships' opinion, it is sufficient to satisfy the test and is adequate proof of the respondent's intention to continue her possession after 1940 and establishes that, when the appellant entered the land in 1948, she was in possession. She is, therefore entitled to maintain an action for trespass."

What was the response of Ms. Judith Clarke for the respondent, to the above factual and legal positions? She did not contest the legal position as adumbrated in the two cases cited from the Privy Council. She however, contended that the appellant failed to establish possession necessary to maintain trespass. Consequently, she submitted that "a nonsuit be entered"

pursuant to Sec. 251 of the Judicature (Resident Magistrates) Act. As to the law on this issue it is conveniently stated by Carberry J.A. in **Vincent Davis v. James Harris** (1980) 17 J.L.R. 89 at 90 thus:

> "Unfortunately, once again the present action with which we are concerned was not conducted in a manner calculated to settle the issue of either possession or title. We think, and the advocates for both sides agree, that the proper course, having regard to the way in which the action was conducted was that the Resident Magistrate should have entered a non-suit both on the claim and the counter-claim, that is, a finding that neither side had established their case, and we so direct. It will then be open for the parties, assuming that they wish to continue the luxury of this litigation, to bring actions for recovery of possession or ejectment and to proceed to try to establish the title of one or other to this land, which both have possessed for a very long time."

The answer to counsel for the respondent is that the appellant did establish possession and that possession was admitted by the respondent. More particularly the respondent said that she entered the land in 1991, when Alfred Witter was caretaker on behalf of the appellant. The respondent's entry was sufficient to establish trespass in the circumstances of this case.

Something should be said of the status of the appellant Thelma Grant. Thelma Grant is the administrator of the estate firstly of Stanford Witter, her father, and secondly of Maisie Witter, her mother, who were both in possession before Thelma Grant brought proceedings against Beatrice Barnes for trespass. The record shows that both letters of Administration were listed as exhibits 2 and 3 in the Court below. In **Commissioner of Stamp Duties (Q'D.) v Livingston** (1965) A.C. 695 at 707 Viscount Radcliffe said:

"There were special rules which long prevailed about the devolution of freehold land and its liability for the debts of a deceased, but subject to the working of these rules whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and these duties would be enforced upon him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate. Certainly, therefore, he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee. "An executor," said Kay J. in **re Marsden May** ([1884] 26 Ch. D. 783,789;) 'is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office.' He is a trustee 'in this sense.'

It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed 'duties in respect of the assets' as trusts. What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of

> satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realized for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realization are very far from being interchangeable terms."

What is to be done?

In the light of the foregoing the order must be reversed and the appeal must be allowed. There was evidence from both sides that the respondent was cultivating the land and had reaped a crop of peanuts and that she had tenants on the land. The claim for damages of $10,000.00 is for continuing trespass up to the date of the Plaint Note, 13th June 1994. This Court in Resident Magistrate appeals is empowered to assess damages. See Section 251 of the Judicature (Resident Magistrates) Act, which reads in part:

> "And the Court of Appeal may either affirm, reverse, or amend the judgment, decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree, or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order; or remit the cause to the Court with instructions, or for rehearing generally; and may also make such order as to costs in the Court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final:
>
> Provided always, that no judgment, decree, or order of Court shall be altered, reversed, or remitted, where the effect of the judgment shall be to do substantial justice between the parties to the cause:
>
> Provided also,..."

There is also a claim for an injunction as set out in the Particulars Of Claim. The Resident Magistrate is empowered to grant such relief pursuant to sec. 105 of the said Act as regards the 8th specified type matter. That part reads:

> "105. Every Court shall have and exercise jurisdiction in the suits or matters hereinafter mentioned, that is to say –
>
> ...
>
> 8th. In all proceedings for orders in the nature of injunctions, when the same are requisite for granting relief in any matter in which jurisdiction is given, by this or by any other law, to the Court."

The injunction should be in terms of the Particulars of Claim but should be discharged if Beatrice Barnes or another obtains a better title than the appellant. Accordingly, therefore, the order below is reversed and the appeal should be allowed. Damages of $10,000.00 is awarded to the appellant for trespass. Costs both here and below are to go to the appellant. Costs for the conduct of this appeal is fixed at $50,000.00 to be paid by the respondent. The matter is remitted to the Resident Magistrate's Court for the costs below to be agreed or taxed pursuant to Sections 202-206 of the Judicature (Resident Magistrates) Act. There should be liberty to apply.

LANGRIN, J.A.

This is an appeal from the Resident Magistrate's Court in the parish of St. Elizabeth concerning a dispute in which the plaintiff is claming against the defendant for trespass to land. The land in question is approximately two and three quarter acres situated at Stevens Run, St. Elizabeth.

The plaintiff's claim is for Ten Thousand Dollars ($10,000.00) damages for trespass to land. She also prays for an injunction restraining the defendant, her servant, workmen and or agents from entering the said land or from further interfering thereon. The claim is based on the allegation that since the month of August, 1991 the defendant, her servant, workman or agent has repeatedly trespassed on lands in the possession of the plaintiff at Stevens Run, St. Elizabeth. The particular acts of trespass complained of are that the defendant has displaced tenants thereon and has tilled the soil and planted crops on the land.

The land is butted and bounded as appears by the plan thereof dated the 2nd day of November, 1976 bearing Survey Department Examination No. 149052 and being part of the land comprised in Certificate of Title registered at Volume 115 Folio 125 of the Register Book of Titles.

The defendant in her defence asserted that she is not a trespasser and claims an interest in the land by virtue of the land being a part of the estate of her mother Mary Barnes.

After a hearing before the Resident Magistrate for St. Elizabeth, Mr. J.H. Moodie, judgment was entered for the defendant on 16th April 1999 with costs to be taxed or agreed.

An appeal was filed against this judgment and the grounds of appeal are stated thus:

> (1) That the judgment of the Learned Resident Magistrate is in error because of his failure to consider adequately or at all the question of the possession of the subject land at the time of the alleged trespass.
>
> (2) That the Learned Resident Magistrate did not take into consideration rights which had been acquired by Stanford Witter over the land registered at Volume 115 Folio 125 of the Register Book of Titles in the name of Alfred Barnes.

A summary of the evidence reveals that the plaintiff's claim is based on her father's ownership of the land as well as the payment of taxes and a survey which was done without any objection. The plaintiff relies on occupation of the land since 1979 and the fact of her placing tenants on the land up to August , 1991. The only documents she possessed at the time of the trial and in respect of this land were tax receipts since 1970 which were in the name of Standford Witter, plaintiff's father who died in 1968.

The defendant relied on a registered Certificate of Title with diagram which corresponds with the survey diagram produced by the plaintiff. The registered proprietor is Alfred Barnes who is the great grandfather of the defendant. Upon cross-examination the defendant said, "My mother owned the land, coming from my great grandfather."

A trespass is only actionable at the suit of a person who is in possession of the land. Possession includes entitlement to immediate and

exclusive possession. A landlord cannot therefore sue for trespass as the tenant is the person in possession and is the only person who can sue. The landlord may sue if he can prove that actual harm has been caused to the property which has damaged the value of his reversionary interest. Anyone who has a right to immediate possession and enters in exercise of that right is deemed to have been in possession ever since the accrual of his right of entry and may sue for any trespass committed since that time.

Reference must now be made to Halsbury's Laws of England 4th Edition at para. 1394 where it is stated:

> "Actual possession is a question of fact. It consists of two elements; the intention to possess the land, and the exercise of control over it to the exclusion of other persons. The extent of control which should be exercised in order to constitute possession varies with the nature of the land, possession means possession of that character of which the land is capable".(emphasis mine)

And at paragraph 1395 the learned author continued:

> "Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrongdoer. It is not necessary, in order to maintain trespass that the plaintiff's possession should be lawful, and actual possession is good against all except those who can show a better right of possession in themselves."(emphasis mine)

It is trite law that possession is prima facie evidence of ownership. It is nine tenth of the law which means that it is good against all the world except a person who has a better right eg. the owner.

It is instructive to make reference to a decision of the Judicial Committee of the Privy Council in ***Perry v Clissold*** [1907] AC 73 at 79 where Lord MacNaghten in delivering the opinion of the Board observed:

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title."

Mr. Cunningham, counsel on behalf of the appellant, submitted that the only questions of fact which the Magistrate had to determine in order to ascertain whether the plaintiff had, on a balance of probabilities, proved her case, were the following:

(1) Was the plaintiff a person in actual possession of the land at the time of the trespass?

(2) Was the defendant able to show a better right to possession in herself?

There was satisfactory evidence coming from the plaintiff to indicate that the plaintiff had exercised possession over land from sometime prior to and up to 1991 when the acts of trespass commenced. Mr. Standford Witter, father of the plaintiff, owned the lands which he occupied until 1967 when he died. His wife died about 1971. Then Joshua Genius, the man working the land all the years died. The plaintiff then asked Mr. Albert Witter to oversee the land about the latter part of 1979. He was instrumental in

getting Joshua Genius' son, Ben Nembhard to work the land up to the time when the trespass was committed.

In contrast the evidence from the defendant was that sometime in 1990 she went to the land and noticed them working on the land. "A notice was served on Albert Witter and he came off the land. It was then I started to work the land". The defendant traced the possession of the land from Alfred Barnes, down through Henry Barnes and Mary Barnes to the defendant. The evidence of the defendant clearly demonstrates that the plaintiff was in possession of the land prior to 1990 when the acts of trespass took place. There was an absence of acts of possession on the part of the defendant prior to 1990 when the trespass was committed.

The Learned Resident Magistrate fell into error in his judicial determination of the material facts when he said:

> "A registered title exists. Although it is not the defendant's title she can use it to deny the plaintiff's claim to possession..."

The defendant could not rely on the registered Title in the name of Alfred Barnes to resist the plaintiff's claim to possession. There was no evidence indicating that the defendant was the lawful owner of the land or had legal rights thereto. Not being seized with a grant of Probate or Letters of Administration to her mother's estate, the defendant could not as a matter of law claim any legal interest in the said land.

I therefore accept the plaintiff's submission that the defendant was, at best, a person entitled to share in her mother's unadministered estate by virtue of her mother's intestacy. It is settled law that a beneficiary has no

interest, legal or equitable in the subject matter of the estate until the estate is fully administered. In the 12th Edition of Modern Equity by Jill Martin at page 59, the learned author, in describing the nature of the interest of a legatee or devisee, had this to say:

> "A legatee or devisee does not, on the testator's death, become equitable owner of any part of the estate. The executor takes full title to the testator's property, not merely a bare legal estate. He is, by virtue of his office, subjected to various fiduciary duties which can be enforced against him by persons interested; and these duties are inconsistent with his holding the property on trust for the legatee or devisee. The equitable ownership is 'in suspense' ".

On the question of whether the plaintiff could hold a possessory title in the land as a result of adverse possession, the evidence is in my view insufficient to make such a determination.

Ms. Judith Clarke, counsel for the defendant submitted that the plaintiff's claim should be non-suited. She cited the case of ***Vincent Davis v James Harris*** [1980] 7 JLR 89 in support of that proposition. However, this case is easily distinguished from the instant one because in the instant case the evidence is clear that the plaintiff alone was in possession. While in the case of ***Davis v J Harris*** both parties were in possession but the evidence was insufficient to decide the question of title.

Since the defendant could show no better right to possession than the plaintiff, I would allow the appeal by granting the plaintiff the award of the damages sought for trespass. I agree with the order proposed.

SMITH, J.A. (Ag):

I agree with both judgments and the order proposed by Downer, J.A.