

25, 1953

No. 42 of 1951.

# In the Privy Council.

**ON APPEAL**  
*FROM THE SUPREME COURT OF BERMUDA.*

UNIVERSITY OF LONDON  
W.C.1.

12 NOV 1956

E.C. ADVANCED  
LEGAL STUDIES

33504

BETWEEN

MARGARET YOUNG HORNE and RICHARD  
CLEVELAND FOX (Defendants) . . . . . *Appellants*

AND

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RODERICK ALEXANDER FERGUSON (The  
Younger) and HERMAN FREDERICK  
LESEUR (Plaintiffs) . . . . . *Respondents.*

## Case for the Respondents

RODERICK ALEXANDER FERGUSON and HERMAN FREDERICK LESEUR

RECORD.

1. This is an appeal by the Defendants to the action against the Judgment of the Chief Justice of the Supreme Court of Bermuda (the Honourable Sir C. G. Brooke Francis) delivered on the 22nd June 1951 in favour of the Respondents the Plaintiffs in the action. p. 31.

20 2. This appeal relates to a piece of land (hereinafter referred to as "the said Land") situate on the south shore in the Parish of Warwick, Bermuda, which the Appellant Horne under a power of attorney from the Appellant Fox agreed to sell to the Respondents in manner hereinafter appearing. The main question for decision on this appeal is whether the Appellants were able to show a good title to the said Land agreed to be sold.

30 3. By an oral agreement evidenced by the documents hereinafter set out the Respondents in the early part of June 1949 agreed to purchase and the Appellant Horne (as attorney for the Appellant Fox) agreed to sell the said Land for the sum of £5,000 of which £1,000 was to be paid forthwith and the balance to remain on mortgage for a period of 10 years or less at the option of the Respondents.

4. Pursuant to the said oral agreement the Respondent Ferguson on the 18th June 1949 and the Respondent Leseur on the 24th June 1949 each paid to the Appellant Horne the sum of £500 by way of deposit and

CASE FOR THE RESPONDENTS.

in part payment of the said purchase price of £5,000 and the Appellant Horne on the said respective dates executed paper writings in the terms of the Exhibits "A.1" and "H.1" which are respectively printed on pages 50 and 49 of the Record. The paper writing which is Exhibit "A.1" was in error dated the 18th July 1949.

5. The Appellants failed to produce to the Respondents or to their Attorneys Messrs. Appleby, Spurling & Kempe documentary or other evidence considered satisfactory or sufficient to prove that they or either of them were able to give a clear and good title to the said Land agreed to be sold. 10

p. 1. 6. The Writ of Summons in the action was issued on the 21st February 1951 claiming return of the sum of £1,000 paid by way of deposit; the sum of £20 as expenses paid by the Respondents in examination of the title to the said Land; damages in respect of non-completion of the sale and interest and costs.

pp. 2, 3. 7. The Statement of Claim on behalf of the Respondents was delivered on the 19th March 1951. The Respondents pleaded the said oral agreement of sale, payment of the said respective sums of £500 and the said paper writings evidencing the same and alleged that the Appellant Fox was unable to give good title to the said Land and that the Appellants had neglected and refused to perform the said sale agreement. The Respondents claimed damages for breach of the said agreement; repayment of the said deposit of £1,000 with interest; costs and a declaration that the Respondents were jointly entitled to a lien on the said Land for the said sums claimed. 20

p. 4. 8. By their Statement of Defence delivered on the 19th March 1951 the Appellants admitted the said agreement of sale and the payment by the Respondents of the said deposit of £1,000 but alleged (*inter alia*) that the Respondents had broken the said agreement and they counter-claimed damages for such breach and the right to retain the said deposit. 30

p. 5. 9. By their Reply delivered on the 13th April 1951 the Respondents denied that they had broken the said agreement or that the Appellants were entitled to any of the relief counter-claimed.

10. The action was tried before Chief Justice the Honourable Sir C. G. Brooke Francis on the 21st, 22nd and 28th days of May and the 6th June 1951 and judgment was reserved. Oral evidence was given on behalf of the Respondents by the Respondents and Arthur Dudley Spurling their Attorney and on behalf of the Appellants by the Appellants and Edward Trenton Richards (who had acted as Attorney for the Appellant Horne in the matter of the proposed sale) and Wycliffe Stovell 40 (a Surveyor instructed by the Appellant Horne).

pp. 42, 43, 44.  
p. 42, l. 29. 11. Such title as the Appellants had to the said land agreed to be sold commenced with the will dated the 18th May 1890 of Adastrus Henry Astwood who died in 1901. By Clause 3 thereof he devised to his

eldest son Samuel Josephus Astwood a tract of land in Warwick Parish "supposed to contain about twelve acres." The north, south and west boundaries thereof were therein clearly defined and the east boundary thereof was stated to be bounded by "other land of my own next herein-after devised." By Clause 4 of the said will the testator devised to his son Frederick Brownlow Astwood a parcel of land in Warwick Parish "supposed to contain about four acres" and stated to be bounded on the west "by the land hereinbefore devised to Samuel Josephus Astwood." By Clause 5 of the said will the testator devised to his children there named a parcel of land in Warwick Parish "supposed to contain about eight acres" and stated to be bounded on the west "by other land of my own."

12. The said Samuel Josephus Astwood died in 1933 and by his will dated the 6th February 1929 he devised (Clause (4)) the parcel of land in Warwick Parish "devised to me by my father the late Adrastus Henry Astwood by the Third Clause of his will" to his eldest son Samuel Edward Astwood. The Appellant Horne is the sister of the said Samuel Edward Astwood and sole executrix of the will of her father the said Samuel Josephus Astwood.

13. One Wycliffe Stovell giving evidence for the Appellants stated that he was instructed as a Surveyor by the Appellant Horne to make a survey of the property purporting to be that of the estate of the said Adrastus Henry Astwood deceased. This was done in June 1945. On such survey the land amounted to 19.9 acres as against the "supposed" 24 acres devised by the will of the said Adrastus Henry Astwood. Stovell stated the he was instructed by the Appellant Horne to lay out 12 acres to correspond with the devise in Clause 3 of the will of the said Adrastus Henry Astwood and that in doing so he arbitrarily fixed the eastern boundary thereof.

14. By a Power of Attorney dated the 8th May 1947 the said Samuel Edward Astwood (then known as Edward Astwood) appointed the Appellant Horne his lawful Attorney and (*inter alia*) empowered her to sell his interest in the property at Warwick Parish.

15. In 1947 the Appellant Horne (as Attorney for the said Edward Astwood) purported to sell to the Appellant Fox nine and a half acres of the land alleged to belong to Edward Astwood at Warwick Parish (including the said Land the subject of this appeal) for the sum of £1,200. The Appellant Fox in cross-examination stated that he did not pay the £1,200 which remained on mortgage. He also stated that he sold a portion of the land to one Viera for £7,000 and that the remainder was to be sold to the Respondents for £5,000. He admitted that he received none of the £7,000 or the £1,000 deposit paid by the Respondents.

16. By a Power of Attorney dated the 28th October 1947 the Appellant Fox appointed the Appellant Horne to be his lawful Attorney and (*inter alia*) empowered her to sell his interest in the property situate at Warwick Parish aforesaid.

17. During the hearing of the action a considerable amount of evidence was adduced by both sides as to which of their lawyers was to prepare the necessary documents to give effect to the proposed sale of the said Land to the Respondents. It is contended on behalf of the Respondents that this evidence has no real bearing on the matter under appeal as whoever was to draw the documents the Appellants were bound to show a good and clear title to the said Land to the Respondents or to their advisers.

p. 11, l. 10.  
p. 13, l. 4.  
p. 8, l. 34.  
p. 12, l. 28.

18. Both the Respondents gave evidence to the effect that their lawyers were not satisfied with the Appellants' title to the said Land the measurements of the boundaries of which had been given to them by the Appellant Horne. 10

pp. 52, 53, 54.

p. 54.

p. 13, l. 34.  
p. 14, l. 9.

p. 14, l. 36.  
p. 60.

p. 24, l. 7.  
p. 37, l. 1.  
p. 27, l. 22.

19. Arthur Dudley Spurling of the firm of Appleby, Spurling & Kempe, Attorney for the Respondents, gave evidence on behalf of the Respondents. He referred (*inter alia*) to his letters of the 4th February 1950 and 21st February 1950 to Mr. E. T. Richards the Appellants' then Attorney requesting (*inter alia*) delivery of the documents of title for examination of the title. He produced a list of documents submitted on behalf of the Appellants on the 2nd March 1950. The witness stated that he was aware of a boundary dispute between the Appellant Horne and an adjoining landowner and that none of the documents produced to him satisfied him as to the correctness of the boundaries and accordingly he refused to pass the title. He also stated that he had subsequently examined Court Records and discovered a Judgment in an action against the Appellant Horne and one Viera which affected the said Land agreed to be sold. He stated that the Appellant Horne admitted to him that this was so. The Appellant Horne in evidence in chief denied this but the Chief Justice in his Judgment preferred to believe Mr. Spurling. The Appellant Horne in answer to the Court admitted that it was adjudged in the action *Gibbons v. Viera and Horne* that the western boundary of Gibbons went fifty feet in from the boundary she claimed. 20 30

p. 38, l. 6.

20. The Chief Justice in his Judgment stated that he did not value the Appellant Horne as a straightforward witness.

pp. 31-39.

21. On the 22nd June 1951 the Chief Justice of the Supreme Court of Bermuda delivered his Judgment declaring that the two respective deposits of £500 should be returned to the Respondents with interest at the rate of 5 per cent. from the 24th June 1949 until the date of payment and that the Respondents should have Judgment against the Appellants jointly and severally in respect thereof. He also awarded damages to the extent of the amount expended by the Respondents in investigation of the title such sum to be taxed by the Registrar. The Appellants' Counterclaim was dismissed and costs were awarded against the Appellants jointly and severally. It was further declared that the Respondents should have jointly a lien on the said property contracted to be sold against the return of their deposit, payment of damages and costs. 40

22. The findings of the Chief Justice as set out in his Judgment were :— p. 38, l. 8.

(1) That the Defendant Horne knew in 1945 that the eastern boundary of Edward Astwood's estate was in dispute, and was well aware that, until the dispute was settled, his title was uncertain.

(2) That the conveyance to Richard Cleveland Fox was a stratagem, and in no manner removing existing uncertainty.

(3) That the Defendant Horne withheld knowledge of this dispute and uncertainty of title from the Plaintiffs.

10 (4) That at the date of the negotiations the title to the land, the subject of the agreement with the Plaintiffs, was defective.

23. The Appellants being dissatisfied with the said Judgment applied by Motion dated the 11th July 1951 to the Supreme Court of Bermuda for leave to appeal to His Majesty in Council and for an order staying all further proceedings upon the said Judgment pending the hearing of the appeal. The grounds of appeal were as stated in the Notice of Motion of Appeal as printed on pages 39 and 40 of the Record. On the 21st July 1951 leave to appeal was granted on the terms set out in the Order of that date printed on page 41 of the Record. p. 39. pp. 39, 40. p. 41.

20 24. The Respondents submit that the Judgment of the Chief Justice of the Supreme Court of Bermuda in favour of the Respondents was right and that the present appeal should be dismissed for the following amongst other

## REASONS

(1) BECAUSE the Appellants were bound to prove a good and clear title to the said Land agreed to be sold to the reasonable satisfaction of the Respondents but failed so to do.

30 (2) BECAUSE at all material times the title to the said Land was uncertain and defective to the knowledge of the Appellant Horne.

(3) BECAUSE the non-completion of the agreement for sale of the said Land was due solely to the default of the Appellants in deducing a good and clear title thereto.

(4) BECAUSE the Judgment of the Chief Justice of the Supreme Court of Bermuda was right in fact and in law and ought to be affirmed.

K. L. COGILAN.

**In the Privy Council.**

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*from the Supreme Court of Bermuda.*

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Younger) and HERMAN  
FREDERICK LESEUR**

(Plaintiffs) . . . . . *Respondents.*

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**Case for the Respondents**

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