

26,1953

No. 33 of 1951.

In the Privy Council.

ON APPEAL  
FROM THE SUPREME COURT OF BERMUDA.

UNIVERSITY OF LONDON  
W.C.1  
12 NOV 1956  
INSTITUTE OF DISTANCED  
LEGAL STUDIES

CASE FOR THE APPELLANTS.

33495

BETWEEN—

ADMON GABRIEL VIEIRA and MARGARET  
YOUNG HORNE (Defendants) *Appellants*

— AND —

MORRIS ALVIN GIBBONS  
(Plaintiff) *Respondent.*

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**CASE FOR THE APPELLANTS.**

RECORD.

1. This is an appeal from the judgment of the Chief Justice of the Supreme Court of Bermuda dated 6th April, 1951, whereby judgment was entered for the Plaintiff against the Defendants jointly and severally in a sum of £440 damages and costs to be taxed and the Defendants their servants and agents were restrained perpetually from trespassing upon certain land described in the judgment.

Judgment:  
p. 24.

20 2. By a Writ of Summons issued on 5th September, 1950, in the said Supreme Court the Respondent claimed against the Appellants damages for wrongfully entering his land in Warwick Parish in the Colony of Bermuda and injuring the dwellinghouse thereon erected and an injunction to restrain the Appellants from entering upon the said land.

Writ: p. 1.

3. By his Statement of Claim the Respondent alleged that he was at all material times in possession of a cottage and parcel of land in Warwick Parish aforesaid containing 1a. 2r. 17p. or thereabouts therein more particularly described and that on or about 6th August, 1950 and on 3rd September, 1950, the Appellants or their

Statement of  
Claim: p. 2.

servants or agents wrongfully entered on the said land and did certain damage thereon particulars of which are contained in paragraph 2 of the Statement of Claim in consequence of which the structural repairs and improvements of the said cottage was delayed for upwards of two months whereby the Respondent alleged that he suffered damage particulars of which are contained in paragraph 3 of the Statement of Claim.

Defences: p. 4.

4. The Appellants delivered separate Defences, each alleging that part of the land referred to in the Statement of Claim belongs to the first Appellant, Vieira, and that any damage done to the said cottage was not done on the Respondent's land. 10

5. The case was tried by the Chief Justice on 2nd, 4th, 5th and 6th April, 1951. Evidence was given *viva voce*. On 6th April, 1951, the Chief Justice delivered judgment as stated above.

6. The facts of the case shortly stated are as follows:—

Will of  
A. H. Astwood:  
p. 37.

(a) By his Will dated 18th May, 1890, one Adrastus Henry Astwood (hereinafter called "the Testator") (by Clause 3) devised to his eldest son Samuel Josephus Astwood "a tract of "land in Warwick Parish supposed to contain about twelve "acres" bounded on the north, south and west as therein mentioned and on the east by other land of his own next thereafter devised and (by Clause 4) devised to his son Frederick Brownlow Astwood "a parcel of land in Warwick Parish supposed to contain about four acres" bounded on the north as therein mentioned, on the south by a road in the said Will called "the South Longitudinal Road", on the east as therein mentioned and on the west by the land devised by Clause 3 and (by Clause 5) devised to the said Frederick Brownlow Astwood and five other children of the Testator equally "a parcel of land in "Warwick Parish supposed to contain about eight acres" 20 30 bounded on the north by the said South Longitudinal Road, on the south by the ocean, on the east as therein mentioned and on the west by the other land of the Testator.

(b) The Testator died on 19th June, 1901, and his said Will was proved on 12th August, 1901, in the Supreme Court of Bermuda.

Will of  
F. B. Astwood:  
p. 40.  
Vesting  
Order: p. 42.  
Conveyance:  
p. 44.

(c) By virtue of various events and acts one Frederick Gunnison Astwood, the son of Frederick Brownlow Astwood referred to above, became the owner of all the undivided shares 40 devised by Clause 5 of the said Will.

Will of  
F. B. Astwood:  
p. 40.

(d) Under the Will of the said Frederick Brownlow Astwood dated 12th August, 1924, his daughter Ruth Elizabeth

Astwood became (after the death of her mother in 1938) the owner of the parcel of land devised by Clause 4 of the said Will.

(e) Edward Astwood, the son of the said Samuel Josephus Astwood became on his father's death in 1933 the owner of the tract of land devised by Clause 3 of the said Will.

10 (f) In the year 1943 there was a dispute between the Appellant Margaret Young Horne, who is the sister and attorney of the said Edward Astwood, representing the said Edward Astwood on the one hand and the said Frederick Gunnison Astwood on the other hand as to the location of the eastern boundary of the tract of land devised by Clause 3 of the said Will and as to the boundaries of the said parcel of land devised by Clause 5 of the said Will as the result of which (according to the evidence of the Appellant Horne) the said Frederick Gunnison Astwood gave up possession of the said cottage.

20 (g) On 31st May, 1949, the said Frederick Gunnison Astwood purported to convey to the Respondent Morris Alvin Gibbons certain property edged pink on the plan annexed to the Indenture of Conveyance being land lying immediately to the east of parts of the line between the points marked "B" and "D" on the plan which is Exhibit "A" and including the said cottage. The Respondent admitted in evidence that when he bought this land he knew that its western boundary was in dispute.

Conveyance to Respondent : p. 51.

Plan : Exhibit "A". p. 14, l. 3.

(h) On 1st August, 1949, the Appellant Admon Gabriel Vieira bought seven acres of the land devised by Clause 3 of the said Will including part of the land purporting as aforesaid to have been conveyed to the Respondent.

30 (i) In September, 1950, the Appellants did certain damage to the said cottage to which the Respondent was then causing certain repairs to be done. The Appellant Horne in evidence admitted having pushed in five panes of glass which were already broken and the Appellant Vieira in evidence admitted breaking five windows. They both denied having done any other damage complained of by the Respondent and further denied that any such damage as aforesaid was done on the property of the Respondent. Evidence with regard to the alleged damage was given on the part of the Respondent by the Respondent himself and by witnesses named Victor da Costa and James Rubain, but, save that Rubain said that he had seen the Appellant Horne break five windows, none of the witnesses was able to say who had done the damage complained of.

p. 21, l. 39.

p. 23, l. 31.

p. 14, l. 21.  
p. 16, l. 27.

40 (j) It is common ground that the western boundary of the land in Warick Parish aforesaid owned by the Testator was

Plan:  
Exhibit "A".

along a line shown on the said plan (Exhibit "A") between two points marked respectively "A" and "E" thereon. The Respondent contends that the eastern boundary of the tract of land devised by Clause 3 of the said Will is along a line shown on the said plan between points marked respectively "B", "C" and "D" thereon. If such eastern boundary were correct the area of the said tract of land would be 9.062 acres only. The Appellant Horne on behalf of the said Edward Astwood contends that the said eastern boundary is further east than the said line between the points marked "B" and "D" so as to allow to the said tract of land the full area of 12 acres mentioned in the said Will, and that such eastern boundary is in fact along the line 150 feet to the east of and parallel with the said line between the points marked "B", "C" and "D". The Appellant Horne stated in evidence that her father had shown her this boundary on 25th December, 1931. 10

p. 20, l. 4.

7. The witness R. H. Clarke, a surveyor, called on behalf of the Respondent purported to identify (a) the land devised by Clause 3 of the said Will with the area of 9.06 acres enclosed by the boundaries indicated by the lines connecting the points marked "A", "E", "D" and "B" on the said plan (Exhibit "A") (b) the land devised by Clause 4 of the said Will with the area of 3.8 acres enclosed by the boundaries indicated by the lines connecting the points marked "B", "C", "F" and "H" on the same plan together (apparently) with a small triangle of land to the north of the Kyber Pass Public Road as to which there was no evidence of its identity or that any such small triangle of land ever belonged to the Testator (c) the land devised by Clause 5 of the said Will with the area of 6.35 acres enclosed by the boundaries indicated by the lines connecting the points marked "D", "G", "F" and "C" on the same plan. The same witness stated that the Testator had no land outside these boundaries, but he gave no reasons for so saying and he admitted that the only document of title that he had looked at was the said Will and that he had examined no other deeds or documents. There was no other evidence that the Testator did not, whether at the date of his said Will or at any other time, own or believe that he owned land to the east of the line "G" to "H" on the said plan or elsewhere in the said Parish adjoining or near to the land comprised within the said boundaries, and the said Frederick Gunnison Astwood in evidence stated that he (the said Frederick Gunnison Astwood) does in fact own land to the east of the said line "G" to "H" and admitted in cross-examination, that, if there were 20 acres in the three areas identified as aforesaid by the witness Clarke, "she (i.e. the Appellant Horne) could get 12 acres". The Appellants also contend that the identification of the said three 20 30 40

p. 5, l. 40.

p. 6, ll. 21, 26.

p. 7, l. 8.  
p. 8, l. 4.

p. 13, l. 5.

p. 13, l. 25.

areas by the witness Clarke as representing the lands devised by Clauses 3, 4 and 5 respectively of the said Will was erroneous because such areas are inconsistent with the descriptions of the same contained in the said Will for the reason (amongst others) that, as the Appellants contend, the South Longitudinal Road referred to in the said Will is the road which is designated on the said plan (Exhibit "A") "South Shore Public Road (formerly Military Road)"

8. The said Frederick Gunnison Astwood claimed in evidence to have built the said cottage and the said Ruth Astwood in evidence said that he did so. This the Appellant Horne in her evidence denied. She stated that the land which the said Frederick Gunnison Astwood purported to sell to the Respondent as aforesaid was part of land belonging to the said Edward Astwood and was rented from him by Eliza Astwood, the mother of the said Ruth Astwood, until she died in 1938 and thereafter by the said Ruth Astwood until September 1939 and that the said cottage was then standing on the land so rented. She further stated that in 1943 on behalf of the said Edward Astwood she summoned the said Frederick Gunnison Astwood for trespass as the result of which he moved from the said cottage.

p. 11, l. 16.  
p. 12, l. 45.  
p. 9, l. 31.

p. 21, l. 9.  
p. 21, ll. 2-16.

p. 21, l. 22.

9. The Vestry Clerk of the said Parish stated in evidence that the estate of the said Samuel Josephus Astwood was assessed for rates in respect of 12 acres.

p. 17, l. 1.

10. The Chief Justice on 6th April, 1951, gave judgment in favour of the Respondent as stated in paragraph 1 above and on 28th April, 1951, he supplied to the parties an explanatory report of his judgment for the purpose of the Record for this Appeal. The learned judge accepted the evidence of the witness Clarke that the total area of which the Testator could dispose was only 19.2 acres and not 24 acres or thereabouts as the Testator supposed and also accepted the view of the same witness as to the identity and boundaries of the three several parcels of land devised by the Testator's said Will. He consequently proceeded upon the view that "the tract of land supposed to contain about 12 acres" referred to in Clause 3 of the said Will was shown to include only the 9.06 acres enclosed within the lines connecting the points marked "A", "E", "D" and "B" on the said plan.

Judgment :  
p. 24.

Report by  
Trial Judge :  
p. 26.

11. Leave to appeal from the said judgment to Her Majesty in Council was granted by the learned Chief Justice on 3rd May, 1951.

Leave to  
Appeal : p. 29.

12. The Appellants submit that the said judgment of 6th April, 1951, is wrong and should be reversed with costs for the following among other

**REASONS.**

1. BECAUSE the land devised by Clause 5 of the said Will was therein described as bounded on the north by the South Longitudinal Road and on the west by other land of the Testator.
2. BECAUSE the said cottage is situate to the north of the South Longitudinal Road.
3. BECAUSE, if (as has been assumed) the "other land" of the Testator referred to in Clause 5 of the said Will was the land devised by Clause 3 of the said Will, the western boundary of the land devised or intended to be devised by Clause 5 could not upon the true construction of the said Will be ascertained until the extent of the land devised by Clause 3 had first been ascertained. 10
4. BECAUSE there was no evidence, or no proper or sufficient evidence, before the Court that the Testator at the date of his said Will did not possess or believe himself to possess other land in the said Parish capable of passing under the said devises besides the land within the boundaries shown by the lines connecting the points marked "A", "E", "G" and "H" on the said plan and because the said Frederick Gunnison Astwood stated that he owned land to the east of the line connecting the points marked "G" and "H". 20
5. BECAUSE the learned Chief Justice was wrong in construing the said Will and identifying the several subject matters of the devises contained in Clauses 3, 4 and 5 thereof upon the footing that the Testator intended thereby to dispose only of land lying within such boundaries as last aforesaid. 30
6. BECAUSE, if it be assumed that the Testator at the date of his said Will did not possess or believe that he possessed any such other land as aforesaid, the learned Chief Justice was wrong in construing the said Will and identifying the subject matter of the devise contained in Clause 3 thereof upon the footing that the subject matter of each of the three devises should abate.
7. BECAUSE upon the true construction of the said Will full effect ought to be given to the devise contained in Clause 3 thereof notwithstanding that this may result in the Testator having died possessed of insufficient 40

land in the said Parish to give full effect to the devises contained in Clauses 4 and 5 thereof.

8. BECAUSE upon the true construction of the said Will the said Samuel Josephus Astwood became entitled to 12 acres of land lying to the east of the line connecting the points "A" and "E" on the said plan and between the Kyber Pass Public Road and the Atlantic Ocean.
9. BECAUSE the eastern boundary of the land to which the said Samuel Josephus Astwood became entitled as aforesaid is a line 150 feet to the east of and parallel with the line connecting the points marked "B", "C" and "D" on the said plan or alternatively is the line connecting the points marked "L" and "K" on the said plan and extended northwards to the Kyber Pass Public Road.
10. BECAUSE the onus is upon the Respondent to establish that he is the owner of the land upon which he alleges that the Appellants have done damage (viz.: the western part of the said cottage) and he has not discharged such onus.
11. BECAUSE even if the Appellants were liable for any damage done to the said cottage there was no evidence, or no proper or sufficient evidence before the Court that the Appellants or either of them did any damage other than the damage to the windows referred to in paragraph 6 (i) of this Case.
12. BECAUSE, if the Appellants or either of them were or was liable for any damages, the learned Chief Justice was wrong in awarding one sum of damages against them jointly.
13. BECAUSE the Respondent in his Statement of Claim alleged no damage other than that of which Particulars are contained in paragraphs 2 and 3 of the Statement of Claim amounting to £285, and because, even if the Appellants either together or separately were liable for the whole of such alleged damage, the learned Chief Justice was wrong in awarding an amount for damages in excess of £285.
14. BECAUSE the judgment of the learned Chief Justice was against the weight of the evidence and was wrong in fact and law.

DENYS B. BUCKLEY.

In the Privy Council.

**ON APPEAL**

FROM THE SUPREME COURT OF BERMUDA.

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**VIEIRA and Another**

*v.*

**GIBBONS.**

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**CASE FOR THE APPELLANTS.**

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**WALMSLEY & STANSBURY,  
6, New Square,  
Lincoln's Inn, W.C.2.**