

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 ADVANCED
LEGAL STUDIES

33496

BETWEEN

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

AND

MORRIS ALVIN GIBBONS (Plaintiff) *Respondent.*

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Case for the Respondent

MORRIS ALVIN GIBBONS.

RECORD.

1. This is an appeal from a judgment of the Supreme Court of Bermuda (His Honour Sir Brooke Francis, Chief Justice) dated the 6th April 1951 in favour of the Respondent in an action commenced by the Respondent by Writ of Summons dated the 5th September 1950 against the Appellants for damages for wrongful entry upon land of the Respondent in Warwick Parish Bermuda and injury to his dwellinghouse thereon and for an injunction to restrain the Appellants from entering upon the Respondent's said land. Leave to appeal to Her Majesty in Her Privy Council was granted by His Honour Sir Brooke Francis on the 3rd May 1951.

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p. 1.

2. The Appellants have never denied that the said land and dwelling-house was in the possession of the Respondent and the trespass thereon and substantial damage thereto was admitted by the Appellants. The question at issue is their alleged claim in justification of their conduct that the land trespassed upon and property damaged was the property of the Appellant Admon Gabriel Vieira and not of the Respondent. No documentary evidence however has been produced by the Appellants or either of them in support of their said claim.

3. The Respondent became possessed of the land and property in question under and by virtue of a Conveyance dated 31st May 1949 made between Frederick Gunnison Astwood of the first part the Respondent of the second part and Nicholas Bayard Dill of the third part. Thereunder there was conveyed to the Respondent the parcels of land described in the Schedule thereto.

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CASE FOR THE RESPONDENT.

The Schedule thereto was (so far as material) in the following terms :—

“ All that certain parcel of land situate in Warwick Parish in
 “ the Islands of Bermuda delineated on the plan hereto annexed
 “ being that portion outlined in pink to the North of the South
 “ Shore Public Road containing One acre Two roods and Seventeen
 “ perches bounded Northerly by the Public Road leading from the
 “ Khyber Pass Road to the South Shore Road and there measuring
 “ One hundred and sixty-eight feet or thereabouts Easterly by land
 “ heretofore forming part and parcel of the land now being
 “ described remaining in the possession of the said Frederick 10
 “ Gunnison Astwood and there measuring Four hundred and
 “ twenty-three feet or thereabouts Southerly by the South Shore
 “ Public Road and there measuring One hundred and fifty-one feet
 “ or thereabouts and Westerly by the land of Samuel Edward
 “ Astwood and there measuring Five hundred and seven feet or
 “ thereabouts (which land is hereinafter referred to as ‘ the
 “ ‘ Respondent’s land ’) and also that certain parcel of land situate
 “ in Warwick Parish in the Islands aforesaid delineated on the
 “ plan hereto annexed being that portion to the South of the South
 “ Shore Public Road ” (further particulars of which are not material) 20
 “ Together with the dwellinghouse erected on the parcel of land
 “ firstly hereinbefore described and all other buildings fixtures fences
 “ ways rights rights of way lights liberties privileges easements
 “ advantages and appurtenances whatsoever to the said parcels of
 “ land or either of them belonging or in anywise appertaining or
 “ usually held or occupied therewith or reputed to belong or to be
 “ appurtenant thereto.”

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4. In the past the Respondent’s land was part of and surrounded
 by land owned in fee simple by the late Adrastus Henry Astwood (herein-
 after referred to as “ the Testator ”) who died on the 19th June 1900 and 30
 whose Will dated the 18th May 1890 was proved on the 12th August 1901
 and recorded in the Registry of the Supreme Court of Bermuda.

5. The Testator disposed of his land in Warwick Parish by Clauses 3,
 4 and 5 of his said Will which (so far as material) are in the following
 terms :—

(Clause 3): “ I devise to my eldest son Samuel Josephus
 “ Astwood subject to the estate in the pasture and planting land
 “ hereinbefore given to my wife a tract of land in Warwick Parish
 “ supposed to contain about twelve acres bounded on the North
 “ by a Public Road separating it from land formerly of Dr. John 40
 “ Frith now or late in the possession of Walter Riddell Graham
 “ Smith and his brothers, on the South by the Ocean, on the East
 “ by other land of my own next hereinafter devised and on the West
 “ by land in the possession of James Blaithwait Lindley, which
 “ land hereby devised is intersected by a Military Road.”

The land devised by this Clause is hereinafter referred to as
 “ Block A.”

(Clause 4) : “ I devise to my son Frederick Brownlow Astwood
 “ subject to the estate in the pasture and planting land hereinbefore
 “ given to my wife a parcel of land in Warwick Parish supposed to
 “ contain about four acres bounded on the North by Land formerly
 “ of Benjamin Lusher deceased and there now partly bounded and
 “ partly intersected by a public road, on the South by the South
 “ Longitudinal Road, on the East by land formerly of Benjamin
 “ Dickinson Harvey and now in the possession of the heirs or
 “ devisees of Joseph John Outerbridge, and on the West by the land
 10 “ hereinbefore devised to Samuel Josephus Astwood, together with the
 “ dwellinghouse and other buildings thereon and the appurtenances.”

The land devised by this Clause is hereinafter referred to as
 “ Block B.”

(Clause 5) : “ I devise to my children John Henry Astwood,
 “ Charles Erastus Astwood, Elizabeth Anna White, Frederick
 “ Brownlow Astwood, Margaret George Astwood and Joseph
 “ Benjamin Astwood, or such of them as shall survive me, equally
 “ between them, subject to my wife’s estate in the pasture and
 “ planting land hereinbefore given to her, a parcel of land in Warwick
 20 “ Parish, supposed to contain about eight acres, bounded on the
 “ North by the South Longitudinal Road, on the South by the
 “ Ocean, on the East by land formerly of Benjamin Dickinson Harvey,
 “ now in possession of Daniel Dunscomb and on the West by other
 “ land of my own, together with dwellinghouse thereon and the
 “ appurtenances.”

The land devised by this Clause is hereinafter referred to as
 “ Block C.”

6. The Appellants did not dispute at the hearing that at the date
 of the said Conveyance to the Respondent of the Respondent’s land the
 30 said Frederick Gunnison Astwood had become possessed in fee simple of
 the whole of whatever was included in the land Block C devised by the Will
 of the Testator by virtue of :—

(A) The Will dated the 12th August 1924 of the Testator’s p. 40.
 son the said Frederick Brownlow Astwood who died on the
 15th July 1925 and whose said Will was proved on the 7th October
 1925 under Clause 5 of which the said Frederick Brownlow Astwood
 devised all his part share estate and interest of and in the parcel
 of land in Warwick Parish estimated to contain 8 acres devised by
 and particularly described in Clause 5 of the Will of the Testator
 40 unto and to the use of his son the said Frederick Gunnison Astwood
 his heirs and assigns free from all right to dower therein of his
 wife Eliza Susan Astwood ;

(B) A Vesting Order dated 23rd June 1930 of the Supreme p. 42.
 Court of Bermuda in the matter of Anna Lynette White, an Infant
 and In the Matter of the Infant’s Property Act 1921 ; and

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(c) A Conveyance dated the 7th May 1931 and made between Charles Erastus Astwood of the first part Margaret George Moore of the second part William Alexander Moore of the third part Joseph Benjamin Astwood and Nina Astwood his wife of the fourth part and the said Frederick Gunnison Astwood of the fifth part.

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7. Under the said Will of the said Frederick Brownlow Astwood upon the death of his widow in 1928 Block B passed to his daughter Ruth Elizabeth Astwood in fee simple.

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8. The Statement of Claim in the action was delivered on the 12th September 1950. Therein the Respondent alleged that he had at all material times been and was in possession of the Respondent's land and alleged the wrongful entry of the Appellants thereon with particulars of the damage caused by them on the Respondent's land. 10

p. 4.

9. The Appellants delivered separate Defences in the action on the 20th September 1950. Neither Appellant disputed the possession of the Respondent. The Appellant Admon Gabriel Vieira alleged that the western portion of the cottage upon the Respondent's land was on land belonging to him and the Appellant Margaret Young Horne alleged that she verily believed and still believed that a great portion of the Respondent's land together with the western portion of the cottage thereon belonged to her co-Appellant. 20

p. 5.

10. At the hearing evidence called on behalf of the Respondent included evidence by Robert Hunt Clarke a Civil Engineer and Surveyor who produced the Plan Exhibit "A" in the action. The land formerly owned by the Testator was shown thereon included in the Rectangle A.H.G.E.A. His survey showed the area of such Rectangle to be not a total of 24 acres as supposed by the Testator but to comprise only 19.2 acres. Aided by the Ordnance Survey Exhibit "B" in the action and natural indications of boundaries upon the land the said Robert Hunt Clarke gave evidence that in his view the eastern boundary of Block A was a line drawn from point B to point C and D upon the said Plan Exhibit "A," that Block B consisted of the land in the Rectangle B.H.F.C. on the said plan and Block C of the land included in the Rectangle C.F.G.D. on the said plan which gave areas for Block A of 9.06 acres for Block B of 3.8 acres and for Block C of 6.356 acres. 30

p. 17.

11. Wycliffe Stovell an Architect and Surveyor who gave evidence on behalf of the Appellants agreed that the total area was not 24 acres. He disputed the Line B.C.D. on Exhibit "A" as being the eastern boundary of Block A as it did not give 12 acres but admitted the existence of original marks upon that line which gave only 8 acres. He assumed that the Testator must have owned a further 4 acres to the east of the line H.G. on the said plan and in order to give 12 acres for Block A fixed the eastern boundary thereof upon a line drawn between points K and L on the said plan and continued northward to the public road which line passed through the cottage on the Respondent's land. He further stated that such line was drawn in accordance with instructions from the Appellant Margaret Young Horne. 40

12. The Appellants at the hearing produced no documents of title in support of their claim to any part of the Respondent's land. The Appellant Margaret Young Horne stated in evidence that Block A which was devised to her father Samuel Josephus Astwood by the Will of the Testator passed under the Will of her father to her brother Samuel Edward Astwood and that under a Power of Attorney from him she had sold to her co-Appellant. The Appellant Margaret Young Horne did not produce the Will of her father or a copy thereof or the said Power of Attorney or a copy thereof.

10 13. Judgment was given on the 6th April 1951 in favour of the Respondent against the Appellants jointly and severally for £440 damages together with a perpetual injunction as prayed and costs. p. 24.

14. In his report of the trial prepared by His Honour Sir Brooke Francis on the 28th April 1951 the learned Chief Justice states that he accepted the evidence and Plan Exhibit "A" prepared by the said Robert Hunt Clarke. He found as a fact that Block A contained 9.06 acres instead of about 12 acres and that the western boundary of the Respondent's land was on the line B.C.D. on the said plan Exhibit "A." He discounted the evidence of the said Wycliffe Stovell as being upon instructions and so as to give a full 12 acres notwithstanding that on the basis of original marks Block A was of smaller acreage. He considered the claim of the Appellant Margaret Young Horne who had not produced her alleged Power of Attorney to act for her brother or documentary evidence to support his title as an attempt to filch land from her cousin the said Frederick Gunnison Astwood and found that the Respondent's land originally formed part of Block C. p. 26.

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15. It is submitted that the decision of the learned Chief Justice was correct and that this appeal should be dismissed with costs for the following (among other)

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REASONS.

- (1) BECAUSE the Appellants have shown no title in themselves or either of them to justify their acts of trespass.
- (2) BECAUSE the Appellants have produced no evidence to disprove the title of the Respondent to the Respondent's land.
- (3) BECAUSE the learned Chief Justice having heard the witnesses and there being evidence to justify his finding that the Respondent's land formed part of the land devised by Clause 5 of the Will of the Testator such finding of fact should not be disturbed.
- (4) BECAUSE the Judgment dated the 6th April 1951 was right and ought to be affirmed.

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T. A. C. BURGESS.

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BETWEEN

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and **MARGARET YOUNG**
HORNE (Defendants) . *Appellants*

AND

MORRIS ALVIN GIBBONS
(Plaintiff) . . . *Respondent.*

Case for the Respondent

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