[2012] UKPC 40
Privy Council Appeal No 0034 of 2010

JUDGMENT

(1) Anthony Armbrister
(2) Cyril Armbrister
(as personal representatives of the Estate of Francis Armbrister)
(Appellants)
v
(1) Marion E Lightbourn
(2) Robin Mactaggart Symonette
(in her capacity as the sole surviving executrix of the Estate of Sheila M Mactaggart – substituted Petitioner for Sheila M Mactaggart)
(Respondents)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Walker
Lord Clarke
Lord Sumption
Lord Carnwath
Sir Stephen Sedley

JUDGMENT DELIVERED BY
LORD WALKER
ON

11 December 2012

Heard on 29 – 30 October 2012

Appellant	*Respondent*
Miss Carolyn Walton	James Dingemans QC
Miss Hannah Ilett	Timothy Evans (Bahamas Bar)
(Instructed by E P Toothe & Associates)	(Instructed by Charles Russell LLP)

LORD WALKER:

Introduction

1. This is an appeal from the Court of Appeal of the Commonwealth of the Bahamas in proceedings under the Quieting Titles Act 1959, Ch 393 ("the 1959 Act"). The original application was made over 30 years ago, by a petition presented on 15 March 1982 by two sisters, Marion E Lightbourn and Sheila M Mactaggart ("Mrs Mactaggart"), who were devisees under the will of their father, Herbert Arnold McKinney ("Mr McKinney"). On 5 July 1982 an adverse claim was made in the proceedings by Frances Fintel Armbrister ("Mrs Frances Armbrister"). During the protracted course of the proceedings Mrs Mactaggart and Mrs Frances Armbrister have died, as have two of Mrs Mactaggart's personal representatives. The parties are now Mrs Lightbourn and Robin Mactaggart Symonette (the surviving personal representative of Mrs Mactaggart) as respondents in the main appeal and Anthony Armbrister ("Anthony Armbrister") and his brother Cyril Armbrister (the personal representatives of Mrs Frances Armbrister) as appellants in the main appeal. There is also a cross-appeal in which their positions as appellants and respondents are reversed.

2. The documents before the Board were in some disarray, consisting of five agreed bundles, one bundle of documents (some from each side) which were not agreed, and a further bundle containing a notice of application filed on behalf of the appellants on 3 May 2011, together with the documents to which it relates. All except the last bundle have a single uniform system of pagination. To facilitate identification in the different bundles, page references are included in the Board's advice. With the helpful cooperation of counsel the need for argument about documents has been largely avoided.

3. The main appeal is concerned with title to an area of land, well over 400 acres in extent, on Cat Island. Cat Island lies between the islands of Eleuthera and San Salvador (confusingly, Cat Island was itself formerly called San Salvador). Cat Island is for the most part long and narrow in shape, with its length extending from the point nearest Eleuthera at the north-west to the point nearest San Salvador to the south-east. The land in question in the main appeal, the southern half of the Freeman Hall estate, is at Warren's Harbour on the east coast, not far from the south-east end of the island. It is referred to below as "Freeman Hall South". Its exact acreage is uncertain but that is not an issue in the appeal. In a conveyance dated 27 May 1895 ("the 1895 conveyance") [281-294] the Freeman Hall estate as a whole was described as 860 acres or thereabouts, but by a deed of partition dated 21 February 1899 [296-297] the southern part was described as extending to 440 acres (so that the acreage seems not

to have been precisely split, possibly because the agricultural value of the southern part was lower). In the petition [004-005] the claim was put at 484.6 acres.

4. The cross-appeal is concerned with title to another area of land on Cat Island, 15 acres in extent. It was formerly part of what was called the Village Estate. It too is not far from the south-east end of the island, but is on the west coast. It is referred to below as "the 15 acres."

5. The trial judge (Jeanne Thompson J), after a three-day hearing in July 2006, gave a written ruling on 30 January 2007 granting the petitioners certificates of title in respect of each of the two disputed areas. The Court of Appeal, after hearing over four days between March and May 2009, gave judgment on 25 June 2009 allowing the adverse claimants' appeal in respect of the 15 acres (part of the Village Estate), but dismissed their appeal in respect of Freeman Hall South.

6. The trial judge had to consider a substantial volume of documentary evidence and affidavit evidence, and a limited amount of oral evidence (there was no oral evidence for the petitioners; for the adverse claimants there was oral evidence from Anthony Armbrister and two other witnesses). The principal issues for the Board are whether both courts below erred in their assessment of the evidence relating to Freeman Hall South; whether both courts below erred on an unusual point of law relating to the devolution of real property belonging to a dissolved body corporate ("the reverter point"); and which of the courts below was in error in construing the 1895 conveyance and assessing the evidence as to the 15 acres. In relation to the concurrent findings of the courts below on the first issue, Miss Walton (appearing for the adverse claimants) relies on the practice of the Judicial Committee in exceptionally reviewing concurrent findings where "there has been some miscarriage of justice or violation of some principle of law or procedure": *Higgs v Nassauvian Ltd* [1975] AC 464, 471.

The Quieting Titles Act 1959 and other statutory provisions

7. The purpose of the 1959 Act is to provide a judicial process for the determination of disputes as to title to land in the Bahamas. The process is initiated by a petition presented by a claimant. The petition is advertised, and adverse claims may be made by rival claimants. The procedure is in the nature of a judicial inquiry and it ends in a judgment in rem which, subject to appeal, finally settles entitlement to the land, not merely as between the parties, but for all purposes. This judicial procedure meets an economic and social need in the Bahamas, where many of the outlying islands were, for much of the Commonwealth's history, sparsely populated and only sporadically cultivated. Much of the land belonged to landlords who were not permanently resident, and travel was slow. Parcels of land often had no clearly-

defined boundaries based on comprehensive surveys. But while the 1959 Act meets an economic and social need, there has also been a warning from a lecturer, familiar with the 1959 Act both as a legislator and as a practising member of the bar, that bench and bar must be vigilant to prevent the statutory procedure being abused by "land thieves" (the Hon Paul L. Addersley in an address to the National Land Symposium on 17 March 2001). It is no accident that the Judicial Committee has over the years heard many appeals raising questions of title to land in the Bahamas, including *Paradise Beach and Transportation Co Ltd v Price-Robinson* [1968] AC 1072, *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, *Higgs v Nassauvian Ltd* [1975] AC 464, and *Higgs v Leshel Maryas Investment Co Ltd* [2009] UK PC 47.

8. Procedure under the 1959 Act is relatively informal. The strict rules of evidence do not apply. The procedure is comparable to that which applies on the investigation of title on an ordinary sale, out of court, under an open contract. Each rival claimant must prepare an abstract of title and adduce evidence in support of it. Section 8 of the 1959 Act provides:

> "(1) The court in investigating the title may receive and act upon any evidence that is received by the court on a question of title, or any other evidence, whether the evidence is or is not admissible in law, if the evidence satisfies the court of the truth of the facts intended to be established thereby.
>
> (2) It shall not be necessary to require a title to be deduced for a longer period than is mentioned in subsection (4) of section 3 of the Conveyancing and Law of Property Act or to produce any evidence which by the Conveyancing and Law of Property Act is dispensed with as between vendor and purchaser, or to produce or account for the originals of any recorded deeds, documents or instruments, unless the court otherwise directs.
>
> (3) The evidence may be by affidavit or orally or in any other manner or form satisfactory to the court."

9. Section 3(3) and (4) of the Conveyancing and Law of Property Act provides as follows:

> "(3) Recitals, statements and description of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of truth of such facts, matters and descriptions.

> (4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter."

The qualification to subsection (3) is important. There may be evidence which casts doubt on the correctness of a recital. A striking example of this is provided by the conveyance dated 15 January 1944 ("the 1944 conveyance") [337-342] which is crucial to the petitioners' claim. It recites that Charles Walter Brownrigg ("Mr Brownrigg") was at his death in 1933 "seised and possessed in fee simple of the hereditaments hereinafter described" and goes on to give particulars of four areas of land totalling 911 acres which were sold for £240. The adverse claimants' case is that Mr Brownrigg could claim only a squatter's title to some of that land, and that as regards the 15 acres and Freeman Hall South he had no title at all. The fact that the land changed hands at the rate of almost four acres to the pound tends to raise the question of whether the agreed purchase price reflected a discount for the vendors' doubtful title to part at least of what was sold. Under the mortgage of 13 July 1931 ("the 1931 mortgage") [321-325] Mr McKinney, through whom the petitioners seek to establish title, had accepted 100 acres in the Village Estate as security for advances of up to £200 to be made to Mr Brownrigg. It contained a recital of the possessory nature of the title which Mr Brownrigg claimed.

10. At the material time the statute regulating prescription was the Real Property Limitation Act 1874. Section 1 provided as follows:

> "After the commencement of this Act no person shall make an entry or distress or bring an action or suit, to recover any land or rent, but within *twenty* years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within *twenty* years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

As an exception, the period for claims by the Crown was sixty years under the Real Property Limitation (Crown) Act 1873, Chap 69.

11. In view of the relative informality of the procedure under the 1959 Act the Board has decided to take account of an affidavit of Mrs Frances Armbrister [698-710] sworn on 26 April 1999, which is thought to have been handed to the judge on

the third day of the trial (of which no transcript was made) but not to have been before the Court of Appeal. The Board has also taken account of some other documents, including new copies of plans on title deeds, recently obtained from the Registrar General, which are much clearer than the copies previously available. The Board considers that in the circumstances of this case justice is best served by looking at all the documentary material that may be relevant.

The 1895 sale to the Sisal Company

12. For a detailed examination of the competing claims the best starting point is the 1895 conveyance made between William Edward Armbrister ("William Armbrister") (1) and The Bahama (Inagua) Sisal Plantation Ltd ("the Sisal Company") (2). A typed copy of this document (originally in manuscript) appears in two places in the bundles [241-245 and 281-284] but both contain some errors in transcription which are apparent from reference to the manuscript [231-241 and 285-295].

13. Before going further into the detail of the 1895 conveyance it may be helpful to say something about the Armbrister family, whose fluctuating fortunes over three generations appear from the documentary, affidavit and oral evidence. William Armbrister seems to have been the most successful member of a large extended family with many interests on Cat Island and elsewhere in the Bahamas. The oral evidence of his grandson, Anthony Armbrister [460], was that he started in business as a haberdasher but became a prosperous merchant with substantial landholdings in different parts of the Bahamas. He was also prominent in public life, being head of the legislative council and the executive council. At the date of the 1895 conveyance he was 78 years of age, and had just remarried. As his grandson said [460],

> "He outlived his entire first family. My father was born to his second wife when he was 78, and my father was 12 when he died at the age of 90."

14. The son of William Armbrister's second marriage was Cyril Edward Armbrister ("Cyril Armbrister"), who was born in or about 1895 and died in or about 1966. Cyril Armbrister (who was then a film actor and director in Hollywood) married Mrs Frances Armbrister in 1938 and had two children, an elder son (also named Cyril, but familiarly called Ted) born in 1940 [704-705], and Anthony Armbrister, born in 1946 [460, reading "in" as "until"]. They are the appellants, and respondents to the cross-appeal, as personal representatives of their mother, the original adverse claimant.

15. In 1895 William Armbrister sold almost all his land on Cat Island to the Sisal Company, a decision that he and his descendants may have had ample reason to

regret. It was an English company formed for the purpose of producing sisal, a vegetable fibre used in rope-making, from plantations of agave (or American aloe). It seems to have started its business on the island of Inagua but then extended it to Cat Island and some other islands. By the 1895 conveyance, William Armbrister conveyed to the Sisal Company for £1,885 eight separate areas of land totalling no less than 3,016 acres (or 3,026 acres if 440 acres are included for Freeman Hall South, anticipating the partition which followed a few years later).

16. All eight parcels of land can be seen (though with some difficulty, after repeated photocopying) on the three sketch plans annexed to the conveyance [237-239 and 291-293]. Better copies have been produced, as mentioned below. Plan "A" shows the Village Estate including (as the fifth parcel, though they are not numbered in the deed), in the verbal description [221 and 282],

> "Also 85 acres of land situated as aforesaid being part of a tract of land containing 100 acres granted to the said William Edward Armbrister by the Crown by Letters Patent under the Great Seal of the said Bahama Islands dated the 9th day of October in the year of our Lord 1871 which said tract is bounded on the south-west by the sea on the south-east by land granted to Caroline Thurston on the north-west by a public road and on the north-east by land granted the said Caroline Thurston and a pond also."

The Crown grant is in evidence [217-219], but not its annexed plan, stated to have been prepared by the Surveyor General. Caroline Thurston was William Armbrister's mother [451]. The adverse claimants' case is that William Armbrister decided to retain the 15 acres in his own personal ownership, that it is a coastal strip which appears in black on [237], that it devolved on Mrs Frances Armbrister, and that no one has ever acquired title to it by adverse possession. That case was rejected by the trial judge but upheld on appeal by the Court of Appeal.

17. The Board now has the benefit of an affidavit sworn on 24 October 2012 by the Registrar General, Ms Jacinda P Butler. She deposes that in the normal course copies of documents are certified from microfilm held in her department, and that the microfilm is in black and white, with arrows superimposed to indicate different colours. The Registrar General also deposes that she has examined the original 1895 conveyance and states:

> "The plan, however, at page 237 of the Record (page 318 of the said Conveyance) is not an accurate depiction of the original and is irregular in that instead of the entire property being one solid colour the copy would suggest that the property comprises two colours with a dark

> colour at the bottom of the plan adjoining the sea which is not reflected either on the original of the Conveyance recorded in Book U9 or on the copy contained in the microfilm which according to the date stated thereon was copied on the 9th October, 1950."

The affidavit exhibits (as exhibit 3) a clear colour copy of plan "A" which shows the whole of the parcel in question coloured pink and annotated "Thos. Ross", without any acreage being mentioned. The four adjacent parcels (also coloured pink) are annotated as follows:

Caroline Thurston	160 as
Isaac R Tucker	80 as
John Tucker now W E Armbrister	400 as
W E Armbrister	221 as

These can be readily identified as the first, second, third and fourth parcels in the 1895 conveyance.

18. The seventh parcel disposed of by the 1895 conveyance was:

> "One undivided moiety or half part of All that tract of land situated as aforesaid containing 860 acres or thereabouts and known by the name of 'Freeman Hall' and 'John M Tatnall' which said tract is bounded as follows on the north by land granted to Jane Wells, I Armbrister and M Lundie on the east by the sea on the south by land granted Archibald Mackey and James Hepburn and on the west by land granted James Hepburn, Peter Curtis and William Wells."

This interest was the subject of some confusion at the trial, but William Armbrister's title to it is well documented. It came to him by purchase from three sisters in another branch of the Armbrister family, Mrs Mary Sophia Cooke, Mrs Emma Eliza Couteau and Mrs Laura Ann Peterson [782]. They and their husbands joined in conveying their one-sixth legal interests to trustees for sale [223-230, recitals] and the trustees sold the undivided half share to William Armbrister for £62.10.0 by a conveyance dated 25 August 1873 [223-230]. After the 1895 conveyance the partition between the Sisal Company and the owners of the other undivided share (which belonged to the heirs of a fourth sister, Mrs Julia Ferguson [782]) was effected by deeds dated 21 February 1899 and 4 May 1900 [296-301].

The failure of the Sisal Company

19. The Sisal Company's business did not prosper, and it was dissolved in 1911 as mentioned below. There is little evidence as to the reasons for its failure, or the course of its decline. But during the hearing before the Board the petitioners' London agents obtained a copy of the company's last annual return, made up to 31 December 1909 and filed in 1910. This shows that the Sisal Company had an authorised capital of £120,000 divided into 120,000 £1 shares, of which 108,000 had been issued. The list of shareholders included William Armbrister (though he had died in 1907), shown as holding 500 shares. He was the only shareholder with an address in the Bahamas. The great majority of the shareholders were resident in England, with a few in Ireland, Newfoundland and elsewhere. Of the issued shares only seven shares had been issued for cash. The company's secured indebtedness was a little over £49,000. No statement in the form of a balance sheet was filed. In the space available for the statement was written,

> "The Company's business has been at a standstill. No balance sheet has been prepared and no auditors appointed for some years."

20. A little more information can be gleaned from a mortgage indenture dated 22 June 1901 ("the 1901 mortgage") [309-320, with an inaccurate typewritten transcript at 302-308]. The Sisal Company and two trustees for debenture-holders, under deeds dated 26 September 1895 ("the 1895 debenture") and 24 March 1900, joined in giving priority to a mortgage of the company's freehold and leasehold land to secure £3,500 to be advanced in instalments by Captain Christian Combe ("Captain Combe"), a retired officer in the Household Cavalry who was a shareholder in the company. The land listed in the First and Second Schedules consisted of 3,016 acres of freehold land in Cat Island, 2,626 acres of freehold land in San Salvador (subject to a prior mortgage), 800 acres of freehold land in Inagua and 83 acres of freehold land, and a further 14,000 acres of land held on a 999-year Crown lease, in Abaco.

21. The only evidence as to the dispositions to the trustees for debenture-holders is in the recitals to the 1901 mortgage. It recites that the 1895 debenture (made about four months after the 1895 conveyance from William Armbrister to the Sisal Company, but before the partition of Freeman Hall) contained a grant of freehold land to the trustees, but it refers only to a security by way of floating charge. Today a debenture of this sort would normally be secured by a fixed charge on the company's land and a floating charge on its circulating capital, but at the beginning of the twentieth century the law as to floating charges was still developing (see *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, paras 5 to 15 and In *re Spectrum Plus Ltd* [2005] 2 AC 680, paras 130 to 134). So far as concerns enforcement of the 1895 debenture as a security over land in the Bahamas, the governing law would be the law of the Bahamas, and the Board has not heard any submissions about the legal

effect, under the law of the Bahamas, of the floating charge apparently created by the debenture. But this issue is ultimately irrelevant since Mr Dingemans QC, appearing for the petitioners, relies on the 1901 mortgage as a sufficient ground for resisting the adverse claimants' case on reverter.

22. In the light of the incomplete return filed in 1910 it is unsurprising that during 1911 the Sisal Company was struck off the register of companies, as recorded in a letter dated 1 August 1972 from London solicitors [781]. This was done by the Registrar of Companies under the procedure laid down in section 242 of the Companies (Consolidation) Act 1908. It resulted in the immediate dissolution of the Sisal Company, subject only to the possibility (which never occurred) of an application made within two years for its restoration to the register.

23. The evidence as to the activities of Mr Brownrigg, both as manager of the Sisal Company until its dissolution, and afterward on his own account, is considered below in the part of this advice dealing with adverse possession. But first it is appropriate to consider two issues, one an issue of law relating to the devolution of Freeman Hall South after the Sisal Company's dissolution, and the other a mixed issue of law on fact relating to the effect of the 1895 conveyance on the 15 acres. The resolution of these issues must determine on which side lies the burden of proving the acquisition by adverse possession of title to those respective areas of land.

The reverter point: introduction

24. The adverse claimants' case is that on the dissolution of the Sisal Company, Freeman Hall South (and indeed all the land comprised in the 1895 conveyance, but their claim is limited to Freeman Hall South, and the 15 acres, which on their primary case did not pass under that conveyance) reverted automatically to William Armbrister as grantor under the 1895 conveyance. They rely on a principle stated by Lord Coke in the first part of his Institutes ("of fee simple") and explained by Blackstone as follows (Book I, Chapter 18, IV):

> "But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation, for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. The grant is indeed only during the life of the corporation, which *may* endure for ever: but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life."

25. It is referred to below as the Blackstone principle, though it is founded on Coke's commentary, published in 1628, on Sir Thomas Littleton's work on Tenures, written in the middle of the 15th century. This principle has been discussed, and more than once doubted, by the English court in several 20th century decisions, mentioned below. So far as it relates to the dissolution of a registered company it was abolished in England, by section 71 of the Companies Act 1928, but not with retroactive effect. It can still be a live issue when freehold property owned by an insolvent company is disclaimed (as onerous property) by its liquidator before the company's dissolution. In the Bahamas an enactment with the same effect as section 71 of the Companies Act 1928 came into force in 1926, but it too had no retroactive effect. In the Bahamas as in England, the position in 1911 must be decided by the common law, as Osadebay JA correctly stated in para 71 of his judgment in the Court of Appeal.

26. The petitioners challenge the adverse claimants' submissions. Their case is, first, that the doctrine of reverter has been discredited, and that there is no authority for its application in the Bahamas; and secondly, that there was no legal estate to revert to William Armbrister because the legal estate was vested in Captain Combe as mortgagee, and the Sisal Company had only an equity of redemption, which (on the petitioners' case) vested in the Crown.

27. The judge dismissed the argument for reverter very briefly. She accepted both of the petitioners' submissions. In the Court of Appeal Osadebay JA dealt with the point more fully but reached the same conclusion. He referred to four of the English cases, and also noted the argument that the 1901 mortgage excluded reverter to William Armbrister. His final reasoning and conclusion were very brief (para 79):

> "Suffice it to say that at the time when the company was defunct and struck off the register there was no legal estate vested in the company which could have reverted to William Edward Armbrister even if the doctrine of reverter was in existence in the Bahama Islands."

Neither of the courts below seems to have been referred to the Declaratory Act of 1799, Ch 4 or to the Escheat Act of 1871, Ch 141.

28. Before the Board the point has been more fully argued by both sides, and counsel have provided numerous references to the views of some eminent conveyancers and writers on property law, including (apart from Coke and Blackstone themselves) Sweet's third edition (1911) of Challis, Law of Real Property, pp 467-468; Gray, Rule Against Perpetuities, third edition (1915) pp 45-51; a lecture by T Cyprian Williams (1931) 75 So Jo 843; a note by W S Holdsworth (1933) 49 LQR 159; exchanges between F E Farrer and M W Hughes (1933) 49 LQR 240 and (1935) 51 LQR 347 and 361; and a note by R E Megarry (1946) 62 LQR 223.

29. In the face of this volume of scholarly discussion, some of it very technical, it is best to start with some basic principles of property law. This inevitably involves some historical background. For the purposes of private international law the most important distinction between different forms of property is the distinction between moveable and immoveable property. But under the common law of England, which forms the basis of the law of the Bahamas (apart from ancient feudal tenures and other matters excepted by section 2 of the Declaratory Act), the essential distinction was between real property and personal property, and leasehold interests in land were classified as personal property. Only real property was regulated by feudal tenure and its incidents. Until the Statute of Wills of 1540 real property could not be disposed of by will. Before then, if an individual owner of real property held in fee simple died without an heir (ascertained according to fixed legal rules) the deceased's land reverted to the Crown and this process was called escheat "propter defectum sanguinis" (that is, because of failure of the blood-line). This continued to occur after the Statute of Wills if the owner died without an heir and without disposing of the land by will. Land also reverted to the Crown if the owner of real property held in fee simple was convicted and executed for felony. This was called escheat "propter delictum tenentis" (that is, because of the tenant's crime). These were the commonest forms of escheat.

30. The word is a term of art, but its basic meaning (traceable through Middle English to Old French, and also reflected in the modern French verb échoir, to fall to someone as a share) is "to fall in". In the words of the eminent conveyancer T Cyprian Williams, quoted in *Scmlla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793, 800 "the word escheat . . . simply means the falling-in of the land to the lord." The two commonest forms of escheat (under the old law) have been abolished in England, but common law reverter to the Crown can still arise, as already noted, when a liquidator or trustee in bankruptcy disclaims freehold property. It can also occur, in some Commonwealth jurisdictions, where title to freehold land is forfeited for contravention of statutory restrictions on the holding of land by aliens, though such forfeiture may not be automatic: *Ho Young v Bess* [1995] 1 WLR 350.

31. Escheat for felony was abolished by statute in 1870, and escheat on intestacy was replaced (the change being more a matter of form than substance) by section 45(1)(d) of the Administration of Estates Act 1925. The substituted table in section 46(1) of that Act has as its final provision:

> "In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as bona vacantia, and in lieu of any right to escheat."

This is followed by a statutory recognition that provision may be made, as a matter of Crown discretion, for the intestate's dependants. In this way intestate succession to real and personal property was at last put on the same footing. Both types of property were treated as going to the Crown as bona vacantia, a term previously used only in relation to personal property (there is a full discussion of the old law as to personal property in *Dyke v Walford* (1846) 5 Moo PCC 434). The distinction between the Crown's "seignorial" and "prerogatival" rights (mentioned in a reporter's note to *Middleton v Spier* (1783) 1 Bro CC 201, 205) has for most practical purposes disappeared.

32. Some of this discussion of the development of this rather arcane area of English law may not be relevant to the law of the Bahamas. But it is relevant to understanding the 20th-century English authorities, which are not easy to fit into a coherent pattern.

The English authorities on the reverter point

33. *Hastings Corporation v Letton* [1908] 1 KB 378 was an appeal to the Divisional Court heard by two King's Bench judges, Darling and Phillimore JJ, who gave extemporary judgments. The issue was the destination of a lease for a term of seven years held by a company which had been wound up and dissolved without the lease having been either assigned or disclaimed by the liquidator. The county court judge held that the lease continued in existence and vested in the Crown as bona vacantia. The tenant's sureties appealed, relying on the principle stated by Blackstone. The Hastings Corporation argued that the principle applied only to freehold land. The Divisional Court rejected that argument. The Board, in agreement with most recent authorities, considers that the case was wrongly decided. The passage in Blackstone does not in terms refer to real property. It did not need to do so, because the whole context was escheat, a principle that applies only to real property.

34. *Re Woking Urban District Council (Basingstoke Canal) Act 1911* [1914] 1 Ch 300 was concerned with freehold land. The land was part of the canal undertaking vested in a company incorporated by Act of Parliament in 1777. In 1866 the canal company was wound up, in 1874 the liquidator purported to sell the land and undertaking to another company, and in 1878 the original company was dissolved. Eventually in 1908 most of the land and undertaking was purchased by a new canal company, which also went into liquidation. Its liquidator commenced proceedings to determine the extent of its obligations under the 1911 Act mentioned in the title to the proceedings. Sergant J held that the company was liable for part of the cost of repair provided for in the 1911 Act. In the Court of Appeal most of the argument was concerned with the validity of the original sale in 1874, and the Court of Appeal unanimously held that it was ultra vires the original 1777 Act. The Court of Appeal also held, relying on *Hastings Corporation v Letton*, that Blackstone's principle

applied on the dissolution in 1878, but that any right of entry had long since become statute-barred: Cozens-Hardy MR at p 310, Swinfen Eady LJ at p 315, and Phillimore LJ at p 320. The point was necessary for the disposal of the case, since if there had been escheat to the Crown there would have been a different limitation period in play; but the Crown was not represented.

35. The *Hastings* and *Woking* cases were both referred to in the decision of the House of Lords in *Morris v Harris* [1927] AC 252. As the report states, the only question of general interest raised by the appeal was the effect of an order for a dissolved company's restoration to the register on transactions between the dissolution order and the restoration order. Lord Sumner (with whom Viscount Dunedin and Lord Blanesburgh agreed) said at pp. 258-259:

> "The Legislature would never have bestowed on the Court a power to declare the dissolution void, without imposing terms, as by the section it certainly is empowered to do, if the effect of this order of avoidance might be to undo the reversion of freeholds to an original grantor or the acceleration of a reversioner's immediate title to leaseholds in the case of lands accidentally undisposed of in the winding up (Co. Litt. 136; *Hastings Corporation v Letton; In re Woking Urban Council (Basingstoke Canal) Act,* 1911; *In re Albert Road, Norwood;* yet such would be the effect of the construction contended for, with a consequent avoidance of all dispositions made by such grantor or reversioner in favour of third parties, wholly innocent of any irregularity."

36. In *re Wells* [1933] 1 Ch 29 was concerned with a legal mortgage granted to a company by trustees on the security of the company's leasehold property. The company defaulted and went into liquidation with a view to reconstruction. But the reconstruction never came about and the company was dissolved in 1916 without the leasehold property having been disclaimed or assigned. After the dissolution the leasehold property rose in value and payments under the mortgage were resumed. The Crown claimed the equity of redemption as bona vacantia. Farwell J held [1932] 1 Ch 380 that section 296 of the Companies Act 1929 (re-enacting section 71 of the Companies (Consolidation) Act 1908) was not retrospective, and that the owner was the surviving trustee, free from any right to redeem. He reached that surprising conclusion on the ground that the Crown could claim as bona vacantia property in the hands of another person only if that other person held as a trustee, and that the mortgagee (although he happened to be a trustee) was not a trustee for the mortgagor. The Court of Appeal (Lord Hanworth MR, Lawrence and Romer LJJ) agreed with the judge that section 296 was not retrospective but held that the judge, in limiting the scope of the Crown's claim, had wrongly followed a dictum of Wright J In *re Higginson & Dean* [1899] 1 QB 325, 332. There is no reason to doubt the correctness of those conclusions. The case is most relevant because of what the Court said about the *Hastings* case.

37. The Solicitor-General, appearing for the Crown, said in argument (p 33) that it was on account of the *Hastings* case that the words "including leasehold property but not including property held by the company in trust for any other person" were included in section 296. He added:

> "This makes it difficult to say that the section is merely declaratory of already existing law; and the Court cannot be asked to say that *Hastings Corporation v Letton* was wrongly decided, as it was cited without disapproval in *Morris v Harris*."

The Court of Appeal was not however inhibited in its comments on the case. The Master of the Rolls commented in the course of the respondents' arguments (p 38),

> "You can make very little of that case. I think we had better leave it where it is."

In his judgment (p 47) he referred to it as irrelevant. Lawrence LJ went a good deal further (pp 53-55), agreeing with academic criticism of the whole of the Blackstone principle, and not merely its application to leasehold property. Romer LJ discussed the point at some length (pp 60-63) and seems to have seen strength in the criticisms, but expressed no definite conclusion. He did point out (p 62) the practical implications for commercial companies:

> "In the case of a grant of the fee to a trading corporation the inconvenience of the doctrine stated by Blackstone has been felt for a long time. If, for instance, a conveyance of land be made to a company formed for the purpose of developing and turning it to account, the fact, if fact it be, that on the dissolution of the company, which would probably take place as soon as the land had all been disposed of to purchasers, the land would revert to the grantors would seriously prejudice the sale of the land to the best advantage."

38. There have been two further first-instance decisions expressing doubt about the Blackstone principle even as regards freeholds: the very learned judgment of His Honour Judge Wethered in *The British General Insurance Co Ltd v Attorney-General* [1945] LJNCCR 113, 126, and the judgment of Jenkins J in *Re Strathblaine Estates Ltd* [1948] Ch 228, 230-231. In *Scmlla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 794 Mr Stanley Burnton QC (as he then was) was concerned with a disclaimer of freehold property under section 178 of the Insolvency Act 1986. He carefully surveyed the authorities and correctly concluded that escheat was not wholly abolished by the 1925 property legislation, although its scope is now limited to situations where there has been a disclaimer. He did not need to express a view on the

application of the Blackstone principle to freehold property, and did not do so. He seems, with respect, to have misunderstood the judgment in *Strathblaine*: the essential point in that case was that there had been an effective (though informal) resolution, before the company's dissolution, for the distribution of the company's surplus assets to its shareholders, so that they were held in trust and taken out of the reach of section 296 of the Companies Act 1929 (re-enacting section 71 of the 1928 Act).

The reverter point: conclusion

39. Mr Dingemans relies on the absence of any Bahamian authority supporting the Blackstone principle. He also points to its irrational effect as applied to a grantor making an arm's length disposition to a commercial company, as opposed to a benevolent grant, by way of endowment, to a religious or public corporation. Blackstone was plainly thinking principally of grants to religious or public corporations. The next sentence of the passage quoted in para 24 above refers to the dissolution of the monasteries during the reign of King Henry VIII:

> "And hence it appears how injurious, as well to private as public rights, those statutes were, which vested in King Henry VIII, instead of the heirs of the founder, the lands of the dissolved monasteries."

Some commercial corporations did indeed exist in Coke's time. The Muscovy Company was incorporated by Royal Charter in 1555, followed by the Levant Company (which last only seven years) in 1581, the East India Company in 1600 and the Hudson's Bay Company in 1670. But there is no sign that Coke or Blackstone had these in mind. The Royal Charters gave the companies a monopoly of trading in different parts of the world, and title to their lands would not depend on English law until they had come under English sovereignty.

40. Two Bahamian statutes were brought to the notice of the Board, but there was little argument on them. The first was the Declaratory Act of 1799. Section 2 provides that the common law of England, so far as not altered by specified statutes, is in full force in the Bahamas with the following exceptions:

> "(Except so much thereof as hath relation to the ancient feudal tenures, to outlawries in civil suits, to the wager of law or of batail, appeals of felony, writs of attaint and ecclesiastical matters)".

This exception is a double-edged sword for the parties, which may be why both sides were reluctant to make much of it. It is hard to assess the intended scope of the reference to "the ancient feudal tenures", especially as section 4 preserves all statutory

provisions relating to the prerogatives of the Crown. It seems unlikely that the exception in section 2 was intended to displace the basic principle that under the common law of England all land is held from the Crown. It seems more likely that it was intended to exclude the feudal services that were incidents of tenure, such as knight service and frankalmoign; and perhaps also subinfeudation, which in England was permissible at common law but prohibited after 1290 by the statute Quia Emptores. The second relevant statute, the Escheat Act of 1871, tends to reinforce that view, since in section 2(1) it defines "escheat" as including all property which falls to the Crown in default of an heir or next-of-kin. It seems to have assimilated intestate succession to real and personal property, as English law did in 1925, but using the old term of escheat rather than the term bona vacantia used in the English statutes. The Escheat Act of 1871 does not appear to have any direct application to the property of corporations.

41. The Board's view of the 20th century English authorities, in short, is that the *Hastings* case was wrongly decided; that in the *Woking* case the Court of Appeal applied the Blackstone principle to freehold land, but apparently without argument on the point, and in the absence of the Crown; that Lord Sumner's dictum in *Morris v Harris* cannot be given much weight; and that in *Re Wells* the Court of Appeal cast justified doubt on the whole principle, at any rate as applied to a commercial company. As applied to land acquired for full consideration by a commercial company, its operation may be irrational and unfair. The Board declines to decide that until 1926 it formed part of the law of the Commonwealth of the Bahamas.

42. On that basis, the Sisal Company's freehold land in the Bahamas vested on its dissolution in the Crown (that is, the Consolidated Fund, as it is put in the Escheat Act, of the Commonwealth of the Bahamas). Captain Combe's mortgage (now long since statute-barred) could not by itself prevent that vesting, since the Sisal Company had an equity of redemption, which was an estate in real property. There is ample authority for that, starting with the classic statement of Lord Hardwicke in *Casborne v Scarfe* (1738) 1 Atk 603, 604, cited by Lord Hanworth MR In *re Wells* 1933 1 Ch 29,45:

> "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets."

43. There is no sign that any official of the Bahamas government has ever taken any action, at any time during the last century, to claim Freeman Hall South or any

other land once owned by the Sisal Company. Mr Dingemans agreed that the Crown must be taken to have had notice of these proceedings, which have now been on foot for more than 30 years. Jeanne Thompson J referred to this in her judgment (paras 24 and 25). After referring to some observations of Sawyer J (as she then was) in *Re Hepburn* [1996] BHS J No 15 the judge commented (para 25):

> "A similar situation exists in this case, and, as the Petition was filed in 1982 and the relevant government officer was served more than 20 years ago, I am able to consider this case without being concerned with a possible interest in the Crown."

Osadebay JA made the same point in para 85 of his judgment in the Court of Appeal.

The 15 acres

44. The first point that has to be resolved is an issue as to the correct construction of the 1895 conveyance. The relevant part of the parcels clause (set out in full at para 16 above) refers to "85 acres of land . . . being part of a tract of land containing 100 acres granted to the said William Edward Armbrister by the Crown" and there is no doubt about the extent and location of that 100 acres. But exhibit 3 to the affidavit of the Registrar General shows that on the original conveyance plan the whole of the 100 acres was coloured pink. Mr Dingemans argues that that indicates that the grant must be understood as a grant of an 85/100ths undivided share. Ms Walton argues that it was intended as a grant of a separate 85 acres, with 15 acres being retained by William Armbrister, and that its location can be established by extrinsic evidence.

45. The Board considers that the latter view is correct. The 1895 conveyance was plainly prepared by a skilled conveyancer. The draftsman knew how to describe an undivided share in land held as a legal estate, since in 1895 that was the nature of William Armbrister's interest in Freeman Hall: "one undivided moiety or half part of all that tract of land [etc]". Moreover it is impossible to imagine why William Armbrister, who was selling over 3,000 acres to the Sisal Company, should have wished to retain a small undivided share in the 100 acres, rather than choosing a particular site that he wished to keep in his personal ownership. The unusual right of occupancy for two months of the year that he retained in relation to the whole of the Village Estate and Newfield (together totalling over 2,500 acres) is not inconsistent with his wish to retain a particular area of 15 acres in his absolute ownership.

46. The Board concludes that a mistake must have been made in the colouring of plan "A" on the 1895 conveyance. It is far too late for that mistake to be corrected by rectification, but where there is doubt or inconsistency as to the description of land in a conveyance, extrinsic evidence is admissible to resolve the difficulty. The principles

were stated and applied by the House of Lords in *Eastwood v Ashton* [1915] AC 900 and by the Judicial Committee in *Watcham v Attorney General of the East African Protectorate* [1919] AC 533. The latter is a striking case on the facts, because of the large disparity (27 acres) between the stated acreage and the area of land as described by its boundaries; and the case shows that the admissible extrinsic evidence may include later events. During the twentieth century the Court's readiness to take account of extrinsic evidence has become stronger. Peter Gibson LJ said in *Clarke v O'Keefe* (2000) 80 P & CR 126, 133:

> "It was said, as long ago as 1969, by no less an authority than Megarry J in *Neilson v Poole* (1969) 20 P & CR 909, 912, that the then modern tendency was towards admitting evidence in boundary disputes and assessing the weight of that evidence rather than excluding it. That tendency has, in my experience, not diminished in the intervening years."

47. The tendency has not been restricted to boundary disputes, but extends to all issues as to the interpretation and effect of parcels clauses in conveyances. In *Scarfe v Adams* [1981] 1 All ER 843 the principle was well expressed by Griffith LJ (p 851):

> "The principle may be stated thus: if the terms of the transfer clearly defined the land or interest transferred extrinsic evidence is not admissible to contradict the transfer. In such a case, if the transfer does not truly express the bargain between vendor and purchaser, the only remedy is by way of rectification of the transfer. But, if the terms of the transfer do not clearly define the land or interest transferred, then extrinsic evidence is admissible so that the court may (to use the words of Lord Parker in *Eastwood v Ashton* at [1915] AC 900 p 913) 'do the best it can to arrive at the true meaning of the parties upon a fair construction of the language used.'"

48. In the present case Anthony Armbrister gave oral evidence as to the location of the 15 acres. He seems to have derived much of his knowledge from his mother, Mrs Frances Armbrister, who had first visited Cat Island in 1938 as Cyril Armbrister's bride. Asked in his evidence in chief whether she was interested in any property on Cat Island, he replied [452-453]:

> "Yes, keenly. We had obtained some of the maps, the old maps of Cat Island that show all the original Crown grants and she had diligently gone and outlined every piece of property that our family was interested in. And I could bring the map, I could bring it and show it to you if you

like. She diligently went over all the documents and she would sit over it for hours to make sure she had these outlines correct."

Unfortunately he had not brought the map to court. But later in his evidence in chief there is a passage [458-459] that addresses the location of the fifteen-acres:

"Q. Is it accurate that he sold the entirety of the Village Estate? Did he keep some of it back, or was this something which he got rid of, as far as you are aware, at that time that he sold it?

A. I was under the impression that he kept a piece of it. He did keep a 15 acre tract that was on the beach specifically.

Q. When you say 'on the beach', are we talking about a beach?

A. I'm sorry. It's an iron stone shoreline. It was 15-acres long the shoreline.

Q. And has that actually been surveyed out?

A. No, it has not been surveyed out.

Q. OK. Do you know where that is?

A. Roughly."

There was then a digression about papers being lost in a serious fire in 1975 but then the witness was asked about a plan:

"Q. Right. This is a plan that was surveyed at the instance of Mr Herbert McKinney. I am showing it to you only to ask you, whether or not on this plan –

THE COURT: That's the plan filed in the action?"

MR TOOTHE: Yes, My Lady, the 15 acres is shown.

THE WITNESS: The 15 acres would be in this vicinity [indicating].

THE COURT: Here?

THE WITNESS: Yes, my Lady [indicating]".

49. The transcript does not describe what the witness was indicating, but it seems to be common ground that he was looking at a plan which was (contrary to his earlier evidence) produced by surveyors in 1966. His counsel (if correctly reported on the transcript) also seems to have been mistaken about the provenance of the plan. It is clear from correspondence in 1966, quoted by Osadebay JA in paras 59 to 61 of his judgment, that the plan was prepared by surveyors instructed on behalf of the Armbristers and sent by their lawyers to the lawyers for Mr McKinney.

50. In cross-examination it was put to Anthony Armbrister that his grandfather would be unlikely to have chosen shoreline land of no agricultural value, but he insisted that it was recorded in notes made by his grandfather. He could not produce these notes, but he did refer to an entry in an inventory of land made after the death of his grandmother, Mrs Eugenia Armbrister [256]. In re-examination he was asked [480-481] about his grandfather's likely choice:

"Q. Would he be interested in land on the beach from an aesthetic point of view or from a point of view of his ability to farm it?

A. From what I can see from where his house was located, I think he was there because – it was up over there, overlooking the sea; I suspect he was trying to catch the breeze as much as possible.

Q. How far was your grandfather's house from the sea?

A. I think about maybe 300 feet, if that."

51. Anthony Armbrister seems to have been rather confused about some of the documentary background, but his evidence on the central point – the location of the 15 acres – was reasonably clear. The judge seems to have thought that the Armbristers' claim to the 15 acres was based solely on a possessory title. The Court of Appeal recognised this, and took the view that it was, on the contrary, for the petitioners to establish a possessory title if they could. The Board accepts the Court of Appeal's analysis of which side had the burden of proving a possessory title to the 15 acres. It

also accepts the Court of Appeal's conclusion on that point, but not its conclusion in relation to Freeman Hall South, for the reasons considered below.

Issues as to possessory title: introductory

52. As to factual issues about possessory title the Board has first to consider whether it is appropriate, in the case of Freeman Hall South, to review the concurrent findings of the trial judge and the Court of Appeal. It would perhaps be more accurate to refer to their conclusions rather than their findings, because the judge did not analyse in any detail the oral and affidavit evidence given by Anthony Armbrister and the other witnesses for the adverse claimants. Her assessment was limited to two paragraphs (paras 16 and 18, separated by a reference to *Re Knowles* [1971-6] 1 LRB 31):

> "In support of their possessory title, the Adverse Claimants provided viva voce evidence of Anthony Frederik Armbrister, Eugenie Cadet and a Mr Poitier. Unfortunately I did not find that their evidence was sufficiently strong to persuade the Court that the Armbristers had by their adverse possession ousted the documentary title established by the Petitioners.
>
> [Citation from *Re Knowles*]
>
> The evidence of the witnesses on behalf of the Adverse Claimants fall far short of the standard of proof as stated by Smith J and Scarr J. There was no specific delineation of the property adversely possessed and no indication of the period of time within which the dispossession would have occurred."

53. Osadebay JA, having dealt with the evidence about the 15 acres in detail, dealt with Freeman Hall South even more briefly (paras 87 and 88):

> "The trial judge did not believe the evidence of the appellants and their witnesses.
>
> I find no reason to interfere with the finding of the trial judge on this issue."

The trial judge did not say that she disbelieved the witnesses, and she erred in supposing that the petitioners had a sound documentary title, since the 1944

conveyance, and before it the 1931 mortgage, have been shown to be based on a dubious possessory title claimed by Mr Brownrigg.

54. In the circumstances the Board considers that it is right to review the conclusions reached by the courts below. In relation to Freeman Hall South neither court made a proper analysis of the evidence, leading to the risk of a miscarriage of justice.

Issues as to possessory title: geographical background

55. Before embarking on a detailed analysis of the rather confusing evidence it is appropriate to set out some of the known facts about the terrain of Cat Island, and about the lives of the Armbristers, Mr Brownrigg, and Victoria Celly Rolle ("Celly Rolle") and her descendants.

56. The Village Estate seems to have consisted of, or included as its main components, the three parcels of land described as the first, second and fifth parcels in the 1895 conveyance, together with the 15 acres excluded from the fifth parcel. These together amounted to 340 acres. The words "The Village" are written over the first and fifth parcels (together with the 15 acres) on an official plan (of unknown date) included in the record [277]. The verbal description in the first and second parcels refers to "The Village". The 400 acres (the third parcel) is described on the official plan as "The Forest."

57. The evidence as a whole suggests that on the Village Estate there were a number of houses, including a house where William Armbrister lived (about 300 feet from the sea, according to Anthony Armbrister's evidence [481]) and another house where Celly Rolle lived. Mrs Frances Armbrister deposed as follows in her affidavit (para 8, the first sentence referring to her first ten-day visit in 1938) [700]:

> "I saw the Village Estate which appeared to me to have little or no cultivation and I met the woman who was described to me as 'Celly Rolle'. Celly Rolle was living in a small house in the Village yard. I told her that she would have to move as she was on the land that belonged to Cyril Armbrister. Mrs Rolle threatened to attack me with a cutlass, however when I returned to the Bight in 1939 Mrs Rolle had moved and I was informed by Commissioner Wells that he had instructed her to leave the Village as she was trespassing on Armbrister property. At the same time that I met Celly Rolle I also walked up to the main house of the Village Estate (which was then in a dilapidated state). I could see what appeared to me to be the remains of a beautiful kitchen chimney which was some little way away from the main

dwellings. The house where I met Celly Rolle was a considerable distance away from the main house in an area that people on Cat Island call the Village Yard which was comprised of small dwelling houses, at least two of which were constructed of stone."

58. The 15 acres seems to have had ironstone outcrops where it met the sea [485]. Anthony Armbrister was cross-examined on the basis that the land was not suitable for agriculture, and he accepted this [475], enlarging on the point in re-examination [480-481]. He also said [456, 464-465] that he had dug his grandfather's house out of the bush a number of times, but that the bush was quicker than he was.

59. Before the 1960s, when there was no access for motor vehicles, Freeman Hall South was quite a long journey from the Village Estate. There was a footpath and access was either on foot or on horseback [450, 454]. Anthony Armbrister described the area in his evidence in chief [461]:

"A. Freeman Hall Estate, it's a lovely piece of property. It rises from the beach up to a hilltop.

Q. Is it a beach?

A. Yes, it is. The piece of property that we have there is about 5,000 feet give or take a few feet. 5,000 feet of ocean front. Most of that, there is probably 3,000 to 3,500 feet of beach and 1,500 feet of rocky shoreline. It has a small rise off the beach, then it drops down to a small valley back there, which there should be lots of fresh water in that area. Then it rises to a ridge toward the back of the property. That's probably close to 100 feet high. So the elevations are quite nice."

His evidence was that there was little farming on Freeman Hall South [462]. Mitchel Poitier, however, one of the co-owners of the northern part of Freeman Hall, said [498-499] that farming was done on both sides of the property, but that there had been no farming on either side for the last five years. Some of the affidavits referred to farming being carried on Freeman Hall South at different times.

Issues as to possessory title: biographical matters

60. Some basic information about the Armbrister family is set out in para 13 above. But it is necessary to get a clearer picture of the family's periods of residence in and absence from Cat Island at different times during the last century. Mr Dingemans

understandably emphasised the importance of the periods of absence. But it is also necessary to take account of the evidence of overseers appointed on behalf of the Armbrister family, and to match this against what can be established from the evidence about Mr Brownrigg and his family.

61. At the beginning of the 20th century William Armbrister was 83 years old, and married to a younger wife, with a young son. He had a residence in Nassau where he was (or had been) prominent in public life, but also had a house on the Village Estate on Cat Island. He was a small shareholder in the Sisal Company, to which he had sold almost all his land on Cat Island, though the 1895 conveyance suggests that he expected to spend up to two months of the year on Cat Island after the sale. There is no evidence whether he did so, or as to his relations with Mr Brownrigg. Mr Brownrigg became manager of the Sisal Company's operations on Cat Island in about 1905 [363, 368]. According to the affidavit of Wilberforce Swain [363] the Sisal plantation had failed some years before 1908, and Fred Rolle [369] said that it had failed before 1907. Mr McKinney, on the other hand, deposed (in an affidavit made when he was 81) [394] that Mr Brownrigg operated the sisal plantation and factories on his own account "during the First World War and afterwards."

62. Potentially the most important deponent for the petitioners was Celly Rolle, who made an affidavit in 1957, when she was aged 65. She seems to have been illiterate, as she signed the affidavit (and other documents in the record) with her mark. Her affidavit evidence was that she became Mr Brownrigg's cook in 1911, when she would have been about 18. She also became the mother of Mr Brownrigg's daughters, Kathleen (whose married name was O'Brien) and Charlotte (whose married name was Varence), though she did not mention that in her affidavit. That information is in Mr McKinney's affidavit [395; also 703]. It will be necessary to return to these affidavits, both for what they contain and what they do not contain, in considering the evidence as to adverse possession.

63. Mr Brownrigg died in 1933 in Nassau, but his normal residence was stated to have been The Village, Cat Island [326]. Mr McKinney deposed [395] that "shortly after the First World War" Mr Brownrigg engaged in a new activity, raising cattle and sheep on Cat Island, and that he (Mr McKinney) made a secured loan (presumably the 1931 mortgage) for that business, but that Mr Brownrigg became insolvent. Mrs Effie Armbrister, who made an affidavit in 1983, when she was aged 90, deposed [268] that Mr Brownrigg left Cat Island some years before 1920, but it seems that she was probably mistaken on that point. On any view of the evidence there are difficulties in the chronology.

64. The death of William Armbrister in 1907 marked a radical change in the family's way of life. His son Cyril Armbrister, then aged 12, was sent to boarding school in England. William Armbrister's widow Eugenie left the Bahamas and there

is no evidence that she ever visited Cat Island again. She seems to have had unhappy memories of the Bahamas as in her will [251], made in 1922 when she was resident in Victoria, British Columbia, she entreated her son "not to return to live in the West Indies but to keep to the Northern lands." She died in Los Angeles in 1933 [252].

65. Cyril Armbrister did not return to Cat Island for many years. From England he moved to Canada and from Canada he moved to Hollywood, where he had considerable success as a film actor and director. He married Mrs Frances Armbrister in 1938 and they had a honeymoon in Mexico. She then visited the Bahamas, including Cat Island, in 1938, without her husband but with her parents. Her father, Ed Fintel, was a Methodist missionary from Iowa who was also keenly interested in farming. They returned to Cat Island in 1939 and the parents decided to settle on the island. They lived in what was referred to as the Armbrister shop at New Bight, which is about two miles north of the Village Estate [449]. Mrs Frances Armbrister stayed with them when she was on the island [701].

66. Her father embarked on a programme of improving the farming of the Armbrister land on Cat Island, but these activities came to an abrupt end with his death in 1940. Mrs Frances Armbrister says that he died in suspicious circumstances. She was overwhelmed with grief at her father's death; her mother was unwell and she herself was pregnant with her elder son, Ted, [698-705]. She visited Cat Island in November 1940 but was then away for two years. Travel was restricted during the war. She and Cyril Armbrister returned to Cat Island in 1945 and lived at Fernandez Bay, which is to the north of New Bight. Her main home was at Fernandez Bay in the 1960s, and from 1966 until her death in 2002 she was permanently resident there, apart from short trips abroad [705-707].

67. Anthony Armbrister was born in 1946 [460]. His first visit to Cat Island was in 1956 and he has lived there since 1965, when he was 18 [448-449]. He now lives at Fernandez Bay, about six miles north of the Village Estate [448]. His father died in 1967on Cat Island, having made that his home for the last three years of his life [450].

The evidence as to possession: introduction

68. An important part of Mr Dingemans' case, on the factual issues, is the long absences of the Armbrister family (especially for 30 years after William Armbrister's death, and during the Second World War). Against that, an important part of Miss Walton's case is that the family employed overseers (sometimes called overlookers [451, 456]) to take care of the interests of the absent owners. The evidence shows that much of the farming on the island was "peripatetic" share-cropping (clearing scrub, growing a crop such as peas, potatoes or corn, and then moving on) of the sort described by Lord Diplock in *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, 23 [487-

488, 490-491]. Rent ("thirds") was payable in kind, that is one-third of the crop. One of the overseers' tasks was to collect thirds for the land for which they were responsible.

69. Mrs Frances Armbrister said in para 22 of her affidavit [705-706]:

> "During our absence from Cat Island and whilst my husband and even while my husband and I lived at the Bight, Beatrice Gilbert was our Chief Overseer. When farmers brought produce to us direct as 'shares' we accepted the same, however our objective in having overseers was to ensure that the land was kept clean and that our goats and sheep did not run wild destroying growing crops. This policy is maintained by me today and has been my policy throughout. It is also the policy of my son Anthony who lives permanently on the island of Cat Island where he is raising his family."

70. The transcript of the oral evidence contains some puzzling passages (especially in the evidence given by Miss Eugie Cadet, considered further below) suggesting that some of the thirds were received by Celly Rolle, the common law wife of Mr Brownrigg [483, 488-489]. On any view the evidence as to what happened on the Village Estate is hard to follow, and it is impossible to make perfect sense of it. It must be borne in mind that the petitioners' original claim, in relation to the Village Estate, was to about 555 acres [004] comprising, according to the filed abstract of title [008-009] tracts of 100 acres (parcel one), 160 acres (parcel two), 221 acres (parcel three) and 70 acres (parcel five, being part of 80 acres, the other ten of which went to Mr Brownrigg's nephew, Blake). Parcel four is Freeman Hall South. This can be confirmed by the plan of the Village Estate attached to the judge's certificate of title [026]. The copy is unclear, but comparison with exhibit 3 shows that it is the land shown coloured pink on that plan, with the exception of (i) the 400 acres ("the Forest" on [277]) and (ii) the ten acres conveyed in 1944 to Blake Brownrigg [015]. The petitioners were therefore seeking to prove title to much more of the Village Estate than was included in the adverse claimants' cross-claim (originally 100 acres, but then reduced to the 15 acres). The only part of the Village Estate in issue is the 15 acres. Freeman Hall South is the subject of both the petitioners' claim and the adverse claimants' cross-claim. It is important to identify and consider evidence relating to these two specific areas.

The 1931 mortgage and the 1944 conveyance

71. Before detailed consideration of the evidence as to possession it is appropriate to revisit, in the light of section 3(3) of the Conveyancing and Law of Property Act (para 9 above), the recitals in the 1931 mortgage and the 1944 conveyance. By the

1931 mortgage [322] Mr Brownrigg (described as a rancher) was recited to have been in undisturbed use, occupation and enjoyment of the mortgaged land for a period of 25 years. He was also recited as being "about to establish a cattle ranch" at Old Bight, Cat Island. The mortgage contained no receipt clause. It was to be for future advances up to a limit of £200. The mortgaged property was described as a tract of land of 100 acres in The Village, bounded on the south by the sea (and on its other sides by features which are not easy to identify). The second recital is hard to reconcile with Mr McKinney's affidavit [395] which refers to the ranching as having been "shortly after the First World War" and having failed, and to the mortgage having been to secure money already owed, with the security extending to 700 acres in The Village.

72. The 1931 mortgage was followed after Mr Brownrigg's death by the 1944 conveyance [337]. Celly Rolle described it [371] as having been "in settlement of a mortgage". The vendors were Celly Rolle, who was illiterate, her two daughters, and Blake Brownrigg (Mr Brownrigg's nephew). The property conveyed was 911 acres, described as parcels of 100, 160, 221 and 430 acres. These appear to have been the first, second and fourth parcels in the 1895 conveyance (see para 17 above) together with Freeman Hall South. As regards the 15 acres and Freeman Hall South the evidence (considered in detail below) for Mr Brownrigg's possessory title does not stand up. Unless Mr McKinney was striking a very hard bargain with the daughters of his old friend [395] Mr Brownrigg and their mother, it might be inferred that Mr McKinney must have suspected that Mr Brownrigg's title was (to say the least) questionable. But it is not necessary to go that far. The Board concludes that at least as regards these parcels of land, the truth of the recitals has been shown to be inaccurate, so that the exception in section 3(3) applies.

The evidence as to possession: Freeman Hall South

73. As to Freeman Hall South, the affidavits sworn in 1957 by Fred Rolle [368], Celly Rolle [371] and Paula Romer [398] make no reference at all to Freeman Hall South. The evidence of Wilberforce Swain was in a curious form, since it appears that he made a statutory declaration on 18 January 1957 [365] and then swore an affidavit on 23 February 1957 [363, wrongly indexed as 22 February 1951]. These are in very similar terms except that in para 6 the affidavit does, but the statutory declaration does not, refer to Freeman Hall, describing it as part of the Village Estate. The Court of Appeal rightly criticised this as putting in question Mr Swain's knowledge of the property. Apart from that the only evidence of possession of any part of Freeman Hall South by the petitioners or their predecessors in title is the wholly unspecific recital in the 1944 conveyance.

74. By contrast the evidence for possession of Freeman Hall South by the Armbristers was considerable. There were three affidavits sworn in 1982 and 1983 by

deponents with knowledge of the property at different periods. Effie Armbrister (then aged 90) deposed [267] that she married Phillip Armbrister in 1920 and that he was the overlooker of the Armbrister land on Cat Island, including Freeman Hall. She deposed (paras 4 to 8 of the affidavit [267]):

> "Tenants worked the land for the Armbrister family and we also worked the land ourselves. We collected thirds from all the tenants including Mr Sam Cleare who died approximately six years ago aged 105 years. We also collected thirds from Freddie Rolle, Louisa Armbrister and Celeste Armbrister. These persons are now all dead.
>
> My husband collected thirds from tenants on the farms up until his death in 1945. After 1945 the Armbristers appointed other Overlookers.
>
> I remember Mr Brownrigg who I understand worked for the Sisal Company. Mr Brownrigg left Cat Island some years before 1920.
>
> I doubt that Mr Brownrigg ever knew of Freeman Hall because this property was out in the middle of the land.
>
> My husband and I built a shack at Freeman Hall for overnight shelter because of its distance from the settlement."

Effie Armbrister may have been the person referred to by another deponent as "Baby Armbrister".

75. Ellis Wells (then aged 67) deposed [261] that he knew "Village" and "Freeman Hall", and that he had worked those lands with his father, John Wells, for over 30 years. He said that he knew the lands belonged to the Armbristers and that he was willing to share crops with them whenever they said so.

76. Ronald Johnson (then aged 68) deposed [263] that he had been the overseer for the Armbristers since 1955, and before that had worked since 1945 with Thaddeus and Beatrice Gilbert, the overseers since before 1945. He deposed that the Gilberts collected thirds from tenants on various estates, including the Village Estate, but that

> "a woman known as 'Baby Armbrister' collected from the thirds from the tenants of Freeman Hall and I collected from her for the estate barn which was situated in the Armbrister yard at The Bight, Cat Island."

77. Mrs Frances Armbrister referred in her affidavit to Beatrice Gilbert, as mentioned in para 69 above. In para 16 of her affidavit [703] she said that Beatrice Gilbert died in 1960 and that new overseers were appointed. John Devaux was overseer when her affidavit was sworn in at 1999.

78. There was also the oral evidence of Miss Cadet and Anthony Armbrister. Miss Cadet was 70 when she gave evidence and some of it is hard to follow. She had grown up on Cat Island and worked there, first as a teacher, and then on the land. She had then worked as a nurse in Nassau, but returned to work as a nurse on Cat Island. She had known both Anthony Armbrister and Celly Rolle for a long time. She said that her father, William Seymour [483] "used to work along with Mr Rolle too to help him with the Freeman Hall lot to take in crop and carry it to the – where Celly was. They had a house there, what they does put the corn and peas and things in." She was asked about the Freeman Hall Estate [484]:

> "Q. Do you know anything about the Freeman Hall Estate on Cat Island?
>
> A. Yes, the Freeman Hall Estate, we had a lot of people working on there. And James Rolle was the overseer –
>
> Q. Okay
>
> A. - for there: and after James Rolle, it was Naman Rolle.
>
> Q. Okay
>
> A. And after Naman Rolle died, well, we didn't had nobody else.
>
> Q. You didn't have anybody else?
>
> A. No.
>
> Q. They didn't appoint anybody else?

A. Nobody else – Oh, yes, yes, T. Strappe, Theophilus Strappe was one of the overseers too.

. . .

Q. And the Rolles and Mr Theophilus Strappe, who were they overseers for?

A. They used to oversee for Tony – I mean Tony Mother, the Daddy, they used to overseer for her.

Q. Okay.

A. All of them used to oversee for that.

Q. How did you know that?

A. Because I used to see them take the crop and carry it in. And my daddy used to help too when Mr Rolle – my daddy used to help with his horse, take the crop and carry it down to the Village. I used to work on the Village too."

Her references to crops going to "where Celly was" was taken up in cross-examination [488-489] but she insisted that it was for the Armbrister land. She said that she still went to Freeman Hall in her truck, but that the road was bad.

79. In relation to the period since 1965 (when he was eighteen) the adverse claimants rely on the evidence of Anthony Armbrister. Contrary to what was said in the Court of Appeal, the trial judge did not say that she disbelieved his evidence. She made no criticism of his demeanour, and (so far as can be assessed from the transcript) he seems to have given his evidence spontaneously and candidly, admitting that he was, like his parents, vague about many legal matters [455]. He explained how, in 1965, he did not wish to live on the island but felt obliged to look after his parents [453]:

"Q And, of course, during this period of time what were you doing on Cat Island?

> A. Trying to create a life that they could live without me there. I had left college. I had completed one year of college and the family had come down here to retire on Cat Island, to live on Cat Island. There was no power, there was no running water, there was no services available there, so I kept trying to figure out how to create things for them to live without having me there. After a couple of years trying this I realised it wasn't going to happen."

80. In the event he has so far spent the rest of his life on Cat Island, and he and his wife run a successful hotel at Fernandez Bay. Soon after 1965 he and his mother had a bulldozer road built to enable motor vehicles to get to Freeman Hall [458]:

> "It's a bulldozer road. No, there's nothing particularly noteworthy about it, it's just a track road or a bulldozer road that goes from the King's Highway or Queen's Highway from the beach across to the beach at Freeman Hall."

81. Anthony Armbrister was doing a lot of building work at Fernandez Bay and he took rock from Freeman Hall South to use in the building work. This was done as a joint undertaking with his mother, Mrs Frances Armbrister [706]. He said that he had taken "hundreds of truckloads of rock" [462] and paid people from the communities to take part in this work [456]. He also frequently used the property for recreational purposes, including spear fishing, with his family [461]. Mrs Frances Armbrister had horses and rode there until she was seriously injured in a fire at their house during the 1970s. (Anthony Armbrister gave the year of the fire as 1975 [459] or 1971 [463], if the transcript is accurate.)

82. The Board has thought it necessary to go into this evidence in unusual detail since it was apparently disregarded almost entirely in the courts below. The issue is whether Cyril Armbrister and after his death Mrs Frances Armbrister, by herself and through Anthony Armbrister and the family overseers as their agents, were in possession of the land in the requisite sense. The clearest statement of the law is in the speech of Lord Browne-Wilkinson in *J A Pye (Oxford) Ltd v Graham* [2002] UK HL 30, [2003] 1 AC 419, with which the rest of the House agreed. Lord Browne-Wilkinson (at para 41) approved the principles stated by Slade J in *Powell v McFarlane* (1977) 38 P & CR 452, 470-471:

> "The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed . . . Everything must depend on the particular circumstances, but broadly, I think what must be shown as

> constituting factual possession is that the alleged possessor had been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."

83. In the Board's view the evidence adduced by the adverse claimants met this test. The Armbristers acted openly as owners because they believed (though wrongly) that they were the legal owners with a good title. The land was (especially before the construction of the bulldozer road) a relatively remote, unproductive tract, but there was some sharecropping carried on with the consent of the Armbristers, whose overseers collected thirds. The evidence was that at Freeman Hall South the overseers were Mr Phillip Armbrister and his wife Effie, then the Gilberts, the Rolles, the Johnsons and (at the time of Mrs Armbrister's affidavit) Mr Devaux [263-264, 267-268, 483-485, 703, 705]. The Armbristers built a bulldozer road, which evidently marked the boundary between Freeman Hall South and the northern part along some of its length. They removed large quantities of rock for building purposes, using paid workers. They used the land for recreational purposes.

84. This evidence was not seriously challenged. The judge, who did not make any detailed review of the evidence, regarded it as insufficiently strong. Bearing in mind the nature of the land and the complete absence of any other serious claim, the Board are driven to the conclusion that both the judge and the Court of Appeal erred on this point. The adverse claimants' claim to Freeman Hall South is made out.

The evidence as to possession: the 15 ares

85. Here the positions of the parties are reversed. Following the decision of the Court of Appeal, and in line with the Board's conclusion as to the correct construction of the parcels clause in the 1895 conveyance (para 51 above), the petitioners are in the position of cross-appellants seeking to establish a claim by adverse possession ousting the Armbristers' paper title.

86. The Board can deal with this issue more briefly, as it agrees with the conclusion of the Court of Appeal, and is largely in agreement with the Court of Appeal's reasoning. The affidavit evidence on behalf of the petitioners was in general and formulaic terms, referring to "full, free and undisturbed possession" of land without distinguishing between different parts of the Village Estate (which was, as described above, quite extensive) and sometimes failing to distinguish between the Village Estate and the Freeman Hall Estate [363, 365, 368, 371]. The only exception is the affidavit of Paula Romer [399] which refers to small farms started in about 1986 along the main Government highway, but their location is uncertain, and this point was not explored in the oral evidence.

87. There are, however, two points in regard to the 15 acres on which the Board wishes to comment on the judgment of Osadebay JA. The first is the reference (in paras 58 and 63 of the judgment) to the evidence of the Armbristers having farmed the 15 acres. The evidence as to the occupation and farming of different parts of the Village Estate is patchy and inconsistent, and there is evidence of ambitious farming projects when Mrs Frances Armbrister's parents were on the island. But Anthony Armbrister accepted in his cross-examination and re-examination that the 15 acres was probably kept for its amenity value rather than for any agricultural value. He also spoke of trying, repeatedly but unsuccessfully, to clear what was left of his grandfather's house from the encroaching bush. The evidence tends to negative any significant farming being carried out on the 15 acres by anyone. But that adds nothing to the petitioners' case.

88. The other point is that it is clear from para 9 of the judgment that the Court of Appeal proceeded on the mistaken premise that the 15 acres was separately delineated on Plan "A" on the 1895 conveyance. That made the Court's task appear simpler than it was. But the location of the 15 acres has been identified by extrinsic evidence, and it was made clear to Mr McKinney's lawyers in 1966. As to that, Osadebay JA referred in some detail (paras 59 to 62) to letters sent by the Armbristers' attorneys to Mr Donald McKinney who was, it seems, acting for Mr Herbert McKinney. The correspondence made clear that the Armbristers were claiming the 15 acres, and a letter of 19 December 1966 enclosed a detailed survey plan of the 15 acres. It seems reasonably clear that this survey was carried out on behalf of the Armbristers, and the Board does not assume that the references on the plan to "pipes set in concrete" was a pre-existing feature. It seems much more likely that they were placed by the surveyors in 1966 in accordance with Regulation 14 of the Land Surveyors Regulations, made under section 34 of the Land Surveyors Act, Ch 251.

89. Nevertheless the letters and plan do show that this particular area of land was clearly identified and claimed by the Armbristers in 1966, and there is no indication in the record that there was any response to this claim made by or on behalf of Mr McKinney. That is quite inconsistent with the petitioners' case that Mr McKinney was in "full, free and undisturbed possession" of the 15 acres for 20 years before 1982. His title depended on exorbitant claims to over 3,000 acres originally made by Mr Brownrigg. As Anthony Armbrister said in his evidence about Mr Brownrigg [468]:

> "But he certainly couldn't have squatted on both Freeman Hall and Village. That's about 900 acres. Tough to do that."

Disposal

90. The Board will therefore humbly advise Her Majesty that the appeal should be allowed and the cross-appeal should be dismissed. The adverse claimants are already entitled, under the order of the Court of Appeal, to a certificate of title in respect of the 15 acres. They must now be granted a certificate of title to Freeman Hall South. Written submissions as to costs should be made within 14 days.