Privy Council Appeal No. 33 *of* 1951

Admon Gabriel Vieira and another - - - - - *Appellants*

v.

Morris Alvin Gibbons - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH OCTOBER, 1953

Present at the Hearing :

LORD PORTER

LORD REID

MR. L. M. D. de SILVA

[*Delivered by* LORD REID]

This is an Appeal from a judgment of the Chief Justice of the Supreme Court of Bermuda dated 6th April 1951 in an action in which the appellants were Defendants and the respondent was Plaintiff. The respondent claimed damages for trespass and for damage done by the appellants to a cottage and also an injunction. The appellants pleaded that a portion of the cottage was on land which belonged to the appellant Vieira and denied entering on the respondent's land. Brooke Francis, C.J. gave judgment for the respondent awarding damages of £440 and costs against the appellants jointly and severally.

The real question in the case is the situation of the boundary between the land of the appellant Vieira and the land of the respondent, and in order to understand and determine that question it is necessary to go back to the will of Adrastus Henry Astwood who died in 1901. The testator owned a tract of land in Warwick parish which was admittedly bounded on the North by a road known as the Khyber Pass road, on the South by the ocean and on the West by a straight line running from that road to the ocean. There is an eastern boundary marked on the ground and running parallel with the western boundary from the Khyber Pass road to the ocean. The area enclosed within these boundaries is about 20 acres. There is no doubt that this area was owned by the testator: there is some vague evidence that he owned farther land to the East but that is not proved. The area of 20 acres is crossed by two roads. One runs East and West not far from the ocean and a strip of War Department property adjoins it. The other road connects this road with the Khyber Pass road: it leaves the Khyber Pass road near the North West corner of the 20 acres and runs diagonally across it meeting the southern road some little distance from the South East corner of the 20 acres. The testator devised his land in three parcels 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 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."

(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 hereinbefore devised to Samuel Josephus Astwood, together with the dwellinghouse and other buildings thereon and the appurtenances."

(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 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."

There was considerable controversy about the identity of one of the roads mentioned in these clauses. There is no doubt that the public road first mentioned in Clause 3 is the Khyber Pass road and the Military road is the southern road running East and West. The question is what is meant by the South Longitudinal road mentioned in Clauses 4 and 5. At first sight that expression would appear to be appropriate for the Military road because it runs for a long distance near the southern shore of the peninsula which includes Warwick Parish, but an examination of these clauses of the will in light of the surveyor's evidence and plan shows that the testator must have intended to refer to the diagonal road.

There is no doubt that the Clause 3 land lies to the West of the 20 acres, the Clause 4 land lies to the North East, and the Clause 5 land lies to the South East. It is common ground between the parties that the boundary between the Clause 3 land on the West and the Clause 4 and Clause 5 land on the East is one straight line running from the Khyber Pass road to the ocean parallel to the West boundary of the 20 acres. There is controversy about the position of this line: the appellants maintain that it runs through the cottage which was damaged while the respondent maintains that it must be put about 150 feet farther West, but both agree that it runs in the same direction parallel to the West boundary of the 20 acres.

If the diagonal road is the "South Longitudinal Road" and the boundary between the Clause 4 and Clause 5 land then, whichever of the two competing lines be taken as the western boundary of the Clause 4 and Clause 5 lands, the Clause 5 land is much greater in extent than the Clause 4 land. But if the "South Longitudinal Road" is the southern or Military road then the Clause 4 land would be very much greater in extent than the Clause 5 land and would greatly exceed the four acres mentioned in Clause 4. Moreover the evidence of possession goes to show that the diagonal road has been regarded as the boundary. Their Lordships therefore hold that the "South Longitudinal Road" is the diagonal road.

The appellant Vieira now owns the northern part of the Clause 3 land and the respondent holds a conveyance from the owner of the Clause 5 land of a strip 150 feet wide running from the diagonal road to the ocean. The eastern and western boundaries of this strip run in the same direction as the boundary between the Clause 3 land and the Clause 5 land. If

the respondent is right in his placing of this boundary then the whole of the land conveyed to him lies within the original Clause 5 land and he has a good title to it, but if the appellant is right then the greater part of the land conveyed to the respondent is Clause 3 land belonging to the appellant and the respondent has no valid title to it.

On 6th April 1951 Brooke Francis C.J. gave judgment orally and what he said is not recorded, but their Lordships have a report of his reasons by the learned judge dated 28th April, 1951. From this it appears that the main argument for the appellants was that under Clause 3 of the Will a full twelve acres was devised and their boundary line is drawn so as to include a full twelve acres irrespective of what is left for the devisees under Clauses 4 and 5. This boundary is not marked on the ground. On the other hand there are some marks on the ground on the line for which the respondent contends. There is not much evidence of continuing possession: the cottage was built by the respondent's predecessor but the dispute about the boundary has been going on for many years and it appears that the appellant Mrs. Horne has done a number of acts on the disputed strip on behalf of the owners of the Clause 3 land. The evidence of possession on the whole favours the respondent but it does not appear to their Lordships to be conclusive and if the Will of Adrastus Astwood clearly showed that the land devised by Clause 3 included the site or part of the site of the cottage then the appellants would be entitled to succeed.

The appellants could only succeed if the true interpretation of Clause 3 were that it carried a full twelve acres irrespective of the acreage which might be left to satisfy the devises under Clauses 4 and 5. In their Lordships' judgment that is not the proper interpretation of Clause 3. Clauses 3, 4 and 5 are in the same form: in each what is devised is a parcel "supposed to contain about" a stated number of acres. That is quite indefinite and is a very different thing from a devise of a stated number of acres.

It was argued for the appellants that the respondent's own evidence showed that they and not the respondent had been in occupation before this action was raised and therefore the onus was not on them but was on the respondent to show that the land was his property. Their Lordships do not take that view of the evidence. The respondent bought this strip in 1949 intending to make improvements on it. In 1950 when he went to carry out the work he found that the appellants had put up a fence which he tore down and it would seem that this happened a second time. Then after some months he began building operations at the cottage and almost at once the appellants broke or destroyed part of the cottage. Their Lordships are unable to regard the erection of a fence in such circumstances as being equivalent to occupying the land. Moreover in the pleadings in this case the respondent states "The plaintiff is and was at all material times in possession of a cottage and parcel of land" which he identifies as the land now in dispute and that is not denied by either appellant. The only defence was that part of the cottage was on the appellants' land. In their Lordships judgment the appellants have failed to establish that defence.

There remains the question of damages. The respondent claimed £105 in respect of damage done to the cottage, £100 for compensation to the contractor for delay in carrying out the work at the cottage and £80 for loss of two months' rent of the cottage and then he made a general claim for £500 damages. In the course of his evidence the respondent said that he claimed loss of rent for six months amounting to £240 and that he would be satisfied with £200 and this £240. The learned Chief Justice awarded £440 against the appellants jointly and severally without giving any reasons for his award. It was argued for the appellants first that they could not be liable jointly and severally and secondly that so large a sum could not be justified on the evidence.

There is no doubt that the appellant Vieira deliberately set out to prevent the respondent from carrying out building operations by destroying parts of the cottage: he appears to have told the respondent that he had torn up the work which had been done and would continue to do so. The evidence with regard to the appellant Mrs. Horne is not so strong. She had sold the land to Vieira and was actively supporting him in his claim: together with Vieira at the beginning of the operation she stopped the respondent's workman from working and threatened him with violence and she did part of the damage to the cottage herself. In their Lordships judgment there was sufficient evidence to entitle the learned judge to find that she was jointly and severally liable in respect of the whole damage.

On the question of the amount of the damages their Lordships are prepared to assume that the Chief Justice accepted the evidence of the respondent and awarded £240 for loss of rent and £200 for other special damage. There is sufficient evidence to justify the £200 but the difficulty arises because the £240 is for six months' loss of rent whereas only two months' loss of rent was claimed in the statement of claim and moreover it is difficult to find any justification for holding that the damage done deprived the respondent of use of the cottage for so long a period as six months. But it does not appear that any objection was taken to a claim being made beyond the limits of the statement of claim or that any evidence was led or detailed cross examination made for the appellants on this matter. If objection had been taken at the time the matter might have been dealt with by amendment. On any view the appellants' actions were most reprehensible, and this would be relevant if their Lordships had to consider the question of general damages. Their Lordships have found this question to be one of considerable difficulty but they have come to the conclusion that this is not a proper case in which to alter the award of damages by the trial judge.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the Appeal.

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In the Privy Council

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v.

MORRIS ALVIN GIBBONS

[DELIVERED BY LORD REID]

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