GN2 T.G.1.

30/1962

IN THE PRIVY COUNCIL No. 43 of 1961

ON APPEAL

FROM THE SUPREME COURT OF THE BAHAMA ISLANDS

BETWEEN :-

GEORGE ALEXANDER SELKIRK Appellant

74059

- and -

ROMAR INVESTMENTS LIMITED Respondents

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a judgment of the Supreme Court of the Bahama Islands (Scarr J.) dated the 28th April 1961 whereby it was ordered that Judgment be entered for the Defendants (being the Respondents to the Appeal) with costs to be taxed unless agreed. pages 38 and 39

2. The action was brought by the Appellant as Plaintiff by a Writ of Summons issued on the 3rd September 1959. In the action the Appellant claimed a declaration that a notice purporting to rescind an Agreement for Sale (hereinafter called "the Agreement") made between the Respondents as Vendors of the one part and the Appellant as Purchaser of the other part and dated the 6th January 1959 (being an agreement for the sale by the Respondents to the Appellant of certain freehold land) was ineffectual to rescind the Agreement. The Appellant also claimed a declaration that the Respondents were not entitled to rescind the Agreement, specific performance of the Agreement and further or in the alternative damages for breach thereof and further or other relief. pages 1 and 2; page 2

3. Sub-Clause (3) of Clause 3 of the Agreement upon which the Respondents relied in the said proceedings in support of their right to rescind the Agreement provided as follows:- page 42, lines 14 to 27

> "Should any objection or requisition whatsoever be insisted on which the Vendor shall be unable or unwilling to satisfy or

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comply with he may (notwithstanding any attempt to remove or satisfy the same or any negotiation or litigation in respect thereof) by notice in writing to the Purchaser or his Solicitor rescind the contract upon the terms hereinafter mentioned in sub-clause (7) of this clause and the Purchaser shall thereupon return to the Vendor all papers belonging to the Vendor in his possession in connection with the sale. If the Purchaser within six days after receiving notice to rescind withdraws the objection or requisition the notice to rescind shall be withdrawn also."

page 43, lines 12 to 23

The said Sub-Clause (7) of Clause 3 of the Agreement provided as follows:-

"If the Vendor shall fail to produce a good marketable title to the said hereditaments approved of by the Purchaser's Solicitor or shall rescind the sale pursuant to the provisions of sub-clause (3) of this clause on or before the completion date the Vendor shall refund to the Purchaser the said deposit of the equivalent in Pounds Sterling of the sum of Forty thousand and Five hundred Dollars in the currency aforesaid hereinbefore referred to AND thereupon this Agreement shall be cancelled and the Purchaser relieved from all covenants on his part herein contained".

The question at issue in these proceedings is as to the true meaning and effect of the said sub-clause (3) of Clause 3 of the Agreement and as to its applicability in the events hereinafter stated which have happened.

pages 3, 4 and 5

4. In paragraphs 1 to 11 (inclusive) of his written Statement of Claim delivered on the 3rd November 1959, the Appellant pleaded (inter alia)

(i) the Agreement, whereby it was agreed that the Respondents should sell and the Appellant should purchase certain freehold land situated in the Southern District of the Island of New Providence described in the Schedule to the Agreement;

(ii) that upon the investigation of the Respondents' title to the land comprised in the Agreement, the Appellant by his Attorney made certain requisitions and objections to the title thereto;

(iii) that by letters dated the 10th and 24th August 1959 the Respondents by their Attorney requested the Appellant to withdraw the requisitions and objections to the title to certain tracts of land containing approximately 75 acres (hereinafter called "the 75 acre tracts") being a part of the tracts of land comprised in the Agreement;

(iv) that by letters dated the 15th and 31st August 1959 the Appellant by his Attorney refused to withdraw in accordance with the request to do so referred to above the requisitions and objections to the title to the 75 acre tracts;

(v) that by letters dated the 10th August and 1st September 1959 the Respondents declined to satisfy or make further efforts to satisfy the requisitions and objections to the title to the 75 acre tracts and still refused to do so and by their Attorney purported to rescind the Agreement in accordance with the provisions thereof and tendered a cheque for the sum of £14,876.0.7 being the sterling equivalent of the said sum of 40,500 dollars referred to in the said sub-clause (7) of Clause 3 of the Agreement (the sum paid by the Appellant to the Respondents on account of the purchase price in accordance with the Agreement) and that the Appellant by his Attorney refused to accept the same and returned the said cheque to the Respondents' Attorney.

5. By paragraph 12 of his Statement of Claim, the Appellant claimed that the requisitions and objections to the title to the 75 acre tracts should be complied with by the Respondents and that the Respondents had acted arbitrarily or capriciously and unreasonably by not doing so and were thereby not entitled to rescind the Agreement under the terms of sub-clause (3) of Clause 3 thereof set out above. page 5 lines 4 to 11

6. By their written Defence delivered on the 9th page 6

February 1960 the Respondents admitted the Agreement and the facts pleaded in paragraphs 1-11 inclusive of the Appellant's Statement of Claim but denied that the requisitions and objections referred to in paragraph 12 of the Statement of Claim should be complied with and/or that the Respondents had acted arbitrarily or capriciously and unreasonably by not so doing and said that they were entitled to rescind the Agreement under the terms of sub-clause (3) of Clause 3 thereof. By their said Defence the Respondents further stated that they had been and were then willing to return the said sum paid on account of the said purchase price.

7. The title to the 75 acre tracts originally offered to the Appellant by the Respondents comprised the under-mentioned Conveyances, Release and Affidavit:-

pages 76 to 79 — (a) a Crown Grant dated the 12th July 1881 and made in favour of one Concepcion Canuta Kemp (hereinafter called "the Crown Grantee");

page 75 to 76 — (b) a Conveyance on Sale dated the 16th March 1939 and made between Maximo Edward Kemp (therein described as being "of the City of Montreal in the Province of Quebec in the Dominion of Canada but at present of the City of Nassau in the Island of New Providence aforesaid the only son and heir-at-law of Concepcion Camuta Kemp deceased") as Vendor of the one part and the Honourable Harold George Christie as Purchaser of the other part;

Page (v) Page 26 lines 36 to 42. — (c) Conveyance from Honourable Harold George Christie to Austin Theodore Levy dated 5th July 1946;

Ditto — (d) Certificate of Probate Court dated 31st December 1951 with copy of Will of Austin Theodore Levy attached the grant being made to June Rockwell Levy as executrix;

Ditto — (e) Conveyance from June Rockwell Levy to the Harrisville Company dated 4th March 1955;

Ditto — (f) Release of Dower from June Rockwell Levy to the Harrisville Company dated 4th March 1955;

Page (iv) Page 26 lines 41 and 42 — (g) Conveyance from the Harrisville Company to the Respondents dated 27th February 1959.

(h) an Affidavit sworn on the 17th September 1958 by one Maude Malcolm McDonald testifying as follows:- page 80

"1. I knew and was well acquainted with the late Concepcion Canuta Kemp the wife of Edward Kemp late of the said City of Nassau

2. My father was a relative of the said Edward Kemp

3. Both the said Concepcion Canuta Kemp and her husband Edward Kemp died before my father who died in the year 1909".

8. The contents of the last-mentioned Affidavit (if true) established (inter alia) that the said Concepcion Canuta Kemp died before the Real Estate Devolution Act (Ch. 219 of the Laws of the Bahama Islands) came into force on the 22nd June 1914 and accordingly that if she died intestate her real estate vested directly in her heir on her death.

9. In a letter dated the 29th January 1959 from the Appellant's Attorney Mr.Foster Clarke (hereinafter called "Mr.Foster Clarke") to the Respondents' Attorney Mr. Harry B. Sands (hereinafter called "Mr. Sands") Mr. Foster Clarke raised the following requisitions in respect of the title to the 75 acre tracts namely:- pages 53 and 54

"There is a gap in the chain of title between the grantee who took title on the 12th July 1881 and Maximo Edward Kemp who conveyed on the 16th March 1939 to the Honourable Harold George Christie. It will be necessary to obtain the following:-

(a) Evidence of the death of Concepcion Canuta Kemp.

(b) If C.C. Kemp died intestate before 1913, then evidence that Maximo Edward Kemp is the only son and heir-at-law (as claimed in the deed dated the 16th March 1939).

(c) If C.C. Kemp died testate, production of the Will or certified copy thereof.

(d) If C.C. Kemp died after the 22nd June 1914, evidence of Administration or Probate of her estate and a Deed of Assent vesting title in the heir-at-law or persons beneficially entitled thereto".

Mr. Foster Clarke also raised certain other requisitions in respect of the 75 acre tracts in the last-mentioned letter, but the points raised by these other requisitions had been previously or were later dealt with by Mr. Sands, and were ultimately waived by Mr. Foster Clarke.

pages 55 and 56

10. Under cover of a letter dated the 11th February 1959 Mr. Sands resubmitted the above-mentioned Affidavit of Maude Malcolm McDonald which had been returned to him by Mr. Foster Clarke and enclosed also a further Affidavit sworn by the same deponent on the 11th February 1959 in which she repeated the statements in her earlier Affidavit set out above and further testified as follows:-

page 82

"4. I have had produced to me a death certificate in respect of one Charles Henry Edward Kemp who died in the year 1913. The said Charles Henry Edward Kemp was not the husband of the said Concepcion Canuta Kemp.

5. I know that the said Concepcion Canuta Kemp only had one son whose name was Edward Maximo Kemp".

11. In his above-mentioned letter of the 11th February 1959, enclosing the said further Affidavit of the said Maude Malcolm McDonald, Mr. Sands answered the four requisitions set out in paragraph 9 hereof as follows:-

page 55 lines 21 et seq. page 56 lines 1 to 8

"In answer to requisitions (a) (b) and (d) of your letter of the 29th ultimo I would refer you to the Affidavits of Maude Malcolm McDonald enclosed herewith. In this connection I would also draw your attention to the fact that on March 16th of this year the statement in the Conveyance by Maximo Edward Kemp that he was the only son and heir-at-law of Concepcion Canuta Kemp will be twenty years old and hence "sufficient evidence of the truth....."

(Section 3 (3) of the Conveyancing and Law of Property Act).

In answer to your requisition (c) I can only say that to the best of my knowledge no Will in the name of Concepcion Canuta Kemp has been offered for or admitted to Probate. I know of no basis for a suggestion that the deceased died testate. Some assistance is perhaps derived from the dictum of Lord Esher in Re Harrison, Turner v. Hellard (1885) 30 Ch. D. 390, C.A. at page 393: "There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce, - that he did not intend to die intestate when he has gone through the form of making a will." I submit that when it is shown that no will has been advanced the assumption must be in favour of intestacy, particularly in view of the lapse of time since the death of Concepcion Canuta Kemp".

12. In a letter dated the 12th February 1959 written to Mr. Sands, Mr. Foster Clarke stated that he could not accept the title to the 75 acre tracts. In a letter to Mr. Sands dated the 23rd February 1959, he stated that he was instructed by the Appellant to say that he was prepared to extend the date set for the completion of examination of title as set out in paragraph 3(4) of the Agreement and to give the Respondents a "reasonable time" in which to perfect title. In a further letter dated the 1st April 1959 to Mr. Sands Mr. Foster Clarke wrote that in respect of the 75 acre tracts, in reply to the above-mentioned letter from Mr. Sands of the 11th February 1959, he submitted as follows:-

page 56

page 57

page 57 lines 16 to 19

page 59

"(a) The Conveyance dated 16th March 1939 between Maximo Edward Kemp and the Honourable Harold George Christie cannot be regarded as a good root of title until after 16th March 1969.

page 59 lines 20 et seq.

(b) The Affidavit by Maude M. McDonald to the effect (i) that Concepcion Canuta Kemp died before 1909 and (ii) that Maximo Edward Kemp is the only son of the said Concepcion Canuta Kemp is not sufficient evidence to support the contention that the said Maximo Edward Kemp is the heir-at-law of the said Concepcion Canuta Kemp.

If corroborating evidence on these two points can be obtained from other sources and a declaration of the Court can be obtained to the effect that the said Maximo Edward Kemp is the heir-at-law of the late Concepcion Canuta Kemp and was entitled to convey the said land, then my client will be prepared to accept title".

page 30 line 45 – page 31

As the learned Judge rightly pointed out with regard to (a) above Mr. Sands had never put forward the deed of 16th March 1939 as the root of title.

page 61 – pages 80 and 81 – page 80

13. Under cover of a letter dated the 3rd April 1959 Mr. Sands supplied Mr. Foster Clarke with two further Affidavits in support of the title to the 75 acre tracts. In one of these Affidavits, (sworn by Richard William Sawyer on the 19th March 1959) the deponent after stating that he knew and was well acquainted with the late Concepcion Canuta Kemp the wife of the late Edward Kemp of the City of Nassau testified as follows:-

"The said Concepcion Canuta Kemp died in or about the year A.D. 1909. I cannot state definitely the year in which the said Concepcion Canuta Kemp died but I know that it was before the year 1914".

page 81

In the other of these Affidavits (sworn by William Edward Gladstone Pritchard on the 25th March 1959) the deponent after stating that he was 74 years of age and knew the late Concepcion Canuta Kemp the wife of Edward Kemp, who were both deceased, testified that "the said late Concepcion Canuta Kemp had two children only, namely Maximo Kemp and Lila Kemp".

pages 65 and 66

14. The Appellant did not accept the additional Affidavits mentioned in paragraph 13 above, as satisfying his said requisitions, and on the 21st July 1959 Mr. P.L. Adderley (hereinafter called "Mr. Adderley") who had by that date been instructed to act as attorney for the Appellant, wrote to Mr. Sands referring to the breakdown of certain previous negotiations for completion of the Agreement as to part of the land comprised therein, other than the 75 acre tracts, and requesting the Respondents to agree to extend the completion date on all the tracts of land covered by the Agreement until such time as the Respondents had satisfied the

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requisitions in connection with the 75 acre tracts. Mr. Sands replied to the last-mentioned letter on the 10th August 1959 stating that he was instructed to inform Mr. Adderley that the Respondents were unwilling to satisfy or to comply with any objections or requisitions which in the Appellant's opinion had not yet been already satisfied or complied with. Mr. Sands further stated in this letter that his Clients would not answer any further requisitions or satisfy any further objections which might be made concerning the title to the properties in question. Mr. Sands in the said letter further served notice that the Agreement was rescinded in accordance with the said sub-clause (3) of Clause 3 of the Agreement, the notice being in the following terms:- pages 66 and 67

> "If all outstanding objections and/or requisitions are not withdrawn within six days from the receipt hereof the deposit of £14,876.0.7 paid by Mr. Selkirk in respect of the purchase price will be refunded to him as provided by paragraph 3 (7) of the said Agreement and the said Agreement shall thereupon be cancelled....." Page 67 lines 22 to 28

15. Later, at the request of Mr. Adderley, contained in a letter dated the 15th August 1959, Mr. Sands, in a letter dated the 24th August 1959 written by him to Mr. Adderley withdrew the last-mentioned notice, but thereby served a new notice to rescind in substantially identical terms. pages 68 and 69 pages 69,70

16. By a letter dated the 31st August 1959 written to Mr. Sands, Mr. Adderley stated that he had been instructed by his Client not to withdraw all outstanding objections and requisitions but that his Client would be prepared to complete if either the said objections and requisitions with regard to the 75 acre tracts were satisfied or if an Order of the Court could be obtained to the effect that the title to the 75 acre tracts was one which the Appellant must accept. Mr. Sands acknowledged the last-mentioned letter on the 1st September 1959 stating that the Agreement was rescinded and enclosing a cheque for the above-mentioned sum of £14,876.0.7. This cheque was returned by Mr. Adderley under cover of a letter dated the 22nd September 1959. page 71 and 72 page 73 page 74.

17. The said proceedings were heard by Scarr J. on the 11th and 13th April 1961.

18. The only witness called on behalf of the Appellant in the proceedings before Scarr J. (who had

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all the above-mentioned correspondence before him) was Mr. Foster Clarke who stated (inter alia) that in pressing his above-mentioned requisitions on title he had wanted three points settled namely (in effect)

page 9 lines 46 to 50

(i) the death of the Crown Grantee;

(ii) the date when she had died meaning whether before or after 1914 and whether she had died intestate or otherwise;

(iii) whether or not the said Maximo Edward Kemp was the heir of the Crown Grantee.

page 10 line 1

Page 9 lines 43 to 44 page 9 lines 44 to 46.

He further stated in effect that though he might have been satisfied as to the death of the said Concepcion Canuta Kemp, if a death certificate proving her death had been obtained, he was "adamant" that the Appellant would have to "go to Court" to establish the relationship between the said Maximo Edward Kemp and the Crown Grantee, whether or not further corroborative evidence of such relationship was afforded by the Respondents.

19. Mr. Foster Clarke further tendered in evidence at the said hearing before Scarr J. certified copies of four Conveyances respectively dated the 8th June 1916, the 1st December 1919, the 21st June 1920 and 25th May 1920, to which one "Concepcion Canuta Kemp" or "Concepcion C. Kemp" was a party.

Pages 83 to 89

Page 8 line 11

Objection was taken to the admission of these documents in evidence, on behalf of the Appellant, at the said hearing before Scarr J. The learned Judge ruled that since the documents might have a bearing on the date when the Crown Grantee died, it was proper for them to be put in evidence and used in cross-examination of the Respondents' witnesses. The Respondents submit, however, that these documents have no relevance for the purposes of the present appeal, because no evidence was adduced at the said hearing before Scarr J. showing either that the Concepcion C. Kemp or Concepcion Canuta Kemp mentioned in the said four Conveyances was the same person as the Crown Grantee or that the Respondents or Mr. Sands had any knowledge of the existence of any of the said Conveyances at the time when either of the said notices to rescind were served on the Appellant.

Page 21 lines 42 to 50 Page 22 lines 1 to 37

20. The oral evidence adduced on behalf of the

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Respondents at the hearing before Scarr J., in the Respondents' submission, establishing the following facts (inter alia):-

(1) At the date of the Agreement, the Respondents were themselves engaged in purchasing the 75 acre tracts from the said Harrisville Company and their purpose thereof had not yet been completed. — Page 15 lines 30 to 36; Page 11 lines 14 to 20

(2) Mr. Sands was acting as attorney for the Respondents and Mr. Geoffrey A.Dinwiddy Johnstone (hereinafter called "Mr. Johnstone")* was acting as attorney for the Harrisville Company on the last-mentioned purchase. — Page 12 lines 36 to 38; *Page 15 lines 34 to 35

(3) As a result of requisitions on title made by Mr. Sands in connection with the last-mentioned purchase with respect to the death of the Crown Grantee, Mr. Johnstone searched the records at the Nassau Registry with a view to finding a death certificate of the Crown Grantee. His searches extended earlier than 1909 and later than 1940. His firm further caused searches to be made for her death in Montreal for this present century up to 1957. All such searches, however, were fruitless. — Page 11 lines 18 to 20; Page 15 line 41 and Page 16 lines 1 to 16.

(4) With a view to satisfying Mr.Sands' said requisitions, Mr.Johnstone accordingly arranged for the swearing of the four affidavits above referred to and supplied such affidavits to Mr. Sands; — Page 16 lines 17 to 20; Page 13 lines 17 to 20

(5) Prior to completion of the said purchase by the Respondents, Mr. Johnstone had informed Mr. Sands of the above-mentioned searches, which had been made by him or his firm with a view to establishing the death of the said C.C.Kemp and that he could produce no further information in this respect. — Page 16 lines 33 to 36; Page 12 lines 1 to 7; Page 14 lines 39 to 43

(6) Neither Mr. Sands nor Mr. Johnstone was aware of any of the said Conveyances respectively dated the 8th June 1916, 1st December 1919, the 21st June 1920 and the 25th May 1920 before the 11th April 1961. — Page 13 line 43; Page 17 line 16

(7) Though Mr.Sands could not swear whether a search was made by his own office in the Nassau registry for the death of the Crown — Page 14 lines 30 to 34

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Page 14 line 47 – Page 15 lines 1 to 13.

Grantee, it was the usual practice of his office and he personally made various enquiries as to her family.

(8) By the time when he finally served the said notices to rescind on the Appellant, Mr. Sands considered that there was in all the circumstances of the case nothing further he could usefully do to answer the Appellants said Requisitions.

Page 15 lines 19 to 21

21. At the said hearing before Scarr J., objection was taken on behalf of the Appellant to the admissibility of the evidence given by Mr.Johnstone as to the information supplied by him to Mr. Sands as to the title to the 75 acre tracts, in connection with the purchase thereof by the Respondents. The learned Judge, however, (in the Respondents' submission rightly) held that such evidence was admissible, in effect because the Appellant having alleged that the Respondents had acted arbitrarily, capriciously and unreasonably in not answering the Appellant's requisitions and in rescinding, any evidence relevant to the reasons for the rescission were relevant and in the learned Judge's view "the extent of Mr.Sands' knowledge of and about, and about the past history of, the items referred to in the purchaser's requisitions is the most relevant factor for the purpose of assessing his motives at the date of rescission and for deciding whether he was acting reasonably or otherwise".

Page 16 lines 24 to 26 – Pages 20 and 21 – Page 21 lines 13 to 19

22. In his reserved judgment given orally on the 28th April 1961 Scarr J. held that the Appellants' claim was not made out and accordingly found for the Respondents and gave judgment for the Respondents with costs to be taxed unless agreed. The learned Judge based his judgment principally on the following grounds (shortly summarised):

Pages 23 to 38 – Page 38 lines 14 to 25.

(a) that there was no dispute as to whether or not the literal terms of sub-clause (3) of Clause 3 of the Agreement were satisfied since the purchaser had insisted on compliance with his requisitions and the vendor was unwilling to comply;

Page 24 lines 34 to 45

(b) that although on the authorities it was clear that a vendor must not, under a condition such as that contained in the said sub-clause

Page 25 lines 15 to 20

(3), exercise his power of rescission capriciously arbitrarily unreasonably in bad faith or recklessly, he was bound only to take whatever reasonable steps he could to fulfil his contract and what was reasonable would depend upon the circumstances of each particular case - the learned Judge referred in this connection to Re: Dames and Wood (1885) 29 Ch. D. 626 C.A. at p. 630 Re: Starr Bowkett Building Society and Sibuns Contract (1889) 42 Ch. D. 375 C.A. Re: Des Reaux and Setchfield's Contract (1926) Ch. 178 Re: Jackson and Haden's Contract (1906) 1 Ch. 412 C.A. Duddell v. Simpson (1866) 2 Ch. App. 102 Merrett v. Schuster (1920) 2 Ch. 240 and Baines v. Tweddle 1959 2 All E.R. 724); Page 25 lines 35 to 37 Page 25 lines 20 to 30

(c) that although the vendor must have some good reasons for rescission under such a condition as aforesaid, he is under no duty to impart those reasons to the purchaser when exercising his power (applying Glenton and Saunders to Haden (1885) 53 L.T. 434 C.A. and Woolcott v. Peggie (1889) 15 App. Cas. 42 P.C.); Page 26 lines 1 to 11

(d) that the twofold demand contained in Mr. Foster Clarke's letter dated the 1st April 1959 both for corroborative evidence "from other sources" and for a declaration of the Court was not, on the face of it, a reasonable one; Page 31 lines 30 to 48

(e) that on the evidence when the Respondents served their second notice to rescind they did not act capriciously or arbitrarily nor in bad faith (bad faith having in fact never been alleged) nor had they acted without reasonable cause or recklessly without due regard to the rights of the Appellant and that to so hold would completely emasculate Clause 3 of the Agreement and Page 36 lines 20-29 Page 36 lines 24 and 25

(f) that Mr. Adderley's said letter of the 31st August 1959 modifying the Respondents' requirements did not constitute a withdrawal of the requisitions for the purpose of sub-clause (3) of Clause 3 of the Agreement Page 34 lines 42 to 46. Page 37 lines 3 to 8

23. By Order of the Supreme Court of the Bahamas Equity Side dated the 27th May 1961 the Appellant was granted leave to appeal to this Honourable Court Page 39

upon the conditions therein mentioned that within 2 months he paid £500 into court as security for the due prosecution of the Appeal and otherwise and within the like period took the necessary steps for procuring the preparation of the Record and its despatch to England.

24. On behalf of the Respondents it will be contended that the Judgment of the Supreme Court of the Bahamas was right and should be upheld for the following and other

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REASONS

(1) Objections or requisitions were insisted on by the appellant which the Respondents were unable or unwilling to satisfy or comply with and upon the Respondents serving a notice to rescind under sub-clause (3) of Clause 3 of the Agreement those objections or requisitions were not withdrawn and the Agreement was accordingly prima facie effectively rescinded by the Respondents' notice.

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(2) BECAUSE if the Respondents are to be precluded from asserting their said contractual right to rescind, they must be shown "to have had that shortcoming which, although not amounting to anything in the nature of dishonesty could be described as recklessness" (per Evershed M.R. in Baches v. Tweddle 1959 Ch. 679 at p. 689 following In Re Jackson and Haden's Contract 1906 1 Ch. 412).

(3) BECAUSE there is no evidence that the Respondents or their attorney Mr. Sands in their or his dealing with the Appellant or his attorneys did anything less than an ordinarily prudent man was bound to do.

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(4) BECAUSE the Appellant and his attorney suggested no further searches or enquiries which they required or desired the Respondents to make for the purpose of satisfying the requisitions material for present purposes.

(5) BECAUSE the demand of the Appellant's Attorney in his letter of the 1st April 1959 requiring not only corroborative evidence from other sources proving that the said Maximo Edward Kemp was the heir-at-law of the Crown Grantee

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but also a declaration of the Court to the like effect was unreasonable and oppressive, both because such corroborative evidence, if it had been possible to obtain it, might have afforded conclusive proof of this fact and for the additional reasons referred to in paragraph (8) below.

(6) BECAUSE the Appellant maintained his objections or requisitions after and the Respondents did not rescind until after the Statement in the said Conveyance dated 16th March 1939 that Maximo Edward Kemp was the only son and heir-at-law of Concepcion Canuta Kemp deceased had become twenty years old and was therefore sufficient evidence under Section 3(3) of the Conveyancing and Law of Property Act

(7) BECAUSE, had the Respondents complied with the Appellant's requisitions, they would have been involved in expenses far beyond what they ever contemplated or been involved in litigation and expense, which they never contemplated, and for avoiding which they reserved to themselves the power of annulling the Agreement, and the principle stated by Turner L.J. in Duddell v. Simpson (1866) 2 Ch. App. 102 at p. 107 should accordingly be applied.

(8) BECAUSE in so far as the Appellant in his attorney's said letters respectively dated the 11th February 1959 and 31st August 1959 was insisting that the question of title in dispute between the Appellant and the Respondents should be settled by decision of the Court, such decision of the Court would have been effective only inter partes and accordingly would have done nothing to perfect an otherwise imperfect title (if imperfect it was) and unwillingness to resort to the Court in these circumstances was itself sufficient to justify the Respondents in applying the said rescission clause.

(9) BECAUSE the Appellant knew at all material times the Respondents' reasons for rescinding or if he did not know then the Respondents were not bound to state their reasons and the principle laid down in Glenton and Saunders 53 L.T. (N.S.) 434 referred to by Chitty J. in

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Re: Starr-Bowkett Building Society and Sibuns Contract (1889) 42 Ch. D. 375 at p.382 should accordingly be applied.

(10) AND upon the further grounds stated in the oral judgment of Scarr J. in the Supreme Court of the Bahama Islands.

REGINALD W. GOFF

CHRISTOPHER SLADE

No. 43 of 1961

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF THE BAHAMA ISLANDS

B E T W E E N:

GEORGE ALEXANDER SELKIRK — Appellant

- and -

ROMAR INVESTMENTS LIMITED — Respondents

C A S E FOR THE RESPONDENTS

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Agents for:-

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