

Privy Council Appeal No. 42 of 1951

Margaret Young Horne and another - - - - - *Appellants*

v.

Roderick Alexander Ferguson (The Younger) and another - *Respondents*

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 22nd June, 1951, by which the appellants were adjudged jointly and severally liable to repay to the respondents a deposit of £1,000 paid under a contract for sale of land and to pay as damages the amount expended by the respondents in investigating the title of the land.

The appellant Fox owned certain land in the parish of Warwick, Bermuda. The appellant Mrs. Horne is his sister and was authorised by him to deal with his land. The respondents wished to purchase a piece of land on the south shore of Warwick parish and they entered into negotiations with Mrs. Horne. They made an oral agreement to purchase the land for £5,000 and each respondent paid a deposit of £500. The only written record of the agreement is contained in receipts for these deposits signed by Mrs. Horne. The receipt granted to Mr. Leseur is in these terms:

June 24th, 1949.

“Received from Herman F. Leseur the sum of Five Hundred Pounds Sterling as part payment on the purchase of a certain lot of land on the South Shore, in the Parish of Warwick, Bermuda; belonging to Richard Cleveland Fox and consisting of Two acres and Seventeen perches, measuring as follows: Five Hundred and Fifty feet on the North, One Hundred and Twenty feet on the East, Five Hundred and Thirty-two feet on the South and One Hundred and Eighty feet on the West.

The total purchase price to be Five Thousand pounds Sterling, balance of £4,000 to remain on mortgage for a period of Ten years or less at Buyers' option: it is also agreed that all interests paid during the above mentioned period is to be deducted from the purchase price, providing final settlement is made within the Ten year period, which date is to commence from the date of the mortgage.

If the Owner or Owners cannot give a clear title to the above property or proper rights of way then this contract is cancelled and all deposits and expenses are to be refunded to the purchasers. It is also understood that this lot of land is to be purchased jointly by Messrs. R. A. Ferguson, Jr., and Herman F. Leseur.

(Signed) MARGARET Y. HORNE.”

Postage Stamp
Value Sixpence.

LUCY E. A. BARNES.
MARJORY C. SMITH.

Their Lordships need not set out the terms of the receipt granted to Mr. Ferguson on 18th July, 1949: its terms are somewhat different but those differences are not material.

There were long delays and ultimately on 21st February, 1951, the respondents raised the present action. Paragraph 4 of the Statement of Claim sets out the grounds of action: "The second named defendant (herein called the owner) is unable to give good title to the said land and, notwithstanding repeated requests by the plaintiffs, he and/or the agent have neglected and refused and continue to neglect and refuse to perform his or their part of the said agreement". The defence was that the defendant Fox was able to give a good title to the land and that the defendants had not neglected or refused to perform their part of the agreement. At the trial the only issue was whether or not the defendant Fox owned and could give a good title to the whole of the land. In order to determine that issue it is necessary to go back to the will of Adrastus Henry Astwood, who died in 1901.

The testator owned a tract of land which was admittedly bounded on the north by a public road, on the south by the ocean and on the west by a straight boundary running from the road to the ocean. The eastern boundary was not proved: the testator's land certainly extended to a certain line and the area enclosed by that line and the three admitted boundaries is 19.9 acres. There is some rather vague evidence that he may have owned some more land to the east of that line but that was not proved.

The testator devised his land in three parcels. By clause 3 of his will he devised to his eldest son Samuel a tract "supposed to contain about twelve acres" bounded on the north, west and south by the admitted boundaries of his land and "on the east by other land of my own next hereinafter devised". The appellant's title derives from this bequest and the question whether he can give a good title to the whole of the land sold depends on the location of the eastern boundary of the land devised by the above mentioned clause 3. By clause 4 he devised to his son Frederick a parcel "supposed to contain about four acres". This land was described as bounded "on the west by the land hereinbefore devised to Samuel". By clause 5 he devised to his other children a parcel "supposed to contain about eight acres" and bounded "on the west by other land of my own". There was no evidence of there ever having been any physical boundary between the land bequeathed by clause 3 and that bequeathed by clauses 4 and 5 and there was no evidence of any act of possession or other conduct of interested parties from which the situation of the boundary could be inferred. It was assumed on both sides that the boundary is a straight line running parallel with the western boundary of the testator's land and the question was where this line was to be drawn. The appellant's surveyor drew his line on the footing that, neglecting a small strip belonging to the War Department, a full twelve acres had been devised by clause 3 of the will. If this line were correct then the appellant would have a good title to the whole land which he purported to sell because the whole of this land lies to the west of this line. But if clause 3 of the will carried less than twelve acres then the boundary must have been farther to the west than the appellant's line and the appellant would not have a good title to the eastern part of the land which he agreed to sell.

The land devised by clause 4 lies to the north of that devised by clause 5 and the respondents are only directly concerned with the boundary between the part of the clause 3 land sold to them and the adjoining part of the clause 5 land. But if the whole eastern boundary of the clause 3 land is one straight line it is plain that the determination of the boundary between the clause 3 land and the clause 4 land or the rest of the clause 5 land might vitally affect the land agreed to be sold to the respondents. Some time after the agreement to sell the respondents or their solicitor found that there was a litigation with regard to the boundary between the clause 3 and the northern part of the clause 5 land. In that litigation judgment was given against the owners of the clause 3 land and the appellant's surveyor in this action admitted that the line put forward by the successful

party in the other case runs (or if prolonged would run) 100 feet to the west of his line so that if that line were correct the appellant could not give a good title to the easterly part of the land which he agreed to sell.

In their Lordships' judgment the matter stands thus. The testator devised three parcels of land "supposed to contain" "about twelve acres" "about four acres" and "about eight acres" making about twenty-four acres in all, and he is only proved to have owned twenty acres. The burden is on the appellant to show that he has a good title to the whole of the land that he agreed to sell, and he has not got a good title to the whole of that land unless the devise under clause 3 can be held to have carried a full twelve acres of land. It was argued that clause 3 should be so construed and that, if the testator did not own as much as twenty-four acres, then the loss should have fallen on the devisees under clauses 4 and 5. Their Lordships reject this argument. The three clauses are in the same form and in each what is devised is a parcel "supposed to contain about" a stated number of acres: that is a very different thing from a devise of a stated number of acres. The absence of any evidence that the appellant or any of his predecessors since 1901 ever possessed or exercised any right over the land which he agreed to sell and the litigation with regard to the northern part of the east boundary of the clause 3 land afford in their Lordships' judgment ample justification for holding that the appellant failed to offer a good title to the land which he agreed to sell.

Before their Lordships a new argument was submitted for the appellants. It was said that the action was premature because the appellants were not in breach of contract when it was raised. Time was not of the essence of the contract. After delivery of the appellant's documents of title there was no formal requisition but only vague indication that the respondents were not satisfied about the boundary and there was no notice to the effect that unless the respondents' objections were met by a particular date they would treat the contract as at an end. It may be that if the appellants had taken this point in their defence they would have had some success and would have had a further opportunity to make a good title, but there is no indication that such a further opportunity would have been of any advantage to them. Sooner or later the case must have gone to trial on the merits and in their defence the appellants chose not to take this technical point but to join issue on the merits. Now that they have failed on the merits it is in their Lordships' judgment too late to take this preliminary point.

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

In the Privy Council

MARGARET YOUNG HORNE
AND ANOTHER

v.

RODERICK ALEXANDER FERGUSON (THE
YOUNGER) AND ANOTHER

DELIVERED BY LORD REID

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