

**Kenneth McKinney Higgs and Another substituted for
Clotilda Eugenie Higgs (deceased) – – – – –** *Appellants*

v.

Nassauvian Limited – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE BAHAMA ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 14TH OCTOBER 1974

Present at the Hearing :

LORD CROSS OF CHELSEA

LORD SALMON

SIR HARRY GIBBS

[Delivered by SIR HARRY GIBBS]

This is an appeal from a judgment of the Court of Appeal of the Bahama Islands affirming a judgment of the Supreme Court of the Bahama Islands (Smith J.) given in favour of the respondent, Nassauvian Limited, in proceedings brought under the Quieting Titles Act 1959.

The proceedings were commenced by a petition presented to the Supreme Court on 23 August, 1967 by the respondent which claimed to be the owner in fee simple in possession of (1) an undivided one-fourth part of or interest in a tract of land, 92·33 acres in area, on the Island of New Providence ("Tract A"), and (2) a parcel of land comprising 12·52 acres adjacent to Tract A ("Tract B"). The respondent's claim to each tract of land was based on a documentary title. Adverse claims were filed by Clotilda Eugenie Higgs and Roger Charles Adderley, stating, in each case, that the claimant claimed an undivided interest in fee simple in the lands the subject of the petition. These statements of the adverse claims did not reveal the real issues in the case, for although it is uncontested that the adverse claimants have an undivided interest in Tract A, their claims were not based on that fact but on the contention that they had acquired a possessory title to the lands in both tracts, and on the further assertion that the documentary titles on which the respondent relies are invalid.

Smith J. found against the adverse claimants on both issues. An appeal was brought to the Court of Appeal by both adverse claimants, but Roger Charles Adderley withdrew his appeal and has played no part in the subsequent proceedings. The decision that the respondent had established a valid documentary title was not challenged either before the Court of Appeal or before their Lordships' Board. On the question

whether the adverse claimants had acquired a possessory title, the Court of Appeal agreed with the conclusion of Smith J. Clotilda Eugenie Higgs obtained leave to appeal from the decision of the Court of Appeal but she has since died and her executors have been substituted in her place as appellants.

It does not appear to have been in contest that Tract A formed part of a larger area which was in 1873 granted to one Alliday Adderley. In 1890, the land was conveyed to Joseph Richmond Adderley, William Campbell Adderley, Daniel Dewellmair Adderley and Sarah Ann Bain, the four children of Alliday Adderley, as tenants in common. Daniel Dewellmair Adderley died in 1934, leaving a will whereby he appointed his natural son Frederick William Adderley his executor and devised to his children, Richard Crowther Adderley, Clotilda Eugenie Higgs, Roger Charles Adderley and Mary Ellen Adderley, "one quarter interest in the Goodman tract of land situate in the Western District of the Island of New Providence, to hold the same as tenants in common and not as joint tenants, in fee simple, subject however to the life interest in the same of my natural son Frederick William Adderley". Frederick William Adderley died in 1945. It is conceded that since that date Clotilda Eugenie Higgs and Roger Charles Adderley have each been entitled in possession to an undivided share of at least one-sixteenth in Tract A. Their Lordships do not find it necessary to consider whether their interest has been enlarged by succession to the shares of any of the other co-owners upon their deaths, because it is clear that neither of them has any documentary title to the one-fourth interest claimed by the respondent. The title of the respondent to the undivided one-fourth interest in Tract A is traced back to William Campbell Adderley who, as has been mentioned, became in 1890 one of the four tenants in common of the land. In 1892, the one-fourth interest of William Campbell Adderley in the land was sold and conveyed by the Provost Marshal of the Bahama Islands, acting under the authority of a writ of execution, to one James Austin Thompson. As part of their attempt to assail the documentary title of the respondent, the adverse claimants at the trial attempted to establish that in 1890 Joseph Richmond Adderley and William Campbell Adderley had agreed to dispose of their interests to Daniel Dewellmair Adderley and Sarah Ann Bain, and that in 1892 William Campbell Adderley had no interest in the land which the Provost Marshal could sell, and further, that the debt, the subject of the execution, had been paid, but these facts were not established and the attack on the respondent's title failed. On 2 November 1939 the successors in title to James Austin Thompson conveyed the interest in Tract A to the Caves Company Limited. Some evidence was given on behalf of the adverse claimants that Tract B had also formed part of the Adderley estates, but the only conclusion possible upon the whole of the evidence is that Tract B was Crown Land until 15 May, 1940 when it was granted to the Caves Company Limited. Subsequently, the undivided one-fourth interest in Tract A and the entire interest in Tract B were transferred by the Caves Company Limited to the trustees of the will of Sir Harry Oakes and by them to the respondent.

The appellants' case, as originally presented, was that the adverse claimants and their predecessors in title had been in exclusive possession of the land for more than 20 years before the present proceedings were commenced in 1967, and that the title of the respondent is barred by the Real Property Limitation Acts of 1833 and 1874 (U.K.) which were declared in force in the Bahama Islands by Acts 9 Vic. C.9. and 40 Vic. C.2 of that colony (as it then was). However, it was conceded in argument that the limitation period fixed in respect of actions for the recovery of land brought by the Crown is 60 years (Act 36 Vic. C.6 of

the Bahama Islands), and that to establish a title to Tract B the appellants would have to prove that their predecessors in title had been in possession for 60 years, unless of course, a period of 20 years' possession after 15 May, 1940, when the land ceased to be Crown land, could be established.

It may be accepted that the respondent's predecessors in title were not in possession of Tract A during a period of more than 20 years from the date when they first became entitled to possession by virtue of the conveyance to James Austin Thompson on 25 May, 1892. Although no evidence was directed to the question whether the Crown was ever in possession of Tract B, it may be proper to infer that over a period exceeding 60 years it was not in actual possession of that tract. According to the evidence it was not until 1950 and 1951 that any predecessor in title of the respondent did any act indicating possession of the lands. In those years concrete markers were erected on the lands to indicate that they belonged to the Oakes estate, which controlled a number of companies, including the Caves Company Limited. The view was taken in the courts below that some importance could be attached to the facts that in 1937 and 1938 workmen employed by Sir Harry Oakes put a road through the lands and that between 1940 and 1959 this road was blocked by employees of the Oakes companies who once each year put a barrier of stakes across it. However, in 1937 and 1938 neither Sir Harry Oakes nor any of his companies had any interest in the land—the workmen who built the road were trespassers—and there is no evidence that the barriers, which were erected after the Caves Company Limited had acquired its interest, were erected on the lands themselves; they may well have been erected on adjoining lands. Accordingly it is right to say that, for many years before 1950, the persons having the documentary title did nothing to exercise their right to possession of the subject lands. However, time does not run against an owner of land simply because he is out of possession for the limitation period. The law on this point was stated by Parke B. in *Smith v. Lloyd* (1854) 9 Ex. 562 at p. 572; 156 E.R. 240 at p. 245 in a passage cited with apparent approval in *The Trustees Executors & Agency Co. Ltd. v. Short* (1888) 13 App. Cas. 793 at p. 799 as follows:

“We are clearly of opinion that the statute applies, not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute.”

The crucial question in the present case therefore is whether the courts below were correct in holding that it had not been established that the appellants' predecessors in title had been in possession of the land for the required period. This question is one of fact, and there are concurrent findings of the courts below against the appellants. The settled practice of their Lordships is to decline to review the evidence for a third time where there are concurrent findings of two courts on a pure question of fact, unless there has been some miscarriage of justice or violation of some principle of law or procedure. In the present case, for reasons which will appear, their Lordships think that there may have been some misapprehension of principle in the courts below and that the Board should therefore consider for itself whether the findings made below ought to stand.

The land in question—the total area comprising both tracts—was for the most part arable although some of it consisted of pine barren. It was not fenced or otherwise enclosed. There was evidence that at various dates

between 1920 and the date of the trial, the land was farmed by Daniel Dewellmair Adderley and his descendants and their tenants. The farms produced small crops of various kinds, particularly vegetables. The practice of most of the farmers was to cultivate a small area, to reap the harvest, and then to move on to another area leaving the first to become overgrown. There was some evidence that fruit trees were planted but it was not made at all clear where or how extensive the orchards were or how long they survived. There was also evidence that lime burning or coal burning was carried out on the land. Although it is unnecessary to repeat the effect of the evidence in full detail, it is desirable to refer to some of the most important parts of it. Clotilda Eugenie Higgs, who at the date of the trial was aged 79, said that her father, Daniel Dewellmair Adderley, had possession of the land from 1890 until his death in 1934. She qualified this by saying that it was her father and her aunt Sarah Bain who were in possession in 1890. In part, this evidence was hearsay—a circumstance which, under the Quieting Titles Act 1959 (section 8 (1)) did not render it inadmissible but which of course affected its weight—since she herself did not go on the land until 1920. She said that her father farmed the land from 1920 until his death, that he was always on the land from about 1922, that he had about six tenants whom she named, and that after his death the tenants stayed on the land and worked it continuously. Although some of her general statements were to the effect that the whole of the land was in possession, it is clear that she cannot have meant that it was physically occupied, for she said:

“Most of the farming was on the south—now the Stapleton Gardens. There was farming also to the west. I cannot say the size of the farms. Farming was done by keeping moving through the land—no spot was ever continuously farmed. Women farmed up to 2 acres—men up to 3 acres or 4. They go back to the old farms for vegetables. The entire land could not be covered.”

The other adverse claimant, Roger Charles Adderley, was on the land between about 1908–1909 and 1914–1915; he said that his father had let the land to tenants who grew crops such as tomatoes and cassava. One of the tenants named by Mrs. Higgs, William Knowles, gave evidence which in some material respects was at variance with that given by the adverse claimants. William Knowles said that he worked on the lands between 1930 and 1948. He first worked in the neighbourhood in 1912 and at that time no one worked the Adderley land. It appears from his evidence that he cultivated one small farm after another and in so doing, traversed the subject land from side to side. Another tenant, Etheline Maylock, who worked about 1½ acres from 1932 to 1942, said that during that period there were other tenants on the land. In apparent conflict with the evidence of these witnesses, and with that of other witnesses to which reference will later be made, was that of Edward Knowles, who was called on behalf of the respondent, and who said that in 1937 and 1938, when the road was put through the land, he saw no farms on it. Another tenant, Dudley Johnson, worked from 1943 to 1960 partly on the subject land and partly on adjacent Crown land; he had a farm of from 2 to 3 acres and would cut and burn the land and then move on. Although his evidence was rather confused, he apparently meant to say that Leonard Higgs (the husband of Clotilda Eugenie Higgs) farmed most of the land and that there were in addition a number of tenant farmers. Oliver Vanstock Higgs, a son of Clotilda Eugenie Higgs, gave evidence that from 1929 or 1930, when at the age of about 6 he first went on to the land, both Tract A and Tract B were quite extensively farmed by his father and by tenants, some of whom planted trees. He said that he still had tenants and was still farming Tract A; indeed his family was now farming a larger area than in the 1940's; they also had quarried the

land since 1950. If accepted, his evidence would lend considerable strength to the appellants' case, but in one respect it appeared patently unreliable. At the time of the trial, as Smith J. who inspected the lands saw, quarrying had taken the place of the former farming, all traces of which had been completely obliterated. Further, one of the respondent's witnesses, Samuel Plante, whose evidence the trial judge said that he had no reason to disbelieve, visited the land in 1958 and saw no signs of farming on Tract A, although there was quarrying there; he saw no activity at all on Tract B before 1965. Osborne Higgs, another son of Clotilda Eugenie Higgs, said he had been on the land since the 1930's. He said that his father farmed a vast area of the land, that he remembered six farms on the land in the early war years and that he himself farmed about 10 acres after 1950. Another brother, the appellant Kenneth Higgs, gave evidence (which was heresay) that the whole of the land was used by his grandparents for money crops, that his parents continued this type of farming until 1930, that all the land had been farmed up to the 1930's but has since been gradually overgrown. He asserted that his family had been in undisturbed possession but this, of course, could not have been true of the period after 1951 when the respondents' predecessor in title entered to put the markers on the land. Two other witnesses also gave evidence, but with little particularity, that there had been farming on the land by the Higgs family and their tenants at various times. Finally, there were tendered aerial photographs which, according to the explanation of them given in evidence, showed that in 1943 roughly 40% of the usable land in both tracts was being cultivated and that in 1958 there was some occupation and clearing but fewer farms than in 1943.

It is clear that the evidence given on behalf of the adverse claimants would not have supported a finding that the adverse claimants and their predecessors were in possession of Tract B for the requisite period of 60 years before 15 May, 1940, and they could not have had exclusive possession for 20 years after that date, because the respondent's predecessor exercised its right to possession in 1951. However, if that evidence could have been accepted in its entirety, it might have established that over a period extending from 1920, or even earlier, until 1951, the adverse claimants and their predecessors were in actual possession of parts of Tract A and, indeed, according to some of the assertions made, of the whole of that tract. The fact that for part of this period—before 1934 when Daniel Dewellmair Adderley died and after 1945, the date of death of Frederick William Adderley, the life tenant—they were entitled to possession as co-owners would not have prevented them from establishing a possessory title—*Paradise Beach & Transportation Co. Ltd. v. Price-Robinson* [1968] A.C.1072. However, the body of evidence presented by the adverse claimants was imprecise and lacking in detail; it was not completely consistent within itself and it was in certain material respects contradicted by other evidence. The trial judge was not bound to accept it; on the contrary it was open to him to take the view—which indeed has much to commend it—that the evidence was vague, nebulous and unreliable and insufficient to discharge the burden of proof resting on the adverse claimants.

However, the judges of the Court of Appeal, in affirming the decision of the trial judge, placed considerable reliance on the decision of their Lordships' Board in *Ocean Estates Ltd. v. Pinder* [1969] 2 A.C. 19, and there are passages in their judgments which suggest that they regarded that decision, which Bourke P. described as "the *locus classicus* in quieting investigations, on the question of rotational or peripatetic use of open land", as determinative of the appeal. Although the trial judge did not expressly mention *Ocean Estates Ltd. v. Pinder*, some of the expressions which he used suggest that he also may have taken the

view that sporadic farming over portions of a large tract of land could never be enough to establish possession of the whole tract. In *Ocean Estates Ltd. v. Pinder* the Board was concerned with a claim made by the defendant in that case to a possessory title to a plot of land of 144 acres on New Providence Island, part of which was unfit for cultivation and part of which consisted of poor quality scrub land. The defendant had grown vegetables on various small plots on the land and had also planted some fruit trees on part of it. The defendant's method of farming was similar to that described by some of the witnesses in the present case. The conclusion of the Board on the matter now relevant was expressed by Lord Diplock as follows (at pp. 23-4):

“On these findings, the defendant's claim that he had acquired a possessory title to the whole or any part of the land in suit or, what is the same thing, that the plaintiffs' title was extinguished must fail. So far as any claim to the whole parcel of land is concerned he established no dispossession of the plaintiffs or their predecessors in title in respect of the uncultivable swamp, and his own occupation of the cultivable scrub land was not exclusive during the period up to 1946 when Mr. Chipman in the right of the Chipper Orange Co. Ltd. was concurrently cultivating fruit trees on the land or inconsistent with the purpose for which the plaintiffs held the land after 1950, when they exercised powers of dominion over it in 1957 and 1959-60 by going on to the land for the purposes of inspecting and surveying it for future development. So far as concerns any claim to any individual plot which the defendant cultivated from time to time under his peripatetic system of market gardening, his occupation of the plot, though it may have been exclusive while the plot was under actual cultivation, was not continuous. During any period when he was not cultivating any particular plot the owners of the land would have no continuing cause of action against him. When he returned to any plot, a fresh cause of action would arise and the limitation period of 20 years would start anew”.

In this passage, Lord Diplock was discussing the facts of the particular case before the Board, and the members of the Court of Appeal were wrong in viewing it as laying down a general principle that to establish possession of an area of land, a claimant must show that he has made physical use of the whole of it, or as deciding that a farmer can never establish possession of an area of land over parts of which he works in rotation. It is clearly settled that acts of possession done on parts of a tract of land to which a possessory title is sought may be evidence of possession of the whole. In *Lord Advocate v. Lord Blantyre* (1879) 4 App. Cas. 770 at p. 791 Lord Blackburn said:

“And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it and what the kind of possession proved was.”

This rule is not applicable to a question of undefined and disputed boundary (*Clark v. Elphinstone* (1880) 6 App. Cas. 164 at pp. 170-171; *West Bank Estates Ltd. v. Arthur* [1967] A.C. 665 at pp. 679-680), but this does not mean that acts done on part of the land are only relevant to prove possession of the whole if the land is enclosed by a wall or other physical barrier. The property claimed by possession may be sufficiently defined in other ways, e.g. where the claim is to trees in a

belt of woodland (*Stanley v. White* (1811) 14 East 332; 104 E.R.630), to the bed or foreshores of a river (*Jones v. Williams* (1837) 2 M & W 326; 150 E.R. 781); (*Lord Advocate v. Lord Blantyre, supra*) or to the right to fish in a river (*Lord Advocate v. Lord Lovat* (1880) 5 App. Cas. 273 at p. 289). In the present case, although the two tracts were not physically enclosed, their boundaries were known and undisputed, and possession of the whole tracts might have been established by appropriate evidence of acts done on parts of them. The question was one of fact and degree and depended upon a consideration of all the circumstances of the case.

However, it does not appear from the reasons given by the trial judge that he reached his conclusion simply in obedience to a supposed principle of law rather than by considering whether the evidence given was sufficient to make out the case of the adverse claimants. It has already been mentioned that he indicated his acceptance of evidence contrary to some of that given on behalf of the adverse claimants and it is obvious that he could not have accepted as correct everything that was said by their witnesses. His concluding words—"It is impossible to say on the evidence that the petitioners have been ousted so far as the one-fourth interest they claim is concerned . . ."—suggest that the basis of his decision was that the evidence which he accepted was insufficient to discharge the onus of proof that rested on the adverse claimants. It is true that in those words he did not mention Tract B, but it is clear from the judgment as a whole and from the order that he made that this was a mere slip, and in fact the evidence of possession of Tract B was weaker than that relating to Tract A. Their Lordships have reached the conclusion that it has not been shown that the trial judge failed to consider the question of fact which he had to decide, or that there is any ground for interfering with his decision of that question.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

In the Privy Council

KENNETH MCKINNEY HIGGS AND
ANOTHER SUBSTITUTED FOR
CLOTILDA EUGENIE HIGGS
(DECEASED)

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NASSAUVIAN LIMITED

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