

THE BELL'S ASBESTOS COM- } APPELLANTS;
 PANY (DEFENDANTS)..... }

1894

*Feb. 27, 28

*May 1.

AND

THE JOHNSON'S CO., (PLAINTIFFS)...RESPONDENTS ;

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR
 LOWER CANADA (APPEAL SIDE).

Action en bornage—R. S. Q. arts. 4153, 4154, 4155—Straight line.

Where there is a dispute as to the boundary line between two lots granted by patents from the crown, and it has been found impossible to identify the original line but two certain points have been recorded in the Crown Lands Department, the proper course is to run a straight line between the two certain points. R. S. Q. art. 4155.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), confirming the judgment of the Superior Court.

This was an action *en bornage* taken in the Superior Court for the District of Arthabaska, on the 9th day of February, 1889, to establish the boundary between that part of the lot 27 in the sixth range in the Township of Thetford, which joins the south-east half of the lot number 27 in the fifth range of the same township, the defendants, appellants, being the proprietors of the latter lot, and the plaintiffs, respondents, of the former.

The defendants pleaded the general issue.

The material facts of the case are fully stated in the judgment of the court.

During the trial surveyor experts were appointed by the parties in the case to visit the locality, but they did not agree as to the line of the original survey.

On the 30th November, 1891, the court at Arthabaska ordered the *bornage* to be made according to

*PRESENT—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

1894 the pretensions of the respondents, that is to say : by
 THE BELL'S following the direct line between the two nearest
 ASBESTOS points recognized by both parties, and condemned the
 COMPANY appellants to pay the costs of the action, and the costs
 v. of the *bornage* to be borne in common by the two
 JOHNSON'S parties.
 COMPANY.

The surveyor, Ashe, was appointed by the court to carry out this judgment and to draw a line of division between the two lots. This was done, and on the 9th February, 1892, the court homologated the report of the surveyor, and condemned the defendants to pay \$7,145 in damages for the value of the asbestos which they had taken from that part of the property which the court decided to belong to the respondents.

Stuart Q.C. and A. Hurd for appellants.

Irvine Q.C. and J. Lavergne for respondents.

The judgment of the court was delivered by :

TASCHEREAU J.—The litigation in this case originated by an ordinary action *en bornage*, with a claim for damages. The parties are proprietors of contiguous lots in the township of Thetford, which are divided by the concession line between the fifth and sixth ranges of the said township, and the controversy is as to the situs of that line. The respondents contend that the said line should be a straight one from the corner of lots 25 and 26 in the fifth range of Thetford, to the corner of Coleraine, Thetford and Ireland; this is the line marked "DB" on the plans in the record. This contention has prevailed in the two courts below. The appellants contend that the straight line "DB" is not correct, but that a line called the Legendre line should be the boundary between their property and the respondents'; that whether this Legendre line, as traced in 1878, was then erroneous or not cannot affect this

case, as the respondents got their title after that, and that title is based on that line, whether straight or angular.

The line in question, which is in the range or concession line between the fifth and sixth ranges of Thetford, was originally run in the year 1800 by one Jeremiah McCarthy. His report and field notes have been produced in this case which show the bearings on which the line was run, and also show it to be a straight line. After a lapse of a number of years, during which time no settlements were made in this part of the township, the property began to become valuable for the asbestos mines which were then being discovered. It became necessary then to arrange the lines in some satisfactory way. In the particular neighbourhood where the lots belonging to the parties are situated fires had passed over the line and destroyed pickets and other marks indicating the original survey. In 1878 Mr. J. B. O. Legendre, surveyor, was instructed to retrace this line. By his report he claims to have passed over the original line run by McCarthy, and in consequence the result was a straight line. Upon this last survey grants were made of lot no. 27 in the sixth range, and 27 in the fifth range, to the persons from whom the parties in the case hold title.

In 1882 judgment was rendered ordering a side line to be run between lots 26 and 27 in the fifth range. The suit was in the case of *King v. Hayden*, Hayden then being proprietor of the lot now belonging to the appellants. This survey, made under order of the court, was done by Legendre, the same above mentioned, and one Towle. The respondents had no interest whatever in this line and had no notice that a survey was to be made. In making this survey the surveyors, being unable to find the post dividing the lots 26 and 27 of the fifth range, professed to retrace the

1894
 THE BELL'S
 ASBESTOS
 COMPANY
 v.
 JOHNSON'S
 COMPANY.
 ———
 Taschereau
 J.
 ———

1894

THE BELL'S
ASBESTOS
COMPANY
v.
JOHNSON'S
COMPANY.

Taschereau
J.

survey made by Legendre four years before. On the day following one of the shareholders of the Johnson's Co., being on the ground, noticed this retraced line and perceived that it was not what he considered the original line and called the attention of Legendre to it, and he re-measured the line and retraced it, marking the place with iron bolts. This second operation, he says, indicates, as nearly as he could show it, the line run by him in 1878. He says that it is the exact line or very near it.

It is this operation of Towle and Legendre which has give rise to all the trouble the parties have had in this case.

A very large amount of evidence has been given tending to show where the original Legendre line was run. It has been shown by a number of people that Legendre has given conflicting statements as to where this line was and all the evidence which has been taken on one side or the other has been to show whether or not the line run by Legendre can now be found with certainty.

The law regulating these matters is to be found in the Revised Statutes of Quebec, articles 4153, 4154, 4155 as follows:—

4153. Whenever it happens that the posts or boundary marks between any lot or range of lots have been effaced, removed or lost, the Land Surveyor is hereby authorized to administer the oath to witnesses and to examine them for the purpose of ascertaining the former boundaries. 45 V. c. 16, s. 71.

4154. If such former boundaries cannot be ascertained such Land Surveyor shall measure the true distance between the nearest undisputed posts, limits or boundaries, and divide such distance into such number of lots as the same space contained in the original survey, giving to each a breadth proportionate to that intended in the original survey as shown on the plan and field notes thereof of record in the office of the Commissioner of Crown Lands. 45 V. c. 16, s. 71.

4155. If any part of any outside line, central line, concession or range line intended in the original survey to be straight has been obliterated or lost the Land Surveyor then runs a straight line between the two

nearest points or places where such line can be clearly and satisfactorily ascertained and plants such intermediate posts or boundaries as he may be required to plant in the line so ascertained, and the limits of each lot so found are the true limits thereof. 45 V. c. 16, s. 72.

1894

THE BELL'S
ASBESTOS
COMPANY

v.

JOHNSON'S
COMPANY.

Taschereau
J.

The contention of the appellants is that there are three certain points established on the line drawn by Legendre in 1878; one is a birch tree between lots 25 and 26, the other is the point "K" where a bolt was planted at the time of the survey made by Towle and Legendre, and the third is the post marking the division between the townships of Ireland, Thetford and Coleraine.

This would make a deviation from a straight line and an angle at the point "K."

The plaintiffs, respondents, contend that "K" has not been identified as being a point on Legendre's line and that the only two certain points are the birch tree and the Ireland post, and that a straight line should be run between these two points, which is the view of the case adopted by the courts below.

It is clearly explained that the idea of placing the bolt at "K" arose from the fact that there was a tree near that place upon which there was a blaze. Legendre in the most positive way swears that the blaze on this tree was not made by him and in no way indicated his line.

The witness O'Neil explained that this blaze on the tree near the point "K" was made whilst he was going over the line for the purpose of identification previous to its being patented to Robert G. Ward, and it was not made by him and was on the line as he located it.

The whole case as to the exact position of the line made by Legendre is extremely uncertain and the attempt to identify it with the line claimed by the appellants has entirely failed. The only course to adopt was to follow the straight line between the two certain

1694 points as originally drawn by McCarthy in 1800, as
 THE BELL'S was done by both judgments of the courts below.
 ASBESTOS
 COMPANY
 v.
 JOHNSON'S
 COMPANY.
 —
 Taschereau
 J.
 —

Again, the patents of both parties were granted on what was supposed to be a straight line and which was recorded as such in the Crown Lands Department, in the reports and field notes of the surveyors, McCarthy and Legendre.

This gives the respondents a right to have a straight line, and even if Legendre on his survey through error deviated from the straight line, they are, nevertheless, entitled to have one. The point "K" which forms the corner or angle and is the point in the line claimed by the appellants which extends furthest into the property of the respondents is eighteen feet from the straight line.

Now, whilst there is, it is true, no such law as that a division line between two properties should be a straight one, yet, under the circumstances in this case, the *onus probandi* was, it seems to me, clearly on the appellants to establish such an anomaly as they contend for. And were I to pass on the case, in first instance, I would say that they have failed to do so. The Superior Court appointed two surveyors to report on the contentions of the parties. These gentlemen could not agree and filed separate reports. The Superior Court adopted that one of them which supports the straight line and the respondents' views, Ashe's report. The Court of Queen's Bench confirmed that judgment. The appellants would now have us set aside those judgments and Ashe's report, and adopt the other expert's conclusions. He has failed to convince me on what ground we could do this. I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Hurd & Fraser.*

Solicitors for respondents: *Laurier, Lavergne & Côté.*