1903
*Dec. 10, 11.
1904
*Feb. 16.

THE DOMINION IRON AND STEEL COMPANY (DEFENDANTS)..... } APPELLANTS.

AND

DUNCAN McLENNAN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Expropriation of land—Statutory authority—Manufacturing site—Survey—Location—Trespass.

The Town of Sydney was empowered by statute to expropriate as much land as would be necessary to furnish a location for the works of the Dominion Iron Steel Co., a plan showing such location to be filed in the office for registry of deeds and on the same being filed the title to said lands to vest in the town. Engineers of the company were employed by the town to survey the lands required for the site and to make a plan which was filed as required by the statute. M., two years later, after the company had excavated a considerable part of the land, brought an action for trespass claiming that it included five chains belonging to him and, at the trial of such action, the main contention was as to the boundary of his holding. He obtained a verdict which was affirmed by the full court.

Held, reversing the judgment appealed from (36 N. S. Rep. 28) that the only question to be decided was whether or not the land claimed by M. was a part of that indicated on the plan filed; that the sole duty of the engineers was to lay out the land which the town intended to expropriate; and whether it was M's land or not was immaterial as the town could take it without regard to boundaries.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the plaintiff.

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*PRESENT:—Sir Elzéar Taschereau C.J, and Sedgewick, Davies, Nesbitt and Killam JJ.

(1) 36 N. S. Rep. 28.

1903

DOMINION IRON AND STEEL CO. v. MCLENNAN.

The facts of the case sufficiently appear from the above head-note and the judgment of the court on this appeal.

Lavell for the appellants.

Newcombe K. C. and *McInnis* for the respondent.

The judgment of the court was delivered by:

SEDGEWICK J.—This is an action brought against the appellant company for trespass on a lot of land at Sydney, in the County of Cape Breton, Nova Scotia.

The trial judge found in favour of the plaintiff, which judgment was confirmed by the Supreme Court *in banco*, and an appeal was taken to this court.

The appellant company was incorporated for the purpose of manufacturing iron and steel, and the town of Sydney desiring that the works of the company should be located within its limits, obtained from the legislature an Act authorising it to give a site for their works. The Act is chapter 84 of the statutes of 1899, and provides in effect as follows:—

The Town of Sydney is hereby empowered to expropriate, acquire, purchase, take over and hold so much land within the limits of the town as may be necessary to furnish a location for the works of the company, a plan showing the site or location of such lands and lands covered with water, easements, privileges and other rights shall be filed in the office of the Registrar of Deeds of the County of Cape Breton by the town clerk of the said Town of Sydney immediately after the town council of the said Town of Sydney shall by resolution provide for such acquisition or expropriation, and on the filing of the said plan all the right, title and interest in said land and lands covered with water, easements, priviledges and other rights, shall forthwith absolutely vest in the Town of Sydney.

1904

DOMINION IRON AND STEEL CO. v. MCLENNAN.

Sedgewick J.

Under this statute the town employed engineers of the appellant company to survey the lands required for the site of the steel works and to make a plan; this they did, and it was duly filed in the office of the Registrar of Deeds after the town council had passed the resolution required by the statute.

The sole question to be decided in order to determine this appeal is whether or not the locus upon which it is alleged the appellant company committed trespass was included in the plan or was outside of it.

The site chosen and selected consisted of a considerable tract of land bounded on the north and north-west by the waters of Sydney Harbour; on the south-east by the line of the Sydney and Louisburg Railway; on the south-west by a line staked by the surveyors on the ground, and subsequently marked by iron posts, extending from the railway mentioned to the Reserve Mine Railway and thence along the line of Reserve Mine Railway to the harbour waters.

The whole point in dispute is as to the location of the north-eastern corner of the property, the respondent contending that this corner is five chains nearer the harbour than the company says it is—these five chains being the land in dispute. In surveying the grounds the engineers commenced from a certain well known and defined point in the waters of Sydney Harbour: they proceeded along the line of the Sydney and Louisburg Railway until they came to a point which, in their opinion, would be sufficiently landward to afford adequate ground for the company's works. At this particular point they placed a stake. There was here no indication of any kind that it was a boundary line but they were told as a matter of fact it was the end of a boundary line between John McDonald and one Alexander McLennan. From that point across to the Reserve Railway they

staked a line the stakes indicating that the line was a line between John McDonald and Alexander McLennan, and for these stakes there were shortly afterwards substituted iron posts, also indicating the supposed boundary line.

1904

DOMINION IRON AND STEEL CO. v. MCLENNAN.

Sedgewick J.

Afterwards the company erected their works upon the site chosen, with a railway or siding on the locus. Now it happened that five chains harbourward from the point mentioned on the Sydney and Louisburg Railway there was another point which was intended to indicate the corner of a lot of which one John McDonald had given an option of sale to the plaintiff Duncan McLennan. The sale had not been completed at the time of the filing of the plan, but it subsequently was, and the plaintiff brings his action holding that that conveyance gave him title as against the town of Sydney and the defendant company.

The plan filed purports to be a plan of lands and lands covered with water in the Town of Sydney, C.B., required for proposed blast furnaces to be erected by Henry M. Whitney—scale 400 feet to one inch,—and the description upon the plan refers to the corner in dispute as the division line between the lands of John McDonald and the lands of Alexander McLennan. Which point is the true corner? I am of opinion that the point marked upon the ground by the surveyors governs. It is true that at that point there was no division line between John McDonald and Alexander McLennan, but that was the point intended to be the corner of lands to be expropriated, the lands which the town of Sydney intended to pay for and transfer to the company, and the lands which the company expected to receive.

The plan it was proved was a substantially accurate picture or representation of the lands intended to be expropriated, and one could by scaling, having regard

1904

DOMINION IRON AND STEEL CO. v. McLENNAN.

Sedgewick J.

to the railways, roads and other objects marked upon the plan, ascertain from the plan, within a few feet, the proposed boundary, irrespectively of the stakes or posts upon the ground. The plaintiff's position, however, is that because there was a division line between himself, Duncan McLennan, and one John McDonald, it must be presumed that that division line was the one intended and not the alleged division line which the surveyors were informed existed between John McDonald and Alexander McLennan. This, in my view, is absolutely fallacious. The marking upon the plan of the boundary in question with John McDonald on one side and Alexander McLennan on the other, the latter being a fictitious person, made it, for the purposes of the expropriation, a boundary line identifying that boundary as the one mentioned in the description, and there is, in my judgment, no ground which would compel the company to accept any other boundary than that one. The surveyors making the plan may have called the corner point in question by any name they chose. The fact that they designated that point in the way they did whether accurately or inaccurately affords no justification for the plaintiff's claim. If they had called it Black Acre and marked it on the ground as Black Acre the plaintiff unquestionably would be out of court. I am unable to conceive why the plaintiff can make the company stop in their landward claim at his boundary; that boundary might have been a few feet from Sydney Harbour or miles distant from it. They were entitled to the lands included within the plan and were limited by the boundaries indicated upon the plan irrespective altogether of any actual boundary line whether within or without the lands surveyed. I need not discuss the authorities but the following cases and references support the propositions which have enabled me to

come to the conclusion I have; *Lyle* v. *Richards* (1); *Nene Valley Drainage Commissioners* v. *Dunkley* (2); *Llewellyn* v. *Earl of Jersey* (3); Devlin on Deeds, section 1022, etc.; *Penry* v. *Richards* (4); *O'Farrell* v. *Harney* (5).

DOMINION IRON AND STEEL CO. v. MCLENNAN.

Sedgewick J.

For these reasons I am of opinion that the appeal should be allowed with costs in all the courts.

Appeal allowed with costs.

Solicitors for the appellants; *Pearson, Lovett & Covert.*

Solicitors for the respondent: *Ross & Ross.*

(1) L. R. 1 H. L. 222.
(2) 4 Ch. D. 1.
(3) 11 M. & W. 183.
(4) 52 Cal. 496.
(5) 51 Cal. 125.