SARAH MARIA GRASETT (PLAINTIFF)..APPELLANT; 1883

*Mar. 13.

AND

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JOHN CARTER (DEFENDANT).....RESPONDENT. *June 16.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Boundary line—Equitable estoppel—Description of land by reference to plan—Construction of deed—Extrinsic evidence of boundaries—Conflicting evidence—Duty of Appellate Court.

T. was the owner of lot 9, and *C.* was the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. F. being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked *C.* where he claimed his northern boundary was. *C.* pointed out an old fence, running part of the way across the land between the lots and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, *C.* not objecting. A few days afterwards, *T.*, with his architect and builder, went on the ground, and, in the presence of *C*, the builder again marked out the boundary by means of a line connecting the surveyor's marks, *C.* not objecting. Excavating was commenced according to that line immediately, and *T's* house was built according to the line

*PRESENT: Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Taschereau, JJ.

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on the extreme verge of *T's* land. The first time that *C.* raised any objection to the boundary so marked was when the walls of *T's* house were up and ready for the roof and considerable money had been expended in building.

Held,—That *C.* was estopped from disputing that the line run by the surveyor, was the true line.

Per *Strong*, J.: When lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description. In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents which do not agree with those in the deed.

In 1861, *W. D. P.*, who owned a piece of land bounded on the south by *Queen* street, on the east by *William* street, on the west by *Dummer* street, and running north some distance, laid out the southerly portion into lots depicted upon a plan, which plan showed the boundary line between the plaintiff's and defendant's lots to be exactly 600 feet from *Queen* street. There were no stakes or other marks on the ground to indicate the boundaries of the lots or the extent of the land so laid out. Many years afterwards the remaining land to the north of the parcel so laid out, was laid out into lots so depicted on another plan, and a street was shewn between the northerly limit of the first plan and the southerly limit of the second plan. The actual distance, however, of this street from *Queen* street was greater than the first plan on its face shewed it to be, and the parties owning lots on the first plan appeared to have taken up their lots as if *Queen* street and the street on the north of the first plan were actual limits of the plan.

Per *Strong*, J.: 1. The true boundary line between the plaintiff's and defendant's lots was a line commencing at a point 600 feet from *Dummer* street, as measured on the ground at the time when the plan was made; but in the absence of evidence showing a measurement on the levelled street, that point could not be accepted as the true point of commencement of the boundary in question.

2. Inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots so conveyed.

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Where there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanor while under examination.

APPEAL from a judgment of the Court of Appeal for *Ontario* reversing a decree of Vice-Chancellor *Blake* in favor of respondent.

The plaintiff and the defendant owned adjoining properties abutting on the west side of *Simcoe* street, in the city of *Toronto*, and running through to the east side of *William* street. The plaintiff's lot was known as No. 9, and is north of those of the defendant which are Nos. 7 and 8. *Simcoe* street was formerly called *William* street, and the street now called *William* street was formerly called *Dummer* street.

The plaintiff, in his bill of complaint, alleged that he acquired lot No. 9 from one *J. A. Temple*, who had upon it a brick house, which he had built close to the southern boundary of the lot as ascertained for him by a surveyor named *Wadsworth*, but which the defendant alleges encroaches 4 inches on his lot No. 8; and that the defendant had commenced to erect walls, which, to the extent of 4 inches, come across the line to which the said house extends.

The bill also alleged that the defendant was aware of *Wadsworth's* survey, and of the erection of the house by *Temple* on the faith of the correctness of the boundary then ascertained, but did not object until the walls of the house were nearly, if not quite completed, when, for the first time, he informed *Temple* that he claimed that the wall encroached on him 4 inches; and it sets out attempts, on the part of the plaintiff, to arrange the matter without litigation. The prayer was (1) for a declaration that the 4 inch strip is part of lot 9, and belongs to the plaintiff; or (2) that, if part of lot 8, it

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now belongs to the plaintiff in consequence of *Temple's* improvements, and the defendant's conduct; or (3), that in any event it may be declared to belong to the plaintiff, subject only to his paying its value; and (4), that defendant may be ordered to deliver up possession, and may be restrained from continuing to build or from otherwise trespassing; and (5), for further relief.

The defendant by his answer asserted that the encroachment, by the plaintiff's wall, is 4¾ inches at the east and 4 inches at the west part of it.

By the 3rd paragraph, in answer to the 4th paragraph of the said bill, he says: "before the survey therein referred to was made, I told the gentleman who was making the same that a fence which was then standing, and which ran east and west from a point distant about 77 feet, 8 inches from *Simcoe* street to the eastern boundary of *William* street (formerly *Dummer* street), was claimed by me as the true line between the land claimed by me, and that which I claim to belong to the plaintiff; and that there was a space of 5 feet 10 inches between the north wall of my house and the land which I claim to belong to plaintiff; and I also pointed out to the said surveyor a post which was then and I believe and charge the fact to be, had been since the year 1855, standing on the west side of *Simcoe* street, and which I then told the said surveyor I claimed to be the north-east boundary of my land, and I believe and charge the fact to be that the said surveyor made his survey on the line of such fence, and that on the plan which the said surveyor made, and which was furnished to *James A. Temple*, in the said bill named, the said space of 5 feet and 10 inches was shown thereon as being the distance between my said wall and the south boundary of the plaintiff's land."

"4. In answer to the fifth paragraph of the said bill, I believe, and charge the fact to be, that the said *Temple*

did not adopt the said survey made for him as shown on the plan when he commenced to erect the brick dwelling in the said bill referred to, but that the said *Temple*, with the aid of the builder whom he had employed, laid out a new line which the said *Temple* adopted as the south boundary of his land."

The defendant also denied the charge of dilatoriness in giving notice to *Temple*, and alleged that he notified him promptly, and before he had begun to build the walls of his house, that he was encroaching; and he tells a very different story from that told by the plaintiff, about the exertions made to come to an amicable settlement. He admitted building his walls on the four inch strip, but said he did not interfere with the plaintiff's wall, and had no intention of injuring it. The answer stated a survey made at the instance of the defendant, at which *Temple* and his surveyor were present by appointment, by which the boundary was ascertained, as now claimed by the defendant. That was after *Temple's* house was built. Other facts were alleged for the purpose of showing acquiescence by *Temple* and by the plaintiff in the result of that survey. The defendant also set up title under the Real Property Limitations Act.

The cause was heard in November, 1880, before *Blake*, V.C., who made a decree for the plaintiff, from which the defendant appealed to the Court of Appeal for *Ontario*, which court reversed the decree. V. C. *Blake* dismissed the plaintiff's bill.

The documentary and oral evidence is reviewed at length in the judgments hereinafter given.

Mr. *Robinson*, Q.C., and Mr. *Armour*, for appellant, contended that the conduct of the respondent before, at, and about the time of running the line and building estops him from now disputing the said line, even if it ever encroached upon his land, and from, in fact, attack-

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ing the quiet possession of the land, having by his former acts, induced the appellant's predecessor in title to believe such land was his own, and to incur great expense; that the evidence showed the line was a conventional one, and that the finding of the learned judge of the facts upon which he made his decree should not have been disturbed by the Court of Appeal.

Dr. *McMichael*, Q.C., and Mr. *Hoskin*, Q.C., for respondent, contended that as the evidence showed that the respondent never consented to any deflection from the true boundary line, and as there was evidence that the true line had not been followed, he cannot be held to have assented because he believed their representation or to be estopped from claiming the true line.

RITCHIE, C. J.:—

The action in this case was brought in consequence of the defendant's interfering with the southerly wall of the plaintiff's house. The defendant and the plaintiff were proprietors of lots of land in the city of *Toronto*, adjoining each other, and the difficulty arises between them as to the dividing line between those lots. A great deal of evidence was gone into in the case for the purpose of discovering, if it were possible, (which might not be a very easy task) exactly to an inch where the dividing line of those lots was, but I think that was a discussion wholly foreign to this case, which I think should be determined on another point altogether. I think it is clear law, well established at any rate in the Lower Provinces where I came from, and I believe it must be established everywhere, that where there may be a doubt as to the exact true dividing line of two lots, and the parties meet together and then and there determine and agree on a line as being the dividing line of the two lots, and, upon the strength of that agreement and determination,

and fixing of a conventional boundary, one of the parties builds to that line, the other party is estopped from denying that that is the true dividing line between the two properties.

[The learned Chief Justice after reviewing the evidence and Vice-Chancellor *Blake's* judgment concluded as follows :—]

I think, what took place in this case between the parties amounted to the establishment of a convential boundary or division line, of the respective properties of plaintiff and defendant, from rear to front, and I think the evidence clearly shows that the building of plaintiff's was erected on such line, so agreed on as such dividing line, and that the plaintiff's building is therefore now on plaintiff's lot.

I therefore think that the judgment of Vice-Chancellor *Blake* was right, and that it should not have been reversed.

STRONG, J. :

The dispute which has led to the litigation out of which the present appeal arises is in respect of a piece of land 4 inches in width, and 120 feet in depth, the value of which, according to the respondent's estimate, is ascertained by the fact that he offered to sell 5 feet of the land, of which this 4-inch strip forms part, at the price of $50 per foot. On the part of the appellant's testator (the original plaintiff by whom this suit was instituted), the contention had a substantial object, and there can be no reproach against him of having acted in a spirit of unreasonable litigiousness, for had he conceded to the respondent the claim which he makes to this four inches of land, it would have involved the necessity of either pulling down the south wall of the dwelling house, which has been built to the extent of 15 feet and 9 inches, on this 4-inch strip, or of accept-

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ing the offer which the respondent made of allowing the house to stand as it had been built, on the condition that it should never be used for any purpose but that of a dwelling house, the plaintiff, however, in this last alternative not to have an absolute title, but merely a license to use the 4 inches as a site for the wall of the house, the acceptance of which would have seriously interfered with the plaintiff's title to the house, and might have rendered it unmarketable, so far as the plaintiff and his predecessor in title are concerned. There does not seem, therefore, to be anything unreasonable in the position which he assumed; and as regards the respondent, if he is able to show that the four inches in question were originally his property, he is, as the Court of Appeal say, entitled to insist that the evidence which would deprive him of it and vest it in his neighbour should be very full and convincing.

The land in dispute is part of park lot number 12, in the city of *Toronto*, which was originally granted by the Crown to the Hon. *William Dummer Powell*, who, in 1831, caused a plan to be prepared by Mr. *Chewett*, a surveyor, showing a sub-division of a portion of this park lot into streets and building lots. This plan is registered in the registry office of the city of *Toronto*, and it shows a street now called *Simcoe* street, running north from *Queen* street (formerly *Lot* street) and another street, originally *Dummer* street, to the west of *Simcoe* street, also running north from *Queen* street, and between these two streets two ranges of 23 lots each, one range fronting on the west side of *Simcoe* street, and the other on the east side of *Dummer* street, each lot being 60 feet in width and 120 feet in depth, and each tier of lots commencing at a distance of 120 feet from *Queen* street, this intermediate space of 120 feet being taken up by a tier of lots fronting on *Queen* street, 100 feet in depth, and a lane 20 feet wide in the

provisions of the statute are shown to have been contravened. Under the circumstances I think we are to take the execution as good, and, I therefore, concur with the Chief Justice that this appeal should be dismissed.

TASCHEREAU, J, concurred.

Appeal dismissed with costs.

Solicitors for appellants: *MacLaren, MacDonald, Merritt and Shepley.*

Solicitors for respondents: *Thomson and Henderson.*