

The reasons for judgment of the Court were delivered orally by:

FREEMAN, J.A.:

This appeal reflects the reopening of a property dispute involving lands near Black Brook on the Mira River in Cape Breton which the appellant's predecessor in title, Andrew Campbell, had attempted to settle by a quit claim deed to the "MacInnis girls", predecessors in title of the respondent John A. Horne, in 1935.

Mr. Campbell, a lawyer, had obtained a crown grant to about 125 acres of land that had been previously occupied but never granted. It was not thoroughly surveyed prior to the crown grant. Christina MacInnis, Effie MacInnis and Mary Hammond, whose family had occupied ungranted lands to the west, then obtained a crown grant to the property in their possession. However they claimed that because of a "false survey" they had lost about 25 acres of lands they had occupied. Colin Dixon was engaged to survey the disputed area, which Mr. Campbell then conveyed to the MacInnis sisters. Apparently he considered the matter settled to the satisfaction of all parties. The MacInnis property was conveyed to Albert Horne, father of the respondent, in 1948. There was evidence the Hornes cut timber on parts of the land they claimed up to the eastern boundary established by the Dixon survey.

However the appellant, E. Allan Jost Limited, claims the Dixon survey did not correctly locate the land in dispute; it therefore asserts that the lands conveyed by Mr. Campbell to the MacInnis sisters are not the lands now claimed by Mr. Horne. It seeks to recover a portion of the lands which it argues Mr. Campbell mistakenly conveyed away. Raymond MacKinnon, the appellant's surveyor, was able to precisely fix the starting point of the Campbell grant on its eastern boundary and established the other boundaries by "a combination of mathematics and evidence I found on the ground." On that basis, he located the western boundary of the appellant's lands well to the west of the eastern boundary claimed by the respondents.

Mr. MacKinnon said he had the Dixon plan but "I didn't put much weight on it." He found no evidence of any 1935 surveys on the eastern line claimed by the respondents.

Eric Robert White, the respondent's surveyor, disagreed with Mr. MacKinnon's approach, which he said was disruptive not only to the respondents property but, if its logic were followed, to other properties in the neighbourhood. He said the line established by the Dixon survey, as the west line of the Jost property and the east line of the Horne property, was well known and respected in the area. He was able to retrace the Dixon survey: "we followed, so to speak, in his footsteps."

The trial judge, Justice Edwards of the Supreme Court of Nova Scotia, had "no hesitation in deciding that Mr. White's approach is the appropriate one. Accordingly I find that Exhibit 4, Mr. White's plan of August 13, 1993, is an accurate depiction of the lands of John A. Horne, and specifically at the boundary between the Horne and Jost properties."

Justice Edwards said that even if he was not prepared to find that Mr. Horne has documentary title to the subject property, "I would be prepared to find that he had obtained possessory title." He remarked that the dispute was effectively determined in 1935 by Mr. Campbell's quit claim deed to the MacInnis sisters. "That should have been the end of the matter."

We agree. We have not been persuaded that the lands described in the Dixon survey as located on the ground by the White survey are not the same lands Mr. Campbell conveyed, and intended to convey, to the MacInnis sisters to settle the dispute almost 60 years ago.

Justice Edwards granted a declaration that John A. Horne holds good title to the lands depicted in the White plan. He ordered that the MacKinnon survey markers be removed within thirty days, and granted "a permanent injunction to Mr. Horne and his successors in title against the plaintiff and his successors in title."

The appellant argued that the trial judge erred in making findings of fact on the survey evidence of Mr. White, in finding the property dispute was settled in 1935, in not accepting Mr. MacKinnon's survey plan and in considering that Mr. Horne had established possessory title.

We have carefully reviewed the evidence and in particular the survey plans and the testimony of the surveyors. We are not satisfied that Justice Edwards fell into error and we agree with his conclusions. Accordingly we dismiss the appeal with costs to the respondent which we fix at \$2,000.00 plus disbursements.

J.A.

Concurred in:

Jones, J.A.

Pugsley, J.A.