

JAMES SPRATT (DEFENDANT).....APPELLANT;

AND

THE E. B. EDDY COMPANY }
(PLAINTIFF) } RESPONDENT.

1898

*Oct. 4.

1899

*Feb. 22.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR
LOWER CANADA, APPEAL SIDE.*Bornage—Concession line—Survey—Evidence.*

In an action *en bornage* between E. the owner of lots 7, 8 and 9, in the tenth concession of the Township of Eardley, Que., and S. the owner of like numbered lots, in the ninth concession, the question to be decided was the location of the line between the two concessions, E. claiming that it should be one straight line to be traced from the south-easterly angle of lot 14, in the tenth concession easterly on a course S. 87° 30' E. to the town line between Eardley and Hull, while S. claimed that as to the lots in question it was about a quarter of a mile north of where the straight line would place it. A survey of part of the line was made in 1828 and the remainder in 1850, and in 1892 the whole line was surveyed again and the result was held by the court below to establish it in accordance with the claim of E. In 1867 there was a private survey which established the line further north as claimed by S. who contended that it, and not the survey in 1892 was a retracing of the original line.

Held, affirming the judgment of the Court of Queen's Bench, Strong C. J. dissenting, that the original surveys were made in accordance with the instructions to the surveyors and established the straight line as the true concession line; that the survey in 1892 was the only one which retraced the original line in an efficient and legal manner; and that the evidence failed to support the contention that it was retraced in 1867, such contention depending on assumptions as to the manner in which the original surveys were made which the courts would not be justified in acting upon.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) affirming the

*PRESENT :—Sir Henry Strong C.J, and Gwynne, Sedgewick, Kin and Girouard JJ.

1898
 SPRATT
 v.
 THE
 E. B. EDDY
 COMPANY.

judgment of the Superior Court, sitting in review at Montreal, which had reversed the judgment at the trial in favour of the defendant.

The facts of the case are sufficiently stated in the above head-note and fully set out in the judgment of Mr. Justice Gwynne.

Aylen for the appellant.

Geoffrion Q.C. and *L. N. Champagne* for the respondent.

THE CHIEF JUSTICE.—I would allow the appeal for the reasons given by Chief Justice Lacoste.

The judgment of the majority of the court was delivered by :

GWYNNE J.—The sole question upon this appeal is as to the true location of the concession line between the 9th and 10th ranges or concessions of the Township of Eardley, in the Province of Quebec.

For the purposes of this suit it is admitted that the plaintiffs are seized of lots nos. 7, 8 and 9, in the 10th concession, and the defendant of the lots so numbered in the 9th concession, or at least of the north parts of those lots, and the contention between the parties is reduced to this, that the plaintiffs in the action, the now respondents, contend that the concession line between those concessions is one continuous straight line to be traced from the south easterly angle of lot no. 14, in said tenth concession easterly on a course S. 87° 30' E. to the town line between the townships of Eardley and Hull, while on the contrary the appellant, while not contesting the location of the concession west of lot no. 13, and east of lot no. 5, in the tenth concession to the town line of Hull to be as contended by the respondents, contends that at least as regards

the said lots nos. 7, 8 and 9, it is situate about a quarter of a mile north of the place where the straight line as contended for by the respondents would place it.

The township of Eardley appears to have been surveyed by the Crown in three several parcels, one in 1803 by a Mr. Watson, another in 1828 by a Mr. Burrowes, and the third in 1850 by a Mr. Driscoll. It is only with the two last that we are at all concerned.

We are not furnished with the instructions given by the Surveyor-General in 1828 to Mr. Burrowes in accordance with which to make his survey, but we are furnished with the report made by him to the Surveyor-General upon the completion of his survey, which is sufficient for our purpose as it is not contended that his survey upon the ground was not as reported by him. His report is so short that it will be convenient to set it out in full. It is dated the 2nd April, 1828, and is as follows:

Sir,—Agreeably to your instructions dated Hull, the 6th day of October, I proceeded to survey and subdivide in the field the township of Eardley—commenced from an old decayed post at the foot of the mountain marked VII on east side and VIII on west side, also Con. VII on north side; measured and ran across two concessions being a distance of 161 c. 60 l., which brought me in front of the 9th range; planted a large substantial post properly marked; continued westerly from lot no 8, to the side of the Ottawa, which is on no. 22; continued by offsets northerly to the front of the 10th concession, on which ran easterly to lot no. 14, where the mountain from appearance of its roughness and steepness bids defiance to cultivation; from post XIII and XIV ran north to the front of the 11th concession; ran west to the division side line of the township. North 80 c. 80 l. to the 12th concession. East to lot no. 18, being at foot of hill. Returned on the concession line and ran north 80 c. 80 l. being the front of the 13th concession. Continued north to the front of the 14th concession, returned on the same line to the front of the 13th concession and ran east to lot no. 24, after which scaled the river to the side town line from lot no. 22 to 28, the particulars of which are stated in the field book herewith. Resting on the certainty that this survey has been properly performed, I remain Sir, &c., &c.

JOHN BURROWES,

D. Provl. Surveyor.

1899

 SPRATT
 v.
 THE
 E. B. EDDY
 COMPANY.
 Gwynne J.

1899
SPRATT
 v.
 THE
 E. B. EDDY
COMPANY.
Gwynne J.

This report establishes that Mr. Burrowes commenced his survey on a concession line previously established in front of the seventh concession at a point constituting the south east angle of lot no. 8 and the south-west angle of lot no. 7 in that concession. He then proceeded across the 7th and 8th concessions in a northerly direction along the eastern limit of the said lots numbered 8 in those concessions, 161 chains, 60 links, to where he established the concession line in front of the 9th concession, which he laid down upon the ground westerly marking the angles of the lots from nos. 8 to 22, both inclusive, upon which latter lot he reached the River Ottawa, and from the point so reached he laid off the lots in the 9th concession along the banks of the river westerly, until he reached the concession line in front of the 10th concession near to the south westerly front angle of lot no. 25, in said 10th concession. He then laid down the lots in the said 10th concession from lot 25 to lot no. 14, both inclusive, and at the south easterly front angle of said lot no. 14, where he determined also the south westerly front angle of lot no. 13, in said 10th concession, he planted a post marked xiii-xiv from which he measured northerly along the line between the said lots numbered 13 and 14, 80 chains, 80 links to the concession line in front of the 11th concession. Thence he proceeded westerly along that concession line as described in his report, but not necessary to be further noticed here.

By this survey of Mr. Burrowes, the front lines of lots nos. 8 and 9, and the south west front angle of lot no. 7, in the ninth concession, were fixed and determined upon the ground, as were also the front line of lot no. 14, and the south west front angle of lot 13, in the 10th concession, and the depth of those concessions was fixed and determined at 80 chains, 80 links.

So much being determined by Mr. Burrowes' survey instructions were given by the Government in November, 1849, to Mr. Driscoll, to complete the survey of the residue of the Township of Eardley, that is to say, the part not already surveyed by Mr. Watson and Mr. Burrowes. By these instructions he was (among other matters not requiring notice as regards the question in issue on this appeal) directed to

1899
 SPRATT
 v.
 THE
 E. B. EDDY
 COMPANY.
 Gwynne J.

repair along the line of division between the Townships of Hull and Eardley to a post erected by the said Mr. Watson to divide the 6th and 7th ranges of Eardley which range line you will verify and trace and admeasure to the post erected between lots nos. 7 and 8 in the said line where Mr. Burrowes fixed his point of departure for the survey he performed in the said Township of Eardley.

He was also directed to

chain the several range lines in continuation of those already drawn commencing respectively at the posts planted in the field as reported by Mr. Burrowes in his survey of 1828 and represented on a diagram (furnished to Mr. Driscoll) by the letters A, B, C, D and E, and to set off in each range lots of the breadth of 26 chains planting between each lot a square post properly inscribed and offset pickets indicating the course of the side line parallel to the township line;

and he was directed further to carefully admeasure the depth of each range, as marked off by Mr. Burrowes on the lines run by him and edged red on the plan furnished to him. He was directed further to note in his field book the quality of the soil and timber, and finally to report the result of his survey accompanied with a plan to the Government. On the 14th May, 1850, Mr. Driscoll made his report to the Government of the survey made by him under these instructions and therein he stated that he had commenced his operations on the 1st of January, 1850, and he then proceeds as follows:

Having ascertained the position of the boundary mentioned in the instructions as at lots 7 and 8, I verified the said line to the town line where I ascertained the bearing of the said line and found it to be N. 2° 37' E. magnetically. I subsequently traced the same up to the rear

1899
 ~~~~~  
 SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.

—  
 Gwynne J.  
 —

of the township planting posts at the depth of 80 chains 81 links for the depth of the ranges up to the 13th range, which I found to be 86 chains. I then proceeded to draw the several range lines on the magnetical course S. 87° 37' E. planting posts for the lots at a distance of 26 chains, the variation of the needle I found to be 6° 57' W.

Now by this report it is established and there is no dispute upon this point, that before proceeding to continue the several concession lines from the points of the termination thereof respectively as determined by the survey of Mr. Burrowes, Mr. Driscoll determined by posts planted by him on the town line of Eardley and Hull the precise depths of the several concessions in accord with the survey of Mr. Burrowes, and precise points at which the several parts of the concession lines as surveyed by Burrowes when continued, would reach the eastern boundary line of Eardley; all that remained, therefore, to complete such concession lines in accordance with the only survey authorized and directed by the Government, was to run a straight line from the several points of termination of the said several concession lines as determined by Burrowes's survey to the several posts so planted by Driscoll on the town line of Eardley and Hull. This report is addressed to the Commissioner of Crown Lands, Montreal, and is accompanied by Mr. Driscoll's field book and diary and a plan of the line as run by him, and the report concludes with the following sentence:

Accompanying the field book and diary is a plan on the scale of 40 chains to the inch, the whole of which I submit for your approval.

We have been furnished, from Mr. Driscoll's field book, with certified copies of extracts of so much as is material to the case before us, that is to say, of the lines run by him in continuance of the concession lines run by Burrowes in front of the parts of the 9th and 10th concessions as reported to have been surveyed by him to the eastern limit of the township and of so

much of the town line as extended from the post planted by Mr. Driscoll in front of the 9th concession to the post planted by him in front of the 10th concession. In such extracts he describes the nature of the soil and of the timber as he proceeded, mentioning also the streams crossed by him and their courses, &c., as directed in his instructions. In running the continuation of the 9th concession line he commenced as directed by his instructions at the termination of the line as run by Mr. Burrowes at the south east front angle of lot no. 8, and proceeded thence on a course S.  $87^{\circ} 30'$  east 26 chains, determining thus the front boundary of lot no. 7 at the S. E. angle of which he planted a post marked 6 and 7 "on the face of a precipice." He then proceeded on the same course laying out the several lots with a frontage of 26 chains each and marking the respective front angles of each lot to and including no. 1 with posts marked respectively 6-5 and 5-4 and 4-3 and 3-2 and 2-1, until he reached the town line which constituted the eastern limit of lot no. 1 at post marked 8 and 9 for designating the concession line in rear of the 8th and in front of the 9th concession, whence he proceeded on a course N.  $2^{\circ} 30'$  E. along such eastern limit of said lot no. 1 describing minutely the nature of the land so traversed until he reached "post 9 and 10 on north side of pond" so marked plainly to designate the eastern terminus of the concession line in rear of the 9th and in front of the 10th concession. He then as appears by his field book "repaired to station B on range line X at post between lots xiii and xiv," and thence ran out concession line east—S.  $87^{\circ} 30'$  E.,—and on such line marked the front angles of each lot with posts numbered in like manner as on the 9th concession line describing also the soil, timber, &c., on the course traversed until he reached the south east angle of lot

1899  
SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.  
Gwynne J.

1899  
 SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.  
 Gwynne J.

no. 2, which he marked with "post ii and i, rough and rocky," thence he proceeded along the front line of lot 1, describing minutely the character of the ground thus:—at the distance of 50 links from the south east angle of lot no. 2 "Creek 6 links." At the distance of 10 chains "steeply descending;" at the distance of 15 chains "intersect road across portages;" at the distance of 19 chains "small creek going into pond;" at the distance of 21 chains, 50 links "pond shore;" at the distance of 26 chains "post I and O, town line."

The plan which accompanied the report shewed continuous straight lines for the continuation of the several concession lines from the respective points of termination of those lines as surveyed by Burrowes, run out to the eastern limit of the township and this is the only plan of the survey made by Driscoll ever received by the Government. Now this plan accompanied with the above extracts from Driscoll's field book constitute *primâ facie* positive and direct evidence that the concession lines in front of the 9th and 10th concessions respectively were run by Driscoll in precise conformity with the Government instructions given to him from the eastern termination of those lines as run by Burrowes in a continuous straight line to the eastern limit of the township. In corroboration, however, the plaintiff has produced a man named George Hébert, employed as picket man on the Driscoll survey in 1850. This witness of the age of 76 when examined in 1893, confirms in the clearest manner the evidence furnished by the surveyor's report and field notes. This witness was on the survey by Driscoll of the concession lines in front of the 8th and of the 9th concessions and also of the concession line in front of the 10th concession as far as lot 4 in that concession, when he left the work and returned to his home which was



on lot 8 in the 8th concession. Having been asked how he knew it was lot 4 he had reached when he left, he said that when leaving the surveyor informed him that there remained but three lots to the town line. All the lines were run from the west to the east. In front of the 10th concession they commenced at a post pointed out by a Mr. Rayside, who lived in the neighbourhood, whether it was on lot 15 or lot 14, or what lot in particular he could not say, but it was from an old post east of Mr. Rayside's place and situate at the foot of the mountain. Now it will be remembered that Mr. Burrowes in his report remarks that where he terminated his survey on lot 14 "the mountain from appearance of the roughness and the steepness bids defiance to cultivation." The witness then states that from this the point of commencement, they continued the survey on a straight line east without any jog, angle, or deviation whatever, blazing and planting posts as they went along, some of the blazing having been done by himself, until they reached the lot at which the witness left the work and which he believed to be lot 4, for the reason already stated. About the last thing which he did on the evening of which he left was, as he said, that he made a post out of a spruce tree which was there, and the post so cut by him was planted on the lot where he left off working and returned to his home; a few years after he left the township and has ever since resided in another township and was never again on the concession line until just before his examination. Having been subpoenaed as a witness, as a person employed on the original survey, he went over the line in company with one Bourgeau. On this occasion he observed on the top of the mountain an old blaze on a pine tree which had fallen, then another in the middle of a ridge of hardwood, and a third further on, which is

1899

SPRATT

v.

THE

E. B. EDDY  
COMPANY.

Gwynne J.

1899

SPRATT

v.

THE

E. B. EDDY

COMPANY.

Gwynne J.

between lots 9 and 10. The witness did not profess to swear that these blazes were made at the Driscoll survey, but that he believed them to be such, and that they were old blazes, and were on the line run as the concession line at the running of which the witness was employed. He said further, and this is certainly of special value as showing the witness to be a very intelligent and observant man, when he came to a creek which they crossed on the line, he said to Bourgeau that a little further on they would cross another creek where there was a flat, square rock over which the concession line passed, and accordingly that as they proceeded they came to the creek and the rock. He also as he said recognized a large blazed spruce tree which was near the rock and which he had seen on the survey. He said further that they proceeded east until they reached the place where he had left the work after having made a post from a spruce tree and which was planted there, and he saw there lying on the ground an old square spruce post, rotten at the stump but partly still solid and having still marks on it which he believed to be the post he had cut from the spruce tree as already mentioned. Now this witness is corroborated by Bourgeau as to what he had said when crossing a creek on the line as to there being another a little further on, and as to the rock, and that the fact occurred as Hébert had said it should occur. Bourgeau also says that they started on the concession line in front of lot no. 13 in the 10th concession which he knew well and they proceeded in a straight line easterly in continuation of the line in front of lots 15, 14 and 13 to lot 4, where Hébert recognized the old post found lying there, as he had said. He also fixed the last two blazes spoken of by Hébert, one as being at the line between lots 9 and 10, and the other as being at the line between lots 11 and 12.

Julien Delorme, aged 68 at the time of his examination in 1893, was born on lot 15 in 8th concession of Eardley, and has lived in the township all his life, and since the year 1867 on the north half of lot no. 13, in the 9th concession, which lot abuts on the concession line between the 9th and 10th concessions. This line so far as the witness has ever heard, has always been called, and known as the Driscoll line. He did not see the line when being run, but he remembers the time and hearing it spoken of at the time it was being run. He had known the lot for four years before he went to reside on it, that is as far back as 1863. He knows also the line called the Baldwin line, the line north by the distance of 7 or 8 arpents of the line called the Driscoll line. Before ever the Baldwin line was run, and as far back as 1865, he saw a post on the southern or Driscoll line at the line between lots 11 and 12. It was a marked post, but as he could not read he could not say what the marks were; but it was a marked post. He had gone to look for wood on lots 11 and 12, as the rest of the lots were taken up. The first fire which occurred about 1868 partially destroyed that post and the subsequent fires, of which there were two, wholly destroyed it. He has often been in that part of the country gathering blueberries and he has often travelled eastward upon this line to where he has spoken of the post having been before it was destroyed by fire. The line was quite visible before the fires. He has never travelled east of lot 11.

Leon Lebrun, aged 53, has lived on the south half of lot 15, in the 10th concession since the year 1858. The concession line in front of that lot ran easterly in front of 15, 14 and 13, and was quite visible, and it was then and always since has been called and known among the neighbours as the Driscoll line. About 24 years before his examination and before any of the fires

1899  
 SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.  
 Gwynne J.

1899  
 SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.  
 Gwynne J.

he was employed by one Gibson, getting out timber in the bush in the 10th concession and in front of the lot on which he was working he saw a post marked 9 on south side and 10 on north side, indicating the concession line in front of the lot on which he was working; that post was situate from 6 to 8 arpents south of a post on the Baldwin line which he knew well. He only saw the post that once for when he next was that way was after the fire and it was gone; the other sides of the post were also marked, but he could not from memory say what were the marks which he saw on it. He described the post as having been on a rock near which was "*un bassin d'eau*" where the water ran in wet weather; his description corresponds with the work of which Hébert had spoken. When he was there next after the fire he says the post was gone and nothing remained but the rock, and there has never been a post there until George C. Rainboth ran the line in 1892. After Rainboth had finished his line he took witness over that part extending from lot no. 9 to his own lot no. 15, and witness says that Rainboth's line runs within fifteen feet of the place where he saw the post, which now he understands to be at the line between lots 11 and 12.

Charles Lusignan, aged 56, in 1863 bought the west half of lot no. 14, in the 9th concession of Eardley, and lived on it for 14 years when he moved to lot 16, in the 9th concession, where he has lived ever since. His lot abutted on the concession line. When he went to live on 14 in 1863 there were old posts between 15 and 16, and between 15 and 14, and at the front angle of 14 and 13, in the concession line there was a tree blazed marking the line between 14 and 13; that blazed tree was used to guard his land, that is, to shew the line between 14 and 13. About the year 1865 he was employed by a Mr. Baldwin, who had a saw mill,

to get out lumber on lots 12 and 13 in the 10th concession; had then to know the line in front of the lots; they worked by that line, the Driscoll line; used to go by the blazes; did not look for a post. He used to go up between 12 and 13; that line was indicated by a blaze on the Driscoll line; did not look for a post, the blaze was sufficient for his purpose. The Driscoll line east of 12 was visible but he never travelled on it east of that lot until about a fortnight before he was examined as a witness in this case. He was working on lot 12 together with one of his brothers making saw logs for Mr. Baldwin, who owned a saw mill in the neighbourhood where the Baldwin line was run down from the mountain; had to look for the Driscoll line then so as not to cross that line; the Baldwin line was brought down into lot 15 and to the concession line near to the line between 14 and 15; it crossed the line between 14 and 15 about three and a half acres north of the Driscoll line. He knows where the Baldwin line runs and the country through which it passes well, and he never saw any sign of a line there before Thistle and Baldwin ran their line.

Christie Miner, aged 42, says his father owned and lived upon the west half of lot 11, in the 9th concession of Eardley, and witness himself lived on it until 15 years before he gave his evidence in 1893; when he was a boy about 13 or 14 he and his father were out together and that in rear of their lot 11, in the 9th concession, on which they lived, he saw a post, it had marks on it. Again about 18 or 19 years ago when ascertaining boundaries with the owner of the other half he again saw the post and he and his neighbour took it to determine the boundary of their lot. There was a post, also another post, on the concession line, then on the east corner of lot 11. These were then old posts but have since been burned to the ground.

1899  
  
 SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.  
 Gwynne J.

1899

SPRATT

v.  
THEE. B. EDDY  
COMPANY.

Gwynne J.

That concession line has always been called the Driscoll line. He saw the beech tree at the line between 9 and 10 about 18 years ago; the tree was blazed on four sides, its appearance was for a post.

Mr. Geo. C. Rainboth, a licensed surveyor, testified that in 1892 he was employed by the plaintiffs to ascertain and lay down the boundaries of lots 7, 8 and 9 in the 10th concession. This work necessitated his ascertaining the true concession line as originally surveyed by Driscoll in front of the 10th concession. So far as appears this was the first occasion upon which a surveyor had attempted to trace that line in an efficient and legal manner. He first determined the line in front of lots 1, 2, 3 and 4 to accord precisely with Driscoll's field notes. He then continued on that line projected in a straight line westerly until he reached about the centre of lot 6; he found many old blazes, 42 years old, corresponding precisely with the period of the Driscoll survey. He proceeded up to the western extremity where he found a post between lots 15 and 14; from lot 6 to lot 14 he found no reliable traces but he says that from lot 9 westward the country has been so badly burned that no trace of the original line remained. Apart from the destruction by fire the evidence shewed that the whole country round had been lumbered over for a period of from 40 to 50 years.

Mr. Driscoll in his report in 1850, has this paragraph:

From the mountainous nature of the country and the position of the hills with regard to the settlement on the old survey there are no facilities for making a good road without great expense. The roads which are at present used by the inhabitants are those which have been cut by enterprising lumberers, and although very rough in the summer season are nevertheless good and of great service during the winter.

And Mr. Robert Kennedy Lusk, who was the first to see posts in 1851 across lots 7, 8, 9, 10 and 11, says that he himself got that year a Crown license over lots 9, 10 and 11, and that at that time a Mr. Smith was lumbering in that neighbourhood who wanted to get a road to the front and that Lusk undertook to make and as he says, did make one for him, but where is not stated.

1899  
 SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.  
 Gwynne J.

Mr. Rainboth having so reached lot 14, surveyed the line back from lot 14 to lot 4, and divided the distance in the manner required by art. 4155 of the revised statutes which announces the law as it has been ever since the passing of the statute of the late Province of Canada 12 Vict. ch. 35, sec. 20. In the course of his survey Mr. Rainboth observed two or three points of special importance. 1st, that the line in front of lots 1, 2, 3 and 4, was run from the west on the original survey. 2nd. Where the Driscoll line crosses the line between lots 9 and 10, his field notes describe the land and timber found there thus: "fine level hardwood land, good soil," and he testifies that this is correct, while where the northern or Baldwin line crosses the same line it is a spruce swamp all around and no hardwood within eight or ten chains. And all this is confirmed by several other witnesses. Then, 3rd. On the original line run by Driscoll, as described in his field notes, there is a creek on lot 10 said to be distant 7 chains from the line between 11 and 10. Mr. Rainboth found the distance of the creek from the line as established by his survey to be 5 chains, 58 links, while the distance of that same creek from the said line between 11 and 10 is by measurement made by Mr. Rainboth, 14 chains, 20 links. These two latter facts afford strong confirmation that the southern line was the line run and reported by Driscoll.

1899

SPRATT

v.

THEE. B. EDDY  
COMPANY.Gwynne J.

Now the answer of the appellant to all this evidence is that Driscoll never ran the southern line at all, but that the line which he ran is the same line as that which Baldwin ran in 1867 which line is contended to be a simple retracing of the original Driscoll line and by way of explanation of the extraordinary circumstances that a surveyor should deviate from his instructions so as to leave the Burrowes line which it was his duty to continue in a straight line eastward and to go north to a point distant about a quarter of a mile from the true line he was directed to run and then to turn and run easterly nearly parallel with the Burrowes line continued on the true line and after traversing such easterly course for a couple of miles to diverge again south and to go precisely the distance necessary to reach a point which would be on the Burrowes line if continued from west to east, all that is offered is a suggestion, not founded upon any evidence whatever, that the line was run by two persons, one commencing at the eastern extremity of the township at the town line, and the other at the western end at the extremity of the Burrowes survey. But this suggestion, if it has any effect at all, only increases the difficulty, for it assumes that two parties made mistakes of which there appears no natural explanation whatever. For why should the party surveying from the east across four lots along the true line after planting a post which indicated the southeast angle of lot no. 5, go north on the side line of that lot? A surveyor surely could not imagine that by going up a side line of a lot in the 10th concession he could make that side line a part of the concession line in front of the concession, or that after determining the situs of the south-east angle of lot no. 5, on the concession line as first run, he could move it to a point 17 chains 47 links north; and why did the surveyor go north at all,



and why stop at reaching the distance of 17 chains 47 links, and then diverge to the west upon a line nearly parallel to the line he had first run and had left? Then how did it happen that the surveyor commencing at the west end left the Burrowes line altogether and instead of continuing it by running a course S. 87° 30' East ran on a course north-easterly until he reached a point distant nearly a quarter of a mile north of the true line as directed to be run, and then diverge on a course south-easterly so as to meet exactly somewhere, the party running from the east? What determined the point where the north-easterly course should cease and the divergence upon the south-easterly course should commence? It is quite obvious that such a state of things could never occur without prearrangement of a very precise character between the two surveyors on the survey; but the suggestion requires this further addition to be made to it, namely, that while the survey was conducted by Mr. Driscoll in this manner designedly in violation of his instructions and his authority, he made a false report to the Government showing the line to have been run as if it had in fact been run on the course directed. It is impossible that a suggestion so utterly unfounded upon any evidence can be entertained for a moment.

Now as to the survey called the Baldwin survey, in 1867, which is claimed to have been simply a retracing of the Driscoll line. It appears that Mr. Baldwin under whose name the line run in 1867 is known, was not a licensed surveyor in Lower Canada, but was in Upper Canada, where he resided, and was a partner of a Mr. Thistle, who was a licensed surveyor in Lower Canada, and that a young man named Lang was Thistle's articulated clerk. The lines run in 1867, of which the line called the Baldwin line was one, appear to have been run by Lang under the direction

1899  
 SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.  
 Gwynne J.

1899  
~  
SPRATT  
v.  
THE  
E. B. EDDY  
COMPANY.  
—  
Gwynne J.  
—

of Baldwin. As to the particular line in question here we have Lang's testimony that the course pursued was this :

They first found what he calls the range line at the post between lots 11 and 12, where he says: "the range line was found." They commenced then, plainly on the assumption that the line upon which they found the post between lots 11 and 12 was the concession line. He then says that under the directions of Mr. Baldwin, the line was run westerly to the brow of the mountain at about lot 13, then he says that the line was found "west of the mountain at about the line between lots 15 and 16." The point here designated plainly is on the old Burrowes line and is the point which is made the western extremity of the Baldwin line, but Mr. Lang gives no particulars as to the mode by which Mr. Baldwin determined and reached such point. He was most probably not present with Baldwin at that portion of the work, for he says that he himself afterwards commenced from about between lots 11 and 10 (he probably meant 11 and 12 from which Baldwin had proceeded westward) and continued eastward. We have however the evidence of Mr. Joseph Lusk, one of the appellant's witnesses, who though not himself employed on the work was present when Baldwin was proceeding with that work. He says that

they built a fire between lots 12 and 13 on the mountain and they came down to between lots 14 and 15, and they ran a line through lots 13 and 14 and they connected these two points together where they could not find any old line.

Again he says that there was a piece of the line gone there through lots fourteen, thirteen and twelve, and that they had a lot to survey around for him, namely, lot 13, in the 10th concession "and they had to get a concession line there, and they ran one across and con-

nected both together;" so they made a fire on the mountain between 12 and 13; and he says "they went afterwards between lots 14 and 15 where they got a post of the old survey and they connected these two points." And he adds from the line so determined they ran round his lot 13 in the 10th range and he adds that this was all they had to do from lot 15 to lot 12, for that the fire had burned the old line and they could not trace it. But there is not a particle of evidence that any trace of an old line had ever been seen there. Pierre Lusignan says that he saw the Baldwin party coming down from the mountain, where they had built a fire and that they crossed the line between lots 14 and 15 about 3 arpents north of the post on the Burrowes concession line, and that they crossed lot 15 to the post in front between lots 15 and 16; that is on the old Burrowes line. This is the only evidence we have of the manner in which Baldwin's line from the post on the line between lots 11 and 12 was connected with the Burrowes concession line in front of the 10th concession, and it is manifest that the survey proceeded wholly upon the assumption that the line claimed by the appellants as marked by the posts across lots 7, 8, 9, 10 and 11, situate nearly a quarter of a mile north of the line as reported by Mr. Driscoll, constituted the true concession line.

Now Lang, as to the work done by himself, says that he

followed up the range line preparatory to the running of the side lines between several of the lots, from about the point marked E, to the point marked B, and from the point marked A, to a point eastward of lot number 2 as shewn upon plan exhibit "C";

and he said that he did not recollect reaching the town line. The plan so referred to he said was a plan made by himself and on it the point marked E, is placed on the line between lots 11

1899  
 SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.  
 Gwynne J.

1899  
~  
SPRATT  
v.  
THE  
E. B. EDDY  
COMPANY.  
Gwynne J.

and 10. This is probably placed there by mistake instead of at the line between lots 11 and 12, where as he had said they had "first found the range line," and from which Baldwin had proceeded westward. The point marked B on the plan is placed on the side line between lots 5 and 4, at the distance of 17 chains, 47 links north of a line found upon the ground and which is shown by the evidence to be the eastern end of the line as reported by Driscoll to be the line run by him for the concession line. The point A is at the south-west angle of lot no. 4, and the south-east angle of lot no. 5, in the 10th concession, fronting on the concession line as reported by Driscoll. The space from B to A is shown to be not upon a concession line at all, but upon a side line of lots in the 10th concession, whose front is on a line south 17 chains 47 links from the Baldwin line; and the line from A eastward is precisely where the eastern end of the Driscoll line if run as reported by him would be, from the front of the side line between lots 5 and 4, to the town line.

It may here be observed that upon this plan the western extremity of the Baldwin line from the line between lots 11 and 12 is drawn across lot 12 and for a short distance, about five or six chains into lot 13 where it reaches the mountain at a point where presumably the fire may have been built, so far the line runs in apparent continuation of the course of the line across lot 11, but where no post or trace of a line was found, or so far as appears ever was, and upon reaching the point in lot 13 where presumably the fire may have been built, it diverges upon a wholly different line across the residue of lots 13 and the whole of lots 14 and 15 to the post on the Burrowes concession line between lots 15 and 16 which Mr. Lang makes the western extremity of the line as surveyed by Mr. Baldwin, and not the post between lots 14 and 15.

This line so run by Mr. Baldwin is called a retracing of the line as run by Driscoll in 1850, as the concession line in front of the 10th concession, but it obviously was nothing of the kind. Had the object been to determine where Driscoll had run that concession line the surveyor's plain duty was with copies of Driscoll's instructions, report, and field notes in his hand to have commenced at the point where alone his instructions authorised Driscoll to commence his survey of the continuation of the Burrowes line in front of the 10th concession, and to have continued therefrom on the line indicated by Driscoll's report and field notes, and if he had deviated from the straight line which his instructions directed him to follow, the place where and the reason why such deviation had taken place and the course taken upon the deviation would have appeared; but nothing of the kind was done, and moreover, upon no part of the Baldwin line west of the post on the line between lots 11 and 12 which Mr. Baldwin made his point of commencement was any post or trace found of a prior line having been run, and neither upon it nor upon any part of the Baldwin line from the Burrowes concession to the point B. on the plan made by Lang, is there a particle of evidence that Driscoll was seen engaged in a survey; his instructions invested him with no authority to run such a line, nor did there appear anything in his report or field notes, or upon the ground to warrant the supposition that he had run such a line. Now as to the work done by Lang on his survey eastward, we have a fuller and different account from a witness named Paul Lebrun who accompanied Lang and was employed in breaking down branches, twigs, &c., to enable him to get a straight sight ahead for his line. This witness says that from the point of commencement they found no

1899  
SPRATT  
v.  
THE  
E. B. EDDY  
COMPANY.  
Gwynne J.

1869

SPRATT

v.

THE

E. B. EDDY  
COMPANY.

Gwynne J.

line or posts. Blazes there were enough in the woods around but none in a straight line as run by a surveyor. Lang made a straight line and they chained along, but planted no posts on the route eastward. The evidence of Joseph Lusk affords confirmation of this evidence of Lebrun that Lang found no straight line previously run, for he says that between the Baldwin line and what he calls the old line there was a difference of some rods at the lines between lots 9 and 10 and between lots 11 and 12. And the line between 7 and 8 is the only place spoken of where the two lines are said to have agreed. Then on arriving at the point which Lang on his plan marked with the letter B which is the western side line of lot 4, Lebrun says that Lang "*il s'est trouvé comme désolé*" at not finding a line. Then some of the party suggested that there was an old man on the town line who knew the line better than any one and could shew it to them, accordingly they went over to the town line, found a person who shewed them the terminus of the concession line near a little lake or pond there; and from this point the next morning Lang proceeded westward along the line in front of lots 1, 2, 3 and 4 without the aid of a compass; on arriving at the line between lots 4 and 5, Lebrun says that he was proceeding straight on westward in advance as he had done all along, and that he had not gone further than one hundred feet when Lang called him back saying that the line went no further, and he went north to where he had stopped the work the previous evening and there then planted a post; from that post they proceeded westward on the line run the day before and planted posts at such places as Lang directed until they reached the line between lots 11 and 12 where their work stopped.

Now upon this evidence it is abundantly proved that the line run by Driscoll as and for the concession line in front of the 10th concession is the one he was directed to run and which alone he had authority to run as such concession line, namely from the eastern extremity of the Burrowes line in a straight line to the town line, the eastern extremity of which line so run by him has always been known in front of lots 4, 3, 2 and 1. This really determines the whole question, for that line having been run by Driscoll, the line which George C. Rainboth ran in 1892 was that which under the circumstances in evidence, the law required him to run in retracing the Driscoll line. It is also clear that there is no evidence that any line was run by any person westward of the post on the line between lots 11 and 12 on the northern or Baldwin line to the Burrowes concession line at any point. It is unnecessary therefore to inquire if there had been evidence that Driscoll had run the line run by Baldwin between those points thus crossing lots 15 and 14 the whole of whose boundaries were determined by the Burrowes survey, and across lot 13 the south western angle of which was determined by and was upon the Burrowes concession line, and the western side line of which was run by Burrowes, whether such a line being wholly illegal in its inception as crossing those lots in the 10th concession fronting on the Burrowes line could have constituted a legal concession line in front of the 10th concession or of any part of it. Then east of lot 7 the evidence failed to show any line run eastward prior to the Baldwin line run in 1867, unless what Mr. Genest says in his report be accepted as such evidence. He there says that he found a beech tree upon lot 6, and a spruce tree upon lot 5, the blazes upon which indicated that they had been made 44 years before he examined them,

1899  
 SPRATT  
 v.  
 THE  
 E. B. EDDY  
 COMPANY.  
 Gwynne J.

1899  
~  
SPRATT  
v.  
THE  
E. B. EDDY  
COMPANY.  
Gwynne J.

which as he made his inspection in the end of October of 1895 would seem to point to 1851 as the year in which they were made, whereas the Driscoll concession line was run in January, 1850. This witness, like all other witnesses of the appellant assumes that blazes being proved to have been made in or about the year 1850 affords proof of their having been made by Driscoll in 1850, although he was never seen running a line where the blazes are found. However, east of the above spruce tree Mr. Genest concurs that there was no trace of any line having been run prior to the Baldwin survey, and the spruce tree is placed on Mr. Genest's map as upon lot 5, at a point about 8 chains east of the line between lots 6 and 5. Now there being no trace whatever of a line east of that spruce tree nor west of the line between lots 11 and 12, it is plain that the line between those points must have been run for some other purpose than a concession line in front of the 10th concession from which concession line the line so run is as absolutely separate and distinct as it is from the line in front of the 11th concession, and whether it was run by Mr. Driscoll in 1850 or not, matters not, although I am unable to see any evidence which would justify a court in adjudicating that in point of fact it was run at all by Mr. Driscoll. But all this is irrelevant in reality, for as already observed it is impossible upon the evidence in the case to come to any other conclusion than that Mr. Driscoll ran the concession line precisely as he was directed, and as alone he had authority to run it, namely, upon the straight line from the terminus of the Burrowes line in continuation of that line to the town line, as reported by Driscoll, and as testified by Hébert in his evidence, of which line so run by Driscoll, that in front of lots 4, 3, 2 and 1 constitutes the eastern extremity and no other line can be pronounced to be



the true concession line than the line so run, and Mr. George C. Rainboth under the circumstances in evidence adopted the only course which the law authorised for relaying the concession line west of lot 4. That line must therefore be affirmed, and the appeal must be dismissed with costs.

1899  
~  
SPRATT  
v.  
THE  
E. B. EDDY  
COMPANY.  
Gwynne J.

*Appeal dismissed with costs.*

Solicitor for the appellant: *Henry Aylen.*

Solicitors for the respondent: *Rochon & Champagne.*

---